



Tales from the Drawing Board:

*IP wisdom and woes from
Scotland's creative industries*

**Melinda Grewar, Barbara Townley,
and Eilidh Young**

With legal observations by
Philip Hannay, Cloch Solicitors

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Research for this project was funded by:

Creative Scotland

Creative Scotland Lottery Funding

Economic & Social Research Council Capacity Building Cluster Grant:
Capitalising on Creativity (RES 187-24-0014)

Innovate UK

Research Councils UK Centre for Copyright and New Business Models in the
Creative Economy (CREATe) AHRC Grant (AH/K000179/1)



ALBA | CHRUTHACHAIL



Innovate UK
Technology Strategy Board



ISBN 978-0-9932294-0-4

Published by Institute for Capitalising on Creativity

Produced by Print & Design, University of St Andrews

Contents

Introduction

From ICC.....	2
From Creative Scotland	3

Case Studies

Computer Games

Blazing Griffin	6
Polybius Games	10
Reloaded Productions	14
Tag Games	18
<i>Legal observations</i>	22

Dance & Theatre

David Hughes Dance	26
Curious Seed	30
Catherine Wheels	35
Peter Arnott, playwright	40
Stellar Quines	45
<i>Legal observations</i>	52

Fashion & Product Design

Angharad McLaren Textiles	56
Brazen	60
Di Gilpin	65
One Foot Taller	70
Strike Your Pose	75
Studio Gnu	78
<i>Legal observations</i>	82

Film & Television

Hopscotch Films	86
Ko Lik Films Hopscotch Films	92
Makar Productions	99
La Belle Allée Productions	105
STV	110
Tern TV	115
Matchlight	120
<i>Legal observations</i>	126

Music & Publishing

Rage Music	130
Red Note Ensemble	138
Catherine Czerkawska, author	144
Canongate	152
Freight Books	158
Saraband	165
<i>Legal observations</i>	172

Acknowledgements	175
-------------------------------	-----

Resources	177
------------------------	-----

Introduction

From the Institute for Capitalising on Creativity

Awareness of the need to protect and exploit intellectual property (IP) is growing steadily, as is the range of how-to and where-to information provided by trade associations, public agencies and commercial services (see a selected list of these in the final section, Resources). *Tales from the Drawing Board* has a different focus: in re-telling creatives' stories, this collection surveys the broad range of IP issues challenging Scotland's creative industries, and illustrates the wisdom and woes of some of the strategies chosen.



The drawing board, and its modern-day equivalents the tablet and desktop, is where ideas and potential IP are born, scrubbed out, redesigned and eventually launched. Within these processes creative workers may move through a diverse range of false starts, positive steps, thrilling wins, and deep regrets. These experiences of working with IP can be instructive and inspirational, whether the reader is facing the drawing board or the executive board.

It was with the aim of capturing these IP lessons for the benefit of others that Creative Scotland and the Institute for Capitalising on Creativity at the University of St Andrews embarked on a Knowledge Transfer Partnership project. Funded by Creative Scotland, Creative Scotland Lottery, the Economic & Social Research Council, Innovate UK, and the Research Councils UK Centre for Copyright and New Business Models in the Creative Economy (CREATE), the research team has conducted over 120 interviews with entrepreneurs in Scotland's creative industries and also presented a series of seminars, including Strategies for Success in 2013 and Up Your IP in 2014, which transferred information learned through the project between creative workers and the researchers.

The case studies that follow have been distilled from the rich bank of data collected. To aide selection and comparison of the stories, bullet points preceding each case highlight the key forms of Intellectual Properties, Protection Tools, and Issues illustrated. Observations provided by Philip Hannay of Cloch Solicitors summarise the primary legal implications of managing and exploiting IP, and a Resources section provides contact details of organisations that provide assistance on IP.

Tales from the Drawing Board does not represent the full range of issues and approaches encountered in the various creative sectors. Nor should the information be taken as guidance on IP protection or legal procedures; official and up-to-date advice is best taken from the agencies listed at the end, and from legal professionals. However what we hope you will take from these cases is their accumulated wisdom, their examples of creative thinking and energetic pursuit of effective IP management.

Professor Barbara Townley
 Director, Institute for Capitalising on Creativity,
 School of Management, University of St Andrews

From Creative Scotland

Creative Scotland is the public body that supports the arts, screen and creative industries in Scotland. We enable people and organisations throughout Scotland to access qualitative and engaging experiences which will provide life-long benefit and fulfilment at every age. We support creative, entrepreneurial and inspirational practice that will continue to engage with future generations of potential participants by bringing creative ideas to life.



Our collaboration during 2012-14 with the Institute for Capitalising on Creativity at the University of St Andrews and Knowledge Transfer Associate Eilidh Young aimed to identify successful strategies for the management, commercialisation and exploitation of Intellectual Property in Scotland's creative industries. We were well aware that typically, businesses in the sector struggle to adapt to the fast pace of technological advances, changes in consumer behaviour and the erosion of the enforcement of copyright. Often there is a lack of an IP strategy, as organisations fail to appreciate that creative ideas and innovations are separate from the IPR (copyright, trade marks, patents etc.) that protect them and determine their ownership, thus leading to strategic difficulties for content creators making management decisions. As a consequence, although Scotland's creative industries have an enviable reputation, they often see limited financial return on investment, as revenue reverts to rights holders often outside Scotland. These misconceptions suggest there is much to be gained from an improved appreciation of IP throughout the sector. This has proven to be particularly the case amongst Creative Scotland's own key clientele, which is why this initiative and partnership are so important.

The Knowledge Transfer Partnership's primary activity, the gathering and analysis of data from 120 interviews conducted by ICC, was conducted within a wider framework of consultation and change currently underway in the UK following the Hargreaves report into IP, and in relation to the continued development of EU policy around copyright and digital media. The knowledge gleaned from the interviews has created a deep and insightful resource of information about these and associated issues. The work will help inform Creative Scotland's strategic approach to Intellectual Property and enables us to respond effectively to policy matters. In this way we can ensure that aesthetic delivery of high quality work in the arts, screen and creative industries is conjoined with essential economic returns, enabling the sector to flourish and grow on a global scale, and maximising Scotland's place in the creative environment.

Ian Smith
Portfolio Manager,
Music & IP Development, Creative Scotland

Case Studies:

Computer Games

Blazing Griffin

Polybius Games

Reloaded Productions

Tag Games

Legal observations



Blazing Griffin

Acquiring, developing and pricing IP



Properties

- Acquired games

Protection Tools

- Copyright

Issues

- Acquiring and developing IP as brand strategy
- Pricing and customer payment models

“We tend to stay away from contract work as it can be a slow death. You build no value in your own company if all that time investment goes towards someone else’s project.”

Many SMEs in the Scottish games industry aim to develop their own IP but find themselves forced by the high risk and inconsistent revenue of this strategy to pursue more reliable income, typically from working to contract on other companies’ IP. But Blazing Griffin, an independent studio based in Edinburgh, chose to begin by acquiring IP: it purchased two games that were already generating revenue, and used these as testing grounds, brand development projects, and eventually, as springboards to further acquisitions. While this strategy does require initial investment, it enables Blazing Griffin to focus on the development of a portfolio of IP that it owns, rather than the IP of others (as in, for instance, a license-in model).

Acquiring and developing IP as brand strategy

“We will acquire more intellectual properties, reinvest in them, and grow from the revenue it generates,” said Peter van der Watt, Managing Director. “We tend to stay away from contract work as it can be a slow death. You build no value in your own company if all that time investment goes towards someone else’s project.”

Blazing Griffin accepts it may have to do some contract work to maintain cash flow, and some contracts offer additional value to their strategic needs: “We’re not entirely averse to it, but there needs to be a tangible benefit. There is some contract work that generates valuable knowledge for the team to retain, either in tools to use or processes to follow. There are also happy instances where you can end up publishing the game yourself, which creates additional revenue. We’ve been lucky enough to be involved in both types,” Peter said.

Blazing Griffin's strategy of acquiring and developing IP into a coherent brand requires a sharp sense of its property's value. Peter believes this is an area where the company stands out:

"Most games studios that are technically capable of building games don't necessarily understand the underlying value behind the thing they have just built. I think that brand and intellectual property are horrendously undervalued by a lot of people. This is something that the larger publishers probably understand better than most."

Granted, the intangibility of IP makes it notoriously difficult to value. Peter minimizes the risk in this task by considering how IP value changes over time and negotiating the right price: "Usually what I will start with is a discounted cash flow forecast against what the intellectual property has generated over the last two years," Peter explained. "It is probably not as scientific when you get to grassroots IP. So for brand new titles, a lot of the estimation comes down to past experience and looking at what comparable competitor products are generating."

"For well-established IP, you have to consider its current worth as well as its potential future value. It's an intellectual property that has been around for a while, so you occasionally need to tack a bit more on during negotiation with a company. But if revenues are declining then they would have to justify to us why they would want to inflate it beyond that. This kind of negotiation is heavily biased in our favour, as we would not buy any intellectual property if we didn't think that we could re-invest into it and generate from it."

The process of acquiring games is therefore an assessed risk, with potentially high reward. Blazing Griffin purchased the rights to its first two IPs at relatively low cost, due to the age of the games. But, as with all its acquisitions, it expects it will benefit by developing the titles as a continuous brand and story, interconnecting them across platforms.

Peter explains: "We are trying to increase the value of the intellectual property either through regeneration of it or as an asset to sell later down the line. [The latter] is unlikely in current scenarios but it could be a possibility if we were to build something that went as large as *Angry Birds*."

"A valuable brand can be translated into things that are not just games. It can go into movies, it can go into anything, because what people like about it is the underlying concept, not just the execution in one format. *Star Wars* is a very good example of something that was a film and is now an intellectual property brand that transcends every type of medium."

Such a strategy requires Blazing Griffin to manage a portfolio of games in which it can balance high-risk with low-risk acquisitions. "So if we can get some fairly well-established IPs that are dwindling and then some grassroots stuff that we think would actually have the potential to grow, then hopefully that will balance itself out."

"We are trying to increase the value of the intellectual property either through regeneration of it or as an asset to sell later down the line. [The latter] is unlikely in current scenarios but it could be a possibility if we were to build something that went as large as Angry Birds."

Pricing and customer payment models

Another major focus of Blazing Griffin's strategy, enabled by its ownership of IP, is trialling alternative models for generating revenue from players. The companies that created Blazing Griffin's first two games charged consumers one-off purchase fees. However, revenue models have changed dramatically since those games were launched.

"The price of the original software was usually between \$3 and \$5, but at the moment it is free because we wanted to see how many users we could acquire through a free title. We use it as a testing and marketing tool, but it generates very small amounts of money," Peter explained. "Most of our revenue is generated from the promotional stuff that we do for our other game. So that is one-off sales – there is no free-to-play on that yet."

In common with many others in the games industry, Blazing Griffin is exploring the free-to-play, or freemium, model. Because it can build a larger user base and easier brand recognition than games that are purchased, the model offers companies several advantages: revenue can be made through selling upgrades, items and currency within the games, and using the game as a paid advertising space. However, if the user base is not very large, these types of advantage can generate less revenue than a pay-per-purchase model.

Currently in the games industry there are titles that generate large revenues from both models, demonstrating there is no one formula for success. Nor, given the variety of payment models in use in other industries and regions of the world, have all the possibilities been exhausted, Peter suspects.

"I find it strange that, as businesses that live in a digital environment – that have no manufacturing costs, no replication costs – we can't find a more flexible way to allow users to pay for our content. If you think of the way the Chinese pay for games and if you think of the way that people pay for stuff in Brazil, Sweden or America, they are geographically different, largely based on social economics and how each region manages their finances at a more digital level.

"China is free-to-play – this is where we are getting that model from. America has always been historically the one who wants to pay for it and get it over with, and that is much like most of Europe and the UK. Places like Brazil and emerging markets, they pay through their cell phones, like a tariff. You pay the mobile company, who then pay the games company a proportionate fee. Or things like subscriptions – lots of people want to pay a smaller amount, or want to pay up front or spread the costs over a long period of time – just so they can play your game now."

From Blazing Griffin's experiments, a new flexible payment model is taking shape: Pay How You Like. With PHYL, the consumer decides how to pay for the game depending on his available resources, as Peter explains:

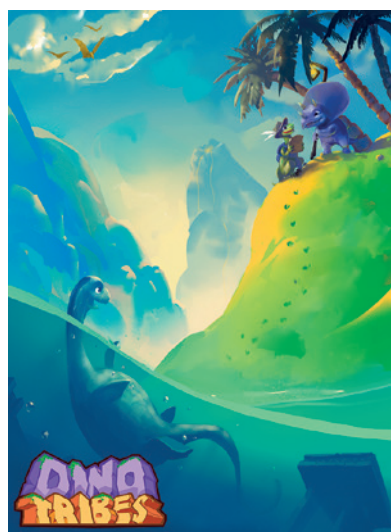
“We have tried to make it as simple as possible. If you pay £12 up-front you get a game and everything that is in it for, say, one year – so that is you paying for everything. Or you can subscribe to the game for £24 per year at £2/month – so you are committing to paying a price but it is going to be spread over a period and, in our calculations, this period is always one year.

“The idea is that if you have the funds you can pay us now so that we can make more content. If you don’t, pay us over a period of time. But then [for the company] that requires a much larger user base. If you look at the free-to-play conversion rates and all the metrics that surround that model, you’re lucky if you convert 2%. So, if you want 60,000 paying customers with an average of \$20 then you need 3 million users. And to acquire that many users is very expensive – or you have to make something that everyone is talking about, but then you’re relying on every game being a hit. So, what we would rather try to do is have a smaller player list that converts higher, to get to the same figures. Hopefully, by allowing them to choose the way that they pay for the content, we eliminate fewer people. Traditionally, studios and publishers have set one-off prices to suit themselves, so this is about empowering the player to pay that price in a way that works for them.

“From a production point of view, it introduces slight complexities in trying to design the game to be able to cope with those options. But we are trying to future-proof our products by introducing a system like this against any consumer mood swings, social economic swings, just whatever. If we can take the revenue model completely out of the product, so we are not forced to design it in one specific way, but in a couple of specific ways, it is more complicated. But it is more stable in terms of what we think should happen.

“We are being the guinea pigs for this one and we have no idea if it is going to work. Games are changing and it’s going to get to a point where players are going to say, ‘You know what, I really don’t want to be sold anything. Let me buy it the way I want to, then I’ll play it.’”

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Polybius Games

Strategy and action for international IP exploitation



Properties

- Trade marks
- Game designs

Protection Tools

- Registered trade marks
- Copyright
- Non-disclosure agreements & contracts

Key Issues

- Early research and advice
- Strategic choice of protection
- Securing rights

“ When you go to meetings with the global heads of branding for all the Hiltons, Wyndhams, Caledonians, the biggest chains in the world, ... they want to know that you have secured [your IP rights] and know the thought process of how you have done it. ”

Polybius Games has created a unique game in which users crack codes to complete secret spy missions. The game is distributed through cloud-based servers to clients in the hotel entertainment industry. Access codes for different missions are purchased by hotels and resorts, and provided to their guests. Each game involves a storyline that can be customized to the venues that buy the codes, enabling guests to interact with their surroundings. “It is more like an old traditional scavenger hunt around the hotel. You are in a confined space, but the hotel pick where they want you to go when we construct their game for them, including child-safe places,” said David Goutcher, Managing Director.



The game has proved popular with guests, and hotels appreciate its low investment costs. Polybius now counts global hotel chains and resorts, such as the Jumeirah Group and Disney, among its clients. Following this success Polybius found a new market in education, where it supplies schools with syllabus-specific learning games adapted from the spy storylines. The company hopes this market will soon provide greater revenue than the entertainment sector.

Start with research and advice

Polybius's success is due in large part to its strategy toward protecting IP, which involved early research and advice. "We spent a lot of time at the start to make sure that we got it right. We were dealing with the [former] Intellectual Asset Centre [IAC, now part of Scottish Enterprise*], getting full reports to identify our IP weaknesses as well as our strengths. The copyright and trade marks are probably our key strengths. We could have gone for design patents for some of the things we are doing, but we didn't, because registration was giving away way too much, especially in America where you are having to commit the details of what you are doing".

David believes that securing the Polybius trade mark was essential to the company's winning of contracts with their biggest clients. "From the first meeting we ever had with the IAC, the strength was building a brand. If you build a brand and you are first to market it is very, very difficult for someone else to come in behind you. When you go to meetings with the global heads of branding for all the Hiltons, Wyndhams, Caledonians, the biggest chains in the world, you are bidding for every hotel in the world that they have got, and they want to know that you have secured your IP rights and know the thought process of how you have done it. With Disney, we got flown back and forward to New York, and they were looking at the books and all sorts of stuff, looking at the whole range of our products, how it would all work; but we would not have got to that stage if we had never got our intellectual property."

Legal advice may be beneficial but it is usually out of reach for smaller creative companies, especially when they are starting out. However the costs can be reduced through careful research, seeking advice, and acting to secure IP, Polybius found. "For me it is the single biggest thing. We have only spent a matter of a few hundred pounds protecting what we had, to theoretically go on to negotiations for a price of upwards of £50 million, all based on making sure we had the rights from the start."

* *Scottish Enterprise offers helps to Scottish businesses to manage intellectual assets. See <http://www.scottish-enterprise.com/services/develop-new-products-and-services/manage-your-ia/overview>*



IPO Right Start trade mark application:
see Resources, page 177

“You just never know what is ‘round the corner. All of a sudden you have got somebody chapping on the door saying, ‘We are interested in working with you’ and that is where your money is going to be made, when you retire to the Bahamas or whatever. So if you have not done [IP protection] from the start you are not going to get that down the line.”

Strategic choice of protection

The cost of registration must be paid in every jurisdiction where registration is desired. As an international business, Polybius chose strategically to register in just a few markets, then to increase territories when financially possible. “Internationally, the prices that we were quoted, upwards of £10,000, your quotes from legal firms, I know some people who have spent £40,000 to do stuff that I did myself for £500. We just protected what we thought we needed, our trade marks, and we did it in the UK, and then decided what other territories we wanted. You can do it yourself, you can research it enough so that you can take what you need and put it in. We are very lucky in the UK with the IPO [Intellectual Property Office] that if you put it in the fast track [Right Start]* system, with the half price one, they tell you if there is a problem and guide you on how to make it right before you actually commit” to registering.

Polybius optimized the services available from IPO, did extensive [trade mark] searches themselves and referred to similar applications for trade marks. “[The IPO website] is a fantastic system, and they are even nicer and better to speak to on the phone. I have had so much great advice from them. They are very good at talking you through it: ‘Have you thought about putting that in to it, or have you thought about this?’” Researching other companies’ trade marks also was insightful. “You can look at a similar game by a big company and go and look at their trade mark to see what they have covered in it. Because it is down to the detail, some companies are very, very short and sweet, but the more you can cut it down [to the details] the more that if somebody did something that you were not happy with, the more you can prove that you have already thought of it and got it there,” David said.

Polybius further reduced its trade mark costs by weighing the benefits and the costs of the protection options available. For example, the publishing category was attractive because the company wanted to produce books based on their spy games, but this required further choices: “Do you register a logo or do you register the text to protect it? It’s stronger both together but, if you are on a budget, if you can get the text you have got a stronger position than just a logo. We went for the text because we didn’t need the logo as much because it says “Polybius” anyway. Because we are not just gaming anymore we were registering it across a variety of things; we did four classes of registration, but we could potentially do seven in total when we finished. But that was to do with looking at selling third party licenses so it all comes down to what you are doing as a brand and having security.”

Securing rights

The cost of enforcement, and companies’ ability to protect their IP on a par with larger companies, is another common issue. David believes the best way to negate these risks is to secure the IP in the first instance. “It is very scary when you are talking to Disney, especially at the start where you are giving away all your ideas, even under a non-disclosure agreement, because you would not have the money to sue them if there is suspected infringement and the same goes for a lot of companies out there. That still is not a reason not to secure it because you just never know what is ‘round the corner. All of a sudden

you have got somebody chapping on the door saying, 'We are interested in working with you' or buying, or doing something, and that is where your end result is, that is where your money is going to be made, when you retire to the Bahamas or whatever. So if you have not done [IP protection] from the start you are not going to get that down the line because you must have that in place from the start."

David has seen instances where if IP protection had been sought early, damages could have been prevented or at least reduced. He often cites the story of a Scots businessman in the maintenance industry who sought to expand abroad, and as discussions advanced with a possible US partner, the man revealed trade secrets which were key to the negotiation. However the company passed the secrets to a local supplier and didn't complete the partnership with the Scot. "He lost out on about £50 million possibly per year if he had managed to crack it, because he never got a non-disclosure agreement in place when he first pitched to them. His story applies to any industry – it is not just creative industries."

Even working with local agents abroad, particularly in emerging markets where copying is rife and governed by different IP laws, has its pitfalls. "So many people are too trusting and they don't have the background or know what to expect. I heard a horrendous story about the agents going and registering your trade marks and copyright in China so that nobody can both produce it and sell it in China without them as the agent. Well the boy with the five-toed shoes – that is a massive thing over there at the moment – the agent registered it over there, but it was a designer who went to him with it, and now the designer cannot produce it and sell it there without the agent who owns it."

The success of Polybius and its spy games in global markets demonstrates that successful international exploitation of IP is possible, but there is no substitute for early research and taking advice, strategic planning, and securing protection in advance.



Reloaded Productions

Maximising the 'free-to-play' model in massive multiplayer online games



Properties

- Game designs
- User customisations

Protection Tools

- Registered trade marks
- Copyright

Issues

- Exploiting income from free-to-play: IP, payments, and piracy
- Expanding user base through development and merchandising

“ I said, ‘What is your business model, is it purchase price or box?’ They said, ‘Well why would you do that?’ Because they only have free-to-play models; that is the only way for them to get around the piracy issues. ”

When you have thousands of people around the globe at any minute playing your online game, you want its IP to be as easy to manage as possible. That’s the situation that Reloaded Productions strives to maintain with its free-to-play massive multiplayer online (MMO) game, *APB: Reloaded*.

Based in Edinburgh, Reloaded develops the IP for the game, which is owned and published by its US parent company. That simple relationship hides the ongoing need for Reloaded to manage and monetize the in-game events of a programme with a substantial hard-core following: “The product itself is an international player-versus-player game essentially, so our customers are in the majority men between 18 and 25, of which we have 3 million at the moment – 10,000 roughly at any given time playing the game” explained Michael Bonniface, Managing Director.

The ownership of the game’s design and coding IP is straightforward: the parent company owns it all, after buying it from another Scottish company, which went into administration. “We purchased all the copyrights and so they were just transferred to us at the time,” said Michael. “We did have a few hiccups in Norway, China, Taiwan and somewhere else, where we had to go and retrospectively do it because of the way that they controlled our trade marks”.

The ownership of content IP created inside games is straightforward. While a “free-to-play” game costs players nothing to join, they pay games companies for in-game assets that allow them to customize the characters and other features of their gaming experiences. While the customization in *APB* is essentially content created by the players, its IP is assigned to Reloaded, as is normal practice in online games. Players do not expect to own the IP, particularly as there is no use of the content beyond the game, for either the players or the company. “We don’t exploit that IP creation – that is just character customisation that we store. Should we for some reason lose it all, or it gets set on fire or something, we don’t have any way of recompense for the customer – they are not expecting to own something at the end of it.”

The free-to-play model provides another freedom from typical IP worries, in that Reloaded does not have to contend with piracy threats. When a product is free, pirates have no motivation. “That is actually our biggest protection of IP,” Michael said, and one of the reasons why the free-to-play model is growing in the games industry. “For example, the standard business model for our type of game historically would have been a box purchase at £30 and then a multi-subscription to play. I was in China last year, where obviously piracy is rife on everything from physical assets to IP or whatever, and I was asking them what their business model was for the games we were looking to publish on their behalf. They said – ‘Well what do you mean?’ I said, ‘Well what is your business model, is it purchase price or box?’ And they said, ‘Well why would you do that?’ Because they only have free-to-play models; that is the only way for them to get around the piracy issues.”

For some types of games, “I don’t think [the paying] model is dead,” Michael said. From a player’s perspective, “there are many games, even now, where free-to-play is so intense that really you cannot do anything unless you are purchasing and it is really grinding you for money. So personally I would much rather, in those types of games, just pay up front and say, ‘You know what? There is £30 and just let me play the game. Stop asking me if I want to buy another set of corn – I don’t, I just want to play.’”

Delivering a game to the paying market also means a company can avoid competing with the free and nearly free games. “You know your mobile, your iPad, your Android – they are very cool with this free-to-play model and they kind of expect it. And yeah, you could charge 69p for a game or £3.49 for a game but the saturation in the Apple iStore is so much that actually to try to get your game to stand out is very difficult.”

“There are many games where free-to-play is so intense that you cannot do anything unless you are purchasing and it is really grinding you for money. Personally I would much rather pay up front and say, ‘You know what? There is £30 and just let me play the game. Stop asking me if I want to buy another set of corn – I don’t, I just want to play.’”

“If you invest in a large game like an MMO, then not everyone, but hard core players will invest in that, they will create their character, they will level up, and they will stick with the game over a long period of time. So the average lifespan of a free-to-play MMO is five years, but you probably would not play Angry Birds [a low-price smartphone game] for five years.”

The MMO format of *APB* however avoids these issues. While it is free to play, the software is of a complexity that requires players to have high-specification computing equipment, excluding it from the smartphone game market and cultivating a greater commitment to continue playing and purchasing in-game assets. “So this is the thing with an iPhone game, because cost-wise it is either free or very low, you will download it, you will play it a couple of times, say ‘Oh that was kind of fun’, and then you will forget about it and you will never play it again. Whereas if you invest in a large game like an MMO, then not everyone, but hard core players will invest in that, they will create their character, they will level up, and they will stick with the game over a long period of time. So the average lifespan of a free-to-play MMO is five years, but you probably would not play *Angry Birds* [a low-price single-player game] for five years.”

For *Reloaded* the free-to-play model is therefore suitable and successful. *APB* attracts a large audience of hardcore gamers who spend long periods of time playing, and who develop their characters and further customize their game through purchases in the virtual world. Massive-multiplayer online games have notoriously long development times and require much more financial investment to build up a community of avid players. However, by acquiring this game in a later stage of its life span, when it already had a large user base, *Reloaded* mitigated many of the risks involved in creating and bringing to market a new MMO game.

Expanding the user base

Reloaded is exploring other opportunities for exploiting its IP, particularly those that would maintain and even increase *APB*'s user base. Expanding the business into multiple platforms with other games under the same brand is one such possibility, Michael said.

“We built the brand through one title and we have a good client base for that, but our strategy is to try to reach other areas using the same brand. So, for example, our game requires a fairly high-spec PC, which not that many people would have – you have got to be really into your games to have that – so for us, it is looking at mobile, it is looking at console...at the mid-core gaming market. And that is to reach users – like the people who already play the games to keep them engaged, you know, sitting in front of the television or whatever – but it is also to try to get new players who may then start to look at the title through that.

“By expanding the game in those directions if we can capture more players either through the mobile, or through the console, and continuing the brand on, then that opens up the possibility of merchandising for us as well. We have steered clear of merchandising because although we have a lot of players it is relatively niche, however, we would be able to expand that if we reached a wider audience.”

A more international audience also would expand the user base, but this requires further development of the game: "The other thing we are looking at just now is localisation for multiple countries, because we feel we can grow, especially in countries like France and Spain where they are very nationalistic about their language and they would much prefer to play games in French than in English, as opposed to Scandinavia who want to play games in English and not Swedish or Norwegian."



Tag Games



Balancing risk: Self-publishing, partnerships, & proprietary technology

Properties

- Self-published mobile games
- Proprietary technology

Protection Tools

- Copyright
- Contracts

Key Issues

- Risk and revenue in self-publishing, partnerships and proprietary tools
- Protecting IP and balancing risk

“ You know, you might come up with a game and spend a year making it and it flops and so there is no value in the IP, or it does an Angry Birds, and there is massive value in the IP. ”

Tag Games provides social mobile game innovation, developing games for mobile, tablet and handheld devices. There are two primary strands to the company's work: self-publishing its own games, and supporting games publishers, brand owners, broadcasters and digital agencies who want to reach potentially large audiences through mobile gaming. Tag offers these partners bespoke games development and porting services, or adapting games for the various mobile platforms, many of which have not been designed with gaming in mind and thus require unique technical solutions. To meet these challenges, the company developed its own proprietary technology, including a multi-platform game engine, a cloud-based server system and a metrics platform, all of which enable it to develop and monitor games easily and effectively.

In the six years since it formed, Tag has learned to manage the different nature of IP in each of its projects such that the opportunities and risks of self-publishing can be balanced by the steady income from providing technology and services to others.

Self-publishing

Tag's revenue from self-publishing varies according to the number and type of games it launches each year, but typically ranges from 10 to 35% of total income. The company owns the copyright IP of these games and the potential to exploit it, but there is always the risk that no-one will play them. "You know, you might come up with a game and spend a year making it and it flops and so there is no value in the IP, or it does an *Angry Birds*, and there is massive

value in the IP. So it is like the lottery, I mean, the chances of succeeding are very, very small," said Paul Farley, Managing Director.

The unpredictable timeframes of success also contribute to the games' variable income. "We have games that will sit, and have sat, for long periods, and they will still generate reasonable revenue three years later. Then there are other games that come out and peak for a couple of weeks and then do virtually nothing thereafter, so it does vary dramatically," Paul explained.

Further risk is created as the company changes its focus from the product model of game development, where a game is launched and left to the market to decide its fate, to a service model, where the programme is updated after launch, sometimes daily, and the customer base grows as the experience improves. In the latter format, the company's resources are invested longer-term. "You see a game start off very slowly and it is very rough 'round the edges and it creates a small fan base and then you keep supporting it and you run it as a loss leader for a long, long time, then all of a sudden the quality is obviously improving as it goes along and it starts to snowball as people get enthusiastic about it."

Partnering others

Tag balances its high-risk self-publishing with more reliable revenue provided by its game development and services for partners: "It is the large game publishers – so television, broadcast, school companies, brand owners – pretty much anyone that wants a game made to promote their brand, their property, or wants to take a game from one platform to mobile for the first time, or just wants a bespoke game made for them. That is relatively low risk, but you have got to go out and find the work obviously," Paul explained.

In projects where the company develops a mobile game for a partner, Tag receives an upfront fee and the partner retains all the copyright IP, as is standard practice in contract work. "There might be a royalty share, but there would never be an IP share and quite often what we are doing for a partner is based on another third-party license or solution," Paul said. However that possibility of a royalty share is an avenue that Tag has learned to pursue, especially as its relations with contract partners have become more long-term and service-oriented, as elsewhere in the mobile games industry.

For this reason Tag now refers to its business contracts as 'partnerships' rather than simply working 'for hire.' "The model is very common; the partner we are working with will recoup the development costs first, 100%, and then once they have recouped them we will be cut in for a revenue share of some sort at the back end – generally we are now into double figures, which is good... somewhere between 10 and 25% roughly is where we sit depending on the type of project."

Such arrangements do require careful negotiation and balancing of potentially larger financial reward with the risk of potential losses. "Obviously we want to push for 25% but it depends on the partner, it depends where they see the risk. We are of a size now that we can share some of that risk and

"We are of a size now that we can share some of that risk and if it is a big branded piece of content then we are willing to cover more risk because we think there is potentially more reward and the project probably has more chance of commercial success. But you never really know."

if it is a big branded piece of content then we are willing to cover more risk because we think there is potentially more reward and the project probably has more chance of commercial success. But you never really know. So for us it is a quite conservative approach that allows us to take risk in a managed way, so that the risk would never kill the entire business.”

Profits from proprietary tools

Tag’s ability to take risks with partners’ IP is strengthened by its deployment of proprietary technology and tools. While aiding the development and publishing of its own games, these tools also give the company market advantage because of the added service they can offer to partners.

“It is a nice competitive advantage to have your programming code. If someone comes to us and says that we want this type of game and the mobile platform engine does not support a certain feature then we can do it ourselves and we are fully in control. I think the control factor is really important,” Paul said.

“There is a massive advantage. We are working with some very large multi-nationals on some pretty big projects now and they are choosing us to take our solution and implement it. They will either own or rent the servers’ infrastructure, but it is our system that is running on that so that has brought in a lot of revenue and projects full stop that we would probably not be pitching for otherwise.

“I am pretty proud that we have built stuff that allows us to punch way above our weight in terms of the size of the company, and we have done it organically which is great, and Creative Scotland and Scottish Enterprise have played a big part in being able to match fund some of that, or fund some parts of it.”

“The benefits [of open source] are that you then get a worldwide collection of people hacking around and playing with it and improving it for free and then we get to take the best of that, while we are also developing it ourselves.”

Protecting IP and balancing risk

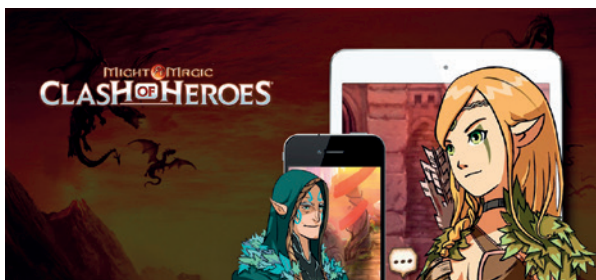
The IP in Tag’s proprietary technology is owned and retained by them, and only licensed to partners for use in relation to the games the company has developed for them – a strategy which ensures its IP portfolio remains strong. “It is protected because we only let a few people have access to it, only our partners, and we have been far more selective about partners now. These contracts are pretty tight in terms of making sure that our rights are very clear in the fact that we own it and they are only getting a license to use it for that particular product.”

However the company keeps an eye on industry developments which challenge thinking about IP protection, such as the movement to make coding open-source, or freely licensed to other developers, to aid the advancement of technology. “There is talk about exploiting this externally, about making parts of it open-source, and I am a little bit against that because it does reduce our competitive advantage but there are some pretty nice benefits from doing that,” Paul explained.

“I suppose the benefits are that you then get a worldwide collection of people hacking around and playing with it and improving it for free and then we get to take the best of that, while we are also developing it ourselves. And we would not release the latest, we would probably release year-old code so that we are always a year ahead. But I don’t know, at the moment we have a significant commercial advantage, so to actually reduce that from where we are at just now would be daft,” Paul said.

In the creative industries, risk is inherent and usually achieved through a combination of ‘bread and butter’ work alongside more ‘creative’ projects. For Tag, the exploitation of external IP in their partners’ brands alleviates the risks involved in the development of their own IP in self-published games, which has the potential, though largely unpredictable, for much greater financial success.

“The business model is high-level enough that I don’t think it will change, in that it is balancing risk and I think that is inherently who we are. So fundamentally I think it will stay the same because we are still here after six years, and I would like to think that we would still be here in some guise in another six years. But also we want it to stay exciting and we want to keep taking risks and we want to keep pushing forward, so you cannot reduce that risk entirely.”



Legal observations

“Game theory is concerned with the actions of individuals who are conscious that their actions affect each other.” So opens Business Economics Professor Eric Rasmusen in “The rules of the game”, in his book *Games and information: An introduction to game theory*. Professor Rasmusen’s definition of game theory provides a helpful joystick to briefly manoeuvre through the computer games case studies and target the primary legal implications of managing and exploiting IP.

The case study of **Polybius Games** illustrates the first dilemma experienced by many early stage ventures over whether to action professional IP advice, which can form a significant proportion of an often very limited budget. While there is much to be said for the streamlined Gov.UK websites, user-friendly UK-IPO staff, and bounty of free online resources on offer, a DIY approach may not only backfire on IP strategy by absorbing critical creative and management time – thus eating away at any first mover advantage – but an insufficient rights specification, or worst of all the forfeit of IPR on successful challenge, plus the absence of a professional representative on record can detract massively from the maximisation of IP value. There is no substitute for experience. In truth, cost is often not the actual detraction from taking professional advice or instructing legal assistance, cash flow is. Many IP professionals are alive to game theory and conscious that their costs quote affects not only the fledgling IP business, but their firm also. Recent years have witnessed a variety of cash-flow friendly alternatives to upfront fees which enable both parties to benefit from correctly managed and exploited IP.

The search for certainty is not an issue confined to IP registration fees and transaction costs, as the case study of **Tag Games** amply announces. Certainty and its antonym, risk, battle at every level in the computer games business, be that during initial market disclosures, pre-contractual discussions, or placing faith in future revenue share. As the case study teaches, risk parameters should be managed accordingly to personal taste, and on the understanding that one corollary of the certainty-risk contest is greater risk based reward. Perhaps one underemphasised risk area in the case studies as a whole is the engagement of labour. “Partnership”, “joint venture” and “commission” may imply a close relationship in the English language, but each is a distinct legal term with varying consequences for the authorship and ownership of IP. The default statutory position over both the authorship and ownership for each relevant IP right in a given work should be exhaustively considered prior to actioning any contractual displacement (be that under company law, employment law or contractual law) of the IP fruit of creative labour.

If identification, protection, management, and exploitation are the four fingers with which a business can grasp intangible assets, valuation is most definitely the thumb. A reality rarely clenched, but its mastery crucial, as pressed home by the case study of **Blazing Griffin**. Whereas a historical cost approach to IP valuation (e.g. the outlays paid for professional IP advice in securing IPRs) can act as a value platform, and a discounted future cash flow approach to IP valuation (e.g. the fixed cash amount to be paid under the

remaining term in each issued licence or under an unexercised option) can act as a value springboard, a market approach to IP valuation is where the greatest value bounce lies. Market forces are such that the ultimate price paid for IP may be driven into many multiples, particularly and especially in high demand software related businesses which are often complementary rather than competitive. But equally, the ultimate price paid for IP may be driven through the historical cost floor to the inner market value set by accounting standards – currently £0. An IP valuation may not be relevant to every business, especially at an early stage, but an active IP value strategy is, as Blazing Griffin's gestalt market view of IP (that the acquisition of complementary IP and IPRs will create greater business value as a whole over the sum of its parts) definitely shows.

The case study of **Reloaded Productions** reloads considerations of IP value from a discounted future cash flow perspective, where it is clear that the flexibility afforded by licensing is a luxury and a lifeline. Reloaded Productions' knowledge of its market is evident and an example to follow. The construction and maintenance of market intelligence allows the company to explore and include varying pricing strategies (an intellectual asset in themselves) in its IP and licensing models and tactically deliver product versions at varying price points in order to capture the willing payee while repelling potential pirates – most notably turning the luxury of a free end user MMO community licence into a lucrative money-spinner. IP businesses which wish to follow Reloaded Productions' adoption and actioning of a licensing model should understand the resources necessary to audit license terms where necessary. Allowing third party use of IP also means having to police the actions of such third parties – a time consuming and sometimes costly task, particular in cross-border and cross-cultural scenarios. However, licences prove a lifeline in that compliance, monitoring and enforcement duties can be delegated to licensees with appropriate safeguards.

Success may not only be found in watching the market and valuing the market share obtained by a self-created product or service. Other computer games related businesses demonstrate that value can be extracted from the market by listening to the market and allowing democratised parts to create the product or service. Markets are very rarely evenly distributed; hence facilitating user generated content in the long tail may prove uneconomical or simply unworkable. But it may not. A company's access to market participants' unconsciousness of the value of their actions, alongside use of appropriate legal disclaimers, seeding and directing the determination and loyalty of a distributed fan base, can provide not only a sufficient return, but a channel to labour/consumers which can be of significant value to a bigger, slowly moving but equally acquisitive business.

In summary, Polybius Games is alert to alternatives in avoiding a hurdle of IP 'historical' cost; Tag Games confirms that risk reward is not impossible in the search for certainty; Blazing Griffin links up IP for market value; Reloaded Productions displays faith in future income; while others find that the unexploited users in the long tail can indeed wag the market. It is clear; computer game companies should consider game theory when attempting to put IP value under the thumb.

Case Studies:

Dance & Theatre

David Hughes Dance

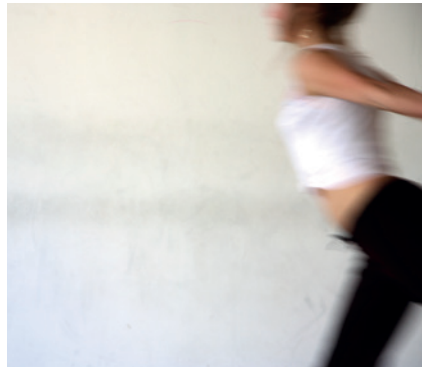
Curious Seed

Catherine Wheels

Peter Arnott, playwright

Stellar Quines

Legal observations



David Hughes Dance

Buying rights and negotiating contracts: A skilled performance



Properties

- Dance Shows
- Choreography

Protection Tools

- Copyright
- Contracts

Issues

- Buying rights vs licensing
- Negotiating contracts
- Reducing IP
- Unravelling authorship

David Hughes Dance (DHD) is an Edinburgh-based company established in 2005 which produces and tours contemporary dance in the UK and abroad. DHD is a limited company with two full-time employees, Artistic Director David Hughes and Associate Director Matt Foster, who contract choreographers and dancers as needed for each production.

This case study examines the company's preference, atypical in the industry, for securing choreographers' IP by purchasing perpetual performance rights, rather than licensing for restricted periods. Such a strategy requires skilled negotiating and contracting, and as in other sectors there are differences of IP understanding in dance which continually challenge the contracting process.

Buying and contracting: A careful two-step

The typical approach to IP in commissioned works of dance and theatre is for production companies to license the copyright in the choreography, script, set design and so on for a certain period of time or a number of performances.

"Generally people hold on to their rights, i.e. a choreographer or a director holds on to that licence that they have," David explained. "They give the company a licence to do the work for two to three years. At the end of that tenure the work will go back to the choreographer or director and if that company needs to perform it again, that work will not unreasonably be withheld from that company because it is in the interests of both parties. Of

course they will pay for it on a per-performance basis, generally if they are on good terms with a choreographer, or just a royalty.”

DHD however applies a different strategy when commissioning work: it aims to buy out the choreographer’s copyright. While there is inherent risk in buying untested IP, if the work is successful the company can further exploit it without having to renegotiate the rights and without having to pay royalties to the choreographer. For a two-man company with production budgets which are a fraction of those of big dance groups, it is a simple, if risky, business model. “It makes life a lot easier [although] we take the risk, especially if it is a commissioned work,” David said. “We have bought a few works that have just panned, so it is not always in our interest.”

David aims to mitigate the risk by using a two-stage contracting process. The first phase is a variation on the standard practice: he commissions and licenses a work for a period of time, but his contracts include clauses that allow him to consider later buying the perpetual rights, and they establish the future costs of such rights. In the second phase, once the work is produced, David decides if the company will exercise this option. Such a process does require cooperation from the choreographer, who may be more familiar with licensing rather than selling rights, but David has found that if the potential for buying out is suggested in the contract, the door is kept open for later discussion.

“Contractually, what we do is we give them the option. We like to feel we can negotiate after we see what the work is like, that we have a choice of first refusal. We will say, ‘If it is good you will get that extra percentage for the rights to the work and if it is not good then you can have it back after the two years’ – rather than it being a successful work and then them kind of going, ‘Oh actually, we could have really asked for a lot more money.’ We try to be very clear – it is a gamble on both sides.”

As an acclaimed dancer who has worked with companies such as London Contemporary Dance Theatre, Rambert, DV8, Adventures in Motion Pictures, Siobhan Davies Dance and Janet Smith, David’s reputation and contacts in the sector enable him to “call in favours” to acquire choreography for DHD, either through commissioning new productions or licensing existing, acclaimed work from high profile choreographers. He secures their copyrights through vigorous negotiations, which aim to get the best deal possible for the company.

“I go in and say, ‘This is what I have got.’ They are millionaires. I have done my time with these people and I have given more than my pound of flesh and danced in works which have made them famous, okay, and they know that. So when it comes to favours, I can say ‘One very famous choreographer is charging me this much for a work, and I want to buy a work that has already been made, so what are you going to charge?’

“So they are going to charge nothing, because they respect each other and they are helping out. Also at the end of the day they want to see dancers dance – they want to invest – because the more money they take the less I have for those performers. Believe you me – the fees that they get for what they do are pretty decent anyhow, well, more than decent.”

Reducing and unraveling IP

DHD also trims its spending by minimising the royalties it pays to choreographers and other collaborating artists involved in its performances. David keeps these expenses down by restricting the number of collaborators in a work, and thus, the owners of its IP. For instance, DHD rarely commissions composers or set designers, in order to prioritise the dancers.

“We don’t generally commission music. When we have, it has been people that we know and it has been more of a collaborative process with a group of people because the musicians want to be part of it. We are not privy like the major companies to having the live orchestra or pieces of music written for us – it does not equate in our budget. But we have had music and [the cost] is within what we have got. It is [a negotiation] between the musical director and the choreographer – what I am willing to pay and what they are willing to take.

“I try to do something which a lot of choreographers didn’t do a while ago, when the dancers always came last: They had a budget and the dancers were always at the bottom of the list when they have had the composer, the set and costume maker. But this is about dance work – dancers are at the top of my list, because if I don’t give them that amount of time they are just going to look pants.”

The IP that DHD does prioritise is the choreography. However the authorship of such work is becoming difficult to untangle as definitions of roles in dance change and collaborative working becomes more commonplace. Traditionally, choreographers create the IP – the dance pieces – and dancers perform them. However David has observed that increasingly, choreographers are positioning themselves as directors of movement, who expect dancers to contribute to the choreography. While this shift in the IP creation may not yet have a financial implication in DHD’s contracts, David feels a moral obligation to give credit where credit is due: He insists that marketing texts do not solely feature the choreographer, but also indicate when shows contain “additional choreography by the dancers”.

“When you are working with choreographers, they are more ‘directors’ now, which does my nut in – you do the choreography for *them*. It is very ambiguous as to actually what choreography is,” David explained. “When I ask people to come into my studio, I don’t want to choreograph if I have asked them to choreograph. If they want to be a director then they should put that on their title. That was a problem with some work a few years ago when somebody wanted to choreograph and actually didn’t, and it was absolutely pants – and we did a buy-out for that.”

In David’s opinion, the problem is greater among younger choreographers who seek to change the roles, despite the details being spelled out in commissioning contracts.

“I think that newer choreographers tend not to read their contracts thoroughly. It is the old-school choreographers where life is so much easier.

They are what you call choreographers: They come in, and they are old, but they get up and they make movement.”

David also ensures that contracts address expectations of etiquette in the dance studio. To outsiders this might seem an excessive measure but to dancers everywhere, etiquette is an essential code of behaviour that enables productive and safe creative work in the studio. Detailing the code in contract helps DHD solve any disputes that may arise as commissions are carried out.

“One of our last choreographers who came in went, ‘Oh god – your contract, it stipulates this in the studio, in your etiquette.’ And I went, ‘Yes, because that has happened. We have to protect you and we have to protect us and if you have a qualm you can refer to your contract. These are the rules in my studio whether you are a choreographer or not. These are our rules, we abide by them. Sign it, or we can work together to amend this contract so that you are happy and I am happy.”

Having a lawyer on the DHD board helps the company to update contracts with necessary clauses as new situations arise. Combined with David’s approach to negotiating fees, credit for IP, and etiquette, this robust strategy to commissioning and contracting ensures that all parties know where they stand, are professional in their work, and will deliver value for the money. While such goals might seem universally desired, DHD’s approach stands out from the industry.

“I think it has shocked people sometimes when we show them the contracts but then also because of my nature they think, ‘You are really together, you are really all right.’ All the haggling as well – the haggling is embarrassing, but I don’t care. I am going to be employing my dancers and so when I go in to negotiations with choreographers maybe I do make them feel bad, to feel that if you take more money, then I cannot give you the dancers for as long as you want. Bearing in mind the money that they get is still bloody good – they still get a nice sum of money and four choreographies per year, i.e. five weeks, 20 weeks per year. They earn more than what I earn, for 20 weeks’ work, so they should get up and move!”

Curious Seed

Collaboration, then separation



Properties

- Dance productions
- Choreography, music, film and design

Protection Tools

- Copyright
- Contracts

Issues

- IP in collaborations with other artists
- IP in collaborations with dancers and other choreographers
- The unusual case of joint authorship (and separation)

IP “ is an interesting issue in relation to working with other people, the creative collaborators or the creative team. In amongst that of course are the dancers and the performers I work with. I’ve been in their shoes so many times, and still am sometimes in other people’s projects. It’s like another minefield within the minefield. ”

Following a career as a performer and choreographer with dance and theatre companies in the UK and Canada, Christine Devaney is now the artistic director of her own dance production company, Curious Seed. Established in 2005 and based in Edinburgh, Curious Seed is typical of many creative organisations in that it is “a one-man band”, as Christine refers to herself, who works with other artists on a project basis. Christine also receives business assistance and support from the Catalyst Dance Management team at Dance Base Edinburgh.

Christine describes her productions as “dance theatre”, a term that describes her way of working with collaborators in other art forms, such as designers, musicians and film artists, as well as other performers and choreographers. This case study considers the implications of this way of working for IP ownership and its exploitation.



(Photo: Maria Falconer)

IP in collaborations with other artists

For Christine, the experience of working with artists in other disciplines is pivotal to each Curious Seed production:

“What is really important to me is that the process is particular to that project, and that I work with very strong creative collaborators from different fields. My passion is dance and physical expression. I like to work with a designer closely from the very early stages of a project, and sometimes a video/film artist. I often work in different ways and live music also has been a very important part of my creative process as it has developed over the years.”

Christine has developed a circle of collaborators with whom she typically works, including a theatre designer, a video artist, composers, writers, and performers. When working with different collaborators, the ownership of IP follows the same models used in theatre: Each creator of the production’s IP owns the copyright in his or her work, as a part of the whole. The company producing the show licenses the creators’ IP exclusively for a specified period or number of shows; in return each artist receives a fee and, when a show is re-staged, each may receive royalties, depending on the contract terms.

In dance and theatre sectors, this model of collaborating with and contracting artists is a long-held practice. The IP ownership and remuneration is straightforward when each collaborator’s work is distinct from others’. However complications arise when the authorship of the created properties is shared to various degrees, as we now explore.

IP in collaborations with dancers and other choreographers

In their traditional roles, the choreographer creates and directs the movement to be performed by the dancer. The dancer therefore has no claim to the copyright in the work, which belongs to the choreographer, and is paid only a fee for performing.

However, as explored in the David Hughes Dance case, the roles in the creation process can be less clearly defined, such as when performers contribute their ideas and movements as they work with the choreographer. Christine too has worked in a similar method, but for her the ownership of the IP is not a question: it remains with the choreographer. As an example, she explained how she devised the choreography for a recent production:

“There are a couple of solos that definitely came from me asking a specific question and asking the dancers to answer it. Then through seeing how they were responding I choreographed and shaped these solos. They very much came from the essence of the dancers, who wouldn’t have made this particular material, these solos, without me asking the question, and without me employing them. They didn’t just turn up and say, ‘Christine, I want to show you this.’ There is a process of finding the choreography, of coming at it from obtuse angles and in different ways. The solos aren’t typical of these performers, but the essence of them is still there.”

To avoid later disputes Christine defines the roles in advance.

"I usually talk to the performers and say, 'This is how I work: There is a lot of improvising initially, and creative tasks from me. Then there is shaping, directing and more specific choreographic work from me.' I try to be clear from the beginning. I ask people, 'Does this suit you as well?' so that people know as much as possible about the process before we begin and know that they will have creative contribution.

"It is definitely still my vision; I am making the decisions and if the result is poor, it's because I have made the decision. We're all working towards a collective goal but the buck stops with me. It's not making work by a committee and that's the difference in terms of devising or collaborating. That's why these things have to be clear from the beginning."

Christine does believe in the importance of giving credit to dancers where they have influenced the choreography: "We have changed the wording a couple of times on the marketing to say for example, 'directed and choreographed by Christine Devaney with choreographic input by ___."

The importance of getting such wording right is increasing as awareness of IP issues grows. "It feels like the language has changed around it as things become more complex," Christine said. Her own evolution from performer to choreographer also has altered her perspective on rights and credits.

"You think about it in a slightly different way. I think it's an interesting issue in relation to working with other people, the creative collaborators or the creative team. In amongst that of course are the dancers and the performers I work with. I've been in their shoes so many times, and still am sometimes in other people's projects. It's like another minefield within the minefield."

The unusual case of joint authorship (and separation)

The distinction Christine makes in the above models of choreography, and their implications for IP ownership, rests with the difference in the defined roles of performer and choreographer. However there are occasions when a dance is created jointly by artists in the same roles. As in other industries, the IP arrangement in such a case would be that the parties would have co-ownership of the copyrights, which they can exploit jointly, and if one party wished to exploit the IP separately, a license would be bought from the other parties for the rights to do so.

In practice, the gradual evolution of a project can mean that roles and rights also evolve, causing some confusion along the way. Such was Christine's experience of working with another choreographer in 2011 to devise, produce and perform a production for children, which evolved from a workshop project and was then commissioned by the Imagine Festival, as Christine explained:

The other choreographer later decided that he wanted to produce the work with his own company in his home country, which led to the unusual situation where both companies were producing versions of the same show, in different territories.

"There began a big long, interesting, learning curve of negotiations."

“This piece of work didn’t come about in the usual way of me thinking, ‘I have got an idea, I have something starting to form here – I’ll apply for money and hopefully I’ll get the support this needs.’ Initially I had no intention of making a piece of work, but after being teamed with another choreographer, working away for 10 days, people being interested in the work and then Imagine saying, ‘Maybe we could give you a little bit of money to see if this could go further’, there was a lot of interest. We kept working on it together and right from the beginning we were equal co-authors. Initially it wasn’t an issue, because what we were doing was sharing ideas and practice and then we showed what we had done.”

While Christine and the other choreographer had an agreement with Imagine to develop the work further after the original workshop, there were no contracts defining their actual joint authorship of the evolving show. However the two choreographers shared a desire to extend the life of the production, and when Christine suggested that her company, Curious Seed, should produce the show, the other choreographer agreed.

For the production, Curious Seed wrote contracts for both choreographers, and for the other collaborating designers, composers and production team. However, the other choreographer later decided that he wanted to produce the work with his own company in his home country, which led to the unusual situation where both companies were producing versions of the same show, in different territories. “There began a long, interesting, learning curve of negotiations,” Christine recalled.

At stake was the issue of who owned the IP in the post-workshop professional show, and who therefore had the right to exploit it. Curious Seed initially proposed a contract with the other company, but after much negotiation, confusion continued. Christine then approached a lawyer.

“We realised that we needed this because it was a lot of going back and forward and a lot of negotiation, and it was beyond our experience. We went to a lawyer, she looked at the agreement that we had drawn up, and she made it clear that the other choreographer and I are co-authors, and that both companies needed rights to produce and the two co-authors needed rights.”

The solution lay in both companies contracting with the co-authors, licensing rights to each company to produce the work separately. This process required continual, clear communications, particularly as Christine believes that in all cases, contracts should be negotiated, rather than accepted without question.

“I have learned over the years, when someone gives you a contract, don’t just sign it. You need to read contracts and understand that the contract is there to be negotiated. With good managers, if you have got a question or you are not sure about something, you can say, ‘Actually can we look at this clause?’

“When you’re young you think that a contract is set and don’t realise that it’s actually negotiable. I guess it’s the perceived power balance – you think you are just this little emerging artist, but as you get older your experience and confidence grow. I think there’s a misunderstanding in many creative sectors that a contract should just be verbal and based on trust. It’s important to know that the contract is there for both parties so that everyone knows where they stand and it’s not just about you signing over your rights.”

With the IP clarified, the shows went into production, and a new issue arose: With both artists credited as authors in each show’s production, there was a desire to ensure the quality of each other’s show, its integrity to the original production, and thus the reputation it would reflect. “We had created this piece, and if we are doing it with our separate companies we have to try to agree to do it as close to the original as possible, to uphold each other’s creation,” Christine said.

In the end, both companies have been able to continue performing the piece. Both choreographers continue to use the original name and design of the production, and they are in the process of negotiating new agreements with all the original collaborators in the work. Clearly the evolution of the production was atypical for the industry and presented a learning curve for everyone involved.

“Quite a lot of people have said, ‘That’s really unusual – how is that going to work?’ and I’ve said, ‘I’m not sure but it is going to work, because it’s taken a bloody long while to get here and the work stands for itself.’ So I suppose that’s one piece of advice on this issue – if the work is worth it stay calm and work it out.”



(Photo: Tuur Uyttenhove)

Catherine Wheels

Authorship and royalties in devised theatre



Properties

- Theatre productions
- Set designs, lighting, music, etc. within theatre productions

Protection Tools

- Copyright
- Contracts
- Trade agreements

Issues

- Copyright in theatre productions
- Devised works: authorship and IP ownership
- Remuneration through royalty pools

“ We have a devised process. At the moment we are creating a show where we have got a designer, a performer and I think a lighting designer. The four people from very different types of disciplines within the arts are working together, just exploring lots of ideas, and that is where it gets tricky as far as intellectual property is concerned. ”

Founding artistic director Gill Robertson established Catherine Wheels children’s theatre company in 1999. Since then, it has received critical acclaim for many of its productions, including *Martha*, *Hansel and Gretel* and *White*.

The company aims each year to produce one new show, tour a school show, and tour a repertoire of plays nationally and internationally. As a children’s theatre company, Catherine Wheels’ business model is limited due to the lower box office revenues available from children’s audiences, however it has had success in licensing some shows to other producers and re-touring its own shows. This repertoire model that has been crucial in sustaining financial income, explained Paul Fitzpatrick, who at the time of interview was the company’s producer.

“We use our shows over and over again because our audience grows up. So we recycle. We describe the way that we work as ‘to a repertoire’, where we have got about five or six shows that are good, that there is a demand for. We use those over and over, and then the year’s new show may or may not enter the repertoire.”

Gill continues to lead the artistic direction of the company, but also works with other creators, such as lighting and set designers, puppeteers, and performers, to broaden the vision of the company and increase its capacity to create new works.

“We have long-term standing relationships with – I suppose you might want to call them associate artists, but we don’t use that terminology. For example, one is a solo performer who uses objects and puppets in story-telling; and another is an artist with whom we have worked on various different projects. Sometimes we will go to them with an idea or sometimes they will come to us with an idea. So we have worked with them regularly for about 10 years. That also takes some of the pressure off it being an artist-led organisation, because it is not just the one artist who it is falling on to, which we don’t think is a sustainable model.”

The new works created by these external artists often enter the repertoire of shows that Catherine Wheels tours and licenses. This case study considers the company’s approach to negotiating contracts and royalties in relation to shows created by external sources, and in particular those stemming from the devising process of playwriting.

Copyright in theatre productions

Copyright law recognises that authorship of a creative work may be achieved by a single author, or by two or more authors contributing equally and jointly, or through a collaborative or collective arrangement, where each creator’s contribution is separate from the other.

A theatre production most closely resembles a collective work, where the final product is the result of numerous authors’ contributions. For example, to create a theatre production, a scriptwriter, director, musician, set and lighting designer each produce work which has individual copyrights attached. The performers of the piece also will have performance rights. However, unlike film, where all rights are assigned to the production company for ease of commercial exploitation, in theatre the rights holders license all rights to the production company for a set period of time, or a certain number of performances. A separate contract for each party will detail the license and the rights and remuneration expected. In the theatre industry, contracts are generally based on trade agreements, such as those provided by the Theatrical Management Association (TMA), the Independent Theatre Council (ITC), the Federation of Scottish Theatres (FST), Scottish Society of Playwrights (SSP) or the trade association Equity.

Despite the creators of a collective work holding separate rights, there is a hierarchy within theatre which recognises the scriptwriter and director as the key authors of the play’s copyright. This hierarchy is generally reflected in the displayed credits for a work, and in the higher percentage of royalties which the writer and director receive from the proceeds of exploiting the production.

It is not surprising that in the long history of theatre production, theatre companies, and the legal framework they work within, favour the single-authoring of texts over more collaborative processes. In the former process, the creation of a theatre production begins with a script produced by one author, or perhaps a writing partnership which has agreed joint authorship. The scriptwriter is clearly identified as the author, removing any ambiguity as to who is the owner of the underlying IP. Increasingly however, production companies such as Catherine Wheels are creating new works through a devising process, which entails multiple parties collaborating and contributing from the outset without the presence of a script. As Paul explains below, when there is no underlying text to work from, when ideas are generated in a collective process, the identification of authorship and ownership of the resulting intellectual property can become 'tricky'.

"We are working with artists to generate new productions, new ideas. We don't do a traditional commission with a playwright to write a play – we have a devised process. At the moment we are creating a show where we have got a designer, a performer and I think a lighting designer. The four people from very different types of disciplines within the arts are working together, just exploring lots of ideas, and that is where it gets tricky as far as intellectual property is concerned. For example the lighting designer would normally just do the lighting and would not have an input into what happens on stage. But in this one we have invited the lighting designer to come in at this early stage of creation. So they may or may not have an interest in the authorship as well as what they then bring to the production."

The collaborative devising process consequently brings into question the idea of a clearly identified single author of the work. In copyright law, for joint authorship to arise the contributions to the work should not be distinct from one another, as is the case in collective works, and each author must significantly be involved in the creation, or rather expression of the work. It is worth noting here that ideas or concepts themselves are not protectable through copyright law; rather, it is the expression of the idea in a fixed format, for instance written or recorded, that is protectable. Therefore joint authorship is not obtained merely by contributing an idea or minor changes in the development process. Thus, in devising a play, different people may contribute their ideas without actually gaining joint author status.

Consequently, the law on joint authorship helps to remove problems where indistinct or negligible contributions are made; yet simultaneously it creates authorship and ownership discrepancies for those who are heavily involved in the devising process and who are thus instrumental in the creation of the play. Where joint authorship fails, a better approach to assigning authorship in devised and collaborative work may be to enter into a merged copyright agreement where creators assign their rights to an entity and own proportion shares of the merged copyright.

In the production of *White*, Catherine Wheels chose to employ a joint authorship approach.

“We put a team together to work on that so actually in the end the creative team, the composer and the designer, added to the story and so did the other actor. So there is joint authorship. So we just negotiated on how that worked.”

Remuneration and royalty pools

Devised work also presents challenges in terms of contracting and apportioning royalties. Catherine Wheels has thus far relied on loose guidance from trade associations and other theatre companies. However, for a small company, traditional royalty models can be financially unattractive when the revenue projections for the production are small, as is often the case in children’s theatre, due to lower ticket prices and fewer tickets being sold. Catherine Wheels has thus devised a ‘royalty pool’ approach, which relies heavily on a sense of fairness, trust, transparency and agreement by each contributor.

“We nominated who within the team should get royalties and we took 10% as the standard, and then split that 10% amongst that pool of people.”

“We used to work in a different way because our management association is the Independent Theatre Council and they have got guidelines as to how royalties might work. They work on a model where you would commission a playwright, who always gets 10% royalty. Then as a producer you know that you have got to pay the 10%, and then on top of that if you take your own production out again you have got to pay royalties to the lighting designer, designer and sound. They used to say that you pay them one-third of their original fee as the royalty.

“For us, sometimes we will put a show on for a week as a revival and one-third of your original fee as a royalty in that situation would actually prohibit it going on. It is prohibitively expensive. On the other side of that we might put a show on for six months and one-third of your original fee actually is a bit rubbish, so we wanted to see if we could work out a fairer way of doing that. Also there is a limited capacity to see *White* at a time so there is limited revenue. When you start getting into 10% for the writer plus X-Y-Z for the other creative team, the royalty can come up to 20-22%, which is unfeasible.”

As each production is different, the division of the royalty pool will depend on the contributions of each creator, Paul said: “I think we are known for being really fair with royalties for people and they always get paid. I think the other thing was, I could illustrate to them what they would get. But we don’t feel that the artist should basically have to continue to subsidise that choice of it being a limited capacity show”. While Paul has sometimes received resistance to apportioning royalties based on contribution, and sometimes the pooling approach has not fitted a particular production, in those instances he has been happy to revert to traditional fees and royalty models.

“Lots of people have been asking us how it works and I think people are adopting it. I think for us it works because of the nature of our company and actually it reflects us, because it feels like it is very democratic, it is collaborative. There is still a hierarchy but I think theatre-making by its nature has got to have a hierarchy because if no-one is leading you never get a piece done. Generally I would say the lead artist gets the lion’s share of the royalty, so the lead artist is the person who came up with the idea and up to this point that has been easy to identify because it is the person who has said, ‘I want to do this’. Generally next down has been the designer and that is just the way we tell stories because of the environment – it is really important. Then third down is probably the sound designer or composer, but that might shift if music is involved, say if there was no set and the music was the key thing.”

As Paul suggested, in theatre it is difficult to provide a ‘one size fits all solution’, making the management of royalties difficult for a small production company. While Paul has taken steps toward breaking down the hierarchical structure of traditional royalty models to better fit the collaborative process of devising new works, he accedes that there remains a need for a leader who will ultimately receive the bulk of the royalty pool.

There are other questions raised by Paul, such as the timing of negotiations. In the devising process, can the participants pre-agree authorship and remuneration? By its very nature, the devising process entails that these factors can be contractually defined only after the final product has emerged and contributions have been accounted. Devising new works thus requires trust and strong relationships between all contributors. This approach might not appeal to a lawyer, yet a careful documentation of the creation process and the waiver of some authorship rights by less significant participants prior to beginning work, could negate at least some of these risks.

Ultimately, for Catherine Wheels this is still an experimental process and while it is making headway with its royalty pool approach to remuneration, it has not escaped the need to negotiate and agree terms with each contributor.



Ian Cameron and Andy Manley in *White* by Catherine Wheels Theatre Company (Photo © Douglas McBride).

Peter Arnott, Playwright

A playwright's perspective on rights and remuneration



Properties

- Play scripts

Protection Tools

- Copyright
- Contracts
- SSP & FST Minimum Standards Agreement

“If new playwriting, specifically from Scotland, is a strategic priority, then it needs to be paid for. It needs to be possible to sustain some kind of career doing it.”

Issues

- Minimum standards for rights and remuneration
- The role and remuneration of the playwright as dramaturg
- Disappearing subsidies
- A new model: “A Play, a Pie and a Pint”

Peter Arnott is a renowned Scottish playwright who began his career at the Traverse Theatre in Edinburgh in 1985. Peter has written more than 40 professionally produced original scripts and adaptations for the stage, as well as songs, screenplays, and radio and television scripts. In 2007 he received a Creative Scotland Award and from 2008 to 2011 he was Writer in Residence for the John Murray Archive at the National Library of Scotland. He has also been Writer in Residence for the Traverse Theatre and for the ESRC Genomics Forum at Edinburgh University.

This case considers Peter's perspective on the rights and remuneration of playwrights. Throughout his career, Peter has experienced the particular challenges of making a living as a playwright in Scotland. As opposed to other theatre markets, in Scotland, productions run for a shorter period, audiences are smaller, and therefore the royalties available to playwrights are smaller. “They were never going to be as high as they are even in rep theatre in England, let alone in London,” he said.

To improve conditions for himself and for other playwrights, Peter has maintained a close involvement in the Scottish Society of Playwrights (SSP), and currently serves as its Chair. SSP was founded in 1973, when Scottish playwriting was winning keen interest in the world, but playwrights were recognizing that the existing trade body, the UK-wide Writers Guild, did not adequately represent the needs and circumstances of playwrights in Scotland. In particular, Peter explained, writers north of the border needed a voice with which to campaign for improved public funding for the commissioning of new theatre IP, in the form of scripts.

“It was felt, and the petitioners maintained really, that if new playwriting, specifically from Scotland, from playwrights based in Scotland for a Scottish audience, was a strategic priority, then it needs to be paid for. It needs to be possible to sustain some kind of career doing it and that is really the underlying logic of everything.”

Minimum standards for rights and remuneration

Over the years the SSP and the Federation of Scottish Theatre (FST), which represents theatre producers, have worked together to negotiate a Minimum Standards Agreement (MSA), essentially a trade agreement. An ongoing item of business for SSP is the updating of the MSA, which ensures that the rights and remuneration stipulated in commissioning contracts adhere to industry standards and are thus fair to both the playwright and the commissioning producer. As outlined in the agreement, the ownership of IP, the copyright of a script, is always retained by the playwright and licensed to the production company exclusively for a set period of time in return for payment in the form of a fee and subsequent royalties. The MSA base contract provides for a variety of additional circumstances:

If the playwright has adapted a script from another author’s work, such as a novel, then there will be two copyrights involved: one for the novel itself, and one for the script. The agreement requires that the writer must obtain the adaptation rights from the novel’s author, and that the remuneration will be proportionally divided and pre-agreed.

** The current rates can be found on the SSP website at:
www.scottishsocietyofplaywrights.co.uk/commission-rates.html*

Similarly, the agreement also stipulates that when there is more than one literary contributor, as in joint authorship, the remuneration will be applied proportionally, and will be pre-agreed. Lastly, the MSA establishes that the producer is responsible for the clearance of and remuneration for any applicable music rights.

The fees and royalties defined in this agreement are re-visited regularly by SSP and FST to reflect the changing circumstances in the theatre sector*, Peter said.

“The rates are re-negotiated every year but sometimes however, when things are tough, we stop, when things are disorganised we stop. There have always been moments when the uplift has been more considerable, and the particular one I am talking about is the strike, the playwright strike in 1990 when the Scottish playwrights stopped delivering scripts and said that you have to make this in some way reflective of some kind of living wage.”

“This is occasionally a matter of controversy but our attitude basically is ‘the work, is the work, is the work’. Even if you write the play from devising, you are still writing the play – or if you are adapting a novel, or whatever you are doing.”

The role and remuneration of the playwright as dramaturg

For much of the period of its existence, the MSA has focussed on the basic IP rights and pay terms as related to the playwright’s finished script. However, more recently, concern has arisen that playwrights should be paid for their time, particularly as their role of dramaturg has evolved. In this activity, the playwright acts less as a writer and more as a consultant on rehearsals or workshops, without the imperative to produce a script.

“I think fashions have changed, things have changed – I mean there are more performance writers now; it is a whole different thing,” Peter said. “In fact, one of the things that we are doing is we have been working on devising a variation on the contract for that kind of work.”

This variation to the MSA does not change the ownership of the script property, but does address the fact that producers may involve the playwright in devising or acting as dramaturg, rather than stipulating the traditional playwriting process. Some producers have argued that dramaturgical activity is not the same as the traditional approach – which involves researching, developing and writing a script on one’s own, as the identified playwright of the work – and thus the MSA rates need not be paid.

But Peter takes the view that “no matter what the source is, the work is deemed to be the same,” Peter said. “This is occasionally a matter of controversy but our attitude basically is ‘the work, is the work, is the work’. Even if you write the play from devising, you are still writing the play – or if you are adapting a novel, or whatever you are doing.”

SSP’s contract variation for dramaturgy suggests that playwrights should be paid either on a time basis, acknowledging the period of their work in rehearsals or workshops, or on a script basis, as in a traditional commission, but with room for negotiating further variations.

The society encourages its members to use the MSA and template contract wherever possible, even outside of Scotland, Peter said.

“That usually requires a little give and take, because obviously if you are working in England then you would be handed a TMA (Theatrical Management Association) contract or an ITC (Independent Theatre Council) contract. There are key differences, that reflect different realities.”

For instance in England, some portions of the recommended pay are based on venue sizes, which tend to be larger than in Scotland. “So you are paid more for a bigger theatre and I don’t quite understand that. I think it is better to be paid for writing a script and the size of theatre will be reflected in the royalties, or perhaps in rights.

“Again, the situation is reflected in the contract. If it is a brand new script then the time-based approach applies. If it is not a brand new script then it is option fee plus royalties. If it happens that you have already written the script and you take it to a theatre and they want to do it, then you treat it as a permission, or license. The fights we have got into over the years have quite often been about that, if something is pre-written: They say, ‘Well why should we pay you to write it?’ and you say, ‘Because.’”

Disappearing subsidies

Despite the MSA and other achievements of SSP and FST, Peter feels the prevailing means of public support for the industry are shifting and as a result, making a living at playwriting is ever more difficult:

“It is much, much harder to get commissions for new work and there are fewer playwrights now – there is no living in it. It feels like there are fewer commissions – we don’t know the numbers, but it feels like that, it feels like it is harder to break into.”

With SSP, Peter lobbies for research and re-invigorated public investment in script commissioning, to the levels awarded until the turn of the millennium.

“What there used to be was a dedicated fund, a commissioning fund, and what that would do was it would allocate a certain number of commissions to theatres every year. The Traverse got eight, can you believe it? Eight, and they do two now if you are lucky. The Tron got two; the Citz got two. And then project funding, it was split half and half between buildings and projects. It all came to ‘round about 30 commissions per year, and what they did was that they paid 80% of the cost, which came from the fund, and 20% was from a theatre’s own trust. That system was stopped well before everything, well basically 10 years ago when everything went up in the air.”

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Propaganda Swing (Photo © Robert Day).

New model: “A Play, a Pie and a Pint”

Peter also supports new models for theatre production which aim to provide some commercial revenue to producers while providing new commissions for playwrights and stages on which they can showcase existing work.

An example is “A Play, a Pie and a Pint”, the lunchtime theatre programme presented at Glasgow’s Oran Mor arts venue by producer Vox Motus. Here the playwright’s commission contract differs from the SSP’s Minimum Standards Agreement: In exchange for a smaller fee to the playwright, the producer will have a shorter run of shows (6, instead of the 39 specified in the MSA), and retain no further rights to re-produce the show beyond this short licensing window. This arrangement allows the playwright to seek opportunities to further exploit the IP elsewhere – a process which can take quite some time, depending on the market. “For example, I wrote a play in 2004 for the very first season here,” Peter said, “which has now just been done on BBC Radio.”

While ‘A Play, a Pie, and a Pint’ enables playwrights to display their work to audiences and potential producers, it does not alleviate the larger commissioning shortfalls in the Scottish Theatre sector, Peter lamented.

“In a way, because of here, at ‘A Play, a Pie and a Pint’, the pressure is taken off, because actually there are 32 plays happening here – 32 new plays every year – it is breathtaking. But what is happening – and it is not their fault – but this has become an industry standard, the idea of the short play thrown on, less money – that has become an industry standard.”

The production of new works is ultimately reliant on a mixed ecology where opportunities for short and commercially sustained runs, as well as long and publicly funded productions, are available. At the moment, Peter feels the prospects of gaining larger commissions in the Scottish sector are few, however he remains hopeful that better recording measures can be put in place to demonstrate the reality of the situation, and to inform measures for re-igniting the commissioning of new IP for Scottish theatre.



Stellar Quines

Exploring digital models



Properties

- Plays and rehearsals
- Live-streamed broadcasts
- Films and recordings

Protection Tools

- Copyright
- Contracts
- Broadcasting rights
- Performers rights

Issues

- A digital strategy for theatre
- Live streaming
- 3D filming
- Recording for distribution and sale

Artistic Director Muriel Romanes established Stellar Quines in 1993 in order to provide a platform for live theatre that would be driven by women, and present women's stories. The company creates diverse work in live theatre genres, and recently has begun exploring the space between live theatre and the digital realm.

Stellar Quines employs three core staff and a range of freelance directors, performers and designers who join the company as projects require. In 2009 the company was granted AmbITion Scotland* funding in order to implement a new digital strategy. For this work, it contracted Lesley Anne Rose, a freelance producer and writer with experience of digital technologies in the cultural sector, to execute the company's digital vision. This case explores the company's digital experimentations in the project and the IP issues encountered.

* www.getambition.com

A digital strategy for theatre

Stellar Quines set out three goals for its Ambition funding and the company's experiments with digital technologies:

- to expand ways of creating and delivering live theatre
- to grow audiences and increase engagement with them
- to develop business models that extend the life of live productions

To achieve these goals, Stellar Quines planned three core digital activities, each of which would draw on an existing piece of work:

- live streaming of the company's *Rehearsal Rooms* events
- 3D experimentations with the co-produced play, *Ana*
- digital recording and commercial distribution of the play-film, *The List*

Live streaming

Owing to the work of companies such as National Theatre Live and Digital Theatre, the use of live streaming is expanding in the theatre sector. While there have been numerous debates about the role of streaming in an industry that is concerned with the live theatre experience, it is acknowledged that live streaming has improved access to theatre for viewers who are geographically or financially restricted, or when demand is higher than venue and tour date capacities allow. To date the streaming of live shows has predominantly been the privilege of larger companies with A-list stars, bigger brands and greater resources, yet small companies have begun to investigate how they too can effectively make use of live streaming.

The *Rehearsal Rooms* events which Stellar Quines chose to live-stream are an ongoing feature of the company's programme. Performers rehearse, then give readings in front of audiences, of scripts in development with playwrights from around the world. The aim in live-streaming them was to improve audience development: In addition to reaching new audiences, the digital presentation included online chat sessions in which viewers, including some playwrights who could not attend personally, could discuss the readings.

The company deliberately avoided exploring the commercial potential of this activity, which might have involved, for instance, installing a pay wall on the streaming website. Instead the broadcast enabled global, free access to the content. The lack of revenue also simplified the rights and fees required by the creatives involved. Negotiating the terms in advance, Lesley Anne gained the artists' agreement that there would be no additional remuneration for the live-streaming experiment.

"The fee for performers is just included in their contract for the live event. We have not paid any more. They get paid quite well for it anyway and they are quite happy. I think if we put it up on [video-sharing website] Vimeo for people to watch then I think that would be a different matter but we are not, it is just a way for increased audiences."

The only IP adjustments thus involved gaining permission from the venues, writers, translators, and performers to record and broadcast the footage, and to use it for potential archive and promotion.

“We put something in the actor’s contract that basically agrees that they are happy for that to happen, and we obviously have to ask the permission of the writer and sometimes the translator if that can happen. Often the writer or translator cannot be there because they live abroad so they are really happy for it to happen because they can get to see it and take part in it.

“We have always made it quite clear that we have permission to live-stream it, but we don’t then have permission to put that up on, say, Vimeo, so that anyone can then watch the recording completely. We do use the content maybe if we take the show forward to full production, to create marketing trailers out of it. They are under two minutes and it is just snippets, it is not the whole thing. And we will sometimes ask permission if we are approaching venues or potential co-producers, if they can watch maybe a password-protected site on Vimeo so they can see the show – but again it is not exploited.

To avoid infringing music broadcasting rights, Lesley Anne removed tracks or replaced them with free-sourced music. “Obviously there is an issue around music where in a rehearsed reading we might use a bit of music just because it is a one-off, but if it is live-streamed we have now got to think really carefully about any music that we may use, so we try to use free-sourced stuff or no music at all, because we are broadcasting it now, so that has been a bit of a learning curve.”

In total the live streaming experiment demonstrated to Stellar Quines that the medium can indeed increase audiences, by enabling viewers, playwrights, and potential venue managers, to watch and participate from any location, Lesley Anne said.

“The response has been really good, not least of which because we can work with writers abroad. We tend to use it for pieces of work that have some kind of international link; the last one we did was a Finnish playwright and translator and we are taking it through to production next year, so it is quite nice for people like the Finnish Embassy to see it and promote us in Finland. Also we have had really nice emails from people in Australia saying that they have watched our work and playwrights from Canada and all over the place as well as Scotland and the rest of the UK, so it is undoubtedly brilliant for increasing audiences.”

An additional benefit of the experiment was the testing of different camera angles to assess which were most engaging for audiences watching on screen. Lesley Anne used simultaneous online chats with the audiences to gauge their reactions:

“What I was trying to work out was, if we are putting theatre on the screen what does a screen-based audience want? It does not seem right that we just stick a camera in front of it and expect an audience to enjoy it or pay for it if they are watching it through a different medium. So a lot of our work has been about exploring what is best for that audience, what they want.

“With the second one that we did we had two experiences online and audiences could say which ones they preferred. We had a single fixed camera in the audience that was just watching the show as if they were in the audience, and then we had two or three cameras that were cutting from one to the other, so it was more of a film experience. People who were watching online could join the chat-room and they could say what they wanted the camera to do – so if they wanted a close-up we would do that for them. Then we had a survey attached to find out who preferred what experience, so that was quite interesting.

“The outcome was, in the rehearsal room, people tend to want a more fly-on-the-wall experience with just a single camera, but certainly when we did the performance in the evening people preferred that more film-like experience – they wanted to get really close in, they wanted different angles – because they felt that they were getting something different from the live audience.”

The live streaming of *Rehearsal Rooms* demonstrated a demand for this mode of delivering live theatre, although Lesley Anne believes the developmental nature of rehearsals makes them less attractive than polished productions.

“I think for things like *Rehearsal Rooms*, I don't feel that there is a market there to pay for it. If we ever got to the stage that we live-streamed a production I think that is different – I think you could put a pay wall on it, or some kind of niche experience, whether it was watching the dress rehearsal or the director's notes or something. I think there is definitely a model there, but with all development work it is kind of against the grain of the work I think. I might be proved wrong but I suppose that is my feeling.”

3D experimentation

Another feature of Stellar Quines' digital programme involved exploring the question: Can 3D film offer an artistic and commercially viable experience of live theatre?

The recording of *Ana* in 3D was a first for the Scottish theatre and film industries, and required partnering with a variety of organisations to amass necessary skills and additional funding, such as the Digital Design Studio: GSA, Edinburgh Napier Institute for Creative Industries, Screen Academy Scotland, Freakworks, DCA, Scottish Enterprise, and the Scottish Funding Council.

“It was a very complicated show, and the 3D filming was a project that was sort of tacked on to the end of it. *Ana* had been five years in development and then right when the show was being built we decided that we would experiment with filming it in 3D. What made it very tricky was that all of the creative team involved had never signed up to do that, and they had never designed the piece to make it good for 3D, but it was the only show that we had. So the 3D wasn't perfect and in the places where the show was really dark it did not work. Also red is not good for 3D and all the costumes were in red. But I think the places where the conditions were right I think it worked.”

Ideally, the technical challenges, as well as the IP implications of 3D filming, would have been addressed before the work began. Stellar Quines' production of *Ana* was an international co-production with Imago Theatre of Montreal, which further complicated the permissions needed to record the production in 3D, and then to further exploit the recording. Ultimately, Lesley Anne was able to negotiate rights only for using the recording for educational purposes, not for further distribution and sales.

"The IP, that was very difficult. I think it is just a different attitude towards theatre in Montreal. It is much more of a kind of pure attitude and the standard of their work is amazing and so I understand why they want to protect that. Whereas I think here in the UK we are much more along that process of accessibility and experimentation, so it was a little bit of a clash. The only way that we could agree to do it with our co-producers in Quebec and the cast in Quebec particularly was if we just used the products as an experiment. And we were allowed to show it three times for research purposes but we could not commercially exploit it. In the end, I don't think that it was good enough to commercially exploit.

"All we did in terms of the IP was we created letters of agreement which stated exactly what we were going to do, how we were going to film it and how we were going to use the work. Obviously we just let them know as the process went on what we had done.

"We have learned a lot, we have got something that was a really useful experiment and that is it, it is good enough."

Digital recordings for distribution and sales

The final phase in the Stellar Quines digital plan involved recording and creating a film version of a theatre performance, not for a single broadcast as was the case with the live streaming, but instead to create a product with a life beyond the stage, which could be distributed and commercially exploited as a film. Here the company chose to record its highly acclaimed production, *The List*, which it restaged for the recording.

For this project Lesley Anne aimed to simplify the recording process:

"We were going to experiment with things like 3D sets, but I think after *Ana* I got fed up with experimenting. I just thought, 'The company needs to try to produce something that is commercially exploitable, so we can go through all of that process and have something at the end that we can test and see if we can make money out of it'. So that is what we focused on. So our next show was very simple, and because we could really start introducing the idea of it quite early and we live-streamed it, we knew it would work."

The List was a strong choice for recording: It was critically acclaimed and had received good ratings from theatre audiences; it was not a co-production; and those involved in creating it had agreed from the outset that it could be made into a film.

“With all the conversations that we had, with all of the creative team, and the cast and the writers, we said, ‘We are re-staging it for the purposes of doing the film, so we might take it to the Fringe again, it might do well, but the main reason we are doing it is to do this.’ So we made that very clear from the start, and then began the process of trying to work out the IP and copyright. Because what we have never done before, what theatre doesn’t have is anything that has got a long-term foreground IP – something that has got longevity. We have got all the background IP in place but nothing else.”

Background IP resides in the original production of the live show and describes the rights held by its creators, as outlined in the other theatre case studies. Foreground IP is generated from the research, development and production of creating any subsequent product, in this case the film. In negotiating the rights for *The List* as a film, Stellar Quines worked with a lawyer to draw up contracts with the original creative team, to license the background IP for a flat fee on top of remuneration for the original live performance. What is exceptional here is that the rights involved in the eventual filming of *The List* – and of a behind-the-scenes documentary of the project called *Filming The List*, created by Executive Producer Robin McPherson – were discussed at an early stage. Lesley Anne advises other producers who may consider similar follow-on projects to “think long and hard about the long term possibilities, because it’s hard to go back and renegotiate contracts.” In her case, early negotiations prevented later disagreements.

“We did a buy-out basically. We worked with an entertainment lawyer, who drew up contracts for each of the creative team, explaining what we were going to do with the work and to agree that they license their IP. They have not assigned their IP or their copyright – they still own it – but they have licensed it to us for the use of this film and they have just been paid a flat fee for it, which is another percentage of their original fee. It is the same with the writer: We have basically bought the film rights, so we have done a film rights contract, a standard contract, and bought out the non-exclusive film rights.”

Stellar Quines also had to negotiate performers’ rights, which only come into force when there is a recording of a show. This was new territory, so Lesley Anne worked with trade union Equity and the performer’s agent to create a contract that was closely based on those for the film industry.

“Luckily there is just one actor. We went to Equity and we asked what their advice was – as soon as you go to an agent, if you say you have been to Equity and Equity say this, then it calms their nerves a bit – and also we wanted to make sure that we were doing it fairly and transparently. Equity’s advice was to treat it as a low-budget feature film and they have standard contracts for actors for low-budget feature films, so we have contracted the actor basically on a film contract. With that you pay them a fee for their time and then for usage fees.

“I kind of envisaged at the start that we would be creating this whole raft of contracts that you could use for projects like this moving forward, but the only new contracts we had to create were about the theatre IP flowing into the film. Everything else we could use film contracts for. I think if we ever did it again it is probably easiest doing it that way. I don’t see that we have to re-invent the film contracts.”

In addition, as with the live-streaming of the *Rehearsal Rooms*, for the music content in *The List* film, Lesley Anne had to clear all rights held by composers, musicians or publishers, including synch rights for use in the recording.

To date, Stellar Quines has shown the film in a handful of Scottish cinemas, but to secure screening opportunities more widely, the company will be climbing another learning curve as it forms partnerships with film distributors. Nonetheless, there is potential income from this film through further box office sales, DVD sales and streaming the content online with pay walls. The company is considering these activities, which, when combined with production of further films, will provide more evidence as to the financial viability of a 'theatrical film'.

The experience of managing IP rights in the projects was instructive, involving considerations of new IP rights and contracts, and the importance of clarifying and negotiating them from the very start. Crucially, the content itself also needs to be created with a view to digital applications, as the technologies work best when embedded in the original development of a show, and not simply added on.

This experience also illustrates the potential of digital technologies to support smaller companies' artistic and audience development, although Stellar Quines did call on the skills and financial resources of a number of organisations to supplement the original AmbITion funding.

"We used that as matched funding to bring in other money. I think we are lucky that we had that chunk of cash, but I don't think that theatre companies can stick their heads in the sand about it. We have done the projections on how much we hope it will earn over the next three to five years, and whether it will ever recoup the costs I am not sure. But at least it is an income stream that is not public funding, and I think that is really valuable to have that experience, especially for small companies."

For Lesley Anne, while the combined results of the company's digital experiments do not suggest they can substitute for the live experience of theatre, she does believe that to make any similar project succeed, one does need to embrace thinking about "a life beyond the live".



Scenes shot of the filming of *The List* (Photo © Robin MacPherson).

Legal observations

William Shakespeare compared the world to a stage in *As You Like It*, and with that pun he teased out how the reputation of an actor is *authored* in seven phases. Elsewhere in *The Merry Wives of Windsor* Shakespeare compares the world to an oyster, an expression designed to proclaim an actor's *ownership* of opportunity. Arthur Miller later augmented Shakespeare's oyster expression in *Death of a Salesman* with the adage "...but you don't crack it open on a mattress" – Miller teases the truth that use is still required for an actor to exploit an opportunity in this world. The worlds of dance and theatre IP are not dissimilar. The concepts of authorship, ownership and use permeate each of the case studies, and act as platforms upon which lessons on managing and exploiting IP can be teased out.

The case study of **Curious Seed** is a helpful starting point, and while focusing on collaboration and separation, it is instructive as to the dual rights that principally exist in dance related work. The legal regulation of dance and theatre related intellectual property is principally located in section 3¹ and Part II² of the Copyright, Designs & Patents Act 1988 (as amended) ("CDPA"). Section 3 establishes copyright for literary, dramatic and musical works in the United Kingdom while Part II covers rights in qualifying performances. A "performance" is a wide term and covers dramatic performance (which includes dance and mime), musical performance, reading or recitation of a literary work, and/or a performance of a variety act or any similar presentation. The coupling of copyright and rights in performances works well for they are equally concerned with the creation and realisation of literary, dramatic and musical works. As the Curious Seed case study makes clear, collaboration and separation have not only to be considered for the subject matter of the literary, dramatic and/or musical work, but so also must consideration be given to the collaboration and separation of copyright and rights in performances (two separate legal rights) themselves.

Even with a lawyer on Board, the case study of **David Hughes Dance** stresses that difficulties still arise in buying perpetual rights when those rights have the lengthiest terms in the IP world and negotiation often involves personal representatives of deceased authors. The difficulty arises not so much from the company of copyright and rights in performances in literary, dramatic and musical work, but from the crowd of rights when moral rights (i.e. the right to be identified as the author of a work (paternity right), the right to object to derogatory treatment of a work, right to object to false attribution, and privacy rights in photos and films) are also in play. If copyright is established in primary literary, dramatic (which includes a work of dance or mime) and/or musical works under the CDPA, the author(s) of such work may also benefit from the applicable, but latent, moral rights discussed (and outlined in Chapter IV³ of the CDPA). In order to activate the applicable moral rights, certain of those rights (e.g. the paternity right) must be identified and/or asserted by the author (in writing). An author's failure to activate paternity right in work may (unless otherwise agreed by contract) mean the loss of mandatory credit (i.e. being cited as the author), which in turn may lead to failure to build a reputation as an artist (an asset with its own legal

protection). Likewise, moral rights exist in relation to performances, are outlined in Chapter III⁴ of Part II of the CDPA, and are similarly latent until asserted (or indeed waived) in writing. The case study of David Hughes Dance underscores the need for exploitation of these latent moral rights either by assertion (and crediting) or waiver, thus avoiding creative input difficulties stemming from notions like “choreography”, mismanagement of reputation, and the changing attitudes of successor right holders. Contracts are, of course, a useful source of writing where all rights can be and should be addressed.

The case study of **Steller Quines** explores opening dance and theatre related IP to the world by means of the worldwide web. In reality, copyright in dance and theatre work has been exploited by means of an international web for many years. The Government of the United Kingdom (the underwriters of the CDPA) has subscribed to a number of important international treaties to enable the UK copyright holder to have their work recognised and protected abroad. Steller Quines’ exploration of digital models uses this copyright web as a safety net to explore how the internet has truly made ‘all the world a stage’ and tests the benefits in exporting digitised theatre online. Such a move enables and adds audience reach, eases and elicits feedback, turns viewers into participants, and provides a more private and potentially enriched experience: all of which should have a positive impact on income generation. However, in addition to mandatory trading disclosures under company law, data protection regulation compliance, and the necessity for a suite of contractual terms; the increase in audience is not homogeneous, and cultural (including language) issues as well as economics should be fully thought through. Likewise, instructive feedback (if used) may be creative input and in turn lead to rights issues. Not all viewers make good participants, and whereas collective booing and the throwing of cabbages may not exist, trolling and hacking are worse for business.

Dance and theatre related intellectual property is not exclusively protected by copyright, as the case study of **Catherine Wheels** teaches. A wider view of intellectual property rights ought to be encouraged, especially for work participants who may not have a stake in copyright or rights in performances. IP rights seek to protect those creating the IP not servicing the IP. It has been noted that “creative input” can cause issues in terms of transfer or establishment of extra rights to manage. On the flipside, where there has been creative input, there has been input that is creative, and that should be duly rewarded. For make-up artists, lighting directors and others (e.g. see the TV formats case studies) this should be heeded and due recognition sought. Catherine Wheels’ inclusive ‘rights pooling’ approach deserves applause. This community model pooling of all IP rights including unregistered design right (at a UK or European level e.g. which may be applicable to costume work or set design) and unregistered trade mark rights (in the underlying trading business which is exploiting any theatrical or stage related work), allows remuneration under contract law, and facilitates remuneration of artists which IP law may have otherwise have missed out.

With the case study of **Peter Arnott** the potentially show-stopping issue of trade marks emerges front and centre. It appears that a common oversight by playwrights and performers alike (and by those managing the rights pools),

is the failure to appreciate not only the great value in the title of the scripts or the mark of their own names as author or artist, but that the very same will not be protected by copyright if enforcement is necessary. Here, one must turn to the law of trade marks where a name is protectable under s1(1)⁵ of the Trade Marks Act 1994: “A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging”. The case study’s emphasis, quite correctly, is that it is never too early to think about contractual regulation; but equally, dance and theatre participants (and their companies, if so operated) must consider the relevance of trademarking to their business and business plan within the next five years (partly to future proof the business, but mainly because a continuous period of 5 years is the point where any unused specification (list of goods and services) covered by a trade mark registration becomes liable to revocation on the grounds of non-use). This issue is compounded when the collaborative or collective approach to IP generation is adopted. Often, all eyes (and ears) are fixed on the regulation of copyright and that the ownership of the title or ‘brand’ is overlooked. If success follows the creative work, the value of the mark(s) associated with the work may out-value the copyright. The reason why trademarking may be overlooked is that typically, unlike the licence fee paid for use of copyright material, the revenue derived from trade marks is usually only unleashed on the sale of the associated business/asset or when the mark(s) can be monetised themselves i.e. either by the acceptance of a premium to see a show *because of* the mark(s) or when merchandising occurs. Yet trade marks can outlast copyright, and that alone is good reason to take note.

In summary, Curious Seed makes the important leap from managing collaboration and separation of work to exploiting collaboration and separation of rights; David Hughes Dance poses the importance of defining terms, especially “choreography” which implies labour (but whose?) and thus a possible encore of rights claims; Steller Quines pirouettes around the shock and awe which can follow digital internationalisation; Catherine Wheels turns on the benefits of rewarding those without rights; while Peter Arnott brought the curtain down with the need to exhaust ownership of the brand of a collective work. It is clear; dance and theatre companies have to consider the impact of “creative input” not only in terms of possession of IP but also claims to IP rights. As the actor, and former US President, Ronald Regan quite rightly remarked: “Trust, but verify”.

- 1 www.legislation.gov.uk/ukpga/1988/48/section/3
- 2 www.legislation.gov.uk/ukpga/1988/48/part/II
- 3 www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/IV
- 4 www.legislation.gov.uk/ukpga/1988/48/part/II/chapter/3
- 5 www.legislation.gov.uk/ukpga/1994/26/section/1

Case Studies:

Fashion & Product Design

Angharad McLaren Textiles

Brazen

Di Gilpin

One Foot Taller

Strike Your Pose

Studio Gnu

Legal observations



Angharad McLaren Textiles

Documenting designs for protection and defence



Properties

- Textile designs

Protection Tools

- Copyright
- Registered design right

Issues

- Documenting work for protection
- Defending a claim of infringement
- Acting with caution

“Get out there and get your work shown in the public realm and then you have got proof of timelines, because you are out there doing it. Because you could worry too much about IP. Some people don't want to show things because they are dead protective about people taking photographs.”

Like many designers Angharad McLaren has worked hard to craft a distinctive line of work, and she has been careful to protect her designs by documenting them and collecting any associated press or publications about them. Eventually however, it was noticed that someone else's work was similar to hers – but this is not the typical story of design infringement, because in this case, Angharad was the accused.

Angharad is a textile designer and weaver who produces textile items for the gift and interior markets, and works on commissions and collaborative research projects. Throughout her design studies, a residency, and her early years of trading she explored a variety of themes, materials and finished products. “I guess I have a distinctive style through my work but that is something that I have tried to foster within my product range. My original collection when I first started out was all the neons and ropes – that was developed from my graduate collection. But to actually make something that was commercially viable, my interests changed,” Angharad explained.

“It has to be commercially viable, so there are different sacrifices you make along the way.” Angharad's design development constitutes part of the hard work of establishing a profitable, small crafts-based business enterprise in a competitive market.

Documenting for protection

Central to Angharad's business is the value of her artistic copyright and unregistered design right, which she works to protect as much as possible in law. In the digital age, the old trick of self-documenting designs by putting them in an envelope and posting to oneself has been replaced by more sophisticated measures, such as those offered by various organisations. Angharad is a member of Anti-Copying in Design (ACID)*, which urges members to display its logo as a deterrent, similar to display of the copyright sign, ©, and to mark work with the date and artist's name.



"I would use the ACID logo at shows as well; on any of my invoices, or any of my paperwork that I send out, it has got the logo on it so that people are aware that I know my rights and have support protecting them," Angharad said. "ACID has a databank that you can send your design work to, so if you are developing new designs you can send them in. It's not actually protecting them, but they have got a data bank with the date attached to it so you can prove when you created it."

However Angharad finds the best way to create a paper trail of evidence – or rather, digital trail – is to expose her work as much as possible in the press and online. "Whenever I have spoken to people, I have always said get out there and get your work shown in the public realm and then you have got proof of timelines, because you are out there doing it. Because you could worry too much about IP. Some people don't want to go out and show things because they are dead protective about people taking photographs."

Defending a claim of infringement

Angharad has learned this advice through experience. When another designer noticed that Angharad's work looked similar, she accused Angharad of infringing her Registered Community Design (a potentially actionable offence in itself). While applying for such registration requires the design to meet certain criteria, such as novelty and individual character, it does not require a search of similar designs that may already exist in the market. Thus, a design can be registered but later revoked if it is successfully challenged – but this requires the challenger to become aware of the registered design. In Angharad's case, she became aware at precisely the wrong time:

“I was just about to exhibit at *100% Design**, a big trade fair with a range of textiles. I took a lot of the designs that I had developed during my graduate collections and explored how to make them commercially viable – so where would I get the yarns from; which mills would I use to weave them; how would that fit in with all those kind of values that I had as a business; and how much would it cost; are they commercially viable; can I do the sustainable business sort of thing? So a lot of preparation went into that because I did not want to just turn up to a show with designs and not have any way of producing them for customers.

“About two weeks before I was due to show there I got a lawyer’s letter through the post, saying that their client was claiming that I was copying their design, which was really interesting because a lot of people are really scared about having their designs copied and they are so protective about this. But this was somebody saying that I was copying them. They were sending me a letter saying, “Cease and desist”, that the design was not mine, and that she wanted damages. She wanted me not to go to *100% Design*, she wanted me to take it down off my site, and they said if I took it to *100% Design* they would contact the show organisers and they would pull down my stand.”

* *Anti-Copying in Design (ACID) provides legal advice, case studies, and a Design Databank to store and record work. www.acid.uk.com*

100% Design, the UK’s largest design trade event, part of the London Design Festival. www.100percentdesign.co.uk

These threats could not have come at a worse time for Angharad, as it takes significant work to prepare for a design show, especially for a solo debut at London Design Festival, the host of *100% Design*. The accuser had a European Registered Design for her concept, a style of pleat similar to several of Angharad’s designs, which cost several hundred Euros to register and was used as the basis of the infringement claim. However, it was clear to Angharad that her accuser was mistaken and had no case.

“There were so many layers that I could unpick: First of all my use of this pleat pre-dated hers by about six years and I could prove that. I had press, media – images of me in the Royal College of Art *Prospectus* showing me at my desk developing those designs – so there was all this evidence to show that this was my design prior to her registration. Second to that, my design was in a different market, using very different techniques, materials, colours and patterns. But then there was also the fact that it used a generic pleat – this is an origami structure that dates back hundreds of years and if you look up any origami books there are instructions out there on how to make those particular pleats. So it is not something you can copyright [nor register as a design right]. She did not have any rights to it, and basically, no leg to stand on.

“I had to put together all this evidence though, and it took out so much time at one of the busiest, most stressful times of my working year. I was able to do the show, as fortunately I got all the information to her lawyers in time. I kind of felt sorry for her in the end because somebody has made money out of the fact that she has registered the design. They have got a fee for doing that for her and I completely picked apart her application. There was also no background to her work anywhere – she did not have a website, she had never done any exhibitions, she had never published her work online, it was never in any magazines. How could she possibly think that I had copied her?”

Acting with caution

Moving forward, Angharad believes that a good understanding of IP rights and thorough research into possible infringement is essential before taking any action:

“It is an area that I am interested in and I research thoroughly, so I know what my position is in these types of situation, although there are some grey areas. I don’t leap to assumptions either and I would make sure that I have research to back me up if I ever decided to take any action against someone else.”

Angharad also feels such knowledge informs assistance from legal experts, particularly those who are unfamiliar with a client’s particular design sector. “It’s important for designers to have a good knowledge and understanding of their design field, including a solid contemporary and historical contextual awareness, and to understand that while lawyers may have expertise in the legal aspects, they may not know how your work relates to what already exists.”

She also believes that it is possible for designers and students to create similar concepts without having seen each other’s work, but this must not be seen as copying. “By continually developing our professional knowledge, we can explore concepts rigorously and hone our creative design process in order to create IP that is original, meaningful and relevant,” she said.



Brazen

Managing a mixed portfolio of IP challenges

brazen

Properties

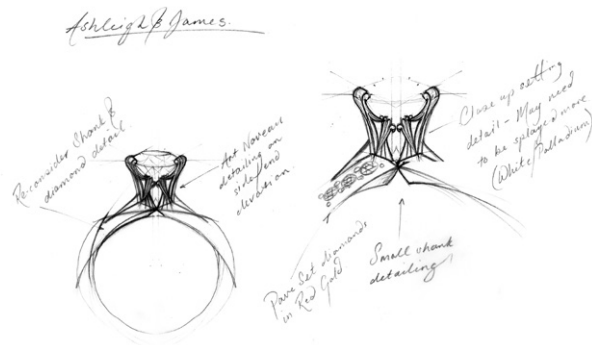
- Jewellery designs
- Retail products
- Company trade mark

Protection Tools

- Copyright
- Contracts
- Trade mark

Issues

- Rights in bespoke designs
- Licensing and design protection
- Retail exclusivity
- Trust in collaborative projects
- Enforcement and design inspiration



Brazen is a glittering jewellery and accessories boutique in Glasgow's Merchant City which was established in 2004 by Director Sarah Raffel. Its display of unique designs by Sarah and others also provides a shop front for Brazen's bespoke jewelry design service, which specializes in wedding and other rings for individual clients. Thus the various IP going through the Brazen door is created, owned and exploited by a mixture of designers, with Sarah in charge of its management.

The challenges arise at every turn. Brazen's bespoke service emphasizes the role of clients in forming the style and shape of the finished piece, with Sarah required to act alternately as creative thinker, inspiring advisor, complying producer, and financial manager. In consultations with clients about bespoke designs, Sarah said, "We get people to commit to things like architecture or pattern, images or anything. But you cannot redesign a wheel – if they want a plain single band with a single stone on it I am not going to tell them that they cannot have that; I will make it for them. We are fortunate that we are in a position where we are able to design and create from scratch and take a couple through a process which ultimately adds value and authenticity to the piece. It has been a service that the market is looking for."

Rights in bespoke designs

Although the bespoke process with clients is suggestive of co-creation, the design for each unique piece is essentially created by Brazen, which retains ownership of the IP. If the design is sufficiently original in UK law, it will be afforded copyright protection automatically*. However this protection is essentially useless for bespoke work; unlike other areas of design, where IP is typically exploited by being licensed or sold, bespoke design attracts clients with its assurance that commissioned pieces will remain exclusively theirs, as designers refrain from reusing or transferring bespoke designs to others.

The potential for exploiting bespoke IP is therefore exhausted in the marketplace, as no further income can be made from it. However Sarah converts this exclusivity into a value-driven service which produces goods with high prices, at the top end of the jewellery market. This model provides Brazen's strongest revenue stream and has not been impacted by declining sales in the traditional retail sector.

Licensing and design protection

Brazen also designs and manufactures collections of its own-label jewellery to sell in the boutique and to other retailers. While it is here that IP licensing could offer Sarah a potentially lucrative revenue source, she has not pursued this possibility, primarily because she is uncertain about forging licensing relationships and their implications for IP protection:

"I do think it is an avenue that we want to look at just in terms of how we design and where I think we have got the ability to work with other companies. I don't know if artists and designers are particularly well equipped with this knowledge and I would certainly include myself here. We have very little knowledge or experience of exactly what goes in to a licensing agreement or even how to go about attracting that kind of relationship.

"I think as a designer you want to be protected but not to the extent where you could end up damaging a relationship or miss opportunities. I also understand where that kind of preciousness lies. As a designer myself it can be easy to become very protective of what you do. You want to be sure the agreement is right for you and the product/design and that you understand fully where the follies may lie."



*

*For further information on copyright, visit the **Intellectual Property Office**, at www.ipo.gov.uk*

Retail exclusivity

The retail side of the business provides another revenue stream and with it, another arena in which to manage IP. Here, products of other jewellery and accessory designers are sold with a mark-up. As do many retailers, Sarah typically contracts the supply of such products on a sale or return basis rather than purchasing them wholesale, in order to mitigate against the risk of low sales. Such an arrangement does not involve the exchange of IP but of the product, therefore the individual jewellery designers retain the IP of the designs.

* *Brazen's efforts to register its trade mark were funded, in part, by NESTA: www.nesta.org.uk/get-funding*

Nevertheless, Sarah is careful to ensure there is an exclusive range of IP in the shop, regardless of who owns it. The ability to offer a unique collection of products is critical to the retail model and thus supplying designers are required to agree to Brazen's marketing terms and conditions, including refraining from stocking the same products in other outlets within a close proximity. In return, Sarah does not stock other designers' work if it is too similar to work she already retails, and which would encroach on her designers' clientele.

Trust in collaborative projects

Occasionally Sarah works collaboratively with other designers but here, she employs an approach to securing IP rights and rewards that is more casual than her bespoke and retail strategies. For instance, in a project to create tableware pieces with another design company, Brazen received a one-off fee to develop a design which was initially conceived by the other company. As Sarah describes below, there was no contract or agreement regarding the ownership of the IP; instead, the collaboration was carried out on a trust-based relationship, as is often the case among design businesses:

"There was never actually a discussion, there was never a contract. We just trusted the fact that we would be name-checked and we got paid accordingly. As far as I am aware neither of the products has been rolled out to anyone because they were only there to be one-off commissions. So if I were to find out, for example, that those particular models were being re-used and being manufactured elsewhere then I think that I would be entitled to raise some sort of complaint or receive some sort of royalty fee, but that has not been the case.

"We should probably have had a contract in place that says, 'If you are to engage in our company on this level, and you were to produce the stated number of pieces to an acceptable quality etc., that you undertake this and you are not to reproduce this' – but then I don't know what the rights are."

Trade mark

Regardless of where Brazen designs and products are traded, the company name is well protected, thanks to its early efforts to obtain UK registered trade mark status in five categories: Jewellery and Accessories, Bag Luggage and Leather Goods, Bath and Body, Lingerie, and All other retail services. This step was undertaken following advice from a business mentor, Lynn McHattie, who specializes in brand development and engaged with Sarah through NESTA*. Lynn advised that IP protection of a creative company of this nature, where design and manufacture are at the core, should be legally protected. As a small business, Brazen found the registration process expensive, due in part to the pursuit of trade mark in multiple categories. Currently it costs £200 for registration in one category followed by £50 per additional category; this is in addition to legal searching and, possibly, professional fees, which can run into thousands, should other companies oppose the filing. However by registering five categories, Sarah has extended the scope of protection for the company, and as she is considering entering new markets abroad, she may pursue further trade mark registration for other territories.

“I will be drawing up some sort of a strategy, mulling over exactly what the best avenue to go down would be – whether or not it is just investigating some business-to-business sales or whether or not we actually want to look at really steering our own design signature. So from that point of view, in terms of IP, then I would be looking to see what further protection I will need against both the brand and any other facets. You have got to assess what the actual damage is going to be against somebody infringing on your brand.”

Infringement or inspiration?

Even where rights are formally protected via copyright, design rights or trade mark, the possibility of infringement remains, and as illustrated in other cases, the costs of enforcing rights can be expensive and time-consuming for small businesses.



“We have recently had to oppose a company entering the jewellery market whose name was phonetically the same with a slight spelling variation. We felt it was too close for comfort and as a team, we wanted to protect the hard work and commitment of the last 10 years. We couldn’t afford for our reputation to be mistaken or misrepresented by a company selling the same product in the same country. We were successful in our opposition and the company has changed its name.”

Much of the confusion behind possible cases of infringement stems from the fine difference in the creative process between inspiration and copying – a distinction that is growing ever murky as the world adapts to the mass of information circulated by the Internet, Sarah believes.

“Have I seen anybody infringe my work? Do you know, I think any designer, if you catch them on a wrong day and they see a picture that could be classed as similar to their own work, it is going to annoy them. To actually break it down, well, you have to actually establish who created what at what time. It’s the zeitgeist – and it just so happens we are human and we share a very similar organ of the brain – and trends come around and whether you are absorbing them consciously or unconsciously, stuff can appear at the same time as your own designs and you can be completely oblivious as to what has brought that about.

“Also, because we live in such a visual world, social media turns over so many visuals on a daily basis, we are absorbing so many pictures, images and flashpoints. It is like, are we going to end up with this steep incline on some kind of mental graph, of copyright? What is going to happen, do you know? Look at [online gallery] Pinterest: I could sit and look at it all day. It is just hundreds and hundreds of pretty pictures and at what point am I unconsciously going to then translate that, as a visual person, into something which could be classed as copyright infringement?”

In any cases of uncertainty about IP rights, enforcement and infringement, seeking legal advice will go some way to clarifying the issues. In addition, there are a number of organisations which offer advice to designers, such as Anti Copyright In Design (ACID) and the Cultural Enterprise Office*.

* For more information about *IP rights, enforcement and infringement*, see:
www.acid.uk.com/
www.culturalenterpriseoffice.co.uk/

Di Gilpin Ltd.

Creative alternatives for IP Protection and Enforcement

Properties

- Textile designs
- Know-how

Protection Tools

- Copyright
- Contracts and agreements
- Alternative measures



Issues

- Motivations to protect IP: rewards
- Barriers to enforcement: costs
- Alternatives to formal protection
- Contracts and agreements provide clarity

“From Croft to Couture” is how Di Gilpin Ltd, a knitwear design studio in Fife, describes its business model, in which garments are designed and hand-made in Scottish homes and sold from catwalks and selected boutiques in Europe and Japan. This simple but ambitious goal is made possible by an equally expansive knowledge, built by founder and Creative Director Di Gilpin over 32 years in the industry, of the pros and cons of IP protection and alternatives that work when money and time are in scarce supply.

Starting as an independent designer on Skye in 1983, Di established the limited company in 2011 and enlisted a team of 90 hand-knitters. Today hers is a renowned fashion brand which also sells to private clients around the world and collaborates with leading couture houses. The company also designs, sells or licenses yarns, knitting kits, and patterns for craft knitters, and invests in teaching and community projects to help maintain Scotland’s rich hand-knitting heritage.

“We do quite a lot of design and production for other companies, for example Top Shop and some London fashion designers,” Di explained. “We are given a brief and we do the creative work and the technical work to bring that product into the market for them. We may go on and do production and we may not. We can out-source that to factories or to knitting co-operatives, sometimes to Ireland.

“Then we have our own signature collection, which is Di Gilpin, that we sell to several companies abroad. And we do a bespoke service here which is very big. We send out a look book for customers to choose styles that they want to

order. Sometimes they will change the sizing, colour, and material. I am just making five pieces for a couple in Paris at the moment for December. That is a full suit, hand-knitted with jacket and jumper for the guy. So they have been here, chosen fibres; they come every year and choose something different. Other people may do it just simply on the Internet.”

Why protect IP?

Across all industries there are at least two common justifications for protecting IP: to secure a means for being rewarded for the effort of developing the property, and to motivate innovation among designers, who will own a protected product’s monopoly rights, which they can exploit by selling or licensing.

However IP protection is not a universal goal. In the world of fashion design, the industry’s very name requires that participants work with ever-changing idea trends and customer demands. Particularly in the competitive ‘fast fashion’ realm of high street retailers, there is a prevalence of labels which copy the work of industry trendsetters. Thus among style innovators there is a view that registering their design rights or pursuing infringement cases is counter-productive, as the market moves so quickly that products are likely to fall out of fashion by the time such measures have been taken. Staying ahead of the game has become a necessity, as Di explained:

“My attitude generally is that if you are developing your design work and you are the maker, you know the provenance of it, you know exactly where it has come from and to a degree it is a form of flattery if somebody is copying your work. You have to keep a step ahead anyway, so that is what a good, healthy designer will be doing most of the time.”

Nevertheless Di prefers a belt-and-braces approach, as she is very aware of the nature and value of her company’s IP. In the case of Di Gilpin signature pieces, the IP concerns the exacting design of each garment, the specified quality of wool knitted into it and the extensive production skills and effort required to make it (some products in the collection can take up to two months to create by hand). The company thus protects its designs through unregistered copyright and unregistered design right (UK and EU), while registered trade marks and non-disclosure agreements (NDAs) protect the company’s brand and production knowledge. Other measures, such as contractual and licensing agreements, assign ownership and stipulate the use of Di Gilpin IP when the company works in design collaborations or development projects.

Barriers to rights enforcement

It is not enough to protect one’s work; the IP system only works if the protection is enforced and infringements are pursued. Across the creative industries however, analyses of the costs and benefits of employing lawyers, paying registration fees and spending time to build infringement cases – often against larger, better resourced companies – tip heavily towards the cost side of the scale. Earlier in her career, Di faced the situation herself:

“A woman who used to organise American tours to the UK bought one of my garments and a knitting kit on one of her visits. A few years later I was doing two lecture tours of the States, because we had launched a yarn with Rowan who is one of the big knitting companies, and I had designed the yarn and done several knitting books with it. In one of the seminars a woman came up to me and said, ‘The design you have got here in the book, you have cribbed that. I have just knitted that from a knitting kit by – ’ and it was the woman who had been in my studio. The woman at the seminar said, ‘It was in Vogue Knitting and it was advertised all over the States; she must have sold a lot of kits.’ She brought in the pattern, and the woman who made the kit had changed the front cover of the pattern, but she had left in all my charts and she had failed to take out my copyright and there on the bottom was ‘Di Gilpin 1991’.

“She has never done anything like it since. I did not do anything. This was 12 to 15 years ago and I had no idea how to go about it, particularly with somebody in another country who had taken the whole thing; I just let it go.”

Now Di benefits from having a partner who is a barrister specialising in IP, and the company is able to engage a solicitor as necessary. But she is very aware that the costs of such expertise are prohibitive for others:

“The problem is actually if there is a case to be brought, actually funding it, proving your IP. My IP is evident; I have intellectual property rights in everything that I do. So it is the cost; it is purely the cost of taking on a lawyer. The company has a lawyer in Edinburgh who can negotiate our deals and whatever we need to do, but if there is an infringement on work being produced, for a lot of companies this is a real headache because they cannot afford the amount of work it takes to actually take the case forward. I think my partner’s view would be that you can put as much in place and pay as much money as you wanted to protect yourself, but that will do nothing if you cannot afford to then enforce it.”

Alternatives to formal protection

Although Di is fortunate to have the resources to pursue enforcement of her IP, she is also a proponent of other protection measures which do not imply the need for enforcement and thus cost far less. One method, a collective insurance scheme, was developed by Di’s partner for the company, but she feels it would benefit the entire industry.

“The concept that I would like to see set up and activated is where groups within the textile sector can get together and pay for the insurance as a group collectively. I mean that is what I think would be the future. My partner has taken the idea from advice he has been giving to a renewable energy company. There are specialist insurance companies that do this and his idea was actually that something like an industry agency could create an umbrella and organise the insurance and then people could become protected by it, so that it was not costly for each person but the whole industry benefited. It would be a great project.”

Other protection measures are cost-free, such as designing products to be too complicated to copy. Di deploys her know-how – her extensive experience and technical skills – to make garments that are difficult to replicate, especially by a machine:

“We know our work is hard to copy because a company tried to get a designer in London to replicate one of the pieces that was proving incredibly popular and he couldn’t do it. He did not understand how it had been knitted at all. It makes us smile each time we think about it – vindication. You see, that is what I am thinking about all the time: When I design I am thinking that everything I do would be impossible to knit on a machine, and only if I intend it to be made on the machine will I make a design that we can replicate. That is how I protect the IP.”

Another protective step requires careful analysis of the knowledge and ability possessed by Di, her employees and freelance knitters. While this is a difficult asset to capture, once gathered it will inform the company’s understanding of its IP, support its financial sustainability, and ensure that the traditions and skills of knitting are available to future generations. “We want to be able to take one of our base designs and then direct it into a form that is new and innovative hopefully, but can be re-used. So that the knowledge exists, the technical knowledge, the experience is there, the understanding of the discipline. We are trying to record it actually at the moment,” Di said.

The company’s Production Manager, Sheila Greenwell, is heavily involved in the project: “We are trying to have a database of styles and patterns. To capture it all but also then to be able to cross-reference. Ideally we would like to be able to cross-reference because I keep on telling Di that she has already invented all the knitting patterns and ideas that one could ever have time to do. But the knowledge, the techniques and the skills to cross-reference, that is the intangible isn’t it? That is where we sit down over a cup of coffee and say, ‘Well, we could take this and do that with it. It is incredibly difficult to quantify.”

Across its operations, Di Gilpin Ltd is tightening the reins on sharing the company’s IP and knowledge – another cost-free way of protecting it. While many companies decide it is advantageous to promote their work and be less restrictive, there are instances where stricter measures can be essential, as Di has learned:

“I know so many people that have been absolutely totally ripped off, in Scotland, by designers in other parts of the world and London, where they have been asked to sample stuff and put all their creative input into it, and then they have either simply just not been paid or the product has been taken and manufactured elsewhere. I think it is a real problem for Scotland actually, in textiles.

“We have really clamped down on anything being out in the public domain. So we send out look books to individual clients and we check them before we do so we know that they are individuals. We are very careful about things like that. And we are keeping very quiet about product development and who we

are working with; we don't generally discuss all of those things. I have learned that actually it is the only way to be at the end of the day if you want to keep your provenance and keep everything tight."

Contracts and agreements provide clarity

Di's attitude toward using contracts and NDAs also has changed. Although creative enterprises are often inclined to rely on trust-based, verbal agreements, Di now tries to get everything down in writing, as early as possible:

"We try to set up contracts at the start of projects but it does not always work. Some companies are much easier to work with on that front than others. Agreements are really good because they give clarity to the situation. How can you know what somebody else is thinking? You can't. The only way you can do it is to reach an agreement, which is written down and clear, and I think that is it. I mean two years ago I would not have even said that, I would have been on the trust-basis side of things."

In development work, Di contracts with a commissioning company to develop and possibly also produce the IP for the commissioner, who pays Di a fee and retains the IP. With collaborative work with other designers, Di expects to retain the resulting IP.

This case has shown that there are alternative protection solutions for small companies that find the costs of legal protection and enforcement beyond their budgets. Whether one chooses the standard tools of copyrights, trade marks, and patents, or alternatives such as those above, a thorough understanding of the properties owned, and which methods are relevant, is essential.



One Foot Taller

Rights and patents for industrial products



one foot taller

Properties

- Product designs

Protection Tools

- Registered and unregistered design rights
- Contracts
- Patents
- Expense barriers

Issues

- Enforcement of protected IP
- Agreements and trust among designers
- Alternative methods to IP protection

“Normally I will just say, ‘We should have an agreement – why don’t I write something down, and you write something down, and then we can check it?’ It is really quick and it is just a written agreement; no lawyers, nothing complicated.”

One Foot Taller is a product, furniture, and interior design company which was established by two designers in Glasgow in 1995. Today the company consists of one designer, company owner Katty Barac, and is now based in France, while its products are largely sold throughout the UK. A specialist in lighting, the company’s aim is to design simple, durable and environmentally responsible products.



Canyon Chair and AVC Handset, designed by One Foot Taller

This case examines One Foot Taller’s management of intellectual property in the industrial design sector. Katty’s business plan features three revenue streams which involve the creation and selling or licensing of design IP:

- 1) Products are designed either independently or in collaboration with other designers for the One Foot Taller range, then manufactured and sold through mid-range retailers in the UK and internationally, or through the company’s website.
- 2) Products are designed and manufactured for private-sector architectural projects, such as hotels and restaurants, and for public-sector projects such as hospitals and schools.
- 3) Designs are created as a consultancy service for entrepreneurs or manufacturers, for a design fee and/or royalty payment.

In the first revenue stream, the company's ownership of intellectual property is relatively straightforward: The designs are retained in-house and the products are sold mainly through wholesale agreements with retailers. These products, if they meet the criteria, are automatically protected through unregistered design rights within the UK and/or Europe. As the company sells products internationally, different automatic rights in other jurisdictions also may provide protection.

In addition, Katty has registered some design rights in Europe. However, despite having these registered and unregistered forms of IP protection, as with many creative companies, One Foot Taller has not pursued enforcement measures when infringement has occurred:

"We produced a wine rack, which was really popular and successful and then my brother saw it on sale elsewhere. It was leather, but not with our little stamped leather logo on it, and then we started seeing them all over the place. We just phoned them up, that company who were selling them and said, 'Please stop.' And they said, 'All right then', and they did not stop.

"So after that we just said, 'Shall we do anything else?' We phoned them one more time and said we will do something about it, but we never did. So for all of that they did carry on producing them, because a really good customer of ours, who sells a lot of my lighting now, stocked them for years, these wine racks, the same as the ones we did; the same but not quite as good.

"That was frustrating but there was no way we were going to be tempted to do anything else about it. Because it was a good product and if we had made a big meal of it, of selling the product, maybe we could have sold thousands and thousands but as it was we sold hundreds and hundreds and it was never going to be worth it to start spending the time or the money on taking them to court."

Katty occasionally collaborates with other designers to create products, although she explained that at the start of such processes, it is not often clear if the finished product will be used in the One Foot Taller range or sold or licensed to other companies. Nevertheless, the ownership and remuneration for such designs is made very clear from the start, via a written agreement drawn up with the other designer:

"The first thing that I do is I will write something down that covers all the possible bases that I could imagine. So first of all saying, 'I will produce this lighting; if it gets produced I will pay you this much of a royalty; if we sell it to somebody else we will split the royalties 50:50...whatever they are.'"

Such a contractual agreement, whether formally drawn up by lawyers or constructed informally between the parties involved, is essential for preventing later arguments. However, as our case interviews show, collaborative projects often fail to include such contracts. Katty's approach demonstrates that arriving at such an agreement need not be intimidating to either party.

“Normally I will just say, ‘We should have an agreement – why don’t I write something down, and you write something down, and then we can check it?’ So that is what we do – it is really quick and it is just a written agreement; no lawyers, nothing complicated.”

Trusting fellow designers

The second revenue strand involves Katty working on architectural or interior projects to a client’s specifications. Usually such work attracts a design fee, and ownership of the designs created in the project are contractually assigned to One Foot Taller, so she can exploit the designs further so long as future uses do not encroach on the level of exclusivity expected by the client. Such project-based work too may involve working in collaboration with other product- or interior-design companies. However while Katty may have a contract with the client, there is no formal agreement as to the ownership of any joint work. This lack of contractual agreement contradicts One Foot Taller’s normal approach, described above, but Katty said it has not caused a problem to date:

“Between us we’ll say, ‘Oh did you design that or did I?’ And then, ‘Okay – you go ahead and produce it then, or I will go ahead and produce it.’ I still produce a lampshade that we designed for The Arches originally. Timorous Beasties and One Foot Taller talked about the product, but One Foot Taller ended up designing it. We said, ‘All right, if we produce this are any of the rights yours?’ – ‘No.’ And if you go on to do the textiles you worked on whilst we were doing the project then they are yours. We have got different expertise and we will just go ahead and each produce any of the products we designed individually from this collective interior design.”

This scenario highlights the trust between designers and artists working collaboratively. However, for Katty the more important feature was that a contract was in place with the client:

“There was a lot down in writing so far as the client went. For that project, it was important for us to agree that anything we designed could go on to be produced ourselves, if we wanted to. We were already getting fees to design them so the client could have wished to keep the designs as theirs. When a client pays you to come up with designs for their project you have to decide and agree whether you are being paid to hand over the designs as their property as well as the products that come out of that project. That is absolutely between the clients and designers but must be carefully agreed so that everyone involved is clear.”

Rights, patents and other tools

In the final part of its business model, One Foot Taller designs as a consultant for entrepreneurs or manufacturers who sell the products in their own ranges or license them to others. As Katty’s revenue stems from the design fee and/or royalty payments for such work, it is imperative that she establishes registered rights for the designs, to gain added protection and monopoly on the designs’ exploitation.

In one instance, One Foot Taller designed a chair using an interesting construction method. Although the method itself may not have been protectable, because the design was likely to be popular, Katty decided that it would be worthwhile registering the design:

“We produced a moulding and then cut it apart to put it back together again, and it meant that you saw the inside of the moulding which was suddenly interesting to lots of folk. So we sent off our drawings of the look of the product to the Patent Office and got them design registered, and that cost £100 or whatever it used to cost. It was really easy to at least register a design so that if you want to sell that design, you know that it is yours, and the person buying the design knows that it is yours, and if they want to they can protect it in any other way that they want.”

Obtaining a design right also provides a useful tool in negotiations with other companies, since the registered right clarifies ownership and adds value to the agreement. As Katty found, the cost of design registration can be built into the sale or licensing agreement:

“With one product we designed the product, we did the design registration, but it was all for a fee. In the agreement there was the handing over of design rights to the other company, but there was also the agreement [that] we received a fee and a royalty.”

In another instance, where One Foot Taller created specific tooling to produce the designed product, the tool itself became a vital component in the licensing deal:

“We designed the product, produced tooling for the product, and sold the tool. We said, ‘Right – you can produce the product using our tool and you just give us a percentage of the sales as payment for the design and for the use of the tool.’”

In this case, the tool itself did not have patent protection, but the tool required was expensive to produce. This cost barrier acted as another level of protection on top of the design right, as Katty explained:

“We had a design right but we did not have a patent, and the tool cost enough. If the tool costs a lot of money, then that is the discouragement for people to copy you. Once we had a chat with a furniture company, and they said, ‘It would be great if you designed us something, but it must be something which involves expensive tooling because that way I can produce it and it will discourage people from copying me’. We never did, but still it was an interesting discussion.”

Katty has designed patentable features in various products but thus far, One Foot Taller has never applied for a patent – although it has not ruled this out for the future. Katty pointed out there are difficulties that can arise when attempting to protect a product with a patent:

“Well, there are dangers for anyone who spends a lot of time developing anything because people are so good at copying, mostly massive companies.

“The patent is an invention and if you change something a little, it becomes a different invention. I don’t mind the fact that one person would design something, somebody else designs something else which is really similar and it has just changed a little bit because that is how we have developed things. A lot of products are not very innovative but are slightly altered.”

I mentioned some people using patents as armour when going to talk to large manufacturers about the possibility of selling them their ideas, and I have only ever heard horror stories about that because large companies have big departments, so they have designers and engineers who work on getting round patents or design rights.

“The patent is an invention and if you change something a little, it becomes a different invention. It is fair, but protecting yourself is only so useful because it is such a grey area. I don’t mind it, I don’t mind the fact that one person would design something; somebody else designs something else which is really similar and it has just changed a little bit because that is how we have developed things. A lot of products are not very innovative but are slightly altered.”

The abilities to prove copying and enforce rights are crucial factors for protection of industrial property, but for small businesses like One Foot Taller this is not always economically possible. Owing to this, it is unsurprising to find alternative attitudes to protection and enforcement like Katy’s:

“My advice to anybody who has ever asked me, is first of all look at how much it would take to protect yourself, to protect those patents if you were to take them out, then you have got the cost of patenting and then the cost of defending yourself and it just does not figure in your life. I just like to get my designs out and protect as little as I have to. Environmental issues seem to be driving me more and more in projects, rather than Intellectual Property, I think.”



Ethel Lampshade in the Arches, interior designed by Timrous Beasties and One Foot Taller, from Frame Magazine



Strop wine rack, shown in Wallpaper Magazine USA

Strike Your Pose

Making the most of trade mark protection



Properties

- Company trade mark
- Bespoke and themed jewellery

Protection Tools

- Registered UK trade mark
- Automatic copyright

Issues

- Protection of brand identity
- Alternative protection strategy

“The protection comes from the strength of the brand and the fact that I have got that registered trade mark and we are becoming known for offering that service.”

For some businesses, it isn't just what they make and sell that is important – it's how they do it, and who “they” are. Such ideas involve notions of a company's service, reputation and branding, and they are specifically protected by a key IP tool: the registered trade mark. For companies like Strike Your Pose, the trade mark is the most important intellectual property they can own, yet many small creative businesses fail to see the value of their brand image.

Leah Black is a sole trader operating as Strike Your Pose, which makes and sells handmade, customized, silhouette jewellery. As most of the products are based on images uploaded to the company website by customers, the designs are bespoke and will not be used again, so do not need copyright, nor do they qualify for design rights – two of the most common forms of IP protection employed by designers. But the combined package of Strike Your Pose's jewellery concept, its unique website with customer design interface, and highly attentive service created a reputation for the company which Leah was quick to protect via trade mark registration.

“The protection comes from the strength of the brand and the fact that I have got that registered trade mark and we are becoming known for offering that service,” Leah said.

The Strike Your Pose business model is uncomplicated. There are two revenue streams, the larger of which comes from the bespoke jewellery sales. These products are generated by an innovative process: The customer uploads an image to strikeyourpose.co.uk and chooses a type of item to be made, such as a gold necklace or a brass brooch, then Leah adapts the uploaded image to a silhouette design. This is shared with the customer for approval before being passed to a freelance jeweller for manufacturing. Leah then presents the finished piece in Strike Your Pose-branded luxury packaging.

“One of the most important parts of the manufacturing process is the finishing. The pieces are highly polished, which takes time and care to achieve, Leah said.

The bespoke design, high-quality hand-making and branded presentation result in a final product which sits at the value-driven end of the gift market, although the range of design options available provides a variety of price points for customers. In the future Strike Your Pose plans to introduce a range of ready-made jewellery featuring silhouettes on popular themes such as families, pets, and sports. Leah hopes the new product line will generate revenue from the mainstream market and help drive sales of her bespoke products.

As for all types of businesses, a company’s reputation and brand identity, represented by its registered trade mark, can impact upon sales and increase revenue if managed correctly. Leah focused on this challenge from an early stage, as she prepared to launch her business with help from the Cultural Enterprise Office Starter for 6 business development programme.* Her first steps involved selecting an effective company name and planning its use through a logo:

“It was ‘Strike a Pose’ in the beginning but then as I searched for domains there were lots of ‘Strike a Pose’ photography business websites. So ‘Strike Your Pose’ seemed a better option as it was not in use,” Leah said. “The idea is to, in time, laser-etch the Strike Your Pose logo on every piece,” Leah explained.

The trademarking strategy also includes the final packaging of the jewellery, in a black velvet branded box. “I buy them in bulk, and each order is presented in the same way, for consistency in brand identity,” Leah said.

** For more information about Starter for 6 and the Cultural Enterprise Office, visit culturalenterpriseoffice.co.uk*

Having a strong company identity also means recognizing one’s assets and preventing their confusion with other businesses, such as might arise when sub-contractors take credit for their work too prominently.

“Before I started the Starter for 6 Programme, I was already working with a web company which then offered to develop my website. They saw it as a good opportunity to showcase their work, because it was a different business concept with some technical challenges,” Leah explained. However for her, the point of the website was not to showcase the web designer, but to sell jewellery. “The website for my company is an integral part of the business. When I was participating in Starter for 6, I was advised to ensure contractually my ownership of the website.”

While application and enforcement costs of trade marks can deter small businesses, a protected brand identity not only helps attract customers, but also can prove useful when working collaboratively with suppliers or designers to expand a product range or to enhance a brand image, as Leah has been working to achieve:

“With a good network of designers, in the future I may collaborate with a textile or fashion designer, creating a wider range of products. It makes sense to collaborate, pooling experience, resources, and individual brands.

The shape of Leah’s business plan then is largely a consequence of the company’s IP portfolio: She focusses on the exploitation opportunities provided by her trade mark while her product designs work quietly in the background, and with little IP protection, to generate revenue. As simple silhouettes cut from metal or Perspex, Strike Your Pose designs do not qualify for UK or Community design rights, which protect “the overall appearance of the design”, but specifically exclude “features dictated by technical function”*.

* See www.gov.uk/register-a-design

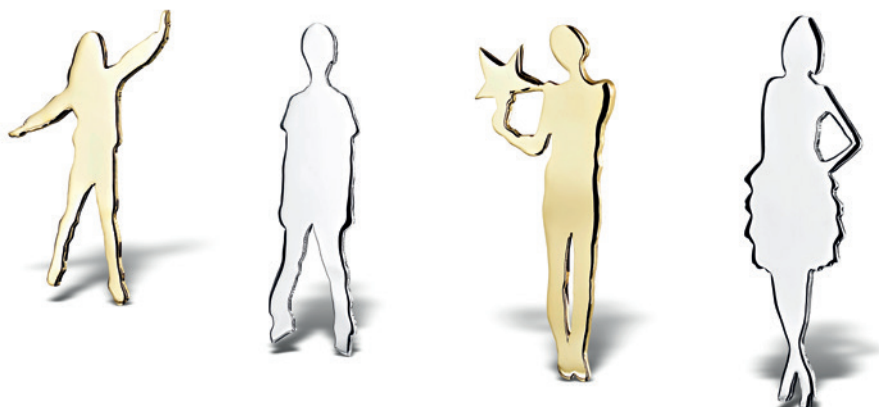
“I looked into design right protection but it just was not possible” Leah said, because “saw piercing, the technique we use is, an age-old process.

Bespoke designs for individual customers can qualify for automatic copyright protection as artistic works, however the need for copyright in such products is low. Because the copying of a bespoke product renders it no longer unique and contradicts the value proposition of one-off designing, the exploitation possibilities of a personalised design are exhausted as soon as the product is sold.

As with the silhouette objects, the Strike Your Pose ‘upload and order’ business model also has no legal protection, but to date, Leah has not found other companies using the same concept. “The main threat is that somebody looks at the idea and has the money and the resources to copy the business model,” she said.

Leah plans to further develop the services and products available from strikeyourpose.co.uk. Corporate orders are of interest and with higher profit margins due to the bulk ordering, this means that it is a lucrative avenue to follow.

Sculptural pieces, key rings, and other non-jewellery items are among other possibilities under consideration, now that Leah has established the company identity through its protected trade mark and unique approach to bespoke design. “I am quite open to moving away from jewellery products.”





Studio Gnu

It's all in the detail:

Protecting bespoke work with automatic and unregistered rights

Properties

- Bespoke interior textile designs
- Company name and reputation

Protection Tools

- Copyright
- Unregistered design right

Issues

- Choosing artistic design over business development
- Balancing company resources with costs of formal protection

“By the time you have spent two weeks making a pouffe it is still a footstool at the end of the day. It was a big learning curve. So the plan became to try to get things that held more value, and things that you would take in a slightly different way. If you put all that effort into something, that needs to be valued in a different way.”

While Studio Gnu's output is entirely unique, its approach to protecting its intellectual property is highly typical of micro-businesses and sole traders who have weighed the benefits and costs of formal protection tools: It operates without registered designs or registered trade marks. Nevertheless the automatic rights afforded by IP law provide the company with sufficient protection for its current output, while offering scope for enhancement if the business strategy should change.

Chloe Harrison is a sole trader who specialises in designing and hand-making bespoke interior textile objects in the form of hunting trophies. Her aim is to make ethical artistic objects which re-interpret and replace the taxidermy of animals found on British estates. Studio Gnu products are constructed from environmentally sourced Scottish materials, such as Harris Tweed. Each work is designed to the customer's specification, making the products' cost structure value-driven and positioning them at the high end of the interiors market.

“They are one-off pieces; they are not really products,” Chloe said. Each commission or exhibition work “is much more artistic based and I will just explore a lot more with each piece so it will be far more affiliated with art than it would be product design.”

Studio Gnu's revenue is entirely derived from commissions through word-of-mouth or the company website, and sales via high-end retailers and galleries. While the majority of its customers are located in London, the 'trophy' pieces now also hang on walls in Switzerland, New Zealand and the United States.

It is the highly detailed, hand-made nature of the objects which determines both the company's strategy for exploiting IP and the approach to protecting it. Chloe's decision to create products emphasising artistic uniqueness builds value in what could have been seen as craft objects which didn't warrant large price tags.

"I think because originally I had started in furniture design, I never quite saw myself as an artist, not a proper artist anyway," Chloe said. "I started really small, just trying to make things and I got more into textiles. I made big pouffes, but again the money involved – by the time you have spent two weeks making a pouffe it is still a footstool at the end of the day. It was a big learning curve. So [the plan became to try to get things that held more value, and things that you would take in a slightly different way. If you put all that effort into something, that needs to be valued in a different way."

This decision positioned Studio Gnu at the crossroads of the art world and the design market. While its pieces attract retail prices of up to £4000, output currently is limited to just a few objects per year and the company maintains a minimal business profile (Chloe performs both the business and creative roles for Studio Gnu, although she occasionally contracts a freelancer to help with production). Typical of small-business owners who are creatives themselves, she has chosen not to exploit her intellectual property in a lower, mid-end market.

"I love making things but I am really terrible at running a business and I think I would need to be good at that. I really respect people who can do it but I find it less creative, I find the constraints of what needs to be done to be mass-produced would not suit me, and I think I don't value it myself; I don't value mass-produced pieces.

"I did look into that. What I was intending originally would be that I would have the trophy mounts, so they would be limited editions; and then I would have the next category of products that would be more like cast pieces, and they would be more retailable and would be batch produced; and then I would have wee things, that would be really cheap, like little things; so there would be a three-tiered product range. I got funding and things and I looked into it but some things even became expensive to just get up and running. I am quite conscious of how things are produced; I wanted them to be quite environmentally friendly or local and I did not want to go down the big plastics route.

"Then when a high-street retailer, they started saying, would I design a range that could be more retailable? I looked into some castings and I made some models of hares and things, and I was going to do owls that would be cast and then flocked. I then took that to a company and I discovered that it was going to be £2,500 to get 10 done and things like that, so I went back to the retailer and said that the cost was prohibitive and I would need to re-work things.

"I think that is when I started working out whether I am really wanting to be a designer, making more products, or to get a bit more ethical about what I am doing, to get more conservation-led and still do one-off pieces. I was at

"I questioned everything that I was doing. I think it is the balance of running a business and managing to keep the creative side of things as strong as you can whilst still making it a viable business; it is really, really difficult. At one point you start to think, 'Which bit is going to get compromised?'"

that point where it should have really grown, when it could have expanded and been something else. But I questioned everything that I was doing. To me it felt that I did not want to just be designing and producing products for the sake of the money or the cash flow or things like that. I think it is the balance of running a business and managing to keep the creative side of things as strong as you can whilst still making it a viable business; it is really, really difficult. At one point you start to think, Which bit is going to get compromised?”

Given Chloe’s uncomplicated strategy of high-value, in-house production and minimal staffing, her plan for protecting the company’s IP is equally straight-forward: It invokes the automatic, protection offered in law for copyright and unregistered designs. As Studio Gnu pieces are unique, artistic objects which are “fixed” (drawn or produced), each benefits from automatic UK copyright protection, which protects any expressible form of an idea or information, but not the idea or information itself. Chloe retains ownership of the copyright in each design, which she may exploit by selling or licensing but thus far she has chosen not to do so – given they are mostly bespoke designs, they are intended as one-offs, made to the specific requirements of the commissioning purchaser. Community and UK design rights cover parts of the visual appearance of the whole or part of a product. Being automatic and unregistered, these forms of copyright and design rights can cost nothing to arrange and last a varying number of years. However their enforcement usually involves legal support, as the creator must demonstrate proof of ownership of the design, and proof of copying by another party.*

*

For full details of the protection provided by **copyright and design rights**, and when and how to **register designs**, visit ipo.gov.uk

While copyright and design rights act as legal protection for Studio Gnu work, this does not in itself prevent infringement, decrease the costs of enforcement, nor make the outcomes of pursuing a legal case more certain. There is another protective device however, as employed by Studio Gnu, which acts as a barrier to copying and provides a supplemental strategy for protection: the complicated nature of the product. The skillful construction of each of Chloe’s piece is painstaking and time consuming, resulting in pieces which are unique to each other. This makes the products difficult to imitate, and reduces the likelihood that other artists or companies will be able, or want to attempt, to copy the objects.

“I have been lucky in that what my work is, keeps it outside of having to worry too much about copying. But I think if I was doing anything else, that would be easier to produce, I would need to get much more involved in IP protection. Because I am a sole trader, I instantly think that it is just going to cost me money and you need to weigh that up against what it is.”

“I think because it is so labour-intensive that it is not possible to copy my work really, because I even make the eyes [feature], you know, every wee bit is done in detail. There are lots of simple versions coming out, but it is very hard to copy in detail” Chloe said.

Indeed, to date, she has found no infringement of the company’s designs.

“Since I started, there have been a lot of similar products trying to create the taxidermy style of objects, which makes me nervous, but I think I do it with more realism than other companies. I keep checking and I have not found anybody doing the same. I am creating the realism without using any of the actual animals. Rather than creating a cute version of anything I am trying to make a very real version of it. I think that is quite unique. Using fabrics, using a textile version to create what I am doing is what still probably sets me apart from things.”

Chloe's decision to use these informal IP protection tools is the result of a considered balance of the cost of protection versus the benefits. She is aware, however, that the strategy would require adjustment if she were to shift toward manufacturing on a larger scale. Designs would need to be simplified, in-house skills would perhaps have to be disclosed as external partners became involved in manufacturing, and the likelihood of copying would increase due to these factors.

"At that level, I think that was when I was starting to think more about the implications of going down those lines. I think with more mass-produced products you need to simplify the idea so much to make it mass-producible that it becomes a simple thing and easy to copy" Chloe said. "I have been lucky in that what my work is, keeps it outside of having to worry too much about copying. But I think if I was doing anything else, you know, any of the smaller pieces or the things that I was looking into that would be easier to produce, then that would really worry me and I would need to get much more involved in IP protection. But I think just for me, because I am a sole trader, I instantly think that it is just going to cost me money and you need to weigh that up against what it is. If there was something that was big enough, or if it was going to go through a retailer, then I would probably look into it; you would need to."

There is one further type of IP protection, as highlighted by other cases in this collection, which Studio Gnu could find useful: A trade mark registered in the UK or other market jurisdiction would allow Chloe to build her brand story with the knowledge that the company name and reputation cannot be used by others.

However despite the comfort provided by registration, operating without registered trade marks is very common among micro-businesses in the creative industries, as is the use of unregistered design rights and copyright. Studio Gnu's strategy demonstrates that IP protection afforded by the advanced skill and time required to produce complex products can act as a deterrent and barrier to the copying of designs. This may not allow for business expansion, but for many small enterprises in the creative sector, this acts as a suitable, financially sustainable, strategy for IP protection.



Legal observations

There was an old well-to-do widow who loved to shop. One day she asked her butler to interview three candidates for the post of driver. The role would involve chauffeuring the widow from her seaside residence to her favourite boutique outlet up the coast; but the route was very dangerous and involved several steep cliffs along the way. The butler asked each applicant how close they could safely drive near the edge of the cliffs. The first responded, "I have expert skills. I could drive within three feet of the edge and her ladyship would be safe". The second responded, "I know the route. I could drive within three inches of the edge and her ladyship wouldn't even notice". The third responded, "I would keep her ladyship as far away from the edge of the cliffs as I possibly could." It was clear who the butler hired. Intellectual property is alluring, but it is also tempting; as the case studies of fashion and product design show. Managing and exploiting IP in a marketplace involves considering the implications of attracting the good, and the bad, along the way.

The case study of **Angharad McLaren Textiles** helpfully cuts the cloth in how prudent documentation of design work and design related PR provides an audit trail vital in settling any prior right/use dispute which is likely to impact a designer's reputation. But note: "Design" is a shapeshifting concept in IP law. Its definition changes depending on the legal lens through which the design context is viewed (i.e. UK design or EU design, registered or unregistered etc.). A designer may consider her artistic work "designed". Often designed works attract copyright not design right. However it is advisable that 'designers' first look at the law of design right to ascertain what protection applies (or may apply) to their work (and their plans for exploitation of that work) before venturing to copyright or other affiliated rights. This is principally because the industrial exploitation of design in a copyright work will trim the term of protection from 70+ years to 25 years from first marketing,¹ and also, that any unjustified threats made to a third party of infringement proceedings in an unregistered design right (or registered design) is liable to spring a legal counteraction – one cliff well worth avoiding.

The burden of financial and time expenditure in creating and deploying an IP protection and management strategy was not lost in the case study of **Di Gilpin**, which chose to safely chauffeur a cost effective IP strategy. In terms of unregistered design right, the UK position is found in Part III² CDPA. Section 213 explains that a "design" means *"the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article"*. Subject to satisfying applicable legal tests, "shape or configuration" of a design is thus automatically protected against copying in the UK for between 10 and 15 years. A design may also (and simultaneously with UK protection) gain protection as an unregistered Community design³ if first disclosed within the EU. In the EU context, a "design" means *"the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation"*. Subject to satisfying applicable legal tests, "lines, contours, colours, shape, texture and/or materials" which create the designed impression are thus automatically protected against copying in the EU for 3 years. Designers should gain an understanding of, and work with these "free" rights. Designers

can also benefit from utilising the “TM” in trade mark law (without cost) to give notice where there is intention to use a graphic (be that a word, slogan, logo or whatever) in a trade mark sense. Di Gilpin also steers a safe road by using trade secrets (confidentiality) while pioneering the collective insurance scheme concept – an interesting wheeze which should definitely be explored further by the industry.

The interior design focused case study of **Studio Gnu** contrasts with the foregoing case studies. It moves the mind from the shop window to mid-store. There, Studio Gnu’s IP focusses on the detail of the products it creates. The complicated nature of the product is a natural fillip for the reputation of the ‘master craftsman’ business (boosting brand value) while performing two important functions. Firstly, the more detailed the product and more skilful its preparation, the less likely a defence may be established by an infringer that a product was not copied – a function echoed when creating a distinctive trade mark (e.g. a coined word). Secondly, the artisan’s skills and technology barriers are characteristics which have to be viewed “up close”. Whereas the visual impression created by other designers’ work is “on show” Studio Gnu’s work tends to be “browsed”. This tactic of luring copycats into sight can be crucial in establishing the necessary link for enforcement of unregistered rights (copyright, unregistered design right and passing-off). How proof of proximity is captured is as much an administrative consideration worth planning as evidencing how substantially the work is derivative of key intellectual aspects. Consideration must be paid to the road as much as the cliffs: Will the showcasing of work internationally travel outside the scope of protection of UK or EU unregistered rights? Studio Gnu’s strategy works well locally but may not detract international copycats and IP squatters.

The case study of **Strike Your Pose** pivots from unregistered design right and registered design for a moment and focusses on the usefulness of copyright and trade marks in protecting the overarching brand and reputation of the designer. A move, which while perhaps a little unconventional, is one which wisely selects the IP rights with the longest terms of protection (and thus the longest opportunity to monetise). Where competitors may enjoy protection under design law for between 3 and 15 years, copyright in an artistic work will endure for 70 years beyond the author/artist’s death and there may be no end to the protection afforded by a registered trade mark (subject to renewal and use). Section 4⁴ CDPA explains that an “artistic work” includes “*a graphic work, photograph, sculpture [including a cast or model made for purposes of sculpture] or collage, irrespective of artistic quality*” and that a “graphic work” covers “*any painting, drawing, diagram, map, chart or plan, and any engraving, etching, lithograph, woodcut or similar work*”. Given Strike Your Pose is a bespoke jeweller, it is expected such works will be continually produced and unlikely the design aspect will be “industrially” exploited. The investment in a registered trade mark will provide monopoly rights in the registered territory for the claimed goods and services (subject to any prior user rights) and will help when commercialising online, as is Strike Your Pose’s plan.

Even in the ever-changing world of fashion the case studies show that the designer’s quiver has to be full. If the target is protection of design, then often the safe way is to try every tactical legal right available. The case study of **One Foot Taller** illustrates the added availability of patents for novel product

design work which is capable of industrial application. If work may qualify for patent protection it is essential that no disclosure of the invention is made at all in advance of the patent application being filed (including online or in a work portfolio). The one exception is where disclosure is made under strict obligations of confidence (e.g. under an NDA (non-disclosure agreement) or through a sufficiently drafted contract clause). In IP law, omission is often worse than commission. Valuable rights can be lost, money can be wasted, legal actions could be brought for negligence and even criminal sanctions may apply. Furthermore, even when rights are held, if they are not actioned, then that choice may be counterproductive as the rights may become ineffective through acquiescence, personal bar or revocation. The costs of registration, policing and enforcement can be thrown in the trunk: by, as One Foot Taller shows, building into any licence agreement (as a fee premium or a delegated obligation).

The case study of **Brazen** takes the design baton and continues to inform that, in fashion, competing is not without natural hurdles. Brazen illustrates the paradox between investing in long term IP rights while the zeitgeist is fast changing. It has been noted that short term legal fixes do exist. However, it would be unwise to ignore that fashion trends have a longer cycle than actual fashion items and that the longer an item can sustain sales through the trend it may become iconic of that trend – thus applicable the next time the trend cycle revisits. For that reason, design law provides a 12 month grace period whereby a design can be marketed, responses gleaned and sales tracked. If the item does well, that should indicate that investing in more structured IP rights would be beneficial and an application for registration of a design filed retrospectively claiming the date of first marketing can be made. IP rights can then be used to control the volume on the market and buttress the uniqueness of a collection or experience of a given shop. Brazen acknowledges the conscious and unconscious absorption of ideas which, for retailers like Brazen, means staff contracts and supplier agreements should, as far as possible, have appropriate restrictive covenants. While the infringement-inspiration dichotomy is often accepted by the infringed as “flattery”, it is no justification to veering closer to the infringement cliff.

In summary, Angharad McLaren provides a lesson in undertaking sufficient IP homework; Di Gilpin sews together IP rights and IP right holders creating a strategic comfort blanket; Studio Gnu blindsides competitors with an eye for detail; Strike Your Pose is attracted by the pout of long-term rights; One Foot Taller leverages dominance in contractual position by delegating the IP levy to others; while Brazen realises that uniqueness is a quality to be controlled. It is clear; fashion and product design ventures should use both their skill and experience as the safest way to drive the management and exploitation of IP.

- 1 www.legislation.gov.uk/ukpga/1988/48/section/52
- 2 www.legislation.gov.uk/ukpga/1988/48/part/III
- 3 <https://oami.europa.eu/ohimportal/en/unregistered-community-design>
See also the UK registered design position in the Registered Design Act 1949 www.legislation.gov.uk/ukpga/Geo6/12-13-14/88/section/1
- 4 www.legislation.gov.uk/ukpga/1988/48/section/4

Case Studies:

Film & Television

Hopscotch Films

Ko Lik Films

Makar Productions

La Belle Allee Productions

STV

Tern TV

Matchlight

Legal observations



Hopscotch Films

Reward and risk in a copyright exception

hopscotch films 

Properties

- Television/film programmes

Protection Tools

- Copyright
- Copyright exception: fair dealing

Issues

- Interpretations of fair dealing
- International exploitation
- Risk and reward

“We would still be arguing – I know that we would not have been able to finish it,” John said. “I mean, it was hard enough finishing it as it was.”

From its offices in Glasgow and Kent, Hopscotch Films creates work in the drama and factual documentary genres for both television and cinema. Like all media production companies, Hopscotch’s business sustainability requires balancing a portfolio of projects based on the risks involved in taking each one forward, and subsidising riskier ventures through profits made from more reliable projects. “We tend to make things that we are interested in and it is a combination of knowing what we might get away and what we would like to make,” said John Archer, Producer and Managing Director for Hopscotch. “We try to earn our money and then we take a risk on projects which are less commercial for the rest of the time. In one case that turned out to be the most commercially successful thing we have done.”

This study focuses on that singular risk, *The Story of Film: An Odyssey*, a mammoth 15-hour film (also screenable in one hour) which comprehensively surveys the world’s greatest films and tells the history of the art form’s global development. Based on film critic Mark Cousins’ 2004 book, *The Story of Film*, the project pitch aimed to bring to the screen all the cinematic triumphs described in Mark’s book, with narration and direction provided by him and production by John. The proposal would have been viewed by most producers as an unfathomable nightmare, given the need to gain permissions to include more than 600 film clips and to pay fees to each rights holder. Yet, John saw this as a challenge:

“Mark wrote the book, and I said to him that we should make this for television. He said it would be impossible, and I said, ‘Well, that is why we should do it.’”

Securing support from broadcasters was difficult too, John said. “I was disappointed that the BBC thought that it was too big. ‘Too big?’ I thought, ‘for

the BBC?’ – That is more of a comment on them.” Hopscotch turned to Channel 4, which commissioned the series at an attractive rate. “They didn’t pay a huge amount of money. It was a pre-sale to them of under £20,000 per hour – a bargain for them, but it made all the difference to us.”

After 6 years of on-and-off production, in 2011 *The Story of Film: An Odyssey* was aired on Channel 4’s More 4. It was heralded as a landmark television programme about film, and went on to be distributed worldwide as a film itself. The entire series was presented at the 2011 Toronto International Film Festival, and in 2012 at the Museum of Modern Art in New York City. In 2013, US channel Turner Classic Movies won a Peabody award for distinguished public service by the media, for broadcasting *The Story of Film*.

Fair dealing and its interpretations

In addition to winning critical acclaim, the series is seen as an achievement in rights clearance, or rather, the avoidance of rights clearance, through the application of the fair dealing exception in UK copyright law, and by extension, fair use in US law. This provision permits the use of copyrighted works without rights holders’ permission, if for the purpose of criticism and review, private study, or reporting current events. Given the vast number of copyrighted films featured in *The Story of Film: An Odyssey*, the time it would have taken to communicate with each rights holder and the cost of paying their typically high licensing fees, without the fair dealing exception it is likely the programmes would never have reached our screens.

“We would still be arguing – I know that we would not have been able to finish it,” John said. “I mean, it was hard enough finishing it as it was. I think if we had planned it to be like that, originally we thought that we were making three 90-minute films at the most.”

Instead, by using the copyright exception, Hopscotch was able to create a series that runs 915 minutes. John explained how he and Mark realised they could affordably access sufficient material for producing the longer version:

“There is archive of things like the Japanese bombing of China, First World War – all sorts of factual archive which we bought from film archives and we bought that in perpetuity so we own it outright. And then the film clips – and this was really our sort of eureka breakthrough moment but also the scariest bit of all, because when we started out we thought that we would have to clear all those clips. What happens then is that you go to a film studio and they say, ‘Right – for that minute it will be £6,000.’ But that is not the end of your problems because they then say you have to clear with the individual actors or the music, which is just impossible – I mean we could never have done it.

“However, Mark and I made a documentary about Iranian cinema in about 2005 – *Cinema Iran* – and for that, which was for Channel 4, they encouraged us to use fair dealing. That is where you are commenting and reviewing on something, you can use it without pay because it is fair dealing.

“We thought that the only way we are going to do this is to use fair dealing, so that is the way we will go. So with Channel 4, they put in money, about a third of the budget, and that was just for the rights to show it for two years on their channels, and as valuable as their money was, their lawyer went through the script with us and made sure everything was fair dealing.”

As in much legislation, the fair dealing exception is open to some interpretation within the industry, depending on whether a party is keen to secure more or less access to IP for economic or public interest purposes. At different times, John has supported and opposed parties seeking to apply the exception.

“They said, ‘Are you going to pay us for using the footage?’ I said, ‘Well actually, it is going to be Fair Dealing.’ And they said, ‘What do you mean?’ So I said, ‘It is this law where –’. ‘Oh, we are putting our lawyers on to you.’ That was their immediate response.”

“When we were doing the *History of Television in Scotland*, there was one company that I needed to talk to about using their piece simply because for legal reasons to do with the people in it. It was a gritty Glasgow documentary. They said, ‘How are you going to do it? Are you going to pay us for using the footage?’ I said, ‘Well actually, it is going to be fair dealing.’ And they said, ‘What do you mean?’ So I said, ‘It is this law where –’. ‘Oh, we are putting our lawyers on to you.’ That was their immediate response. But I saw the two people yesterday at a BBC event and they were perfectly happy.”

On the other side, John once uploaded to YouTube footage of his own toddler son delivering lines from Shakespeare, after being coached by the actor Brian Cox. The clip attracted nearly 400,000 hits, and BBC4 later used it to accompany an interview with Cox, but did not clear the rights, John said. “But YouTube isn’t saying, ‘Here it is free’. The BBC claimed it was fair dealing and I just thought it was a bit sharp. But it was not really fair dealing – they just took it – and also they should have had an issue because it involved a child, but life is too short to pursue that kind of thing anyway, and who am I going to annoy? I mean I just laughed really because never has anything been so fair dealt as much as in *The Story of Film*.”

Exploitation at home and abroad

Hopscotch sought to capitalise on the series IP by licensing the episodes after the More 4 license period ended. However this goal brought the definition of fair dealing back into critical focus for John, because the copyright exception applies only to non-commercial productions:

“I said, ‘Oh we are thinking of showing it in cinemas now and selling it’ – and the [Channel 4] lawyer said, ‘You cannot do that’. I said, ‘Why not?’ And he said, ‘It is fair dealing – it is okay for us because we are a public service, but selling it would be commercial, you would be making money out of it.’ I said, ‘Well actually, it would take a long time to make any money out of it, and what are those things that interrupted us when we were on More 4, those commercials?’”

Satisfied with these arguments, John then pursued exploiting the film internationally. However the notion of fair dealing varies, if it exists at all, in other countries' copyright legislation. In the United States, the concept of fair use has similarity with the UK's fair dealing, but in Canada the copyright exception law is different, as Hopscotch learned to its cost early in the series production. "What had stopped us initially with the *Story of Film* is that we had a Canadian investment partner and it would not have worked for them they said, in Canada," John said.

However John continued with his preparations to distribute abroad, and asked a lawyer to support his application for errors & omissions (E&O) insurance (which guards against any lawsuits regarding the series content or accusations of copyright infringement).

"I tracked down a lawyer, and I needed him to do an opinion anyway so that I could get E&O so we could sell to the States – quite apart from explaining how we might exploit the film with fair dealing and fair use – and he said, 'Alright, I am very cheap – £200 per hour'. And I thought, 'It is going to cost me £3,000 to get him to watch it – I mean spending £3,000 to watch the whole thing!'

"So what I said was, 'Well look, this has been through Channel 4's lawyer to be vetted, if you watch some of it.' He said, 'Well I could do that, and you could perhaps pinpoint any where which you feel is particularly contentious – i.e. involving a big studio with big pockets to sue.' So we found a couple of those parts, we did that and he wrote his opinion, a 15-page opinion, which gave us our E&O insurance and was like our ticket. He wrote an opinion saying that in his view this complied with both fair dealing legislation and fair use legislation."

Beyond the United States however, the lack of harmonised copyright legislation makes it difficult for those seeking to use the fair dealing/fair use provisions. Hopscotch learned to address this in its sales agreements and licenses, by shifting any infringement liability to the buyer or licensor, as John explained:

"I got a sales agent and obviously with the contract with them you have to say that all the clips have been cleared. So then my next discussion was, 'Well I don't know what the legislation is in Finland or Sweden – anyone might be buying it'. So we put in a clause that said it was the responsibility of the person buying it to see that it complied with their local laws."

Unsurprising given the series' subject matter is a globally enjoyed art form, Hopscotch Films eventually managed to distribute the work in different markets. "So far [our main revenue] has been international rights. It has paid back the money we have invested rather than going into profit," John said. "France bought *The Story of Film* for TV and DVD and they paid \$200,000 for it. China bought it with a much bigger population and it was \$15,000 so there is not a huge value in that market. I think it is now over £1.2 million that has come in from all over the world, with 25% to HanWay Films [the distributor]."

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Risk and reward

The various understandings of the fair dealing exception in the UK industry, and the impossibility of checking interpretations of fair dealing in other jurisdictions, meant that Hopscotch had to risk that its production would be accused of infringing copyright by any of the rights owners. It also had to apportion risk to its distributors when it exploited the work outside the UK. That risk proved to be well-judged, because since the global distribution, Hopscotch has received only one rights-related complaint, as John explained:

“When it was on Channel 4 one distributor in the UK got in touch with Channel 4 saying that ‘We have not had our rights payment for this’, and Channel 4 said it was fair dealing. And then they wrote back to Channel 4 saying, ‘Well you will not be able to sell it or distribute it.’ Channel 4 said, ‘No we won’t be’ – because they weren’t.

“But that person has not come back to me. He distributes a Buñuel film, and I suspect that he probably sold a few more DVDs once it was featured in the series, because people have been searching out the films to see them for themselves.

“It sold to over 26 countries around the world including China, Taiwan and Hong Kong – I am quite pleased with that trio. And it started last week on Turner Classic Movies in the States – It is owned by Warner Bros and before they had bought it they went to Warner Bros and said, ‘Look, I think we want to show this series, it uses fair use, is that okay?’ And their lawyers said yes. I mean, Warner Bros are the very people that we fear because they are so big and so powerful, and so if they did not really like it then it would have been a problem.”

However John suspects that had *The Story of Film: An Odyssey* been critical in a negative sense, it may have been a different story. “I think if we had done the 100 worst moments of acting and film – you know if we had been rude about people – people would have complained. But actually what we are doing is celebrating the best. That is what I hope people see because actually we were not ripping them off, we were putting their work into a context.”

For John and Mark, the series was a risk that paid off. “It has been quite gratifying that people see it for what it is, and it is unique,” John said. “And people say, ‘Well, what are you going to do next?’ Well it is not like that. Even if you began thinking, ‘Oh well, we have done film, let’s think about the story of music’ – you could not do it that way and it wouldn’t work, we haven’t got the clips.”

The creative industries thrive on risks, and ideally these are approached in a balanced and measured fashion. But often that perspective is only available at the end of a project, as John observed:

"I suppose from a business point of view you should not do the kind of things that I do, which are sort of one-offs about the arts and culture. You should think of popular TV formats that you can sell around the world, but that's not me.

"It is a sort of bad object lesson. When I talk to students about it I say, 'Don't try this yourselves.' You know, I ventured into doing it after 30 years' experience of production and knowing what a risk, or not, it is taking it. And I thought, 'We can always show this to ourselves; it will just be something that we have done.'"



Baz Luhrman



Toho Studio



SOFAO film strip



Gus Van Sant

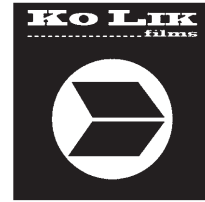


Kyoko Kagawa



Ko Lik Films

Writing and developing screen IP



Properties

- Scripts for film and TV

Protection Tools

- Copyright
- Contracts
- Non-compete and non-disclosure agreements

Issues

- Combining and separating IP roles
- Partnerships and agents in screenwriting IP
- Choosing IP creation over protection

“ Perhaps it is the cynicism of having been involved in the creative industries for at least 25 years, maybe even longer. The business models I’ve seen have almost always exploited creatives. As a result, the only sensible option a creative has, which has kind of been recognised by the industry as well, is to try and secure payment at the front end. ”

Ko Lik Films is an independent production company founded in 2004 by screenwriters Cameron Fraser and Neil Jack. The company is known for its stop-frame animated films for children and family audiences of television and film. Cameron and Neil also work as a scriptwriting duo, developing projects with other directors and producers in the UK and abroad, predominantly in the United States.

These two activities are the company’s business priority, but there is a second revenue source: As with most Scottish independent companies working in film, Ko Lik also produces service work for other companies in the television and games sectors, in order to subsidise its film development, Cameron explained:

“We are an 80% IP-based company – it is the development of ideas, the exploitation of ideas and associating ideas with commercial opportunities. The film side is fairly well structured. We have a slightly unusual role because Neil and I are a limited company. We have a successful track record of having worked as a service production company, but we also operate as a writing partnership and we have a literary agent, so they overlap in often quite a sophisticated way. We are pretty selective about the service work that we do. It is more so that we can focus on our main task, because they don’t tend to work too well together – we tend to have to suspend the writing and development when we are in service production.”

This case study considers Ko Lik's mixed business model and in particular its screenwriting activity, and the IP issues encountered.

Combining and separating IP roles

As both screenwriters and producers, Cameron and Neil have an unusual relationship to IP. Typically, the ownership of IP rights by writers and producers differs: Writers' economic rights usually are assigned to the producers in charge of the film, in exchange for up-front fees and occasionally, staged fees and stakes in the completed film's revenue. However in Cameron and Neil's case, the production company involved is sometimes their own, and provided Ko Lik can leverage a major role in a production by contributing financial and intellectual capital, Cameron and Neil will indirectly retain ownership of the screenwriting IP. In those projects where other parties have greater buying power and are thus "in charge", Cameron and Neil's role is limited to their screenwriting, and their IP follows the usual route, as Cameron explained:

"The idea for us is to be able to develop a project where we are able to stay involved as a production company and with the opportunity to bring equity into business relations – that would be our ideal opportunity. But often with us as writers, people want to buy an idea outright, pay for that idea and have us as writers. Often it depends on the size of the project and the power of the party buying.

"We recently worked with an experienced animated feature-film producer. We had two projects with him. One of them was a project we knew would have to have a very high production budget. He picked it up whilst he was still in production with another film and we realised he had a relatively good chance of being nominated for an Oscar for that film. At that level of budget it was beyond the scale of a small company like us. The producing team involved had a great deal of experience across a range of internationally successful features and had Creative Scotland slate funding attached. It was clear that in that model we did not really fit in as producing partners. We had much less experience than the other producing partners. However, we had come up with a high concept idea that they all really liked. That deal was done through our agent and now, other than writers and having a contract as writers, that idea does not belong to us anymore – we have sold that and it belongs to the other producer now.

"The second project that we had with the same producer was a small project where we were co-producers. It was a European co-production and was a project that he, Neil and I jointly hold through an SPV [special-purpose vehicle – a limited, temporary company]. As it was a smaller project, us staying involved was much more appropriate than with the bigger project. On that smaller scale it was probably useful for the other producer to have our practical knowledge of the low budget end of the film business, to go with his higher-end knowledge. That represents a very different model to the first model of the big production where we weren't really bringing much to the table. However, in the context of the low-budget model our understanding and knowledge were much more useful and allowed us to stay as production partners."

Payments for these varying roles again relate to their power in the project partnerships. If acting solely as writers, Cameron and Neil typically agree a contract involving a “step deal”, an arrangement in which they receive a flat fee for a first draft, perhaps later payments for later drafts, and if the script goes into production, potentially a fee when shooting begins – although the previous payments will be deducted as advances on this fee. Such contractual agreements also might assign shares in a film’s net profits to the writer, but it is often the case in the film industry that the net profits will be slim, if there are any at all, after all obligations to each production partner, the finance lenders, distributors, and others have been paid.

Cameron and Neil accept these practices as standard and work to negotiate the strongest positions possible. In the first project with their co-producer, Cameron said, “We ended up with what our agent said was a very fair deal. We had a small share of equity on the back-end. As a writing team for that we were paid a fee upfront and if the film went into production I think our fee was somewhere about eight times that, and it was a split fee for that.

“Theoretically we get royalties as writers if it is going into profit, but in feature films the odds are stacked by the distributors in such a way that it would have had to have been a fantastically successful production in order for us to see any of that money. So effectively, all the money that we could expect to see would really be that writing fee, which is fine, we understand. That is the grown-up world of screenwriting and that is the standard contract, as agreed between our agent and the other producer’s lawyers.”

Indeed Cameron is doubtful that some new business models attracting interest in the industry, such as those which aim to make use of digital distribution to increase revenue, would translate to any increase in the “crumbs” that are left for writers and other creatives.

“Perhaps it is the cynicism of having been involved in the creative industries for at least 25 years, maybe even longer. The business models I’ve seen have almost always exploited creatives. As a result, the only sensible option a creative has, which has kind of been recognised by the industry as well, is to try and secure payment at the front end. Because there’s every chance your share will be chipped away by other interests all the way along. At least with up-front fees, some part of your payment is guaranteed. The way that traditional film accounting seems to work means that there appears to be very little likelihood of ever seeing any percentage of profits, and while that can’t be good for companies over the long term, at least, as writers, we’ve secured our fees.”

Cameron and Neil split the above payments equally, as an equal partnership. This team approach to developing ideas into a coherent script ready for production is relatively unusual in the film industry, Cameron said.

“Long-term writing partnerships are less common, partly because it is really difficult to find somebody that you have a really good fit with. Neil and I are just lucky to have that really good fit. I think more people would like to do it but you don’t really want somebody that is the same as you, you want somebody that has a different kind of mind-set. I think it is hard to find somebody with different yet complimentary skills. I am quite a bit older than Neil and I have been writing for a lot longer. Sometimes I just need to work on things for myself just because ultimately writing is what I like to do. Neil’s background was in animation. He has not been writing as long as I have, and initially was pretty focused on the projects that we are working on together. However, he’s a great writer and he’s really enjoying it more and more and now. Our main focus is still very much on the ideas we’re co-writing but, as you would expect, he’s also interested in developing ideas on his own.

“Up until now, with just about everything we have done, I have come up with the initial idea and usually write a very loose first draft. We then usually work together on it until we feel it’s in the best shape we can get it. Recently Neil has been coming up with more ideas, and now I’m having to be the one that comes in with sleeves rolled up ready to start the rewriting process.”

Cameron and Neil’s preferred writing genre is the family feature. The market is a niche in which they have honed their craft with both animated and live action scripts, while supplementing this work with writing in other genres. “The UK market for animated or family films is very limited, but happily for us, there are relatively few writers specialising in it,” Cameron said.

Cameron and Neil work closely with their literary agent to negotiate favourable payments and IP rights within their contracts, and have also found the agent invaluable for providing access to specific markets.

“Our agent went through a bit of a kind of boom in Los Angeles, just before we went out there, which was again another really positive thing. We discovered that one of their other writers was taking off in a big way, because they are the agents for an author with a top-selling title. They had just secured a really massive deal in Los Angeles for that book, and so at that time everybody was really keen to meet any of their other writers. So the connections were really useful and they do seem to have good relationships with a number of the studios.”

Ko Lik now enjoys an encouraging level of attention from the bigger studios, which are happy to read the company’s scripts and development ideas, Cameron said. Their networking with big US studios, specialisation in family features, and work with their co-producer have combined to increase interest in their work from LA-based companies:

“Over the last two years things have kind of changed for us in so much as we now have direct access. I think for writers access is always the difficult part to secure, and we currently are able to get our work read really quickly, even from some of the most successful studios in the industry. We visited some of the US-based studios last year and we’re encouraged by the positive reaction. They recognised that we were specialists in what we were doing, that we’d worked hard to be familiar with the language of family feature film writing and the structural integrity of animated feature films, children’s feature films and family feature films. So, at least for now, we have a really interesting relationship with Los Angeles and that feels like a very positive shift.

“One of the most important breakthroughs for us was that we had a respected and experienced producer taking one of our screenplays into meetings with all the big animation studios. As a result, that screenplay was being read by some of the biggest agencies and studios and the reports back from their readers were really positive. I think there was probably a level of surprise that two Edinburgh-based screenwriters would be able to deliver something that could impress LA’s famously picky script readers.

“As a result, as well as doing the bits of service animation we need to do to pay the bills, we’ve spent that last couple of years developing a range of new ideas, further refining what we already have, and preparing our work for the international marketplace.”

Protecting ideas and scripts

“Non-disclosure agreements and non-compete agreements offer some protection but we worked out a while ago that it’s not really the idea itself that has value, but being able to deliver the idea to a high quality – that’s where the real value lies and that’s something that lies with us.”

Cameron and Neil’s agent performs another vital function, to serve as a copyright protector for their work, particularly when it is going to be sent for consideration to large studios abroad, as Cameron explained:

“If we have a particularly good high-concept idea then what we do is that we register it with our agent, with an outline that clearly lays out the idea we’re working on. The point of literary agents is that their word holds up in court, and they date and file our ideas at that point. If we didn’t have an agent I would look to having a lawyer that would deal with these things. In dealing with the States I think that we probably would have to look at having something that was registered with the Writers Guild of America because that is a clearly established mechanism there.”

Thus far however Cameron has not found any difficulties with keeping his IP safe as he pitches to other producers or studios, including those as large as Disney.

“It certainly wasn’t straightforward. Disney has a particularly complex management structure that involves various complicated layers of compliance issues and brand management concerns. But thankfully there were no nasty surprises. It ended up being a positive relationship and they were very happy with the experience of dealing with Ko Lik, even though our remoteness, here in Scotland, was initially a concern for them. As producer, I

was contracted to Disney on my own, and it took me probably until the end of the project to be able to at all relax into the relationship. But at the end they could not have been more positive, so I would definitely regard our dealings with Disney as having been a success.”

Where Ko Lik Films has recognised potential issues with the protection of its work, as a precaution it has used non-compete agreements to prevent others from using Ko Lik ideas in competition against them, and non-disclosure agreements to prevent the revelation of the ideas to others. However in the main, Cameron views legal protection of his work as largely unnecessary because he feels the value of his writing stems from his unique delivery of the ideas; in isolation from the writer, a film idea remains only that – an idea.

“Anyone employed by us on the development side has access to everything that we do on a day-to-day basis and that can cause slight concerns if that person then moves on to another company. Non-disclosure agreements and non-compete agreements offer some protection but we worked out a while ago that it’s not really the idea itself that has value, but being able to deliver the idea to a high quality – that’s where the real value lies and that’s something that lies with us.

“I have been dealing with IP almost since my first job after graduation, because I worked in the music business for a short time, as a songwriter and as somebody who was running a distribution company and working on record labels and things like that. I think that there are certain areas where IP is much more vulnerable. Ultimately I think that most of our ideas are pretty useless to anybody else without having us attached to them.”

Cameron feels more threat from the situation where an idea underlying a Ko Lik project is found to be simultaneously developed by another writer. In this case, he said, there is little they can do.

“We submitted an idea to a major US studio earlier this year and they said, ‘We really like this and it is really great but we have got something very similar in pre-production.’ Now they knew that we could not have seen what they had got in pre-production, and we could not have known what they had in pre-production, so it was just an unfortunate coincidence and our idea was just a little bit too late.

“It had happened to me before with a script I had for a feature film. I’d been paid to write a draft but we discovered that just shortly before we were going out with it that the writers of *Dads’ Army*, who are well-established film writers now, had a project that was different but similar enough to kill our idea. But overall, other than these relatively rare occasions when you find a similar idea has already just gone into production, generally the value lies in the treatment and development of an idea rather than the idea itself.”

Choosing creation over protection

Ko Lik's relatively light brush with infringement issues, and the fact that they rarely write adaptations and thus do not need to acquire rights for underlying IP, have given them a relaxed attitude toward protecting their IP. "We are seldom in the business of securing rights," Cameron said.

The comment also reflects the company's practical use of resources. As a small enterprise with time and money in short supply, Ko Lik has chosen to prioritise the creation and development of new ideas over pursuing infringements or chasing paltry royalty payments, Cameron explained:

"I think policing these things – mainly nagging distributors – are things that we might have to do if we didn't generate so much of our own IP. Rather than spend resources protecting a limited supply of IP, we'd rather invest our resources in creating another proposal for an animated feature film. I think you have to make the decision that works best for you.

"I think small companies have to be pragmatic about how much effort goes into protecting what you have got. For us, relatively little goes into protecting our existing IP and our focus is mainly on what lies ahead."

Makar Productions

A collaborative approach to IP: Script development and co-production



Properties

- Scripts
- Films

Protection Tools

- Copyright
- Rights options
- Co-production agreements

Issues

- collaborative script development
- co-production agreements and relationships

“ People sometimes call me a ‘creative producer’ but I am not actually quite sure what a non-creative producer is. ”

Makar Productions creates feature films in the horror/thriller genre. To date the company’s credits include *Blind Fight*, *True North*, *Trouble Sleeping* and *Outcast*. In Spring 2015 the company is releasing its latest feature film, *Let Us Prey*, a co-production between Makar and Fantastic Films of Ireland. This case study considers the company’s collaborative and common-sense approach to the early production stages of such projects.



True North – Peter Mullan and Martin Compston



Blind Fight – Linus Roache and Ian Hart



Trouble Sleeping – Alia Alzougbi

Director Eddie Dick established Makar in 1998, following a career in public service. While other production companies typically aim their business models toward long-term sustainability and growth, Eddie puts creativity first, focussing on projects in which he has genuine interest, with the practicalities of running a business coming a close second:

“I came into it quite late after having been in the public service side and I think if I had started earlier I would have looked to expand the company, and to have a model which was sustainable beyond my participation. But I am 63 now so what I am concerned with really is just to maintain a level of individual production. I am driven by the passion of the project, all of which is tempered by common sense approaches, whether it is something that can get into production or not.

“My business model? Well, ‘model’ might be gracing it with too sophisticated a term. When I started out I thought that there might be a time when I would want to bring in other staff but the fluctuating nature of the business meant that it was never sensible to do that. I am employing anything between – well it is varied, between, say, 40 and 70 staff on a film. So the company expands to take account of film production and then shrinks back to me.”

Collaborative script development

Makar films are born from a distinctly cooperative creative process. The films’ underlying IP first begins to take shape when Eddie considers ideas or texts which typically belong to others, as he explained:

“The intellectual property starts, generally speaking, with either an underlying text – which is in itself intellectual property belonging to someone else – or an idea. I would get myself into a situation where I would acquire rights in an underlying work, and generally speaking that would be a novel or a short story or it could be a play. The other situation would be, people would come to me and say, ‘I have got this idea’. Sometimes it is a sentence – that is all it amounts to – and then we start to talk about it at that point.”

For those ideas or texts that seem most viable, Eddie progresses to script development. Perhaps unusually for producers, he keeps a close involvement in this stage, actively engaging with the writers throughout the development process:

“My background is English and Philosophy, so that was my starting point rather than, say, some producers who have been lawyers, others have been accountants – you know, coming at it from a financial engineering point of view. I could do all of that, or at least I have learned to do all of that, but I want to work with the writers so we get to a stage where when I am being asked to actually raise money and produce the film that it is in my DNA by that time.

“People sometimes call me a ‘creative producer’ but I am not actually quite sure what a non-creative producer is. Well, I do have an idea what a non-creative producer looks like, because in certain other territories, say particularly in Ireland, the tax regimes there are such that people can produce projects easily and quite often if they have read the script it has been a cursory examination.”

At some point within this development stage, producers may buy the copyrights to the emerging script, or more typically, contractually arrange options to buy the rights at a later time. The latter approach is less expensive and lowers the risk of investing in the as-yet unproven IP, while supporting the developmental phase and securing the possibility of future ownership. However in some projects, this security isn’t possible, as Eddie explained:

“Part of the purpose of IP to me, is to protect what I in turn generate and so that is one type of it, where I take an option on a piece of work. As it happens at the moment, I do have one film which I am developing which is based on a novel, but the novel is actually out of copyright. Now the issue for me with that of course means that the underlying text isn’t protected, so someone else could quite legitimately come along and start to work on this piece. So IP to a certain extent then, if you take the property part of it, it is to do with protecting the creativity that you are going to invest and the financial support that you will have to provide to invest the creativity into a piece of work.”

However in another recent project, with a young theatre director who wanted to move into film, Eddie was able to pursue the co-development model and achieve both creative engagement and IP security in the process:

“He came to me with a worked-through idea and I talked to him about it. I was willing to participate in that in an unprotected way at that stage to allow a number of things to happen – for us to see if we could work together, which in a sense comes into the intellectual part of the IP statement, because one of the things which I am always keen to do is to have a creative engagement with the idea. He and I got on very well in that process and he was amenable to debate on what this thing would be like.

“So once that had got to a certain stage I then contracted with him for the ownership, or at least the option on the ownership. You can buy things outright – that can be an expensive way, although it is a one-off process, it can be too expensive. That is too much of a risk, so quite often one would take an option which is defined within certain characteristics – mostly it is to do with time and money – and then you would define the point at which you would then exercise that option and in fact own the rights to the particular piece. That is often at a much later stage.

“With this thing with the theatre director for example I have an 18-month option, automatically renewable after another 18 months. Now that three-year period can sound to some people like a long time but it is not. In film, at the moment it can take quite a long time.”

“Ideally you come forward with a piece of intellectual property, let’s call that a script, which has already been honed and polished in such a way that when it goes to the financiers they may not like it, but creatively there are no holes, it has got the pace, the structure is sound, etc., etc. All of those things have been examined in the process of co-development.”

Co-production agreements and relationships

Eddie continues the collaborative approach as the script is further developed to the point of raising finance for production. His preference has been to bring into his projects the interests, skills, and resources of other producers, particularly those based in other countries, to build a creative relationship which will lead into a formal co-production arrangement.

“My tendency is to seek out like minds, so I am working with Swedish, Icelandic, Canadian and Irish producers at the moment. In each case they are like me and want to have a creative involvement, which obviously sometimes can be tricky. But mostly I find that really beneficial because it means that your ideas are constantly being – in a supportive way – your ideas are constantly being challenged.

“Ideally you come forward with a piece of intellectual property, let’s call that a script, which has already been honed and polished in such a way that when it goes to the financiers they may not like it, but creatively there are no holes, it has got the pace, the structure is sound, etc., etc. All of those things have been examined in the process of co-development.”

In addition to creative incentive, the co-production model offers a significant economic motivation. Film co-production is an established industry tool which enables project partners to access financial investors, grants or tax relief which might be available from the partners’ home nations. Indeed, Europe is one of the largest co-producing regions due to the number of national film markets and the varying incentives provided to film makers by individual governments.

Co-production partnerships require careful management and legal status. To be eligible for funding, co-productions involving UK companies must be bound by a formal agreement, either a bilateral co-production treaty or an agreement adhering to the European Convention on Cinematic Co-production. These agreements also address the partners’ split of the risk and revenue in the IP developed, by detailing the ownership of IP in the completed film, the key responsibilities of each party, the percentage of costs to be raised by each, the chain of title (guarantee of cleared rights in all underlying IP), and other matters such as currency, location, insurance and credits, to name a few.

* For more details on **film co-production**, visit:

- creativescotland.com
- *Rights, Camera, Action! IP Rights and the Film-Making Process, Creative Industries – Booklet No.2, available from the World Intellectual Property Organisation, www.wipo.int*

The co-production treaty also assigns a lead producer, who is usually the producer in the domestic territory in which the film originated. A lead producer is necessary for legal and financial purposes, but the status does not necessarily dictate who has greater control over the creative input and IP ownership of the film; instead this is negotiated and assigned depending on each partner's leverage. Eddie's position within co-productions has varied in different projects, although his preference is to retain creative control over the direction of a production:

"It depends I suppose on the stage at which the project is brought to you. The first thing I ever produced when I was a co-producer, I was very much a minority player, and so I was brought in at quite a late stage, and I was able to raise the money that was the gap that I was being asked to raise and it was fine. I did not have the level of creative involvement in that, which I subsequently had, and in fact I would not get involved in a project on that basis again – just because I felt slightly disengaged with it. Not that I am a genius – because I very much take the William Goldmansque position about Hollywood filmmaking that fundamentally nobody really knows anything for sure – but there were certain things in the script and in the development process which if I had been on a more equal basis I would have altered and shifted – which it proved to be the case that it was wrong to include those.

"It is all negotiable. The last two things I have produced have been with Fantastic Films in Ireland and the rights have been split exactly down the middle. In the first case, in a movie called *Outcast*, they brought the project to me. It was reasonably well developed and we did a lot of development after it but it was split down the middle between Makar and Fantastic. So it meant that when I went back to them with the film which I am in post-production with just now, called *Let us Prey*, we just took exactly the same deal, and it just so happened that it flipped round.

"Sometimes as well it is important for somebody to be defined as the lead producer for a big thing for technical reasons. This current one is an Irish-UK co-production and the film has to be simultaneously Irish and British and so clearly the balance has to be struck – it relates to the finance point of view."

Unsurprisingly these contractual arrangements can be extremely complex, particularly when there are several co-producers, each one working across international territories with differing legal frameworks. However here again Eddie's emphasis on collaborative working ensures that relations are addressed in a constructive, no-nonsense manner.

"The Icelandic thing for example, I have got 51% of the rights in that because I felt that the Icelandic producer, with whom I get on with very well, was an experienced line producer but not in terms of being a producer per se, so I just wanted to make sure that in the event of a dispute everybody knew where the control lay. Now that makes it sound heavy-handed, but in the five films that I have produced, never once have I had to withdraw the contract out of the filing cabinet.

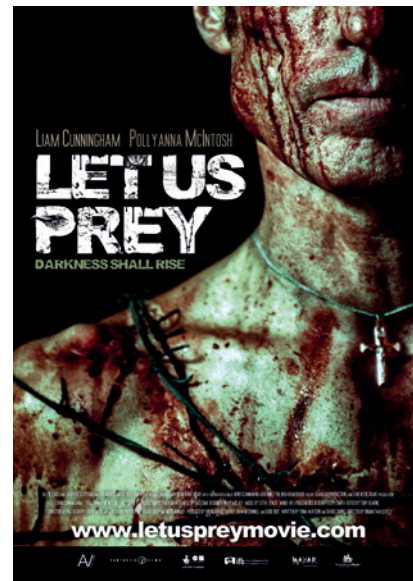
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“I take the attitude that you should always try to have the contract emerge from the relationship rather than get into something where you have in your mind a fixed idea of what a co-production might look like, and try to apply it to a relationship. What you do is that you find a relationship and then let the contract emerge from there, and ultimately there will be a point where if things go awry you need to know where the buck stops. In the Icelandic case it will be with me; in the Irish case we have an agreed situation on arbitration just because we have gone 50:50, so you know where everything lies when things go wrong. Again over two films it has never even arisen as a question.

“We are all trying to make the same film and we all know what our obligations and responsibilities are as well as our rights. It is just trying to create a circumstance where you are behaving like grown-ups rather than thinking that your ego has to invade the contract. What you try to do I think at the outset is to withdraw your ego from the contract and where it has to remain those are the points that we agree. With *Let us Prey* it will be ‘Makar Productions and Fantastic Films presents...’ whereas on *Outcast* it was ‘Fantastic Films and Makar Productions presents...’ We agreed that in two seconds – it is in the contract and it only comes up when we do the credit blocking, but everybody just refers to what we have agreed and that is it.”



Outcast – James Nesbit



Let Us Prey poster

La Belle Allée

Options for owning film IP

Properties

- Feature films

Protection Tools

- Copyright
- Option and assignment agreements
- Rights reversion
- Chains of title

Issues

- Developing film IP from ideas, scripts, novels and plays
 - Underlying works
 - Ideas and script projects
- Acquiring IP through co-production

La Belle Allée is a film, television and service production company which was formed by Managing Director Karen Smyth in 2001. It creates factual, documentary and entertainment films and programmes in a variety of genres, and commercials and corporate videos for domestic and overseas clients.

Before establishing the company Karen worked as a freelance producer and production manager on other companies' projects, for which she received fees but no shares in the IP that derived from those productions, no matter what her creative input was. The desire to own and have greater influence on the production of film IP led her to forming La Belle Allée. "I set up the company to own the means of production, to work on projects that interested me, to originate ideas myself, and to have material that came from that gestation and development, so that we basically owned the ideas," Karen said.

This case considers the variety of routes to owning IP that are available to film makers and La Belle Allée's experiences with each.

Developing film IP from ideas, scripts, novels and plays

A film can often be a derivation of pre-existing IP such as an idea or an underlying work (a novel or theatre play). The development stage of the film involves acquiring the rights to the IP and progressing it into a script fit for production. The methods of paying for, owning and developing the rights vary according to the nature of the IP and the producers' relationship.

Underlying works

The copyrights of published novels or staged plays are held by their authors. When a film production company desires to adapt such a work, it must convince the book's author or playwright that the IP will be developed for film to an appropriate standard, and it must pay for the rights to do so. Film development rights can be purchased outright but this is an expensive approach and is also very risky, given various factors may yet prevent the adaptation of the work into a script for production.

For these reasons, the underlying IP is typically 'optioned' by the producer. An Option and Assignment Agreement gives the producer, in exchange for a fee to the original rights holder, a specified period of time in which she has exclusive rights to adapt the underlying work. The option period typically is organised in stages, and additional fees may be paid at each. If the producer wishes to extend the developed work into production, she pays an additional purchase fee and its rights are assigned to her. The first option payment typically is considered an advance towards the full acquisition; any further option payments are not usually subtracted from the final purchase price. "Normally you will have the first option period, second and possibly a third and to extend, then usually the price will go up, or it will go down depending on the importance of the authors," Karen said.

However if the option period expires and the producer has not progressed the work to production, control of the IP rights reverts to the owner. The length of an option period varies, and can extend 'in perpetuity', but this is rare and unnecessary, Karen said:

"Rights will always revert because there will be a point actually at which – for the production company, not really for the original owner of the intellectual property – that there is no value stream, there is no advantage in continuing to own something after a certain point in time. So normal time spans can be anything from 15 to 25 years to 50 years, in extreme situations."

If an optioning period is not fruitful, the development rights to the underlying work automatically revert from the producer to the author, who is then free to seek out another producer to option the work if they so wish. In this case the second producer is expected to repay the first producer's optioning fee, as Karen explained:

"Should we decide that after a suitable option period we do not want to take and purchase the material then we will return that material to the owner unencumbered, bar the payments that we have made to that particular owner, which should be returned to us on consideration of them proceeding to get that material optioned, assigned and bought by somebody else. So we would not say to the original owner of the material, 'Look we paid you, for example, £20,000 for that book, we want it back before you can get the book back.' It does not work that way. We say, 'Okay here it is, we have not managed to do anything with it, you now owe us £20,000.' Should another producer come along and manage to do something with that, that producer will pay us the money on the first day of principal photography."

As one would expect, there is no set rate for the optioning and purchasing of underlying works. The finance required to adapt a novel will vary depending on, for example, the duration of the initial option agreement; the popularity and success of the original material; the range of ancillary rights included in the agreement, such as rights to produce TV spin-offs and merchandise; and any share of net profits to the rights holder of the underlying work if a profit is ever made. All of these are negotiable elements which require financial leverage from the production company. Often in the development stage of a film, this is the key problem facing producers, who typically must work with external financiers to pay for rights and fund the ensuing production.

Ideas and script projects

Another route to developing film IP begins not with an underlying work but with someone's original idea, which the person may have scripted for film or merely expressed in a few words. Such ideas may be submitted to a production company unsolicited, or they may be supplied in response to encouragement from a producer. Film producers then work with the idea originator to mould it into a suitable film script; the ownership of this IP depends on the degree of involvement of both parties, as Karen explained:

"If somebody comes to me with a project, with a script, and I like it and it is in an inchoate state of development, it depends upon our expectations for it as to what extent we become involved in developing that project. We will take ownership according to our influence on those underlying rights at that point in time.

"So for example, I can option solid material – pre-existing books, novels and scripts. I can also option ideas and then the splits on the IP will differ according to the involvement of the company, of our creative teams in getting that idea to fruition. So it may be that it is 100%, or 50:50, or we feel that the material, the adaptation that we have done is so based on the original sourced material that we will own no IP – it can be anything across the broad spectrum from zero to 100% ownership of IP."

Before the development of the idea goes very far toward scripting, it is essential that the authorship of all rights is researched, clarified and stated in a document called a "chain of title". When a novel or stage play is produced, the author/playwright's copyright is expressed when the work is published. However as film ideas or scripts have yet to reach a public audience, such a formal rights declaration may not exist. In addition, there can be many parties who contribute to the progression of the film idea toward production, and all who stake a share in the rights must be documented in the chain of title. This step provides the production company with essential evidence as it works to secure finance and distribution, as investors will not commit to a film unless they are assured that there will be no rights issues further down the line.

Documenting this chain of rights is a way of protecting the film IP, and should be done as early as possible in the development of ideas or scripts, Karen advised:

“If I were to give advice to my younger self, or my emerging or coming into the business self, it would be to start at a very early point in protecting the material that I want to develop, especially material that may be generated by someone else.

“In terms of non-adapted material, if someone comes to you with a script, saying, ‘Oh this is an idea about my dad who is a fisherman who everybody thought drowned and he didn’t – he is still alive and he has been living as a woman in Fife’ – you go, ‘Oh my god, that is a great idea and I want that.’ Then you find out that this is something which didn’t happen to the putative subject, but instead to this guy’s best friend at school, who told him about his own experience. So what you’ve been told has actually been worked up from a piece of factual information. That is scary because by dint of someone bringing you the material, it is so easy to pursue, and you invest in the creation of a project predicated on something that you do not own. In the context of you saying, ‘Oh we will option that material, it is really great, that has come out of your head’ – and it has not, it is the boy who lives next door and it is *his* true story, therefore it is completely, dangerously sue-able. You shouldn’t appropriate experiences which don’t belong to you.

“As opposed to the novels that you are optioning and the plays that you are optioning, for things that pre-exist, if you are working with ideas like this example, it is about protecting the idea whether it is yours or it has come to you from an unusual source, that is my advice. The earlier that you clarify ownership of the work, the easier it is further down the line to make agreements and own work in a way that you feel confident about.”

Acquiring IP through co-production

A third avenue for producers seeking to acquire film IP is to partner with another production company which already has development rights. As described in the Makar Films case, the film co-production is a popular means in the industry for pooling the resources of each of the production partners (which must be legally registered in different countries). Such resources can include the IP for the film idea or underlying work, finance to produce it, varying skills of the production teams, and technological or geographic assets of the partners’ countries and film industries.

The portion of each producer’s ownership of the film IP is based on the proportion of the total project resources it provides, with the major contributor being identified as the lead producer in all legal and financial arrangements. A company’s total contribution, in turn, may be based on whether the producer has creative or economic motives for participating in the co-production. La Belle Allée has experience of working from both perspectives.

For instance, for the film *Valhalla Rising*, the company joined a co-production because it anticipated that its financial investment could be recouped. La Belle Allée contributed sufficient funds to leverage ownership of the film’s IP in an even split with the Danish director Nicholas Winding Refn and his company Live Lola Love.

The decision about whether to follow the creative or financial impulse in co-productions and IP ownership is central to Karen's business planning, she said.

"You are attempting to create a sustainable business as it is all about sustainability in this industry. It is normal for producers to be more likely to take on financial co-productions they have no creative influence over, because there is a remunerative possibility. Creative co-productions are more difficult because if you are not agreeing with the direction of the material and how things are going then it is harder to feel content with the final product, and therefore that becomes an issue of reputation.

"It is the artistic control and your distinction within the production environment. So if you are seen to be doing lots of exploitation films or porn as an extreme example, do you really want – even although you are going to make a lot of money from it – do you really want to be doing that? That is obviously at the root of what the creative industries are all about – monetising ideas and selling dreams, but there are hard decisions which are always going to be about fiscal fluidity, creative control and ongoing business development."

Whether developing film ideas or underlying works, or pursuing IP through co-productions, the early and efficient negotiation of option and assignment agreements, chains of title, and co-production partnerships is essential practice for mitigating the risk of rights disputes arising later, Karen said.

"Especially when you are starting out and you don't know. You could call it a pointlessly complex legal framework that has to surround IP for the obvious reason: You cannot touch it, you cannot smell it, you cannot feel it and therefore its ownership is more intangible and a little bit more opaque than it perhaps would be if it were a pen. You know – I own this pen, it is my pen, you have stolen my pen and I want my pen back. So protecting yourself with lawyers, with contracts, with agreements that are very specific as to the nature of what you are doing with the material that you have, is very important from the beginning."



One Life Stand – directed by May Miles Thomas



Valhalla Rising – directed by Nicolas Winding Refn

STV Productions

Rights, returnability and reputation



Properties

- Television programmes and formats

Protection Tools

- Copyright
- License agreements

Issues

- Negotiating rights ownership
- Developing and licensing IP
- Rights, returnability and reputation

“ You have got to be pragmatic about it. Sometimes to have something like Catchphrase, an ITV peak-time entertainment show, you cannot go, ‘I am only going to do that if I own [all] the rights to it.’ Well good luck with that. You are better having a percentage of something than 100% of nothing. ”

With the worldwide TV market estimated to be worth more than £400 billion as of September 2014 (according to Producers Alliance for Cinema and Television (PACT)), it is hardly surprising that STV Productions is sharply focused on increasing its content IP. Although it is a part of Scottish company STV Broadcasting, only about 5% of STV Productions’ output is commissioned by STV. The remainder is created for the BBC, Channel 4, Channel 5 and Sky, and increasingly for international broadcasters. But to win these commissions, the company must compete against other independent producers. The best strategy, believes Alan Clements, Director of Content, is simple:

“Production is not a complicated thing to understand – it is very complicated to do and it is very difficult to execute – but it is not a complicated thing to understand. Get more things commissioned, make them so well that people want to come back for more and that is fundamentally it.”

Rights: Negotiating ownership

While the Communications Act 2003 radically improved the playing field for independent TV producers by enabling them to own the IP they created on commission for public broadcasters (rather than the broadcasters keeping the IP, as previously), STV Productions does not qualify as a fully independent production company, given its relationship to public broadcaster STV. Thus its ownership of commissioned IP must be negotiated with public and private broadcasters, to determine the percentages of the programme rights it retains (qualifying independent producers must negotiate rights percentages only with private broadcasters such as Sky).

“That means if we make a show for the BBC, like *Antiques Road Trip*, we have 85% basically of the rights of that show, 85% of the IP,” Alan said. “So if we sell it to another channel in the UK – Discovery, or Gold or Blighty, any one of the channels – we keep 85% of that revenue, after all costs. If we sell it either as a finished programme or as a format internationally we get 85% of the revenue from that. We also have a similar deal with ITV and we should have it with Channel 4 but because we are not a qualifying indie we negotiate on a deal-by-deal basis so it tends to be more like 50:50. And like all companies when we do something for Sky it is done as a straight 50:50 deal.”

STV Productions’ status also impacts on the quota of commissions it can compete for from the BBC and Channel 4. Thus there are disadvantages to not being a qualified indie, but there are advantages to being part of a large broadcasting company. In addition, STV Productions is able to keep all IP rights for such projects and can then exploit it in secondary markets with 100% of the profits feeding back into the company.

Developing and licensing IP

In addition to producing commissioned content for the UK and increasingly, for international distribution, STV Productions’ business model focuses on partnerships for developing existing IP, and licensing agreements with international rights holders. A relationship with US production company Kinetic Content enables both companies to license original formats from the other and to develop new formats, such as the *Perez Hilton Super Fan* series which played on ITV2. These shows were based on the Perez Hilton blogs, Alan explained: “Basically he did a whole series of celebrity love-ins with Lady GaGa and Katy Perry, and that was in Aberdeen, one of the most bizarre Saturday nights in my life.”

Potentially lucrative, the licensing and developing of existing IP models involves less risk than new commissioned work, since the IP has been tried and tested in the market.

“People are more and more risk-averse, so if you can see something has been a huge success....You know, we have just brought back *Catchphrase* – much loved, actually belongs to a guy called Marti Pasetta. He is 80 years old but sharp as a tack, lives in Palm Springs. He produced the Oscars for years, he produced the Grammys – a really interesting man. We took [his] idea of *Catchphrase* – the basic idea is that an image comes up and you have to guess the Catchphrase. That is his idea, unquestionably. No one else was doing it, it is very original.

“The rights to it, to exploit it worldwide, were bought by a company called DRG, who are distributors. We took the UK rights, and we have a share in the UK exploitation, apps and so on, but we don’t have any share if the rejuvenation of *Catchphrase* takes off internationally. Well, it is good for us in that it creates a halo effect but we have no financial income from that.”

Although STV Productions attempted to gain the show's copyright for other territories, it was unsuccessful. However with solely UK rights, Alan is pleased with the low-risk/high-reward potential in the deal: "If it runs for 10 years and we make 800 episodes, wow. It gets us in the internationally focused entertainment field, so the next time somebody is looking for a partner maybe in the UK they will come to us."

This realistic approach to licensing and revenue is a hallmark of the company's exploitation strategy. As Alan suggests, while it is, of course, ideal for producers to own all the IP in their content, when it comes to negotiating shares in rights it is important to consider the revenue that even just a portion of the IP potentially will provide:

"You have got to be pragmatic about it. Sometimes to have something like *Catchphrase*, an ITV peak-time entertainment show, you cannot go, I am only going to do that if I own [all] the rights to it. Well good luck with that. You are better having a percentage of something than 100% of nothing."

STV Productions also has found success with partnering other companies to further develop formats which do not initially attract commissions.

"We did a show called *First Dance*, which is basically a format we have always loved. We could not get a UK-wide commission and we really believed in it. We worked with [Kinetic and] Group M, who are part of WPP, the massive advertising company, and we created a pilot of *First Dance*, an hour long pilot. We took a couple from Edinburgh and a couple from Aberdeen, totally unbeknown to one another, and Group M secretly backed us with absolutely world class choreographers – Lady GaGa's choreographer and Katy Perry's choreographer – to teach the couples the most amazing first dance ever at their weddings, which if judged as the best they would win £10,000. So we are then using effectively our broadcast window as almost an advertising tool for that format but it means that we can go to the international marketplace and say, 'It attracted 20% audience share, it won the 16-34 year-olds, here is the Twitter feed, here is the Facebook.'"



When Alan is negotiating licenses and partnerships, impact on company reputation is a key consideration, along with the rights share and something called 'returnability', or the likelihood that a programme or series will create demand for further episodes. Indeed, the rule of thumb at STV is that a property will not be considered if at least two of these 'Three Rs' (rights, reputation and returnability) are not significant parts of the proposal. A healthy IP portfolio, Alan believes, contains properties with a mixture of the Rs, in order to balance the inherent risk experienced by all creative industries and achieve a sustainable business model.

"I do a little chart called the Three R's and for us it is: rights, returnability and reputation. What I say about a show is that it has to have two of these three. Now you hit the jackpot if it is all three of those: With *Antiques Road Trip*, we own 85% of the rights, it is on Season 7 and Season 8 currently being filmed, so it is returnable, and it is brilliant for our reputation as it is now on BBC 1 as a well-known feature show.

"We do a show called *Fake Reaction* for ITV 2. Originally it was a round in a Japanese game show – you know these Japanese game shows – a small part of it was created by a guy called Mr. Eto, who I met, with his two very glamorous Japanese assistants. Then Kinetic, our cousin company in America, bought the US and UK rights to it. They could not get it away in America, but we liked it and piloted it for the BBC. It did not go on the BBC though, it was picked up by ITV 2, and we made a series and, touch wood, it will come back" or 'return' for further series, Alan explained.

STV Productions owns only a part of the IP in *Fake Reaction*, but its potential for revenue is strong, he believes:

"So it is a Japanese format, bought by an American company, exploited by a British company and it is currently being sold by a German distributor called Red Arrow. We share the fees, and if the British version kicks off the American version then we get a share of the fees and internationally we have got a little bit there, because we have created an English language version for it which is great for the foreign market.

"Something like *Fake Reaction* – great for our reputation, very returnable if it works, but we don't own the rights. *Catchphrase* – the same. *Fire in the Night* – not at all returnable. We own the rights – it is the big drama documentary about [the North Sea oil platform disaster] Piper Alpha – but it is brilliant for our reputation.

"Now the only thing that is awful is if you have got a programme format, it is not really returnable, you don't own the rights and it is going to be on a minor digital channel. You go, well actually, — For *First Dance*, from a format point we are still negotiating and it went out six months ago."

"I think if you don't enjoy competition this is not really the job for you. I like to compete and I like to win and that is what we intend to do... I think clearly we work to the Three R's, we get an international focus and we try to hold on to as much IP as we can."

Thus a rule of thumb is perhaps not as easy to replicate in real life, or it takes longer than expected to apply. Nor does Alan's formula fully eliminate all risks from the company's IP portfolio, but he sees risk-taking, as well as passion, as imperative for any business.

"You cannot say 'I want to be a business person, a business man or a business woman', and then not take risks. What was it – 'Capitalism without bankruptcy, is like Christianity without hell' – do you know what I mean? It does not work – unless there is that disincentive then there is no incentive.

"I think if you don't enjoy competition this is not really the job for you, you know? I like to compete and I like to win and that is what we intend to do and as I say it's the Three 'R's focus. ... I think clearly we work to the Three R's, we get an international focus and we try to hold on to as much IP as we can."



Tern TV



Sowing the seeds of IP: Pitching, spinning, selecting talent, building trust

Properties

- Television programmes

Protection Tools

- Copyrights

Issues

- Winning IP commissions by
 - pitching
 - spinning
 - selecting talent
 - building trust

“ We are essentially going to them with some bits of paper or a chat over a drink and saying, ‘How about you give us £150,000, or £1.5 million? And by the way if this all goes wrong, yes our reputation will not do well out of it but neither will yours, and you have next to no power over it except to trust us to get it right for you.’ ”

As all good gardeners know, a bountiful harvest is only possible if the growing conditions are right, and this includes preparing productive ground and sowing strategically. Tern TV, producer of *Beechgrove Garden* as well as other lifestyle, documentary, and factual TV and interactive programmes, applies a similar strategy toward winning IP commissions. This study focuses on Tern’s approach to successfully pitching and spinning programme ideas, selecting appropriate talent, and cultivating trust.

Established in 1988 with a core staff of 3 people, Tern TV has since grown to include a full-time staff of 20 (including gardeners) in offices in Glasgow, Belfast and Aberdeen. The company has been commissioned to create programmes for clients such as the BBC, Channel 4, ITV, and private broadcasters such as Discovery, National Geographic, Sky, PBS and the History Channel. These programmes are also distributed by BBC Worldwide, Sky Vision, DRG & Passion Distribution.

Like other independent production companies, Tern’s ability to expand is rooted in the success of the content it produces, owns and exploits. Managing Director David Strachan explained the importance of each team member to creating television IP:

“The core team of any production company is normally producers, and executive producers, whose job it is to co-ordinate the development of ideas. They hire development staff to support them in that, so we have a development team, and they then hire production staff. When those ideas go into production they hire separate production staff to make those things work.

“The bigger the production company the more that top layer of management there is, so we, the directors of the company, do stuff as well as managing... It is the balance between how much of a risk do you take by doing less and managing more – because then you are an overhead – and if you do more and manage less then you have less opportunity to develop, so the future of the company isn’t there. So it is a potentially, massively unstable process.”

When possible however, David focuses on giving the company creatives as much distance as possible from the managerial duties. “It is about IP: The overall company strategy is a bit chaotic but we had this vision of providing an umbrella that keeps the crap that rains down on us off the creative people, so that they have space to be creative and come up with ideas and stuff.”

Winning the commission: Pitching and spinning

However, business success requires more than merely coming up with ideas; the creative concepts must be pitched to and commissioned by broadcasters before they can be produced and further exploited.

The pitch itself is a brief but catchy proposal for a programme, including perhaps a title and format, or typical synopsis, which is formally submitted to commissioners for consideration. Sometimes commissioners will encourage producers to pitch ideas within general themes or genres, but typically production companies submit unsolicited concepts and must compete against other creatives for commissioners’ attention and money. Indeed the BBC has established an online facility, BBC Pitch, for receiving programme proposals from producers, writers or directors anywhere in the world*.

* *BBC Pitch: www.bbc.co.uk/commissioning/tv/pitching-ideas/*

Pitching becomes perilous for producers when their concepts float around in casual conversations or formal meetings as mere ideas, which are not protected by IP laws, as it is not the idea itself but the expression of the idea that is protectable. The television industry is seen as being notorious for pinching ideas, with several TV sector interviewees indicating that they believed an idea of theirs had been produced by another independent production company or by in-house producers at broadcast companies.

At the same time however, in TV it is widely accepted that ideas are ‘in the ether’, and that someone else is likely to arrive at a similar concept. Therefore, David believes that winning commissions is not so dependent on the monopolistic ownership of an idea, but on the way the concept is spun and sold:

“We have got to be grown up about this you know. There is no such thing as an original idea. The chances are that whatever it is that has stimulated us into thinking something, somehow, somewhere else, someone else will have had the same stimulus. But what we try to be is original in our take and that is what they will generally ask us.

“I will give you an example: We have recently been pitching CS Lewis – the 50th Anniversary of his death is this year – and we pitched two versions of this. Both of these were welcomed with enthusiasm by the commissioning editor and finally dumped.

“Well we don’t let these things die and our team had discussions today with RTE Television. We are trying to put together a co-production because Lewis was Irish in his roots, Northern Irish, and we are trying to put together a co-production between RTE and BBC Northern Ireland with some public money in it as well.

“It is in the take and how you are going to spin it – ‘What is the conceit?’ they say. What the hell does that mean? It means what is your take on it, what is your interpretation, what is your angle? What we would say is that the IP is not just the idea, it is the spin and it is how you do it. For instance, you might describe in one paragraph a long running television series based on a fairly crappy regional English hotel with some fairly eccentric and useless people in it. Is that *Crossroads* or is it *Fawlty Towers*?”

Selecting talent

The next factor to consider in the pitching and commissioning process is the talent – the presenter, the actors, and the director who will add value to the programme concept. Part of Tern’s revamp of the C.S. Lewis pitch included a different presenter, who was considered more appropriate for the new target audience in Northern Ireland, as David explained:

“It is a choice of presenter which is different for different people, you know. The presenter we are working with for RTE would not have done at all for [the BBC] network because he is not really known to the BBC. But for RTE particularly, and I suppose for BBC Northern Ireland to an extent, some posh English commentator coming along and passing judgment on CS Lewis is —, a spin is all.”

The dynamics of the relationships between the production company, talent and commissioner, David believes, “depend on the personality of the people and the power that they exert”. For the production company it is important to build strong relationships with the talent, to ensure their commitment to the programme, he explained:

“If you look at celebrity chefs and so on, they actually have set up production companies. How the parent production company works is that it is a vanity thing – they say ‘Well, you can have your production company, and [the show] is called this, and we will put in an association credit at the end of the programme. But we will manage the day-to-day business of the company and in return you will get a percentage and we will get a percentage.’ So it is a way of tying the presenter into you.”

Building trust

Beyond creating spin and hiring the right talent, David believes that winning commissions requires building trust, through strong relationships and sustained reputation, so that commissioners are persuaded to take on the financial risk of a production.

“There is an over-supply of production companies because it is not that difficult to get into it. It is a low-cost entry. The number of bits of business that we win in any year is quite small and they are all quite high value. One commission was £1.5 million at one fell swoop, and the smallest thing we do is about £40,000, so that is the range of value. But the process of winning that is not just as simple as ideas – it is all about trust and winning that trust.

“That is why they call us ‘luvvies’, because we have to be good at parties. You have to do an enormous amount of sucking up and in a way you cannot blame the guys, because how do you define the ethos of a programme? It is affected by the mindset, the world view of the person who is in charge of it, and even although television is made by teams, the choice of people that you have around you in that team is affected by your vision. So the relationship between the executive and the commissioning editor is absolutely crucial.

“We are essentially going to them with some bits of paper or a chat over a drink and saying, ‘How about you give us £150,000, £1.5 million? And by the way if this all goes wrong, yes our reputation will not do well out of it but neither will yours, and you have next to no power over it except to trust us to get it right for you.’”

Ultimately, Tern’s approach to winning commissions shows that considering a programme concept alone, as an owned property, is somewhat futile in the television industry. No-one has a monopoly right over an idea and the infringement of any foundation IP would be difficult to enforce unless there was blatant copying of a script or perhaps format. Many production companies, therefore, focus on preparing a creating the right conditions for growing the seed of the idea – on presenting the right spin on the IP, securing the best talent and sustaining their relationships with commissioners to develop trust.

Finally, the gardening metaphor for Tern’s careful approach is more than poetic license – one day the actual Beechgrove Garden may become an essential asset in the company’s business model: “We are the only production company that employs full-time gardeners. And that actually may be something that helps us to develop as a business,” David said, “because we are working with the City Council to try to open the garden up and make it a bit of a tourist attraction.”



Great North Air Ambulance Team



Cairngorm Mountain



The Small Animal Hospital with John Barrowman
– Dalmation hearing test

Matchlight



Exploiting commissioned IP in re-versions, formats and music

Properties

- Television programmes
- Formats
- Music

Protection Tools

- Copyright

Issues

- Legislation and indie IP ownership
- Re-versioning IP for exploitation
- Producing and protecting formats
- Secondary IP: music

“ I have found that anything with a Scottish accent on it does not travel as well as you would think, which is frustrating. I think it might be partly the fault of the mediators rather than the audience, in that the distributor feels slightly less comfortable with it, so they don't put as much money into it, which means they are not as incentivised to then sell it. ”

Established in 2009, Matchlight is an independent production company based in Glasgow with a core staff of approximately 12 employees. It creates content for broadcast television including all BBC channels, ITV, Channel 4 and Channel 5. The company's single films and series are predominantly created in the factual genre and are aimed at the UK market. In addition, Matchlight works with DCD Rights to distribute and exploit its IP internationally.

Matchlight's business model involves a solid understanding of its IP portfolio and the various ways that it can be exploited. Where the previous case focused on Tern TV's strategy for winning commissions, this study examines how Matchlight works to exploit IP after it has produced commissions. Managing Director David Smith summarises Matchlight's strategy as simple but challenging, but also feasible, thanks to supportive UK legislation.

“You just have to do what you want to do and if you can find a way of making that pay then that is great, but it is really difficult,” David said. “In terms of rights management, as a TV producer you are not in a bad position in the UK because by law you own your output, if you work with the public service broadcasters.”

The Communications Act 2003 and Terms of Trade agreed in 2004 turned around a long-standing arrangement in UK television production: They allowed independent companies which produced commissions for UK public service broadcasters to own the IP in their programmes, and to negotiate for shared ownership of commissions with private broadcasters. Previously, all TV copyrights remained with the commissioning broadcasters, a practice still prevalent in other countries. There, David explained, “it is the complete reverse, they own everything. You might be able to argue for a line of income and you might be able to argue for control of international rights with them taking the majority of the income, but what you don’t want to be in is a situation where you don’t have control of the rights and they are not doing anything with them.”

However the UK legislation radically changed the position of the independent producer.

“What that means is that we are the authors of our work and as authors we would always be the first owner of that work. Previously when we entered into a contract with a broadcaster they would have acquired that ownership and we would have had no real interest, save, for some income backwash from the rights exploitation. Now we retain ownership and we licence that to them on a kind of limited basis. Working with different broadcasters it varies – the BBC and other terrestrial channels are bound to the Terms of Trade – but it is different with Sky as they can negotiate. So for BBC, ITV, Channel 4 and Channel 5 they take a licence rather than an acquisition. Sky and every other broadcaster in the world take a [partial or full] acquisition of rights along with the physical property of the tape.

“It was a really massive step change. It kick-started this whole Indie Revolution that has happened, and very successfully I think, for Britain as a creative economy.”



Amanda Vickery, *The Story of Women & Art* (© Matchlight 2014)

Re-versioning and exploiting abroad

Now that production companies own much of their IP, once a commission license period ends, producers are free to exploit the properties as best suits their business models. Matchlight aims to distribute its IP to secondary markets in the UK and abroad, but to achieve this it must first acquire the rights to all assets within the programme, such as music and archive video clips. While some of these rights are covered during the commission period under a public broadcaster's blanket license, thus removing the need for production companies to clear each right individually, the blanket license is restricted to the media and territory of the commissioning license. Therefore, before exploiting the IP further, Matchlight must trace the rights holder for each programme component and pay a license fee for its use. Where it does not acquire the necessary rights, it must edit out or replace the segments in the programme – a process called 're-versioning', as David described:

"When we deliver [a commissioned programme] to the BBC that is not the end of the story for that production because we will then do what we would call an International Version. We re-version everything and strip out all the unclearable archive, unplayable music and put on library music, which is a lot cheaper to clear, cheap to buy out worldwide. You replace archive where you have to or you just cut the programme. The re-versioning costs about £2K an hour."

Once the 're-version' is complete, the programme is ready to distribute and generate additional income for the production company. Programmes are received differently across the world, as Matchlight is learning; currently the company is successful in Scandinavia and English-speaking countries, with history selling particularly well in the United States, David said.

"It is content-dependent. I have found that anything with a Scottish accent on it does not travel as well as you would think, which is frustrating. I think it might be partly the fault of the mediators rather than the audience, in that the distributor feels slightly less comfortable with it, so they don't put as much money into it, which means they are not as incentivised to then sell it.

"We did a film with a famous comedian on his addiction recovery and it did not sell as well as we thought it would and that was because fundamentally it was a current affairs story. And although it was funny in places, it was a serious film and it was about drugs policy in the UK. I think that confusion on the part of the audience might have been one of the things but I think the other thing was that it was really about the UK drugs policy and that is irrelevant to the rest of the world."

Rather than leave it to chance, Matchlight is taking a strategic approach to its IP exploitation of secondary markets and has installed a creative director whose remit is to explore new markets abroad as well as new genres. The company is keen to develop formats, which are programmes, often in multi-part series, that follow a specified structure and typically build viewer interest as the episodes play out, making them ‘returning propositions’, as the industry calls them.

Formats often transfer more readily to secondary markets than documentary or factual genres, because they involve plot or structure that can be recreated in new settings, instead of fixing on real-life stories or specific cultures. Therefore, developing format IP can provide a lucrative revenue stream, and Matchlight is seeking to make it a larger feature of its business model, as David explained:

“I think everything is changing, that is what it comes down to. I think you will get fewer and fewer commissions in the UK, I think the value of those commissions will be less, on an individual basis and on aggregate, and I think you have to seek new markets. I think that the territories that we work in – that is partly to do with the market and partly to do with our maturation as a company, you know, we are just changing.

“We have been in the ‘one and done’ model of business, where you come up with an idea and you make it and you are done, and it might be one hour, it might be three hours – but effectively there is no returning life in it. The presenter may come back to you with something else but you have to spend 12 months thinking about what that something else might be. That market is completely legitimate and creatively very satisfying, but we have to get into the multi-part returning propositions as well.”

Thanks to the current UK legislation placing ownership in the hands of the production company, it is best to create formats here, David believes:

“The real thing to do if you want to work in formats is to get the format away in the UK first, because then you have both got proof of concept, because you have made it, but you also own the IP. So then take it to the States and then license it in the States because then they cannot take the IP, because there is a pre-existing relationship in the UK for the same product. So they can only licence it and then you are free to make it there or make it anywhere.”

How can a format, which is essentially a transferrable idea rather than a programme, be protected? David, a former lawyer, acknowledges that “Really you can’t – that is the first thing. Legally there is no protection for a format.” But he has found that substantial parts can be secured, by writing a comprehensive description of the programme, essentially a ‘bible’ that specifies every detail, and together these details can save the format being infringed:

“The real thing to do if you want to work in formats is to get the format away in the UK first, because then you have both got proof of concept, because you have made it, but you also own the IP. So then take it to the States and then license it in the States because then they cannot take the IP, because there is a pre-existing relationship [in the UK] for the same product. So they can only licence it and then you are free to make it there or make it anywhere.”

“You write a bible; you would then have copyright on the bible. You have then got the show, so you also have elements of the show which attract individual copyrights- names are usually a bit too small to really attract copyright – but you have got the whole look and feel. The bible will give you a breakdown: A lot of the format shows will say at minute 5 you are doing X, at minute 7 you are doing this, so you know exactly how the mechanics of it works and so you will have a copyright on that written description. You have also got trade marks and brands and everything else but that is separate as well, so that is how you protect a format, but actual format rights don’t exist.”

For smaller companies developing formats for international licensing, David said it is the usual practice to hire agents to protect a lucrative format. Nevertheless, infringement of formats does occur, particularly in developing markets. However, what one producer calls ‘infringement’ may be called merely ‘derivative’, and thus not illegal, elsewhere.

Secondary IP: Music

Finally, Matchlight’s refocused business strategy also aims to build the value of its ‘secondary IP’, or clips of its films, online rights, and in particular, original music, David explained.

“When you are selling a programme there is more than one bundle of IP involved and the clearest example of that is music. So we make money from our programmes but we also make money from the music in our programmes separately. Actually the shows that we make are really well suited to it because you will have beds of music running all the way through a history show and it will be repeated all the way through – it is not just the titles and the end credits.

“We have woken up to the fact – again, it is cyclical, everything changes back and forth – but it all used to be composed and the composer used to keep more or less all the rights. Then we all went to Audio Network [a production music library] because we were kind of fed up with the composers taking all that income and charging us for it up-front, and Audio Network was very cheap. But they then had all the PRS [performance license fees] and they made all the income. Now we have realised that there is money to be made from PRS and MCPS [recording licenses] and everything else and the composers have realised that they cannot play the charging game as they used to.”

Matchlight therefore has returned to commissioning original music for its programmes, and arranges a 50% share of the music rights with the composers, David said. “It’s a fair division, so that means that we can now... count on not hundreds of thousands of pounds worth of income but a few thousand pounds worth of income from music on certain shows.”



Darcey Bussell's *Looking for Audrey Hepburn* (© Matchlight 2014)



Russell Brand *End the Drugs War* (© Matchlight 2014)

Legal observations

Desiderius Erasmus included in his 1500 AD work *Adagia* the often quoted proverb, “*In the country of the blind the one eyed man is king.*” Businesses that create film & television formats can often sympathise. While highly creative and IP rich, there is little by way of IP right regimes to protect the underlying idea they seek to market. That is when an eye on strategy can help lead to key rights. Such position is reminiscent of an episode of the hugely successful and multi Emmy award-winning TV show *West Wing*. In “Swiss Diplomacy”, Season 4, Episode 8¹, there featured the scenario that presidential hopeful, Senator Tripplehorn, could not run for election as the key Democratic precinct captains in Iowa and New Hampshire (key states) had been locked up in advance by President Josiah Bartlet for Vice President Hoynes. Locking up the highly skilled and connected workers became the key to blocking the competitor’s route to market, while simultaneously and singlehandedly engendering the role of kingmaker – a key objective in the exploitation and management of IP.

The case study of **La Belle Allée** illustrates a number of frames which separate protected works from the world of risk. Whether it is the exploitation of orphan works or dealing with specific downstream chain of title issues, appropriate insurance ought to provide sufficient comfort to keep one step ahead in managing IP. In the former case, the Government is rapidly agreeing to guarantee the exploitation of orphan works. In the case of the latter, advice of a specialist broker should be sought. In addition to outside insurance advice, La Belle Allée supports that there is no substitute for good legal advice to separate creative from economic motives. It is also clear that when dealing with options (unless a “survival clause” exists) it may be useful to include the same in a separate agreement to stop any cross fertilisation of risk and the auto contractual termination that may follow from any number of unforeseen events.

Hopscotch Films is appropriately named, as the case study narrates the company hopping from territory to territory, fair dealing defence to fair use defence, while firmly in the non-commercial exception, in order to retrieve the object of a seemingly impossible piece of film work. Ultimately, the unrepeatably wholesale acceptance by industry is a lesson that high risk-reward is a leap generally only to be taken by those with first mover advantage – as was the case for Hopscotch Films as they pioneered the way with this film first.

Litigation of IP rights is largely unforeseeable and claimed (in films) to cause blindness by volume of paperwork involved. The case study of **Makar Productions** pivots towards the path of dispute resolution by alternative means, an issue and position that should be raised, discussed and agreed before contracts are signed. It should be stated if parties would prefer to mediate, arbitrate or even litigate as should other basics of contractual questions which can often be overlooked (in a rush to draft or review the rights or money clauses) such as, which country’s law governs the co-production contract? Does any court or industry body in particular have

exclusive jurisdiction over any disputes? Depending on the nature of the IP rights, the UK IPO offers not only a mediation service but an opinion service for more complex right issues (e.g. subsistence of design right and patent infringement).

It was noted in the case studies that the lobbying of the UK government had paid off by the change of default ownership of copyright in commissioned broadcasts in favour of the independent production company. The case study of **Ko Lik Films** emphasises this corporate nature of exploitation of film & television rights. Yet all too often the impact of company law is forgotten from an IP strategy. How can directors exploit IP if a shareholders agreement binds the directors to first seeking shareholder consent? Similarly the use of personal service companies and SPVs can often result in conflicts of interest, or at least, the mandatory legal requirement to declare (and minute) interests. What happens if in a JV (joint venture) company a 50/50 deadlock occurs? Do the articles of association deal with this? Does the management team know where the articles are? How to obtain a copy? And what is the process to make a necessary change? These are all intra-company risks that need rehearsing because they are a common source of disputation, not only for the UK company licensor but the international licensees. Has disclosure been made of the corporate structure of the US agent, the EU distributor, the Pan-Pacific broadcaster? Would a change of control in any corporate trigger an auto termination clause in any IP contract? Company due diligence should accompany IP diligence and any undertakings for quality control, policing and the like.

An echo can be a handy navigational tool, especially when having to course through the murky world of business. The case study of **STV Productions** hints towards using echoes to locate goodwill. But why seek goodwill? Goodwill is a very important IP asset and it has its own legal protection under the law of passing-off. Often goodwill is associated with unregistered trade marks, but in reality, it could attach to any facet of an undertaking (design aspect, trading style, customary dealings, etc.) enhancing the value of the underlying asset. What is goodwill? *“It is a thing very easy to describe, very difficult to define. It is the benefit and disadvantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one good thing which distinguishes an old-established business from a new business at its first start.”*² Without trade it is unlikely that there is goodwill. However, as the STV case study shows, if there is trade only in one territory, then that creates (to quote the case study) “a halo effect”. The case study rightly teaches that the upshot of managing UK goodwill is that the business with goodwill is usually first in queue when internationalisation turns to inward investment (i.e. into the UK) – reminiscent of the benefits of rights publication outlined by the Polybius Games case study.

Working out through legal ‘supervision, direction and control’ tests whether a labourer is in fact an employee or a contractor is crucial, not only for tax compliance purposes but the default position of ownership of most IP rights is set according to the employee or not-employee status. The case study of **Tern TV** deserves a first pump for grabbing the often thorny issue of employment. By doing so, Tern successfully locks down the available talent for their

Beechgrove Garden work product, ensuring that competitors struggle to hire local and skilled talent and stumble on route to market. This move was akin to the *West Wing* tactic outlined at the outset. That said, in the age of “zero-hour” contracts and the backlash against their use, detailed employment contracts will require to be negotiated and kept confidential. When entered though, the employment relationship puts Tern TV into a strong management position leveraging obligations of confidential ownership of IP, restrictive covenants and other employee related IP protections firmly on Tern’s side.

The case study of **Matchlight** illuminates many key considerations such as: licence v assignment; ownership of physical property (i.e. master tape); getting genre right is getting market right; knowing your market, including current and evolving tastes; ensuring relevancy to rest of world (if it is parochial at least make it ‘glocal’); strategic use of UK copyright law as base right before taking international, as countries party to international treaties will have to recognise the base right; remembering trademarking titles can be a fillip to value; there is danger in derivative works; and, the need to factor in music rights for complex work. The importance of properly documenting any agreements, particularly the scope of use, cannot be stressed enough. Also, diligence should be paid to any automatic or notified updates to any existing contract. One trend is for infringers (once caught) to try and locate a licensee and ask for a retrospective sub-licence which predates their infringing act. Whether such activity is legitimate or not, it also stresses the importance of parameterising use. In the foregoing example the infringer is a third party, but what if they were part of the licensee’s group?

In summary, the film & television case studies are trailers for the overarching message: get creative when approaching IP.

- 1 http://westwing.wikia.com/wiki/Swiss_Diplomacy
- 2 *IRC v Muller & Co Margarine Ltd (1901) AC217*

Case Studies:

Music & Publishing

Rage Music

Red Note Ensemble

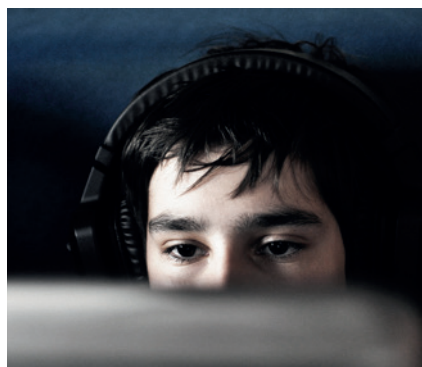
Catherine Czerkawska, author

Canongate

Freight Books

Saraband

Legal observations



Rage Music

Working with complexity: Making music for the creative industries

RAGEMUSIC

SINCE 1996



Properties

- Music compositions, lyrics, performances, recordings

Protection Tools

- Copyrights
- Contracts and licenses

Issues

- Complexity of rights in music
- Poor IP knowledge among clients
- Variety of IP issues across Film, TV, Advertising, Art, Tourism and Games

“ We try to say, ‘Right – you have this much time, a year, 18 months to sell this idea for a TV series with our music attached to it and if you don’t, then we get our music back and we can then try to sell it on or make changes to it.’ We want to help them to sell their idea. But at least it gives us a little bit of freedom that the music could revert to us and it will maybe have a home elsewhere. ”

This case study considers the wide range of IP rights involved in creating production music and Rage Music’s approach to managing them. As producers of “hand-crafted music and sound” for businesses in film, TV, advertising, video games, fine arts, tourism, and more, IP is a daily concern for Rage, a limited company established in Glasgow in 1996 and now with additional offices in London and Los Angeles. Three full-time and six part-time employees and a raft of freelancers fulfil the company’s commissions with high-profile clients such as Ford Motor Company, STV, JK Rowling, The Walt Disney Company and Electronic Arts.

There’s more to music than meets the ear

In terms of IP, music production can create a minefield of rights. But effective managers such as Rage’s Head of Music, Caroline Gorman, know how to respond to the challenges of each project with an armoury of IP contracts and strategies.

Very briefly, the UK Copyright, Designs and Patents Act 1988 establishes the following copyrights in relation to music:

- ‘author rights’, or moral rights in certain copyright works
- copyright for ‘musical works’ such as music compositions
- copyright for literary works (e.g. lyrics) or spoken words to accompany music
- ‘master’, ‘mechanical’, or recording rights, where music is reproduced as a physical product
- performance rights, where music is played or performed in a public space

Depending on the roles involved with producing a piece of music, its component IP can be owned by several parties, for instance where a songwriter owns copyright for a tune's lyrics, a composer owns the music, and either might own its performance and mechanical reproduction rights, as Caroline explained:

"Most people think about a recorded piece of music, you know a CD or a flat recording of some description. In that recording there are both the master rights, so the rights that relate to the actual recording itself, and then the other rights which are of the song – so who wrote the lyrics – and who wrote the melody, which is separate to the actual pressing of the music."

The ownership of the above rights is secured in contracts with each participant in the production. Contracts also establish the fees to be paid for each role, and any royalties due when the music is consumed. When a musical work is performed publicly, royalties are paid (via PRS for Music) to those who hold its performance rights; when a work is recorded and sold as a physical or digital product, those with mechanical rights receive royalties from the Mechanical-Copyright Protection Society (MCPS, via PRS for Music), and when a recording is played in work or public places, or broadcast on TV or Radio, the mechanical rights holders also receive royalties via PPL UK.*

* Websites

For more information on royalties for –

- *public performances: prsformusic.com*
- *recording music as a commercial product: prsformusic.com*
- *public playing of recorded music: ppluk.com*

"[They] work hard for the money..."

The complexity of these rights makes them a boon and a bane to Rage Music, whose business model spans two functions: As a music publishing company, it generates revenue by exploiting composers' and songwriters' works; and as a production company, Rage sells bespoke compositions to other businesses (as opposed to commercial music, which is marketed to the general public). Usually Rage performs these roles by contracting composers and musicians to create new works, with the copyrights assigned to Rage. "So one of our composers would write the song or the music or the track and we would publish it," Caroline explained. "Everything is kept within Rage Music. The composer gets their money [a fee] as the author of the work and we get our money as the publisher of the work, with both parties also receiving royalties from the performance/broadcast of that work."

However if a client commissions Rage to provide existing commercial music owned by other companies, there are two possible strategies: In the first, Rage can purchase licenses for the work's publishing and recording rights on behalf of the client, but this option can be very expensive if the song is a big hit. The less costly alternative is to re-record the piece as a 'sound-alike', as Caroline calls it:

“If you want to use a commercial track in a film or a TV show or an advert, you would need to find out who the publisher was of the track, which is normally the record label, and then who the actual writers are. For instance if it were Katy Perry and several others, if you wanted to do a re-recording of that track – so creating your own version of that track albeit very, very similar to it, so that it is essentially a sound-alike – then you would only need the publishing rights.

“If you wanted to use the master (Katy Perry’s original version), you would have to buy both the publishing rights and the master rights. You would pay a lot for them and you would essentially go to the publisher and that might be one company or that might be five companies and you would have to give them details about the intended use (what kind of use, e.g. advertisement, what territories it would be broadcast on, e.g. UK TV, for what brand, for how long, etc.). They would say ‘Yes’ or ‘No’ and they would give you a license cost. If there is more than one publisher involved then the Most Favoured Nations (MFN) principle comes into action. Essentially this means that the cost paid to all parties is equal. So if one of two publishers quotes a higher amount than the other one, automatically you need to pay both of them the higher amount. So they would all have to agree to the same cost. So say there were two publishers, which happens quite a lot, one will come back and say, ‘Right, that will be fine, I want £20,000’; the other publisher will instantly say the same and if they come back saying that they want £25,000 then you would need to pay both parties £25,000.

“So it can be very expensive and that is why a lot of people choose to have a re-recording done, as it is often much more affordable to recreate a track and, even as painstakingly as we do it, it is usually a lot cheaper than buying out the master rights. It can be extortionate, cripplingly extortionate and it is something that a lot of people/ brands are simply not prepared for. They have no concept of the worth of music.”

Still more rights: Contracted performers

In addition to the above rights, a musical recording generates ‘performer’s rights’ to compensation, for each musician involved. Similar to copyright, these property rights can be assigned to others, in which case performers are compensated via royalties for commercial music released as a single or on an album, or by fees paid when they license or sell their rights to the clients of production music houses such as Rage. This is particularly the case in film commissions, where Rage’s clients prefer to buy all the rights so they can sell the film soundtracks, as Caroline explained:

“If I am booking musicians, I will give them information on the sessions – how many 3-hour sessions will be recorded, what the project is (a film soundtrack, a videogame etc), how much of the recorded music from that three hours we can then use on screen, if the player will be overdubbing an instrument, and what payment they will receive. There are payment scales set out by the Musicians Union (UK) that covers the majority of our session work, however for feature films, it is the standard that the studio wants free reign with the music recorded.

“Sometimes there is a lot of crossover and you might have done music for a film but the client will want to release the soundtrack and that might make its way as music onto a trailer for another film, for the same trailer house or studio. So the contract is kind of saying, ‘Look, this is the other stuff that might also happen.’ So musicians are signing off on that too because it is simpler that way, and hopefully they get a higher fee. It is essentially a buy-out for want of a better term. The larger the projects that we get involved in the more that is becoming standard.”

Musician contracts differ in complexity and cost depending on the country where the recording is made. Typically, Americans’ Musicians Union contracts make them more expensive to hire and Caroline has found this can work in Rage’s favour:

“In the UK, if we had a musician here we would have to pay him for a session fee, and we would also have to pay them portorage, which is a payment to bring their music or musical instrument to the session – it is just a kind of nominal amount depending on how big or small the instrument is – and then they would also get royalties that would stream through. However, in the American system they have to pay their players a session fee, portorage, health and welfare, dental insurance – all sorts of crazy additional fees that we just don’t have here. So for the American market they see us as a cheaper option essentially, much as we would see the European players in the same way because they don’t have the same union rules as us in the UK.”

Improving others’ poor IP knowledge

Given the complexity of IP rights in music, it is not surprising that Rage Music frequently encounters misunderstandings about the legal use of music, the permissions required and their related costs.

“There are large gaps in people’s education when it comes to music and that is not something that can be easily rectified. The problems we get is when people are kind of stuck, for want of a better word. They will be in the production of a series, or maybe just an advert, and then they will suddenly go, ‘Oh right – well we need to get music,’ and they will not have budgeted it correctly. They don’t actually know what is involved. It is not a problem for us because we can always write a new piece of music and we will always do our very best to do that in the budget [they] have got as best we can. But sometimes they have aspirations which cannot be met because they really want a commercial track which they cannot afford. They don’t understand how expensive that can be and who you need to pay for it and how much you need to pay for it. So we can sometimes be asked to essentially plagiarise a track, which is obviously illegal, but explaining that to a client can be difficult! We are often trying to educate people and it is just something that a lot of people are perplexed by.”

The lack of understanding is particularly present in the television industry, Caroline observed. Part of the confusion relates to blanket licences, which are yearly fees paid to PRS for Music by the BBC and independent companies. Blankets remove the need for producers to acquire broadcast clearance for

every single use of music, but they do need to check the music they want to use is covered by the blanket agreement.

“It is a very fuzzy area for a lot of people who work in TV, even if they have been working in television for years and years. Because perhaps the television series you are making has only ever had one composer on it, or has only ever used library music, or maybe you just used your own internal library, and it might just be something that you have never come up against before. If you have been working in drama, or factual, or advertising or whatever, maybe it is just something that has not presented itself.”

With blanket licenses, Caroline said, “A lot of the usage is completely covered but some things can trip producers up. The perfect example is if you are having to edit a track, our BBC flat licence will allow you to use any track you like at its original length – you don’t have to use the full track but you have to use verse one and chorus one. You cannot say, ‘I will have verse three, jump to this bit and then edit this bit’ – You cannot edit it that way. You cannot change the lyrics without permission and you cannot make any kind of additions to it or categorically change it in any way.

“A lot of people just don’t understand it, that this is someone’s work and you cannot just screw about with it. You are not doing anything horrendously derogatory to it but you are still changing somebody’s creative vision at the end of the day. Recently we had a producer-director in who was undertaking at that time a very ambitious musical project and he had no idea about the can of worms that he was essentially opening and spilling round the carpet because he just did not know about any of this. He just thought, ‘I can do what I like – I can just take it in and the editor can chop it up’. They physically can but they are not allowed to do that legally.”

* For more on **blanket agreements**, see:

- www.prsformusic.com/users/broadcastandonline/TV
- www.bbc.co.uk/academy/production

IP horses for courses: Working across the creative industries

TV’s use of blanket licenses illustrates how methods of creating and managing IP differ across the creative industries. Rage makes it its business to fully understand and exploit IP, applying a strong understanding of the way each sector operates.

For instance, film clients prefer to buy out all rights to music tracks, in order to distribute and exploit the film (see film case studies) and its soundtrack. Rage Music agrees to sell the rights if the price is right, but selling can be detrimental to the original rights holders if the new owner does not further exploit the work and generate further occasions when royalties must be paid to the original owners. For this reason, Rage prefers to retain publishing rights and further exploit the work directly, benefitting itself and those who created the music.

“A lot of people would like to publish their own tracks and they want to have ownership as much as they can. They also normally try to sell that on to other people and they will sell it on to a company, publishers or distributors who want to create a soundtrack, which is fine if they intend to do exactly that and have it forever and ever, and use it forever and broadcast it forever because only then will the composer get royalties. If, however, they are just going to sit and put it on a shelf then it is not earning anyone any money and therefore it is kind of prohibiting the composer from future income. If they have that music and it is owned by them then we have no way of giving the music another life, or giving the composer future income from that piece of music. So we try to negotiate and combat that as much as we can, where we can, but sometimes with big production companies and certainly for films it is just not on the table.”

In television, production budgets typically are lower and the pitching requires Rage to take on more upfront risk, as Caroline describes below, but to safeguard its investment by including a reversion clause in case the music is not used:

“We might for example do a pitch for a programme. The TV producer might normally do one or two episodes as a kind of demonstrator for different channels and try to sell that idea. So it is in our interest that we would do the best that we can for that knowing that if this gets sold we will be the company who will produce the music. For us obviously it is very little money up front and you are doing essentially all the work – you are creating the entire package. So in those instances we try to say, ‘Right – you have this much time, a year, 18 months to sell this idea for a TV series with our music attached to it and if you don’t, then we get our music back and we can then try to sell it on or make changes to it.’

“It is fair – we want to help them to sell their idea. If they cannot sell that within a year and a half then at least it gives us a little bit of freedom that the track could revert back to us and it will maybe have a home elsewhere.”

Composing music for advertising has proven to be fertile ground for Rage, having composed music for brands including RBS, Stella, Dell, IBM, Chevron, Amazon Kindle, Irn Bru, Disney, and many other companies in the UK and North America. Thanks to the display of adverts on both TV and the Internet, Rage is attracting interest from clients further afield. “We have done an advert, for example, for an Italian company which somehow came to us.” Caroline said.

However overseas markets are hard for Rage to explore directly, given cultural and technology differences. “It is difficult to find out who are the big players in that market. I don’t speak the language, and because we don’t have easy access to their TV and stuff as they do to us. Because with UK and US programmes and adverts, we are shown everywhere. If you are in India you can get all the channels, but the other way round it does not happen. So it is kind of difficult for us to know what is going on out there.”

As with TV work, Rage has learned to proceed carefully with speculative pitches for advertising:

“I had to phone their agent and say, ‘How do I contract them for this?’ Because it is a mountain in Germany...an actual big hill with hidden speakers, like Tellytubby Hill, with speakers in it – and it will be open for three months, six months. I don’t know what the footfall going to be, and how do I even quantify this?...I said, ‘We know that there is going to be an album... we know how that works, but a big fat mountain?’”

“We worked on a pitch for a television advert for a UK company for almost one year, which is ridiculous, it is unheard of in itself. They went through lots of research and development and the branding and all sorts of palaver and we got to the point where we said, ‘We are not doing any more work on this unless you tell us it is definitely sold and the job is ours’. Before they came back we found out that the same brand was being advertised in a different market, in Australia, with a very similar advert style and an amazingly similar music track. They said, ‘It is completely separate from yours, we never played your music to them.’ Unfortunately for us it was very difficult to prove otherwise because we had no chain that directly showed that they had heard it, but considering we had worked on it for almost one year, it was very, very likely.”

Art and tourism projects are increasingly incorporating recorded music, and throwing up unusual contract challenges for Caroline. Working with Scottish rock band Mogwai, Rage contributed to an album track created for a sculptural installation in Germany by artists Douglas Gordon and Olaf Nicolai.

“It was called *The Singing Mountain*. As you moved round it, it sung to you. We composed and recorded strings on the track and that was a bit odd because we had to get the players’ permission. I had to phone their agent and say, ‘How do I contract them for this?’ Because it is a mountain in Germany – I thought it was like a paper maché kind of mountain but no, it is an actual big hill with hidden speakers, like Tellytubby Hill, with speakers in it – and it will be open for three months, six months. I don’t know what the footfall is going to be, and how do I even quantify this? I said, ‘We know that there is going to be an album so that is fine, we can deal with that, we know how that works, but a big fat mountain?’ He came back and went, ‘We don’t know either.’ I said ‘OK, great.’ We both know that there is no way to quantify the amount of people that will come round here and actually hear this mountain sing.’

“I think these things are just in their essence a little bit weird. The money can be huge for the entire project but maybe that includes visuals, 3D film, voiceover actors, and we are often just the end bit. And a lot of the time it is not very musical – it is maybe a lot of sound effects or foley sound, you know – here are the footsteps of all the ghosts of the place.”

A project to create music for an attraction within an amusement park set Rage on another learning curve, in terms of making IP appropriate for the environment.

“You are in a 3D space and you have to think about that,” Caroline said. “That was a gauntlet of fire because it was a great way for us to understand the challenges that we had to think about when we think about music: What tone are we on, what key are we working in, how does that work with this? If an audience, visitors – guests as they call them – are queuing up for a ride and they might be here for this long but then kind of half-hear the sounds from over there, it has to be able to work together so people don’t get annoyed.”

The theme park experience gave Rage a head-start on meeting the creative challenges of working in yet another industry, computer games.

“We were contacted by a games company purely because of the music that they had placed as temporary music on a game that they are currently developing, and that had come from our films. They said, ‘This is working really well as temp music and we are wondering if you could do a score?’ That is kind of the way that a lot of the editors work when they are editing visuals – they lay a temporary score on top. Because of the way that these games are cool and hard, you know, gangs with guns, they have obviously gone online and gone, ‘Let’s get some of that *Dredd* music because it is really bass-heavy!’ So we are currently working on that, which has been unreal.”

Creating music for computer games brings with it new ways of working. Unlike music for other media, games music is not built upon a linear plot, but instead must accommodate different in-game scenarios.

“It is very difficult for us having to learn a completely new way of working,” Caroline reflected. “We have always dealt in something that is very linear. With TV and film it is, ‘Here are the visuals.’ They are then locked, we create the music for it, job done. But this game music is not linear, it is all over the place and you have to get yourself in the mind-set of how a game universe is divided up, what may happen in these places. The options that are then presented depend on how long you might be in an area, what barriers you might face, what might be the transition that will come after that. Sometimes also there are the wee scenes that play out that are fixed. Ok that is good, but everything else has to blend. You might be in a space for 40 minutes and you might be here for this long, you might pick up this and use this, so and so might arrive and then you have to chase, then you are speeding up the music. Everything has got to work together and blend nicely. It is hugely complex.”

Despite the challenges, Caroline believes producing music for games offers tremendous scope for Rage’s future development and revenue.

“The games project could be a calling card. I just think that we need to ‘earn our stripes’ for want of a better term. There is so much to do. We want something new and it seems like great fun and potentially lucrative as well, so that is all good. Let’s just hope that we do well.”

“[The theme park] was a great way for us to understand the challenges when we think about music: What tone are we on, what key are we working in, how does that work with this? If an audience, visitors – guests as they call them – are queuing up for a ride and they might be here for this long but then kind of half-hear the sounds from other there, it has to be able to work together so people don’t get annoyed.”



Red Note Ensemble

Building, exporting and branding IP

RED NOTE

Properties

- Music compositions
- Performances
- Reputation and marketing

Issues

- Adjusting business plan to maximise IP
 - Building repertoire
 - Cultivating and selling reputation abroad
 - Branding IP

“You cannot run a music ensemble in Scotland without going outside, because there is simply just not the level of work, audiences or promoters in Scotland without us probably overloading the market.”

Red Note Ensemble is a contemporary music group based in Scotland. Since 2008, it has worked throughout Scotland, the UK and increasingly, abroad, to perform established and commissioned music, to develop new works, and to develop audiences and performance spaces for contemporary music. This case study considers how Red Note is adjusting its business model to build and capitalise on its IP, in order to ensure these fundamental aims can be met.

Lean and keen to maximise IP

Red Note is co-directed by founder and cellist Robert Irvine, and John Harris, the company's CEO. Its business strategy always has focussed on delivering a music programme of high quality and ambition while keeping core costs to a minimum. Red Note activities include spring and autumn touring seasons interspersed with venue-specific performances, collaborative projects, and Noisy Nights and Noisy Words events, the group's showcases for new music. This programme is delivered by a light and flexible team structure: John is Red Note's only salaried worker, while all other officers, administrators, technicians and musicians work freelance. For projects and performances, the ensemble draws from a pool of approximately 55 talented composers and musicians.

Red Note's revenue stems from a combination of commercial and project-funded activities. The company is paid engagement fees to work "on demand" for performance venues, and it develops its own programmes and collaborative projects, for which it typically seeks funding from public sources, venues and partner organisations.

"Venues and promoters primarily approach us and about 25-35% of our turnover is engagement fees – so people paying us to play, effectively on a

commercial basis. That is particularly true outside of Scotland,” John said. For Red Note’s own projects, “it is quite a complicated equation in that some of the stuff we come up with, we go, ‘We are going to do that’, and then we raise funding and then we do it. We always tend to engage a partner with us on that so we very, very rarely strike out on our own entirely anymore.”

Building repertoire

Every performance of a piece of music is a form of IP, made unique by the interpretation of the specific musicians involved. Thus in combination with the compositions that Red Note commissions and licenses, performance IP makes its portfolio rich and ever-growing. However until recently, the role of IP in Red Note’s business plan was minimal – the ensemble rarely performed works more than once nor recorded them, making the ownership of the compositions and performances a moot point. However John understands that putting more emphasis on the cultivation and exploitation of Red Note IP can provide greater sustainability for the group:

“We are increasingly looking at things that we can produce repeatedly. So a good example of that would be, and something we have never really looked at before, is repertoire, by which I mean doing things that we can do more than once or more than beyond its initial tour run.”

Developing a repertoire of performance pieces requires ensemble members to learn the music – and Red Note’s specific expression of it – and to keep it in their current play list, so the group can perform it repeatedly on tour, and perhaps also record it for further exploitation. However the IP is difficult to reproduce and save in repertoire if the music personnel continually change, as has been the case with Red Note’s past strategy of selecting from a long list of potential players. Now this strategy is changing, John said.

“We now have a core group of players and we are pretty well fixed. Even although we have said we have got 55 players, 15 of them get used repeatedly and the others will get brought in for special things.

“So a key example of that at the moment is our *Reels to Ragas* project which is really quite small – there are only four players in it, a violin, a cello, etc. and we are about to add in a fifth person in the autumn who is a folk musician. That is basically a developing project which started out as a little tour of the Highlands and Islands and it has extended on its own. At the start we had written all the music for it, so we said, ‘Let’s record it.’ We got the record label and so then it became a CD, and then we did another tour, and it gets recycled a lot for performances – we are playing at the Commonwealth Games – and it has done tours around Scotland. It kind of gets picked up and used because it is very light on its feet. It is now getting developed into *Reels to Ragas II*.”

In a 2013 collaborative project (*Enough Already*, a concert, play and film) with LOD Music Theatre of Belgium, Red Note further trialled the repertoire model by co-producing a show which it toured in Scotland, England and Europe.

“LOD have an interesting thing: They basically put things together, effectively in rep, so they have shows, to respond to promoter demands. They do go out and find people who want to book it. They say, ‘We have got the show, do you want it?’ and they have a group of venues that take them. They are quite a venerable company in Belgium – they have been going for about 25 years.”

In addition to making frequent use of existing IP, repertoire music can deliver financial benefits. Because Red Note must pay musicians to learn new music, if new compositions are frequently introduced, the costs of learning are greater than if the players replay music they already know. However if the musician list also changes frequently, it does not matter whether the music learned is repertoire or new work – if a musician is new to the piece she must be paid to learn it – and thus the company’s investment costs remain high. Therefore, repertoire music offers a potential saving if the staffing conditions are right, John said. “You can only really do it when you have a core of musicians that you can immediately use, because otherwise they all have to re-learn it and it will not make any financial difference.”

Keeping fees to players under control is particularly important because Red Note musicians command high basic rates, John said.

“I was trying to explain it to someone who was outside of the music industry the other day. I said, ‘Okay, so you know the Scottish Chamber Orchestra and you know the RSNO and you know the BBC – well imagine they are rugby teams [like] England, Wales and Scotland. Well we are like the British Lions’, and so you kind of draw people from all those things and so you are looking for the best.

“The thing is that you have to pay. The BBC is the most expensive, the most highly paid orchestra in Scotland and so you have to pay BBC rates, because the musicians have to bring someone else in to take their place while they are playing for Red Note. So you have to pay them at least that and so basically we peg our pay rates effectively to that kind of level. ”

As with all creative endeavours, producing a new musical performance requires upfront investment. Therefore by building a repertoire of compositions that can be produced more than once, Red Note will be able to maximise its profits. However, this will only work if it is able to retain a core of musicians who are familiar with the works.

Cultivating and selling IP abroad

Another strategic focus for Red Note is to develop its reputation, another form of IP, with international collaborators and promoters, and to exploit this for securing performances abroad, where concert bookings can be more numerous and lucrative than gigs at home, John said:

“The Ensemble is set up to be very ambitious and to be on a par with other musical ensembles, particularly music ensembles in Europe, so we are up against people in London, Music Fabrique in Germany, all that lot. They all work internationally and they are all known internationally, they all have a

touring profile, they all have broadcasting profiles, they all have recording profiles. I thought that even although we come from a lonely rock out in the North Sea, there is no reason quality-wise why we should not be regarded on the same platform.

“Certainly Huddersfield [Contemporary Music Festival, an international platform for new and experimental music] is quite a major marker for that because that is basically where you have got the art, so it is important to do that, to be actually on that level.”

As Red Note is learning with each project, international and collaborative work is expensive to develop, requiring extensive rehearsals of new compositions with players at home before taking them on the road to festivals and venues abroad. Long gaps in performances also lead to further costs, John explained.

“My thinking about the way that one does it is that there is a significant burden of initial investment within Scotland. That is certainly true with the project with LOD and that is certainly true with the project [New York Triptych] we are doing down in Huddersfield with James Dillon – it is looking like it is going to tour to Barcelona, and Moscow as well.

“What we want to try to minimise is the re-investment in it. The difficulty is that often there is an enormous gap between the first performance and the second performance and there has to be re-investment and re-rehearsal. Sometimes you have to re-rehearse because you have not got the same people or because it has been a long time since you last did it. So you need investment initially to get everything off the ground, you need investment at re-performance stage and then, hopefully, you don’t need anything after that.”

However while working abroad increases the effort and capital required for each project, it also can increase the benefits for Red Note and Scottish musicians generally, John said.

“The tour with LOD is maybe six or seven weeks’ worth of work. Now that is substantial and it is abroad – it is France, Germany, Belgium, Italy – and that is quite a major deal. Turnover-wise it increases the amount of work we have for players effectively and that then plays quite a big role in then keeping the players in the Ensemble, because there are only a limited number of opportunities within Scotland.

“You cannot run a music ensemble in Scotland without going outside, because there is simply just not the level of work, audiences or promoters in Scotland without us probably overloading the market. A lot of this stuff does not play in Scotland – there are not the promoters in Scotland who will take it because they cannot find the audiences for it, but it plays well outside of Scotland and so you end up kind of making stuff for export.”

The experiences gained with collaboratively developing and touring Red Note IP are informing the ensemble’s strategies for promoting its own projects in the UK, John said.

“The Ensemble is set up to be very ambitious and to be on a par with other musical ensembles... I thought that even although we come from a lonely rock out in the North Sea, there is no reason quality-wise why we should not be regarded on the same platform.”

“It is interesting because I wrote a little opera [*The Garden*] for the 2012 Sound Festival in Aberdeen-Aberdeenshire and then did a little tour last year. We went down to London, came to Edinburgh, went out to Berlin. It has now been re-booked and in 2015 we are looking at putting on another tour around and we are hoping to get into the Made in Scotland programme held annually at Edinburgh Festival Fringe. After that it then gets sold for a price and watch this space. It is not a hugely expensive show but it basically means that there is no risk taken after that and it can be reproduced.”

Branding IP

A third area of IP focus for Red Note involves its efforts to attract new audiences to contemporary music. Like other ensembles working in the genre, Red Note finds that consumer understandings of the music are still developing. This is perhaps unsurprising given that definitions of “new” or “contemporary” music vary widely. Generally, the labels describe music written within the last century, and which may involve classical concert instruments, electronics, other sound-making objects, and diverse art forms in compositions which often aim to expand listeners’ experience of music and performance.

To market such events, John has found it is essential to make the ‘elevator-pitch’ – to zero in on the unique features that will hook the attention of both music- and non-music audiences – features which contribute to Red Note’s brand reputation.

“Red Note is a contemporary music ensemble. We are trying to change the word ‘contemporary’ at the moment because it is a bit of a customer killer, so we say ‘new music’ ensemble, and we say that we predominantly play music since 1950, but we occasionally break that rule.

“One thing that we have found, and it is important, it is like a litmus test, is that the elevator pitch is important, particularly when you are looking in terms of audience, not just music audience. The example I use with this is that we did one show [*1000 Airplanes on the Roof*, a ‘science fiction music drama’ by Philip Glass] three times: We did it once in the Concorde Hangar at the National Museum of Flight in East Lothian, we did it once up in Banchory in Woodend Barn Arts Centre and once in the Glasgow Royal Concert Hall. I ask people from outside the music industry which one sold out first, and they all go, ‘Probably, the Concert Hall.’ Actually the Concert Hall did not sell out for the simple reason the elevator pitch for the series of 3 concerts was, ‘Do you want to come and see a show on Concorde?’ – ‘Oh yes that is cool’ – and there was a traffic jam for that show. It sold out completely and it was amazing.

“That is the simple thing – I don’t know what it is about it but the elevator pitch is important. The same thing was true with *Tantallon!* [*These Lands, This Wall* in 2012]: ‘Do you want to see a show in a castle, in the open air with a 200-foot video wall?’ – ‘Yes.’ The fact that it was a new commission by Bill Sweeney was neither here nor there.”

The problem comes when an event does not offer a unique hook, John said.

“The LOD project is a fantastic show, amazing. The elevator pitch – you know Vicky Paul [Red Note’s media manager] and I were racking our brains – what is it? Is it, ‘Do you want to come and see a show with some live sound effect artists? Do you want to come and see a show about existentialism?’ – ‘No’. Because we could not describe it in five words, is why did it not sell to a general audience. Because in order to get 200 people you have to go beyond the music audience. And we have to work out what that wider appeal is... it is non-trivial.”

The aim for Red Note is therefore to sell its particular brand of musical IP to a much wider audience, to make ‘new music’ more appealing, but this is easier said than done. Red Note has had numerous successes in the past, with sell-out shows and critical acclaim for its work. Nonetheless, the main issue remains the same for all creative producers: The demand for creative work is unpredictable, and therefore risk of failure is high.

“The thing about our particular branch of music is that you do not know what is going to be a hit and that is problematic. Tantallon Castle is a classic example: I think James Waters, who was the promoter, and I sat down and reckoned that we would get 400 for this, maximum, and looking before the event that looked like a pretty vicious target. 1,400 people turned up. There is no way you can predict that. I think with *Pass the Spoon* [a 2012 performance of David Fennessy and David Shrigley’s ‘sort-of opera about cookery’] we estimated well maybe 200 per night, and the fact that it is a sell-out – that is not predictable.

“But similarly you also have your flops. So you are looking at the project with LOD, which is doing extremely well on the Continent, but in Britain again it is a music problem, you have no idea what is going to sell. We put in an estimate and it under-achieved.

“You don’t know, you just don’t know. The thing is that every single show you are not comparing like with like, and so it is not like going, ‘Fifty people will turn up today’ and 50 people will turn up. It just does not work like that.”



(Photo: Wattie Cheung)

Catherine Czerkawska (Author)

Paper and pixels: Mixing traditional and self-publishing



Properties

- Printed books
- E-books

Protection Tools

- Copyright
- Contracts

Issues

- Changes in traditional publishing
- Pros and cons of digital self-publishing
- Taking control with hybrid model

“ Along came Amazon with Kindle Direct Publishing. I think that was the point at which I, and quite a lot of other people that I know said, ‘Well why not give it a go?’ Because it cannot be as bad as what we are going through right now. ”

Catherine Czerkawska is an author, historian and folklorist who lives and works in rural Scotland. In the 1970s Catherine began writing poetry and scripts for stage, radio and TV, then moved to non-fiction, short stories and novels. Catherine’s most recent novel is *The Physic Garden*, which was published in paperback and as an e-book by Saraband in 2014. Catherine works closely with such publishers to produce and sell her books in traditional and digital formats. Simultaneously, Catherine digitally self-publishes many of her books and play scripts, enabled by the emergence of e-books and online marketing and sales platforms. For Catherine and other writers, this hybrid approach to IP exploitation and management suits the dynamics of a changing industry.

Traditional publishing goes digital

In the traditional relationship, an author’s IP is exploited on his or her behalf by a publisher, who has chosen the author’s manuscript from a highly competitive pool or solicited work based on the author’s reputation. While this model may be referred to as ‘traditional’, the industry marches with technology such that today, the final form of the publisher’s work may be digital e-books and apps as well as, or instead of, printed books.

For Catherine and other authors, there are several arguments for working with publishers. As gatekeepers of quality, publishers’ efforts to select and produce successful publications legitimise the authors, providing a stamp of approval

which extends the books' market reach. Publishers also benefit authors by editing the work, printing, marketing, distributing, and now with online shops, also retailing it. However, Catherine feels that in the past, publishers' promotion of her work often was not well resourced, and over time such budgets have not improved, despite competition for book sales growing ever sharper – with the result that responsibility for promotion has shifted to the author.

“The first time I was published years ago I do remember that feeling of not wanting to tread on publicists' toes. You were thinking, ‘I don't really know what they want me to do’ and you were half waiting for them to contact you and then they weren't doing very much because they did not have that big a budget. I think nowadays that is something that has changed – of necessity most publishers now are pretty keen for the author to do a lot of promotion and publicity.”

Publishers secure an author's IP by negotiating contracts regarding advance and royalties, copyright territories, and so on. Here too Catherine has watched the industry change its approach.

“I have only just finished negotiating a contract. It includes a small advance which is par for the course for a small publisher. Some independent publishers, I think, don't give any advances at all these days. When I was published by [a large publishing house] – we are talking a very long time ago – it was possibly somewhere between £5,000 and £10,000 which at that time was a lot of money for me anyway.”

The advance of digital publishing has specific IP consequences for authors and publishers. For new titles, publishers now typically issue contracts addressing both print and digital rights. If a publisher wishes to produce a digital version of an old print title in its back catalogue, it must renegotiate the rights with the author, because once a printed book is considered out of print, its copyright reverts to the author. However electronic books and digital printing 'on-demand' (the instant printing of single copies to meet consumer demand, rather than stockpiling) now make it possible for publishers to prevent titles going out of print. Authors and agents are responding to such practices by asking that their contracts address appropriate digital rights reversion, as Catherine explained:

“The problem with e-books or even print-on-demand, is that you can keep a book in print, legally in print, by printing only one or two print-on-demand copies or by keeping the e-book out there, so there is no rights reversion. So you have to include a clause that covers that and that is normally what agents I believe are doing now if they are canny. It is certainly what the Society of Authors is doing – they are asking authors that consult them to add a proper rights reversion clause into their contract.”

Of course authors do not have to accept every term in a contract and Catherine has learned to be careful about digital rights.

“If you were a reasonably good writer and if you got an agent then you could be pretty much sure that you would get a publishing deal. Then it changed and it became incredibly frustrating for writers because you were working, working and working, and you were reading that the mid-list is dead. It was really chilling because you thought, ‘What on earth can we do?’”

“A publisher did ask for e-book rights when really it was clear that they did not want to work with me in any other way – what they just wanted to do was to secure e-book rights and I said a polite ‘No’ in that case.”

Mid-list crisis

Such comments remind that the author-publisher relationship is ultimately a commercial one, and this leads to the greatest challenge that writers face in working with publishers: Except for the best-selling authors, it can be very difficult to find a willing publisher. Digital communication and commerce is providing traditional publishers with a wider range of authors to choose from, while also increasing their competition from smaller, start-up publishing companies.

“I would say I was at the literary end of ‘mid-list’ but the mid-list has become bigger and bigger and bigger. I think what you have got now is the big publishers who are looking for the instant big hit – an ‘oven ready product’ as an agent once described it to me – and then you have a whole heap of smaller publishers at the other end who will maybe take a risk on something.”

In the traditional model, “If you were a reasonably good writer and if you got an agent then you could be pretty much sure that you would get a publishing deal. Then it changed. The big corporations took over, the old publishing houses were swallowed up and it became incredibly frustrating for writers because you were working, working and working, and you were reading that the mid-list is dead. It was really chilling because you thought, ‘What on earth can we do?’”

Literary agents can be enlisted to promote authors’ work to publishers. There are benefits and disadvantages to employing an agent, and like any profession there are successful and less successful agents to be found, as Catherine has experienced.

“Having an agent is absolutely no guarantee of finding a publisher these days. I have had about four or five agents in the past. I have done a lot of stage plays and radio plays and so I started off with an agent for drama and that was fine. And I had a very good agent for fiction, but after that it just became more and more apparent that the agent was not doing me a lot of good and in fact was hindering me in some ways. Nor was I bringing in much money for them.

“I have heard a few stories from younger writers, who are being told the kind of thing to write by an agent, so they are writing to spec for an agent who thinks they might be able to sell it. The writers spend two to three years or even more trying to find an agent, writing dozens of ‘query letters’ because it can be very hard to find an agent who will take you on. Then they spend two or three or more years trying to write to the requirements of an agent, or what the agent is telling them the industry wants. Then they are finding actually that the agent cannot sell what they have written, and in many cases, is asking them to write something else, something more commercial.

But when somebody tells you to go away and write something else, that might be up to another whole year of your writing life especially when you're doing other work to earn a living. This has certainly happened to me in the past. It is soul destroying and there must be a better way of building a career. Well now there is."

Agents also can help negotiate the exploitation of the author's IP, although Catherine feels agents do not always adequately address the legal implications of IP agreements.

"I think agents tend to focus on the money, but the IP constraints, particularly with non-compete clauses [which prohibit a writer from publishing other titles that could compete with the work under contract] can be disastrous. Unless they are from a good big agency with a legal department, they may not fully understand IP law. There are some horror stories coming from the US at the moment, although I get the sense that things are better in the UK.

"If I was ever lucky enough to have an offer for film rights or something like that, I would be consulting an IP lawyer. With the Society of Authors, a lot of what they are looking at in contracts is intellectual property implications. They would say themselves that quite often they will re-vet contracts that agents have looked at and sometimes the agents have missed points."

Currently, Catherine chooses to represent herself rather than employing an agent. Empowered by modern communications, her long experience of the market, and the support of a professional society, Catherine is able to 'self-agent':

"With books and stories, unless you are wanting to approach 'the Big Five' [major publishers Penguin Random House, Macmillan, HarperCollins, Hachette and Simon & Schuster] it is actually becoming easier, particularly with a track record, to approach publishers yourself. Also I am a Member of the Society of Authors so they vet contracts and so on; that is important and it would be quite hard to do it without the back-up of the Society."

Self-publishing: Going it alone

Catherine's do-it-yourself attitude has impelled her to apply an alternative, but increasingly popular, publishing strategy: She has embraced digital self-publishing in order to generate revenue from her back catalogue and her new unpublished works. While she continues to publish via the traditional publishing route, she uses self-publishing for work that cannot be commercially published, but which she would like to make available.

"Like a lot of mid-list writers time goes on and you think, 'I am getting older and I am sitting here with lots and lots and lots of work'. Quite often it is work that had been well edited – it is work which has received what a friend of mine calls 'the rave rejection', which is when [a publisher's] acquisitions editor says, 'Oh we love this but no, we could not carry marketing with us.'"

Catherine's solution is to disrupt the traditional role of publishers as sole gatekeepers of writing talent. Like many other writers, she is seizing the affordances of digital technology to offer her work via online publishing platforms and to self-promote through social media and other internet marketing tools:

"Along came Amazon with Kindle Direct Publishing. I think that was the point at which I, and quite a lot of other people that I know said, 'Well why not give it a go?' Because it cannot be as bad as what we are going through right now. We had nothing to lose. At the same time I had a novel called *The Curiosity Cabinet*: I had done a trilogy of radio plays and it was really well received; I developed it into a Scottish historical novel and that was shortlisted for the Dundee Book Prize, and it was published by Polygon. It was serialised in a magazine, and done as an audio book and so on, but then it went out of print after a year and they wouldn't reprint. So that was one of the first books that I thought, 'Well, I have faith in this and I am just going to do that myself as an e-book now.' The publisher was very obliging and gave me a rights reversion and that book has become my best selling e-book by far. It's still selling well, even now, and I plan to bring out a print-on-demand paperback edition this year."

Catherine currently uses Amazon to self-publish her work, but is gradually bringing out her books on various other platforms, via another distribution company called D2D.

"I'm slowly but surely moving to other platforms as well, although Amazon remains by far the best place for sales, for me. But I'm aware that might not always be the case. Amazon makes it so easy. You format the book, get yourself a cover, you upload it and there it is. I think it is a misapprehension to think that Amazon is a publisher. They are not – they are a distributor and for the US and the UK they give you 70% on anything over £1.99 in the UK. Once your book is uploaded into the Kindle store then it is available worldwide with more countries coming on stream all the time. I'm also planning to release two or three novels in paperback with Amazon's CreateSpace print-on-demand option later this year."

Having control over the pricing of her works is one advantage of self-publishing, Catherine finds. Her strategy is to keep prices under £5 and aim for higher sales volume:

"It depends on the length of the book. I was talking to my current publisher Saraband about this and they are trying to stick to reasonable prices for e-books as well. For a download people don't want to pay much more than £5. Even for myself, I do buy a lot of books – I'm probably buying and reading a book every week at the moment – but £5 is sort of the limit for e-books for me.

"Some people price them very, very cheaply and it does seem to be the mark of a beginner. *The Amber Heart*, which is quite a long book, is priced up a bit, but still under the \$5 or £5 mark. I also have a collection of short stories and I tend to put them out in inexpensive trios. I have just put some of my plays out there – not that they have any great shakes of sales, but occasionally people want to look at them.

“It is variable, but it certainly gives me an income. Some months are better than others. Some books sell better than others. That’s a good learning curve for me. Amazon pays on the nail every month into my bank account and very few publishers have ever done that. It is really nice. I think, ‘Oh, here comes more money.’”

Catherine also values the international reach afforded by Amazon, which provides authors with detailed sales data.

“You can see what is sold where and they give you all the information in a really readable form as well, which is quite nice. I have quite good sales in the US and I am always surprised that some months I will have more money coming from the US than I do from the UK. Amazon has countries coming online all the time. I do sell a few books in Canada and I would imagine that might grow because there is a real Scottish connection with Canada, and I think Australia. They have now got Kindle Australia so that is another good market.”

Catherine feels the self-publishing model is particularly useful for established writers like her, who already have presence in the literary field.

“As far as I am concerned it has been incredibly helpful. I had a track record, I had a big body of work, and I still have work that I can put out there. I have things that I have wanted to write and get out there and I was very impatient with sitting around waiting for agents and then publishers to make up their minds and I just was not prepared to sit about any longer. But I did have readers asking me about my books and I did know that the work I was putting out there was okay and I was interested in the business side of it.”

She feels young writers also can benefit from self-publishing, by using it to test the market, to build a portfolio of work and attract publishers while they wait to hear from agents, if they still want to go down that route.

“I do sometimes think they are stuck in an outdated model. I worry about young writers doing all these creative writing courses. Not that there is anything wrong with the courses. But I don’t think they always give enough business advice—although I believe this is changing for the better. ‘Write for love but publish for money’ is a very good motto. I often think they would be better to get on with the writing, amass a significant body of work, and then publish some of it if they want to. Even if it is only short stories. If they think it is good enough to be published, publish it – get that body of work behind them and then maybe 5-6-7 years later go and hunt for an agent if that’s what they decide they want to do. I’ve seen agents counselling against self-publishing but the reality is that if you are lucky enough to have a very successful e-book and then decide you want to go down the traditional route, for whatever reason, you’ll have offers. Then you have choices. You should always think about what’s best for yourself as a writer and this isn’t the same for everyone.”

Of course there are arguments against digital self-publishing. In this model, authors have no choice but to manage their own IP exploitation and promotion. Amazon offers tools that help authors market their uploaded titles, but there are pitfalls, Catherine warned.

“Amazon’s Kindle Countdown scheme has worked incredibly well in terms of sales and pushing them up for me, but only for some books. You can reduce the price of your book for up to seven days and still get the 70% royalty. But to take advantage of this, you have to have your book in Kindle Select, where you don’t have the book digitally available anywhere else. They don’t care about paperbacks – you can put it in paperback where you like – but with the digital version they are trying quite hard to keep people exclusive to Amazon, which isn’t always the best choice for you as the writer. You shouldn’t have all your eggs in one basket. Amazon is by far the biggest market – it is huge.

“But other markets are growing all the time, which is why I’m slowly but surely putting my books out on other platforms. I may keep one or two books in Select to take advantage of promotional offers, but that’s only for three months at a time, so you are not tying yourself up for years. Within that three-month period they also offer the option of listing your book for free for up to five days. Back at the beginning of e-books that worked quite well because although you didn’t get anything for the free days, if you had a few other books out there, you certainly got sales of those. Also it just increased your visibility. But I think that has become far less useful. Amazon also has introduced a new subscription service for e-books and there is some evidence that this isn’t so good for writers—but I also know writers in certain popular genres for whom it is very lucrative.

“Things are changing all the time and you really have to keep your eye on the ball! The complicated new EU VAT rules for digital downloads have pushed the prices of e-books up within the EU and made it impractical for writers to sell e-books to other EU countries from their own websites. So a move that was meant to force Amazon to pay more tax has ironically had the effect of pushing more writers to use Amazon and similar distributors, making the consumer pay more and hardly impacting Amazon at all.”

Some critics dislike Amazon’s dominance and control of the market, noting that without the quality filtering provided by traditional publishers, the market has flooded with inferior products and readers now find it difficult to find quality titles. However Catherine does not see this as an issue.

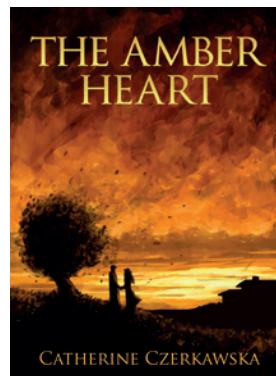
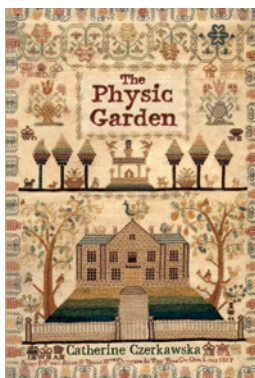
“I think problems arise in work being put online that is probably not ready to go out, but then on the other hand I don’t know if that is too bad a thing because that is what people do with video games, it is what people do with music and it is what people do in film. If something goes out that is a bit raw then a little bit later they can still go, ‘Oh god, I shouldn’t have done that then’ – and they can just unpublish it. You know, the sky doesn’t fall. I am quite laid back about all of that. I read a mixture of self-published work and traditionally published work and I don’t have any trouble finding what I want to read. Anyone who believes that the big publishers only publish quality should go into any big bookstore at Christmas time and wade through the celebrity bios and the acres of television tie-ins. I’ve no objection to them. People clearly love to buy them. But it seems a little hypocritical of the big publishers to try to label themselves as the sole custodians of culture.”

Enjoying a hybrid approach

In the current publishing landscape, featuring fewer opportunities for mid-list authors, Catherine chooses to navigate both traditional and self-publishing routes in order to balance the advantages and disadvantages of each. By taking control of her IP exploitation, she achieves more financial security and increased exposure of her creative work.

“The feeling that I get from some people in the United States now is that if people are very successful at self-publishing then actually they have the upper hand. There is this movement with quite a lot of people who are almost exclusively self-publishing. There are people who are earning a decent living and then they are saying, ‘Actually – do I really want to get a publisher? The more they learn about the business side of things, the more confident they feel.

“Maybe the situation over here is different because I do know quite a lot of people like myself who are doing a mixture. They call it the ‘hybrid writer’, and I think there will be more writers taking this approach. I am really enjoying being published at the moment, I am enjoying that process, and I’m actually working on a new novel for the publisher who took on *The Physic Garden*, but at the same time I wouldn’t stop the self-publishing process. There are plenty of things I want to write – pretty much desperate to write – that I am absolutely certain wouldn’t be accepted by traditional publishing, but at the same time I’m sure some of my readers will like. Why wouldn’t I carry on giving them what they want?”



A selection of Catherine’s e-books, featuring artwork provided by (left to right): Glasgow Museums, Alison Bell, and Claire MacLean

*The rights approach:
Securing and exploiting
all rights to the full*

Properties

- Books

Protection Tools

- Economic rights: copyright and ancillary rights
- Contracts
- Sub-licenses
- Licensing/extract permissions

Issues

- Contracting and negotiating
- Adaptation rights
- Translation rights and sub-licensing
- Licensing permissions for extracts
- Merchandise and trade marks
- Renegotiating digital rights and reversions

Canongate is a Scottish publishing house with offices in Edinburgh and London, and partners in New York and Melbourne. Established in 1973, the company has experienced periods of turbulence, particularly a near-collapse in 1994. However since it was bought by Publisher and Managing Director Jamie Byng, the company has become one of Britain's leading independent publishers, having been voted UK publisher of the year in 2003 and 2009. Among its successful titles is Yann Martel's *The Life of Pi*, which has sold over four million copies, won the 2002 Man Booker Prize and was released as a film directed by Ang Lee in 2012.

With 35 employees Canongate is a relatively large publisher, with sufficient resources to operate a distinct rights team for facilitating all transactions of authors' economic rights, including the primary rights in their books and ancillary rights to translations, adaptations, and so on. This case study considers the company's approach to rights management and its emphasis on pursuing the full spectrum of rights available for exploitation.

The rights approach

Kirsty Wilson, at the time of interview, Rights Executive at Canongate, explained the department's basic function:

"There are four of us and we deal with contracts as well as selling all forms of copyright. We sell translation rights mainly – that is our big money-maker, translation and US and Canadian [publishing] rights. We also handle all kind of permission requests, any artwork requests. We draft any contracts, dealing with head contracts between us and the author or the agent and we do sub-license contracts. Whenever we do a deal there has to be a paper agreement as well.

"It always surprises me that there does not seem to be another big rights department in Scottish publishing – it seems like it is really just us. But I think that Canongate have always put quite a lot into their rights side because they make a fair bit of money from it."

The publishing industry has been built on the exploitation of authors' economic rights, and thus its definition of IP is well established. "To me it just means copyrights, so original content, which the author/creator owns," Kirsty said. "If someone else wants to use it we can license it out and then there should be compensation in some way, or there should be a credit."

In the traditional publishing model, a publisher licenses the economic rights from the author for a specific period or until the published work goes out of print, during which time the company works to exploit the IP on behalf of the author and for company gain. Moral rights, to be credited as the creator of the work and its integrity, always remain (by law) with the author and are not transacted by publishers or agents (unless a request is made that they are expressly waived). In the current digital era, most 'traditional' publishers also deal in e-books and thus their licensing of authors' rights typically includes the digital rights that permit such exploitation. While new models of self-publishing remove the publisher's role and enable authors to take greater control of their rights, as addressed in the case study on writer Catherine Czerkawska, Canongate works in the traditional model and seeks to exploit as many of the author's rights as is feasible.

Contracting and negotiating

Contracts which clarify the position of each party in the rights relationship are therefore essential for publishers. Canongate's typical starting point is a template agreement, also known as a boilerplate, or head contract, which may be supplied by the publisher or the agent representing the author. The parties negotiate the contract's specific terms, in particular the various rights to be licensed and the remuneration percentages. For UK publishers, these concern rights to publish, or to sub-license to other publishers and producers, the English-language, translated, audio and large-print versions of the IP in specific territories.

“The US is a really big market for us, and Canada – any English-language [market] really,” Kirsty explained. “The splits vary, depending on whether we represent an author directly, where there is no agent involved, and the format of the IP.”

At the contract stage, it is beneficial for the publisher to obtain as many rights as possible in as many territories as possible, but this requires leveraging with investment in the IP’s development and exploitation, a risk that must be balanced against potential gain. At the same time, the author or agent must decide how much of the rights and potential revenue to split with the publisher; those authors with greater reputation tend to retain higher percentages. The resulting contract agreement thus reflects the leverage and desires of each party in the negotiation.

Adaptation rights

After agreeing the shares of the primary economic rights related to the book IP, negotiations may extend to the author’s ancillary rights, such as for adaptations in theatre, TV or film. Publishers often find it difficult to obtain film rights when authors or their agents believe they can negotiate more lucrative deals with film production companies. Ultimately, the author will want to ensure the adaptation rights are handled by the person who can best option and sell these rights.

“You find with film that we very, very rarely have film rights to work with. Usually the agent will keep them, or the author if he’s not represented by an agent. With Michel Faber – there is a film coming out next year of *Under the Skin* – we had the film rights to that which was really great for us. But usually the agent has them, so even though a film is really good for the book we don’t actually get money for the film.”

Translation rights and sub-licensing

Most UK publishers who produce English language books are likely to sub-license translation rights to other international publishers. “Head contracts are just between Canongate and the author/agent, and then sub-license contracts are between Canongate and for instance a foreign publisher – so we sell them German rights so that they can publish a German edition of the book, and then we would draft a contract and we would call it a sub-license contract” Kirsty explained. Canongate also buys sub-licensed rights from other publishers in Europe and the US, in order to produce books for the UK market.

When Canongate sub-licenses rights to other publishers, it may be asked to include the rights to the original book’s artwork and typography. These elements of the content are protected by their own copyright and thus licensing their usage provides additional revenue. If Canongate owns the artwork it keeps the license income, or if the original art was licensed from a designer the income is shared, Kirsty said.

“If there is another designer of the artwork then he would get 50% of the fee that we agree. If it is, say, our designer in-house, if she has designed the cover but there are some illustrations that she has got from [stock photo supplier] Getty or whatever, then we would have to clear permission for the illustrations but we would take the whole fee because she is an in-house designer.

“For external designers it is just a bonus: ‘Oh wow, you have done a German deal and you have sold my artwork in Germany?’ It is additional revenue that they were maybe not expecting. The thing is we can never guarantee it because we don’t know where we are going to sell the book.”

Licensing permissions for extracts

In addition to dealing with contracts and licenses for IP, Kirsty and her colleagues also issue permissions to other publishers or authors who wish to use extracts of Canongate book IP. If an extract is used for reviewing, the practice is covered in the UK by fair dealing legislation (see Hopscotch Films case study) and requires only the display of a credit for the author or book. However extracts for story compilations, for example, require permission and a fee for use. Such fees provide a further source of revenue for Canongate, particularly when they stem from content in best-selling titles.

“When someone comes to you and asks if they can use an extract in a book or whatever then you can charge for that. I think sometimes a lot of other publishers say, ‘Okay, you can do this as long as you credit it.’ But you know, if Random House are asking you then you should get a fee.

“A lot of permission requests we do for free just because someone is not making any money out of it. But if you have got a book like *The Life of Pi*, we made a lot of money on that, and permissions can go from £50 to £500 if there is a large enough print run and they want to use big enough extracts, so it really varies.”

While copyright law includes a facility for permissions, as with all forms of IP protection, it prevents others from using content without asking. However policing for infringements of Canongate IP is too costly to be worthwhile, Kirsty said.

“We don’t actively look for anyone using it. If we did find out retrospectively then we can just make up a really big fee because they should have come to us first, that has happened before. But you know most people are actually so careful with it and cautious that they have come to us for tiny things which they don’t even need to ask permission for.”

Merchandise and trade marks

A type of ancillary right with which Canongate typically does not involve itself is the licensing of merchandise and trade marks. Authors of successful IP, whether it is a book or a film, play, or computer game, may be offered opportunities to exploit characters or titles through manufacturing of merchandise, in which case they may move to trademarking the IP in order to protect it as a brand. In literature, a classic example is JK Rowling's *Harry Potter* series of books, and the additional revenue streams developed in films, toys and so on. At Canongate, these rights are left for the author or agent to negotiate with manufacturers and distributors, as Kirsty explained:

"We do have this book called *Simon's Cat*, it is cartoons, and they produce quite a lot of merchandising and branded stuff, but to be honest we don't really have anything to do with that, they just do that separately. I think they like to keep that separate and they really just use us for the book side. With different publishers it might work differently.

"If we sell the translation rights to other publishers, then these international publishers get in touch with the branding company to license the merchandise and stuff, but it doesn't come through us. Although, we also do the *Peanuts* books and we are publishing them this year, and so I am sure there will be something about that."

Renegotiating digital rights and reversions

With the relatively recent introduction of e-books, the publishing industry has undergone substantial change, such as introducing contracts which address the exploitation of digital rights in new IP. However, digital, or e-rights often were not included in the terms for older IP, meaning Canongate's rights team must renegotiate contracts with authors and agents, Kirsty explained:

"It just kind of kicked off really about five years ago. Suddenly we were trying to clear e-rights in every single book in our catalogue and it is difficult because you don't always know who the copyright holder is, and it is hard to get in touch with people and clear it with them. There was a huge big backlog, because the [author] agencies have got so many requests. That was hard but most people were receptive and we cleared the e-rights.

"I think for some titles we took the decision just to put an e-book out there when we couldn't contact the copyright holder and then further down the line suddenly we will come across them and they will have changed address or whatever and we will get in touch. So we have just had to either remove the edition, or most people are happy just to have that extra visibility, and have royalties coming in, albeit very small."

The industry is debating the point at which the e-book license period between an author and publisher ends. With printed books, rights revert to authors after a book goes out of print, but digital books can continue to sell, albeit at a trickle, through online distributors, thus preventing the rights from reverting to the authors. Currently, it is expected that a publisher must produce a reprint of the physical copy in order to continue licensing the e-book rights beyond the originally contracted period. On occasion, some authors may not want the license to continue and Canongate may opt to not reprint in order to preserve good relations with the authors.

“We have the option usually in most contacts to reprint and if we get a new edition on the market then our edition can stay. Sometimes authors don’t want that and say, ‘Look I don’t want you to publish the book anymore,’ for whatever reason. You have to weigh it up – I think it has happened in the past where the author has been very insistent – ‘I want these rights back’ – and you don’t want to have a really bad relationship with an author if they don’t want you to sell the book, but it is on a case-by-case basis.”

This study illustrates the range of rights to be negotiated and exploited in the publishing industry. While some forms of rights may provide insignificant revenue if pursued individually, a strategy like Canongate’s, to secure and exploit as many rights as possible, can contribute substantially to a company’s sustainability. Of course companies with limited resources must prioritise their activities. Making full use of publishing rights may require using sub-agents to sell books in other markets, or selling translation rights to other publishers – options which publishers should consider, Kirsty believes:

“I think that some publishers are so small and they are trying to do everything and I think rights can sometimes be a bit forgotten. But there are lots of areas that they can try to exploit, like the large printed and audio formats, and artwork, license permissions. But you can get income that helps you to cover things like advances to authors so it is worthwhile.”



Freight Books

Negotiating rights, brand building and trademarking



Properties

- Books and e-books
- Brand identity

Protection Tools

- Copyright
- Contracts

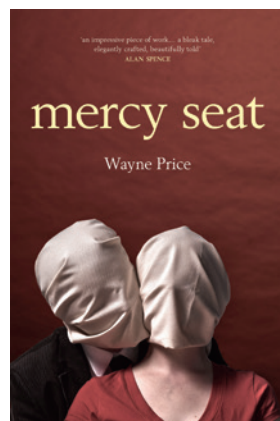
Issues

- Rights Negotiations
 - Author fees and production costs
 - Agent interventions
 - Leverage
 - Negotiating other ancillary rights
- Brand building and trademarking

“I have effectively paid an extra £1,000 - £1,200 for the theatrical rights.... It is a total punt, and that is why publishing isn't for people who need to feed their kids, because it is gambling, it really is.”

The origin of Freight Books is slightly unusual: It was established in 2011 to take over the book publishing begun by its sister company, Freight Design. Its nine employees work in both companies, applying the design side's focus on content and image to the challenges of publishing. Among the roles of Director Adrian Searle is securing the right deal for the right books which will build Freight's reputation.

In the Canongate case study we looked at the range of rights available and how a publishing house might maximise these to the full. In this study, we look in more detail at the negotiation process. We also explore how Freight exploits rights in keeping with its company brand, and works to protect this unique identity.



Freight Books works with a mixed business model of traditional and e-book publishing, with the latter accounting for about 25% of turnover. Fiction is its focus, with the 'high-risk, high-reward' of this genre balanced by non-fiction such as humour and local interest, Adrian said.

"Having been through a Publishing Scotland management programme* we realised that it is quite hard to make money in fiction – it is a bit like gambling, in terms of you might win big once in a while but it is very once in a while. And you know if you win, you win really big but the rest of the time you are kind of bumping along."

* For details of training provided by Publishing Scotland, visit: www.publishingscotland.org/training/training-courses/

Rights negotiation: Balancing costs, agents and leverage

For any publishing company, the ability to acquire authors' rights at realistic prices is critical to success. Adrian begins his negotiations with an idea of the optimum outcome, but he also knows that factors such as author fees, production costs, agents' interventions, and other resources that each participant can leverage into the deal will affect his ability to win and exploit the rights on Freight's terms.

Author fees and production costs

Publishing a book requires the publisher to invest production costs, such as editorial and design work, and manufacturing costs. These are additional to the fee which must be paid to the author for his rights. Given these investments, and the inherent unknowability of the book's eventual success within the market, it is not easy for Adrian to gauge the fairest price for the publishing rights. He also prefers to factor in the long-term potential success of a writer, and while he might initially pay too much for the IP, he believes that investing over time returns benefits such as increased profile and profits further down the line.

"It is the same with all publishing," he said. "I think there is a constant battle in terms of not overpaying for stuff. I have overpaid for something recently which has stuck in my craw a bit. It is needing a lot of work and a lot of investment, editorially, and ultimately it is not that commercial. But I think it has got potential long-term.

"I paid an advance for the book and before any production there is an editorial cost on that, and it needs it in terms of editing. Now I have overpaid for that, in reality the advance should really have been less. At the same time it does have potential, it is definitely worth supporting and it definitely deserves publication. But how commercial it is, I really need to be convinced.

"I think I would say that we are very different to most publishers in that we are very much playing the long game. I want to work with sustainable writers that in five or ten years' time are really coming into their own. Some of those

will fall away and you have to gather together quite a big group of people and out of those you would hope that one or two would maybe become major players, long-term.”

Agent interventions

Authors can choose to handle their own rights negotiations, but frequently they employ agents to act on their behalf. Agents’ expertise of the sector helps authors to find willing publishers and negotiate contracts, creating more time for authors to write. However, agents must be paid, and often they expect a percentage of the fee that publishers pay to writers. Publishers do not have the luxury of choosing to work with an agent; to acquire the rights of an author represented by an agent, they must negotiate through this intermediary, complicating Adrian’s goal of achieving a fair price for the ideal rights package.

“The books generally will either come direct from the author or they will come via an agent. In our dream world our very best authors are all self-agented because we get much better deals that way. If it comes direct from an author generally you will take worldwide rights, which is what we would much prefer because you are taking ownership of the IP jointly with the author.

“For me the negative thing is where agents are retaining those rights. The agent would say ‘Well, you get what you pay for. You are paying less for a book and it is down to me to negotiate and try to get a better deal.’ Some agents are excellent and we have got really good relationships with a lot of them. But on the other hand I think certain agents are very self-serving and don’t really have the author’s long-term benefit in mind. They have got their own short-term need to put food on the table, which is a wee bit frustrating.”

Leverage

Beyond the basic UK publishing rights for a book, a publisher might want to acquire rights for international publishing or distribution. Leveraging these often requires demonstrating to the author or agent that the publisher has sufficient reputation and resources, such as distribution channels, to exploit the rights transacted. Freight Books currently uses BookSource to distribute in the UK, and it has secured international partners to distribute its books abroad.

“If there is an agent involved you will never get worldwide rights unless you pay an absolute premium for it, and we cannot afford to pay that premium. The starting point would be UK, and then a very small level up would be UK and Commonwealth, which really means Australia, New Zealand and South Africa. Often with UK and Commonwealth, agents will exclude Canada, although I would want Canada to be included. What I generally try to do, because we have got a distributor in the States now, is that I try to buy English worldwide rights, which is cheaper than buying worldwide. At least it is giving me an extra bang for my buck.

“With one of the earliest books we bought, we only got UK and Commonwealth rights from the author because she is an American and I think she holds out the dream of selling the rights there herself – she is kind of a self-agent. I offered her distribution in the States and she declined it politely. I

think she is absolutely crazy because we are getting really wide distribution in the States and could potentially sell a lot of books. But it is absolutely her call and it may be that she is hoping that if she has a bigger hit then the value will increase.”

Negotiating for ancillary rights

Publishers often seek to secure secondary, or ancillary, rights, such as for book translations and adaptations, but authors and their agents may withhold them from deals in order to seek other means of exploiting them. “There is the whole cornucopia of subsidiary rights and again if you are dealing with the author direct, the chances are you can just gather them all together, bundle them, and it is about squeezing the value out of every book,” Adrian said. “Sometimes an agent will hold back rights and not do anything with them, but for instance Jenny Brown, based in Edinburgh, is very good and she has got a whole machine in terms of exploiting international rights.”

Where Freight owns the primary publishing rights but others exploit the ancillary rights, if they do so effectively Freight may yet see increased revenue, Adrian explained.

“There is a benefit in a book going to translation, even if we don’t have the translation rights, in that quite often – particularly in Europe in terms of whether it is France, Germany or Italy – you will quite often sell English-language copies off the back of the marketing of the translation. People will want to read it in the English version. *The Hairdresser of Harare* is a book that we bought English rights to; it had been published in South Africa and Zimbabwe, set in Zimbabwe, written by a Zimbabwean, Tendai Huchu, who now lives in Edinburgh. His Zimbabwean publisher had done translations for France, Germany and I think Italy, and we definitely had a lot of sales from Germany off the back of the marketing of the German translation.”

Ancillary rights negotiations may take place between publishers, such as the above example in which Freight Books sub-let the English translation rights.

“With the *Hairdresser of Harare* book in English, I think we bought UK and Australia, New Zealand and we don’t have American rights – that was from another publisher. *Naw Much of a Talker* was a translation from Swiss vernacular into Glaswegian, because it was inspired by six months a Swiss writer spent in Glasgow, and it is about pub culture and gobshites basically. That was a case of a straight rights deal – I think it is possibly English worldwide for that. We effectively bought the rights to translate it into Glaswegian, but they have retained those rights in case anybody wants to do a straight translation.”

The business of translating texts is expensive and increases the costs that must be factored into the rights negotiations, Adrian explained.

“We are doing one big one next year which is 160,000 words – *Outside Verdun*, a First World War novel by a forgotten German writer, Arnold Zweig. He is not that forgotten, but he is not wildly popular and it has never been

published in the UK. In that instance we are getting the cost of translation paid by a grant from the Goethe Institute.”

News of Freight’s translation of the book helped Adrian leverage further translation rights in other territories:

“We initially bought UK and Commonwealth rights, and then it became apparent that we were doing the new translation and nobody in their right mind was then going to buy it in the States and translate it themselves. So we approached the publisher and said, ‘Listen, nobody else is going to translate this now and we are going to be doing the definitive translation – give us English worldwide. For goodness sake, we have got good distribution sites in Australia and New Zealand.’ I was fully expecting them to say, ‘Okay but give us some money’, but we got it for nothing, so that was a good story.”

Similarly, Adrian sometimes tries to obtain a book’s adaption rights for theatre or film, if the content is considered suitable for the stage or screen.

“We have just bought two books from the same author and I have effectively paid an extra £1,000 - £1,200 for the theatrical rights, because I think that the second book, not the first one, definitely lends itself to film in a major way. It is a total punt, and that is why publishing isn’t for people who need to feed their kids, because it is gambling, it really is.”

As outlined in the film sector cases, adaptation rights are often called options, because they give purchasers the right to develop book IP into script form within a specified period. If the development does not occur during that time then the rights revert and the author (or a subsequent rights purchaser) must repay the option fee; however if the script is progressed toward film production, the author often expects to receive additional option fees.

This latter situation is rare, Adrian said. “With the vast majority of books, they will only ever go to first option; it will not go any further than that. But at the same time we would get our money back on that if the script is not developed, and then it would only be if it went into development further that we would take more.”

Typical splits on the rights percentages for adaptations do not favour publishers, Adrian said, and they can be inflated by an agent’s intervention:

“it is kind of annoying because again the agent kind of says, ‘Well, I would not settle for anything less than 20% to the publisher, 80% to the author,’ and again you are then struggling to make any money. You ask, ‘What is your motivation for actually selling these rights? And they say, ‘They might sell at some time or whatever’. Agents have a terrible habit of sounding incredulous, as if they are fighting for the rights of the author, but are they hell.”

Nevertheless, Adrian must negotiate within these conditions to secure as many rights as possible at the right price. An additional, significant factor to Freight’s business sustainability is the way it exploits rights in keeping with its company brand, and works to protect this unique identity.

As a publisher concerned with design, Freight aims to stimulate consumers to read its books by projecting a reliable and credible brand, Adrian said.

“What we have tried is to do these things better than everybody else and really produce high quality stuff. The slightly cheesy line that we use is ‘great stories, great ideas, great books’ – it is that challenge of making sure that everything that we do has got integrity.”

The company’s focus on the look and content of its products is instrumental to this strategy. Freight has won awards for the design of several books and for *Gutter*, its literary magazine. Such attention drives sales and helps support Freight’s position in the publishing market. In addition, *Gutter*, which Freight created in 2009, provides a platform for writers to showcase their short stories while enabling Freight Books to identify talent and build its profile as a publisher, Adrian said.

“A couple of people said not to keep *Gutter* going too long because literary magazines outlive their sell-by date and become very tired. However, I do think that it is a very important resource for us and it was our way in. It lent us a huge amount of credibility and it is a great way of spotting talent and identifying good people.”

Adrian has himself authored a number of Freight’s titles, often collaborating with artists or photographers to enhance reader appeal.

“*Look Up Glasgow* is a coffee table book of the absolutely amazing architectural heritage in Glasgow, principally the sculpture and ornaments that adorn many a building. What we also did is we included 11 poems from six poets – it is a way of kind of sneaking in highbrow culture via low-brow mechanisms – and that has done really well. We have sold out, or we are very close to selling out from a reasonable print run. The book’s recommended retail price is £25 so it has done pretty well, and it is very much a Christmas book. It is a hardback too, which means that the production costs were high on it, but at the same time also the interest has been very high.

“It is all about brand. A successful book becomes a brand of sorts and clearly the brand is all about value. That is all it is – it is just a package to hold the value in – and the higher the profile, the higher the value. I mean you can have a book that has not been very successful but has an incredible profile. Such a thing can exist, that there is a lot of chatter about – one has to be careful because people smell phoniness from a mile away – but the real skill is creating a bit of hype around something. It has got to be tangible and based on something, but that attracts production deals in a major way.

Adrian’s focus on the authentic presentation and marketing of Freight books thus plays a central role in building the company’s reputation and its ability to secure IP rights for exploitation. In order to protect such reputation, companies often seek to trade mark characteristic elements. However for a small publishing company with few resources to pursue infringement activity, Adrian prefers the strategy of being the first company to take new genres to market.

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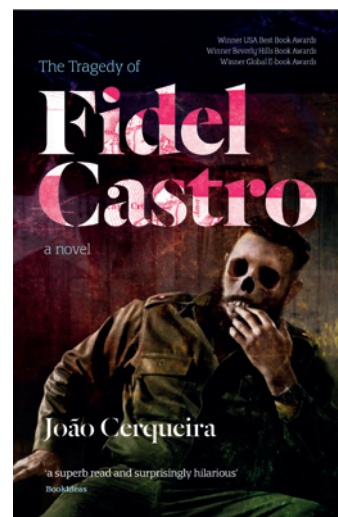
“The principal reason for trademarking something is to create an imaginary stick to beat people. But anybody who really knows what they are talking about knows that unless you are multi-millionaires, it is very, very hard. It is more about brand and you protect it by bringing the authenticity.”

“The principal reason for trademarking something is to create an imaginary stick to beat people. But anybody who really knows what they are talking about knows that unless you are multi-millionaires, it is very, very hard. It is more about brand and you protect it by bringing the authenticity.

“The intention is that with *Look Up Glasgow*, ‘Look Up’ becomes a brand. So we are doing *Look Up London* and *Look Up Edinburgh* next year. We sought advice on trade marks, and they basically said that a trade mark does not actually lend you a huge amount of protection. It is easy to register a mark, which is a combination of your name and design, so that somebody could not create a book called *Look Up Birmingham*, and use the same typeface. At the moment somebody could do that because we are unprotected, however, the sums of money we are talking about are not great.

“But a *Look Up London* book could potentially make us a lot of money. For us though, being first to market is in many ways more important than protection because ultimately then nobody would be as cynical to copy us— and if they did, okay you may not have much protection, but people would know that it was completely phony.”

Thus the cost of trademarking and pursuing infringements is another option which Adrian must balance against potential gain. “It is a resource in terms of it would be great to tie everything up in lovely ribbons of IP protection but you need pots of gold to do it. Our strategy is focusing on brand building and using that as protection to some degree. It does leave us exposed to a point, but again it is risk versus reward.”



Digital publishing, rights management and discoverability

Properties

- Books
- E-books
- Apps

Protection Tools

- Copyright
- Contracts
- DRM

Issues

- The rise of digital and IP
- Expanding digital publishing
- Copyright management in digital publishing
- Increasing discoverability

Saraband is a small independent publishing company based in Glasgow which publishes non-fiction and fiction for adults, in print and digitally as e-books, audiobooks and sometimes other formats. Established by Managing Director Sara Hunt in the USA in 1994 and initially specialising in illustrated non-fiction and reference, the company relocated to Scotland in 2000. Its development has coincided with significant shifts in the publishing industry brought on by various factors including the digital revolution. Now known as an innovative adopter of digital technologies, Saraband's use of these to exploit literary IP is the subject of this case study.

The rise of digital and IP in publishing

The changes in publishing since the advent of digital technologies are now well-documented: from books and readers to e-books and e-readers, from multiple volumes to multi-media CD-ROMs and apps, from libraries and bookstores to online libraries and retailers. Consequently, publishers are speaking less of the author's work as simply a book, but as intellectual property capable of being creatively applied and commercially exploited in a myriad of methods, as Sara observed:

"I think that the term 'intellectual property' is much more used than five years ago for instance, where people just used to think of a book as either

hardback or paperback, but basically it is a physical book. Whereas now it could involve any kind of incarnation and it might not – it could be just straightforwardly adding a digitised version of the same thing as an e-book, but it could also be presented in lots of different ways. We, for instance, do audio books as well as these completely different things. So I hear a lot of people talking about IP now in a way that you certainly didn't hear 10 years ago and perhaps not very much five years ago. I think it is a term that is coming in."

The role of the publisher – to invest, promote and exploit copyright on the author's behalf, while generating a share in the profits for itself – has not changed, but the form of copyright has, creating potential for broader applications and therefore wider exploitation of the IP.

"IP is very fundamental to our business because the intellectual property that is concerned with a book or a book-like product – usually it is the actual written text – is the copyright of the author. As the publisher we are there to exploit that copyright, to promote it on behalf of the author who owns the copyright. On occasion we do other types of things, which are not primarily text: For example, we might do a highly illustrated book or an app where the IP is contained in something less quickly described than simply having written the text. But, in all cases, it is pretty fundamental to what we do and we will protect it on behalf of the author or spread it as widely as possible depending on what the author is looking to do."

Expanding digital publishing

Saraband's various uses of IP, particularly in digital formats, have contributed to its reputation as a forward-thinking publisher. In 2012 the company won the Saltire Society's inaugural Scottish Publisher of the Year Award and was selected to represent Scotland's creative industries at the Scotland House showcase during the London Olympics. In 2014 its digital app, *Bookspotting*, created in tandem with Publishing Scotland and Spot Specific/Design is Central, was shortlisted for a FutureBook Innovation Award for the category "Best use of digital in a marketing campaign".

Such recognition is based on the company's strategy to move quickly into publishing e-books and other opportunities – even if still experimental – being opened by new technologies, Sara said.

"We have done different things: We did an app very early, although we kind of put it out to a developer on a split basis; we did a lot of digital marketing early; we did trailer videos and a lot of social media before it was very common to do that; and we did enhanced e-books with audio interviews, video and so on."

Saraband has been particularly active in the area of adapting book IP for digital mobile phone applications. Working with Glasgow-based developer Spot Specific Ltd., Saraband has created three browser-based apps related to its titles:

- *Wild Harvest*, a foraging app, helps users identify plants, trees, fungi, and seaweed according to users' locations as tracked by the global positioning technology in their smartphones. The app is based in part on the content of *A Handbook of Scotland's Wild Harvests*, edited by Fi Martynoga.
- *Pandacademy* is an app based on *Panda: Back from the Brink*, a book of photography by Zhou Mengqi about the conservation of pandas in their natural habitat in China. The app features photos, quizzes, facts and a Mandarin tutorial.
- In the case of the *Robert Burns Night* app, the production of a book, *Burns Night: A Freestyle Guide*, came after the app proved popular with Burns Night celebrants around the world. The app offers an autocue for reciting Burns' poetry, haggis recipes, traditional music including *Auld Lang Syne*, and a compass pointing to Burns' birthplace. Further features are included in the app that could not be created in book form, including "Flyte Assistant", a guide to memorable Burns phrases, and audio including "iPipes" and pronunciation features.

In addition to raising interest in its books, Saraband's development of mobile apps may one day provide additional revenue, if the company moves toward selling advertising or advertorial space within the content, Sara said.

"I think that that kind of thing will catch on in the way that specialist, targeted advertising goes into trade magazines and so on. But at the moment it is not happening. All I see at the moment is that all of the digital agencies want to only sell or buy space on behalf of their clients for things with enormous numbers of downloads – like *Angry Birds*, or utility apps – a bank, National Rail or something like that, where you have got hundreds of thousands or preferably millions of downloads (or hits, if it is on a website).

"At the moment, that market isn't there unless you can manage to find people who are willing to give it a try. I have been looking to try to do more of this because the market for paid apps has declined dramatically since the early days when they were something of a novelty. That means app development has to be financed in other ways, such as advertising and sponsorship."

Enhancing e-book IP with related material, to be sold as an alternative digital book, is another development that Saraband has trialled, although enhanced e-books have not proved to attract higher prices than normal e-books, and in itself the format does not appear to attract readers, Sara said.

"They have never really taken off. In our case, the first one we did was a novel and it was based on a true story set in World War II. We interviewed the old man on whose experiences the novel was based for a trailer video, and then we thought, 'Let's try making a second version of the e-book including the audio and video we've already created.' So we had a standard version and an enhanced one. But you cannot basically sell one for more money than the other."

Copyright management in digital publishing

As the product formats of publishing have evolved with technology, so have changes in the management of copyrights. The publishing industry played an integral role in the early development of copyright law and thus has always operated within a strong legal framework where economic rights transactions occur between authors and publishers. However, digital advancements in the way creative content is purchased and consumed have naturally led to developments in the clauses included in authors' IP contracts. Initially, larger publishers in particular grappled with how best to secure rights for the unknown digital future, at times using so-called 'future-proofing' clauses. Nowadays, publishers have settled on a standard practice of including basic digital rights in contracts, but Sara notes such agreements are still "a moveable feast".

"We always start with the same standard contract and then some authors will want to vary different clauses in that agreement. Essentially it will give the publisher the right to publish their book for a particular period of time, which would revert to the author if it goes out of print or under certain other conditions, and it also details the rights and responsibilities of the author and the publisher – so it is a fairly straightforward document. There was a period of time when some of the larger publishers started inventing clauses mentioning 'anything related to this content in all forms', 'universe rights in all forms known now and yet to be invented' and so on – and that kind of thing is all just a bit silly but reflects publishers trying to come to grips with changes in the industry.

"I remember being asked to sign up to one contract with a large US publisher granting 'rights forever in all forms yet to be invented' or something akin to this. That was when CD-ROMs were first coming in. I particularly remember wrangling for ages with this contract department: Their senior management insisted on the use of such clauses, but I couldn't sign up to it because the book included copyright of a photographer from whom we only had restricted rights relating to the book itself. It has been quite messy for quite a while.

"It is still a fairly moveable feast and this area is dominated by the actions of the biggest players. As a rule I think people are much more aware that they need to address digital rights and need to address different kinds of circumstances and so on than used to be the case."

Due to the variety of ways that e-published content can be manipulated, the challenge of managing author copyright continues after contracts have been signed and the IP has been published; at the point of sale, authors and publishers can apply various Digital Rights Management technologies, or DRM, to protect e-book data once it is in the hands of consumers. Authors do not universally welcome the application of such tools, which prevent manipulations such as copying, sharing, altering, printing, or merely viewing the text again after initial reading. Those authors who feel DRMs inhibit access to the products may prefer for their e-books to be sold 'DRM-free'.

Authors who do desire the post-purchase protection may specify that their titles are sold with full DRM, or with digital watermarks or other features that prevent manipulation.

While some e-book distributors do not give authors this choice, Saraband's website retail system does.

"We take the view that it should be up to the author. We do have a couple of e-books that are DRM-free. We have a choice between DRM-free, full DRM, and social DRM – like a watermark. Some people make a strong case for DRM-free: You want loads of people reading your book and a proportion of them will do so for free by pirating it, or it has always been the case that people can go to the library or whatever, but you want them to talk about your book and make it more widely known about.

"That is one argument and of course the other is, 'Why should people get my book for nothing?' On occasion I am asked to guide the author, 'What do I think?' I will not be too loaded about it because I concede that there is a very good argument both ways and I think the watermarking solution is a good one.

"At the end of the day it is a real problem to the big, big authors in that their books are pirated so readily anyway. For the more below-the-radar author, whom pirates would not necessarily find to target, piracy is less common, but of course these are the authors who most need every penny of the income. I think these are quite well rehearsed arguments by now."

Another form of IP typically managed through contracts between authors and publishers are adaptation rights. As explored in the Canongate and Freight Books case studies, if a publisher can negotiate adaptation rights for newspaper, TV, radio, film or theatre, the exploitation of these can provide further revenue to both the author and publisher. However, it is worth noting that the changing business models and economics of these creative sectors can impact on the revenue available from adaptation rights. While digital technologies have helped media producers and channels proliferate, creating more potential buyers of rights, they are typically more lean organisations which offer less remuneration, as Sara explained:

"For example, in newspapers, where once I think you would sell a serialisation for a reasonable sum of money – and you still would, if you had, for example, a politician's diary full of all sorts of salacious information – but I think most publishers are now dealing with more impoverished newspapers where they will expect you to provide that content and their part of the bargain is not always to pay for it, but to provide an extra audience for it. So in a lot of those cases money does not change hands nowadays."

Increasing discoverability

Of course, in addition to affecting the nature of publishers' output, the advance of digital technology also has affected the way that publishers do business. Strategies which used to be known as the 'publicity' or 'marketing' of books are now frequently labelled 'discoverability', or making products discoverable by potential consumers. Sara explained the typical range of activity:

- 'offline promotion' by others – at book festivals, booksellers, book clubs and so on, as well as online reviews on reader sites and book blogs: "People making a noise about a book, posting reviews etc., and you add together more buzz about it cumulatively from all of the activity that you have had."
- direct email campaigns – "There is nothing much that any publicity department can do that will hold a candle to Amazon sending emails to people's in-boxes – it is just so much all about Amazon in our market. I know Kobo is quite strong in Canada and there are other things in the US but at the moment it is almost a one-game-in-town thing here."
- social media – "We use the usual social media channels – Twitter, Facebook, YouTube etc., and target big influencers in the fields relevant to the particular book."

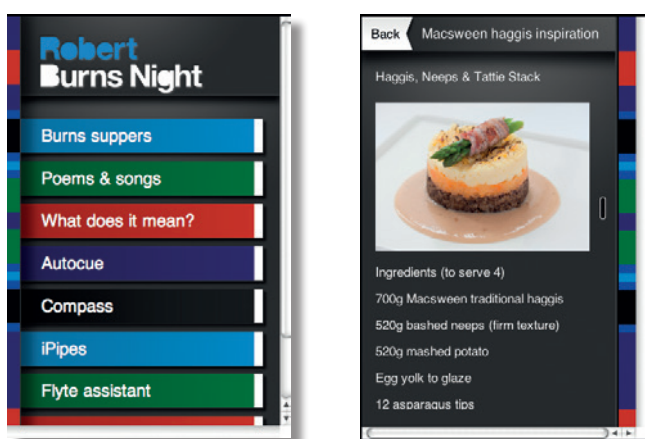
Saraband worked in 2014 to exert more influence on the discoverability of its titles and other publishers' Scottish-interest books by developing *Bookspotting*, a free digital app which suggests books related to specific locations, themes, characters and dates relevant to Scotland. Developed with funding from NESTA and Creative Scotland, *Bookspotting* draws from a database of more than 3500 Scottish titles to match books, and the nearest booksellers, to users' current places, as reported by the geo-location function on their smartphones. The app was named one of *The List's* 'Best apps for booklovers' and attracted the FutureBook Innovation award nomination noted above.

Previous to the digital revolution, a company's approach to pricing its products also would have formed a critical part of its business strategy. This of course is still the case, but it's more complicated in the digital publishing landscape. As a small player in a relatively new market, Saraband draws on industry intelligence provided by Faber Factory, its e-book distribution partner. Supporting an alliance of independent publishers, Faber pools members' knowledge in order to help them operate competitively. Yet Amazon is the dominant figure, with a market share that enables it to control prices to a large extent, Sara explained.

"I just follow the industry guidance. Like a lot of Scottish indies, we are with Faber Factory. They have a lot of data to draw on in terms of price recommendations, but in a sense the price of an e-book is almost irrelevant compared with the quantity because it is all about discoverability – we could sell thousands on a day of a book that has got a Kindle Daily Deal and then that will continue to sell quite well for a little while after. But then maybe two or three months later you may be selling only one or two a week of that

same book, whether it is 99p, £4.99, £6.99. I would always advise any author to not get too hung up on the price alone, because it is the quantity and discoverability that are more important. Although, of course, e-books quickly became established as being cheaper than the list price of a physical book – even if there’s sometimes little difference when shopping online.”

As this case study has shown, publishing companies such as Saraband are creatively adapting digital advancements, such as exploring the application of author IP beyond the basic e-book, collaborating across sectors to produce apps and enhanced digital content, and sharpening business practices with marketing and rights management tools. As the digital revolution continues to unfold, so too do the blueprints for building successful publishing business.



Legal observations

It was said that in 18th-century Venice, the finest musical performances were performed by a young priest named Padre Antonio Vivaldi. Vivaldi's secret was that at each recital, hidden from the audience behind a screen, worked a talented orchestra of orphaned young girls who had varying physical disabilities and illnesses, whom Vivaldi had taught music at the Ospedale della Pietà orphanage. When Vivaldi was eventually separated from his orchestra, it was for each of the girls he later composed his concertos that mark the passing of time, hence the great baroque masterpiece 'The Four Seasons'. It is said that the four concertos later became part of a larger set of twelve, entitled *Il cimento dell'armonia e dell'invenzione* – 'The Contest between Harmony and Invention' – a title befitting the legal implications of managing and exploiting IP composed from the music and publishing case studies.

The case study of **Rage Music** makes clear that music is generally undervalued. As Rage Music outlines, there is more to music than meets the ear. Behind the "copyright" screen works a disparate bundle of rights, including author moral rights, rights in literary work, mechanical rights, and publishing rights which must be harmonised into a rights orchestra if any IP exploitation is to be successful. Many CDs have been trashed for want of sample clearance, or because they permitted only digital streaming – missing that the mechanical rights for vinyl or CD pressing were reserved. Depending on how a musical work is to be exploited, blanket licences and master licence agreements may require fostering. Depending on where a musical work is to be exploited, labour laws, unions and portage fees may need negotiated and paid up front (which will impact cash flow). With so many rights to assert, licence, waive, acquire or use (with permission or subject to a defence) it is essential that employees, contractors and collaborators are appropriately and accordingly educated and the delegation of responsibility is coordinated.

Music and publishing businesses must be concordant with their market(s). The case study of **Red Note Ensemble** is in tune with why music and publishing businesses should learn the vernacular of their market (or target markets). Red Note Ensemble plays down terms like "contemporary" in favour of more original and accessible descriptions of a performance, a small change which paid huge dividends not only in ticket sales for Red Note Ensemble but changed the perceptions, state of the art, and increased the market for all relevant music market participants. The use of a repertoire and the "pooling" of artists injects confidence into the undertaking, positioning it as a scalable (perhaps franchisable) and flexible premium-charging venture. It was not clear if the pooling of labour was on a zero-hour style arrangement or retained basis; in either event the employment/contractor copyright ownership issue would need to be resolved.

The case study of **Catherine Czerkawska** hit a key note on tax issues. Section 4¹ of the Value Added Tax Act 1994 states that "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him." An IP licence can qualify as a taxable supply of

services. For small VAT unregistered businesses the burden of collecting (but not offsetting) VAT may bring down the curtain. The position is further complicated by taxation of EU downloads and international sales. Reserving a domain name, building a website and offering goods and/or services for sale to the world appear tantalisingly simple, yet it is often the blind leading the blind. It is risky to copy policy wording from third party sites. Make sure the screen has been lifted to view at least all relevant corporate disclosure, contractual framework, data protection and taxation compliance issues. Perhaps this may be why Catherine Czerkawska states in terms of the return to print, 'Write for love but publish for money.' It is not about preference. Business requires a business case; and there is a cost to doing business.

The case study of **Saraband** returns to the chorus of IP commercialisation: Standard contracts are never "standard". Whether there is great room for negotiation depends on bargaining strength. Many IP businesses miss simple tactics such as: If a licence is being sought by a third party for a certain product or for a sublicense of a right which is under control for a market, why not ask for legal fees to be paid by the third party (or at least a contribution be made)? Perhaps the less than bullish approach to negotiation over exploitation of IP rights is because, as Saraband notes, "IP" is a term still coming into its fore, being used more now than it was 5 years ago. This is, if there ever was, a reason to get creative and invest in IP strategy. The costs of enforcement will come down. Quite aside, Saraband's interpolation and reimagining of pre-existing work or 'public' goodwill, is inspiring and worthy of the support received. The contractual use of technical clauses – auto-reversion rights for digital, fragmentation rights (use of chapters or excerpts), treatment of online as separate "territory" – are emerging and clever ways of managing IP rights through the tech boom. No doubt the "online" territory will soon be subdivided into proprietary website and social media, and each on a territorial basis (e.g. Facebook, YouTube and Twitter for the West; Renren, Youku and Weibo for the East) and so on.

Often the opportunity to exploit by publishing is found in an orphan work. A work is orphaned when the original or current right holders cannot be traced. The case study of **Canongate** demonstrates that the exploitation of orphan works can work economically if the cost for the Government to underwrite the exploitation of an orphan work is off-market and less than what the market rate would be. If the Government will not underwrite, then insurance or a retention fund used to negotiate a retrospective licence are other prudent management options and integers in the business financial calculations. Canongate pairs this unconventional business case with the very "normal" approach to employment (an approach also adopted by Tern TV). Using in-house designers (employees) means, by operation of law the employer owns the IP rights in the employees' work, and if not, subject to sufficiently drafted IP clauses within employment contracts, that the employer can place themselves at the top of the queue to acquire or licence the same for exploitation. Again, appropriately drafted restrictive covenants can be placed within employment contracts to prohibit the leakage of confidential information and the dilution of unique IP. By creatively dealing with orphaned work season by season, Canongate steadily builds value in the brand, which, secured by a registered trade mark, allows for future merchandising options.

If the Internet is a screen behind which disparate rights and regulations have to be negotiated and navigated, the case study of **Freight Books** reminds us that publishers have had to deal with a similar environment for years. Principally online publishing is self-publishing, and from landing “pages” and “brochure” sites to “catalogue” stores and social “media”, the language of ecommerce stems from the publishing seedpod. Freight Books outlines that learning the language allows the licensing of language. It not only provides an understanding of the board upon which an IP strategy has to be played out, it can also act as a piece on the board. Whereas the nature of a licence can typically be segmented into time, territory, task and throttle, in the context of language; Commonwealth traditions, cumulative translations, convertible texts (including audio and large print) and custom typography, are all equally relevant and controllable. The members of the licensee team are also a necessary consideration. Can a licensee transfer, sub-licence, or otherwise deal with the right they have been granted? At what point must rights be re-negotiated? On change-of-control? On reversion? On anniversary? On missing targets? What Freight Books calls the cornucopia of sub-rights shows that not only has the vernacular of the market to be right, the channels to market must be understood, unblocked and regularly tested, even if that is first on a local test market basis with later upping of the manufacturing and design costs to franchise out.

In summary, the music and publishing case studies provide not only fascinating reading, but also useful insights into the often undiscussed business critical models which underpin behind-the-scene commercial music and publishing businesses. Whereas the predominant trends in the case studies are business strategy related (unsurprising given the clear restlessness of this creative industry subsector) the contest between harmony and invention is played out by managing all IP rights behind the screen.

1 www.legislation.gov.uk/ukpga/1994/23/section/4

Acknowledgements

ICC and Creative Scotland are grateful for the time committed to this project by all of the 122 individuals interviewed, the majority of whom could not be included in this collection due to space restrictions.

ICC also acknowledges the contributions of Henning Berthold in supervising the Knowledge Transfer Partnership research, and Philip Hannay of Cloch Solicitors (cloth.co.uk), for writing the legal summaries of the cases.

Websites of case study organisations and individuals

angharadmclaren.co.uk
blazinggriffin.com
brazenstudios.co.uk
canongate.tv
catherinewheels.co.uk
curious-seed.co.uk
davidhughesdance.co.uk
digilpin.com
freightbooks.co.uk
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labelleallee.com
makarafterdark.com
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polybiusgames.com
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rednoteensemble.com
reloadedproductions.net
saraband.net
stellarquines.com
strikeyourpose.co.uk
stv.tv
tag-games.com
terntv.co.uk
thisisgnu.com
wordarts.blogspot.com (Catherine Czerkawska)

Organisations mentioned in the case studies

Anti Copying in Design (ACID): a UK membership organisation offering various services and information resources. acid.uk.com

BBC Academy: a collection of information and training resources for people working in media production and technology. bbc.co.uk/academy

Copyright User: an independent online multimedia resource aimed at helping creators, media professionals and the general public to understand UK copyright. Funded in part by the RCUK Centre for Copyright and New Business Models in the Creative Economy (CREATe) at the University of Glasgow. copyrightuser.org

Creative Scotland: supports the arts, screen and creative industries across Scotland. It distributes funding from the Scottish Government and The National Lottery. creativescotland.com

Cultural Enterprise Office (CEO): a publicly funded agency which supports creative businesses in Scotland with a variety of advisory services and information, much of it available online. culturalenterpriseoffice.co.uk

- **Starter for 6** business training and investment programme: culturalenterpriseoffice.co.uk/programmes/starter-for-6
- **Business Support Team:** culturalenterpriseoffice.co.uk/business-support

Enterprise Europe Scotland: Funded by Scottish Enterprise, this network includes the Intellectual Assets Specialist Team, which provides a variety of services and online resources. enterprise-europe-scotland.com/sct

Intellectual Property Office (IPO): a department of the UK government offering a wealth of information and applications related to trade marks, patents, copyright and design registration. gov.uk/government/organisations/intellectual-property-office

Federation of Scottish Theatre is the development body for professional dance, opera and theatre in Scotland, bringing the sector together to speak with a collective voice, to share resources and expertise and to promote collaborative working: scottishtheatre.org

PPL (formerly, Phonographic Performance Limited) licenses recorded music played in public or broadcast and distributes the licence fees to its performer and recording rightsholder members. ppluk.com

PRS for Music (formerly, an alliance of the Performing Rights Society and Mechanical Copyright Protection Society) is the home of PRS and MCPS, membership societies which license organisations to play, perform or make available copyright music, and which distributes royalties to the license holders: prsformusic.com

Publishing Scotland is a network for trade, training and development of the country's publishing industry: publishingscotland.org

Scottish Society of Playwrights represents, develops, and promotes the interests of playwrights working in Scottish theatre: scottishsocietyofplaywrights.co.uk

World Intellectual Property Organization: an agency of the United Nations which provides information resources to help governments, businesses and society realise the benefits of IP: wipo.int



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