



White Paper

Using Intellectual Property in the Creative Industries

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1 Introduction

Intellectual property is a fundamental building block of creativity. The law grants rights to creators in order to incentivise them to create and disseminate their works. It does this by enabling them to achieve a monetary reward for use of their creations by others, thus enabling them to make a living and spend time creating new works.

Or at least, so the conventional story goes. In practice, things are rather different. Intellectual property law is complex and difficult to understand, so that creators cannot easily exploit their works themselves. Agreements to exploit intellectual property need the involvement of lawyers who, as highly trained professionals, are inevitably expensive. As a consequence, the main users of intellectual property law are those who finance creators (such as the movie and music industries) and those who distribute creative works under contracts with the financiers.

The research on which this White Paper reports was undertaken as part of the Creativeworks London project, funded by the Arts and Humanities Research Council. The aim of the research was to investigate how creators exploit intellectual property outside the traditional structure of formal contracts, to identify their working practices and their normative stance on those uses (which might not match the law's normative position), and to discuss with them what legal and non-legal mechanisms might be helpful in undertaking these uses more effectively. The role of the internet in opening up new ways to use creative works was a major talking point throughout.

It must be stressed that what follows is only a preliminary and high-level snapshot of what is going on in the creative community and the problems its members face. It is based on input from a small number of creators in four sectors (software, design, fashion and digital music), and so is far from complete or definitive. Our hope is that it identifies a number of lines of future research, and might also contribute to the understanding of those engaged in reforming intellectual property law.

2 Methodology

The research was conducted by holding four research workshops - software, design, fashion and digital music – each chaired by Professor Chris Reed and lasting approximately 2 hours. The workshops attracted a mix of practitioners from the relevant creative sector and lawyers with an interest in intellectual property (IP). Proceedings began by inviting the creative practitioners to talk briefly about their experiences with IP law, and from those the Chair identified a number of issues which were discussed during the remaining time. A confidential audio recording was made, for use by the researchers only, and these recordings form the basis of this White Paper.

It is worth noting here that almost all the creative participants were sole practitioners or represented startups or small companies. The creative industries are like a pyramid, with a small number of large players at the top who are far outnumbered by the mass of individuals and small companies who make up the body of the pyramid. Law tends to concentrate on the pyramid's peak, because this is where the resources to pay lawyers and engage in IP litigation are concentrated. The workshops were designed as a way of discovering what might be going on below that peak.

Although the lawyers outnumbered the practitioners in each case, as was perhaps inevitable given that the workshops were organised by Queen Mary University of London's Centre for Commercial Law Studies, care was taken to focus the discussion on the issues raised by practitioners. Input by lawyers was in reaction to those issues, and so we are reasonably confident that our findings here are a genuine reflection of some of the concerns facing the creative sectors involved.

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3 How intellectual property works

Intellectual property is not one thing – rather, it is a collection of rights which can subsist in different aspects of creative works. Some rights come into being automatically at the moment the work is created, whereas others require registration with some national agency such as the UK Intellectual Property Office.¹ To make matters more complicated, each right subsists only within the jurisdiction of the state which granted it – although most countries grant most of the IP rights discussed in this White Paper, the extent of those rights and the conditions for obtaining them can vary.

The unregistered rights, which come into being automatically, were the main subject of discussion in the workshops. Copyright grants authors the exclusive right to make copies or adaptations of the works they create, including literary, dramatic, artistic and musical works, and films, and comes into existence the moment the work is recorded. Performance rights protect the exploitation of live dramatic, musical or literary performances, usually by way of recording them or making recordings available. Unregistered design right protects designs for making objects, again from the moment the design is recorded. The law of confidence protects confidential information against disclosure or use by a person who received the information in a confidential relationship.

Registered rights protect a range of things. A patent gives exclusive rights to use an invention, even against someone who has not copied the original invention. Trade marks cover names, slogans, symbols and images² which are used to show the origin of goods and services, and protect them against use by others in relation to similar goods and services. Registered designs protect decorative designs, mainly for application to manufactured objects. These registered rights were subject to very little discussion in the workshops. There was general agreement that they can be important, but a consensus that they are really only available to the big players. Creators are too busy creating (and trying to make a living) to bother with the paperwork, and only large enterprises have the resources to enforce these kinds of rights. Thus they were of concern mainly as an external and unpredictable factor in the activities of creators – a patent might turn up unexpectedly, like a thunderstorm, and just like a thunderstorm the creators would have to work out how to deal with the consequences.

This description of the range of intellectual property rights is grossly over-simplified, but it does demonstrate how important they are, at least potentially, to those working in the creative sector. It should also be clear that multiple rights can be relevant to any one creative activity.

Take the apparently simple example of a coffee mug with a cartoon character printed on it. The drawing of the character is already protected by copyright as an artistic work. The character might also be registered as a trade mark. The mug will begin life as a drawing, which is itself an artistic work. This will be translated into a CAD file for production, and that file is an unregistered design. Aspects of the manufacturing process may be protected by patents. And finally the marketing materials will be a mixture of artistic and literary copyright, quite possibly using the mug maker's own trade marks.

3.1 The conventional wisdom

The standard justification for the existence of IP rights is that they encourage creativity by granting rewards to creators. The model which the law assumes is that reward is in the form of monetary payment, in return for permission to do the things reserved by law to the right owner. Thus the main method of exploitation is by means of a contractual licence, which spells out the uses which the licensee can make of the IP and the way in which payment is to be calculated (eg a royalty per item

¹ www.gov.uk/government/organisations/intellectual-property-office.

² And in some countries, colours and smells.

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sold). Secondly, IP rights can be used to keep competitors out of the market, by refusing to grant them licences and taking legal action against unlicensed uses.

In this model the act of creation is almost irrelevant, determining only whether rights exist and when they come into being. The law's main focus is on exploitation of those rights in the market, either by licence to someone who will exploit them, or direct exploitation by the rights owner using the rights to maintain his or her market.

The model is reasonably accurate so far as mass-market exploitation is concerned. The music industry, movie industry, publishing industry and mass-market software houses all use this model. Their role in creativity is primarily to finance creators, and the major part of their commercial activity focuses on exploitation grounded in their acquisition of intellectual property rights. We call these organisations "IP enterprises" because their business depends on understanding IP and legal agreements about its use.

By contrast, as we found from the workshops, the law's model bears very little resemblance to the way creators themselves use IP.

3.2 The view from the workshops

The creators who attended the workshops were mainly from small companies or were individual practitioners, and it soon became clear that their business model is nothing like that of IP enterprises. What our creators mainly focus on is creating one-off or customised products or providing services to customers. There is no clear distinction between these categories – for example, a website designer sees the project as the provision of skill, expertise and labour (services) to produce a website (product), whereas the customer sees this primarily as the supply of a product. The law tends to treat such arrangements as being for services, whilst taking in some elements from product supply law.³

This focus on completing the contracted work relegates IP to very much a secondary place. The workshop participants recognised that they were creating IP and granting some rights in it to their customers, but were generally quite vague about precisely what they were doing. As an illustration, the web designers who attended had often suffered from their customers taking a design and using it to create further websites without paying for use of the design. This was seen primarily as contravening the spirit and intent of the arrangement, rather than an IP issue. As a consequence, contracts to undertake work were often unclear, or even silent, about IP rights.

There was also a very clear feeling that IP law was too complex and difficult to work with, or at least that the time required to understand it was a distraction from their "real" work of creation. Those who had some experience of raising IP issues with customers were clear that if a negotiated solution could not be achieved, the cost and time involved in using legal mechanisms to enforce IP rights was so great that they would not pursue that avenue.

4 Contracts and IP

Lawyers view contracts as mechanisms for allocating rights and responsibilities, and therefore automatically think of including IP rights within contracts. This fits with the lawyer's business model,

³ See eg *St Albans City and DC v International Computers Ltd* [1996] EWCA Civ 1296, where the court treated a contract to supply customised computer software as a contract for services but also implied a term (taken from the law on sale of goods) that the software would be reasonably fit for its intended purpose. The Consumer Rights Act 2015 ss 34-36 has recently introduced product-like quality obligations in sales of "digital content" to consumers.

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which is one of advising on rights and responsibilities. However, the business model for creative practitioners is different, and so they use contracts differently as well.

Because the creative focus is on completing the work, and of course getting paid, this is what their contracts focus on. All the creative practitioners who attended the workshop used written contracts, either on their own terms or their customers' terms, but these contracts concentrated on what the practitioner was to do and what the creative output should look like. Matters which would only arise after the work had been completed, such as use of the creation by the customer for new and different purposes, was generally not covered in the contract.

One reason for this is that contracts are seen as specialist technical mechanisms which can only be produced by lawyers. Creators do not perceive themselves as having the technical skills to write their own contracts, nor the funds to pay lawyers to write them, and so tend to borrow templates from other creators and reuse them without much thought as to their contents. For example, it was clear from the discussions that creators were interested in controlling the use of their creation after they had completed the work and been paid, but they did not consider that they themselves could write wording which impose such restrictions – this would be a complex technical activity which would have to be delegated to a lawyer.

It is therefore unsurprising that these contracts made very little provision for IP rights. IP law was seen as being even more complex than contract law, and thus even more unsuitable for self drafting. However, in discussing these issues the lawyer participants were able to show the creators how they could impose at least some controls without worrying too much about the specifics of IP. Several participants thought that they would now have the confidence to address these issues themselves, and this suggests that some of the difficulties which creators experience using contracts could be overcome through education and training. The main barrier would be that learning how to write contracts is not seen as a creative activity, nor does it generate income directly, and these are the main preoccupations of the creators who attended the workshops.

Given this attitude to their own contracts, it is unsurprising that creators find real difficulty coping with contracts offered to them by large commercial customers. They recognise that they have no real commercial negotiating power, nor the legal skills to discuss and revise IP clauses written in complex technical language. For these reasons such contracts are approached very much on a take it or leave it basis. Again, education and training might be helpful because commercial customers are often willing to consider changes to IP clauses so as to reflect the reality of the deal. But gaining the knowledge and confidence to approach such negotiations is still very far from the core activities of the creative business model.

In several of the workshops there was discussion about bypassing the law and instead using technical mechanisms to protect against future, unwanted use of creations. Among the examples given were:

- website designers who design so that images and video are hosted on servers they control, rather than being handed over to the customer; and
- musicians who release free content but incorporate Digital Rights Management (DRM) technology into it so that if the song becomes popular they can “deactivate” copies and charge for the commercial version.

However, using these techniques effectively requires some legal understanding so that contracts or licence notices can be worded appropriately.

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This inability to use contracts in the way envisaged by law goes a long way to explaining why the creatives who attended the workshops do not attempt to exploit IP in the same way that IP enterprises do. The logical next question, therefore, is: how *do* they use IP?

5 The role of reputation – brands, services and selling the experience

The business model of selling creations and creative services means that, outside the world of IP enterprises, there is little focus on the exploitation of IP. Customers buy from these creators because of their reputation.

Credit or attribution is seen as being one of the most important elements in establishing reputation. A “stolen” creation can still be beneficial to a creator’s reputation if everyone can see that it has been taken from that particular creator. Attribution of their role in creation is particularly important for small companies because marketing is a huge expense in both money and time. However, it is thought that large companies also value attribution highly for the same reasons.

All the workshop participants made extensive use of online technologies to establish their reputation and identity, and thus create a sort of brand (though few had registered their brands as trade marks). This brand creation is perceived as protecting the creator against unauthorised taking because it establishes a moral or reputational “ownership” of the creation. However this route is only available to creators whose work stands out from the market as being personally distinctive. Day-to-day creative work, such as graphic design for websites, is not usually suitable for this route to protection. Instead it has to rely on maintaining a good relationship with the customer, backed up by contracts.

The fashion workshop discussions illustrated particularly clearly why branding and reputation is the key element in success. All the early career fashion designers agreed that they secured work almost exclusively on the basis of their reputation, and talked specifically about the need to build their personal brand. IP is seen as almost irrelevant in creating that brand, but its importance for maintaining it in the long term varies depending on the business models of the different parts of the fashion sector.

For high-end brands, there is a clear distinction between seasonal fashion and the long-term use of a design archive. Seasonal fashion is extremely ephemeral, so much so that IP rights are of little use in protecting seasonal designs against imitation. The cost of enforcing IP rights and, particularly, the time required, are out of proportion to the potential damage, even for large fashion brands. Instead, seasonal designs rely on the time lag required to imitate them for their protection. The digital technologies have shrunk that time dramatically, but IP rights are still inappropriate to fill the gap.

Long-term exploitation of designs by established fashion brands is a very different matter. Here, old designs are used as inspiration, and are updated and refreshed to create new fashion items. Heals and Liberty were cited as companies which particularly specialise in this area. The fact that their designs can be reused multiple times makes it worthwhile protecting them through IP rights, and the long-term nature of this activity means that the slow speed of the law’s processes is less of a problem.

Smaller brands have much less use for IP. Their designs are not retired and replaced so rapidly as those of high-end brands, and instead their success is based on building a community of customers who value the experience of wearing the brand. This gives them protection against mass-market copying because their community of customers will not be seduced away by inferior copies. Small

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brands tend not to have established a design archive, and so have no interest in using IP to protect it.

This transformation of creations from a mere product to an experience via membership of a community is not unique to the fashion sector. It also describes the direction in which music seems to be heading.

Possibly the biggest change brought about by the digital revolution is the move from selling music as a recorded product to selling it as a broader experience. In the off-line world, musicians below the peak of the pyramid⁴ have always done this. They generate income from performances, and from related merchandising such as CDs and T-shirts. The digital world allows musicians to build an online community, where consumers of their music can interact with them directly via comments on YouTube, Facebook, etc.⁵ This also creates new funding opportunities – for example, musicians are increasingly funding their activities, such as the production of CDs or devising tours, directly from the community via crowdfunding technologies. Some musicians are even moving from the commercial economy to a gift economy. We heard about the Greek hip-hop band Hit & Run, which has no record label behind it and funds its concerts and recordings entirely through donations from its fans.

The workshop participants would be delighted to receive an income stream from the exploitation of their IP, but doing so was not a current or even foreseeable part of their business strategy. Income derives from selling services or products, and IP law has little impact on this. It would not be an exaggeration to suggest that if IP law ceased to exist, the creators at the workshops would see almost no difference in their working lives.

6 Sharing and using third party IP

Creativity does not occur in a vacuum. All workshop participants were clear that a new creation will have its starting point, or points, in previous creations. Thus there is extensive use of third party creations.

How far that use might infringe IP rights was a matter of concern to all the participants, but few felt able to understand the complexities of IP law. Thus in practice those third party creations were used in accordance with the relevant creative community's norms, in the expectation that this would avoid complaints and thus potential IP litigation, irrespective of whether IP rights were in fact being infringed.

The biggest constraint on such use seems to be the damage to one's own reputation by using a creation in a way that recognisably "belonged" to someone else, or the dilution of reputation by producing a creation which recognisably incorporates external sources. This last is of particular concern in the fashion sector (see 7.2 below).

For this reason sharing is unusual in design and fashion. There is some evidence of sharing in the design sector, but the purpose of this sharing is primarily to enhance the reputation of contributors. One example given was of free graphic design libraries, based on a donation model where designers deposit designs with the library. The aim of these designers is to grow their reputation through the

⁴ And even at the peak, income from touring and merchandising often exceeds income from sales of recordings. See Marie Connolly and Alan B Krueger, "Rockonomics: the Economics of Popular Music" in Victor A Ginsburgh & David Throsby (eds), *Handbook of the Economics of Art and Culture Vol 1* (North Holland 2006) Ch 20.

⁵ See "The Future Of Music Business Models (And Those Who Are Already There)" *Techdirt* 25 January 2010, www.techdirt.com/articles/20091119/1634117011.shtml.

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distribution of their free designs, and as a consequence to secure paid commissions to produce exclusive designs. This sharing model works because the origin of each contribution is clear, and can thus enhance reputations.

Sharing is, however, increasingly common in the software sector, and is discussed in more detail at 7.4 below.

The motivation for free sharing of software is primarily the reputational reward. Making code available showcases the abilities of individuals and organisations, and if the code is good this makes it likely that work will be commissioned from those people. Academics who engaged in code sharing are looking for both reputational gain and traceability. Traceability, being able to discover how code has been reused, is important to academics because it enables them to show that their work has impact in the wider world.

Sharing of data is also starting to happen. There are a number of live and evolving datasets whose creators allow them to be used without charge for non-commercial purposes, but on the basis that if the dataset is used to make money then payment must be made. Although these datasets are protected by database right, the law in practice plays no part in forcing users to pay. The owner of the dataset can achieve this without needing to access any legal remedies, simply by cutting off access to the dataset for anybody who should pay, but refuses to do so.

The software workshop participants, both programmers and lawyers, agreed that copyright infringement is becoming less and less of a practical problem. The move to constructing software by combining simple code modules means that any copyright infringement can be written around quite easily if a licence is not on offer. This, of course, reduces the risk of using code provided for free by a code sharer.

One of the initial aims of this project was to discover if the kinds of sharing which happen in the software field could be found elsewhere. It is clear that such sharing is quite rare. This appears to be because of the paramount role which reputation plays, so that sharing IP risks diluting that reputation. Software code can have its origin labelled via comments in the code itself, and even if those comments are removed the code can be searched to identify sharing – this perhaps explains the more widespread sharing in the software sector.

Reputation also explains why unauthorised direct use of third party IP is something which the workshop participants attempted to avoid. Although they did not understand IP law well enough to understand whether authorisation was needed to avoid infringing IP rights, they all understood that direct use could damage their creative reputations. There seems to be a strong community norm that using third party creations as inspiration is acceptable but copying is not, though deciding where the dividing line lies is inevitably a matter which is unsettled.

7 Sector-specific issues

7.1 Digital music workshop

The existing system for exploiting music, based on copyright and contractual licences, worked reasonably well in the physical world, at least for IP enterprises. Even so, it never worked particularly well for small players and individuals because of the cost of individually negotiating IP rights.

In the digital world, though, the system fails. For digital exploitation of music, global regimes are required. The current IP system is based on national and regional licensing of rights. In order to

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achieve digital exploitation, users need a one stop shop for licensing purposes, and this must cover all aspects of their digital use.

Technology is under development which will achieve a non-a one-stop shop for newly created music. However, it is impossible to sort out the problem of legacy music because the IP rights are distributed so widely and the interests of their holders are so diverse. Those involved have no incentive to negotiate to achieve a one-stop shop and so this legacy music is likely increasingly to fall outside the digital realm.

Currently the rights to use music are largely managed by collecting societies, which manage large portfolios of music and offer licences on standard terms. This is because it is impracticable to negotiate with multiple rights holders individually. A modern one-stop shop would work on the basis of individual licensing rather than collective licensing. This would give creators more transparency and more control, but would of course disintermediate those who currently control the licensing of music, so they too have no incentive to take part.

Another way in which the digital world has changed music is that the granting of permission to make and disseminate recordings has moved from an ex ante to an ex post system. YouTube is a clear example of this. Musicians who are making recordings do not understand copyright, and so do not attempt to obtain permission in advance before making and posting videos. In order to cope with the copyright infringement problems this creates, YouTube has devised a system called Content ID. This system attempts to identify music in videos, and attributes it to its rights owners. Those rights owners are given three options: to block the video so that it is no longer available; to monetise it by allowing the IP rights owner to place advertisements against it and share the revenue; or to track the actions of those who view the video, and thus derive valuable information about musical tastes and preferences. Those rights owners who choose the last two options are effectively granting retrospective permission to use the IP.

A new IP issue has been created by the digital revolution. It is now possible to extract information directly from recordings. Some of this information is likely to amount to a copyright infringement. For example, automated transcription of the words or re-creation of the sheet music copies a protected element of the music. However, it is possible to extract metadata as well which might indicate, for example, the mood of the music, whether it is happy, sad, excited, etc. In some cases this metadata, in conjunction with a small part of the music (perhaps just a couple of chords or a few notes) can be enough to identify a song. Whether this has IP implications is a difficult question which can only be resolved by future court decisions.

The experience of the music industry is that IP plays little or no part in encouraging creativity. As one music insider put it, "People don't make music because they want to make money. People make music because it's what they're passionate about." What is less clear is how far the change in business model from selling product to selling experience (see section 5 above) will affect future creativity. Will this give musicians less time to be creative, or will their interactions with their user community foster new forms of creativity? Only time will tell.

7.2 Fashion workshop

The creative process in fashion is fundamentally at odds with IP law. Fashion designers overtly look for inspiration from external sources. These sources can be external to fashion, such as art or architecture, but can also be the work of other fashion designers. Those working in the sector find the line between originality and appropriation is very hard to draw. This is particularly so because a fashion design is constrained by not just its visual appearance, but also by the properties of the

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materials used and the need to make the item usable or wearable. A designer might start from any one of these points and later incorporate the others in the process.

The most important elements of IP for the fashion sector are copyright, which largely protects visual appearance, and design right which protects the design for making the item. But much of the value and innovation in a fashion item can be in techniques such as cutting and stitching, or the materials used, none of which fall easily under the protection of IP law. The value might also reside in the services element of the creation, for example in the finishing or detailing. Again this is unlikely to be protected.

But, as was explained in section 5, the strongest protection comes from outside IP law. If a fashion design recognisably originates from a particular source, either it will not be copied directly or, if copied for the mass market, that copying will not seriously damage the designer's reputation. Establishing a reputation is critical, and this requires that the designer's work is attributed to the designer.

The fact that attribution is such a valuable reward helps to explain the ambivalent attitude towards the way fashion interns are often treated. Those employing interns regularly take their designs and use them. Many of the designers present thought that this was, potentially at least, a fair return to the intern. The consequence of such use is that the intern will be able to show future employers that an established fashion house considered their design worth making. This validates their design skills and increases the chance that they will obtain future work. However, excessive taking from an intern without any other form of reward was seen as exploitative.

Sharing of designs is uncommon in the fashion sector. In part this may be because of the long tradition of taking inspiration from others' work. But a further important factor is that sharing creates the potential for brand confusion, and this is incompatible with the sector's strong focus on the brand as its primary source of revenue generation. We were given an example of a collaboration to assist a charitable organisation, where the various contributors took care not to use each other's brands in conjunction with their own, for example by removing labels from fabrics.

Museums, archives and exhibitions have a particular IP problem in the fashion sector. The days when they passively stored or exhibited fashion items are long over. Images and videos are now normal marketing tools and online interaction with collections and exhibitions is common. How far these uses infringe IP rights is unclear because the law did not envisage those uses when it was devised. Also, brand owners have views about how their brand is represented, and in the fashion sector the very visual appearance of an item may be a trade mark in itself. These issues tend to be resolved through negotiation, rather than IP law, but are still so new that clear norms to guide those negotiations have not yet developed.

Although the fashion industry is strongly focused on designing and making fashion products, at the manufacturing end the digital technologies have introduced the possibility of selling new services. One workshop participant began as a high quality manufacturer, developing innovative manufacturing techniques, and has now extended its business to sell design services which take advantage of those manufacturing techniques. For such a service provider, IP rights such as copyright and trademarks are almost irrelevant. However, the protection of know-how through the law of confidence, and the protection of databases containing manufacturing information, are both critical, as is the maintenance and enhancement of reputation.

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7.3 Design workshop

A particular problem faced by designers is that of securing the investment needed to take designs to market. This raises a number of IP issues.

In the first place, the designer needs to disclose the design to the potential investor. Participants in the workshop understood the concept of non-disclosure agreements (NDAs), but did not really understand their basis in the law of confidential information. Thus their NDAs tended to concentrate mainly on disclosure by the potential investor, and did not cover other uses by that investor such as making the design themselves.

One of the desires which participants expressed was for a system which would evidence authorship of a design idea, perhaps some kind of independent registry with which design ideas could be deposited.⁶ They all recognised that the costs of legal enforcement would be excessive for most designers, even if initial ideas were protected by law, but wanted the reputational recognition that it was their design which was being used, even if they did not benefit from it commercially.

Once an investment is seriously in prospect, the role of the law varies depending on the nature of the investor. Professional investors are thought to be driven solely by commercial motives, rather than ethics, and so the deal needs to be documented in watertight legal agreements. By contrast, community investment in the form of crowdfunding generates a different kind of investment culture. This is non-adversarial, and often positively supportive. The motivations of the investor are less to secure a return, and more to encourage something which is seen as worthwhile.

Crowdfunding is transforming itself from a “fun” activity into something that even large enterprises might use. IP enterprises now use crowdfunding as a form of market testing, to identify the level of interest in a new design, and if there is sufficient interest will even use it for equity funding.

One designer participant has developed an interesting business model based on its crowdfunding experience. The core business is product design consultancy, where customers bring concepts to the consultancy for advice on design and production. A new service has been introduced which assists the customer to obtain the investment necessary to bring the design to market through crowdfunding. If the crowdfunding is successful, the customer must use the consultancy’s design or must pay a fee for the crowdfunding service.

This led to an interesting discussion of the move of designers into services, forced by the digital revolution. Because digital technology permits a design to be turned quickly into a demonstrator, this step needs to be undertaken before funding can be secured. Thus the designer’s role goes much further down the production process, potentially right up to prototyping, than it would have done in the pre-digital world.

7.4 Software workshop

The software workshop focused on two issues: sharing programming code and the move from products to services.

The discussion of sharing began by almost immediately dismissing the standardised sharing licenses, such as the GPL and Open Commons licenses, as too inflexible for most purposes. Those participants who did share code did so on one of two bases:

⁶ There was no time to discuss this in detail, and the problems of cost, administration and precisely how priority would be demonstrated (including whether duplication or copying could or should be searched for) are clearly substantial.

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- free sharing, making their code available without restriction; or
- community sharing on the basis of mutual trust. In this latter case you were entitled to take out and use code so long as you put code back in for others to use.

As explained in section 6, the return for free sharing is reputational gain. Academics would also like to be able to trace how their code is used, but the only currently effective way to do so is to search published code, which is time-consuming. For this reason even academics were unhappy with the standard free and open source licenses because they do not offer this traceability. There is no requirement that someone who uses code distributed under one of these licenses should inform the author that they are using it, and what they are using it for.

However, sharing was engaged in by only a minority of the workshop participants, even though the workshop was advertised as focusing on this topic. Some participants operated a proprietary code business model; not only would they not share their code, they were also reluctant to use freely available code in case its authors might subsequently assert rights in the software into which it had been incorporated. Another group were interested in sharing but only wanted to do so on the basis that they could exercise some control over the subsequent use of their code. There were two reasons why such control might be desired:

- first, where the code proved commercially useful to its new user, in which case the original creator would wish to see a share of the return; and
- where the creator had moral objections to some kinds of use, for example the use of the creator's code on porn sites.

The workshop explored some of the possible solutions here, including the establishment of quick and cheap dispute resolution following the ICANN model for domain name disputes⁷, but it was unclear whether there would be sufficient demand for such a solution, or who would pay for it.

A clear finding from the workshop is that the software sector is moving rapidly from the creation of products (programs) to the provision of services. This explains the increasing importance of reputation, achieved by sharing code. The experience of the lawyers present validates this finding. They see a definite move from bespoke software, and bespoke software contracts, to rapid prototyping and development using simple, interconnected code modules. As a consequence, contracts are becoming simpler, and in particular there is less focus on allocating all the risks either on the developer or the customer. With the increasing use of shared code from third-party sources, on whom the contract cannot impose liability, the focus is much more on understanding the risks and devising mechanisms to deal with them if they happen. These are increasingly likely to be in the form of obligations to fix problems, rather than compensate the other party for their consequences. Clearly, the developer will be the party who has to undertake the fix, so the question is who bears the risk and therefore who should pay its costs.

This move from products to services means that software is losing its importance as an asset in valuing software companies. The main value of a software house now resides in two things: its customer base; and the granting of access to its API (Applications Programming Interface). The API is itself a service because it is constantly evolving, and those who wish their software to interact with the software house's offerings will need access, together with training and manuals, to make that achievable.

⁷ ICANN is the Internet Council for Assigned Names and Numbers. For its domain name dispute resolution policy, see <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

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8 Solutions and recommendations

Although we have no doubt that IP law remains of real importance to IP enterprises, one of our main findings from the workshops is that IP has very little day-to-day relevance to the creators who participated. Their general knowledge about the existence and scope of IP rights may, to some extent, influence the way they undertake their creative activities. But its detail has almost no relevance to them at all.

We are certain that IP law has little to say to our creators about their own acts of creation. They do what they do, because they are creators and must thus create, and IP rights either come in to existence or not.

In theory IP law has quite a bit to say to them about exploiting their own and using others' creations, but in fact it tells them little because the law is so complex and difficult to understand. For all practical purposes their exploitation practices are driven by their business model of supplying creative services and products, and their use of others' creations is heavily influenced by the need to build and maintain reputation and the norms of their sector about borrowing and appropriation. What lawyers would consider IP problems are resolved by negotiation or designing around them.

For these reasons this White Paper does not recommend any changes to IP law. The main wish expressed by workshop participants was that the law could be simpler and easier to understand. Unfortunately the issues which IP law has to resolve are inherently complex, and thus the legal solutions cannot be simple. However, almost everything which these creators want could be achieved through contracts if only they had the time and inclination to become contract lawyers.

This need for good contracts is, in our view, the main issue facing the creative industries. Good contracts are readily available from good lawyers, but good lawyers are too expensive for any but those at the apex of the creative pyramid.

In theory this could be solved by providing creators with education and training in contracts and IP. But this only works in theory; creators may not have the aptitude required to become part time lawyers, and they certainly have neither the time nor the inclination to do so.

We think an answer might be found in the provision of model contracts with commentary. Model contracts are very different from the standard contracts so roundly rejected by the software workshop. Standard contracts are designed for use without modification, and it was abundantly clear that the creative business model treats each customer transaction differently, and therefore each requires a customised contract to deal with the IP and other issues which arise.

Model contracts are, by contrast, simply a starting point from which to undertake customisation. They identify the issues which require consideration, and the commentary explains the different way in which those issues might be accommodated. We think that this would give our creators the confidence to attempt to negotiate and write contracts which are more suitable for their activities. Because there is such a diverse range of activity within the creative industries, an appreciable number of model contracts would be needed (though much of the commentary would be reusable between them).

Our creators do not have the organisation or resources to commission this work, but we think it might have a genuinely positive impact on the UK creative sector. It is therefore something which the UK Government should consider investing in, as part of its programme to foster growth in the UK creative industries. The cost would be comparatively small in relation to the contribution creators make to the UK economy, and the potential benefits substantial.

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