

1. A parable.

1.1 A journalist buys a house. There is a shortage of plumbers but luckily she manages to hire a plumber to fit new central heating. It costs £3,000 and keeps the house lovely and warm through the winter months. After a year the plumber writes to the journalist explaining that the licence for the heating only lasted one year and that to continue to use the heating will cost £1 per day.

1.2 Soon after that, the journalist loses her job. Unable to find a job quickly she begins to freelance for a publisher, working from her spare room. The plumber writes to her again, explaining that, as she is now using the heating for work as well as domestic purposes, she requires a further licence. This will cost another £1 a day.

1.3 As it is commercially foolish to have only one client, the journalist finds a second customer for her work. The plumber gets in touch and points out that she is now using the heating to supply two different customers and that she will need to pay an extra £1 per day for each new customer.

1.4 Afraid now of having too many customers and not being able to afford the heating, the journalist has a bit of luck and secures a contract from one of her existing customers to publish a small magazine. The plumber contacts her again, explaining that the publication of a magazine is a further, separate use of the heating and requires a separate licence of another £1 per day. The freelance manages to get another magazine contract and the plumber again demands an extra £1 per day for each and every publication she produces. Each magazine decides to put copies on the web. The plumber bills an extra £1 per day for each website usage.

1.5 One of the subscribers of one magazine then moves abroad and asks if the magazine could be sent to France. The plumber gets back in touch and explains that the heating is now being used to produce a magazine sold in a different geographical region and that this will cost Euro 1.35 (or £1) a week for each and every country the magazine is sent to.

1.6 Eventually the journalist sells the house and moves into another rickety old place. It is now several years on and there are loads of plumbers dead keen on getting the work, so the journalist insists to her plumber that she will only have the heating fitted on the basis that she can use the heating for any purpose, in any media, in any country and, just to be sure, for any purposes, uses and customers, including in media and universes as yet undiscovered. She pays the plumber the same £3,000 as before, even though it is now five years later and inflation should have added nearly £1,000 to that.

1.7 Then she gets a full time job, gives up all her freelance contracts, and never makes any use of the new licences she has bought.

1.8 That's the way copyright works in publishing.

2. About us

2.1 Wheal Associates is a family-run business owned, managed and run by Chris and Kate Wheal. The company produces magazines from its home-based office; produces articles for newspapers and magazines; carries out subbing and production duties, including shifts; offers training and consultancy services; and edits publications or supplements for major publishers. Kate has been production editor and Chris an editor on major business to business magazines in the UK's largest publishing houses. Chris has also edited supplements for The Guardian and has won awards for his journalism.

2.2 This wide range of experience means Wheal Associates has had to deal with copyright from a commissioner's perspective and as contributors.

2.3 Wheal Associates has also taken legal action (supported by the NUJ – both Chris and Kate are members) and settled out of court over breaches of its own copyright.

3 The Guardian – an example

3.1 In February 1998, Wheal Associates provided an article, written by Chris, to The Guardian. The agreed fee was £235. It was published on 4 March. On 5 March, Wheal Associates received a request from the Local Government Management Board (LGMB) wishing to reproduce the article in one of its own publications. The LGMB explained that it was a not-for-profit organisation and could only offer £150. Wheal Associates explained that it too would be a not-for-profit organisation if it licensed its work for such small sums. Eventually the agreed fee was £200.

3.2 One year later, in February 1999, the ACAS report into copyright licences for freelancers at The Guardian was published, heralding a new copyright contract. This gave the Guardian exclusive rights for one year in pretty much everything for its initial one-off price. The only caveat was syndication, which, while still exclusive for one year, would involve The Guardian paying the freelance contributor 50% of the spot sale price (The Guardian agreeing the fee with the third party, not the freelance agreeing the fee).

3.3 In March 2003, Wheal Associates provided an article, written by Chris, to The Guardian. The agreed fee was £300. Scottish Borders Council – an advertiser in The Guardian – sought permission from The Guardian to reproduce the article. The Guardian, wanting to preserve a fine economic relationship with its advertiser, gave permission for the article to be reproduced for free. The Guardian paid Wheal Associates 50% of nothing, which is.....nothing.

3.4 In 2005, Wheal Associates discovered four of its articles, supplied to the Guardian, on other organisations' websites. If The Guardian had licensed these then Wheal Associates should have received 50% of the fee. If the articles had been lifted without permission then The Guardian's copyright had been breached (not Wheal Associates' because the copyright had been licensed).

3.5 Wheal Associates raised the matter with The Guardian, which did take up the four cases. One was billed at just £120 because it was a charity (remember Wheal Associates' response to the previous not-for-profit organisation) and one was billed £135. No money was every recovered from the other two, one because it was in the US, making legal action expensive, and one because The Guardian had a business relationship with the firm involved's parent organisation, the mighty database firm Lexis-Nexis.

3.6 The Guardian's syndication manager Robert Hahn explained:

3.7 "We simply do not have the resources to monitor the world-wide web looking for the odd usages here and there and chasing for payment. Indeed, it is often through the efforts of our contributors and overseas clients that transgressions are spotted and then retrospectively licensed by GNL; you will no doubt empathise that it is easier for a single contributor to track a handful of pieces than GNL tracking its complete output which runs to many hundreds of pieces each day.

It is also not unexpected that syndication fees are lower than commission fees - GNL is paying for original content that a writer may spend days or weeks researching and our commission fees reflect that reality. Of course, commission fees will influence syndication fees (and if there is more than one interested client we will often hold bidding contests) but our clients are effectively buying off the shelf products for secondary use. The true value of a piece lies in its first public divulgation.

You will also note that one of the above uses was by a charity - it would not be in keeping with the Guardian ethos to be seen to pressurise charities and similar organisations. Please rest assured that we are v. experienced in syndicating newspaper content with a long history of commercial success. However, if you feel that you can secure better fees, then may we respectfully suggest that you undertake your own syndication for any future pieces that GNL may commission from you."

3.8 So there you have it, The Guardian, like every other National Newspaper (the former managing editor told me personally they all meet every week to agree on these sorts of things) asks every contributor for a year-long licence but admits it cannot monitor or police the copyright it acquires as a result. It does not actively seek to syndicate all the work for which it demands such copyright either. When it does syndicate, it values contributions much lower than the creator does, so charges lower rates. It has competing economic influences that mean offering a low or even free syndication may provide other income under other streams, such as advertising or sponsorship. And it is not prepared to defend its copyright through legal action on the grounds of the prohibitive cost.

3.9 Anecdotal evidence from other freelances, plus my personal experience as an editor, suggests all media companies are the same in demanding rights they do not actually need or intend to police. The question is: why ask for the exclusive licences at all?

3.10 The answer to that is fear. For years publications could pay a one-off fee and use freelance contributions in a range of different media – Braille versions, taped readings for Newspapers for the Blind, editions sold overseas and so on. Suddenly, with new copyright laws and highly visible new media, such as the internet, individual copyright holders started sabre-rattling that they ought, like the plumber above, get paid for each re-use. The publishers have got their retaliation in early.

3.11 The reality is that either the individual freelance holding a publisher to ransom or the publisher initiating an all-rights grab, makes a mockery of the current copyright laws. The reason it is predominantly the latter is that while the law assumes two business entities entering a contract have done so as equals, the reality is that big multinational publishers that hired the most expensive City lawyers can dictate terms to individual freelances. The relationship is not equal.

3.12 It should be stressed that The Guardian is one of the better organisations in this respect and is unusual in permitting a more flexible approach. Wheal Associates has letters from other publishers insisting that no exceptions can be made to their standard terms at all. The Guardian has now agreed with Wheal Associates that it no longer require the syndication licence on contributions from Wheal Associates. The Guardian has been used as an example simply because Wheal Associates can provide detailed and fairly recent examples.

4. The way forward

4.1 The Guardian's copyright commission held at ACAS attempted to find "a fair, equitable and practicable solution". These are worthy aims. Evidence since then suggests it has been successful, as might have been said to Lord Copper, up to a point. The idea of a new relationship that was fair, equitable and practicable does make sense. On that basis Wheal Associates proposes the following recommendations:

5 Recommendations

5.1 The first principle that needs to be established is that copyright is inalienable and cannot be assigned. This law needs to make clear that an all-encompassing licence that has a similar effect to assigning all rights is also unlawful. And this need to be simply and cheaply policeable.

5.2 Next, syndication must be separated and segregated from publishing. The current situation is anti-competitive. If you take an analogy with the gas supply, you have multiple gas producers piping the stuff out of the North Sea and at the other end of the process you have multiple retailers selling to the public and businesses. But the regulator split the distributor (Transco, which owns the pipes) from the retailer British Gas to ensure free competition.

5.2i In publishing the authors represent the gas producers and the newspapers, websites, radio and TV stations, plus the other media, represent the retailers. Syndication is the distribution part – the pipes that get the producers' work to the retailers. It is this element that needs to be separated from the retailers. Allowing retailers to control the distribution, by setting the price and availability of copyrighted material, distorts the market.

5.2ii The solution is to prohibit retailers from syndication. By this we mean that only the creator should be able to syndicate their work themselves or to sign a syndication licence with a specialist syndication agency (perhaps syndication agencies need to be approved and their ownership checked to ensure retailers do not own or unduly influence them?). A publisher must not also be able to act as a syndication agency and must not, therefore, be permitted to acquire syndication rights in their copyright licence.

5.2 iii This separation would cause a major headache for publishers with their current "lifting rights" contracts but would significantly increase competition and increase the opportunities for entrepreneur creators to fully exploit the value of their copyright.

5.3 The law needs to recognise multimedia publishing. A paper-based publication that has its own website, email alert system, text messaging service, conference and so on should be treated as a single entity, being able to use licensed material on all directly-linked media. This needs to be clarified so that sister publications or media, owned by the same firm, are not included. Bear in mind companies will work to get round this and there needs to be an impartial way of judging the fairness of any structural changes designed to do that with a basic principle, similar to a general anti-avoidance measure used in taxation law, that says "what you are doing may technically be lawful but you are doing it to achieve an unlawful purpose so we're not allowing it to work".

5.4 The maximum length of publishing copyright licence exclusivity needs to be restricted. There is no reason why daily newspapers need exclusivity beyond the day after publication. For a weekly, perhaps with a rival coming out the day after, a two or three day period of exclusivity will be enough to ensure the rival does not carry the same article. Beyond that, exclusive licences simply stifle publication and prevent, through syndication, the full exploitation of the value of the contribution.

5.5 There needs to be a fast, fair, free to use and transparent tribunal system (not expensive court cases) to decide on issues where there is conflict or disagreement over the validity of a contract or a particular term within a contract or licence. The tribunal system should be guided by the principles that all licences should be fair and equitable and practicable. It should be aware that the two sides agreeing a contract are not equal and it should make allowance for that. It should have the over-riding consideration that the result must give the creator the best opportunity to exploit their work's full value. If the terms of the licence will prevent the work being fully exploited then that clause or contract must be struck down. All tribunal judgments must be published and widely circulated.

5.6 There is one other issue – that of databases. Currently many newspapers and magazines send electronic versions of their issues to electronic databases. These simply process the electronic files and then charge a small fortune for subscribers to be able to search and read all relevant material – so that the original creators can rarely afford the exorbitant licence fees required to read their own material. Providing databases for this material is exactly what libraries do best. This shouldn't be a commercial venture. This should be done by the British Library and made available in every library in the country and via the internet, free of charge.

6 What will actually happen?

6.1 Nothing. I attended the all-party parliamentary group on freelancing to raise the issue of copyright and unfair contracts. The deputy chair of the group, a Labour MP, made the honest statement that no political party would take on the media companies so there was no point in his committee discussing the issue.

6.2 No matter how reasonable the report from this Gowers Review is, no matter how measured, no matter how sensible, if it threatens to reduce the media moguls' control over copyright it will be lobbied against, with threats of papers changing sides in the run up to elections. It will be buried and you the committee, and all of us who have contributed, will have wasted our time.

6.3 Still, it's worth a try. Good luck.

**Chris Wheal,
Managing Director, Wheal Associates Ltd.**

Wheal Associates has addressed only the following specific questions, with answers in bold. All other questions have been deleted.

GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation? **There are barriers to effectively keeping your own IP due to the power imbalance between individuals/small firms and the mighty media companies.**

(g) Are there specific barriers to obtaining IP rights in your sector? **There are specific barriers to maintaining ownership, or at least effective ownership (control) of copyright.**

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals? **Again the barriers prevent keeping copyright due to the imbalance in power between large and small organisations.**

2. How IP is used

(a) What types of IP does your organisation use and why? **Copyright – we produce words, layouts and designs only.**

(d) How does your company value its IP? **Yes.**

(f) How well does the UK IP system promote innovation? **It stifles it because good work can effectively be killed off if the producer is forced to sign a licence that prevent further syndication.**

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable? **They are bought defensively to prevent companies being sued no matter what they do. But they buy many more rights than they needs or ever intend to use, so they effectively kill-off further uses. Companies need to be given the protection they need without having to resort to these defensive IP (copyright) contracts.**

3. How IP is licensed and exchanged

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs? **It is virtually impossible for an individual freelance or small business to syndicate their won work widely due to the copyright-grabbing contracts they have to accept from all major UK media organisations.**

(f) Are there specific barriers to licensing IP in your sector? **The nature of copyright contracts that effectively, even if only for a fixed period, assign all rights to an organisation that does not have as its main interest exploiting the value of the copyright it has acquired.**

(h) Are there specific barriers to licensing IP rights for small businesses or individuals – for example barriers to entry to patent pools? **The unequal relationship between large media organisations and small business. The anti-competitive market that allows a retail media organisation to buy syndication rights and act as a part-time syndication agencies.**

(i) Are there barriers to trade and exchange of IP internationally? **Having to use overseas laws. All copyright produced initially in the UK should be subject to UK legislation no matter where in the world the abuse of that copyright has occurred.**

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs? **Yes, several: the unequal power relationship between large media organisations and small firms or individuals; retailers also acting as distributors (syndicating) distorts the market; the length of exclusivity required prevents the full exploitation of the copyrighted material's value.**

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs? **The legal fees involved in copyright disputes can far outweigh the amount sought. This can lead to the costs being awarded against the victor.**

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed? **Create a copyright tribunal to judge the fairness of contracts – to counter the imbalance of power between large and small parties involved in a contract – with the emphasis on the original creator's ability to fully exploit the value of the material.**

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals? **Many media companies will simply cease buying from any supplier who takes legal action against them. Timothy Benn Publishing, now Incisive Media, has refused to accept any material from Wheel Associates after it used our copyrighted material for a purpose for which it had not sought a licence and we threatened legal action (settled out of court).**

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally? **Having to use the courts in the country where the infringement took place, even through the "theft" was from Britain. UK law should be used for all UK copyright, regardless of where the infringement occurred.**

SPECIFIC ISSUES

- Copyright exceptions - fair use / fair dealing

(g) Are there issues concerning the archiving of material covered by copyright? **This should be done for free by the British Library and made available electronically for free through libraries and the internet (and other media where appropriate).**

• **Legal sanctions on IP infringement**

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances? **The value of a copyright infringement is based purely on the going rate for such a commercial usage. That means a company that seeks a licence and is refused (perhaps on moral grounds) can simply use the work without permission and pay the going rate. A copyright holder must have the absolute right to refuse to decide who they are prepared to sell to and at what price.**

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement? **Yes**

• **Coherence between competition policy and IP policy**

(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition? **As detailed above, the retailers acting as distributors distorts competition. Retailers have a vested interest in preventing work being re-used elsewhere, or, have competing interests that mean they keep the re-sale value low or even free.**

(b) How did you deal with this problem? **Wheal Associates has managed to negotiate itself out of the syndication clause of The Guardian's contract but not anyone else's. The power of the media companies is far greater than that of Wheal Associates. If Wheal Associates wishes to supply the market then it has to accept the contracts on offer – contracts discussed and agreed through trade bodies and other informal oligopolies.**

(c) Was competition law effective at controlling this behaviour? **No, the law views all commercial contracts as having been made freely and fairly between two organisations of equal strength. This is nonsense. The market for copyright syndication needs to be regulated to ensure competition in the distribution (syndication) of copyrighted material.**

(d) Should competition law have a greater role to play in regulating IP? **Yes, regulate the distribution – prohibit retailers (the media) from any involvement in distribution (syndication). Set maximum exclusive periods for different media (one day for daily publications, for example).**

(e) How would you see the system working? **A regulatory regime prohibiting retailers (the media) from having any involvement or influence over the distribution (syndication and licensing) of copyrighted materials. A tribunal providing fast and cheap decisions to regulate copyright licensing contracts to counter the imbalance of power between large organisations and small ones (or individuals) and with its main aim as securing the maximum possible exploitation of a creator's work, while protecting the creator's right to decide who to sell to and at what price.**