

BRITISH COPYRIGHT COUNCIL

Moral Rights: Right to be identified as the author or performer Request for information about the requirement to assert

- 1 The British Copyright Council is an association of bodies representing those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which rights of copyright or related rights subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended) and those who perform such works.
- 2 The British Copyright Council is an NGO Observer Member of the World Intellectual Property Organisation (WIPO). Our members include professional associations, industry bodies, trade unions and collecting societies, which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many sole traders and SMEs as well as larger corporations.
- 3 We welcome this request for information about the requirement to assert the right to be identified as the author.
- 4 On this occasion – whilst the Periodical Publishers Association (PPA) works closely with the BCC on most issues, it takes the view that there are a number of business and practical issues which support retention of the requirement to assert the right to be identified within recognition of moral rights, particularly linked to publications online. PPA will make these issues clear in its own response to the IPO Consultation.

The majority of British Copyright Council members support the removal of S.78 (requirement to assert), in its entirety, from CDPA 1988. Our reasons are that such requirement:

- is not a Berne Convention requirement; and in our view is in conflict with Article 5(2) of the Berne Convention (“The enjoyment and the exercise of these rights shall not be subject to any formality...”), and with Article 6bis(1) of the Convention, which contains no derogation from Article 5(2) of the Convention;
- and therefore should have no place in UK legislation;
- introduces the risk of doubt, is confusing and complicated for authors, performers and users alike;
- restricts the application of the attribution right in many cases;
- may contribute in some formats directly to the numbers of ‘orphan works’;
- could increase search costs for users;
- may reduce licensing revenue, secondary payments and fees from potential commissions for authors and performers who cannot be traced;
- could discourage users from identifying creative contributors thus resulting in additional costs for the collective management of rights;
- is a potential inhibitor for systems of author identification and micropayments in the digital age.
- is a potential inhibitor to the right to defend the integrity of a work – a matter of increasing importance to author, performer and user in an age of easy digital copying and manipulation.

5 Moral rights – general issues

The moral rights – both to identify the author or performer and to defend the integrity of a work are increasingly important in the digital age. Who is better placed than the author, the original creator of the work, or the performer to provide the end user with a guarantee of the authenticity of what they see or hear?

Member organisations of the British Copyright Council note the keen interest which SABIP is taking in other issues around moral rights and look forward to participating in these discussions at a later stage. However, for the purpose of this request for information we limit our remaining comments to the requirement to assert.

6 Requirement to assert, an unnecessary formality

- 6.1 The Berne Convention Article 5.2 provides that the enjoyment and exercise of the author's rights shall not be subject to any formality. However, in the UK the right to be identified as the author or performer does not come into effect unless it has first been asserted in accordance with the complex provisions of the Act.
- 6.2 The late Charles Clark, International Counsel for the Publishers Association said: ***“Let me deal with the requirement of assertion. I simply do not understand the need for it. The UK Government points to the wording of Art 6(b) of Berne ‘the right to claim’, as Gerald Dworkin explained yesterday, but the Government’s argument is pedantic, and, while the Government says that the right is in the interests of publishers so that they know where they stand, the publishers know perfectly well where they stand – they put, as they always have, the author’s name on the book – and I hope very much that Australia will have nothing to do with this complicated and bureaucratic provision.”*** (taken from Charles Clark’s speech at ALAI Conference, Antwerp 1993). For the current view of the publishing industry, see the separate submission from the Publishers Association.
- 6.3 In our own most recent submission to IPO on this subject (IPO consultation on Regulations implementing Performers’ Moral Rights in the UK, 18th March 2005), we said that ***“The Council considers that a performer should have the right to be identified as the creator of a performance without the need for assertion of that right. Moral rights should apply as a matter of principle with minimum derogations...”***
- 6.4 The Australian Copyright Act does not include a requirement to assert. However, as an additional safeguard for users the law states that the right to be identified should be applied where it is reasonable to do so. There may be circumstances where removing the current requirement to assert could create confusion and impose business burdens in the online environment. For example, in the case of compilations, or works by multiple contributors. Confusion could also arise in cases where contributors may not wish to be identified, or where contributions come from within interactive online chat, or blogs or commentaries on current affairs, etc. While this should not undermine the initial and automatic right of the author or performer to be identified, if the UK were to consider the removal of the requirement to assert, then we accept that there may be some value in considering a similar provision for the UK Act to deal with such instances. The Australian Copyright Council in its information sheet on moral rights (G043, June 2006) sets out a number of factors to be taken into account in working out whether the action was reasonable. These include:

- ***The nature of the work;***
- ***The purpose, manner and context for which it is used;***
- ***Relevant industry practice;***
- ***Whether the work was created in the course of employment or under a contract of service; and***
- ***If there are two or more authors, their views about the failure to attribute.***

7 Cost and benefit

- 7.1 Several of our members have said they do not recognise the figure which has indicated a huge cost to the publishing industry of the assertion requirement. We would be interested to know its source.
- 7.2 Nevertheless, the majority of our members feel that there are hidden costs for the media and creative industries more generally, resulting from the confusing and complex nature of the formalities involved and from increased search costs for authors and performers who cannot be readily identified.
- 7.3 The majority of our members feel that there are hidden costs to copyright creators and performers due to a lack of understanding about the need to assert and the form which that assertion should take; from the added burden in contract negotiation; from the loss of licensing revenues from works and performances where the author or performer cannot be identified; from the loss of commission fees where potential clients are unable to identify a desired author or performer and from increased costs of collective administration of rights which result from faulty or non-existent identification data provided by users. The Association of Photographers (AOP), in its response to this consultation, lists five such areas where failure to attribute their work incurs a cost for the author. The requirement to assert exacerbates this problem.
- 7.4 As AOP also points out, User-Created Content is on the increase with increased demand for this type of material across all types of media. User-Creators cannot be expected to be aware of the intricacies of CDPA 1988 and rights and revenues are lost as a result. If only for the sake of simplifying the law for the benefit of user-creators, the requirement to assert should be removed.
- 7.5 We see no benefit to be obtained from the retention of the requirement to assert, though we note that the PPA feels that publishers would face additional burdens if the requirement to assert were removed. They will be making an individual response on this issue.

8 Assertion in practice

- 8.1 As our member the Society of Authors states in its response to this consultation ***“Authors’ main objection to assertion is that it is an unwarranted and inhibiting fetter on the operation of moral rights. The need to assert a right that should be conferred automatically is an unnecessary, tedious and sometimes time consuming complication.”***
- 8.2 In practice, the effect of the requirement to assert restricts the application of the attribution right in many cases. While the right to be identified (CDPA 1988 Section 77) is already complicated, the general requirement that the right be asserted (CDPA 1988 Section 78) simply adds an unnecessary burden without any corresponding benefit. However, our member the PPA

highlights in its submission possible new burdens that may arise within online publications some of which are touched upon in paragraph 6.4 above.

- 8.3 The law expects creators, performers and indeed, users, to know and understand the difference between a general assertion, an assertion in relation to a specified act and an assertion in relation to a description of acts. This is unreasonable as well as very complicated.
- 8.4 Users are expected to know that the assertion has appeared on the assignment of copyright, though the user may be a licensee without access to the original assignment or in the case of an infringement there may be no paperwork. The unfairness of the requirement to assert can be most clearly seen in the case of *“Andrew Christoffer v. Poseidon Film Distributors Ltd.”*

While finding Poseidon guilty of infringement of the copyright in the script with the infringing acts including both direct and indirect copying and adaptation of the script, Poseidon were found not guilty of any infringement of Christoffer’s right to be identified in accordance with S.78 (in an assignment or other written instrument). The judge found that the right had not been asserted as prescribed.

“Andrew Christoffer v. Poseidon Film Distributors Ltd”
before The Hon. Mr. Justice Park, 6th October 1999
reported in 2000 (ECDR 487)

- 8.5 Assertion in relation to infringements of copyright further complicates the matter. We note that in the case of musical performers, there is an increasing problem with services such as You Tube mash ups, where the performer, in most cases, now accepts that they will receive no payment for use but where they should, at the very least, retain the right to have their contribution recognised (see Musicians’ Union response on moral rights).
- 8.6 Artists, galleries, auction houses, museums and galleries and purchasers of works of fine art also have incomprehensible hoops to jump through with provisions which bear little resemblance to art world practice.
- 8.7 In the world of book publishing it is, due to industry tradition and an early introduction of a process for assertion, relatively easy to tell whether the right has been asserted. However, across other sectors it is almost impossible. As our member The Writers’ Guild of Great Britain said in its response to this consultation. The removal of the requirement to assert would: ***“increase certainty - at the moment there is the possibility of doubt as to whether moral rights have or have not been asserted.”***
- 8.8 In our own 2005 submission on performers’ moral rights, we stated that the assertion of the right to be identified was: ***“Unnecessary and likely to give rise to problems in practice. This view is supported by our performer members who believe that assertion is an undue burden in negotiating contracts....the assertion requirements detract in practice from any value this brings”.***

9 Impact of assertion on the identification of authors and performers for rights clearance and licensing in the Digital Environment

- 9.1 We have already seen the emergence of the problem of “orphan works” which, in many instances, has arisen from the inability of users to identify the original author or performer.
- 9.2 We have also seen the problems which arise, and the costs which are incurred by collecting societies, when trying to allocate and distribute revenue received from collective licences where users provide little or no data on works and authors used. This is a particular hurdle for those societies administering secondary rights for creative contributors to other works. Unless such contributors are ‘featured’, ‘headliners’ or ‘stars’ i.e. appear in the opening credits, or are co-authors, very little information is retained by the user and subsequently made available to the collecting society.
- 9.3 In its response to this consultation, our member, British Equity Collecting Society (BECS) has provided a useful and detailed example of the importance of precise data for efficient administration of its members’ rights and of the contribution which easy identification of performers makes to the ‘hidden wiring’ of copyright administration.
- 9.4 This contribution can only increase in the digital environment. The right to be identified must be updated and simplified to support and encourage the automatic retention of data by users and to provide for its ready availability for rights management purposes. The removal of the requirement to assert is fundamental to a simplified process, for the future success of micropayments to authors and performers while easing the system for users.
- 9.5 A particular issue for the audiovisual sector is the view of producers and broadcasters that provision of a full cast list is onerous, and therefore, not only should the right to be identified not be asserted, it should be waived. However, technology is changing and as BECS and the Musicians’ Union point out, lists of musical contributors and cast lists can now be available through the use of the “red button”, or on websites associated with particular products and programmes. While this should never replace on-screen opening credits for major contributors e.g. director, producer, screenwriter, art director or starring actors, it provides an important form of acknowledgement for contributors. As a first step towards a change of attitude in the audiovisual sector, the requirement to assert should be removed.

In conclusion, it is the majority view of this Council that the requirement to assert is unjust and inappropriate and its removal would simplify UK moral rights legislation.

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