

Francesca Marchese and Phil Sutcliffe—written evidence (FOJ0099)

How Public Policy Could Better Support Freelance Journalists

The Lords Communications and Digital Committee asked freelance journalists Francesca Marchese¹ and Phil Sutcliffe² to jointly submit their views.

Freelance journalism is under threat of extinction in the UK. If it's to continue as a substantial occupation delivering workable income, freelances need:

Bullet points:

- Tax: Give freelances who have been taxed on PAYE access to SEISS – many are receiving no relief during the Corona crisis. See In-depth 1 below.
- Payment: Stop late payment of freelances – strengthen late-payment-of-debt legislation and administration. See 2.
- Copyright: Change copyright law to ensure freelances get a fair share of income from their work. See 3.
- Fair contracts: Adjust contract law to balance negotiatory power and foster fair outcomes between freelances and client companies. See 4.
- Equality and diversity: Bring the UK's best to the fore: freelance journalism lacks diversity in all areas: gender, ethnicity, disability, economic. See 5.

In addition, we support the National Union of Journalists' constructive submission to this committee – see points 28-29 on public policy and freelancing. We add our points as self-employed cogs in the media machine.

In-Depth

Glossary: *freelances = self-employed journalists who write, take photographs, shoot video, make radio/TV broadcasts/podcasts, edit, subedit, design, and more for print and online newspapers, magazines, books, blogs and broadcast media (ONS estimate of freelance numbers is 31,000).*

1) Tax

Action Now: End the exclusion of income taxed via PAYE from SEISS payment calculation to 21% of freelances (says an NUJ survey – i.e. freelances not furloughed under the CJRS because companies refused or they were not working for the company as of the scheme's cut-off point). Free already hard-pressed UK freelances from this trap so that they can claim the second SEISS tranche in

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² Phil Sutcliffe is London-based, a journalist for 50 years, 41 of them as a freelance. Apprenticeship on the Newcastle Evening Chronicle then freelanced as writer/subeditor in newspapers, magazines, books, radio and TV.

August. (Perspective: the NUJ's 2019 freelance-members survey found "normal" income in the range £20-30,000.)

Medium-Term: Change tax rules so that freelancers who are self-employed by any rational criteria are not forced into PAYE by HMRC threats to client companies re liability for any non-payment of tax. Freelancers giving clients their self-employed tax and NI numbers should establish a sound tax footing. Eliminate archaic and perverse criteria for assessing employment/self-employment/worker status e.g. that being able to field a substitute to do the job instead of yourself indicates self-employment – it's nuts: you're self-employed if, contractually, you can not do the work and not get paid for it!?

Such improvements would also eliminate the potential for contradictions (mirrored in NI payments) e.g. a tax tribunal deems a person an employee in tax terms while an employment tribunal deems the same person in the same client relationship self-employed i.e. without employee rights.

Similarly, this would also ease the pressure from companies on sole-operator freelancers to incorporate as (fundamentally fake) limited companies – burdening them with pointless extra cost and admin. time. (NB on these points see the Matthew Taylor Review P38 – and the Government Good Work Plan – highlighting the incongruence between employment law and tax law.)

Principle: Rationalise tax criteria so that freelancers escape this regime which lands many of us with all the disadvantages of self-employment, "worker" status or employment with none of the advantages of any of them.

2) Payment

Action Now: Start a Late Payment Of Debt inspectorate e.g. via the Commissioner For Small Business, with powers to respond to late-payment complaints, check companies' payment systems at any time and impose penalties on late-/non-payers to deter companies from damaging livelihoods and causing stress to freelancers and small-business people.

Medium-Term: Strengthen Late Payment of Debt legislation e.g.:

- a) base penalties on payment within 30 days of delivery or completion of work, not publication/broadcast etc date.
- b) increase penalties for late payment (both percentage and flat penalty fee).
- c) make these terms mandatory for contracts between companies and sole-operator freelancers or small businesses.

Principle: Media companies must promptly pay the freelancers they engage – to ensure that freelancers of the standard they need can financially survive and thrive for the wider economic and journalistic health of UK media.

3) Copyright

Action Now: Remove two exclusion clauses in UK laws which make it difficult for freelance journalists (and other self-employed in the media) to negotiate fair contracts with clients – especially with large companies wielding lawyered contracts heavily weighted their way:

- a) delete one word – “copyright” – from the Unfair Contract Act 1977 schedule sub-clause which excludes copyright from the Act’s protections.
- b) remove Copyright, Patents & Designs Act 1988 Section 79, clauses 6(a) and (b), and Section 81, clauses 4(a) and (b).

They all create exceptions to the moral rights first installed in UK law by the ‘88 Act, namely i) the right to be identified as the author (byline, credit) ii) the right to object to “derogatory treatment” of your work (distortion of its meaning in a fashion damaging to the professional reputation of the freelance “author”). That is, they *remove* freelance moral rights when contributing to newspapers, magazines/periodicals, and to collective/multi-authored publications such as encyclopaedias and other reference works.

This exclusion – enacted pre-internet – became even more significant in the early ‘90s as digital media revved up, encouraging cross-media reuse of material. Many media companies, print, broadcast and/or online responded by going beyond the Act and including all-media moral-rights exclusion clauses in standard contracts, eliminating freelancers’ moral rights altogether. Their prime objective (as other, related contract clauses confirm – see below in 4)) was to separate themselves from legal responsibility to freelancers and, furthermore, the public for what they published/broadcast.

Moral rights matter to freelance journalists because:

- (i) a byline/credit works both as promotion and proof of “authorship”.
- (ii) but, in terms of journalists’ societal role, bylines/credits also function as a declaration of individual responsibility and accountability for your work (*alongside* the publisher/broadcaster’s responsibility and accountability).
- (iii) so (i) and (ii) connect to and are supported by the right to object to “derogatory treatment” of your work by the publisher/ broadcaster – anything from falsehood introduced to reversal of the author’s “angle”. The moral right to object to such treatment of work is a crucial support of media integrity.

Medium-Term: Change copyright law to make freelance copyright ownership inalienable: a right irremovable by contract or any other means.

Related to the moral rights issue, freelancers’ main copyright problem is client companies’ rapacious wielding of contracts requiring them to *assign* their copyright. Meaning, hand over to the client the ownership they have under the Copyright Act as self-employed authors. (*Many freelancers –us too – have faced contracts requiring assignment “for all media, including those yet to be invented”, “for the universe”, “for all time” and... “for no further fee”!*)

Why? To acquire any and all future reuse income from the freelance’s work. And why do freelancers sign such costly documents? Because media companies abuse their market position by saying or strongly implying (though almost never in writing) “Sign or you won’t work for us again”.

Future earnings from a piece of work will be unknown, but the range is from zero to tens of thousands with hundreds to lower thousands being quite common (for instance, in March a colleague’s annual photocopying(!) royalties from collecting society ALCS produced £7,100.)

Such sums matter to freelances – and their work *earned* them. The client company invested in their work – fee, staff editorial time, expenses perhaps – but so did the freelance: time above all, expensive equipment, other materials, office space at home or rented, hard-won skills, and so on.

As argued above, the chief law change needed to restore equity in the copyright relationship is to *make freelance author copyright ownership inalienable* (cf Germany). So it cannot be bought and sold – but this does not inhibit business at all. Freelance copyright owners love to sell “licenses” for reuse of their work in exchange for negotiated fees.

We speak as freelances, but please consider that staff ownership of copyright, which UK law denies, exists successfully in many countries.

Principle: “Authors’ rights are a human right.” More mundanely, self-employed creative workers should be able to share in all revenues raised by their work – not to operate at survival level, but so that they and their families may thrive. We baked the cake, leave us a slice... maybe some icing too!

4) Fair Contracts

Action Now: See 3) a) above, Unfair Contract Terms Act amendment.

Medium-Term:

- a) Ensure by any amendment necessary that neither the Unfair Contract Terms Act 1977 nor any other contract law undermines current or future freelance-related copyright law rights.
- b) Adjust contract law to cohere with a range of laws regarding responsible journalism in all media – it should protect freelance journalists against contractual traps dumping *sole* legal responsibility on them for costs, and/or fines arising from their work.

From the mid-’90s, the internet’s advent stirred media corporations and their lawyers to insert unfair and unreasonable “warranty” and “indemnity” clauses into their “standard” freelance contracts. In essence, these warranties promise that the freelance’s work does not include anything actionable under libel, privacy, obscenity, blasphemy, copyright or, often, “any other law”(!).

Working in tandem with the warranty is the indemnity clause. This demands that the freelance pay all cash penalties and other costs and accept any other penalties that may arise from legal actions following publication of his/her work – even suits or prosecutions where the offence/complaint is not upheld (I.e. where the freelance has done nothing wrong).

Warranty and indemnity add up to what freelances dub the “lose your house clause” – or “lose your shirt” for those not yet on the property ladder.

This is fundamental injustice because:

- (i) in these legal areas it’s impossible in advance to know whether journalistic work is actionable and impossible to know what the outcome of any case might be until a court has decided it. So no intelligent person could sign such a warranty/indemnity – except under commercial pressure/duress (as above).

- (ii) in most of these legal areas, publication/broadcast of an offence is deemed a responsibility shared by journalist, editor, proprietor and, in libel cases, printer and distributor. Even so, the NUJ's legal advisors tell us that these clauses do "work" – they really do effectively offload sole legal responsibility on to the freelance... and absolve the media company from any responsibility for their freelance content... which may be some, most or all of their output.

This is potentially ruinous to a sole-operator freelance journalist. Even limited individual insurance costs too much for the "normal" earner. And this practice breaks with long-standing tradition in the media industry that companies took responsibility in every sense for what they publish/broadcast – and profit from. That is, they covered freelance work in their company insurance. So they had every incentive to employ or engage sufficient, skilled editors, subeditors and on-the-spot lawyers to check and "legal" content – easing anxiety, but also improving the accuracy and quality of the journalism. A wearisome burden on independent journalism in the UK, warranty/indemnity clauses facilitate an "I'll publish and you be damned" approach from freelancers' client companies.

Please note that in the '77 Unfair Contracts Act Section 4, a consumer "cannot by reference to any contract term be made to indemnify another person" in any circumstances – except where "the contract term satisfies the requirement of reasonableness". Well, these warranty/indemnity traps can in no way be judged "reasonable".

Principle: Freelance journalism supports thousands of people who take responsibility for both the content of their work and making a living; they merit legal protection so that unfair corporate contracts don't drive them out of the media and kill off the information, investigation and entertainment they offer.

5) Equality & Diversity

We support the NUJ submission points 9-14, but add re freelances...

Action Now:

- a) Restore the Equality and Human Rights Commission's budget to pre-2016-cuts levels, or preferably increase it beyond that so that it cannot only investigate whistleblowers' complaints but develop its own research – *and take action*. Freelance journalists combatting discrimination on top of their basic economic insecurities would particularly benefit.
- b) Reverse the pandemic-induced waiver of Gender Pay Gap reporting requirements. This would particularly help female freelance journalists.
- c) Enforce the employment law barring unpaid internships (requiring minimum wage at least). Unpaid work experience for a couple of weeks is one thing, but months/years-long unpaid internships, common in media companies, automatically invite the tyro journalist to call on "the bank of mum and dad". It's obvious that this discriminates against young people from "economically disadvantaged" backgrounds. Multiply that disadvantage if the young person is in one of the other groups vulnerable to discrimination.

This is about how young people get a start in journalism – a little experience, a bit of on-the-job training. Without that their chances of making a living as new freelances are much diminished.

Medium-term:

The profound changes on diversity which the UK needs will benefit freelances along with other workers – and the feeling is that every current and foreseeable working life will include periods of self-employment/freelancing. So an active approach to diversity on all fronts – the “culture”? – will spread economic equity/justice and enhance the media’s journalistic resources.

Government can help. For instance:

- a) Develop “unconscious bias training” – available cheap or free to companies and individuals. Pay them to do it? Make it a recognised qualification? It’s an investment; undermining diversity at work undermines economic potential.
- b) Freelances would benefit from clients operating clearly on the basis of professional standards only – a virtuous circle replacing a vicious, negative one.
- c) Establish a government-funded Journalism Foundation as recommended by the Cairncross Review – details summed up in NUJ submission point 13. For freelances this would improve funding for what the NUJ calls “public-interest journalism with strings attached, including increasing the diversity of the industry by class and ethnicity”. Significantly, that covers investigative journalism, one of the potential prime values to society of independent journalism – but, because of its long-term nature and, often, delayed rewards, difficult for freelances to carry out while maintaining their livelihoods. This goes double for people commonly held back by bias based on ethnic origin, gender, disability, sexuality, and/or economic background.
- d) Extend subsidy, organisation, support and promotion for practical journalism training and apprenticeships across the UK’s social rainbow (in all senses) – training in journalistic skills and, crucially, all aspects of how to run a sole-operator freelance business. This is hardly touched on by current formal media education (except the one/two-day courses run by the NUJ and a few with Government UnionLearn support in England, Scotland and Wales.
- e) Put pressure on/legislate for companies engaging freelances to include them in agreed policies on issues such as bullying, harassment and diversity.
- f) Introduce BAME and Disability Pay Gap reporting too, with penalties for failure to rectify inequities exposed. Again this would particularly help freelance journalists in the many groups prone to suffering discrimination – people even more isolated and insecure than the average freelance. Further, transparency benefits freelances as well as staff – see NUJ London Freelance Branch’s Rate For the Job pages of fee data gathered from freelances – 20 years’ worth at:
<http://www.londonfreelance.org/rates/index.php>.

Principle: We both want to present the case for diversity, but we are, respectively, a 40-year-old white woman and a 73-year-old white man, university-educated, without disability, gender or sexuality issues. So we asked disabled, female, freelance photographer colleague, Natasha Hirst, to sum up on the cultural/economic value of diversity in freelance journalism:

"Why is diversity in journalism important? Because we cannot hope to find and tell the wide range of stories out there in a way that is accurate, insightful and relevant to diverse communities and individuals if the industry is made up of a largely homogenous group of people. We all bring our life experiences to our work which shapes our biases and what we 'know'. People need to see themselves and their life experiences being represented in mass media.

"We talk about the importance of opportunities for marginalised groups being made available under the Equality Act for a range of reasons because it's right, yes – but breaking down barriers of discrimination that prevent many groups of people taking up journalism as a career helps to provide a dynamic diversity of information and viewpoint... encouraging a fairer, healthier and wealthier society. It benefits everyone."

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