

FST/SSP BEST PRACTICE GUIDELINES FOR CO-CREATED WORK

The standard SSP/FST commissioning contract is designed to protect both writers and producers and is flexible enough to be used in a wide range of circumstances. If you think that your project will involve a degree of co-authorship which cannot be accommodated by the standard contract, these guidelines are designed to help you consider all your options. If you need further help then you can consult either the FST or the SSP directly. First though, there are a few questions which are worth considering at the very beginning of the process.

Stage One – Initial Questions

Is it really co-authorship?

Many standard commissioning processes include input from more than just the writer. There might be an original story idea, or a source text to adapt, or material thrown up through workshops, input and suggestions from directors, actors, dramaturgs, designers etc. None of these necessarily amount to co-authorship or fall outwith the range of the standard contract.

As a working definition, co-authorship would typically involve a number of parties sharing authority over the creation of ideas, the organisation and structuring of material and the expression of character, theme and style. This would have to obviously exceed the traditional level of collaboration between writer, actor, director, dramaturg etc.

What form will the process take?

The key to contracting creatives appropriately in a non-traditional process is in having as much clarity as possible about what form the process will actually take. Is the work going to be devised? Using what methods? Is it to be scripted? When and by whom?

In relation to co-authorship it is important to consider how many – and who – will be directly involved – and directly credited. Everyone in the company? Everyone in the room? Key creatives? Specific individuals? There is now a range of crediting options which provide flexibility in this area, but the variety also creates the potential for confusion.

There are many terms used to describe a creative process. The terminology has been used, adopted and modified which means words like 'devised' and 'co-authored' can carry many different interpretations. It is important right at the beginning of the process to ensure that any terms adopted to describe the process are understood by all parties and that their meaning has been mutually agreed. This will help define the expectations of workload and contribution to the process. It will also ensure that when contracts are created using these terms, all parties know exactly what is meant by them.

See Appendix 1: Suggested Options On Crediting

Roles and Responsibilities

Consideration of the process ought to lead to a clear understanding of the roles and responsibilities of the different creatives to be contracted. In a practical sense this should include a consideration of the time commitments expected from each individual – which may vary significantly depending on each role. No-one should be expected to sign a contract without a reasonable sense of what is to be required from them – and what is not.

Ownership and Future Use

This is also the time to discuss intended ownership and possible future use of the work. Leaving such discussions until after the work is created is an invitation to conflict and dispute.

The answer to the question of ownership will be connected to the outcome of the previous consideration of roles and the form of the process. Ownership will be reflected in the allocation of copyright.

Copyright

In co-created work it is essential to discuss and draw up a written agreement on copyright. Producers need to discuss and agree on the most appropriate copyright option for the project. An agreement should also be reached on moral rights.

Producers need to consider all potential long term outputs for the project. They should discuss these with all creatives likely to own copyright in the finished work. This helps identify any potential objections or conflicts. It is good practice to negotiate, or at least have a conversation, about this at the early stage of a project.

Producers should be transparent in this discussion about possible future use and budget for fair payment for any rights they ask from the creative/writer.

See Appendix 2: Copyright Options And Moral Rights

Future Use

It is important to prepare for the best-case scenario. If the show is massively successful, what ownership will the members of the creative team – including the writer – have over it? Even at development stage a show may be picked up by a producer, for instance. Whose contribution at that point warrants credit, ownership or a share of control? How would royalties from future runs or second productions be allocated?

It is worth remembering that a text or performance can also have a future life in a different medium. This should always be considered in the contract - especially with the growth in distribution on screen-based platforms.

See Appendix 3: Examples of Future Use clauses.

It is important to note that ownership is distinct from the questions of crediting and control. In some circumstances, the work may be owned by a group of creators but controlled by the company. Or the company may be credited as creators but the work may still be owned by an individual. In most cases, there will be a large degree of overlap of these terms, but it is important to consider each of them distinctly at this stage to avoid future confusion.

In all cases it's worth investing in legal advice on the best option moving forward for your project and appropriate clauses created for contracts and written agreements.

Stage Two - Initial Development

In some processes of collaboration and shared authorship it may be useful to begin with a short period of research and development in order to establish how the process will work, particularly when embarking on a new or unknown collaborative relationship.

A research and development phase may occur before taking the project to full contract, with ownership over work created in this period covered in a separate, shorter letter of agreement (LOA). It is important that this LOA clearly establishes where intellectual property and ownership over work created lies in the event of the bigger project not going ahead or in key individuals leaving the project at this stage.

Research and development will always look different depending on the exact nature of project in question. It will be a short period where the key collaborators begin to explore the early ideas that will inform the making of the work. Depending on the nature of the project this could be anything from a day's workshop to a couple of weeks.

By the end of a successful initial research and development phase, the creative team will have a clearer picture of the form and nature of the collaboration and the roles and responsibilities of each member. They will be better placed to agree on the following:

- The terms to be used in the contract
- The crediting to be used
- The division of royalties
- The copyright arrangements
- Potential future use

In some instances this clearer understanding of the nature of the collaboration may lead one or all of the individuals involved to realise that this project is not for them. An initial research and development phase therefore provides an opportunity to amicably part ways before the producer contracts for the subsequent realisation of the project.

In many cases the creative team's shared understanding of the nature of the collaboration will be confirmed rather than altered by this initial phase. This is, of course, all to the good and the project will still be substantially moved on by the development.

Stage Three – Full Contract

It is essential that the discussions above are undertaken prior to creation of a full contract. In addition to agreeing credit, copyright and future use you will also have to consider the royalties agreement. The shape of this will be informed by the understanding reached in those other areas and reflect the decisions made there.

Like credit and copyright, royalties can be allocated in a variety of ways. One simple option in a co-created project, is to divide the royalty pool in proportion to the distribution of the commission fee amongst the creatives involved. Whatever method is chosen though, it is important that it is fair to all parties, transparent and agreed in advance.

Of course, the future budget implications of the royalty agreement should be considered. It is also worth thinking about what circumstance would constitute a material change significant enough to necessitate re-visiting the contracted terms. The goal should be to produce a contract which is robust enough for the initial realisation of the project, but also future-proof for the longer term.

APPENDIX 1 – SUGGESTED OPTIONS ON CREDITING

There are myriad ways in which shared authorship over work may be reflected in crediting. This guide is not prescriptive but rather merely attempts to draw attention to popular trends, and to highlight some key principles to consider when deciding how to credit authorship in a collaborative process.

It is worth noting that theatre is by its nature collaborative and that traditional credits (i.e. “written by” and “directed by”) already account for a good deal of collaboration in the creation of new work. It is perfectly normal for a director or actor to fundamentally shape the direction or dramaturgy of a new play in development or for early conversations with a writer to inform a directorial concept. Equally it is quite standard practice for a company or director to commission a writer around a particular concept, theme, or idea. Bear this in mind when considering whether alternative crediting is necessary.

If alternative crediting is more appropriate for your project you might consider combinations of the following:

- “conceived by” or “story by” – to reflect substantial authorial input around the concept of the work
- “text by”, “script by”, or “words by” – often used in conjunction with the above, to credit the writer’s work where key areas of dramaturgy, story, or thematic concept have been clearly authored by others (consider thoroughly whether “written by” would suffice here).
- “created by”, “collaboratively created by”, “co-authored by”, “co-created by” or “devised by” – often preceding a list of the entire creative team, to reflect a devising process that is intensely collaborative with no singular author
- “created by the company” – for situations similar to the above
- “created with”, “created in collaboration with”, “created in association with” – often following a “written by” credit, to acknowledge the collaborative input of the cast or creative team
- “additional text by” or “additional material by” – often following a “written by” or “text by” credit where other members of the creative team have contributed directly to the writing process.

You may choose to use alternative wording altogether. The most important thing is that all members of the creative team are satisfied with the chosen credit. In choosing an appropriate credit, you might also want to consider how relevant or otherwise such terminology is to audiences. Some companies may prefer to avoid potentially convoluted wording for purposes of marketing. This is fine, provided all members of the creative team are satisfied and that any nuances of shared authorship are adequately reflected elsewhere in the contract, i.e. in division of royalties.

APPENDIX 2 : COPYRIGHT OPTIONS AND MORAL RIGHTS

1. Each artist retains copyright of their individual contribution

In this case it is agreed that the work is not 'collective' but made up of a series of distinct parts for whom copyright belongs to the person who created their part. To use the work as whole you have to obtain permission with each separate artist to use their part, but each artist also has control over their own work and can license it, or even assign it, as a separate piece of work. This is easy to apply when separating out stage design, from text, but it's not so easy to draw boundaries around individual work in a devised situation.

2. Joint copyright

If you create or develop a piece work with other people and it is difficult, or not possible, to determine individual contributions, this usually results in joint ownership of the copyright. The work is considered to be a 'collective' work and if someone wants to use it/stage it etc, they need to obtain the permission of all the copyright holders, not just one.

3. Merged copyright

Merged copyright is different from joint copyright in that all copyright owners assign their rights to an entity and proportional shares are agreed.

License or assign rights?

In most situations producers will agree a license to use any material that is in copyright. Licenses are time limited and can also be limited by other conditions such as territories. However, there may be situations in which a producer would prefer that ownership of the rights is transferred to them or their company, in this instance the creative would assign their rights rather than license them. This is also often called a rights buy out. This means that moving forwards the creative has no ownership of their copyright as this has been transferred to the commissioning party. This is not unusual, but a commissioning individual or company should be prepared to pay a fair fee for these rights.

Moral rights

There are four moral rights recognised in the UK:

1. The right to attribution: this is the right to be recognised as the author of a work
2. The right to object to derogatory treatment of a work
3. The right to object to false attribution
4. The right to privacy of certain photographs and films: this right enables someone who has commissioned a photograph or film for private and domestic purposes to prevent it from being made available or exhibited to the public.

Unlike copyright, in the UK, the moral rights of an author cannot be sold or transferred, but they can be waived. Producers should not forget about moral rights and make sure they are adhered to if the author of a work they have permission to use chooses to assert them.

Resources

Useful websites:

www.ipo.gov.uk
www.legislation.gov.uk/ukpga/1988/48/contents
www.copyrightuser.org
www.own-it.org

Useful article on joint copyright

<http://www.publicartonline.org.uk/resources/practicaladvice/contracts/jointauthor.php>

Resources

Tales from the Drawing Board: IP wisdom and woes from Scotland's creative industries.

www.st-andrews.ac.uk/icc/research/publications

Extract from ITC Handbook

Devised Work & Copyright

The general rule on ownership of copyright is –

- When intellectual property arises from work done by a freelance the creator is the first owner of the copyright.
- When intellectual property is created as a result of work done by an employee as part of their contract of employment, however, their employer will own the copyright.

The “employment” status of performers for intellectual property purposes is unclear but copyright only arises when a work is both substantial and original; the contributions of individual participants in a devising process will rarely satisfy these criteria. Nonetheless, it is best to have a clear written agreement with all participants before any devising process begins, making it clear: -

- Who has ownership of any intellectual property rights in the completed work – if a writer is involved in the process they may well be the owner of the final work, if not the company will want to own the rights so that future exploitation of a successful work is straightforward.
- What credit participants in the devising process will receive for the initial use of the work and also for any future use that is within the Managers' control.
- What royalties, if any, participants in the devising will receive for the initial use of the work and also for any future use that is within the Managers' control.

APPENDIX 3 - EXAMPLES OF FUTURE USE CLAUSES

Two example clauses for Future Use.

FUTURE USE

- i) The Contractor will have first option to further develop/commission the Project before the Creative is able to enter into an agreement with any third party. For the avoidance of doubt, the Contractor shall not in any way be obliged to take up the option, further develop the Project and/or proceed to contract and take up further rights.
- ii) The Contractor should be credited on any future life of the Project, with the following credit:

Originally developed with the support of

Future Use

- i) Extensions: If the run of the Production is extended for more than three weeks immediately following its initial run or tour the Manager shall pay the Creative [x]% of the original fee under C)1) above to cover such continuing use of the Work. If the Manager requires the Creative to work on rehearsals as the result of such extension additional payment for these services shall be negotiated separately.
 - ii) Revivals:
 - (a) A revival shall mean the reproduction of the production six weeks or more after the last performance of the initial run or tour.
 - (b) The Creative shall be given the right of first refusal by the Manager to work on all revivals of her/his work.
 - iii) Transfers: The Manager shall only license or transfer the production to another Manager if such Manager has agreed to pay the Creative a royalty and/or a percentage of the original fee that the Creative has agreed.
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