

# THE CREATIVE IDENTITY AND INTELLECTUAL PROPERTY

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## ABSTRACT

Intellectual property (IP) law awareness and education amongst creatives is an emerging theme of the IP policy agenda. This is important to society for socio-cultural growth, but also because research confirms that people with creative personalities are more likely to identify commercial opportunities, start a business and create employment, supporting economic development. This research found that to reach creative people it is important for IP law academics and experts to have a deeper understanding of the psychological traits that distinguish them from other cultural groups such as scientists or business people. How creatives perceive the value of the IP rights in their work influences their behaviour in identifying, managing and enforcing their rights. Through a discussion of 'creative identity' theory, linked to practical examples of thoughtful interventions by the Nottingham Creative IP Project (NCIP), this article examines how academics can transform IP educational practice to specifically target creatives.

## INTRODUCTION

Society relies on creative people to enrich culture by producing the art, music, literature, and to design and invent new products that enhance our lives.<sup>1</sup> Although the fruit of creative work has a high profile in society, there are few studies in relation to intellectual property (IP) rights, culture and the creative identity. Artists and designers have specific and well-established IP rights, but lack awareness of their impact in an entrepreneurial and commercial context. What is the relationship between creatives and IP? How do creatives perceive the IP rights in relation to their work? An interdisciplinary approach begins with an appreciation of how those in other disciplines, such as art and design, think. Indeed, there is evidence of a new 'creative class' whose economic function is to create new ideas, new creative content and to innovate.

IP law is that area of law that concerns legal rights associated with the product of creativity (a cognitive process) and is classified in law as intangible property.<sup>2</sup> The term 'IP' is an umbrella expression for copyrights, related/neighbouring rights and industrial property rights although this list is not exhaustive. The interests of the creators are protected by legal IP rights afforded to the 'property' of their creation. These IP rights are the same as any form of property that is owned and giving the owner the right to assign, mortgage and license. The field of IP law plays an important role in human life by encouraging advancement in social, artistic, technical fields and providing creators with reputational and commercial opportunities.

This research analyses how creatives behave in relation to the IP rights that subsist in their creative work, a concept coined as 'behavioural IP'. Through a discussion of 'creative identity' theory and practice in IP law education, linked to practical examples of thoughtful interventions carried out by the Nottingham Creative IP Project

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<sup>1</sup> C Grégoire and S.B Kaufmann, 'Wired to create: Unravelling the Mysteries of the Creative Mind'.

<sup>2</sup> Adam D Moore, 'Intellectual property, innovation and social progress: the case against incentive based arguments' (2003) 26 *The Hamline Law Review* p604.

and planned for the future, this article aims to make IP academics think about the common characteristics of ‘creative identity’ enabling them to enhance how they communicate the IP law framework to creatives, key stakeholders in the IP regime. It will examine how academics can transform IP educational practice and engage more effectively with entrepreneurial creatives, assisting them to recognise and reflect on the IP rights that subsist in their cultural and potentially economically valuable creative works.

Research into the creative identity is important because the UK’s creative industries are world leaders and their contribution to the UK’s economy is considerable. Recent government figures show that UK creative industries are worth £76.9 billion per year to the economy – £8.8 million per hour. A report published by the London Development Agency described London as the ‘creative hub’<sup>3</sup> and a global city in the new sector of the creative industries. At the same time, IP – its creation, its protection, its management – has become a major area of concern in terms of economic development worldwide. Further, according to Hartley:

The creative industries are important because they are clustered at the point of attraction for a billion or more young people around the world. They’re among the drivers of demographic, economic and political change. They start from the individual talent of the creative artist and the individual desire and aspiration of the audience. These are the raw materials for innovation, change and emergent culture, scaled up to form new industries and coordinated into global markets based on social networks.<sup>4</sup>

The emergence of new ideas and creative works underpins economic development, creating employment, commercial and socio-cultural growth. Offering legal protection for the creation of ideas and innovation is the essence of the IP law framework the purpose of which is to stimulate and encourage the creation and diffusion of ideas crucial for cultural and economic development. To achieve this aim, the IP law framework provides a preventative mechanism to safeguard ideas, and prevent others from misappropriating protected creative works.<sup>5</sup> However, creatives lack sufficient awareness of the IP rights legal framework and the topic rarely features in the curriculum of tertiary art and design programmes. Consequently, international and national IP organisations seek to address these concerns about the lack of IP knowledge and experience of creatives through education and IP awareness programmes.

At the international level, the World Intellectual Property Office<sup>6</sup> (WIPO) Academy was established in 1998 and plays a central role enhancing the capacity of countries to use the IP law system. WIPO adopts an interdisciplinary approach to IP education and has identified the need to focus on the creative industries, among other sectors.

Presently, IP law awareness and education is also a prominent theme of the UK Intellectual Property Office (UKIPO) policy agenda. In 2012, a National Union of Students study co-funded by the UKIPO, found that although 80% of students felt that knowledge of IP was important to their education and future career, only 40% thought their current awareness of IP was enough to support them in their future career. Students who were surveyed indicated that they wanted better access to information on IP but

<sup>3</sup> John Hartley, “The evolution of the creative industries – Creative clusters, creative citizens and social network markets.” (2007) In Proceedings Creative Industries Conference, Asia-Pacific Weeks, Berlin; Knell and Oakley 2007: p8.

<sup>4</sup> *Ibid*

<sup>5</sup> C Colston, *Modern Intellectual Property Law* (2010) Routledge p44.

<sup>6</sup> The World Intellectual Property Organization is one of 17 specialized agencies of the United Nations. WIPO was created in 1967 to encourage creative activity, to promote the protection of IP throughout the world and it provides a global policy forum, where governments, intergovernmental organizations, industry groups and civil society come together to address evolving IP issues.

were not clear on how to obtain this information.<sup>7</sup> Further, in the UK initiatives are underway to attempt to show the value the arts contribute to society and the economy in response to the ‘age of austerity’ and ensuing cuts in public funding. In 2010–2011 public ‘grant-in-aid’ funding to the Arts Council was £450 million and in 2014–2015 stood at £343 million, a substantial reduction in investment.<sup>8</sup> Assisting entrepreneurial creatives to nurture their IP rights has the potential to impact on UK government policies for funding art and design.

### *The IP Awareness problem and entrepreneurial creatives*

The lack of IP awareness and knowledge amongst creatives is particularly important when taking into account research that confirms that people with creative personalities are more likely than others to identify business opportunities and start a business. The genius of the contemporary artist is not unlike the genius of the entrepreneur. The urgent need in the fast-paced modern world in economic and technological change for people who are creative, innovative and flexible<sup>9</sup> is driving the new ‘creative class’ whose economic function is to create new ideas, new creative content and innovate.<sup>10</sup> This group of people are known as ‘entrepreneurial creatives’ who also share common genetic influences.<sup>11</sup>

Creatives, especially visual creatives, are notoriously uninterested in academic subject such as law, and their scholastic records usually reflect this. It is probably for this reason that the French say *bête comme un artiste* (dumb as an artist) when they want to insult someone’s intellect.<sup>12</sup> Although creatives are generally aware of the phenomenon of IP rights, which play an increasingly important role within their discipline, they are light on the detail and view the bundle of IP rights collectively as a colossal concept or as a tangle of uninteresting laws that are remote from their work. The exponential growth in the various ways in which works of art and design can be viewed, experienced and enjoyed has resulted in even more legal rules. For example, the rise of digital media and user-created content illustrates the extent to which creativity is attributable not to creators alone, but also to socially networked participants or consumers. This often results in creative IP being shared, not controlled by the creator.

Further, creatives are often confounded by extensive discussion of statute and case law which forms the basis for the specific legal categories: copyright, moral rights, design, trade mark and patent law. This exemplifies the human dimension in that creatives with a non-law background find it difficult to relate abstract IP law concepts directly to their own art and designs (works made in concrete acts), and as a form of transferable property that underpin legal transactions.

In contrast, IP law specialists and educators take an analytical look at the building blocks of an artistic work or design (the product of creative efforts) in order to evaluate subsistence of copyright, design right, authorship, ownership and infringement. They are mystified by the creatives’ apparent lack of interest in or seemingly unsympathetic

<sup>7</sup> *Student attitudes toward intellectual property* (2015) A Report published jointly by the National Union of Students, the Intellectual Property Awareness Network (IPAN) and the UKIPO.

<sup>8</sup> <https://www.gov.uk/government/policies/supporting-vibrant-and-sustainable-arts-and-culture>.

<sup>9</sup> Robinson, K. *Out of our minds: Learning to be creative* (2007) Wiley-India, New York, USA.

<sup>10</sup> Florida, R. *The rise of the creative class: And how its transforming work, leisure, community and everyday life* (2003) Pluto Press, North Melbourne, Victoria, Australia.

<sup>11</sup> S. Shane and N. Nicolaou, ‘Creative Personality, opportunity recognition and the tendency to start business. A study of their genetic predisposition’ (May 2015) *Journal of Business Venturing*, Vol. 30 (3) pp407–419. The authors examined a sample of 3242 twins from the United Kingdom which they surveyed in 2011 confirming that people with creative personalities are more likely than others to identify business opportunities and start businesses.

<sup>12</sup> Mihaly Csikszentmihalyi, *Creativity: The Psychology of Discovery and Invention* (2013) Harper Perennial; Reprint edition. See Part I The Creative Personality, p178.

view of the IP law regime which offers them substantial legal protection for their economically valuable property rights. There is a cultural divide between the two tribes, and a wise IP law specialist needs to be especially aware of the sensitivities of the other tribe.

What is needed is an effective discourse regarding protection for the creator (and the first owner) in the field of creative art & design. IP rights can be complex, but are important for creatives to understand even during the process of creation. The distinction between inspiration and copyright is a key legal issue for creatives, especially to ensure they are not infringing third party IP rights. Having insight into the psychological theories that underpin the 'creative identity' will allow IP law specialist educators improve the way they communicate the IP law conceptual framework to creatives, useful knowledge creatives can put into practice in their future professional careers and as creative entrepreneurs.

The Nottingham Creative IP Project (NCIP) project was conceived on the basis of the interest shown by the various IP bodies above in IP awareness and education and the fact that Nottingham Trent University has key strengths in both legal education and the creative fields. The flow of talented art and design students who become successful creative professionals is a vital. So too is the ability of these entrepreneurial creative individuals to identify, protect, manage and exploit their IP for their own personal benefit and for society as a whole. The challenge faced by the creative sector is to know how, when and why they should manage their valuable IP.

The rest of this article sets out the background to the NCIP project followed by a discussion of IP rights and the creative identity, including the psychological traits of creatives and theories relating to creativity and creativity. This research provides the foundation for how the NCIP will continue to address raising IP awareness amongst this cultural group and the potential impact of the project.

## THE NOTTINGHAM CREATIVE INTELLECTUAL PROPERTY PROJECT

In 2014 Nottingham Law School responded to the UKIPO's challenge to raise IP awareness and launched the NCIP project with £69,000 funding from the Fast Forward Competition.<sup>13</sup> The NCIP is a collaborative project involving the Nottingham Law School and its IP Research Group, the Legal Advice Centre<sup>14</sup>, the HIVE<sup>15</sup>, the School of Art and Design and the College of Art, Design and Built Environment (CADBE), several Nottingham IP specialist law firms<sup>16</sup>, numerous award winning designers, inventors, entrepreneurs and more recently, City University in London. Nottingham Law School joined with the other schools to work together to make a bigger impact on the issue of raising IP awareness amongst creatives. The IP law experts on the team were Dr Janice Denoncourt, Senior Lecturer in Law, and Jane Jarman, Reader in Law, both in professional legal practice before becoming academics.

A number of existing outputs by NCIP members identified and addressed aspects of the IP awareness problem amongst creatives. The NCIP project began with a series of five themed workshops and clinics held in 2014 to show creatives how to identify, protect,

<sup>13</sup> The Fast Forward Competition (2011–2014) provided funding to universities and Public Sector Research Establishments to encourage collaboration with businesses and local communities on innovative projects that benefitted the UK economy and society.

<sup>14</sup> See [http://www.ntu.ac.uk/legal\\_advice\\_centre/](http://www.ntu.ac.uk/legal_advice_centre/).

<sup>15</sup> See <http://www.ntu.ac.uk/hive/>.

<sup>16</sup> The law firms supporting the NCIP project include Browne Jacobsen, Eversheds, Nelsons and Potter Clarkson.

manage, exploit and enforce the IP rights that might subsist in their creative work.. More than 200 participants attended 8 workshops, attracting key players in the creative industries. From creative industry experts and entrepreneurs to specialist IP lawyers, they all shared their IP experiences. Entrepreneurial creatives with business ideas also had the opportunity to receive pro bono legal advice from the Nottingham Law School's award-winning Legal Advice Centre. Using the university's own talent pool, 40 students from the Law School provided the IP advice, with guidance from experienced IP staff and lawyers. The pro bono IP clinics proved to be popular, with the students delivering 33 clinics. As a result of the success of these clinics, 4 businesses received more in-depth follow on support from local law firms.

The experiences of each participant fed into the main focus of the project, an IP guide for the creative industries which will be discussed further below. The NCIP team learned that appealing to the 'creative identity' is challenging as creatives are highly autonomous and in particular, dislike identifying with what they perceive as commercial or financial incentives, indeed the benefits that IP rights can provide. Indeed, some creatives view members of the corporate tribe (such as business people and lawyers) as killers of creativity who impede or destroy creativity. The NCIP team found that this makes the task of engaging creatives with IP law even more difficult than engaging those in other disciplines such as science, technology, engineering and maths (STEM), IT, accounting, finance and business.

#### *Tailoring IP law to creatives*

Published in May 2015, the *Nottingham Intellectual Property Guide for Creatives (the Guide)* is something of a first.<sup>17</sup> It was designed specifically to appeal to creatives and is different to a traditional law book. The NCIP's *Guide* is unique because it provides creative sector specific IP information to help creatives understand fundamental IP law principles. Rather than adopt the traditional IP law learning approach which typically covers each type of IP right separately e.g. copyright, design, trade marks, patents and the doctrine of confidential information<sup>18</sup>, the *Guide* is structured as follows:

IP for Design;  
 IP for Performance;  
 IP for Image and Media;  
 IP for Interactive Media; and  
 IP for Art and Architecture.

Informal feedback was that this approach to aligning IP topics to creative output was beneficial as it addressed identifiable creative sectors in categories immediately familiar to creatives. In addition, in modern society, there are many more female creatives in the past and the *Guide* reflects the creative talent of women and racial diversity.<sup>19</sup>

Second, the *Guide* includes a series of real life case studies illustrate the application of the IP rights to the business practices of experienced and successful entrepreneurial creatives, members of their own tribe. The NCIP project team hypothesised that creatives' actions follow from being 'reminded' about others' success. Based on experiences gained in the NCIP workshops, the *Guide* introduces how experienced and successful entrepreneurial creatives have actually applied IP law principles to their business

<sup>17</sup> Janice Denoncourt, Estelle Paley, Jane Jarman, et al (2015) *The Nottingham Intellectual Property Guide for Creatives*

<sup>18</sup> For an example of a traditional approach to IP material see the UKIPO's *IP Basics for Business Owners* booklet.

<sup>19</sup> Susi Henson, Eternal Spirits: corsetry designer; Jodie Aysha: singer; Lauren Knifton: blogger; Emma Ball: artist; and Zaha Hadid (deceased) :award-winning architect.

practices, positively adding value to their own IP. The *Guide* profiles NCIP event speakers including: Susi Henson (fashion designer); Mark Tughan (The Glee Club owner); Martin Shakeshaft (Photojournalist); Alistair Clark (Wellington Films Ltd); Lauren Knifton (bluffer [www.theladyinwaiting.org](http://www.theladyinwaiting.org)); and Emma Ball (artist and owner of Emma Ball Ltd). The *Guide* was carefully designed to ensure the case studies were diverse in terms of creative sectors and type of IP rights issues and effectively supported the narrative IP material in each chapter to help creatives deal with their own IP rights strategically, without alien feeling that “this is NOT what creatives do”, rather “this IS what creatives do”. Seven of the case studies (the majority) focussed on how entrepreneurial creatives dealt with IP infringement issues including a theme of the moral right of paternity (also known as the right of attribution).<sup>20</sup>

Third, the visually appealing *Guide* has been well-received by creatives who rely more on visual learning.<sup>21</sup> In *Visual Thinking*, a ground-breaking and now classic work, Arnheim cast the visual process in psychological terms. He argued that perception is strongly identified with thinking and that perception is another way of reasoning leading to a conclusion that there is a need to educate the visual sense. Stunning illustrations were carefully selected by the NCIP team working together with graphic designer Jason Holroyd to visually interest creatives, drawing them into the text – imagery typically neglected and lacking in traditional law books, law being a discipline almost exclusively dominated by text.

Currently the *Guide* is available as an open-access e-book on NTU Institutional Repository page and in NTU library. Softback and e-copies were distributed in the UK and internationally to creatives and IP law teachers in Higher Education. Evidence of the positive impact of the *Guide* as an IP education resource is supported by formal endorsement from the Director of Innovation, UKIPO; EU Regional Development Fund; Writers’ Guild; Chartered Society of Designers and Ian Livingstone CBE. In terms of dissemination, to date over 500 soft and e-copies of the *Nottingham Intellectual Property Guide for Creatives*<sup>22</sup> have been distributed in the UK and beyond, helping creatives gain much needed IP knowledge and skills to move their ideas and innovations from the drawing board into the market place. The impact of the NCIP publication is such that in 2015–2016 a copy will be provided to each graduate of the School of Art & Design.

The positive reception of the NCIP’s first IP awareness publication aimed at creatives paved the way for the second stage of the project. In March 2015 the NCIP team was awarded £24,980 in the UKIPO’s StudentSHIP Enterprise Awards, to continue to help art and design students protect their IP, in particular during their final year degree shows as they embark on their professional careers beyond university.<sup>23</sup> However, all the NCIP team recognised that the use of visuals and case studies featuring experienced entrepreneurial creatives had been successful it was felt that for the project to continue to develop a deeper understanding of ‘creatives’ was needed. Drawing on work already carried out by the NCIP project, the research in next section delves deeper into culture and the creative identity to ask: how will an advanced understanding of the ‘creative identity’ help the NCIP team to further engage creatives in the IP law framework in the second stage of the project? The research began with overview of the role of the IP

<sup>20</sup> The moral right to be identified as the author of a work, known as the right of paternity or right of attribution, is set out in s77 Chapter IV *Copyright, Designs and Patents Act 1988* and must be asserted by the author/creator.

<sup>21</sup> Rudolf Arnheim. *Visual Thinking* (2004) University of California Press.

<sup>22</sup> *The Nottingham Intellectual Property Guide for Creatives* (2015) Nottingham Trent University Publications is free to download at: [http://www.ntu.ac.uk/services\\_for\\_business/support/creative\\_intellectual\\_property\\_project.html](http://www.ntu.ac.uk/services_for_business/support/creative_intellectual_property_project.html)

<sup>23</sup> See <https://ipo.blog.gov.uk/2015/01/30/studentship-enterprise-awards-finalists-announced/>.

law framework, creativity in culture and social identity, followed by discussion of the modern research into the psychological traits of creative identity.

## IP RIGHTS, CULTURE AND THE CREATIVE IDENTITY

Cultural elements raise problems and opportunities. In the context of the IP law regime, the crucial role for policy makers such as WIPO, the UKIPO, IP academics and educators is to identify them and respond to them in line with their culture. Culture may have an effect on attitudes, values, beliefs, and behaviour.<sup>24</sup> A number of scholars have proposed the value of engaging in cultural research and law. Austin Sarat and Jonathan Simon for example analysed the cultural perspective of law by concentrating on the relationship between cultural lives and law.<sup>25</sup> Olwan recommended that countries take into account social context (e.g. for our purpose, a social group such as the ‘creatives’) and culture to form the reason for engaging with and respecting IP laws, ultimately to assist a country achieve its goals for social and economic growth.<sup>26</sup> This understanding may help to provide applicable solutions and improvements to raising the IP awareness in creatives in line with their social group culture. A social identity is another portion of an individuals’ self-concept derived from perceived membership in a relevant social group e.g. creatives. As originally formulated by Henri Tajfel and John Turner in the 1970s and 1980s, social identity theory introduced a way in which to explain inter-group behaviour –predicting certain intergroup behaviours on the basis of perceived group status difference, the perceived legitimacy and stability of these status differences and the perceived ability to move from one group to another.<sup>27</sup> There are a number of ways this impact can be assessed, not the least of which is by examining attitudes, value, beliefs and behaviour. In doing so, policy makers can improve policies to foster a positive relationship between creatives and their understanding of the IP law framework and the benefits it affords.

For the NCIP project, the definition of who is a ‘creative’ is culturally broad and not confined to starving artists in a garret or creative geniuses. Rather, the term includes the modern social group of people who create unique, rare or remarkable creations that have distinctive value to society as well as artisans, craftspeople or designers whose creations may be mass-produced, replaceable consumer goods, reflecting modern culture. In modern society we are surrounded by a plethora of creative works and the idea of being creative is embedded within our culture in a way that simply did not exist centuries ago. Something is in the air. The wind has blown in a cultural shift which WIPO, the UKIPO and IP law educators have to address, namely, a new norm in relation to creativity which suggests that each generation of society should be more creative than the last, will be exposed to more creative works than previous generations and an mounting imperative to be industrially creative.<sup>28</sup> This illustrated how culture has evolved to give rise to a new public discourse involving stimulating economic growth to achieve a higher standard of living spurred by entrepreneurial creativity. According to Pitkethly, an important role of the IP rights system is to act as an incentive to invest time, effort and resources

<sup>24</sup> David Pimentel, “Culture And The Rule Of Law: Cautions For Constitution-Making” (2014) *A Road Map Of A New Constitution For Turkey* (1st ed.) Carolina Academic Press, p82.

<sup>25</sup> D. Tan, ‘Going GaGa: Intellectual Property and Pop Culture’ (2012) 4 *The WIPO Journal*, p64.

<sup>26</sup> Rami M Olwan, *Intellectual Property and Development* (2013) Springer Verlag.

<sup>27</sup> Mihaly Csikszentmihalyi, ‘The Creative Personality’ (1 July 1996) *Psychology Today*.

<sup>28</sup> C Dent, “Legal Academics, our creativity and why we do it: insights from Foucault” (2014) *The Law Teacher* Vol.48, No.3, p232.

in creations. This is true, however, creators must firstly be aware that the IP system actually exists and secondly, have sufficient knowledge as to how the system works in order to access it and use it efficiently resulting in a reasonable chance of obtaining the benefits offered.<sup>29</sup> In other words, if we want creatives to learn about the IP system, IP experts and educators need to ensure creatives pay attention to the information to be learned.

In summary, cultural factors in relation to accessing the benefits of IP rights have the potential to enhance the social behaviour<sup>30</sup> and economic growth which philosophers seek to achieve through theories to justify the legal protection afforded to IP rights.

*Cultural justifications for IP rights: internal and external motivators to create*

Encouraging and incentivising creative individuals is at the heart of the justification for the IP rights legal regime. However, the IP system is usually not part of the creative process or the academic syllabus for creatives. This section explores the interaction between creatives with the societal policy of increasing their awareness of their potential IP rights. This is relevant because the outputs of creatives are extensively legally protected by IP laws, especially unregistered IP rights such as copyright, moral rights and design law, rights which may also overlap.<sup>31</sup>

In essence, IP rights have three key features. First, they are property rights. Second, they are property rights in something intangible. Third, they protect creations and reward creative activity. A central characteristic of IP rights is that they are negative monopolistic rights: they exclude others from the use and exploitation of the subject matter of the right. However, legal and political scholars have often challenged the status and legitimacy of IP, and have raised the issue of why IP rights must be offered protection.<sup>32</sup> The existence of IP rights is usually justified by reference to one or more of the following philosophical theories including the natural rights (reward) theory and the personality theory.

Providing creators with economic incentives to create new works is the concept that underpins the natural rights (reward) justification for the expansion of IP rights protection. In essence, a person who puts intellectual effort into creating something should have a natural right to own and control the creation.<sup>33</sup> Such an entitlement is now recognised in Art 27(3) of the *Universal Declaration of Human Rights*, which states:

Everyone has the right to the protection of moral and material interests, resulting from any scientific, literary or artistic production of which he is the author.

According to Dent, there is a tension in the literature around the target of the incentive. For some the target is the creator, for others, it is the firm that employs the creator.<sup>34</sup> Here, the aim is to better understand creatives, the creative identity, their values and practices. Most studies relating to the creativity identity focus on the creative mental process to try to figure out how and why creative individuals are able to do things in ways that are more original than what most people are generally capable of achieving.

<sup>29</sup> R Pitkethly, 'Intellectual Property Awareness & SMEs' (2006) *World Intellectual Property Organization*.

<sup>30</sup> Ronald Benabou and Jean Tirole "Incentives and Pro-social Behaviour" (2006) 96 *American Economic Review* 1652.

<sup>31</sup> Estelle Derclaye and Mathias Leistner, *Intellectual Property Overlaps: A European Perspective* (2011) Bloomsbury Publishing plc.

<sup>32</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (2014) Oxford University Press, p3.

<sup>33</sup> This is a summary of the Labour Theory by 17<sup>th</sup> century philosopher John Locke. He argues that everyone has a property right in the labour of this own body, and that the appropriate of an unowned object arises out of the application of human labour to that object.

<sup>34</sup> n[28] pp228–247.

There are several motivations to create, both internal and external. Amabile emphasizes the close relationship between intrinsic motivation and “creative” by arguing that such individuals like doing what they are doing, and when they begin to worry too much about fame and riches (external motivators) their work suffers. Creators themselves speak of ‘compulsion, joy and other emotions and impulses that have little to do with monetary incentives’.<sup>35</sup> In summary, intrinsic motivation is conducive to creativity, but extrinsic motivation, such as financial incentives, has the propensity to be detrimental to and reduce creativity.<sup>36</sup> Nonetheless, an alternative view is presented in the autobiography of the famed Renaissance goldsmith Benvenuto Cellini (1500–1571) to realise how important money can be to a creative as a gauge of self-worth. Presumably creatives respond to financial incentives to a lesser extent than most people, but they do so nevertheless.<sup>37</sup>

Consequently, the important point for IP law specialists and educators is that the ‘reward theory’ although still important, has limitations when applied to creatives. This hypothesis aligns with numerous discussions that took place at the NCIP project IP awareness raising events and question and answer sessions.

#### *Reputational motivators to create*

Creative work can also lead to reputational success and be coveted by others. Such reputational motivators are external to the creator and are based on how others react to the creator’s work. Another traditional justification for the existence of the IP law framework is the ‘personality theory’ which rests on the manifestation of the creator’s personality, to show that he or she is distinct or thinks differently than others. The famous philosophical writing is Hegel’s theory of property whereby creation is an extension of the creator’s individuality or person, belonging to that creator as part of his or her selfhood.<sup>38</sup> This justification suggests that property provides an especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual.<sup>39</sup> The personality theory underpins the existence of the moral rights (a form of statutory IP right) which attaches to most copyright-protected works, the most important form of IP right protection for creative works.<sup>40</sup> Moral rights broadly protect the creator’s work as a reflection of the creator in terms of (1) attribution: the right of the creator to have ‘due acknowledgement’ whenever the work is used or reproduced; and (2) integrity: protection from the use or reproduction of the work in some way that is derogatory, potentially undermining the original work and the reputation of the creator.<sup>41</sup> The NCIP adopted the theory that focussing on reputational motivators is more likely to be successful when engaging creatives in IP awareness activities.

#### *IP law enforcement motivators*

IP law also provides mechanisms by which a creator (or the IP rights owner) may be economically compensated for unauthorised misuse of their work. Although unauthorised

<sup>35</sup> Rebecca Tushnet, “Economics of Desire: Fair Use and Marketplace Assumptions” (2009) 51 *William and Mary Law Review* 513, p546.

<sup>36</sup> T.M Amabile, *The Social Psychology of Creativity* (1983) Springer-Verlag, New York at p15; and Mihaly Csikszentmihalyi, *Intrinsic Rewards and Emergent Motivation in The Hidden Costs of Reward: New Perspectives on the Psychology of Human Motivation* (1978) Hillsdale, New York, pp205–216

<sup>37</sup> n[12] p335.

<sup>38</sup> J Hughes, ‘The Philosophy of Intellectual Property’ (1998) 77 *Georgetown Law Journal*, p330

<sup>39</sup> *Ibid* p331

<sup>40</sup> Chapter IV, *Copyright Designs and Patents Act 1988* (UK)

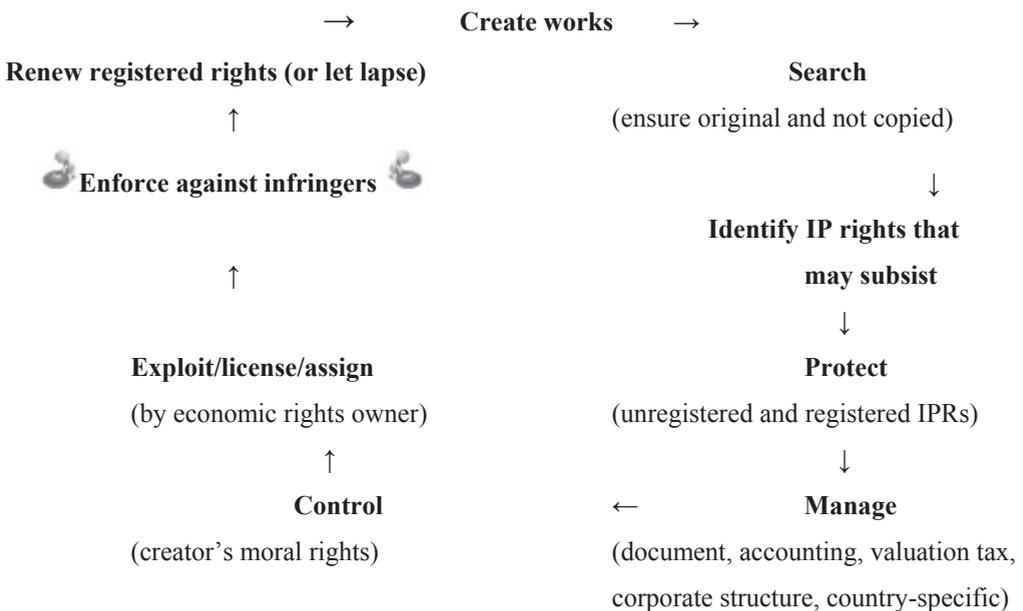
<sup>41</sup> *Ibid*

copying has always been a problem, in the last few decades the Internet has exponentially increased the risk of creative works being easily copied. This has led to policy initiatives by governments to ensure creators are well-placed to protect and enforce the IP rights in their work to stop the flow of income streams being lost. The misappropriation of creative work is also likely to be a trigger point for engaging creatives as in effect, an aspect of themselves, their creative identity, has been taken. In terms of IP law, the case law is unequivocal, the quality of what is taken is more important than the quantity. Infringement cannot be determined solely by a quantitative review, the amount taken is important but not the sole determinant.<sup>42</sup>

*The IP Life Cycle for Creatives and their Hot Button*

These cultural motivators shape the IP law framework and impact on the relationship between creatives and IP. How creatives perceive the value of the IP rights in relation to their work will influence their behaviour in identifying, protecting, managing and enforcing their IP rights. The author has designed the “IP Lifecycle for Creatives” set out below in Figure 1 to represent the stages a creative work undergoes from creation until the IP monopoly expires, a model that strives to explain the pattern of IP activities relevant to creatives.

**Figure 1 The IP Life cycle for creatives and their hot button**



The NCIP team soon realised that in order to successfully engage creatives, it is important to know their “hot buttons”. From the beginning of the NCIP Project in 2014, we spoke with dozens of art and design students informally at our IP awareness raising events and during the networking periods. We also responded to numerous questions raised by creatives in the audiences during the Panel Discussion and question and answer sessions regarding infringement issues. The team noted that the creatives who attended our events were not especially concerned about monetary reward, particularly

<sup>42</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR273 at 293

the students at an early stage in their career. Nor, surprisingly, did creatives often seek information on being acknowledged as the creator of their work as they were often involved in joint projects. Rather, the point at which the creatives' interest in the IP rights that might subsist in their creative work arose was when their work was copied or used without their permission. The NCIP team determined it was important to recognise the interest in IP by creatives when it showed itself. One example, was Martin Shakeshaft, an established freelance photojournalist best known for his iconic photos of the 1984 miners' strike ([www.strike84.com](http://www.strike84.com)) who spoke at the NCIP 'IP for Image and Media' event in 2015. Martin admitted that when he started out in his career he knew little about IP, but his knowledge had grown over the years. Hearing Martin speak about copyright infringements of his photos was a revelation. He revealed that "in one year over a third of my income came from pursuing infringers who agreed to pay for a licence to use my work".<sup>43</sup>

There is no doubt that over his career entrepreneurial creative, Martin, has developed a responsible and disciplined attitude toward his IP rights – a paradox contrary to the usual perception of creatives as irresponsible, non-commercial and uninterested in IP law? Or is this paradoxical trait part of the creative identity?<sup>44</sup>

The NCIP learned that a majority of creatives' concerns centred on dealing with potential infringers. This was the critical juncture for engaging creatives as at this point they had an immediate desire to acquire a more detailed understanding of their IP rights. This IP knowledge "hot button" can contrasted to those who operate in the technology sector who must register their IP rights for them to exist (e.g. designs and/or patents) and who consequently required IP knowledge much earlier in the creation/innovation process. In summary, it was the NCIP team's experience that creatives' interest in IP law peaks when they experience (feel pain) when their creative work has possibly been copied. However, for IP experts and academics, this juncture is arguably too late in the IP Lifecycle for Creatives. This second phase of the NCIP project aims to raise creatives' awareness of the IP law framework much earlier, well before the serious problem of unauthorised copying has occurred. To do so, we needed to learn more about the psychology of creative identity and how to engage them earlier, while they were in the process of creation.

## PSYCHOLOGICAL TRAITS OF CREATIVES

The NCIP determined that to reach creative people it is important to know the psychological traits that stimulate and distinguish creativity. To access this information in a commercial or business context, we considered the literature concerning this personality type.<sup>45</sup>

According to Mihaly Csikzentmihaly, a leading psychologist in the field of the creative personality, "If there is one word that makes creative people different from others, it is the word complexity."<sup>46</sup> Figure 2 sets out several key traits of creatives that describe this psychological complexity:

<sup>43</sup> n[17] p52

<sup>44</sup> n[17] at pp52–53, the NCIP case study profiling Martin Shakeshaft

<sup>45</sup> Douglas Bray, Brain Steffy and John W Jones *Applying Psychology in Business: The Handbook for Managers and Human Resource Professionals* (1990) Lexington Books, USA.

<sup>46</sup> n[12] pp51–75

## Figure 2 Psychological Traits of Creatives

1. Independence
2. Openness
3. Tolerate ambiguity
4. Willingness to take risks
5. Heightened aesthetic judgment
6. Think visually
7. Tendency toward androgyny
8. Persistent

Source: Adapted from Csikszentmihalyi, M. *Creativity: The Psychology of Discovery and Invention* (2013)<sup>47</sup>

The creative process – from the first drop of paint on the canvas to the art exhibition – involves a mix of emotions, drives, skills and behaviours. As part of his research methodology, Csikszentmihalyi<sup>48</sup> interviewed 91 eminent, mostly American caucasian creatives across various fields. An introduction to the psychological traits of creatives he identified is discussed below.

The first distinguishing trait is independence. Creative people (e.g. artists, illustrators, graphic designers, product designers, writers and filmmakers among others) highly value independence. They resist discipline. They bridle at traditional constraints. Consequently, it is important for those who communicate and attempt to educate them to acknowledge the intensity of this need for independence. This trait helps to explain the propensity of creatives to become entrepreneurs.

Second, creative people are open to and nurture new ideas. They are slow to judge and are willing to give a personal project time to blossom. At the same time, they have ‘ownership’ of their ideas, and they love the process of discovery.<sup>49</sup> Thorstein Veblen in *The Beginning of Ownership* stated that, “The unsophisticated man, whether savage or sophisticated, is prone to conceive phenomena in terms of personality.”<sup>50</sup>

Third, Creatives tolerate ambiguity. They consciously examine different perspectives and are rarely dogmatic or insular. Nobel laureate Albert Szent-Gyorgyi once said, “Discovery consists of looking at the same thing as everyone else-and thinking something different.” Thinking differently or imaginatively is at the heart of the creative process. ‘Imagination’, Stevenson said, ranges from “the ability to think of something not presently perceived, but spatio-temporally real” to “the ability to create works of art that express something deep about the meaning of life”.<sup>51</sup> Gregory Currie and Ian Ravenscroft focus on *creative imagination* explaining that this involves combining ideas in unexpected and unconventional ways.<sup>52</sup> The most creative people tolerate ambiguity and show a preference for dealing with unstructured problems, problems that may not have one right answer and this is helpful when discussing the application of legal principle applied to different sets of facts. This relates to the theory

<sup>47</sup> n[12] pp51–57

<sup>48</sup> Mihaly Csikszentmihalyi is noted for his work on creativity and the psychological concept of flow, a highly focused mental state and intrinsic motivation. He is the Distinguished Professor of Psychology and Management at Claremont Graduate University and is the former head of the department of psychology at the University of Chicago.

<sup>49</sup> David H Lyman, *The Creative Personality* (2008) available at [http://www.dhlyman.com/DHlyman.com/Davids\\_Bio.html](http://www.dhlyman.com/DHlyman.com/Davids_Bio.html)

<sup>50</sup> T Veblen, “The Beginning of Ownership” (1898–9) Vol.4 *American Journal of Sociology*.

<sup>51</sup> L Stevenson, “Twelve Conceptions of Imagination,” (2003) *British Journal of Aesthetics*, 43(3): 238–259 at p238

<sup>52</sup> G Currie, and I Ravenscroft, *Recreative Minds: Imagination in Philosophy and Psychology* (2002) Oxford University Press; see also n [39] p74

of plasticity- convergent-divergent thinking. Psychologists Guillaume Furst, Paolo Ghisletta and Todd Lubart identify three ‘super factors of personality that predict creativity: plasticity, divergence and convergence’.<sup>53</sup> It is widely assumed that artists, musicians, writers, painters, are strong on the fantasy side, whereas scientists, politicians and business people are realists. Convergent thinking is a term coined by Joy Paul Guilford<sup>54</sup> as the opposite of divergent thinking. It generally means the ability to give the ‘correct’ answer to standard questions that do not require significant creativity, for instance in most tasks in school and on standardized intelligence tests. Conversely, divergent thinking typically occurs in a spontaneous, free-flowing manner, where many creative ideas are generated and evaluated. Multiple possible solutions are explored in a short amount of time, and unexpected connections are drawn. After the process of divergent thinking has been completed, ideas and information are organized and structured using convergent thinking to decision making strategies are used leading to a single-best, or most often correct answer. Divergent thinking (being creative) is perceived as deviant by the majority and so the creative person may feel isolated and misunderstood.<sup>55</sup>

Fourth, thinking differently implies a willingness to take risks.<sup>56</sup> Accordingly, creatives test the boundaries and prize originality. However, once a sufficient amount of ideas have been explored, the creative turns to convergent thinking. Creative people tend to be introverted and extroverted; rebellious and conservative; passionate yet objective.<sup>57</sup> Csikszentmihalyi states:

In fact, in current psychological research, extroversion and introversion are considered the most stable personality traits that differentiate people from each other and that can be reliably measured. Creative individuals, on the other hand, seem to express both traits at the same time.<sup>58</sup>

Fifth, creative people have a heightened aesthetic judgment and an exceptional sense of form and beauty.<sup>59</sup>

Sixth, creative people use mental imagery and think visually.<sup>60</sup> The “propositional” or “descriptive” theory holds that visual mental images are non-pictorial, language-like representations of visual scenes.<sup>61</sup>

Seventh, creative individuals to a certain extent escape rigid gender role stereotyping and there is a tendency toward psychological androgyny. Psychological androgyny refers to a person’s ability to be both aggressive and nurturant, sensitive and rigid, dominant and submissive – effectively doubling a creative’s repertoire of responses when interacting in the world.<sup>62</sup>

<sup>53</sup> ‘The Messy Minds of Creative People’ Scientific American blog at [www.thecreativemind.net](http://www.thecreativemind.net)

<sup>54</sup> Joy Paul Guilford (1897–1987) was an American psychologist known for his psychometric study of human intelligence, including the distinction between convergent and divergent production. Guilford proposed that three dimensions were necessary for accurate description: operations, content, and products.

<sup>55</sup> Mihaly Csikszentmihalyi, *Creativity: The Work and Lives of 91 Eminent People* (1996) Harper Collins.

<sup>56</sup> Thomas William Nielsen, Robert Fitzgerald and Mark Fettes *Imagination in Educational Theory and Practice: A Many-Sided Vision* (2010) Cambridge Scholars Publishing, pp1–21; n[12] p72.

<sup>57</sup> n[12] pp71–72.

<sup>58</sup> n[12] p65.

<sup>59</sup> n[12].

<sup>60</sup> P F Strawson, “Imagination and Perception,” in *Experience and Theory*, L. Foster and J. W. Swanson (eds.), (1970) Amherst, MA: University of Massachusetts Press, p31.

<sup>61</sup> Z.W Pylyshyn, “What the Mind’s Eye Tells the Mind’s Brain: A Critique of Mental Imagery,” (1973) *Psychological Bulletin*, 80: 1–25; “Mental Imagery: In search of a theory,” (2002) Vol 25 *Behavioral and Brain Sciences*, pp157–182; *Seeing and Visualizing* (2003) Cambridge, MA: MIT Press.

<sup>62</sup> n[12] p71.

Finally, creative people are usually independent and self-motivated. An internal propulsion system drives them to do imaginative work. The stereotype of the “solitary genius” is strong in Csikszentmihalyi’s findings. He reasoned that, “After all, one must generally be alone in order to write, paint or do experiments in a laboratory.”<sup>63</sup> As the process of creation is not easy, creatives are also persistent. Despite the casual air that many creative people affect, most of them work late into the night and persist when less driven individuals would not.<sup>64</sup> However, creatives find it difficult to engage in meaningless work – they perform well only when inspired.<sup>65</sup> Whilst creatives are more likely to be uninhibited, they also have fragile egos.<sup>66</sup> Because they see their work as an extension of themselves, they are quite sensitive about their creative efforts – a ‘hot button’. When their work is critiqued or copied, part of the identity is wounded. We have already seen that a psychological response by creatives to being copied triggers an interest in IP law which provides remedies for unauthorized copying. In theory, this normal emotional reaction includes processing information about the infringement as well as coping emotionally and can be compared (although not equated to) to the psychological response to being burgled (having tangible property stolen). The charity Victim Support and home security specialist ADT surveyed 1000 victims of burglary and found that 37 per cent were more scared of falling victim to street robbery after being burgled.<sup>67</sup> This feeling of vulnerability can be transposed to creatives and their work when it is copied or used with permission.

According to Madahvi, IP rights must be understood as social and cultural relations, and not only understood as an incentive for creation.<sup>68</sup> This view could also apply to a need to understand IP rights through the lens of the psychological traits of creatives. In this vein, this research is the foundation that will underpin the design the NCIP project team created for its second IP awareness publication for creatives, *Intellectual Property Notebook: Displaying Your Creative Work*. The research has provided further insight as to how to raise IP awareness amongst the culture group that identify as creatives earlier in the IP Life Cycle, ideally during the creative process. It will be important to: (1) highlight the way in which IP rights protects creative’s ‘personality’ or ‘identity’ in terms of the provenance<sup>69</sup> of their creative work; and (2) provide examples as to how to protect IP rights before creative work is displayed or made available to the public; and finally, (3) assist creatives access IP enforcement mechanisms provided by the legal system to atone for the wound of infringement.

### *The primacy effect: introducing IP concepts to creatives*

First impressions matter most. In other words, information we receive early in our observation of another discipline influences how we interpret and remember everything that follows. Handing creatives a black letter law IP law textbook is unlikely to engage highly visual people who typically possess a heightened aesthetic judgment and an

<sup>63</sup> n[12] p 65.

<sup>64</sup> n[12] p62.

<sup>65</sup> www.onbeingcreative.com

<sup>66</sup> n[12] p73.

<sup>67</sup> ‘Burglary can damage mental health’ (19 June 2014) The British Psychological Society at <http://www.bps.org.uk/news/burglary-seriously-damages-mental-health>

<sup>68</sup> M Sunder, ‘IP3’ (2006) Vol. 59 *Stanford Law Review* 257.

<sup>69</sup> Provenance (from the French *provenir*, “to come from”), is the chronology of the authorship, ownership, custody or location primarily of works of art. The main purpose of tracing the provenance of an object is to provide contextual and circumstantial evidence for its original creation, by establishing, as far as practicable, its later history, especially the sequences of its formal ownership, custody and places of storage. The practice has a particular value in helping authenticate creative works.

exceptional sense of form and beauty. Confirmation bias is a formidable foe and the last thing the NCIP wanted to do was confirm creatives' perception of law as a dull, dense and unpalatable topic.<sup>70</sup> When NCIP team members teach or design IP awareness materials, they 'present' the discipline of IP law. It is hoped that the creatives will be inspired to learn about the subject by feeling the keen interest that NCIP team members feel. However it is easy for law academics to slip into legalese that stupefies those untrained in law. If IP law knowledge is nearly incomprehensible, few creatives will bother learning it. Therefore to help creatives see not simply what they expect to see, it will be important for the NCIP team to go out of its way to design something attention-getting. Showing that law is of interest and useful to creatives will have to be convincing and hard for them to ignore to get past confirmation bias thinking. Although there is no single way to raise IP awareness, IP knowledge should be appropriate to the skills of the learner. The obvious way to enhance learning IP law is to bring as much as possible from the domain of the creatives and their social and cultural identity to the IP law experience.

### THE FUTURE OF THE NCIP PROJECT

In conclusion, this interdisciplinary approach began with a desire to learn more about how creatives think and the personality traits of creatives. The aim of this paper was to make IP academics think about the cultural, social and psychological characteristics of 'creative identity' to enhance how they communicate the IP law framework and concepts to creatives, key stakeholders in the IP regime. This is why the NCIP project was originally developed and carried out the way it was and what will inform the team's conceptual design for the *Intellectual Property Notebook: Displaying Creative Work* publication which will differ from the earlier publication, *The Nottingham Intellectual Property Guide for Creatives* (2015).

Drawing on the new insight into the creative social, cultural and psychological identity, the new publication will be designed to emulate the 'sketchbook' concept to form a closer, deeper connection with creatives and their use of visual notetaking. It will also focus on the issue of the provenance in the art world.<sup>71</sup> IP rights pertaining to art and design are time-limited or temporary. However, from the creative's point of view, the creative work will continue to exist in reality. For example, the painting, *The Girl with the Pearl Earring*, by 17<sup>th</sup> century Dutch artist Johannes Vermeer still hangs in the Mauritshuis in the Hague centuries after it was created and long after copyright expired. In the creative culture, provenance is still important to the community even after copyright ends. Whereas, copyright is about authorship, during the time period of protection the copyright work is a static entity in the eyes of the law.<sup>72</sup> So too the rights of paternity, a statutory moral right afforded to creators which links creatives to their work.

The potential impact of the NCIP project and its publications outside academe will be to raise the level of IP awareness amongst entrepreneurial creatives. This will target their ability to identify the IP they own, assert paternity and seek advice to clarify their IP right and in relation to infringement and enforcement issues. Further aims are to

<sup>70</sup> In psychology and cognitive science, confirmation bias (or confirmatory bias) is a tendency to search for or interpret information in a way that confirms one's preconceptions, leading to errors.

<sup>71</sup> Mike Rodhe, *The Sketchnote Handbook: The Illustrated Guide to Visual Notetaking* (2012) Peachpit Press

<sup>72</sup> Andreas Rahmatian, *Concepts of Music and Copyright: How Music Perceives Itself and How Copyright Perceives Music* (2015) Edward Elgar Publishing, p90

increase in the number of IP rights registered as well as the financial value of the IP in creative entrepreneurial businesses. Quantitatively, the impact of the NCIP can be measured in terms of:

- (i) numbers of NCIP Event participants;
- (ii) numbers of IP Health Checks carried out;
- (iii) numbers of appointments with the LAC;
- (iv) numbers of IP matter referrals to private specialist IP practitioners;
- (v) UKIPO design, trade mark and patent register searches to confirm if registered rights have indeed been registered by participants; and
- (vi) Companies House register searches to confirm if participants incorporated their businesses;
- (vii) analysis of such annual returns to establish commercial growth and profits derived by participant entrepreneurial creative businesses.

Qualitatively, the impact of NCIP will be measured by surveying participants and developing mini-case studies to depict how an increased awareness and knowledge of IP has helped participants through access to a bespoke IP Law Pro Bono Clinic run by the Nottingham Law School's Legal Advice Centre.

This article is the outcome of a number of initiatives that comprises the NCIP team's research to inform how it communicates IP law to creatives. The author has shared their thinking for the conceptualization and design process for the NCIP project's second publication targeting creatives, the *Intellectual Property Notebook* which will offer a complimentary mix of overarching IP education and individually specific suggestions for creatives. The NCIP project team has a passion for simple and useable solutions, translating complex IP law principles into relatable practical information. However, the NCIP project has also shown that the IP community has to rethink how it engages with creatives about IP law. What we sought to discover in this research was a deeper understanding of creativity and the social and psychological identity of creatives as a cultural group to inform our project IP awareness aims. What we found was the top IP issues for creatives were visual thinking, addressing authorship to establish copyright and design right (provenance) and balancing creative identity and expression with a strategy for dealing with IP rights at each stage of the IP lifecycle for creatives. We know the 'creative personality' matters enormously to society, however mastering it is another issue. This article has set out what the NCIP has learned and refined, over the last 3 years. We are excited for the next stage of the transformation of IP awareness education for creatives.