

The Right Thing

An AUTHORS' RIGHTS
handbook for JOURNALISTS



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Introduction

This is a manual for journalists in Europe, on authors' rights. Authors' rights laws provide the legal foundation for charging money for journalists' work – as the law of ownership of physical property is the foundation for the business of a shoe-maker or a pin-factory. In other words, authors' rights are in economic theory what gives journalists' essentially non-physical product, words and pictures, value in the market. Labour rights laws intervene to give journalists the right to be paid for their time and first use of their work.

Because the work of journalists and other creators can be copied and re-used in ways that shoes and pins cannot be, authors' rights are different from physical property rights. Very practically for journalists trying to make a living, these laws provide for payment for copying and re-use after the first publication or broadcast.

Authors' rights are not a “special interest” for writers, photographers and so on. They provide *every citizen* with the right to be named as creator of works – for example words and pictures – that they create; and to defend the integrity of their own works.

They *also* give every citizen a guarantee that the works that they “use” – for example words and pictures in news reporting – are authentic, where the writers and photographers have the rights to defend their identification and integrity.

This guarantee of authenticity is important in the case of non-journalistic creations: the citizen knows, for example, that what they have is, in fact, a performance by Björk Guðmundsdóttir. It is absolutely essential in the case of journalistic work: the citizen needs to know that what they have is, in fact, a commentary on their government's spending plans by Professor Joseph Stiglitz – a commentary which would

likely affect the citizen's vote at the next election: see Appendix 1 for more on this argument.

Every citizen who is interested in democracy needs professional, independent news reporting to inform them of their democratic choices.

So every journalist needs to understand the basics of authors' rights in order to defend their own work and their right to be paid for it. Section 1 of this handbook offers an introduction to these things – the basic points that every journalist in Europe needs to be informed about.

The following sections provide more detail and information about collecting payment and about taking action against those who infringe journalists' rights.

Journalists also need to understand authors' rights because they are themselves a news story. A battle is being fought over authors' rights. There are those who believe that authors' rights should be abolished; and there are those who want to impose everywhere the Anglo-Saxon version of authors' rights, called "copyright". Every journalists' trade union in the European Federation of Journalists is having to struggle to defend the very idea of authors' rights against attack.

Many of those attacks are presented as reactions to the technologies that are making revolutionary changes in how journalists' work is distributed.

Digital technology does make it much easier to copy words or pictures that are published online – and to make the copies available to hundreds of millions of people. The most pressing problem that journalists face, though, is not "piracy" in the sense promoted by the film and music industries – someone copying works protected by authors' rights in the privacy of their bedroom.

What journalists mostly face are the same problems we have always faced, but intensified. We face publishers and broadcasters that want to make the maximum use of our work for the minimum fee – and now want to re-use that work in many new ways for no additional fee. Some try to justify this with complaints about how times are so much harder for publishers and broadcasters. Every new

technology, it seems, makes times hard. It is publishers who most often “pirate” journalists’ work.

Increasing numbers of journalists are working to produce reporting that will only ever be seen online. There are, for example, extensions to newspapers that appear only on the world-wide web and “content” for applications for mobile phones and other hand-held computers.

Almost all European reporters’ and feature writers’ work is put online after it appears in a newspaper or magazine. Increasing numbers of readers and viewers become aware of journalists’ work only when it is mentioned by their “virtual friends” on social networking sites, with a link to the full story.

The fact that work published online is so easily copied, altered and distorted makes the rights to be identified and to object to changes that damage the integrity of the work – and hence of the journalist who created it – more important than ever.

Unfortunately, the very open nature of online publishing and discussion means that misinformation and misunderstandings spread easily. This is one of the reasons why society needs professional journalists and why we can never be replaced with part-timers and hobbyists. Enthusiasts for “crowd-sourcing” (like Wikipedia) rarely acknowledge where the crowd gets information that it can trust in the first place.

In the field of authors’ rights, online discussion has been dominated by the US – which has encouraged a number of misunderstandings which the EFJ hopes this manual will correct.

Mike Holderness

*Chair of the EFJ Authors’ Rights Expert Group (AREG)
London, Brussels & Helsinki, May 2011*

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1. The Basics

What journalists need to know about authors' rights and copyright

As a journalist you produce words or pictures that can easily be copied. That was true in the age of steam-powered printing presses and is even more true in the age of powerful hand-held computers. The economic value of your work is therefore underpinned by laws against people copying them without your permission. When you give permission – as a journalist, usually in exchange for money – you make a contract with the publisher or broadcaster, which is often called a “licence” to use your work.

Because authors' rights law is about permission to copy, not ownauthors' rights law is about permission to copy, not ownership of physical objects, it is different to the law of property. Authors' rights cover journalists' words and pictures – photographers are included “authors” for these purposes.

Some of the problems that journalists have with authors' rights are a result of editors and publishers being frightened that authors' rights are complicated, or believing myths about them, or not paying their lawyers enough to spend the time to understand what they actually need.

Authors' rights are not complicated.

This is a practical guide to what journalists need to know about authors' rights. It describes the principles that are common to all countries in Europe.

There are two distinct systems – the “copyright” system in the UK, Ireland, Malta and the Netherlands – and “authors' rights” in the rest

of the continent: but many of the day-to-day practical effects are the same. This guide refers to both as “authors’ rights”.

Section 2 deals with more of the details and with more of the exceptions to these general principles. Read that if you need the detail, and ask your own union for more on the detail in your country.

0 What you create, you own. A photograph, a news story, a radio feature, a cartoon commenting on the news... if you made it, it's yours. (The important exception is that if you create something in the UK, Ireland or the Netherlands while you are covered by a contract of employment – that is, if you have a “proper job” under employment law rather than being a freelance – it belongs to your employer: see Section 1.1 below).

1 Authors’ rights do not need to be registered (except in the USA, despite it being a signatory country of the Berne Convention – see below). What you create is yours simply by virtue of you creating it. The © symbol is not necessary, but does no harm.

2 Authors’ rights protect the actual arrangement of words in the article, or objects and people in the photo, or whatever – the “expression”, in the jargon. Authors’ rights do not apply to facts or to ideas. If an editor or producer commissions you to produce work based on a particular idea, in law this has no effect on your ownership of the work. Because you make it, you own it.

3 Standard practice is that what you sell to an editor or producer is a licence to use your work, once, in one territory, in one medium. Examples are First British Serial Rights (where “Serial” means use in a newspaper or magazine), First French Book rights; World Wide Web Reprint Rights... or Japanese (second edition) translation rights.

Generally, if a publisher or broadcaster wants to use your work again or in a different context – for example to put a newspaper article on the web – they should pay more.

You may choose to agree a fee that includes limited web use. In France, a monthly magazine has the right to put articles on the web for

a month, and a daily newspaper for a day – and after that, they pay more.

4 Publishers and broadcasters are vigorously trying to get journalists to grant them the widest possible use for the least possible money. Those with smarter lawyers may “offer” contracts that say how generous they are for allowing you to keep your authors’ rights in your work, then demand a licence to do anything with it, anywhere, forever. This is like them asking for a 999-year lease on a house, for the price of a month’s rent.

In “copyright” countries, it is legally possible for publishers and broadcasters to demand that you “assign” your rights to them – for no extra money. “Assign” is jargon for “sell outright”: see Section 2.1. This means that they want to own your work outright, for the price of a month’s rent. The EFJ advises journalists to resist this.

In the rest of Europe it is not possible to “assign” authors’ rights, though some publishers and broadcasters apply pressure to grant very broad licences. In Germany, the right to equitable remuneration is guaranteed by national law. Journalists can demand equitable payment for any use of their works which is not foreseen at the time of the signing of the agreement.

5 Some journalists, perhaps particularly younger ones, ask why they should not hand over rights in the reviews they write for the fictitious British *What Fridge?* Magazine – will they be worth anything in a couple of months’ time? If these rights are not worth anything, why is the publisher going to all this trouble to get the right to re-use them for free? If you license only first use rights you can get extra money – perhaps from granting a translation licence to *Quel réfrigérateur?*

6 Journalists negotiate with publishers and broadcasters to grant licences for words and pictures to be published in newspapers and magazines and television and radio shows – these are “primary uses” of the work. It is not possible for journalists to negotiate individual licences for each “secondary use” of their work, such as a business or a library user photocopying newspaper and magazine articles, or

a cable television channel re-transmitting broadcast programmes. So these are dealt with by “collective licensing”. Journalists need to register with the appropriate “collecting society” in their country to receive your share of the money paid for such uses: see Section 6.

7 You can agree a licence in a phone call: you can make a legal contract verbally, but everywhere you will have problems if you need to *prove* what you agreed. So put what you agree in writing. You may find the EFJ model contract useful – see Section 4 – or contact your own union to ask whether it has a national model contract: see Appendix 1.

8 The essential parts of authors’ rights in ensuring that you support yourself as an independent professional journalist are the right to authorise someone else to copy your work – or not, if they do not offer enough money to compensate you for your skill and work – and the right to collect further payment for further use.

You also need to protect your reputation, and that means protecting your work. So the law gives you “personal” authors’ rights. These are:

- The right to be identified as author of your work – for example with a credit or by-line
- The right to defend the integrity of your work – the right to sue anyone who uses or alters it in a way “contrary to your honour or reputation”, in the words used in the international law of the Berne Convention.

These “personal” authors’ rights are often called “Moral Rights” in English: this is a ridiculously bad translation of the correct French phrase, « *droit moral* ».

In the law of the UK and Ireland, you do *not* have either right in work which appears in newspapers or magazines, nor in work which reports “current events” anywhere; and publishers can demand that you “waive” – give up – moral rights anyway, maybe in case the law changes later. Journalists in these countries must remember that you

still *own* everything you produce as a freelance, even if you do not have moral rights. That is, they are separate from the economic rights.

9An “exception” to authors’ rights is a kind of use that can be made of your work without your permission. Though the legal details vary from country to country, anyone can, for example, use a reasonable extract from the text of a news story for the purposes of reporting the news. Professional ethics say the person using the extract should give credit to the author of what they quote; in many countries the law says they must.

Another example of an “exception” that is useful to journalists is “incidental use”. There is, for example, generally no problem when a news photograph contains a painting or a building in the background – though the artist or the architect would need to give permission if you were copying the painting or the building itself. There *is* a problem if someone makes and sells a t-shirt of that photo, for example, without getting and paying for the permission of both the photographer and the artist.

It is always permitted to write the facts in a news story in new words. Again, authors’ rights protect the journalist’s “expression”, not the facts and ideas that are expressed.

1.1 The Anglo-Saxon difference: copyright

This is a summary of the main differences between the mainstream of authors’ rights, and the copyright system in the UK, Ireland, Malta and the Netherlands. Though the newer EU member states are often described as adhering to the authors’ rights system, their laws contain some features of copyright – especially concerning employed journalists.

Employed journalists

In the UK, Ireland and the Netherlands the publisher or broadcaster owns the work of a journalist who is working under a contract of employment – that is, a journalist who has a “proper job”, and is not working

as freelance engaged for a fixed period or to deliver a particular piece of work. In Malta, ownership does not appear to be automatically transferred, but as in the other copyright countries it can be “assigned” by a contract, which must be in writing.

In the UK and Ireland employed journalists do not have the right to be identified or to defend the integrity of their work. In copyright countries these rights may be “waived” by an agreement in writing.

In Poland¹, the Czech Republic² and Hungary³, for example, an employer gains the economic rights for work done in the course of employment. In Estonia⁴ this is defined as use “for the purposes determined by and as covered by the responsibilities of employment”. In Hungary the “author shall be entitled to an appropriate remuneration if the employer authorizes another person to use the work” and in Poland employed journalists retain the right to equitable remuneration for certain re-uses.

In Slovenia⁵, the employer gains the economic rights for 10 years; with “adequate remuneration” payable for any extension; and in Lithuania⁶ for 5, unless otherwise agreed: the author, alongside the publisher, appears to retain the right to remuneration for photocopying. In Romania any transfer must be specified in the employment contract and the default period is 3 years; authors appear to retain a right to a share of private copying and photocopying revenue.

In the Czech Republic it is specified that “Unless otherwise agreed, the author of an employee work is entitled to an equitable supplementary remuneration from the employer if the wage or any other compensation paid to the author by the employer is in evident disproportion to the profit...”

¹ Polish legislation: http://www.wipo.int/wipolex/en/text.jsp?file_id=129378 accessed 03/06/2011

² Czech legislation: http://www.wipo.int/wipolex/en/text.jsp?file_id=137175

³ Hungarian legislation: http://www.wipo.int/wipolex/en/text.jsp?file_id=154395

⁴ Estonian legislation: <http://www.wipo.int/wipolex/en/details.jsp?id=1233>

⁵ Slovenian legislation: http://www.wipo.int/wipolex/en/text.jsp?file_id=129664

⁶ Lithuanian legislation: <http://www.wipo.int/wipolex/en/details.jsp?id=7374>

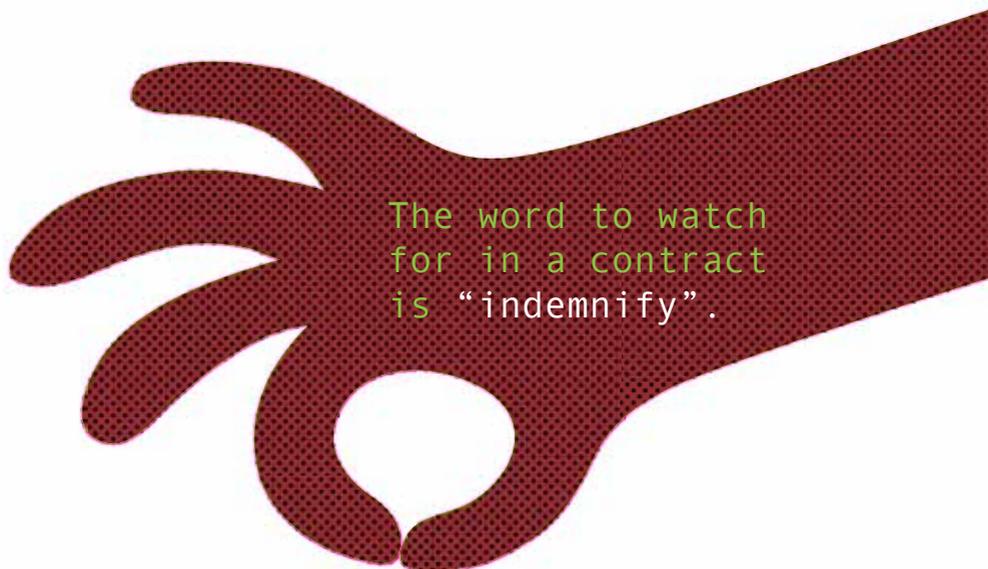
⁷ Romanian legislation: <http://www.wipo.int/wipolex/en/details.jsp?id=5195>

Bulgaria⁸ has a similar provision and also provides that contracts for commissioned works may transfer economic rights, and a right for the author to demand additional compensation where revenue “proves disproportionate”. In Slovakia⁹ “The employer may transfer the right to exercise the author’s economic rights to a third person only with the author’s consent.”

In countries such as Sweden, Finland, Denmark, France, Belgium and Germany, in contrast, employed journalists maintain the full legal connection with their work. Legislation entitles them to be identified, to defend the integrity of their work – and to be paid when the work is re-used. Often, payment is through a negotiated supplement to their salary.

Freelance journalists

In the copyright countries freelance journalists may legally “assign” their work to a publisher or broadcaster: that is, hand over complete economic control, by a contract in writing.



⁸ Bulgarian legislation: http://www.wipo.int/wipolex/en/text.jsp?file_id=125323

⁹ Slovakian legislation: <http://www.wipo.int/wipolex/en/details.jsp?id=7215yh>

Assignment for certain purposes is also possible in, for example, Hungary. The law of Estonia refers to assignment but states that “a legal entity can be the owner of copyright of a work only in cases prescribed by this Law.”

Because publishers and broadcasters can demand assignment, they often do. The EFJ strongly recommends that journalists negotiate a licence instead. Even the publishers and broadcasters that say they “always” get freelancers to assign works will negotiate a licence with writers and photographers who are in a strong negotiating position – for example those who have agents negotiating for them. Often, a publisher or broadcaster will negotiate if the journalist simply asks “what do you in fact want to *do* with this?”

In the UK, Ireland, Malta and the Netherlands freelance journalists may legally “waive” their rights to be identified or to defend the integrity of their work. Again, because publishers and broadcasters can demand this, they often do, simply for convenience – even when the work is for a newspaper or magazine or is otherwise reporting news and current affairs and these “moral rights” do not apply anyway. And in the UK, where the moral rights do apply, they do so only if a phrase such as “the moral rights of the author are asserted” or “all rights reserved” appears with the work (for example on a book’s title page) or on the invoice for the cost of doing the work.

The EFJ strongly recommends that journalists do not agree to “waive” these rights, and warns journalists of the growing practice of Anglo-Saxon publishers demanding that journalists agree to take on the cost of legal cases that result from their work *as well as* demanding the right to change it without consultation (which could be the cause of a legal case). The word to watch for in a contract is “indemnify”.

In the authors’ rights countries, the idea of “assigning” a work makes no legal sense – authors’ rights are personal rights of the individual – though this does not stop publishers wanting to achieve much the same through wide licences. Equally the idea of “waiving the moral rights” is nonsensical.

The USA

The US is a copyright country. If you do work under a US contract, then you probably do not have effective protection unless you register your work with the office of the US Register of Copyrights. If a work is registered and copyright is infringed in the US, the author can sue for statutory damages and reclaim their legal costs when they win; if it is not registered the author can probably sue only for its value and bears their own legal costs. (Many legal analysts fail to understand how this pressure for formal registration of authors' works is compatible with the requirement in the Berne Convention that authors' rights shall be available "without formality", but it is the law in force in the US.)

Under US law, a freelance can be engaged to produce a work that will belong outright to the client – that is, the "work made for hire" doctrine may extend beyond contracts of employment.

2. Authors' rights (and copyright) law

Regulation of the copying of creative works goes back centuries. It began with the marking of tools. Then, starting in the seventeenth century, national laws were framed to provide adequate protection for literary, scientific and artistic creators.

In principle, there are two systems. “Authors’ Rights” are rights of the individual, and stay with the individual. Copyright is a property right and is fully tradeable, just like any commodity.

Copyright principles apply in the UK, Ireland, the Netherlands, Malta – and outside the EU in the USA, India, Australia, Canada and other former British colonies that operate the so-called “common-law” legal system, based on precedent, rather than the fully-codified “civil law”.

Authors’ rights apply in almost the whole of the rest of the world.

Every country in the EU is signed up to the main international law governing authors’ rights, the Berne Convention. In fact, 164 of the 190-ish recognised countries in the world have signed up to the original Berne treaty.¹⁰ The treaty sets out features that countries must include in their national law. The origins of Berne are in the authors’ rights tradition: different copyright-regime countries have taken different steps to adapt their law, for example to partially recognise moral rights – more in the case of Canada, almost none in the case of the USA.

¹⁰ The exceptions are Afghanistan, Angola, Burundi, Cambodia, East Timor, Eritrea, Ethiopia, Iran, Iraq, Kiribati, Kuwait, Laos, the Maldives, the Marshall Islands, Mozambique, Myanmar, Nauru, Palau, Papua New Guinea, San Marino, São Tomé and Príncipe, the Seychelles, Sierra Leone, the Solomon Islands, Somalia, Taiwan, Turkmenistan, Tuvalu, Uganda and Vanuatu.

Member states of the European Union are also bound by directives designed to harmonise aspects of authors' rights across the member states: see section 2.2.

2.1 The international treaties

These treaties are administered by a United Nations body, the World Intellectual Property Organisation or WIPO.

For European authors the most important international treaties are:

- the Berne Convention for the Protection of Literary and Artistic Works
- the Rome Convention for the protection of performers, producers of phonograms and broadcasting companies;
- the WIPO Copyright Treaty (WCT);
- the WIPO Performances and Phonograms Treaty (WPPT); and
- the agreement on Trade-Related aspects of Intellectual Property (TRIPS) administered by the World Trade Organization.

These international treaties establish the basic principles of internationally-applicable authors' rights – the minimum levels of protection that signatory states must offer. They leave individual countries some flexibility in how they express these in national law, including the option of offering stronger protection. As a result, the detail of authors' rights legislation varies quite widely from country to country.

European Union directives, in contrast, require EU member states to implement them in their national law. Each covers a fairly narrow area: a standard European framework for authors' rights will become clearer as the level of detail in the directives increases.

The fundamental direction that authors' rights should take in Europe is still, however, in dispute. The choice is between the copyright system of the English-speaking world, in particular, and the continental approach

of protection for the author. The responsible section of the Commission – the EU’s civil service – currently stresses its commitment to Authors’ Rights; other sections sometimes seem to promote the US system.

2.2 European Union Directives

The creation of the internal market of the European Economic Community – now the European Union – clearly highlighted the need to harmonise national authors’ rights legislation. The idea of harmonisation is to create a uniform legal framework across the EU, so that differences do not impede the free movement of services.

However, harmonisation remains incomplete because the EU has focussed exclusively on market conditions, those being matters on which it has clear “competence” to legislate, in the jargon of the EU treaties.

It has so far not been able thoroughly to harmonise authors’ rights in the member states. For example, there have been no EU regulations concerning authors’ moral rights or law governing authors’ contracts. The EU has accepted an argument that harmonising these has no relevance to the working of the internal market, despite its “supplementary competence” for cultural matters associated with the internal market.

Seven EU directives dealing with aspects of authors’ rights have been issued so far:

- Directive 91/250/EEC concerning **legal protection for computer programs** (of 14.05.1991) made computer programs protected by copyright, just like works of literature or art. (It applied, however, a US-style “work made for hire” rule, so that employers are the first owners of their programmers’ work.)
- Directive 2006/115/EC **concerning rental right and lending right** and on certain rights related to copyright (Directive 1992/100/EEC on 12.12.2006) allows authors to authorise or prohibit the rental or lending of originals and copies of works. They cannot waive the right to a equitable remuneration for

rental. It makes it possible for member states to exempt certain categories of lender, for example Braille libraries.

- Directive 93/83/EEC on the rules concerning copyright and rights related to copyright applicable to **satellite broadcasting and cable retransmission** (of 27.09.1993) states that the rights of the parties holding the authors' rights and holders of related rights to permit or forbid the transmission of a broadcast via cable or satellite can only be exercised by organisations managing collective interests. The rights exercised by a broadcasting organisation are an exception to this. Satellite broadcasts are governed by the authors' rights law of the "country of origin".
- Directive 93/98/EEC concerning **harmonisation of the term of protection** for authors' rights and related industrial property rights (of 29.10.1993) harmonises the term of authors' rights protection to last 70 years after the death, and 70 years after first publication for anonymous works and those published under pseudonyms.
- Directive 96/9/EC on the legal protection of **databases** (of 11.03.1996) gives databases protection similar to authors' rights. It covers databases that are themselves an "intellectual creation" — that is, whose structuring is the result of personal creative work. It gives such databases "*sui generis*" protection — that is, protection arising from their very nature — whether or not they qualify as "works" for authors' rights purposes. Relevant examples of databases include daily newspaper and magazine archives and stock-market data. Rights in the database as a whole do not affect any authors' rights that apply to its contents.
- Directive 2001/84/EC on the **resale right** for the benefit of the author of an original work of art (of 27.09.2001) specifies that authors of works of art, including artistic photographs, get a share in the selling price every time the original is resold — known as *droite de suite*.

- Directive 2001/29/EC harmonising certain aspects of authors' rights and related rights in the information society (of 22.05.2001 – the “**Infosoc directive**” – is a so-called “horizontal” directive, which means it covers a broad range of issues. It harmonises some detailed definitions for authors' rights, such as the “exceptions” allowing copying in the public interest. It provides the member states with a standard definition of the essential rights of resale and restrictions on copying. It allows the EU to sign up to the WIPO WCT and WPPT treaties.

The Infosoc directive introduced a “right of making available” in addition to the right to authorise copying (reproduction right). This was intended to be a framework for negotiating payments for online use of works, but the EFJ is aware of few agreements or contracts that make use of it.

It also introduced into EU law the “three-step test” for determining which exceptions to copyright member states may include in their national legislation: those are

- *certain special cases* which
- *do not conflict with a normal exploitation of the work* and
- *do not unreasonably prejudice the legitimate interests of the rights holder.*

The three-step test is also found in the TRIPS Agreement (above), the Berne convention, the WCT and WPPT.

- Directive 2004/48/EC on the **enforcement** of intellectual property rights in the Member States (of 30.04.2004) set out minimum standards for laws governing what authors (or other “rightsholders”) can do if their rights are breached.

The history of EU harmonisation of authors' rights tells us that the European Union approach is based on:

- the need to ensure a high level of protection for authors' rights;
- granting exclusive rights to authors (and other "rights-holders");
- only natural persons may be classified as authors;
- strengthening rights-holders' protection; and
- regulations for equitable remuneration, where necessary.

Harmonisation of authors' rights between the member states has, however, happened only in those areas where differences between regulations in the member states may lead to a restriction of the free movement of goods, trades and services.

In international negotiations and in speeches by Commissioners the EU has stood behind the authors' rights tradition – but it has not acted to harmonise the fundamental principles of authors' rights in member states' laws, and is probably unlikely to do so in the near future, even though the Lisbon Treaty removed the need for unanimity among member states in this policy area.

You can find the text of the Directives at <http://eur-lex.europa.eu/en/index.htm>

2.3 National legislation

National laws contain the definitive rules on matters of authors' rights. Individual cases cannot be solved in terms of authors' rights without reading the individual laws in the member states and the court precedents that determine how they are applied: check for texts, and possibly translations into your language, on the WIPO web site: <http://www.wipo.int/wipolex/en/>

This short outline of authors' rights is designed to illustrate the relevance of authors' rights for journalists. It cannot replace reading the relevant laws and investigating legal precedents in their application.

Collective agreements also play an important role in the implementation of journalists' authors' rights. These contain provisions

concerning the licensing of economic rights to publishing houses or broadcasting companies. Some place emphasis on the need to respect moral rights. See Section 4.

2.4 Requirements for protection

Authors' rights in a work take effect as soon as the work is completed. Neither the Berne Convention nor the European directives allow states' laws to require registration or any other "formality" for the application of authors' rights. Article 6 of the EU Term of Protection Directive and Article 3 of the Database Directive, for example, stipulate that works merely have to be the result of one's own intellectual invention in order to be protected. No other criteria may be applied to determine whether a work is protected.

The widely-used copyright notice – "©" followed by the name of the party holding the authors' rights and the year in which the work was first published – is, therefore, not a condition for the protection of authors' rights. A few countries outside Europe, which are not party to the Berne Convention, do stipulate formal requirements. If these countries have subscribed to the Universal Copyright Convention this copyright notice gives some protection. And if legal action in the United States is a possibility, registration with the US Copyright Office is strongly recommended: visit www.copyright.gov/eco

In order to enjoy the protection afforded by authors' rights, a work must be "original". Whether the work has any literary or artistic merit is irrelevant. It is sufficient for it to be an original piece of work. However, it must be expressed in a specific, perceptible form, whether in pictures, words, music or material. Ideas *per se* are not protected: it is their expression that is protected, as soon as it is "fixed" and given specific form.

For example: *A journalist has an idea for a story and takes it to a newspaper. The newspaper sees no advantage in working with the journalist, but likes the idea. It engages someone else to develop the idea. The person who had the idea cannot do anything about this under copyright or authors' rights law.*

No permission is needed for the media or anyone else to use news, facts and information from journalists' stories, in the interests of the free flow of information. However, good media ethics do dictate naming the source, in the interests of authenticating the information – and many countries' laws demand this too.

For example: *A journalist who uses factual data taken from another article to write their own stories does not violate authors' rights. However, a journalist who simply takes a significant part of the article word-for-word is infringing authors' rights. That is plagiarism.*

Whenever an actual event is reported, the reproduction of works which can be seen or heard during the event – for example a poster in the background of a news photograph – is permitted, if this can be justified by the need to report the information concerned.

It is not the information contained in the article, but the form of the article itself which is protected. The ways in which facts and data are disseminated or collated are, however, generally protected. This applies both to the work in its unchanged form and to databases that contain only factual data, but required a great deal of systematic work to construct. So it may not always be lawful to reproduce all the data from an article – for example if it consists of factual data such as a laboriously compiled list of dates and places.

2.5 How long do authors' rights last?

In European Union member states, authors' rights in written works and photographic works expire 70 years after the death of the author.

In some member states there is a shorter period of protection for photographs that are not defined in those states as "works". In Germany, for example, this protection lasts for 50 years after the photograph was taken or appeared. (In other member states all photographs are protected works.) Articles 1 to 6 of the EU Term of Protection directive (93/98/EEC) describe the term of protection in detail and deal with more complicated cases like jointly authored works and films.

2.6 The value of authors' rights

Authors have the exclusive right to permit use of their works. That is, in authors' rights law only the author, and in copyright law only the current owner of the copyright, can licence anyone to reproduce and distribute the work as an article or photograph in a magazine, or to broadcasting it or distribute it through an on-line service. Only the author (or copyright owner) can licence anyone to make a "derivative work" such as a translation or other revision.

These rights allow journalists to receive financial remuneration for permitting a particular use of a work. They are therefore referred to as "the economic rights" or usage rights.

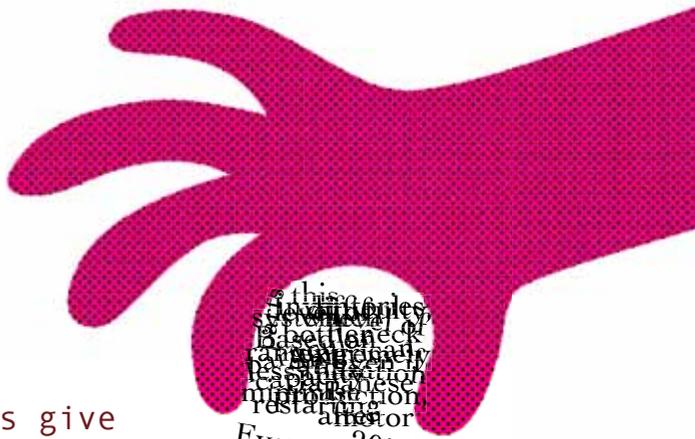
Authors can wholly or partly transfer or license usage rights. It is a good idea for authors to license only limited usage rights, or to license these rights in a specific form or for a certain period. Authors who do this retain more influence over the way their work can be used in future – and so they can do more to prevent unethical uses.

It is extremely important that journalists are able to decide how their works are used – and by whom. The moral rights allow authors to take action against mutilation or manipulation of a work, and to enforce their identification as its author.

2.7 The importance of journalists' moral rights

The moral rights maintain a personal link between each journalist and their work, which is their creation and their brainchild. It is the result of a creative process involving research, the gathering of information, its selection and analysis, and reporting. The moral rights give each journalist the right to be identified as author of the work; and to oppose any distortion, mutilation or other alteration of this work, or any other attack on it, which could adversely affect his honour or good name (Article 6 bis of the Berne Convention).

It is vital that journalists retain control over what happens to their work. Journalists have a responsibility toward society. Guarantees of the quality and authenticity of a publication or a broadcast are



The moral rights give each journalist the right to be identified as author of the work; and to oppose any distortion, mutilation or other alteration of this work, or any other attack on it, which could adversely affect his honour or good name.

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preconditions for serious journalism. The public expects every journalist to adhere to these principles. Distorting or twisting facts, or even merely arranging them in a different order, can give a story a different “spin”, leading the work to misinform instead of informing. The author’s right to be identified means that readers and viewers know who ultimately takes responsibility for it.

Strong moral rights guarantee the authenticity, quality and integrity of work. There is an indivisible link between moral rights and the ethics and independence of journalism. Within the commercial environments of daily newspaper business, magazine production and private broadcasting – as well as in the less-commercial world of public broadcasting – moral rights promote high ethical standards.

These moral rights are in general inextricably linked to the creator, that is the author, and cannot be transferred or removed. In the UK and Ireland, however, it is possible for authors to “waive” moral rights, and in the Netherlands it is possible to “waive” the right to be named and to object to certain kinds of change – but not “the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author”.

Further, in the UK and Ireland the moral rights do not exist at all for works reporting news and current affairs. The EFJ considers that these are the works for which moral rights are most important and that these laws need to be changed.

Editorial changes that do not distort the meaning, alter the facts or change the journalistic intention or context are permitted.

2.8 The importance of journalists’ usage rights

The fact that the journalist’s consent is needed for the use of their work is what gives them the power to stipulate conditions on that use, such as:

- the payment;
- the type and method of use – for example that the work may be reproduced in a daily newspaper, in a radio broadcast, as

an article in an on-line service, as a book, etc.;

- the scope of use – for example that the work may be used only in an initial print run, edition or broadcast;
- the area of distribution or publication – for example local, regional, national or international;
- the duration of use – for example as a one-off in one edition or broadcast, or for a precisely defined period.

These and other associated conditions, such as questions of liability, should be defined in a contract governing the use of the work.

In some countries individual written contracts are required, while in others trades unions or professional associations have negotiated collective agreements that are binding on everyone who signs up to them. The unions can also provide model contracts and specimen terms and conditions of business. In some countries, collective agreements can set out minimum or recommended fees. See Section 4.

2.9 Primary and secondary rights

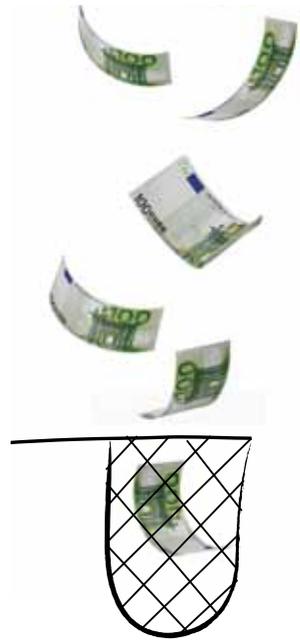
Primary rights relate to the initial publication. Secondary rights relate to subsequent or derived use of the work, such as the making of photocopies or inclusion in a database. The distinction between primary and secondary rights is not clear-cut, so these terms should be used with caution. In practice, secondary rights are those that collecting societies are allowed to manage. Some collecting societies also manage primary rights (eg SAJ in Belgium).

2.10 Collecting societies

Although the journalist should retain as much control over the work as possible, in some cases it is virtually impossible to agree remuneration for mass use on an individual basis. For example, no journalist can conclude individual usage contracts with everyone who wants to take a photocopy of their work.

Because of this, authors, with publishers and broadcasting companies, have established collecting societies to collect the remuneration due for such uses and distribute it between the rightful claimants. In most countries, the activity of collecting societies is governed by laws which also define the types of use for which collecting societies may collect payment. These societies are monitored by public authorities to ensure that the remuneration is appropriate and that the income is fairly distributed.

Because of this,
authors, with
publishers and
broadcasting companies,
have established
collecting societies
to collect the
remuneration due
for such uses and
distribute it between
the rightful claimants.



3. Guidelines for concluding contracts

The EFJ feels that, wherever possible, national journalists' organisations should conclude collective agreements that cover the important aspects of authors' rights. Unfortunately it is not possible to make collective agreements for every author of journalistic works. Freelance journalists, in particular, may find that collective agreements afford only limited protection.

Some guidelines that should at least be considered when concluding individual contracts are therefore given here.

- 1 Contracts should specify that the journalist's approval is required before their works are duplicated and reproduced publicly. Such contracts therefore need to specify that usage rights cannot be transferred wholesale. They ensure that journalists do not find their work re-used in a place or a manner that is contrary to their honour or reputation (in the words of the Berne Convention) – for example re-use in advertising brochures. Unfortunately this principle is still not known or accepted in many countries, particularly those that make employed journalists' work the property of the employer or allow freelances to assign their work entirely to the client.
- 2 Contracts should never be only verbal. Pressure of time often leads to purely verbal contracts, with the risk of making unclear arrangements forgetting necessary provisions. When there is a dispute, journalists' claims on the basis of verbal contracts

often fail due to the lack of evidence. If time pressures make it absolutely impossible to conclude a written contract immediately, the most important conditions – type of use, scope of the rights granted, delivery date, agreed fees, payment date, moral rights – should at least be confirmed briefly in a fax or Email.

- 3 Contracts should always specify the delivery date, fees for the usage rights granted and the payment date.
- 4 Every contract should contain a provision covering the author's moral rights (for example referring to article 6 *bis* of the Berne Convention). Contracts under the laws of countries where moral rights do not apply to the work can specify that the client will respect the spirit of Article 6 *bis*.
- 5 When a contract gives permission for “syndication” – re-selling usage rights to third parties – it should qualify this, for example with a list of parties to whom the rights may not be re-sold. It should state that the author must be informed of any such publications, stipulating the form of notice and the payment due.
- 6 Contracts should specify that the journalist is the sole right-holder of his/her works although some of these rights can be managed by collecting societies representing journalists.

It is difficult to retain control over work that appears on-line. The journalist can lose sight of the way in which the work is re-published, reproduced or edited. Technical rights management systems may offer solutions to these problems in the future. Experiments with such systems, digital watermarks and encryption techniques have not been very successful so far.

Agreements on the use of journalistic works can be made either through collective agreements – where these are possible – or individual contracts with individual journalists. The advantage of collective agreements is that they cannot be changed without consultation by

employers that take advantage of the individual journalist's inferior negotiating position. Collective agreements also have the advantage that they apply to any relevant work or employment relationship, even if otherwise agreed in the individual contract.

See the EFJ's model freelance contract in Appendix 2. This is a template to be modified to take into account national conditions: contact your national union.



Checklist for individual contracts

- Contracts should be in writing
– send confirmation of what has been agreed by fax or at least email
- Specify that the journalist's approval is needed before the work is reused
- Specify work required, delivery date, fees, payment date
- Secure moral rights
- Conditions on syndication

4. Collective agreements

The 19th World Congress of the International Federation of Journalists (IFJ) held in Maastricht back in 1988 laid the foundations of a model collective agreement covering employed journalists' authors' rights. There have been many technological advances since them. New forms of publication such as on-line services and web radio have presented new challenges to journalists' authors' rights.

The basic ideas behind the model collective agreement are still very relevant, however. They are based on the knowledge that journalists, since they are responsible for the use of their works and need to make a living, should retain their rights as far as possible within the working relationship. This is the only way that they can exercise some level of control over the way their works are used.

An IFJ memorandum concerning journalists' usage rights states that:

- Employed journalists grant the publishing house, in return for the wages they receive, the right to publish their articles in the medium for which the journalists work, for example one edition of a daily newspaper.
- The right to re-publish in other media, such as radio, magazines, on-line services, or other types of use may be granted, if the publishing house or other seller undertakes to account to the journalist or their union for any use or re-use of the granted rights and to pay further remuneration for such use.

The model collective agreement contains the following requirements concerning the journalist's moral rights:

- agreements relating to the identification of the creator of the journalistic work;
- the right to prevent the work from being published in another newspaper, magazine or book or broadcast on radio, television or via a data service;
- the right to review or withdraw the work under certain circumstances; and
- that the employer is responsible for ensuring compliance with the agreement.

In 1996, the IFJ also set out some fundamental and modified recommendations for the model collective agreement that took account of the recent technical developments by suggesting rates for authors' rights.

For updates on collective agreements, see the EFJ Authors' Rights campaign on the International Federation of Journalists website: www.ifj.org/en/pages/authorsrights – below we describe important recent developments.

Germany

Collective agreements apply to almost all journalists working for newspapers, magazines and public broadcasters in Germany. The agreement for journalists working for magazines was concluded between the Deutscher Journalisten-Verband (DJV) and ver.di on one side and the Verband Deutscher Zeitschriftenverleger (VDZ) on the other. The collective agreement for journalists working for daily newspapers was agreed between the DJV and ver.di on one side and the Bundesverband Deutscher Zeitungsverleger (BDZV) on the other. The agreements with broadcasters were also concluded between DJV and ver.di on the one side and the respective single broadcaster on the other side for example ZDF.

Collective agreements also exist for freelance journalists, especially in the public radio and TV stations, as well as in newspapers.

In 2002 the German parliament passed a law regulating authors' rights contracts, the "*Urhebervertragsrecht*". This specifies that

authors, including journalists, must receive reasonable pay or “remuneration”. Remuneration is reasonable if, at the time the contract was concluded, it corresponds to what is normally and honestly paid in the normal course of business, according to the type and scope of the granted usage rights, particularly the duration and time, and taking full account of all the circumstances. There is a “windfall” provision for the review of contracts if the work turns out to be worth more than envisaged at the time they were agreed.

The law provides for the reasonableness of fees and other contract terms to be tested in court. It also encourages authors’ and publishers’ associations to draw up agreements on remuneration arrangements and reasonable fees and contractual conditions.

It took until 1 February 2010 for a new agreement with the newspaper publishers to come into effect¹¹, specifying minimum fees for first use and repeat uses of journalists’ texts, between the DJV and ver.di on one side and the Bundesverband Deutscher Zeitungsverleger (BDZV) on the other. Negotiations continue on photography and on updating an agreement with the magazine publishers.

Ireland

In contrast to Germany’s encouragement of collective negotiation, in 2002 Ireland’s Competition Authority used a court case to prevent collective negotiation by actors, and by implication other freelance creators. The Irish government in 2008 promised to introduce legislation to remedy this, but nothing has yet happened.

France

Various collective agreements with individual daily newspapers have been concluded by the *Syndicat National des journalistes* and other unions. The SNJ was involved in negotiations that produced clauses in « *le loi Hadopi* » – the “Hadopi law” of 2009 – giving a weekly

¹¹ <http://www.faire-zeitungshonorare.de/>

magazine the right to put articles online for a week, and so forth, with payments for subsequent use to be established by further collective agreements. See <http://www.snj.fr/spip.php?rubrique67> (in French).

IFJ model clause on authors' rights to be inserted in collective agreements

- All authors' rights in the work shall remain with authors who will retain their exclusive rights. The licence granted to publish or broadcast the work will be limited to the first publication/broadcast only. Unless there is express written agreement to the contrary, the licence shall expire within a certain period as permitted by national law after the delivery date. The publisher/broadcaster shall not make the copies available without the permission of the author after the licence expires.
- Any modification of the work shall be subject to prior authorisation by author.
- Publisher/broadcasting company agrees that the following credit line (name of the author, date) shall accompany every publication or broadcast of the material.

5. Collecting societies

It is not always possible for authors to enforce their rights themselves. A single journalist can neither control who reproduces articles or photographs in all press reviews or for personal uses (“private copy”), nor monitor who photocopies these works. No individual is able to watch over who records their transmitted works on video or DVD or which broadcasters re-transmit them. Even large companies cannot always keep track of people who use works protected by authors’ rights without asking permission. Internet search engines return long lists of examples showing how authors’ works are used without them gaining any benefit from such use.

Collecting societies have been set up in many countries to ensure that authors receive the benefits due from such uses. These collecting societies enter into contractual agreements with authors, including journalists, to enforce the rights that the authors are unable to monitor themselves. These include photocopying, digital reproduction using scanners or CD burners, and the broadcasting of protected works by cable networks.

In most countries, collecting societies gather remuneration for the lending of works and analogue and electronic press reviews.

A number of European countries have a single collecting society which, in some cases, also represents publishers. Others have several national societies, each active in a different field. For example, some countries have a collecting society purely serving journalists working in the written word and others for photographers, camera operators, etc.

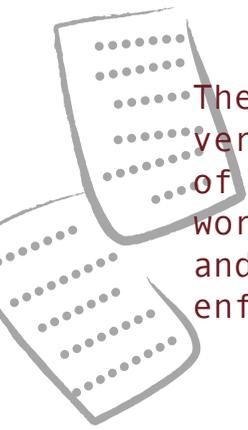
The collecting societies dealing with reprography have an international umbrella organisation – the International Federation of Reproduction Rights Organisations (IFRRO) – which attempts to enforce authors’ rights internationally.

There are also countries in which no collecting societies yet exist, or in which there are only collecting societies for certain groups of authors, excluding journalists. The EFJ is supportive of efforts, alongside IFRRO, to ensure that there are effective collecting societies in the newer EU member states.

The development of digital licence management and information systems will make it much easier to clarify the individual rights for multimedia productions. Anyone who wants to combine photographs, text, film excerpts and music in a production will find it much easier

Functioning of private copy levies in Germany

In Germany, money is collected through levies on copying media such as CD-ROMs, DVDs, audio and video cassettes to compensate for loss of sales due to “private copying”. Collecting societies conclude contracts with manufacturers, importers and operators of devices intended to duplicate works protected by authors’ rights. They negotiate adequate remuneration and are responsible for passing on the remuneration received to the authors or to organisations of authors and sometimes to publishers as well. The amount of remuneration collected by these companies is considerable. Tens of millions of Euros have been collected for journalists, who should therefore conclude contracts with their national collecting society in order to benefit from their pay-outs.



The collecting societies have played a very important role in the development of systems for the identification of works, their creators and the rights and remunerations associated with enforcement contracts, for example.

to settle the legal questions if they use a central rights management agency. Collecting societies offer this type of package as a “one-stop shop”. Such clearing house projects can be found in Germany, Finland, France, Ireland, Italy, the Netherlands, Norway, Portugal, Switzerland, Spain and Switzerland.

Such systems can also improve collecting societies’ work in terms of rights management and fair distribution. The collecting societies have played a very important role in the development of systems for the identification of works, their creators and the rights and remunerations associated with enforcement contracts, for example. They have developed the “Common Information System” (CIS) designed to network the databases of the various national collecting societies. It specifies information on rights holders and rights users, for example, and for the unique identification of works. It is not yet complete, and there is much valuable information that has yet to be obtained from the national collecting societies.

6. Dealing with infringements

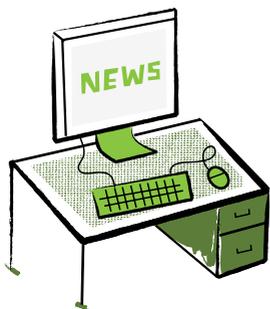
The internet makes it much easier for unscrupulous publishers and individuals to make unauthorised use of journalists' articles or photos, in breach of their authors' rights. In return, it also makes it possible for journalists to track down such abuses themselves. (Of course, in the copyright countries they can only do anything about those abuses if they have not assigned copyright in their work.)

In the age of print, , journalists would never know that their work was appearing in a paper on the other side of the world, unless a friend or relative or colleague spotted it and thought to send a postcard. In the age of the internet, they can go looking – not only for unauthorised uses on the internet in general, but often for traditional print media that have internet editions.

Publishers' associations go on about “piracy”, but of course a very large portion of the pirating of articles and images consists of publishers making unauthorised use of the work of writers, photographers, illustrators and others.

So how can journalist chase them down? There are three steps:

- Find the unauthorised use
- Find out who is responsible
- Make them pay (or at least suffer)



The one most important tip is this: do not search for words that describe an article, search for phrases that are contained in that article – and not in anyone else’s.

The following is extracted from an extensive guide to doing this, at www.londonfreelance.org/feesguide/index.php?section=General&subsect=Tracking+down+pirates

Effective searching for text

To find all copies of one piece of your work online, you need to learn strategies for effective web searching. And photographers will often be searching for articles or web pages that may contain unauthorised uses, based on captions or other text.

The one most important tip is this: do not search for words that describe an article, search for phrases that are contained in that article – and not in anyone else’s. Another is: do not rely on just one search engine.

Finding photos and illustrations

Technology for finding photographs is likely to change quite fast. In the fairly near future it may be possible to send a photo to a special search engine that will find other photos that look like it. At the moment, though, your best bet is to search for text that would be likely to be wrapped round a particular photo.

See www.londonfreelance.org/feesguide/index.php?section=Photography&subsect=Tracking+down+pirates

Once you have found the infringement...

Journalists can take various action against the infringer, depending on what country's law applies:

- You can claim damages. These may consist of loss of income, damage to your good name (reputation) as a journalist, or simply a loss suffered because your name was not mentioned. The compensation could be a reasonable license payment, surrender of any profits made due to the infringement or reimbursement of any losses incurred – depending on the law of the country in which you take action.
- Elimination of the infringement may be requested, for example withdrawal of an item that damaged the author's reputation;
- A ban on publication, or destruction of the publication, may be required;
- Some national legislation allows the entire print-run of the publication (or other medium) to be seized;
- In some countries, criminal charges can be brought, which may result in a judgement against the party that infringed the author's rights and confiscation of any copies already produced.

Journalists have a problem, though, since they typically make a living by licensing use of many works, each for a relatively small sum of money. This is a particular problem in the UK, which has the most expensive court system in Europe and where the Small Claims Court in England and Wales has been instructed not to take cases involving copyright.

There is also a problem in that journalists are increasingly having to deal with unauthorised uses of their work in countries other than their home country.

The EFJ is campaigning for an effective system of Small Claims Courts, able to deal with authors' rights, throughout Europe.

In the meantime, the EFJ is promoting mutual assistance agreements among its member unions, formally agreeing that if a journalist who belongs to a union in country A has a problem with a publisher or internet service provider in country B, then the union in country B will help. Contact your own union to find out whether it has joined this scheme, or whether it has informal arrangements: see Appendix 4 for contacts.

7. The digital difference – the near future

There are determined efforts to weaken authors' rights in a number of forums. Most of these attacks are presented as reactions to the technologies that are making revolutionary changes in how journalists' work is distributed.

Some have argued that technology can replace the law – with the slogan “code is law” promoted by Professor Lawrence Lessig, appealing to those who produce computer program “code”¹². This encourages a misunderstanding both of computer code and of the law and its place in society.

One example of the misunderstanding – fiercely opposed by Lessig – was the belief that “technical protection measures” (TPMs) could physically prevent illegitimate copying of films and music. Fortunately, the big corporations seem to be abandoning this, having realised that whatever technical measures they introduce are broken within weeks.

This is fortunate because journalism, like other authorship, depends on unhindered access to other creative work, and many of the proposed TPM were clunky and hindered legitimate access. Unhindered access is not the same as cost-free access, of course: and the EFJ believes law is the proper way to enforce proper payment.

What TPMs have left behind, though, is confusion over Digital Rights Management (DRM) schemes. Properly used, these are not

¹² <<http://harvardmagazine.com/2000/01/code-is-law.html>> accessed 04/05/2011

systems for preventing access to works by journalists or others, but systems for identifying these works and pointing would-be users to who they should ask for a licence to use the work legitimately.

It is increasingly important for photojournalists, in particular, to make sure that they include contact information in every image that they distribute electronically – since it is at present harder to search for images than for text on the internet. See Section 6 on dealing with infringements.

The EFJ is campaigning for proper legal protection of DRM information, in this sense. This is particularly important in the context of likely European legislation on “orphan works”.

Orphan works

One issue that has been raised as a challenge to authors’ rights is that of “orphan works” – those for which no author can be identified or located, so no-one can ask for a licence to use them.

In Europe, libraries have been at the forefront of campaigning for changes to the law to allow use of orphan works. European libraries are under pressure from the EU to digitise their holdings – not just for preservation purposes, but to make them available online to the public. They cannot do this legally when the works are orphaned.

The EFJ has intervened in the debate to argue that if use of orphan works is to be permitted, then it must be by means of a licence, obtained:

- in advance of use;
- after providing evidence of “diligent search” for the author;
- for a fee reflecting the prevailing amount charged by known authors for such works, so as not to undermine the market for new works;
- with provision for renegotiation of the fee paid with a reventant author, since the work may have higher value with a credit;

- with provision for the distribution of unclaimed fees for the benefit of authors in general; and
- from a body that is truly representative of authors in the field concerned.

The EFJ will therefore support member unions in their efforts to ensure that the laws that their states pass are compatible with these principles. The EFJ insists that strong, enforceable “moral rights” must be available to all authors and performers in all member states, including all journalists, to guard against new works being “orphaned”.

The call for new exceptions to authors’ rights

Meanwhile at the World Intellectual Property Organisation (WIPO) there is heavy lobbying for new exceptions to copyright. A proposal from Latin American countries would insert into international law provision for making copies of works, without permission, for the benefit of “print-disabled” people, including but not limited to those who are blind. Organisations of blind people already benefit from such exceptions in most or all EU member states.

Campaigning groups opposed to copyright – many from the US – are trying to extend this proposal to include further exceptions to authors’ rights.

The European Union proposes a measure which would lead to collective licensing arrangements to pay for use by “print-disabled” people, through collecting societies; and the USA a narrow measure permitting the export of versions of works made for people with print disabilities.

The EFJ proposes that, if such measures are in fact necessary, licensing schemes are the way to go. Among other considerations, technological and social developments are very likely to blur the distinction between versions for “print-disabled” users and others: we are well beyond the days of heavy Braille volumes when an “e-book”

can easily be a speaking book and the idea of computer programs that simplify the same text while retaining much of the meaning is no longer far-fetched.

Collective management (and Google Books)

It seems likely that there will be increased pressure for use to be made of authors' works – journalists' in particular – without permission, but with payment distributed through collecting societies. Libraries, for example, do not in fact want to be able to apply for licences for the orphan works in their collections: they want to be able to write a few cheques to a few collecting societies and legally digitise their entire collections of books and journals without the expensive task of inquiring about authors' rights.

Many of the issues that this raises are illustrated by the proposed Google Books Settlement. Though this was rejected by Judge Denny Chin in the Southern District Court of New York in March 2011, it is a pointer to the way some online players are thinking about authors' rights.

The web search and advertising company Google had by then scanned 15 million books from university and national libraries, and made some of them, or parts of them, available at <http://books.google.com> – most of them to internet users identified as being in the USA than to those elsewhere.

Google continues to claim that this was “fair use” under US copyright law. “Fair use” is relatively ill-defined. It is a defence against actions for infringement of copyright, when the use is

...for purposes **such** as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research¹³

[*our emphasis*]

¹³ See <<http://www.copyright.gov/title17/92chap1.html#107>> accessed 27/02/2011

Essentially, from the point of view of the individual creator, in the US system what may happen is that someone copies your work claiming “fair use”, but neither of you knows whether it is in fact “fair use” until you have raised several hundred thousand dollars to sue them¹⁴.

When, however, the Authors’ Guild and publishers did raise funds to sue, Google found it worthwhile to offer a settlement with a headline cost of \$125 million¹⁵.

Under that settlement, Google would have reported to a new collecting society how many times books had been viewed, and made payments to be distributed to book publishers, and to authors – largely via the publishers, on the argument that it would be too expensive for anyone else to find out which authors had “assigned” their copyright to publishers.

The issues this raises include:

- establishing the amount of income generated, not just from future charges to view books online but from advertising alongside them;
- ensuring that this process is automatically transparent – in the rejected settlement the only mechanism was for the collecting society to pay accountants to audit Google’s report;
- protecting book authors against their work being incorporated in “third-party” products in a way that is detrimental to their honour or reputation;
- ensuring that authors have real and democratic control over the collecting society that allocates funds to them; and
- ensuring that the collecting society can effectively negotiate the proportion of income that it receives.

¹⁴ The British Copyright Council in its submission to the UK government’s Hargreaves Review reports an estimated up-front cost of \$1M: see <<http://www.ipa.gov.uk/ipreview-c4e-sub-bcc.pdf>> accessed 01/05/2011

¹⁵ Figure from <<http://www.authorsguild.org/advocacy/articles/member-alert-google.html>> accessed 27/02/20011

The EFJ continues to work on these and other questions raised by such collective licensing.

Current campaigning priorities

Participants at a seminar on “Authors’ rights in a digital world: a fair deal for journalists” organised by the EFJ in Thessaloniki in December 2010 concluded:

- That journalists’ authors’ rights, including moral and economic rights, must be strictly enforced in European countries where they are challenged, in order to maintain quality journalism. This principle shall apply to all media, including news produced online only.
- That additional strict enforcement of moral rights, including the right of paternity and integrity, is crucial in the digital environment, not least to ensure that citizens have access to reporting that is known to be authentic.
- That journalists must be able to retain their authors’ rights to be able to negotiate agreements.
- That the lack of protection of authors’ rights in the terms and conditions imposed by social media on those who upload works jeopardises authors’ and consumers’ rights over that content.
- That the EFJ will seek more dialogue and cooperation with consumers’ organisations to contribute to strengthening the protection of all creators’ intellectual property rights.
- That there must be more transparency in the management and remuneration of authors’ rights.
- That any collective management of journalists’ authors’ rights must be done by organisations representing a large proportion of authors.

- That the imposition of unfair contracts on freelancers must be put to an end and that freelancers must have the choice to join a union and benefit from collective bargaining.
- That libraries and other institutions digitising protected content should carry due diligent search prior to making digitised orphan works available.
- That a licence must be obtained in advance and paid for prior to digitising journalistic works.
- That extended collective licences may be considered as a solution for digitising orphan works when managed by collective societies that represent a large proportion of authors.

Drafted by **Mike Holderness** for the European Federation of Journalists, using, with permission, work on earlier editions by **Benno Pöppelmann** and **Michael Klehm**. For the purposes of UK law, the moral rights of the authors are asserted

Every citizen needs creators' rights

New technology has changed the meaning of “creators’ rights”. It no longer makes sense to talk of a conflict between authors and performers on the one hand and “consumers” on the other. It is now clear that all citizens need to have and to be able to enforce these rights.

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With current technology, everyone can be a published creator online – whether of words, images, compositions or performances. This offers enormous potential for diversity of news reporting and debate and cultural production. Because digital works can so easily be copied and altered, it also presents enormous risks of abuse.

Everyone, therefore, needs rights as a creator. We all need:

- the right to be credited as creator;
- the right to act against damaging abuse of our work;
- the right to a fair share of profits made from it – or, equally, the right to say no profit shall be made from it, if that’s what we want.

Fortunately, these rights exist in international law. They are creators’ rights, and they are fundamental rights of every human.



The United Nations Declaration on Human Rights says:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (Article 27.2)

But the Anglo-American copyright system, which deals in property rights not rights of the citizen, is broken, because it treats cultural creation and news reporting as if they were commodities. What the world needs in the digital age are proper creators' rights: rights of the individual, human author and performer, that provide an unbreakable link between him/her and his/her audience.

The countries in the mainstream should take pride that they have the best legal system for the digital era, and strengthen and develop it.

How personal rights matter

Once upon a time, there was an angry young man, with an angry blog.

Copyright stopped him copying what he wanted onto his iPod. He resented this, and he read others who resented it, and he read that copyright was a monopoly and it was evil, and he wrote.

So eloquent was the angry young man that a newspaper visited his blog and copied his words and pasted them into the paper and sold the paper, for money. And it was a paper he did not want to be associated with.

This is when he contacted me to ask how he could enforce his copyright.

– Mike Holderness

1. Every citizen's guarantee of authenticity

The other side of an author or performer's right to be identified is that they take responsibility for their work.

So when you read, watch or listen to someone else's work, their rights to be identified and to defend the integrity of their work are your guarantee that it is what it says it is: this is, in fact, by Umberto Eco – or, indeed, Angela Merkel. Except that under US law Patti Smith and Henry Kissinger have no such rights, and you have no guarantee.

When work is digitised and can so easily be altered, who else is to provide this guarantee, other than the person who pointed the camera or the person who wrote the words? The importance of individual creators taking responsibility is particularly acute when they are reporting the news:

The citizen/consumer in our “information society” must be able to trust – to rely on – the authenticity of the images and information which are being provided. That trust cannot be located in an anonymous corporation – whether it be the BBC or News International – but in the moral and ethical standards of journalists themselves.¹⁶

2. Society needs professional creators

It is vital to the health of our societies, our cultures and democracies that they include creators who are professionals – who can make a living from their creations themselves, not from a day-job or sponsorship or patronage.

Some over-excited internet enthusiasts appear to believe that there is no need for professionals any more – that in the future every need for reporting and for creativity will be catered for by people working in their spare time. Look how wonderful www.wikipedia.org is, they say...

¹⁶ NUJ submission to European Commission, quoted in Holderness M, 'Moral Rights and Authors' Rights: The Keys to the Information Age', 1998 (1) *The Journal of Information, Law and Technology*: www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/holderness/

until they find the next bit of malicious or self-interested alteration of the public record...

Journalism in the public interest definitely does not work as a spare-time activity.

If there is to be democracy, it depends on citizens having access to independent reporting of the news that shapes our views and our votes. A crucial part of that *independent* reporting – and a partial corrective to media owners’ tendency to behave like aristocratic patrons – is the flourishing of freelance journalists, who make a living by licensing use of their work – and have control over the contexts in which it may be re-used.

Some “blogs” that writers make available for free are interesting and useful. But it is very, very rare that these “break” a news story: almost always their value is in commenting on what has been reported by professional journalists. Far too many are, on the other hand, simply vehicles for prejudice, preconception and special interests. These do not serve the need of the electorate to be informed.

Many kinds of art definitely do not mix with having a day job and cannot flourish and develop to the full in artists’ spare time. Nor is sponsorship the answer. Aristocratic patronage may have produced some great art – of its time, within its genre. The corporate patronage of our times is more often than not a recipe for mediocrity – whether in office lobby murals or the sponsored novel (Dennis Moore in *USA Today*, for one, described Fay Weldon’s product-placement tale *The Bulgari Connection* as “merely cheesy”¹⁷).

Under the copyright system, a publisher or broadcaster may change any creator’s work without comeback and they may, for example, sell it on for use in advertising, destroying the creator’s reputation for independence.

Is it coincidence that the countries with the lowest reported levels of public trust in news reporting include those in which reporters have no moral rights? Research would be most interesting.

¹⁷ <http://www.usatoday.com/life/books/2001-11-23-bulgari.htm>

3. If you want to give your work away, you need rights

It is true that some people want to create works or performances purely for the pleasure of creation itself, or for the rewards of gift-giving, or because for academics giving their work away reaps financial reward through better jobs.

Very few, though, want to give up all links with the fate of their work. But the pitfalls of giving up those links are often not clear until you have fallen in.

Giving work away depends on enforceable rights as much as does selling permission to use it.

For example: the Creative Commons provides what is, *in theory*, a framework for granting others permission to use your work on certain conditions – licences, in other words. But the default licence, what you get if you just click “OK”, gives everyone permission to change your work, for profit.

Texan Justin Wong, youth counsellor to 16-year-old Alison Chang, took a photo of her. Her uncle Damon uploaded it to the file-sharing site Flickr.com – and Virgin Mobile used it, along with 100 other images posted under Creative Commons licences, in an Australian advertising campaign. Wong sued Creative Commons for, among other things, not educating him about the consequences of clicking “OK”.

– Andrew Orłowski for www.theregister.co.uk¹⁸

Anyway, the Creative Commons licence is entirely meaningless unless you, the creator, have strong, individual, enforceable rights.

Even a creator who does want to give their work away to the whole world, without restriction, for free – even one who really does understand what this means – needs strong rights to ensure that the work *stays* “given away” and is not locked up for profit. This is the whole

¹⁸ <http://www.theregister.co.uk/2007/09/24/creative_commons_deception/> accessed 04/05/2011

foundation of the Free Software movement, with its General Public License stating that anyone who wants to use the work must distribute it under the GPL.

Whatever some ill-informed enthusiasts may think, Free Software is not against Authors' Rights: it is a cunning *use* of Authors' Rights.

4. Fair trade for creators too

Creators' rights are essential, but they are not enough to ensure a vibrant creative culture or high-quality, independent news reporting.

Under Authors' Rights law, the creator and their "content" may be inseparable – but when creators come to negotiate with a broadcaster, publisher or search-engine the playing field is far from level. The creator can be – and very often is – presented with a take-it-or-leave-it demand to hand over control of all future cash generated by their work.

The EFJ is therefore demanding legislation to level the playing field. We creators all need:

- ❶ Rules to ensure that the accounting of payments to creators by businesses is transparent
- ❷ The right to negotiate collectively with publishers and broadcasters. At present, some European countries encourage this – for example Germany, with its law governing contracts for exploitation creators' rights, the *Urhebervertragsrecht*. Others forbid it, as if creators were going to form a monopolistic cartel. This is an absurd over-extension of the principles of competition law.
- ❸ The right to a fair deal (and specifically to "equitable remuneration", in the jargon). This already exists in European law for some kinds of licence and use; it should be made consistent and universal.
- ❹ Effective means of enforcing contracts and objecting to breaches. In some countries there is no legal mechanism capable of handling the typically small amounts of money that

creators usually need to recover from those who have used their work without payment or permission.

- 5 Democratic, transparent control of any licensing schemes which allow new uses of their work without authorisation. This is the essential *quid pro quo* for any proposed loss of control.
- 6 The right to object, effectively, after the fact, to any use or mutilation of our work which is contrary to our honour or reputation.
- 7 The right to be identified and to stay identified.



5. Fair access for all

Creators are probably the heaviest users of other creators' work. Whether you are an actor studying recordings of performances or a journalist referring to previous reports, anyone who is creating a new work needs fair access just as much as they do when they're a "user".

Creators share a strong interest in there being comprehensive, accessible public libraries and archives.

The idea that creators' rights and the needs of the public are somehow opposed is turning out to be an illusion generated by the difficulty of copying and distribution in the age of steam.

All citizens can now express themselves to a wide public. All citizens need the protection of creators' rights to prevent abuse of that expression.

EFJ contract checklist for freelance journalists

This list is an indication of provisions that should be included in a freelance contract.

Agreement between _____

(hereinafter referred to as '*author*')

and _____

(hereinafter referred to as '*publisher/broadcasting company*')

Author agrees to undertake the work described in the description below for *publisher/broadcasting company* under the following terms and conditions:

1 Description of the work:

(brief description of the work submitted or commissioned)

2 Delivery date:

The work must be delivered by: ____ / ____ / ____ at the latest.

3 Date of payment:

All work delivered by the above date and meeting the commission requirements use must be paid for within 30 days, including expenses. The full fee will be paid for all commissioned work whether the company decides to use it or not

4 Conditions of use/licence:

The work shall be licensed to *publisher/broadcasting company* for *publication/broadcast/usage* in _____

_____ (publication/medium in which the work is to appear)

The area of distribution is limited to _____

_____ (local/ regional/ national/ european/ worldwide/other)

Publisher/broadcasting company is entitled to reproduce/broadcast the work on one occasion only. The work may not simultaneously or subsequently be published digitally (e.g. via Internet), used for other purposes, stored or transferred to third parties without an express agreement with *author*.

5 Fee:

Number of words: _____ Fee: _____

Space of reproduction: _____ Fee: _____

Estimated (ordinary working) hours: _____ at _____ per hour

Overtime/night/weekend hours: _____ at _____ per hour

Total: _____

Author must inform the *publisher/broadcasting company* immediately it is apparent that the estimated time required will be exceeded to a significant extent.

6 Expenses:

Travel expenses: _____ per day

plus _____ per kilometre/mile

Accommodation: _____ per day

Other expenses specified (telephone costs, material needed, illustrations) _____

Total (approx.) _____ to be paid within 30 days after the delivery date, or after notification by *author* if this is later.

7 Unforeseen additional work:

In case of unforeseen additional work requested by the *publisher/media owner* additional payment may be request for this extra work.

8 Author's rights:

8a) All author's rights in the work shall remain with *author* who will retain their exclusive rights. The licence granted to publish or broadcast will be limited to the first publication/broadcast only. Unless there is express written agreement to the contrary, the licence shall expire 3 months after the delivery date referred to in clause 2 and once the license has expired *publisher/broadcasting company* shall destroy all copies of the work.

Any modification of the work shall be subject to prior authorisation by *author*.

8b) *Publisher/broadcasting company* agrees that the following credit line

_____ (name of the author, date)

shall accompany every publication or broadcast of the material.

9 Liability:

The company shall indemnify the author against action for defamation on the same basis as staff journalists. This indemnity could be invalidated if the author is professionally negligent.

10 Dangerous assignments

The company will not expose the author to dangerous assignments without appropriate safety training and insurance cover.

11 This contract shall be governed by the law of country x.

Agreed:

Between

(For *the author*)

and

(For *publisher/broadcasting company*)

Date: _____ / _____ / _____

Place: _____

EFJ model guidelines for fair competitions

- 1** who enters the competition shall be recognised as the author of the work(s) they enter and shall keep their authors' rights in the work(s) they submit (their copyright).
- 2** Authors' moral rights shall be respected: the work(s) shall not be altered and the author shall be credited whenever and wherever the work is used or reproduced.
- 3** The competition organisers shall clearly state in the competition regulations the uses they wish to make of the work(s) submitted. The purposes of these uses shall be limited to promotion of the competition in material the competition organisers publish and agreed uses of the winning work(s) when publishing the results.
- 4** It shall be understood that authors grant to the competition organisers only these precise permissions for the use of their work: that is, the agreements as laid down above. These agreements shall not be exclusive. These agreements shall be terminated at a reasonable time after the competition is judged.
- 5** The competition organisers must obtain a separate agreement from each author, offering fair compensation, before they sell on, hand over, publish, make available or distribute the work(s) submitted by any means or in any way not covered by the agreements set out above.

6 If the competition organisers intend to archive work(s) submitted, the exact method of archiving shall be clarified in the regulations. No further use shall be made of works from the archive without explicit agreement from their authors as set out above.

7 Authors have the right to know the names of the jury members making the decisions and the exact prizes. Adequate rules and procedures that prohibit any form of undue influence on the jury process must be developed.

Brussels, October 2010

European Federation of Journalists member unions

Austria

Gewerkschaft de Privatangelstellten, Druck, Journalismus, Papier

Web: <http://www.gpa-djp.at>

Gewerkschaft Kunst, Median, Sports, freie Berufe (Sektion Kommunikation und Publizistik, Elektronische Medien)

Email: michael.kress@profipress.at

Belgium

Association Générale des Journalistes Professionnels de Belgique (AGJPB)/ Algemene Vereniging van Beroeps-journalisten in België (AVBB)

Web: www.agjpb.be (F) • **Web:** www.journalist.be (N)

Bulgaria

Bulgarian Journalists' Union

Email: vsotirov@yahoo.com

Union des Journalistes Bulgares Podkrepa

Email: Journalist@podkrepa.org

Croatia

Croatian Journalists' Association

Web: www.hnd.hr

Cyprus

Union of Press Workers (Basin-Sen)

Email: basinsen@yahoo.com

Union of Cyprus Journalists

Web: www.esk.org.cy

Czech Republic

Syndikát novináru České republiky

Email: snrc@mbox.vol.cz

Denmark

Danish Union of Journalists – Dansk Journalistforbund

Web: www.journalistforbundet.dk

Estonia

Estonian Union of Journalists

Email: eal@eal.ee

Finland

Finnish Union of Journalists – Suomen Journalistiliitto

Web: www.journalistiliitto.fi/inenglish

France

SNJ – Syndicat National des Journalistes

Web: www.snj.fr

Union syndicale des journalistes CFDT

Web: <http://www.journalistes-cfdt.fr>

Syndicat national des journalistes CGT

Web: <http://www.snj.cgt.fr/index1.html>

Germany

Deutsche Journalistinnen- und Journalisten-Union (dju) in ver.di

Web: www.dju.verdi.de

DJV – Deutscher Journalisten-Verband

Web: www.dju.de

Great Britain

National Union of Journalists of UK and Ireland

Web: www.nuj.org.uk

Greece

Journalists' Union of the Athens Daily Newspapers

Web: www.esiea.gr

Journalists' Union of Macedonia and Thrace Daily Newspapers

Email: info@esiemth.gr

Panhellenic Federation of Journalists' Union (PFJU)

Email: press@poesy.gr

Periodical and Electronic Press Union (P.E.P.U)

Email: info@espit.org

Hungary

Association of Hungarian Journalists (Magyar Ujságírók Országos Szövetsége MUOSZ)

Web: www.muosz.hu

Sajtószakszervezet (Hungarian Press Union)

Email: sajto.szakszervezet@chello.hu

Iceland

Bladamannafélag Islands

Web: www.press.is

Ireland

National Union of Journalists UK and Ireland

Web: www.nuj.ie

Italy

FNSI – Federazione Nazionale della Stampa Italiana

Web: www.fnsi.it

Latvia

Latvia Union of Journalists

Email: reiterns@zn.apollo.lv

Lithuania

Lithuanian Journalist Union

Web: www.lzs.lt/

Luxemburg

Association luxembourgeoise des journalistes

Web: www.journalist.lu

Malta

Institute of Maltese Journalists (IGM)

Web: www.maltapressclub.org.mt

Montenegro

Independent Trade Union of Journalists of Montenegro

Email: nsncg@cg.yu

Netherlands

NVJ – Nederlandse Vereniging van Journalisten

Web: www.villamedia.nl

Norway

Norsk Journalistlag

Web: www.nj.no

Poland

Association of Journalists of the Republic of Poland – SDRP

Email: sdrp@sdrp.formus.pl

Poland

Polish Journalists Association – SDP

Web: www.sdp.pl

Portugal

Sindicato dos Jornalistas

Web: www.jornalistas.online.pt

Romania

Romanian Federation of Journalists MEDIASIND(FRJ)

Web: www.mediasind.ro

Serbia

IJAS (NUNS) - Independent Journalists' Association of Serbia

Web: <http://uns.org.rs/>

Journalists' Association of Serbia (UNS)

Web: www.uns.org.rs/en-GB/content/static/2301/history.xhtml

Journalists' Union of Serbia (JUS)

Telephone: +381-11-3236 337

Slovakia

Slovensky Syndikat Novinarov

Web: www.ssn.sk

Slovenia

Slovene Association of Journalists

Web: www.novinar.com

Union of Slovenian Journalists

Web: www.siol.net

Spain

Federación de Asociaciones de la Prensa Española (FAPE)

Web: www.fape.es

Federación de Servicios a la Ciudadanía de CC.OO (FSC-CCOO)

Web: www.fsc.ccoo.es

Federación de Comunicación, Papel y Artes Gráficas ELA IGEEKO

Email: prensa@ela.sind.org

Sweden

Svenska Journalistförbundet

Web: www.sjf.se

Switzerland

Swiss Union of Mass Media (SSM)

Web: www.ssm-site.ch

Switzerland

Syndicom – Media and Communications Union

Email: presse@syndicom.ch

impresum – Les journalistes suisses

Web: www.journalisten.ch

Turkey

Türkiye Gazeteciler Sendikası (TGS)

Web: www.tgs.org.tr

European Reprographic Rights Organisations (collecting societies) belonging to IFRO

Associação para a Gestão da Cópia Privada • *Portugal*

AIDRO, Associazione Italiana per i Diritti di Riproduzione delle Opere dell'ingegn • *Italy*

Bonus Presskopia • *Sweden*

CEDRO, Centro Español de Derechos Reprográficos • *Spain*

CFC, Centre Français d'exploitation du droit de Copie • *France*

CLA, The Copyright Licensing Agency Ltd. • *United Kingdom*

Copydan Writing • *Denmark*

CopyRo, Societate de Gestiune Colectiva a Drepturilor de Autor • *Romania*

CopyRus, Russian Rightsholders' Society on Collective Management of Reprographic Reproduction Rights • *Russia*

Fjölís • *Iceland*

FJÖLRIT • *Faroe Islands*

HARR, Hungarian Alliance of Reprographic Rights • *Hungary*

ICLA, The Irish Copyright Licensing Agency • *Ireland*

Kopinor • *Norway*

KOPIOSTO • *Finland*

Literar-Mechana • *Austria*

luxorr, Luxembourg Organization for Reproduction Rights • *Luxembourg*

OSDEL, Greek Collecting Society for Literary Works • *Greece*

ProLitteris • *Switzerland*

REPROBEL • *Belgium*

SAZOR GIZ • *Slovenia*

SIAE, Società Italiana degli Autori ed Editori • *Italy*

Stichting Reprorecht • *Netherlands*

VG Bild-Kunst, Verwertungsgesellschaft Bild-Kunst • *Germany*

VG WORT, Verwertungsgesellschaft WORT • *Germany*



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