



European Federation of Journalists

Creative content in a European Digital Single Market:

Challenges for the Future

Reflection document of DG Info and DG Markt

European Federation of Journalists' Response

The European Federation of Journalists (EFJ) is Europe's largest organisation of journalists, representing 260,000 journalists in over thirty countries. It defends press freedom and social justice through strong, free and independent trade unions for journalists. It also promotes strong protection of journalists' authors' rights, in their moral and economic aspects. We believe that any "*targeted legislative action*" to address the European Digital agenda should be based on due consideration and protection of the rights of creators.

We thank the European Commission for the invitation to comment on the *Reflection document on creative content in a European Digital Single Market: Challenges for the future*.

Today, many journalistic works, including photographs, films and texts, are available online. Some works have been created specifically for online use and some works are re-used online from an analogue primary source. On top of the need to be identified as author of their work, off-line or online, journalists must be able to exercise their exclusive rights and decide how their work can be used and re-used. One of their biggest challenges involve economic, licensing and legal models.

We particularly welcome the Commission having made clear in the Reflection Document the need to create:

*a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;*¹

and the recognition that there is no point in discussing Creative Content without ensuring that it is possible for professional creators to make a decent living:

*easier access to creative content will have to be combined with adequate protection of rightholders in order to furnish a growing and more diverse content market. Wider access to content, with more attractive business models for tackling piracy and creating new revenue streams, can only be achieved with more effective licensing mechanisms and financial incentives.*²

Lastly, we do share the need to facilitate media consumers' access to the widest and qualitative range of journalistic content as a primary aim of any democracy. However, we believe that any adaptation of business models for the distribution of creative content, including journalistic works must be decided and agreed by all parties involved and take into account journalists' moral and economic rights.

As a member of IFRRO we also support its submission to the Reflection document.

1) Users' access

We believe that information should be accessible to all thus contributing to the strengthening of democracy. This access should however take into account the interest of those who report the news.

- Consumers' access

¹ From the Introduction to the Reflection Document, http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf accessed 23/11/2009

² From Section 5 of the Reflection Document, *op cit sup.*

Encouraging dialogue between journalists and consumers on the value of intellectual property rights – particularly in enabling journalists to survive as independent, dedicated professionals and thus in maintaining and improving the quality of information available to the general public and on which it bases its democratic choices – could pave the way for better understanding of the value of authors’ rights protection.

The need to find a solution for allowing consumers’ access to information while securing journalists’ authors’ rights is crucial. Existing business models, such as micropayment could be a solution, provided that journalists benefit from them.

Extended collective licensing to enable the use of orphan works is a possible solution (see 2)). The EFJ welcomes however the reference made in the reflection paper to the need to carry a diligent search to first establish the orphan status (p14). The stakeholders’ *Diligent Search Guidelines and Memorandum of Understanding*³ is an excellent basis for this.

Many press photographs are at risk of being “orphaned”. To counter this the Commission should give specific attention to the use of metadata as a solution to identify each work. Additionally, the enforcement of moral rights and the right to be named as author could significantly reduce the number of orphan news articles.

We do not believe that further harmonisation of limitations and exceptions (p15) will solve the problem of piracy and plagiarism while ensuring equitable remuneration for creators. Voluntary licensing solutions built on the results of free negotiations offer a good alternative. Rights holders who are not represented obtain the same payments and the same benefits as those who are represented. Furthermore, extended voluntary collective licences have also demonstrated their efficiency in the handling of orphan works.

Statutory exceptions have the disadvantage that they remain static: voluntary agreements can be updated more easily than laws if developments in society or technology make changes necessary. Additionally, their voluntary nature make them stronger as all parties are involved in the creation of the rules. Lastly exceptions that appear reasonable at the time they are adopted could prove to be inadequate for

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http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm

the users and/or unsuitable and ruinous for authors and performers at a later time.

We believe that no additional exceptions or limitations should be made mandatory. On the contrary, existing limitations and exceptions should be subject to the three-step test, according to which they should be confined to certain special cases, do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

- User-created content

Online media encourage people to make their own content available, be it pictures, texts or films. An active audience can indeed improve coverage and in particular, develop “hyperlocal coverage” which complements journalists’ core work. Additionally, blogging is now commercialised and mainstream in the media and other significant new means of distributing citizens’ own content arrive practically every year, from Flickr to Facebook to Futurenet.

We do not believe that new laws are needed to regulate user-created content. Rather, this phenomenon makes it absolutely clear that authors’ rights are rights of every citizen. Every citizen is author of the content they create and must enjoy authors’ rights protection in this respect.

The European Federation of Journalists recommends to the Commission that it supports the development and promulgation of voluntary standards for blogging and similar future media to encourage citizens contributing to them to respect considerations of quality, privacy rights and creators’ intellectual property rights as they would – once they are aware of the issues and risks – wish their own to be respected.

- Commercial users’ access

The argument for a European single market in licences for music and audiovisual performances is, on the face of it, compelling. Closer examination, however, reveals complexities.

Journalists have, since the beginning of the printed press, relied for a significant part of the income that enables them to operate as independent professionals on “syndication”. They licence first use of their work to a newspaper (or, over time, to a magazine, radio station, TV station or

internet service). They retain the right to re-licence the work to other media in the same language, or to licence translations. In the case of photographers, they may even re-licence an image for a second use in the same publication.

Publishers and broadcasters increasingly insist that the first licence includes the right to reproduce work in publications owned by the same group, including online, for no additional fee. However, a number of European courts' decisions have decided that a new reproduction of a journalistic work requires the authorisation of the journalist and should be subject to additional remuneration⁴.

Enormous care must therefore be taken to ensure that any steps taken toward a single European licence offered to the end-user do not undermine the economic relations between those who actually create the work and those organisations that distribute these works to their end-users.

2) Extended collective licensing

The tenor of the Reflection Document indicates that the Commission is warming to the idea of extended collective licensing as a solution to a range of political issues. The ambition should be to support the principle of a public realm of information; therefore, any extended collective licensing should apply to truly public libraries. These should not be confused with commercial operations, which remain free to negotiate licenses with creators.

Extended collective licensing for use online impinges much more strongly on journalists' legitimate interests since all copies made available online would be useful to those wishing to make commercial exploitation of those copies online. This is why improved regulation is an essential concomitant to any such scheme.

Such improved regulation should include:

⁴ Cour d'appel de Bruxelles, Chambre numéro 9, 28 octobre 1997, SCRL Central Station/ Association Générale des Journalistes Professionnels de Belgique et autres ; Cour d'appel de Paris 22ème chambre, section B Arrêt du 09 juin 2009 AFP / Pierre A.

a) A requirement for equitable remuneration

The Commission introduced a right of making-available with the intention that it should cover new ways of distributing creators' works in the Information Economy⁵. This has not, in our experience achieved its goal. The flaw is that the right is not coupled to an unwaivable right to equitable remuneration for the uses covered, and this flaw needs to be rectified.

In general, there should be harmonisation or convergence of member states' legislation toward an unwaivable right to equitable remuneration for all uses of creators' works, including private copying (which is currently not provided for at all in the legislation of the UK nor of Ireland, leading to a distortion of the internal market).

Such legal provision is an essential corollary to any move to encourage practical means of multi-territory licensing within the EU. Without it, no such move can provide that individual creators continue to receive the income that enables them to produce new professional content.

b) Regulation of contracts between journalists and their publishers, producers and distributors

The preamble to the 2001 "InfoSoc Directive" envisages and permits

"definition of contractual relations designed to ensure fair compensation for the rightholders"⁶

This is necessary because individual creators are faced with a steeply-sloping playing field when negotiating contracts for the use of their work with publishers, producers and broadcasters.

We note that the 2002 Study on the *Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*⁷ underlines the lack of harmonisation of copyright contract law in the EU. As an alternative to Community legislation it promotes the development of industry codes or standards and in particular recommends that the

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

⁶ Recital 45 to the InfoSoc Directive, *op. cit. sup.*

⁷ <http://www.ivir.nl/publications/other/final-report2002.pdf> accessed 23/11/09

European Commission promote, at the Community level, the negotiation of model contracts between representatives of authors or performers on the one hand and publishers, broadcasters or producers on the other.

We further note that the UK government's report and consultation *@ the way ahead*⁸ declares that member state's intention

for authors of copyright works; to support fair treatment through new model contracts and clauses and fair returns for use of their work by improving education about and enforcement of rights...

The 2002 German law governing such contracts (*Urhebervertragsrecht*) provides a worked example. It encourages voluntary collective bargaining of contracts, or of minimum standards agreements underpinning individual contracts, with the state intervening only in the event that the parties do not achieve voluntary agreement. Furthermore, it establishes a legal presumption that the compensation agreed to in a collective agreement should be fair.

Measures to regulate such contracts should set a baseline and must not prejudice the terms of any existing collective agreements.

c) Regulation of processes for distributing remuneration to journalists

Increasingly, producers, publishers and distributors – including, notably, internet search enterprises – seek to manage payments to journalists directly, bypassing the traditional European mechanism of collecting societies which are (more or less perfectly) democratically controlled.

Many of the collective rights management systems in place do offer journalists a chance to maintain the economic interests and moral rights in the reuse of their journalistic works and remain the best option for them to manage their rights.

Other business models aimed at managing payments to journalists directly must be addressed by legislation, setting out:

1. a requirement for transparency in accounting such payments;
2. a requirement to follow minimum standards on terms that must be

⁸ <http://www.ipo.gov.uk/c-strategy-digitalage.pdf> accessed 23/11/09

made explicit in contracts;

3. in particular, standards for specifying terms for re-utilisation, “syndication” or onward licensing of works, and for ethical clauses in contracts (such as a prohibition on re-use of news reporting as advertising);
4. a requirement for what should be included in “metadata” accompanying creators’ works – creator identification, a pointer to contact the creator or their representative for further licensing, etc.

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