



European Federation of Journalists

Response to the Public consultation on content online in the single market

The European Federation of Journalists is Europe's largest organization of journalists, representing about 260,000 journalists in over thirty countries. It defends press freedom and social justice through strong, free and independent trade unions of journalists and calls for journalists and photographers to be recognised as authors of the work they create, control further use of their work and receive an equitable remuneration for it.

The EFJ welcomes the current initiatives by the European Commission “*to stimulate the growth of a true EU single market for online digital content*” and the specific emphasis put on authors, artists and creators to be able “*to reap a fair reward for their talent and skills*”.

This consultation, we hope, will contribute to the creation of new incentives for developing innovative and creative content production which will strengthen the quality and the competitiveness of Europe's content sector.

Executive summary

- Journalists are the creators of a very significant part of online content
- The primary challenges to providing innovative online content and services is not technological; the biggest issues are to do with economic, licensing and legal models.
- The answer to this challenge is to build systems that make it easy for users to act legally. User confidence in these systems will, we believe, be strengthened if they know that the systems for distributing payments are transparent and that they equitably remunerate the authors, musicians and other creators.
- “Digital Rights Management” can play a part but it is far from mature and must meet strict legal standards if it is to enjoy the confidence of users and authors

- The risks of not meeting the challenge include legal uncertainty that could undermine confidence.

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

The journalists who the EFJ represents are the actual creators of a very significant part of online content – in terms of the quantity of their work, of its economic significance and of its importance to society and to the functioning of democracies.

Any journalistic work enjoys the protection granted for literary and artistic works. These works are the expression of thoughts of journalists and are independently created. Online and offline journalistic content are to that extent similar and should be subject to the same protection.

Although not all journalistic works are online, more and more can be found on the internet – photographs, films and texts that may have been originally created for online use or, more typically, were created for analogue media and then made available digitally. The online publication of offline material has serious implications from an authors' rights perspective, both in terms of possible infringements of the integrity of the material and in economic terms.

When does an online publication of the same analogue content constitute a new publication? Should the fact that online publications may attract more readers than the offline version be taken into account? Journalists have experienced great difficulties securing adequate remuneration for online uses of their work.

Online archives and “digital press clippings” services are developing. Again this has implications for journalists' authors' rights. If an article is accessible in an online paper archive section upon payment of a fee, this is something for which journalists should receive a fair remuneration. In Belgium, for instance the court of Appeal condemned in 1997 the online database Central station for putting press articles online without asking for journalists' authorisation.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

Journalistic works are widely reused on the internet without any authorisation from their authors. Press articles are republished in online versions and journalistic works are copied on different web sites without any authorization from the journalist and often also without any acknowledgment of the authorship.

The development of new business models, DRM schemes and so forth in the market for creative works and services online has unfortunately not been open and transparent – especially when it comes to contractual questions between the publishers/producers and their content creators, whether reporters, photographers or others. Journalists' business partners have used their dominant bargaining position to pressure journalists into unfair contractual arrangements which do not provide equitable or fair remuneration for online uses.

At the same time, journalists report that publishers and producers have where possible blocked collective licensing and other collective remuneration schemes -- even where this has lost them income in the short term. Journalists would not support schemes which constituted unfair competition for new business models. They would be more willing to enter wholeheartedly into these new models if these respected fairness in the mutual contractual relationship and were transparent and accountable.

This is far from the case. The publisher/producer strategy appears to be very much focused on buying all rights at the source at the lowest possible price, allowing no further contact from the author nor influence on the many uses which will be made of the content in years to come.

Any steps taken towards establishing an environment which will help develop trust, fairer contractual relationships and reliable and accountable royalty schemes for business models will be a significant step in the direction of creating an environment which will be conducive for the production of more innovative and creative content. Aggressive rights take-overs strangle the individual creators.

The present EU legal environment is in principle sufficient to ensure fair protection of journalistic works online. However, more emphasis should be put on authorship as a basis to avoid complete assignment of journalists' authors' rights both in their employment contracts and in freelance contracts. The same applies to guarantees for fair payment for reuse of works and adequate moral rights protection – through which journalists, like all authors, must be able to protect the integrity of their work and insist on being named as author.

Bad contractual practices should be monitored and denounced at EU level. It will also help the individual content creators if the existing and well functioning collective rights management and remuneration schemes are not undermined. The collective management organisations function as trusted partners for creators and often also as valued platforms of dialogue between creators, their industry partners, users and society.

Levies on copying devices have had and still have a positive effect on the creation and protection of journalists' works. To phase out levies before there is any documented risk of user double payment and when there is no viable, trusted and consistent means of collecting fair remuneration would result in a considerable loss of income. Neither should the EU discourage Member States from widening the scope of levies to cover digital devices with a copying function.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

Information and awareness raising of the public is essential, including on authors' rights, privacy and reliability issues. The EU has an important role to play in promulgating best practice.

Users should be able to use all online content on different devices, providing that the work of creators is also protected. The levy system provides journalists (in most Member States) with fair compensation under article 5.2 (2) of the Directive 2001/29. This system remains, for the time being, the only fair means to allow creators the compensation they deserve and are entitled to.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

The internet allows everyone to become a content provider. This has well-known advantages, and weaknesses: it secures freedom of expression, but shifts responsibility for verifying the accuracy of information toward readers, who find it harder to carry it out where they have no legal guarantee that authors are identified. It enhances communication and promotes cultural exchanges. Strong authors' rights protection is, in this respect, an issue to be seriously addressed to maintain quality of online information and free circulation of creative works by identifying the author and compensating him/her when need be.

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

As noted above, where there are strong authors' rights users have guarantees on the authorship and integrity of online content.

As the recent EU Staff Working Paper on this subject concluded, the evidence is that European online content is globally competitive in economic terms.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the qarea of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

Technological developments are contributing to new forms of journalism. As an immediate example, **Graham Holliday**, a journalist, rightly says that "everyone who works in industry, journalism or academia needs to blog to stay relevant and informed these days." <<http://www.journalism.co.uk/features/story1943.shtml>>. Journalists' blogs and are indeed developing significantly, as are many other niche media that are economic given negligible distribution costs online.

The same issues of authors' rights, journalistic ethics rules, trust and accuracy of information apply online as off. We have anecdotal but persuasive evidence that contributors to such media, who are frequently vehemently hostile to copyright seen as a commodity owned by corporations, increasingly understand and appreciate that they are authors and the importance of authors' rights to them personally.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Software technology is not the biggest barrier to new online services, especially with the rapid spread of web-based applications. Increasing upload and download speeds depend largely on the speed at which new network hardware can be financed and rolled out. The biggest issues are to do with economic, licensing and legal models.

It is important to stress that the phrase "Digital Rights Management" (DRM) has been used, confusingly, to cover two very different technologies.

There are technologies for tagging online content to make rights management easier or possible – essentially the provision of metadata, including identification of the work and its authors (and distributors), contact information for users who wish to negotiate a use not permitted under any “bundled” licence, in some cases a scale of fees for use, and so on. These are technologies for managing and enabling negotiation of authorised use.

Then there are technologies that seek physically to prevent unauthorised use – Technical Protection Measures (TPMs). These raise much more complex policy issues. If particular metadata is not interoperable with a particular user's system, for example, then they are have access to the work, and any abuse they make of it is governed by the law, after the fact, as in the analogue environment.

If a TPM is not interoperable with their system, however, they are likely denied access. If a TPM is over-zealous by, accident or design, users may be denied access under the exceptions (or “fair dealing”) to which they are entitled by law. Journalists are users too and have a particularly strong interest in such exceptions as quotation for review and criticism.

In the digital environment journalists may wish to choose between individual and collective management of their rights depending on their ability to manage rights themselves. However, the use of individual DRM is challenged by the fact that journalists – particularly when they work as freelances – have no capacity to manage their rights effectively.

Sole control of DRMs by publishers and producers will make it even more difficult for journalists to reach agreements that guarantee them equitable remuneration for the use of their works, and allow them to set up conditions for further uses of their work in order to uphold press ethics.

To date, digital rights management suffers from a lack of interoperability and there is a real need to establish standards in order to create technically compatible equipment and services. Problems raised also include the lack of compliance of available devices. There is a need to establish digital management systems that actively secure interoperability and enable users to use protected works on different format. We therefore believe that the obvious late development of DRMs and crucial issues such as privacy protection remain an important obstacle to their widespread use.

The EFJ believes that collecting societies have an important role to play in managing journalists' authors' rights in the online environment for many years to come. It is essential to cooperate with all parties involved to develop standard model agreements and other agreed solutions which will enhance the functioning of both business models and collective licensing schemes.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

As stressed below, journalistic works are widely accessible online. However, the need for them to authorize any reproduction of their work is often ignored. Collecting societies, representing both creators and employers should be given a mandate from both parties to manage collective licensing of uses of online journalistic content and the payments for it. Where such licensing schemes are established they exist side by side with business models as a supplementary source of income for the authors and publishers and an added means of access for the users to a wide and varied repertoire.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

Please refer to the response by IFRRO, the International Federation of Reproduction Rights Organisations. However, the IFJ wishes to add that collective licensing of use of digital material is in place and functioning in several European countries. The collection and distribution of remuneration varies according to the type of repertoire and the type of uses which is licensed.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

Please refer to the IFRRO response.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

National licensing currently prevails in the print sector. Journalists would not satisfactorily benefit from Europe-wide or multi-territory licensing and clearance. According to the 2005 EFJ survey on collecting systems for authors' rights in Europe, efficient national licensing schemes and collecting systems are concerns to be addressed prior to multi territory licensing. We therefore believe that the EU should concentrate its action on encouraging good nationally based licensing schemes including the development of online licensing systems.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

Collecting societies have built expertise and have compiled data which enable them to assist authors in establishing a fair and transparent distribution system. Without fair compensation, there can be no exception to authors' rights protection. The compensation belongs to rights holders who will decide on the distribution key. In practice, the distribution plans are usually determined on the basis of statistical evidence within a system of objective availability.

As stated above, we believe that the levy system is well functioning and provides journalists with a fair compensation when their work is being reused. It is impossible for a single journalist to monitor uses of his/her work and we believe that collecting societies have a crucial role to play in this respect. Rightholders should set the price and distribution keys between publishers and authors should be decided fairly and equitably. So long as DRMs do not offer adequate protection and leeway to allow use under the exceptions, we believe that levies are an appropriate solution.

Convergence is not a new phenomenon of the digital environment but a constant evolution from the beginning of analogue

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

No. On the contrary, the non-enforcement of intellectual property regimes hampers the development of creative online content and services by depriving authors of an essential tool to protect their work.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between "small" and "big" ones?

Fighting against piracy and avoiding double payment for users are essential. Printed material will always be a source for copying – be it analogue copies on paper or digital copies made with scanners and PCs.

Unauthorised uploading is more damaging because it constitutes a new publication or broadcast of a work. Unauthorised downloading can be dealt with by generalising the use of levies on all copying devices.

The answer is to build systems that make it easy for users to act legally. User confidence in these systems will, we believe, be strengthened if they know that the systems for distributing payments are transparent and that they equitably remunerate the authors, musicians and other creators.

Journalists, like many other authors, are more concerned with “piracy” by publishers and broadcasters that impose inequitable contracts than they are with private copying. The risks of failing to arrive at a satisfactory licensing and collective management regime early in the development of an online content service are illustrated by the fall-out from the *Tasini -v- Times* case. The US Supreme Court ruled that the New York Times Company had breached freelance contributors' copyright by selling their articles online. A proposed settlement, capped at a US\$11 million payment to authors, now faces a legal challenge.

A total of 26,000 publications seek to be covered by the proposed settlement; but Anita Bartholomew, one of the objectors, went through the databases of the *New York Times* and *Philadelphia Inquirer* looking for articles removed as copyright violations and calculated, using article pricing data collected by the American Society of Journalists and Authors, that these two publications *alone* owe freelance journalists \$12 million.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

DRM will not serve journalists' interests unless the latter are entitled to decide on their use. Moreover, we believe that DRMs developments still remain at an early stage, clearly lack interoperability and do not allow for free circulation of journalistic content on the internet. Their use could service creators' interests if coupled with a trusted third party in the role of collective management society or is at least coupled with authors' rights legislation that does not block out collective representation.

Recent newspapers' and publishers' initiative to introduce ways to manage authorisation prior to online reproduction should be encouraged as long as they involve writers and journalists in the debate. Such developments as the Automated Content Access Protocol

(ACAP) prototype, and the Picture Licensing Universal System (PLUS) metadata, for instance, may provide a solution, so long as all parties involved are invited and free to decide on their use.

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