

**Response to US Copyright Office
Study on the Moral Rights of Attribution
and Integrity
from the
International Federation of Journalists**



- Notice of Inquiry: Study on the Moral Rights of Attribution and Integrity (FR Doc. 2017–01294; Copyright Office Docket Number 2017-2); submitted by Mike Holderness, Chair of the European Federation of Journalists’ Authors’ Rights Expert Group, for the IFJ.

The interest of the International Federation of Journalists

The International Federation of Journalists (IFJ) is a confederation of journalists’ trades unions: its member organizations represent around 600,000 journalists in 140 countries, including the USA.

The great majority of these journalists – whether reporters or photographers – enjoy the protection of strong moral rights laws conformant with the Berne Convention. It is worth noting in understanding the international context that in the majority of jurisdictions journalists who are employees retain both the moral rights in their work and economic rights to, for example, fair remuneration for secondary uses. Furthermore, in most jurisdictions there is no “work for hire” doctrine.

Among the journalists represented by the IFJ there are both authors of journalistic works (including photographers) and broadcasters, who are beneficiaries of the neighbouring rights of performers, including the relatively recent recognition in WIPO treaties of the moral rights of performers. For brevity we will often refer to authors and performers together as “creators”.

Our submission is in three parts:

1. Points of principle and public policy
2. Considerations of legal frameworks
3. Practical and economic consequences

1. Points of principle and public policy

1. The IFJ strongly believes that unwaivable, enforceable moral rights of attribution and integrity are vital tools in the promotion of ethical journalism – and that ethical journalism is equally essential to the existence of democracy and the proper functioning of markets of all kinds.
2. **The moral rights are not important only to authors and performers.** They offer every citizen a guarantee of the authenticity of the works they use: something that is particularly important for journalism.

The other side of an author or performer's right to be identified is that they take responsibility for their work. In the case of journalism this is essential to the functioning of democracy; in that of song or dance or film or theatre to the market.

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.¹

3. **The rights of attribution and integrity are probably the most important to the millions of US and other citizens** whose works are published or broadcast online, as the example below indicates.

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

This example illustrates a whole succession of concerns raised by citizens about use and abuse of their work online. What it highlights is the importance to citizens – including journalists – of being able to object when work appears in contexts that are

¹ 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/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/holderness/)

detrimental to their creators' honour or reputation.

An example of the need for this is provided by the recent experience of UK photographer Jamie Lorriman. One of the photos he took following the attack on Westminster Bridge on 22 March 2017 showed a woman in a headscarf, clearly distressed. The photo was used by more than one notorious far-right troll – to claim that, as a Muslim, she was unconcerned.²

The woman later publicly thanked Jamie for objecting loudly in the press. She asked that the image not be used further.

Nick McGowan Lowe is Chair of the Freelance Industrial Council of IFJ affiliate the National Union of Journalists (NUJ). He concludes that “this case demonstrates precisely why photographers and other authors need to be able to object to our work being used in contexts that damage our reputations”.

NUJ Freelance Organiser John Toner said: “It’s hard enough to enforce the theoretical right in UK law. The perpetrator seems to be living in the US, where there is no such right. In the internet age we need these rights to be unwaivable and enforceable worldwide”.

4. Strong moral rights are the main bulwark against falsified “news”

The case of Jamie Lorriman above demonstrates the importance of enforceable rights of attribution and integrity in responding to deliberately falsified reporting –

² <https://www.theguardian.com/uk-news/2017/mar/24/woman-hijab-westminster-bridge-attack-victim-photo-misappropriated> accessed 28 March 2017

“fake news” in the original sense. Most clearly: who better to object to a manipulation or distortion of a photograph than the person who took the picture: “this is *my* photograph and when I took it I knew it was *not* as you say”?

The other major route to objecting in such instances would seem to be the law of defamation – which where it is effective raises serious First Amendment concerns and where it is circumscribed to avoid these is not effective for such purposes.

5. If you want to give your work away, you still 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 we have seen instances of the default licence, what you get if you just click “OK”, giving 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 Orlowski for www.theregister.co.uk³

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 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.

2. Considerations of legal frameworks

1. The reputation of the United States among authors and performers internationally is not enhanced by the absence of moral rights in that country (except for the very, very limited rights granted to creators of works of visual arts in signed and numbered editions of 250 or fewer). The IFJ recognises that this may not be a decisive consideration in US domestic policy-making.

³ http://www.theregister.co.uk/2007/09/24/creative_commons_deception/ accessed 2017-03-23

2. The IFJ believes, however, that there would be practical advantages to US industry – the pre-eminent creative industry worldwide – in adopting moral rights. We describe these in Section 3.
3. The moral rights as enacted in the legislation of countries as diverse as France, Germany and China are in fact entirely consonant with US economic ideals of rugged individual responsibility. They are as fundamental to the individual author or performer as is the right of material property to an artisan or, indeed, a homeowner.
4. The IFJ is of course aware of the arguments that US legislation provides certain protections that are in some sense, in some circumstances, equivalent. But:
5. As the call for evidence in the Federal Register sets out, the provisions of the Lanham Act are severely circumscribed when it comes to defending the rights of the individual creator. We refer to the submission of the National Writers Union.
6. The Digital Millennium Copyright Act has been interpreted in courts of at least one US Federal Circuit as granting a right of identification under certain circumstances. However, the application of this varies across the United States.
 1. For example, as some readers will be aware, the Third Circuit Court of Appeal held that Peter Murphy had a right to be identified under the DMCA⁴ ⁵.

⁴ <http://www.londonfreelance.org/fl/1107dmca.html> accessed 2017-03-23

⁵ *Peter Murphy, Appellant, -v- Millennium Radio Group llc; Craig Carton; Ray Rossi*: United States Court of Appeals for the Third Circuit, Case 10-2163; judgement available i.a. at http://www.rcfp.org/newsitems/docs/20110616_171844_dmca_story.pdf accessed 2017-03-23

2. We are also aware that, in the territory of the Second Circuit, a jury in the United States District Court, Southern District of New York awarded Haitian photographer Daniel Morel a sum for failure by Agence France Presse and others to credit him^{6 7}.
3. However, in the Ninth Circuit a District Court in California found in the wonderfully-named case *Textile secrets international v. Ya-ya brand inc.* (2007) that what is protected is “*electronic* copyright management information”⁸ [emphasis added].
7. The IFJ cannot think of a single reason why the rights of creators should vary from State to State within the United States. What regional or cultural consideration could possibly be at stake? The same argument can be applied to the various provisions in States’ laws of contract that are held up by some as substituting for moral rights, as mentioned by the call for submissions in the Federal Register.
8. We therefore believe that harmonisation across the United States through Federal legislation would be in the interest not only of US creators but also of the industries that promote and exploit their work – for reasons given in Section 3.
9. The provision of the DMCA on removal of copyright management information have served as an exemplar to other jurisdictions and the implementation of a proper,

⁶ <http://www.londonfreelance.org/fl/1311afp.html> accessed 2017-03-23

⁷ *Agence France Presse -v- Daniel Morel -v- Getty Images (US)*: United States District Court, Southern District of New York, Case 1:10-cv-02730-AJN – judgement available *i.a.* at <http://www.loeb.com/~media/Files/Publications/2014/08/Agence%20france%20presse.pdf> accessed 2017-03-23

⁸ *Textile Secrets International, Inc., -v- Ya-Ya Brand Incorporated*, United States District Court, C.D. California, Western Division, case CV 06-6297-PLA, available *i.a.* at <http://www.ipinbrief.com/wp-content/uploads/2011/01/textile-opinion.pdf> accessed 2017-03-23

nationwide right to identification would complete them.

10. Contract provisions cannot substitute for enforceable statutory moral rights, for reasons set out by the National Writers Union including:

1. As observed above, the moral rights are highly significant in cases in which creators have made work freely available, under Creative Commons or otherwise. In these cases there is no contract: the cost of litigation to establish the validity of Creative Commons terms mandating attribution would be beyond the means of almost any individual and the establishment of a right of integrity in these circumstances is highly problematic.
2. Of specific concern to journalists is that no remedy equivalent to the moral rights is available to creators subject to the work for hire doctrine, or to those who created works in the course of employment.

11. To be effective, the moral rights must be unwaivable, as they are in most jurisdictions worldwide. The experience of journalists represented by the IFJ member organisation in the UK and Ireland, the National Union of Journalists, is that because those jurisdictions are in the minority that permit waiver, larger publishers and broadcasters routinely impose waivers in contracts presented without the possibility of negotiation.⁹ (The prevalence of such coercive contract-making and the tendency of corporate lawyers to produce laundry-list contracts when not paid enough to think through the requirements are probably beyond the scope of this consultation; but acknowledging their existence is essential.)

⁹ *Authors' Rights: copyright in a democratic society* (2005) Brussels: IFJ available at <http://www.londonfreelance.org/ar/efj-pamphlet.pdf>

3. *Practical and economic consequences*

The experience of the many members of IFJ unions who work both as reporters and as editors throughout the world is that scare-stories about the effects of moral rights legislation are entirely unfounded. Indeed, harmonised moral rights offer an opportunity for reducing costs.

1. **Creators must be able to *choose* attribution.** The right to be identified includes, naturally, the right of the creator to *freely choose* to be identified by a pseudonym or not at all. This is not a waiver of the right of attribution: it is an *application* of it. In the case of journalism, pseudonymy may be necessary to protect an individual journalist from retaliation. This is of course particularly important for journalists living under oppressive régimes in which retaliation is likely to come from the state. It may also be sensible in the case of “leader articles” that express a publication’s collective view.
2. **There is no significant *prima donna* effect.** It is the experience of IFJ members that the moral rights lead to no problems for publishers and broadcasters. The right of attribution is, as observed above, a pillar of responsible journalism. The existence of a right of integrity encourages respect for works in the editing process, which is good journalistic practise in any case. The application of the right of integrity in the case of legitimate publishing and broadcasting is *post-publication*. The integrity that the creator can defend is that of the published version agreed reasonably with the publisher. (Lobbyists opposing moral rights will point to a very small number of interesting and exceptional cases in France, particularly those involving the estate of Samuel Beckett. The point about these is that they are interesting and exceptional.)

3. **There is no chilling effect on legitimate expression.** The bar for action for breach of the right of integrity is set quite high: the creator must show that a distortion of their work, whether by manipulation or by use in an improper context, is “contrary to their honour or reputation.”
4. **There are now practically no financial costs.** Especially with the advent of digital publishing, film-making and broadcasting technologies, the costs of implementing a right to be identified are minimal: the information required is already in the system for accounting purposes.
5. **There are potential cost *savings*.** In fact, the introduction of a statutory right to be identified that was compatible with other jurisdictions would offer US publishing, broadcasting and movie industries an opportunity to reduce costs, in that re-versioning for export would be much less of an issue.

Appendix: other moral rights

We give very brief observations on some other moral rights.

1. **The “right to repent”.** France is one of the jurisdictions that grants creators the right to demand withdrawal of a work about which they have changed their mind – on payment to the publisher of costs involved. The IFJ is mindful of the difficulty of implementing such a rule in US law, especially in the age of internet archiving.
2. **The right to object to “false attribution”.** The laws of the UK and of Ireland offer a provision for “false attribution” separate to the right to be identified. The IFJ submits that this is necessary only for deeply technical reasons connected with the multiple weaknesses of the right to be identified in these jurisdictions. A properly-implemented US law protecting the right of a creator to be identified by their chosen name would render it irrelevant.
3. **Private photographs:** UK law also has a little-known provision concerning re-publication by photographic studios of privately-commissioned images. The IFJ is not aware of any instances of this actually being used.

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and respectfully submitted by the International Federation of Journalists

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