Authors' Rights and Audiences: Does Intellectual Property Protection Apply to User-Generated Content?

A Comparative Legal Study of Online News

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The goal of our research is to determine the nature and extent of juridical protection given to news, and more specifically, to news reporting as a social activity, with a concrete focus on audiences' rights. Using a comparative international legal research methodology, we intend to elucidate the categories of rights set forth by the main copyright acts of select countries. We examine to what extent legal protection should be extended to *user-generated content*. We also focus on the relationship and balance between the legal protection granted to authors of individual and collective work, and corporations, most notably within the copyright system in which a firm can subrogate authors' freelance work. The empirical part of the study intends to analyze the typology of user-generated contents and to what extent they are independent works or modifications of previous work (collective works); the strategies employed by media corporations to include, use, modify or cede rights to third parties; and the extent of the protection afforded to the authors of those contents. We analyze respectively the following media: *BBC* and *The Guardian* (United Kingdom), *The New York Times* (United States of America), *Publico* (Portugal), *O Globo* (Brazil), *Le Monde* (France) and *El País* (Spain). Along with copyright acts, we analyze the legal and copyright notifications of those media (considering them as contracts), and other documents of interest (professional agreements, collective agreements, trade

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union decisions, *amici curiae,* reports of all kind, etc.). Throughout our research we consider the transnational implications and problems of authors' rights protection, the purported harmonization of the copyright systems, and the different solutions for similar problems in different societies, within the framework of a globalized market. To a great extent, the internet means a greater control by the juridical persons (the firms) over the acquisition and management of the economic and exploitation rights of those works. This is the reason why over the last years legal reforms have been carried out that harmonize legal systems and national laws, and regulate and enforce the cession of content to third parties in an increasingly global market.

The legal framework

Since copyright first appeared in the legal system in the seventeenth century, the authors rights system has had to adapt its protection mechanism with the appearance of every new technology. News is a good example of how intellectual property laws have been obliged to adapt their protection systems – from its origins in material works rooted in concrete historical moments, to ones that could be reproduced mechanically using the printing press, to the realities imposed by new technologies like radio, television and the internet. Moreover, news, though a product of the printing press, remained outside the protection of copyright acts for the better part of a century. News, especially since the emergence of the World Wide Web, has become a global commodity – an intangible good that can be produced locally but accessed anywhere and whose legal protection is far from being unified, since disparate legal solutions are used in the various legal traditions and systems. And despite the persistence of those varied legal institutions, it is our opinion that all of them have a similar outcome: an attribution of greater power over news to the media, and less to the individual authors – the journalists.

In spite of attempts to harmonize legal copyright protection and the existence of international treaties on copyright since the end of the nineteenth century, news copyright issues continue and require further study. Underlying all copyright law is the idea of "incentive" (Easton, 2004: 503), and news is a commodity that entered the realm of commerce centuries ago. A tension between the protection granted individual authors (journalists) and media companies (under some laws, juridical persons as authors of the collective works) is reflected in the concept of news-reporting activity as a whole and the copyright acts of the various legal traditions that control it. Tensions that do not appear in other categories of copyrightable works, like the idea-expression dichotomy, are present here. A tension between the private legitimate interests of authors, grantees and assignees, and the idea that media content, once produced, is a public good, underlies the topic.

We just outlined the models and the difficulties and tendencies inherent in each, and examined them in the light of legal comparatism. Functionally, the dominant model is the entrepreneurial one, traditionally represented in common law countries but indirectly enforced in the case of the journalistic activities in civil law countries like France or even Spain[1]. It remains to be seen whether a more individualistic, personal authorship-based system in an increasingly globalized (and, hopefully, legally harmonized) world will prevail.

Just some words to remind the reader about the differences between the common law and civil law traditions, and the differences between the copyright system created by the former and the authors rights protection granted by the latter. The process of conveying the right of copy mainly – but not solely, since commerce was protected at every turn – to the authors was statutory law under the common law of England, based on the doctrine of the *stare decisis,* as a consequence of a *judge-made law*. We need to understand the similarities and differences of both legal traditions and cultures, and also their legal practice. This explains, for instance, why copyright was statutory as opposed to common law in Britain, how important the first cases were in determining future decisions, and the way this legal tradition began in England and then spread to other parts of the world, i.e., the United States of America. The way the law, and especially constitutional law, is interpreted in both traditions is crucial to understand how mandatory laws (statutes or judge-made laws) are enacted and applied. This is one of the goals of every comparative legal exercise; to understand, not just the legal phenomenon itself, but also the reasoning process behind its existence.

In both traditions, protecting the interests of the authors and safeguarding them from abuse is paramount, since they are the depositories of the human rights recognized by the constitutional order (also allowing them an enjoyment of the economic benefits of the *oeuvres de l'esprit*, as it was called in civil law France); as is simultaneously maintaining the normal flux of commercial activity, the interest of societies and avoiding monopolies. The tension between these varied interests is evident from the very beginning in the legal decisions rendered that led to sometimes knotty solutions (as seen from the outside, though not so much in the light of the mandatory principles of the legal system) – natural

law, usually invoked by legislators (especially those of the civil law tradition) and applicable most especially to individuals, must be in harmony with that of the society (*natural v juridical persons*, one may say, following, and we are completely aware of it, a civil law distinction), which is to a large extent the way copyright protection operates, most notably in common law countries like the United States. This is the reason why copyright is considered to be to a large extent an *entrepreneurial* system of protection, which views organizations (newspapers, audiovisual producers, even Hollywood stars) as the motors of cultural production, and authors' rights a *personal* system encouraging the individual persons to produce work from the soul.

With respect to news, let us recall how, when copyright was first enacted in Great Britain in 1710 and under civil law in France in 1791-1793, the legislators were thinking of books and literary works and how to legally protect them. Later, other types of works were added to the successive intellectual property (in civil law countries) or copyright (in the common law ones) acts. News reporting, which was a successful business and a pillar of democracy from as far back as the seventeenth century, was not even considered admissible until the end of the nineteenth century and only entered the legal texts in the twentieth century. One reason is that no one thought in those early days that news could be considered an original work – and this must be related to the doctrine of the separation of content and form, the so-called "idea-expression dichotomy"– or that it could have distinct characteristics, in spite of its clear economic value from the very first. Another reason is that the first acts covered all types of printed works, and it was not until much later that the specificities of each genre were identified and laws were revised to properly protect all genres. Thus, is news to be considered a separate category of copyrightable work, and if it is, how is it defined and protected? Is there any difference between the two main legal traditions of the world, not to mention the socialist countries?

News reporting is one of the main commodities of the so-called information society, and is an economic good whose production, use and reception has dramatically changed and multiplied with the advent of the World Wide Web. In spite of the harmonization of copyright protection and the existence of international treaties on copyright since the end of the nineteenth century (starting with the Berne Convention for the Protection of Literary and Artistic Works in 1886[2]), news continues to project light and shadow and calls for extensive further study. Alongside general tendencies, like the attribution of exclusive rights, subrogation of authorship or even direct attribution of authorship (with respect to exploitation and personal rights) to the employer (this is the case of the Netherlands, modulated by the professional unions and the courts of justice), hopes for a general definition of what is considered "news," how to define its categories and how they can be protected remain doubtful.

The popularization of publishing and dissemination tools on the internet has multiplied phenomena which previously existed (e.g., the participation of readers in the transformation of preexisting works) and promoted the audience to the category of (co) authors. Participative, or citizen, journalism, which had already appeared in several media, developed the so-called *transmedia narratives*, and the legal system necessarily faces some problems in light of their particularities. The multimedia (and *multimodal*) character of many of the modern news stories, which contain text, photographs, videos, maps and infographics, means that we should insist on the importance of transmedia narrative (Ryan, 2009). "*The multifaceted nature of storytelling is nothing new,*" explains Ruth Page, but analyzing it in all its complexity "*means that the kinds of stories that now come under scrutiny extend much further than the literary texts typically prominent in classical narratology*" (Page, 2010: 11; for some other good definitions of *transmedia narrative,* please see Passalacqua and Pianzola, 2011, and Scolari, 2009). Transmedia narrative (in journalism, collaborative and derivative works, to use the legal terms referring to copyrightable work categories) poses challenges to the intellectual property system, and especially how user-generated contents are protected – not the least of which is how the intellectual property of news is managed. Given that users are becoming authors of some contents (from comments to texts, as well as pictures and videos), and the internationalization and harmonization of the norms on authors' rights, it is clear that legal comparative research is the only way (Doutrelepoint, 1997; Reimann and Zimmerman, 2008) to determine who benefits economically from user-generated content, and especially original work within the framework of collective work – the webpage, the newspaper, magazine etc. – which are the main products of media.

The first problem is to assess the changes introduced in the core conception of authorship itself with the advent of the so-called Web 2.0, or Social Web, which gives an increasing importance to the user as content generator and diffuser, and gives him or her an important role in the information process. Nowadays, there are several social institutions, and not just corporations or practitioners, who have decisive roles in the production and reproduction of news, so the law faces again a challenge

to adequately protect all of them and their economic interests. As a consequence, one of the final goals of this research is to determine the responsibility shared by all the actors in the news reporting process, from production to dissemination, and how the law applies to new necessities and scenarios like the ones plainly described in these pages – hopefully facilitated by an evaluation of the historical evolution of the news business. This is related to the important question of the access the modern public (let us remember one more time, a potential producer and reproducer as well) has to culture, and to freedom of speech as one of the pillars of Western representative democracy. The creation of the Web has allowed a portion of audiences to have a more direct role in public affairs through more individual and collective freedom, and, consequently, an increasingly important position in the legal mechanism which shelters private action even in the public sphere. Our aim is to explain how the main legal traditions, common law and civil law, respond, and give specific examples from several national laws. The former is considered to have granted its protection of intellectual property a more entrepreneurial slant, while the latter a greater consideration of the individual genius residing at the heart of the cultural creation *latu senso* (and only subsidiarily to corporations or juridical persons as driving forces) of news and entertainment (Strowel, 1993).

To begin with, one of the main differences preventing a harmonization of the copyright laws of both legal traditions is the recognition of moral rights, which in the civil law arena are non-transferrable, inalienable and non-waiverable. Meanwhile, in common law countries, when those moral rights were finally recognized (due to the influence and the insistence of organisms like WIPO) at the end of the twentieth century, it was done in such a manner as to give juridical persons (i.e., the corporations) the possibility to subrogate the author, a ruling considered inconceivable in civil law countries until very recently. At the same time, there has been a clear movement in a similar direction in the civil law arena, as evidenced by the reforms to the copyright acts of countries like France and Spain, giving more original rights to media companies. Needless to say, the question of the moral rights goes beyond the mere recognition of the authorship as a personal right and acquires clear economic consequences (Wilkinson and Gerolami, 2009). It is, therefore, important to analyze the typology of works recognized and protected by the copyright acts in both traditions – collaborative works, for example, or collective works (a daily newspaper or a website are considered such kind of works) – and how the aforementioned acts attribute rights to their promoters: the corporations. Generally speaking, the different legal systems deal with news in the aforementioned terms, but they do not define it precisely. Moreover, it is not clearly stated whether the law must protect the interests of the authors (the journalists and, nowadays, the audience as author as well) or the interests of the media, so the solutions have been very different in the common law and in the civil law systems.

Civil law countries have also moved in this direction. Spain, while implementing the European Harmonization Directive on Copyright of 2001, attended the demands of the corporate press lobby and enacted in article 32 of the *Ley de Propiedad Intelectual* (amended again in 2014 to be enacted in 2015, as was done in Germany the same year) the so-called "Google tax." The attribution of such broad rights on news was previously rejected by the Spanish Competition Court (*Tribunal de Defensa de la Competencia)*, which in 2004 denied the creation of *Gedeprensa*, a firm backed by the most important press publishers in Spain to manage and control the digital rights of news items reproduced in press clips – whose exploitation rights were attributed to those firms (with no compensation for the real authors of the original news items: the journalists contracted by the media). France followed even more decisively. The so called *Loi Hadopi* (a reform of the *Loi de propriété intellectuelle* in 2009 implemented under Nicolas Sarkozy's right-wing government) legislated the exploitation rights of the work of journalists in its section 6 (*Droit d'exploitation des oeuvres des journalistes*), attributing *ab initio* those rights to the media companies or *titres de presse*, meaning "*l'organe de presse à l'élaboration duquel le journaliste professionnel a contribué*," in a permanent or occasional way. In a manner similar to the "work for hire" regulation in common law legislation (whereby an exclusive cession to the employer is established by law, contrary to the general rule of the intellectual property acts of France, and other countries which followed its model, like Spain – and the Spanish-language countries of Latin America – or Italy), a special recognition (in some cases of collective works – i.e., newspapers) is granted to the initiatory and supervisory entity when different from the one that effectively produced the work, granting this juridical person authorship of the collective work, as opposed to the individual work that comprises the collective work, which already belongs to the natural persons that produced it.

In common law countries, the question has traditionally been resolved within the context of work made for hire in combination with the concept of collective works. Common law countries are not the only ones to rule in this way: Portugal, which has been considered a pure civil law country, has included a clause similar to the work made for hire

in its Copyright Act, specifically intended to cover news reporting (art. 17, *Trabalhos jornalisticos por conta de outrem*), but ruling it in the contrary sense, since it establishes that *O direito de autor sobre trabalho jornalístico produzido em cumprimento de um contrato de trabalho que comporte identificação de autoria, por assinatura ou outro meio, pertence ao autor*, and can be attributed to the employer only when the work is not signed.

Meaningfully, a pure socialist country like Cuba recognizes the rights of juridical persons (each one forming part of the communist state and of the "people" in socialist terms) over the collective rights, and does not recognize the particular rights of journalists. France has marked the path that most civil law countries have followed. Some limitations, beyond those usually recognized by any copyright act, were accepted by doctrine. For example, in 1959 Lucien Solal explained that the collective work, the newspaper, was not to be protected, unlike its parts (drawings, news items, literary and scientific articles, photographs), and that mere news was not copyrightable, the *simple reproduction d'un fait, sans aucune mise en forme*. The Hadopi law reversed dramatically the tendency of the French law, which from the act of 1957 establishes that "*pour tous les oeuvres publiées dans un journal ou récueil périodique, l'auteur conserve le droit de les faire reproduire et de les exploiter*."

This model goes further in the case of the Netherlands, whose Copyright Act dates back to 1912, the year in which the country adhered to the Berne Convention, and which occupies a particular place in the Continental European legislative system. "*It has since been amended many times, but never thoroughly revised,*" explains P. Bernt Hugengholtz (Hugenholtz *et al.*, 2009: 21). According to the Dutch Copyright Act (article 7: "*Where labour carried out by an employee consists in the making of certain literary, scientific or artistic works, the employer shall be deemed the author thereof, unless otherwise agreed between the parties.*"), the employer is considered by default not only the grantee of the exploitation rights of the works produced by the authors contracted by the firm (journalists, photographers, etc.), but also the owner of the personal rights. In this case, and in contrast to common law acts – in which a kind of subrogation of the moral rights is permitted under certain conditions, a contractual cession of them which is impossible in civil law countries, since moral rights are non-lapsable and inalienable – the employer *is* the author. The only exceptions are the ancillary rights which permit the parties to reverse the situation and prohibit employers from making secondary use of the works of their journalists (a disposition revised in 1975 and 1998 by collective agreements in the press), establishing the obligation of an authorization from the authors in any case in which the firm or the group wants to make use of said items in negotiating with a third party. The collection right (which was enacted in such countries like Spain as early as 1847, to protect the journalists and permit them to publish their articles elsewhere than in the newspaper which contracted them or acquired the exploitation right in that form) is preserved generally, but is different in the Netherlands. The situation is not as dire as it may seem for journalists, since they are represented by a powerful professional trade union, the *Nederlandse Vereniging van Journalisten*, and Dutch journalists have managed to protect their rights in such influential cases like those involving the journalists of *De Volkskrant* preventing the reutilization of their work in a CD-ROM in 1997. In contrast, the Hadopi law has managed to attribute the re-exploitation rights, if done in *un autre titre appartenant à une famille cohérente de presse* (which includes media groups, but also agreements with third parties), to the employer, but in a "*third circle of exploitation,*" the so-called *exploitations extérieures*, the employer must gain the permission of the authors. This has been the case for many civil law countries, and the unequivocal law in countries like Portugal and Brazil.

The situation is different in other civil law countries, like Germany, in which the employees retain the authors' rights to their work even if it was carried out under a labour contract (art. 43 *Urheberrechtsgesetz*).

The economic exploitation of news is to be examined with most care, as well, since the relationship between individual authors (including users) and companies generates very different scenarios that must be carefully explained, since legal aspects of the common law tradition such as the *work made for hire* attributes to corporations some rights which cannot be extended to civil law. The special consideration and the role of the state ("*the people*") in the Socialist tradition is also another topic to be treated. The protection granted (*tuition*) to salaried workers in civil law countries contrasts vividly with the one based on the autonomy of the parts given to free-lancers, while in common law countries it is not exactly the same case, especially due to the importance of the trade unions and journalists' associations. This is the reason why the International Federation of Journalists (IFJ) has repeatedly said that they prefer the civil law system, although in developed common law countries, freelancers' interests are protected in practice in other ways. It is necessary, on the other hand, to examine the possible collision of moral and economic rights, again in a comparative way, considering the different protection and conception of

moral rights in both traditions – and different again in the Socialist legal tradition, in which such rights can be attributed to "the people," as well. One case, to be examined globally, is the reproduction – and mention, and transformation – of news throughout the (cyber)world, and the problems it poses to copyright acts as we currently know them.

Another important consideration is that we stand before several dilemmas: a) The increasingly professionalized people devoted to gathering, elaborating and publishing news (journalists and companies) today face an access to the global production and dissemination of information with few obstacles, and the consequent increase in active audiences – or, as Jay Rosen stated, "*the people formerly known as the audience*" – is a clear trend which coexists, and on not a few occasion, collides, with professionalization. The movements towards the safeguarding of professional practitioners and corporations' rights parallel the movements in favour of the free access to news production and dissemination and to the legal relevance of the work produced and reproduced by the audience in equal conditions; b) secondly, the necessity of harmonizing applicable laws and unifying the degrees of protection, and the ways of doing it; and c) thirdly, the creation of a globally constructed social, economic and political forum in which to promote dialogue and come to a minimum agreement between the different legal traditions. The European Union is a case in point of how common law and civil law can coexist (and even hybrid traditions like the aforementioned Dutch case) and create a common ground of protection. It is therefore necessary to research the conditions in which this is taking place and its extent, and how it is created.

The question of the opposition between the historical professionalization of journalists and the increasing participation of audiences in news reporting merits some attention, as well. Professional journalist unions have played an important role in making their members aware of the importance of knowing and protecting their authors' options and rights in this context. The most active ones are the International Federation of Journalists, which has, since 1999, published some interesting and practical guides on the subject,[3] and the Brazilian APIJOR. One of their goals is to ensure the protection of individual participation in collective works, contrary, thus, to the position adopted in influential France. The position of the IFJ is particularly interesting, since all of its arguments are based on the assumption that news reporting is not just an economic activity, but necessary work for democracy, and from that perspective promotes the protection of professional and independent news reporting activity. The IFJ clearly prefers the Continental, civil law concept of news and copyright protection, and is critical of the positions of the United Kingdom, Ireland and the Netherlands. It is clearly inclined to follow the Central and Scandinavian model.[4] It recommends – and we subscribe to this point of view after examining the topic in the different legal traditions – for the author to keep control of his or her work, without renouncing to authorship or participation in the benefits.

How do media manage authors' rights of user-generated contents?

Applying this framework, necessarily explained so briefly, we have conducted research on how these regulations are practically applied, or, technically speaking, how laws are applied (legal action), since laws cannot be studied just referring to themselves – their letter – without considering the society in which those norms are applied, and the social, economic and professional groups to which they are applied.

First of all, all of the online media we examined included in their "terms of services" (which, in the end, are to be considered contractual and binding) some explicit regulations of user-generated content. We are not referring here to those ethical and legal norms regulating behaviour. These are important, certainly, since they aim to prevent the dissemination of pornography, terrorism or, in general terms, any kind of contemptuous behaviour and expressions. The rules we examine in this paper are exclusively those referring to copyright, or, more generally speaking, to intellectual property. This term, intellectual property, does not mean the same thing in the various legal traditions we examine. In common law countries, it includes copyright (which in civil law countries is rather called "authors' rights" – although most of the copyright acts of this legal tradition are called "intellectual property acts") and trademarks, patents and licenses, which, in turn, are considered in civil law countries "industrial property," and protected under different acts and in different ways. Obviously, trademarks and, to a certain extent, patents are also important as protectable for any media company, and are explicitly mentioned in every term of service we examined, preventing anything beyond personal use and forbidding any illegal commercialization of anything considered *property* (a term that, even when generally used, is considered by the doctrine of civil law not fully correct, since intellectual property is not real-estate-like property, but a special one) of the company,[5] even third parties' material – such as that submitted by the users. It means that the company reserves the rights

to any possibility of agreement with third parties of all the material on the webpage, with no mention of what happens if this action were to mean economic revenue, and whether those benefits would be shared with the authors, in this case, the users. Compensation, thus, is unclear in most of the legal notices or terms of use examined.

Derivative works are forbidden in most cases,[6] and this is a rule that applies twice to users, since they are expected not to make any derivative use of the work contained on the website, preempting any user from trying to make derivative use of the works submitted by any other user; i.e., no one can modify a video or a picture sent by a user. This is quite a restrictive term of use, but is as it ought to be if the doctrine of the three or (in the US mainly) four-step rule (recognized by the Berne Convention of 1886) is correctly applied, i.e., the transformative rule, which is related to the purpose of the derivative work (expected to not distort the original and not intended to enter the market for direct or indirect revenues); the nature of the original work clause; rule of the use of substantial parts of the original work in the derivative one; and the effect on the potential market. So, usually the derivative works are tolerated as long as they do not generate any income or prevent the original authors from getting theirs – a doctrine which is related to fair use in common law and the doctrine of *lucrum cessans* (and, consequently, *damnus emergens*) in civil law. Anyway, there is room for hope; in 2009 some of the most important media companies of the United States (*New York Times*, Associated Press, Gannett and Tribune Company) addressed an *amici curiae* to the Court of Appeals, regarding the case J. D. Salinger v Coler *et al.*, in which

> *"Amici [referring to themselves] publish copyrighted material everyday, and depend on the copyright law to protect their writings. Indeed, the need for copyright protection is today more intense than ever as digital technologies make it ever easier for third parties to seize and repurpose the fruits of their costly newsgathering efforts. Nonetheless, Amici fiercely believe that the availability of a preliminary injunction under the copyright law cannot trump the prerogatives of the First Amendment [which regulates freedom of speech], and that a book banning of at least arguably transformative work cannot be countenanced."*

Another issue is the prevalence of tension between exclusive and non-exclusive rights. Exploitation rights on works produced by freelancers or under the consideration of the legal statute of *work made for hire* (in civil law, whether the work is produced by people whose contractual liaison with the company is civil or a labour working contract) are considered to have been transferred in exclusivity, even though most of the civil law copyright acts establish the presumption, when it is not explicitly said *sensu contrario* in the contract, of a non-exclusive cession, so the author can keep some further rights of exploitation (e.g., a collection, even a special right recognized in several copyright systems, like the Spanish one) on his or her work. This presumption is only applied to user-generated contents, but it is somehow contradictory with another clause of every term of service examined, which reserves to the company the capacity of negotiating further exploitations of all the parts and works contained in the website, including, allegedly, the content produced by the users, with third parties, and this means, precisely, reproduction in other websites – owned by other companies or groups – and even transformation (e. g., translation, abridgement, mash-ups, etc.) of the original work, or its incorporation in any other collective, collaborative or derivative work.

The mention of a "perpetual and universal cession" of rights[7] of user-generated contents is another point to be carefully examined, since a universal right with no compensation or chance to do business if correctly applied seems to be abusive, and perpetual right is strictly forbidden by most of the copyright acts or intellectual property statutes of civil law.[8] Exploitation rights need to be necessarily limited in time, which on the other hands collides with the use of the works published decades, or even more than a century ago, some of them entered in the public domain – and not, let us be careful, orphan works, which is a different case and category, and susceptible of be applied when in the event of the future exploitation of a work never signed by a journalist or, now, a user, not an anonymous work of unknown authorship.[9] This is the case of the work published originally by a newspaper that has digitized its archives; to what extent can a company make use of a work a) intended to be published in print, not in a digital format, b) intended to be published, and not broadcast (or made available on the internet) and c) that can be displayed like an anthology or a collection of texts under the signature of one author who never gave permission to do so – and contradicting, somehow, the doctrine commonly accepted by both legal sides in Tasini v *New York Times* and the case of the journalist of *Volkskrant*?

But this is another problem, to be broached in more detail on another occasion. The only company of the ones we examined for this research that modulates to some extent this draconian and quite one-sided clause

is *Le Monde*, which accepts a non-collective exploitation of these rights. Most of the clauses of these terms of service (in our humble opinion to be considered contracts[10]) – which leads us to the question of the *consideration doctrine*, which asks, what does the user receive in exchange for his or her contribution, if not money, that can be considered a *quid pro quo* to fulfill a requisite of the contractual relation he or she established with the company when accepting the terms proposed and *adhering* to those conditions? – are rather protective of one side's interests, and extend to linking practices, most of which strictly ban framing or inline linkings (following, and expanding, the doctrine of *Shetland Times* v *Shetland News*, 1996). Of course paternity moral rights are commonly recognized. It is impossible not to do so in civil law countries,[11] and is in common usage also in corporations under common law when referring to user contributions. The BBC, for instance, recognizes that "*any copyright in your contribution will remain with you and this permission is not exclusive, so you can continue to use the material you contribute in any way including allowing others to use it,*" with some exceptions, mentioned offhandedly, since "*we normally show your name with your contribution, unless you request otherwise, but for operational reasons this is not always possible*." But other rights, such as the possibility of the author removing his or her work from the market, are now given to the companies – removal and revocation rights are proposed as an adhesion clause to users.[12]

Some preliminary conclusions (and further research)

By now, as a forecast study, we can advance the following conclusion to our juridical research: the main legal questions which affect user-generated narrative and contents derive from a preliminary confirmation of the increasing participation of the user as an author or a co-author, and this is a growing tendency within news production.

Firstly, derivative work is more prevalent than collaborative or collective work, even though these forms are also possible. As an example, the supposedly collaborative work of users and journalist in a platform provided by a media company, in this case *Eskup* by *ElPaís.com*, is more a transformative work or an addition to the original work published by the journalists of the media.

Secondly, as a preliminary conclusion as well, to be confirmed and more accurately explained in our research, most media treat separately and in different ways their own content, the one produced under a *work made for hire* system, and the one coming freely from the users, which are not bonded to the company by a working contract, nor by a civil or a freelancer contract. Therefore, we need to examine the kind of contract established with the user when the company decides to publish and subsequently gain some benefits from the user-generated contents. Obviously, the law covers these cases, since the user accepts some publicly explained conditions before entering the site and submitting his or her work.

Thirdly, those contents are, at the moment, usually considered ceded in a non-exclusive manner –while the trend is to gain exclusivity of contents produced by journalists and media workers, since the companies need to publish, transform, and exploit the material globally through their own subsidiaries or through agreements with third parties. Therefore, the nature of those agreements need to be examined to determine the extent they may include or consider user-generated contents as well.

Fourth, user-generated content is considered, generally speaking, as it has been ruled in the Canadian Copyright Act's last reform done with non-profit intentions (though this claim is doubtful and needs to be further examined) with the corporation having no intention of accruing economic gains through their exploitation. But this does occur, so we need to examine the ways in which corporations gain or purchase the economic rights of exploitation and share profits with the users. The question of compensation is a central concept in our research, especially in the case of the ulterior exploitation of the journalists' works by third parties. In this respect, recent legal reforms such as the ones carried out in France and Spain attribute those rights, if nothing else is stipulated to the contrary by the parties, to the corporations. This is justified by the necessity to speed up negotiations with third parties of a great amount of information, continuously refreshed.[13] It is considered (and it is a matter for discussion) that media corporations act in this respect as intermediaries for the benefit of everyone, but to do that, they need to enjoy the exclusiveness of the copyrightable works.

Fifth, and finally, as a corollary of the aforementioned trends, some central legal principles appear to carry great weight, and their respective influences in both legal traditions, common law and civil law, need to be noted. These are the notions of *exception* in the civil law tradition and *fair use* in common law. Attention must be given to the rule of the three (or even four–) steps, the reception of common law cases by civil law lawyers and, most importantly, jurisprudence. The tolerance shown in common law to certain derivative works sheds some light on the possible trends in this respect, but cannot distract us from the need for just compensation (economic and/or moral) with respect to the original author.

Notes

[1.] In the case of the socialist state as the promoter of cultural and intellectual activity, indirectly through its citizens, the example of countries of the socialist tradition, like Cuba or China (and even that of the former Soviet Union) will be used occasionally.

[2.] The first Convention of Berne in 1886 produced two legal texts, in French and in English, which talked respectively of "*nouvelles du jour et faits divers"* and of "news of the day and miscellaneous information." These may be considered mere translations, but actually there is a difference, conscious or not, and in 1908 they were amended by the expressions "*simples informations de presse*" and "mere items of press information." It is perfectly possible nowadays that news items not to be "of the day," but of the moment. But, especially, "miscellaneous information" and "*faits divers*" are not exactly the same thing, since the French text relates to *facts*, which are not protectable, and not to the *form* of them, the *news items* themselves, which are copyrightable. Finally, the adjectives *simple* and *mere* introduce a new question, since it seems that the standard aims to protect complex or elaborate news items, but not the most simple ones, which merely explain some facts or data, "raw material" in some ordered way, with no intellectual skills applied and little originality. Actually, most of the news published by today's media is not of this kind, but rather elaborate items of information, and continuously (i.e., more than periodically) refreshed and updated in online media, and enriched with hyperlinks that can be considered more than quotes – in a word, an architecture of complex, contextualized and networked pieces of information. This distinction between almost "mechanical" products, containing crude data, and more elaborate news items, in which appears the clear intervention of the intellectual spirit, underlies all the legal terminology. This distinction, to some extent, is present in the journalistic doctrine of the first journalism schools of the United States (Columbia–Missouri and Columbia, New York), which traditionally distinguished between *stories* and *comments*. Mere news is rare in modern media.

[3.] See Holderness, M., Pöppelmann, B. H., Klemm, M., 2011, *The Right Thing: An Author's Rights Handbook for Journalists*, Bruxelles, IFJ, and the websites http://www.ifj.org/en/pages/authorsrights and http://www.ifj.org/en/sections/news-of-court-cases/contents.

[4.] *"Au Royaume-Uni et en Irlande, les journalistes salariés n'ont pas le droit d'être identifiés ni de défendre l'intégrité de leur œuvre. Dans les pays sous le régime du copyright, il est possible de « renoncer » à ses droits par le biais d'un accord écrit. Dans des pays tels que la Suède, la Finlande, le Danemark, la France, la Belgique et l'Allemagne, au contraire, les journalistes salariés restent juridiquement liés à leur œuvre. La loi prévoit leur droit d'être identifiés, de défendre l'intégrité de leur œuvre, et d'être rémunérés lorsque celle-ci est réutilisée. Souvent, ce paiement se fait sous la forme d'un supplément négocié de salaire*." See Holderness *et al.*, op. cit.

[5.] "As owner or on behalf of licensors as license," states the BBC.

[6.] See, for instance, the terms of use of BBC Online Services: "You may not copy, reproduce, republish, disassemble, decompile, reverse engineer, download, post, broadcast, transmit, distribute, lend, hire, sub-license, rent, perform, make a derivative work from, make available to the public, adapt, alter, edit, re-position, frame, rebrand, change or otherwise use in any way any BBC Online Services and/or BBC Content in whole or in part on your product or service or elsewhere or permit or assist any third party to do the same except to the extent permitted at law."

[7.] A couple of examples: The *New York Times* says that "[y]ou grant NYT a perpetual, nonexclusive, world-wide, royalty free, sub-licensable license to the Submissions, which includes without limitation the right for NYTimes.com or any third party The New York Times designates, to use, copy, transmit, excerpt, publish, distribute, publicly display, publicly perform, create derivative works of, host, index, cache, tag, encode, modify and adapt (including without limitation the right to adapt to streaming, downloading, broadcast, mobile, digital, thumbnail, scanning or other technologies) in any form or media now known or hereinafter developed, any Submission posted by you on or to NYTimes.com or any other Web site owned by NYT, including any Submission posted on NYTimes.com through a third party." *The Guardian* establishes that "[y]ou or the owner of the content still own the copyright in the content sent to us, but by submitting content to us, you are granting us an unconditional, irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, publish or transmit, or to authorise third-parties to use, publish or transmit your content in any format and on any platform, either now known or hereinafter invented." The other legal terms are quite similar.

[8.] Consider this, from the legal terms of *The Guardian*, which avoids the question with extreme legal dexterity: "You or the owner of the content still own the copyright in the content sent to us, but by submitting content to us, you are granting us an unconditional, irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, publish and/or transmit, and to authorise third-parties to use, publish and/or transmit your content in any format and on any platform, either now known or hereinafter invented."

[9.] See, for instance, the legal document of *Público.pt*: "Os direitos de propriedade intelectual de todos os conteúdos do Público – Comunicação Social S.A., que não visem o fornecimento externo e consequentemente não sejam devidamente identificados, são pertença do Público, incluindo as informações, as ferramentas, o grafismo, as imagens, gráficos ou textos. O Público rejeita qualquer responsabilidade pela usurpação e uso indevido dos elementos acima citados, salvo as excepções permitidas por lei, nomeadamente o direito de citação, desde que claramente identificada a sua origem."

[10.] Please see this clause from the *New York Times'* terms of service: "If you choose to use NYTimes.com (the 'Site'), […] you will be agreeing to abide by all of the terms and conditions of these Terms of Service between you and The New York Times Company ('NYT', 'us' or 'we')."

[11.] This is from the *Le Monde*'s terms of service: "La citation est une reproduction d'un extrait de la publication, respectant le droit moral de l'auteur par l'indication de son nom et de la source. Elle est nécessairement courte pour éviter le plagiat. Le qualificatif «courte» s'apprécie tant par rapport à la publication dont elle est extraite que par rapport à celle dans laquelle elle est introduite. La citation illustre un propos et ne doit pas concurrencer la publication à laquelle elle est empruntée. La multiplication des citations aboutit à la création d'une anthologie, considérée comme oeuvre dérivée, et donc soumise à l'accord préalable de l'auteur ou de l'ayant droit."

[12.] *The Guardian*: "We, or authorised third parties, reserve the right to cut, crop, edit or refuse to publish, your content at our or their sole discretion. We may remove your content from use at any time. We accept no liability in respect of any content submitted by users and published by us or by authorised third parties."

[13.] See, for instance, *O Globo*, which uses a subsidiary company to manage the rights of its workers, freelancers and users, thus ceding the rights not to the parent corporation, but to a company especially created to negotiate those rights with the subsidiaries of the group and third parties: "Ao enviar conteúdos, o usuário transfere exclusivamente, gratuitamente, universalmente e permanentemente, sem a criação de qualquer vínculo, todos os direitos patrimoniais de autor à INFOGLOBO COMUNICAÇÕES S/A, podendo esta de qualquer forma usar, transferir ou gozar dos direitos autorais da obra em qualquer mídia.O usuário se compromete que todo o conteúdo enviado é lícito, não viola nenhum direito autoral, de personalidade e, ainda, que possui pleno direito para transferi-lo à INFOGLOBO COMUNIÇÕES S/A conforme disposto no item acima."

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Abstract | Résumé | Resumo

En. Audience participation in the production process is an increasing reality in all fields of cultural production, from fan fiction to news commentary, from transmedia extensions to news items themselves. Author participation takes many shapes, and user-generated content is the most authorial of them. Whether by way of well-formulated strategies of personal authorship or collaborative strategies with other users, or through derivative or collaborative work, audiences are casting a wider shadow on collective work – newspapers or websites, for instance. They complete previous work or create new product. Regardless, audiences have now joined journalists, photographers and the media themselves as actors in news creation and circulation, and constitute a very real part of media business. In this paper, we propose a comparative analysis of the changes introduced by this reality on legal activity, which has implied the reform of the copyright laws in all countries of the two main juridical traditions – Common law and Civil law – and also in the concrete practices of the media, as reflected specifically in their legal terms and conditions, copyright notices and more generally, in the licenses and contracts signed by the users when they enter a website. We aim to determine the characteristics of legal protection as it applies to news content, regardless of its authorship, so as to explain the contemporary tendencies in copyright on news reporting as a social activity. To this end we use comparative legal research techniques, and more precisely, deal with one of the big issues concerning copyright law with respect to news production: the balance between the protection granted individual authors, journalists or users, and the protection granted corporate entities responsible for the content of collective work.

Keywords: copyright, intellectual property, authors' rights, user-generated content, news reporting.

Fr. L'intervention des audiences dans les processus de production est une réalité de plus en plus présente dans tous les domaines de la production culturelle, des « fan fictions » aux commentaires en ligne, des supports transmédias aux articles d'information eux-mêmes. L'intervention des auteurs a pris de nombreuses formes, le contenu généré par l'utilisateur lui-même étant le plus *auctorial* de tous. Grâce à des stratégies construites autour de productions personnelles ou collaboratives avec d'autres utilisateurs, au travers d'œuvres collectives ou non, les audiences montrent une vision plus large du travail collectif — comme dans les journaux ou les sites en ligne, par exemple. Elles complètent des œuvres antérieures ou en créent de nouvelles. Quoi qu'il en soit, les audiences ont maintenant rejoint les journalistes, les photographes et les médias eux-mêmes en tant qu'acteur à part entière du traitement et de la circulation de l'information, jouant de fait un rôle dans le système économique médiatique. Dans cet article, nous proposons une analyse comparative des changements introduits par cette réalité sur l'activité juridique, et notamment sur les implications des réformes des lois sur les droits d'auteurs dans tous les pays issus des deux grandes traditions juridiques — le droit commun et le droit civil —, ainsi que des pratiques concrètes des médias, particulièrement les termes et conditions juridiques, les énoncés concernant les droits d'auteurs et, en général, toutes les formes de licence et de contrat signées par les utilisateurs quand ils arrivent sur un site. Nous cherchons à déterminer quelles sont les caractéristiques de la protection juridique lorsqu'elles sont appliquées aux contenus d'actualité, quels que soient leurs auteurs, de manière à expliquer les évolutions contemporaines du droit d'auteur concernant l'information d'actualité, entendue comme activité sociale. Nous utilisons des techniques de recherche de droit comparé, et plus précisément, nous approfondissons l'un des enjeux fondamentaux concernant la production de nouvelles : l'équilibre entre la protection accordée aux auteurs, journalistes ou utilisateurs, et la protection accordée aux personnes morales responsables du contenu de l'œuvre collective.

Mots-clés : droit d'auteur, propriété intellectuelle, copyright, contenu généré par les utilisateurs, production de nouvelles.

Pt. A intervenção das audiências no processo de produção é uma realidade cada vez mais presente no domínio da produção cultural, das "fan fictions" aos comentários online, dos suportes transmídia às próprias matérias jornalísticas. A intervenção dos outros tem tomado várias formas, sendo o conteúdo gerado pelo usuário a mais a autoral de todas. Graças a estratégias construídas em torno de produções pessoais ou colaborativas com outros usuários, por meio de obras coletivas ou não, as audiências mostram uma visão mais ampla do trabalho coletivo – como é o caso dos jornais ou dos sites online, por exemplo. Elas completam obras anteriores ou criam novas obras. Independente do que seja, as audiências se juntaram agora aos jornalistas, fotógrafos e à própria mídia enquanto criadores à parte no tratamento e na circulação da informação, desempenhando, dessa forma, um papel no sistema econômico midiático. Neste artigo, propomos uma análise comparativa das mudanças introduzidas por essa realidade na atividade jurídica e, sobretudo, das implicações das reformas nas leis de direito autoral nos países originários de duas grandes tradições jurídicas – a do direito comum e a do direito civil –, bem como nas práticas concretas da mídia, particularmente nos termos e condições jurídicas, nos enunciados referentes ao direitos autorais e, de modo geral, em todas as formas de licença e contratos assinados pelos usuários no momento em que eles entram em um site. Buscamos determinar quais são as características da proteção jurídica na ocasião em que elas são aplicadas a conteúdos sobre a atualidade, independente de quem sejam os autores, de forma a explicar as evoluções contemporâneas do direito autoral em relação à informação sobre a atualidade, entendida como atividade social. Utilizamos técnicas de pesquisa do direito comparado e, mais especificamente, nos aprofundamos em uma das dinâmicas fundamentais referentes à produção de notícias: o equilíbrio entre proteção garantida aos autores, jornalistas ou usuários, e a proteção garantida às pessoas morais, responsáveis pelo conteúdo da obra coletiva.

Palavras-chave: direito autoral, propriedade intelectual, copyright, conteúdo gerado pelos usuários, produção noticiosa.