A JOURNALIST'S GUIDE TO COPYRIGHT LAW AND EYEWITNESS MEDIA

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FIRSTDRAFT

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INTRODUCTION

Eyewitness media (videos, photographs and audio clips captured by individuals at the scene of a news event) has become critical to how stories are discovered and reported. News organisations have used eyewitness media in the aftermath of nearly every major news event of the past decade[1] and many newsrooms now have dedicated teams or specialists focused on the monitoring and verification of content shared online.

Newsgathering on social media raises a wide range of questions: ethical questions around immediately contacting people who may have witnessed a truly tragic event; managerial questions around viewing pictures that could be deeply distressing; and legal questions around the right to use this content without infringing on copyright. The latter range of questions is the focus of this guide.

Our goal is for readers to come away with an understanding of how copyright laws apply to eyewitness media and to highlight some of the pitfalls that news organisations should avoid when looking to use it in their reporting.

The challenges of copyright law and eyewitness media are immense. As Julie Posetti of Fairfax Media points out in the discussion about Australia: “The law is analogue and news is digital” — that is to say that there have not yet (at the time of

[1] *Claire Wardle (2015) 7/7: Comparing the use of eyewitness media 10 years on, First Draft News, https://firstdraftnews.com/77-comparing-the-use-of-eyewitness-media-10-years-on/*

writing) been sufficient legal cases to provide clear guidance on some of the issues — so, much is uncertain. Legal frameworks cannot keep up with the speech of technological and behavioral change. As an example, the fair dealing law in the United Kingdom allows certain content to be used in the public interest without permission and without infringement of copyright law. This, however, does not apply to photographs or a collection of images. A GIF (Graphics Interchange Format) is a collection of images made into an animation so, when GIFs are used on social media to depict events, would they be classified as a photograph or a video? Would fair dealing law apply to a GIF?

Although case law is limited, in this guide we will look at some cases that have been brought against news organisations and discuss how they may help us to understand what newsrooms can and cannot do when using eyewitness media.

This guide is designed to give an overview of eyewitness media and copyright law regimes. We start by offering some thoughts about the use of eyewitness media by news organisations and the workflows that they need to follow before deciding to publish a piece of content. We show how these processes should actually help protect the copyright holder as well as allow news organisations to

balance the need for speed with respect for the law. We look at some of the misconceptions around copyright in relation to the social media platforms and explore the dichotomy between digital news and analogue law — especially as platforms emerge that provide new opportunities.

We then turn to specific countries and jurisdictions. We look at six legal regimes in some of the leading global news markets and discuss the challenges for news organisations headquartered in these countries. A review of each legal context is accompanied by short interviews with journalists and editors from major news organisations in each country to illustrate how they have attempted to address the need to use eyewitness media while also respecting copyright. An important discussion here is to compare the terms fair use and fair dealing. These terms are often used (and misused) as a defence for featuring an eyewitness photograph or video discovered on social media without copyright clearance. However, it's important to understand that these terms present different legal considerations from country to country.

We conclude with recommendations and thoughts on future copyright challenges for news organisations who use eyewitness media in their output.

ONE

EYEWITNESS MEDIA AND COPYRIGHT LAW

In research studying the use of eyewitness media by broadcast news outlets published in 2014[2], Wardle et al. highlighted that many journalists interviewed described the landscape as being the "Wild West." The report went on the note that "a lack of precedent, deliberately vague terms and conditions used by social networks, and ignorance on the part of uploaders cause real confusion." It concluded that "the speed at which this landscape is shifting means that all journalists, editors, and managers have to understand this world, and keep up with the pace of change." In the time since this research was conducted and published, much remains the same. However, eyewitnesses are increasingly aware of their rights as content creators and are speaking out when they feel their rights have been violated.

Eyewitnesses are increasingly aware of their rights as content creators

[2]*Claire Wardle, Sam Dubberley and Pete Brown (2014), Amatuer Footage: A Global Study of User-Generated Content in TV and Online News Output, Tow Center for Digital Journalism http://towcenter.org/wp-content/uploads/2014/04/80458_Tow-Center-Report-WEB.pdf*

EYEWITNESSES SPEAKING UP

Belgian citizen David Crunelle, an eyewitness to the act of terrorism at Brussels airport on 22 March 2016, wrote about his experience. He described not just how it felt to be caught up in such a terrifying event, but how he was treated by news organisations contacting him to use a short video he took while fleeing the departure hall[3]. In his blogpost, he explained that he received 10,000 notifications on his smartphone in less than an hour; many of those were from journalists asking permission to use his video. As we discuss later, asking for permission to use a video is one important step to take in clearing the right to use.

A failure to understand how copyright works and the Terms of Service on each social media platform can cost money, reputation and time

While Crunelle made no copyright abuse claims, Alfonzo Cutaia has[4]. In November 2014, Cutaia posted a video to YouTube depicting a time lapse of a storm sucking up water from Lake Erie, near Buffalo, New York[5]. Cutaia claims that the video was used by CNN and CBC without his permission.

In August 2015, Cutaia brought several cases before a New

[3]*Crunelle, David. "The art of being in the wrong place at the right time: behind the scenes of social media newsgathering." Eyewitness Media Hub https://medium.com/@emhub/the-art-of-being-in-the-wrong-place-at-the-right-time-behind-the-scenes-of-social-media-3ee558630e93#.soz46ryyb (Accessed Oct. 20, 2016)*

[4]*Miller, Melinda. "Storm video shooter sues the CBC, CNN for copyright infringement." The Buffalo News http://buffalonews.com/2015/08/18/storm-video-shooter-sues-the-cbc-cnn-for-copyright-infringement/ (Accessed July 7, 2016)*

[5]*Cutaia, Alfonso. Buffalo Lake Effect. https://www.youtube.com/watch?v=VxuacZudBPU (Accessed July 7, 2016)*

York court alleging copyright infringement and circumvention of protection under Title 17 of the U.S. Code.

Cutaia is a lawyer by trade. In an interview for this guide, he explained that it was what he perceived as misuse of his video and his inability to police this misuse that drove him to the courts. “When my video went viral, I was amazed at the frenzy of activity,” Cutaia explained. “People started reaching out to me in every way imaginable asking for permission to use it, but I quickly realised that many more were not asking permission. The most frustrating part was the lack of technical tools available to me for policing the unauthorised use of my video. So, I decided to use the tools of my trade instead.”

While the first claims were unsuccessful, a new lawsuit filed on June 21, 2016 included CBS, Mission Broadcasting Inc., and Critical Mention, Inc.

In the UK in late 2013, a blogger named the Croydon Cyclist with the Twitter username @cyclegaz described his experience with the Daily Mail who used a video he posted to YouTube on their website without permission[6]. It’s important to note that the Daily Mail did contact the cyclist to ask permission to use the video, but when they did not receive a reply they used it regardless. When the “Croydon Cyclist” complained about the unauthorised use of the video clip, he was offered 50 GBP. After a stream of back and forth correspondence, the Daily Mail’s legal team offered compensation of 1,000 GBP, which settled the case.

The one case that did end in a court judgement was the case of Daniel Morel versus Agence France-

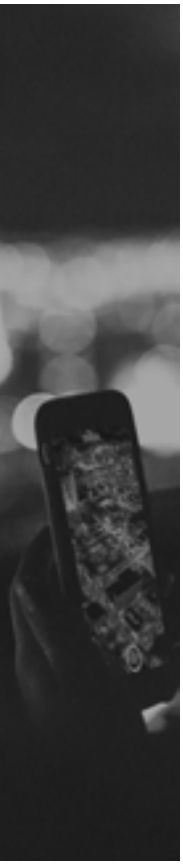
[6] *@cyclegaz. “Video Copyright and the Daily Mail: From 50 to 1000.” The Croydon Cyclist. http://www.croydoncyclist.co.uk/?s=daily+mail (Accessed July 8, 2016)*

Presse and Getty Images, decided in November 2013[7]. AFP had taken Morel's pictures from another Twitter user's account and distributed them to Getty who in turn distributed to its clients. AFP argued that this was due to an editorial error as the photographs were found on the account of another Twitter user. The defendants argued that they could use the content as Twitter's Terms of Service allowed it. The court decided in Morel's favor, noting that Twitter's Terms of Service did not allow content use for commercial reasons, and that copyright violation had occurred. Morel was awarded 1.2 million USD in damages.

This verdict is a reminder that today's journalist should not only ask for permission to use an image or video sourced on social media, but also check if the uploader indeed captured the content as well as posted it.

The above cases illustrate how content creators can react to their images being used without permission by news organisations. They also indicate that a failure to understand and respect how copyright works can cost money, reputation and time. An understanding of each social media platform's Terms of Service and how these apply to breaking news situations is crucial.

[7]Miller, Agence France-Presse v. Morel, U.S. District Court for the Southern District of New York, No. 10-02730. http://www.nysd.uscourts.gov/cases/show.php?db=special&id=256 (Accessed Nov. 7, 2016)



FREQUENT MISCONCEPTIONS

There are frequent misconceptions when it comes to eyewitness media and copyright ownership. Let's clear up some of these here.

THE UPLOADER OR CAMERA OWNER IS THE COPYRIGHT OWNER, RIGHT?

One of First Draft's key recommendations for verifying a piece of content sourced from social media is to ask the question "who created it?". This is a crucial step not only for verification, but also for clearing copyright. In terms of verification, this step is important because the journalist needs to get as close as possible to the person who captured the content in order to check if they truly were in the place they claim to have been. In terms of copyright, the content creator is the copyright holder. The person who uploaded the content to, or shared the content on a social media platform is not the copyright holder. The person who owns the smartphone or camera with which the image was captured is not the copyright holder. The content creator is the copyright holder. Simply, this means the person who pressed the button to start the capture (be that taking the photograph or recording the video) is the copyright holder. This distinction of who pressed the button is important and crucial in copyright.

A good illustration of this is the case of Ben Innes. Ben Innes was a passenger on EgyptAir flight MS181 when it was hijacked by Seif Eldin Mustafa who later surrendered. Innes asked for his photograph to be taken with Mustafa during the hijacking and shared

the image with his friends, labelling it as a selfie. Importantly, in an interview with The Sun newspaper, Innes outlines his motivations for the picture: “I got one of the cabin crew to translate for me and asked him if I could do a selfie with him. He just shrugged OK, so I stood by him and smiled for the camera while a stewardess did the snap. It has to be the best selfie ever.” Here, Innes tells us that it was not he himself who took the shot (which would have made the image a selfie and, therefore, Innes the copyright holder), rather one of the cabin crew on the flight. The reality is, the copyright of the image of Innes with Seif Eldin Mustafa belongs to the cabin crew member who took the shot, not Innes.

Not only was speaking to Innes important for establishing the veracity of the shot, but also to conclude that he was not the owner of the copyright in the image. According to Twitter copyright policy, for instance, the photographer and NOT the subject of a photograph is the actual rights holder of the resulting photograph.

DO TERMS OF SERVICE MEAN THAT THE SOCIAL PLATFORMS OWN THE CONTENT?

AFP and Getty Images, in defending the case of Daniel Morel noted earlier, claimed that any content uploaded to Twitter was freely available for redistribution by other Twitter users under the Terms of Service of the social networking site. While this may be true for retweeting or embedding content, in no way do the Terms of Service take copyright away

from the content creator. Users frequently give social media platforms the right to use uploaded content for their own use, however, Terms of Service do not give third parties the right to use any content 'off platform' without the permission of the content creator. Social media platforms do not own content uploaded by their users, the person who clicked capture on the device does.

As a case in point, Twitter's Terms of Service state that, as the uploader, "You retain your rights to any content you submit, post or display on or through the Services. What's yours is yours — you own your content (and your photos and videos are part of the content)."

EMBEDDING VERSUS SCRAPING

Embedding a piece of content without permission is not a copyright infringement. In Europe, this was solidified in 2014 in the case of BestWater International GmbH v Michael Mebes and Stefan Potsch. The case concerned Bestwater — a producer and distributor of water filters — complaining that Mebes and Potsch — two competing sales representatives — were embedding BestWater promotional videos from YouTube on their own websites. Here, the European Court of Justice ruled that embedding was not copyright infringement since "the work at issue is not transmitted to a new public or communicated a specific technical method different from that of the original communication."[8] This decision also came with what is known as "reasoned order" (where answer to a question for preliminary ruling can be "clearly deduced from existing case law") and referred to the previous case of Svensson e.a. (C466/12, EU:C:2014:76).[9] That is to say, because Mebes and Potsch embedded the YouTube video on

[8]*BestWater International GmbH v Michael Mebes and Stefan Potsch. http://curia.europa.eu/juris/celex.jsf?celex=62013CO0348). Accessed Sept. 26, 2016.*
[9]*Nils Svensson and Others v Retriever Sverige AB. http://curia.europa.eu/juris/liste.jsf?num=C-466/12 (C466/12, EU:C:2014:76). Accessed Oct. 11, 2016.*

their website without taking the video out of YouTube itself, there was no copyright infringement.

Scraping, on the other hand, is removing a piece of content from its original communication platform (e.g. YouTube) and running it as your own on the same or different platform. Scraping, without permission, is an infringement of copyright.

Go to the source: Journalists must check if they can use images and if the content they want to embed is an infringement

Embedding content that was originally posted online without the consent of the rights owner is also very likely to be an infringement. As a result, not only do journalists have to check whether they can use images directly in their reporting, they now also have to check whether the content they intend to embed is an infringement. In the leading European Court of Justice case in this area — GS Media versus Sonoma[10]— linking to a file store where pictures due for publication in Dutch Playboy were available, was found to be an infringement of copyright.

While embedding without permission may be legal (provided the embedded content is available with the consent of the owner of the copyright), news organisations should always consider the ethical implications. For instance, moving a piece of content from a social platform (where someone might only have 100 close friends and family members as followers) to the front page of a news website significantly changes the potential impact for the person who uploaded the content because their username is viewable and clickable.

[10]GS Media BV versus Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker. http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5d298addd-4efa4589882d92b678bdc04d.e34KaxiLc3qMb40Rch0SaxyKah90?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=237886 (C-160/15 EU:C:2016:644) (Accessed October 12, 2016)

THE LANGUAGE OF PERMISSION

Language used by news organisations when requesting permission to use eyewitness media can be daunting — especially requests that use legal jargon. Research conducted by Pete Brown of Eyewitness Media Hub[11] highlighted how confused audiences were by this type of language. Copyright lawyers also cast doubt on whether such language — confusion aside — is legal cover. In his research, Brown asked focus groups to give their reaction to frequently used permission requests from news organisations found on Twitter. Examples include: "Is this your photo? May [news organisation] use it on all platforms in perpetuity with credit to you?" and "Reaching out from [news organisation]. May we permanently licence your photo for all platforms and affiliates?" Brown observed that: "A frequent criticism expressed across the groups was that the wording constituted confusing and/or intimidating legalese that the average person would most likely not understand."

A frequent criticism from focus groups was that wording journalists used to secure permission constituted confusing or intimidating legalese that the average person would likely misunderstand

[11]*Brown, Pete. Eyewitness Media Hub. "It's Genuine, as Opposed to Manufactured: A Study of U.K. News Audiences" Attitudes toward Eyewitness Media. http://eyewitnessmediahub.com/research/uk-news-audience-attitudes/findings/permissions (Accessed July 17, 2016)*

Copyright lawyer Adam Rendle, of law firm Taylor Wessing, speaking at the Perugia International Journalism Festival in 2016, noted that such language is confusing and any agreement may not, at a later date, constitute informed consent. "That's not the kind of wording people in a crazy breaking news situation would understand," noted Rendle "and it strikes me that if you are confusing people and they are not giving the most informed consent, that's only going to cause problems later on."[12]

In effect, when contacting an eyewitness during an event via social media to request permission to use images they have captured, journalists should endeavour — when safe and possible — to advise an uploader transparently how and when their content will be used.

WE CAN JUST "FAIR DEAL" IT

"We can just use it under fair dealing." "We can just use it under fair use." Many editors and journalists hide behind fair use or fair dealing laws when they wish to use a piece of content from social media without permission from the content creator. In some instances, these laws may well apply, but it's in fewer cases than people think.

[12] *Reid, Alastair. First Draft News. "Five points to remember about copyright and breaking news." https://firstdraftnews.com/5-points-to-remember-about-copyright-and-breaking-news. (Accessed July 18, 2016)*

Fair dealing and fair use:

1. ***are legal regime dependent and vary from country to country***
2. ***do not exist in every jurisdiction***
3. ***have specific, important restrictions depending on jurisdiction***

First, fair dealing and fair use are not interchangeable synonyms. They are legal regime dependent and what such laws cover varies from country to country. Second, fair dealing or fair use doesn't exist in every jurisdiction. They exist in many, but not every. We highlight this later in a review of different countries and fair use laws. Third, there are specific, important restrictions on fair dealing and fair use depending on the jurisdiction. In the UK for instance, fair dealing (not fair use) laws do not cover photographs. You cannot claim a fair dealing defense if you use a photograph sourced from social media without copyright clearance in the UK. In Finland, there is no general fair use defense, but there are exceptions for reporting on current events. In all cases, what is important to know is that it is where the content is used that is relevant, not where it was captured. So, for example, an American newspaper could fair use a British photographer's work in the United States relying on the law principles of the US. If it then wanted to sell copies of its paper in the UK, containing that photograph, it would have to consider British copyright law.

If fair use or fair dealing does apply in your country, make sure you understand it. There are three important issues to bear in mind.

First is time. Fair use or fair dealing is, in general, only applicable when an event is live and newsworthy. When the newsworthiness ceases to apply, so does fair use or fair dealing. For instance, when a news organisation used eyewitness media without the permission of the content creator during the Charlie Hebdo shootings they could, theoretically, rely on a fair use or fair dealing defense for as long as the event was newsworthy. If, however, the same organisation wanted to use the same piece of content in an end-of-year review, fair use or fair dealing would no longer apply and permission would be required.

The second issue is if content has been published. Published, in this case, applies if a piece of content has been shared to a public social media network. However, increasingly, content is shared first on private social messaging apps such as WhatsApp. The question that has to be asked is whether sharing in private social spaces constitutes publishing.

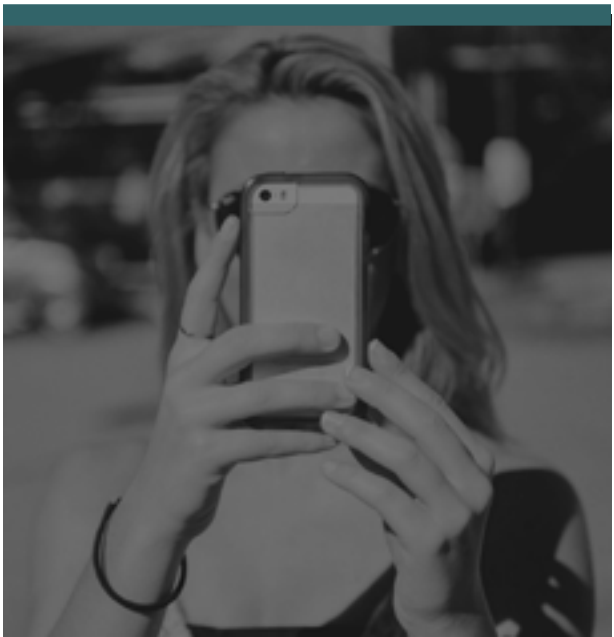
The third issue is crediting or attribution. If you are using content from social media under fair dealing or fair use, all reasonable attempts must be made to credit or give attribution to the creator of the content. However, in doing so you should also bear in mind the ethical considerations and legal privacy issues of publishing an individual's name without their consent — especially if doing so could put them in danger or compromise them in some other way.

These issues highlight that relying upon fair dealing or fair use is not as easy or as convenient as it may

initially appear. It really should be a last resort and if you are going to argue fair dealing or fair use when working with eyewitness media, you have to understand the law in your country, how it applies, and for how long.

All of the considerations sketched above highlight just how crucial it is for the social media newsgatherer to understand copyright considerations around social media, and understand that the landscape is ever-changing.

While many news organisations have used content sourced from social media without permission and have not had their fingers burned, the cases of Alfonzo Cutaia, Daniel Morel and the Croydon Cyclist illustrate that content creators and uploaders are becoming more aware of their rights. Knowledge of social media copyright laws now has to be part of every social journalist's toolkit.



KEY POINTS

1. Verify the content creator - the person who pushed the button is the copyright holder.

2. Social media platforms do not own the copyright - the person who pushed the button is the copyright holder.

3. Embedding content without permission is not a copyright infringement, however, embedding content that has been posted without the consent of the copyright holder is likely to be an infringement. Ask the uploader.

4. Scraping, or removing a piece of content from its original communication platform and running it as your own is copyright infringement.

5. Request permission to use content in clear, uncomplicated language and explain how and when the content will be used.

6. “Fair use” can often apply providing the news event is on-going, the item has already been published and reasonable efforts have been made towards appropriate attribution. Every country has its own interpretation.

TWO

COPYRIGHT AND JURISDICTION

The discussion above highlights some of the essential copyright considerations that every journalist wishing to use eyewitness media should bear in mind. But we also need to consider that laws vary from country to country and that a news organisation, in most cases, is ultimately responsible for its actions depending on where it is located and where it uses the content.

Here, we look at how copyright applies to eyewitness media in some of the world's biggest media markets: the US, the UK, France, Germany, Australia and the Nordic region. The goal is to highlight some of the similarities across these markets but also to identify how there is variance.

COPYRIGHT BY COUNTRY

UNITED KINGDOM

Copyright in the UK is governed by the Copyright, Designs and Patents Act 1988.

Fair dealing does apply and is a defense to rely upon after the fact.

UNITED STATES

Copyright in the U.S. is governed by the The Copyright Act of 1976.

Fair use is allowed for and unlike the UK, no distinction is made between a video, an audio recording or a photograph.

GERMANY

Copyright in Germany is governed by the Urheberrechtsgesetz — the German Act on Copyright and Related Rights of 1965.

There is no fair dealing or fair use, which means a news organisation is much safer and less open to allegations of copyright infringement if it gets permission to use eyewitness media in all situations.

FRANCE

Copyright in France is governed by Code de la propriété intellectuelle.

Fair use does exist in the French law; it is easier and preferable for a news organisation to obtain permission for use of eyewitness media.

FINLAND

Copyright in Finland is governed by the Copyright Act of 1961 and grants the creator of a work its copyright to exploit and the right to make it available to the public.

Fair use or fair dealing do not exist, however, one section of the law in certain cases allow news organisations to use social media content.

AUSTRALIA

Copyright in Australia is governed by the Copyright Act of 1968

The Copyright Act allows for the use of works for “fair dealing” if it is being used to report the news. Unlike in the UK, fair dealing is permissible for photographs.

THREE

COPYRIGHT, EYEWITNESS MEDIA AND THE UNITED KINGDOM

Copyright in the UK is governed by the Copyright, Designs and Patents Act 1988.[13]

For the purpose of news, eyewitness media and social media networks, the law divides content into two, distinguishing between photographs (which fall under artistic works), and video and audio recordings. Ownership of a piece of content belongs, in the first instance, to the author of a work (unless they were an employee creating the content in the course of their employment). The owner of the work has the right to transfer ownership or to grant a license for use to a third party. This can be partial or specific right to use (for instance, a non-exclusive license for a news organisation, but the ownership remains with the author who may grant a license to other news outlets) or a total assignment, giving up all rights to use (a full transfer of copyright). Importantly, the law notes that the "assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor." That is to say, assignment of copyright should be completed through a signed document.

[13]*Copyright, Designs and Patents Act 1988. http://www.legislation.gov.uk/ukpga/1988/48 (Accessed July 30, 2016)*

FAIR DEALING

Fair dealing does apply in the UK and is described as being an exception to UK copyright law, which allows for the use of copyrighted works without licensing in certain circumstances. It is governed by Sections 29, 30 and 30A of the Copyright, Designs and Patents Act. News reporting is covered under Section 30. Section 30 states:

- Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement [and provided that the work has been made available to the public].
- Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3) it is accompanied by a sufficient acknowledgement.
- No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.

It's important to note here that:

1. For fair dealing to apply, the video or audio has to be publicly available (this raises questions around, for instance, the use of content that originated on private social messaging apps such as WhatsApp or Signal).
2. Fair dealing applies to current events.
3. Fair dealing does not apply to photographs.
4. Acknowledgement should be given except where this is impossible.

In the UK, fair dealing is a defense to rely upon after the fact. Therefore, when deciding to use a piece of content without permission, a UK news organisation should ask itself how it would defend its actions under fair dealing were it to be accused of copyright infringement.

INTERVIEW

ALISON GOW

Digital Innovation Editor,
Trinity Mirror Regionals

What are the major copyright challenges you have when thinking about using content sourced from social media?

The biggest copyright challenges are:

Have we asked the right questions to determine absolutely that the person we are asking is the originator of the content?

Is it a fair representation (i.e. is the image genuine); what sort of credit is the person requesting — name, no identification, money?

Do they understand how their content will be used. For example, we use content across our news group via the internal Trinity Mirror Wire, and someone who gives their content to our local newsroom in the town of Grimsby might later see it on the Mirror's national website. We have to ensure they are aware of that.

It's much easier to explain clearly in advance than apologise and try and retrieve a situation where you've annoyed/upset someone who was previously quite happy to collaborate with you.

Do you employ the argument of fair use or fair dealing when using content sourced from social media? How does this work in your jurisdiction?

We take a cautious line on this and will seek and follow the advice of our legal team. As regional brands our reputations are hugely important — just because platforms shift, it shouldn't mean our ethics and ethos does too. We are aware of the need to deal honourably with our audiences because they are local as well as global.

However, it can be frustrating when you see a photo circulating across all other media — regional and national — and we've not used it because we can't be sure of origins. Generally we will try to work closely

> It can be frustrating when you see a photo circulating across all other media and we've not used it because we can't be sure of origins

with an official agency (such as the police) to resolve this. Another problem is when photos start circulating from news agencies where we can't necessarily always verify where they have been sourced from (e.g. are they lifted from a closed Facebook group?).

What is your recommendation for news organisations struggling with social media content usage and copyright?

Use direct questions around ownership and usage — e.g. "did you take this photo yourself/shoot this video," "Do I have your permission, as the owner of this image, to publish across all our platforms?" Always start from a position of "I need to verify this is true," use a reverse image verifier to check photo history and scrutinise metadata if you can. Look back at the poster's internet history — are they longterm users of the platform they've posted the content on? Who are they following/linked to? What do the rest of their posts "feel" like? Who do they converse with, and what language do they use? Also, it's so simple to tamper with elements of, say, a Tweet; I'd say only trust screen-grabbed Tweets you've grabbed yourself.

Do you have any further recommendations?

Make sure you have checked if your source wants to be credited — not everyone will want their name or their handle displayed. And if they do not want payment, make sure you have a note of the conversation somewhere; screengrab the agreement if it's via social media, save an email, take a shorthand note of a phone conversation.

FOUR

COPYRIGHT, EYEWITNESS MEDIA AND THE UNITED STATES

Copyright in the US is governed by The Copyright Act of 1976.[14] Ownership of the work belongs initially to its author. The owner has the right to transfer ownership of the work or to grant a licence for use to a third party.

FAIR USE

In section 107 of the Copyright Act of 1976 "the fair use of a copyrighted work" is allowed for, which includes use for news reporting. It also notes that "The fact that a work is unpublished shall not itself bar a finding of fair use." Unlike, for instance, the UK, no distinction is made between forms of content. Fair use can apply to a video, audio recording or a photograph. In determining if a fair use defense can be used, the Act considers:

[14] *Copyright Law of the United States. http://www.copyright.gov/title17/ (Accessed July 30, 2016)*

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

If we take those determiners for fair use in the US, journalists wanting to use social media content in their reporting without permission should ask themselves: Why are they using the content? What does the content depict? How much they are using? And, considering section 106 of the Copyright Act, which gives the author the right to claim authorship, the author should be acknowledged as such.

INTERVIEW

ADAM ELLICK

Senior International Video Correspondent,
The New York Times

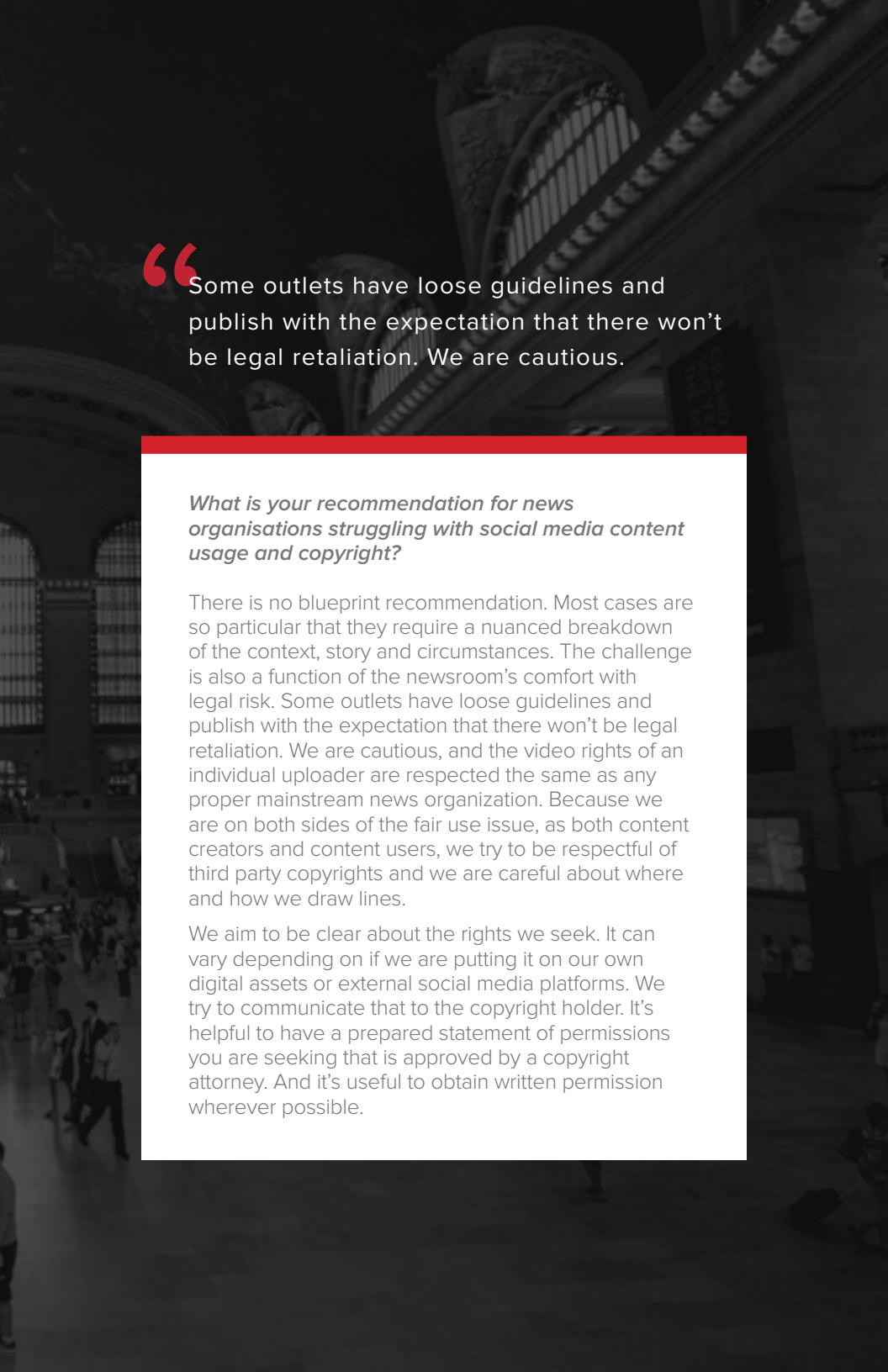
What are the major copyright challenges you have when thinking about using content sourced from social media?

One major challenge is clearing the rights to eyewitness media in a timely fashion, so that we can use it before the news cycle expires. There is a trove of footage that is sourced from third party platforms, but it quickly becomes commoditized. We are trying to discover and verify our own videos, but doing so is only part of the challenge. We then reach out to uploaders and those who retain the rights, and we try to clear usage rights as soon as possible. With time and language differences, it can be a challenge. Another necessary hurdle is verification, which means using technologies to ensure the footage is not from another event, and also that the uploader is the copyright holder.

Do you employ the argument of fair use or fair dealing when using content sourced from social media? How does this work in your jurisdiction?

Our legal team advises us on fair use cases and we employ fair use when it is journalistically and legally appropriate. We will sometimes "write into" the footage to offer context and attribution.

We also note that the concept of "fair use" applies to content created in the US. Other countries don't necessarily have the concept of "fair use." It is a challenge to know the copyright laws in every country, especially in breaking news situations. For example, if you reach out to an uploader and you are waiting for permission, but need to publish, can you "fair use" it?



> Some outlets have loose guidelines and publish with the expectation that there won't be legal retaliation. We are cautious.

What is your recommendation for news organisations struggling with social media content usage and copyright?

There is no blueprint recommendation. Most cases are so particular that they require a nuanced breakdown of the context, story and circumstances. The challenge is also a function of the newsroom's comfort with legal risk. Some outlets have loose guidelines and publish with the expectation that there won't be legal retaliation. We are cautious, and the video rights of an individual uploader are respected the same as any proper mainstream news organization. Because we are on both sides of the fair use issue, as both content creators and content users, we try to be respectful of third party copyrights and we are careful about where and how we draw lines.

We aim to be clear about the rights we seek. It can vary depending on if we are putting it on our own digital assets or external social media platforms. We try to communicate that to the copyright holder. It's helpful to have a prepared statement of permissions you are seeking that is approved by a copyright attorney. And it's useful to obtain written permission wherever possible.

FIVE

COPYRIGHT, EYEWITNESS MEDIA AND GERMANY

Copyright in Germany is governed by the Urheberrechtsgesetz — the German Act on Copyright and Related Rights of 1965.[15] For the purposes of eyewitness media, the law labels protected works as being: Photographic works, including works produced by processes similar to photography and cinematographic works, including works produced by processes similar to cinematography. The rights of the authors or joint authors are fully protected for exploitation and remuneration except in certain cases. While there is no fair dealing or fair use element to the law (unlike in the UK, US or Australia), section VI of the law provides for Limitations on Copyright. In Section VI, Article 50 grants organisations permission to use certain copyrighted content for reporting on current events.

Article 50 states that:

> "For the purposes of reporting on current events by broadcasting or similar technical means in newspapers, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on film, the reproduction,

[15] *Act on Copyright and Related Rights (Copyright Act). https://www.gesetze-im-internet.de/englisch_urhg/index.html (Accessed July 30, 2016)*

> distribution and communication to the public of works which become perceivable in the course of these events shall be permitted to the extent justified by the purpose of the report."

Thanos Rammos of law firm Taylor Wessing argues, however, that this does not grant news organisations permission to use eyewitness media sourced from social media in its reporting. Rammos states: "This defence [Article 50] does not provide news organisations with grounds to use, for example, videos taken from social media sites to report breaking news given that these videos actually report on the event itself."[16]

One of the safest ways for news organisations in Germany to use social media content is through embedding (provided the embedded content is itself there with the permission of the rights holder). Rammos explains that this is due to the BestWater Court of Justice ruling mentioned earlier. Rammos states that "embedding a copyright YouTube video on a website would not constitute copyright infringement if the original author or publisher had not used any access restrictions." He goes on to argue that this would only be applicable to online usage as to any broadcast or printing of the same content "the CJEU's rationale will most likely not apply and there is a risk of copyright infringement."

What is clear is that in Germany, with no fair use or fair dealing defense, a news organisation is much safer and less open to allegations of copyright infringement if it gets permission to use eyewitness media in all situations.

[16]*Rammos, Thanos. Taylor Wessing. "Using user generated content in Germany for purposes of news reporting." https://united-kingdom.taylorwessing.com/download/article_ugc_german_news.html (Accessed July 30, 2016).*

INTERVIEW

KRISTIN ZEIER

Head of Social Media News,
Deutsche Welle

What are the major copyright challenges you have when thinking about using content sourced from social media?

The major issue is video. We rely on social media particularly in breaking news situations when social media often is the best and fastest source for getting eyewitness accounts. We prefer using video on TV simply because it works best with its moving images. However, once we have verified that the content is legitimate, the process of obtaining the rights to use it often takes too long. We contact the original owner of the video (which we determine based on our verification process), but getting an answer can take quite a bit of time, which we don't necessarily have in a breaking news situation. We also frequently find that users have agreed for specific media outlets to use their content and then decide later that they don't want it to be used because of the negative attention they have received since then. Or copyright holders want to be paid for their content once they realise several media outlets are interested in their footage. We, as a public broadcaster, don't pay for this kind of content.

An additional concern for a broadcaster like Deutsche Welle is to make sure the owner of the copyright material understands that his/her content will be broadcast internationally on TV and shared across social media platforms, possibly also in various languages. The owner of the material needs to agree to this. Particularly in cases of sensitive material, the owner must be made clear of these possibilities. Examples of this could be critical statements on issues in the Arab world or comments on political leaders in repressive media markets. Owners of the copyright material should also be asked how they want to be identified as the source. Many in repressive media markets wish to remain anonymous.

> When content is directly related to a breaking news story and is central to understanding a story's development, then we assume it falls under fair use dealing as our legal department has defined it with us.

Do you employ the argument of fair use or fair dealing when using content sourced from social media? How does this work in your jurisdiction?

When content is directly related to a breaking news story and is central to understanding a story's development, then we assume it falls under fair use dealing as our legal department has defined it with us. Examples of this could be smartphone video recordings of a police shooting or content published by official public sources such as police departments or NGOs. When it is also clear that the user who uploaded content is interested in having the message spread, we also consider it to fall under the terms of fair use — in the case that it is directly connected to a breaking news event.

What is your recommendation for news organisations struggling with social media content usage and copyright?

The first step is getting faster and being more accurate in identifying the original owner of the video material. The verification process can be quite time consuming, but forgoing this can also lead down the wrong paths and cost additional time in contacting the correct owner. It's really crucial for media outlets to establish a list of basic guidelines with their legal departments so they can act quickly and efficiently whenever the need arises. Otherwise, getting legal approval can cost too much time. Developing a good working relationship with the legal department is also key, because this allows for the legal department to better understand the needs of the journalists and their program decisions.

SIX

COPYRIGHT, EYEWITNESS MEDIA AND FRANCE

Copyright in France is governed by Code de la propriété intellectuelle — the Intellectual Property Code.

Fair use does exist in the French law. It is covered by Article L122-5 of the law.[17] For our purposes, sections 3 and 9 are of interest.

Section 3 allows for, on condition that the name of the author and the source are clearly stated:
a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated.

Section 9 allows for: "The reproduction or representation, in totality or partially, of a graphic, plastic or architectural work, by print, broadcast or online media, with the exclusive goal of providing immediate information, and directly in relation to it, upon condition of clear identification of the author of the work."

[17] *Code de la propriété intellectuelle - Article L122-5 https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=BF1AAE00BD1C67AC85C19C6E6C919273.tpdjo15v_3?idArticle=LEGIARTI000020740486&cidTexte=LEGITEXT000006069414&dateTexte=20101108 (Accessed July 30, 2016).*

Notably, section 9 does not apply to video, rather only to photographs. If a news publisher wished to use a fair use defense for a video in France, that publisher would have to rely upon the short quotation defense.

In French law, it is clear that it is easier and preferable for a news organisation to obtain permission for use eyewitness media sourced from social media, rather than to rely upon a tight, strict Article L122-5.

INTERVIEW

PETER BARABAS

Editor-in-Chief,
Euronews

What are the major copyright challenges you have when thinking about using content sourced from social media?

The biggest challenges come from using material online rather than on TV. Particularly because sites like YouTube and Facebook are more active on blocking content and licensing companies are aggressive in actively seeking out transgressors. Music is a major challenge because you may not notice if it is on in the background. We tend to ask Storyful to source material for us, partly because we don't want to be hassling people who are already receiving hundreds of requests, partly because they will verify as well as securing copyright which can be a slow process. Another issue is making sure that all the journalists in the newsroom are aware of the rules.

Do you employ the argument of fair use or fair dealing when using content sourced from social media? How does this work in your jurisdiction?

As a pan-European news outlet, Euronews does use the fair dealing principle, but only on those occasions where the need to use content is truly necessary. It is a grey area both for journalists and our legal protectors as there can always be legal consequences.

What is your recommendation for news organisations struggling with social media content usage and copyright?

There is lots of training you can get, much of it free (there's great tips on First Draft, and Google, for instance) and if you cannot train all the journalists, it's

> "Journalists should think twice and keep an open mind about 'too good to be true' content

worth having a specialist who can channel requests, avoid duplication and know the rules. Otherwise, you can outsource it to an agency like Storyful. If you are international, you always have to play on the safe side because you can't know the nuances of the rules in every country in which you operate.

With the constant expansion of this area of content, journalists should equally be mindful about the threat from the darker side of it. Think twice and keep an open mind about "too good to be true" content (videos, photos, information), about all kinds of campaigns whose clear aim is to get traction on social media, about stories clearly "built" by individuals who look for buzz for all kinds of reasons. There are already websites that verify hoaxes and rumors.

The US election campaign brought up this issue, namely several website or pseudo-journalistic web portals whose clear aim was to propel lies or intentionally biased content, half-baked "journalistic" content, through highly sophisticated machineries of deception. Several reputable news outlets did fall for stories originating from political propaganda machines, meaning that altered information, photos or videos did slip through into the traditional content area. Journalists should always use common sense and look for the real sources/attribution of such content through a careful set of checks and balances, mindful not to fall into such traps.

Do you have any further recommendations?

You can't really get by without using social content, especially around breaking news. Obviously copyright isn't the only issue — verification and ethical questions come up — so you need to know what you are doing. We're giving all our 400 plus journalists training at the beginning of 2017 to ensure we are equipping them to use the best material correctly.

SEVEN

COPYRIGHT, EYEWITNESS MEDIA AND FINLAND

Copyright in Finland is governed by the Copyright Act of 1961 [18], which has most recently been updated in 2015. The law grants the creator of a work its copyright to exploit it, which includes: video, audio and photographic works. The law also grants the author of a work the right to make it available to the public. This has implications for content received through private social messaging apps — and behooves journalists in Finland to be sure of the authorship of any content obtained by such means.

While fair use or fair dealing do not exist in the sense that they do in the UK and US, one section of the law is of interest to us and would, in certain cases, allow news organisations to use social media content. This comes under Chapter 2 of the law which governs limitations on copyright.

Section 22 in Chapter 2 allows for quotations of works to be made — as long as that work has been made public. It states that: "A work made public may be quoted, in accordance with proper usage to the extent necessary for the purpose." Again, this likely excludes content shared on private messaging apps as they have not been made public.

[18] *Copyright Act (404/1961, amendments up to 608/2015). http://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf (Accessed July 30, 2016)*

INTERVIEW

PÄIVI ANTTIKOSKI

Editor-in-Chief,
Helsingin Sanomat

What are the major copyright challenges you have when thinking about using content sourced from social media?

At Helsingin Sanomat we have solved the question of copyright laws in a pretty simple way. When sourcing eyewitness media or asking members of the public to share their content with us, we announce always that all rights to the content will be transferred to us. We state this very clearly in our paper and website. If an individual doesn't accept this, then they should not share their content with us. Thankfully, most members of our audience accept this.

One of the main concerns we have is, of course, if the stories and videos are authentic. For example, we get a lots of opinion pieces, and those are often very popular, especially on our website. We publish delicate and personal issues anonymously, and this always raises questions: is the person or the story real? We usually require the writers to tell us their name, and then our job is to check that they really exist and the story is true, which is not always easy.

We really want to receive more eyewitness media. As I said, we get lots of opinion pieces, but would love to have more pictures and videos of events from eyewitnesses. This would require more activity from us on social media platforms. We often ask people to share their stories about issues concerning family life, parenthood, relationships and so on, but getting more material of breaking news is difficult.

“We really want to receive more pictures and videos of events from eyewitnesses. This would require more activity from us on social media platforms

EIGHT

COPYRIGHT, EYEWITNESS MEDIA AND AUSTRALIA

Copyright in Australia is governed by the Copyright Act of 1968[19], which has most recently been amended in 2016. The Copyright Act makes the authors of a work its owner and grants the owner copyright rights over the work. These rights include: the right of reproduction, to upload it online or make it available to the public. The owner also has the right to monetise the content and transfer ownership or grant a licence for use to a third party.

The Copyright Act allows for the use of works for "fair dealing" if it is being used to report the news. However, the law requires an evaluation to be made of each piece of content used. Fair dealing for reporting news is covered under section 42 of the Copyright Act which states that:

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:

[19]*Copyright Act of 1968. https://www.legislation.gov.au/Details/C2016C00741 (Accessed July 30, 2016)*

(a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
(b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

(2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

Unlike in the UK, for instance, fair dealing is permissible for photographs (which come under the umbrella of artistic works in the law's definitions).

To note here is that sufficient acknowledgement has to be made of the work — i.e. the author of the work should be acknowledged if a news organisation wishes to make a fair dealing defense.

While the right to fair dealing is present in Australia, it's important, once again, that each news organisation considers how it would use the defense if deciding to use a piece of content on these grounds. As each piece of content is considering individually, it is important to weigh up the considerations on each usage. It should not be used as a blanket excuse to use a piece of content without obtaining permission and, as in all jurisdictions, it is advisable to clear rights with the content creator and owner.

INTERVIEW

JULIE POSETTI

Digital Editorial Capability Lead,
Fairfax Media

What are the major copyright challenges you have when thinking about using content sourced from social media?

Copyright is a big concern at Fairfax Media. At our recently launched training course on media law in the Digital Age, the greatest number of questions from journalists, including high-level reporters and editors, was around copyright. They asked questions such as: "if we embed pictures rather than copy and paste, are we legally covered?" "Do we have to get written permission?" "How much video can we use from social media channels?" "Can we use any at all without breaching fair use?" One of the greatest concerns at our production desks on the newsroom floors is about copyright. For instance, we had a discussion at one point about whether it was potentially safe to crop an image from another website as long as you include the name of the website. But what happens when you use it as a thumbnail and then it looks like an appropriation? Thankfully, our picture editors, digital producers and editors have increasing awareness around the risk of copyright, but we don't necessarily have the skills or knowledge across the newsrooms. That's why we're developing a three-hour training module around copyright, to build up those skills and knowledge. That's the level of concern we have. In course feedback, I've seen an increase in how much copyright is the issue that dominates. The reality is that we're increasingly in a "publish now" environment and this means that there are fewer checks and balances. We really have to spread copyright knowledge to all levels of the editorial structure.

> "Journalists should think twice and keep an open mind about 'too good to be true' content

> In broadcast news, we have operated on the understanding that we could use 10% of a track if it was crucial to a story. The way it applies to online content is unclear,

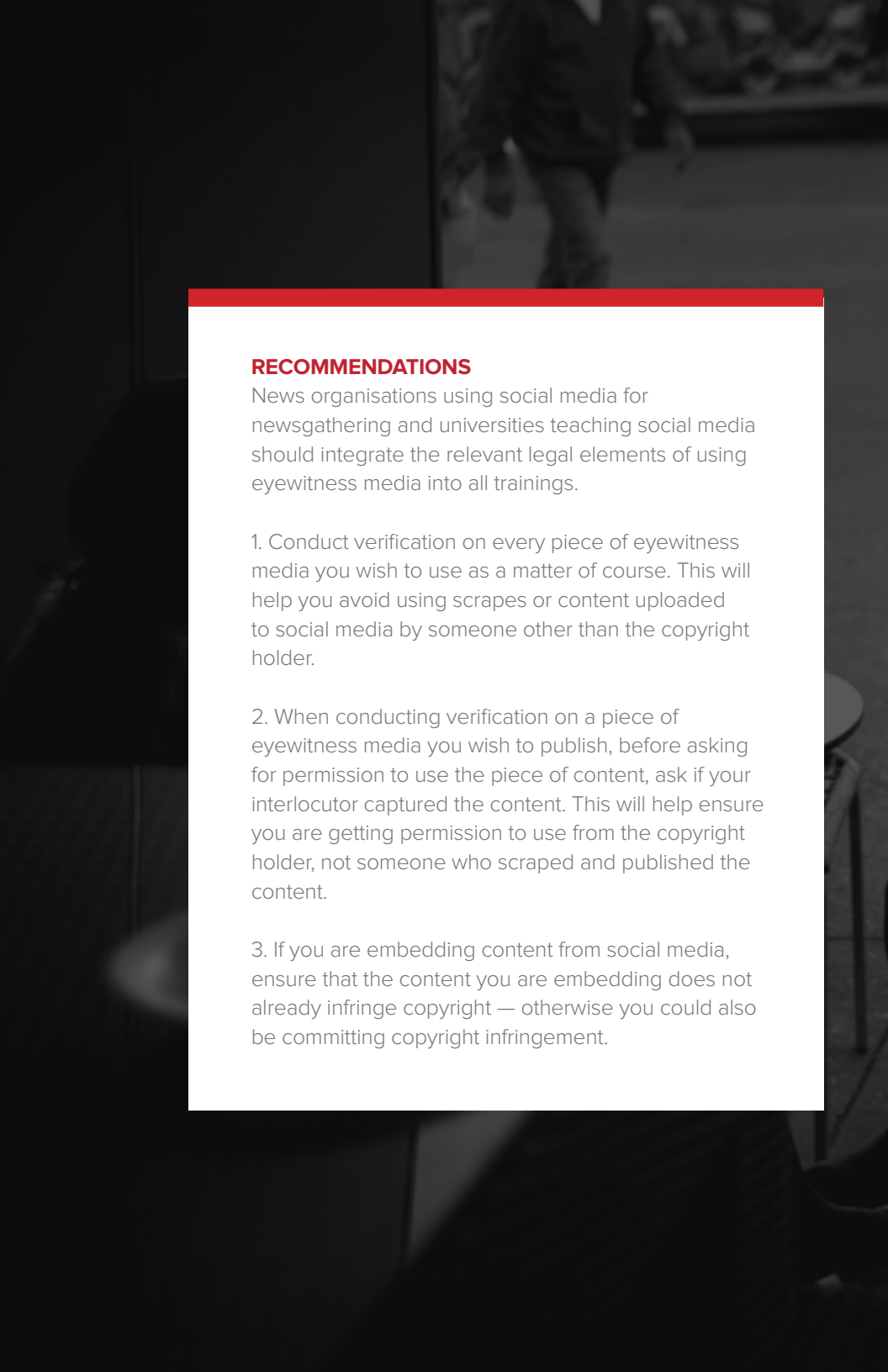
Do you employ the argument of fair use or fair dealing when using content sourced from social media? How does this work in your jurisdiction?

Fair dealing is complex and is based on the British system. In broadcast news, we have operated on the understanding that we could use 10 percent of a track if it was crucial to a story we were telling. We could take competitor content if it was contextual, minimal, crucial to the story and we credited appropriately. The way it applies to online content is unclear. Nor is it clear what you can use. What about GIFs, for instance? Are these photographs or videos? And what does 10 percent of a GIF look like? The 10 percent rule is a good guide, but it's not entirely clear. Our lawyers get more and more enquiries asking for explanations about how eyewitness media or UGC can be used.

One of the biggest problems is that there are limited cases and the law is analogue — and, while we take cues from international organisations, these can only be guides.

What is your recommendation for news organisations struggling with social media content usage and copyright?

There needs to be an increased literacy and knowledge exchange around understanding copyright, around the production process. It does involve dragging people off the newsroom floor for training and going through case studies, but it has to be done. We also need to create the headspace to understand the issues to help people in the decision making process. The chain of command has to ensure that resources are readily available. As every journalist can potentially hit publish now, copyright around eyewitness media has to be clear for everyone in the newsroom.



RECOMMENDATIONS

News organisations using social media for newsgathering and universities teaching social media should integrate the relevant legal elements of using eyewitness media into all trainings.

1. Conduct verification on every piece of eyewitness media you wish to use as a matter of course. This will help you avoid using scrapes or content uploaded to social media by someone other than the copyright holder.

2. When conducting verification on a piece of eyewitness media you wish to publish, before asking for permission to use the piece of content, ask if your interlocutor captured the content. This will help ensure you are getting permission to use from the copyright holder, not someone who scraped and published the content.

3. If you are embedding content from social media, ensure that the content you are embedding does not already infringe copyright — otherwise you could also be committing copyright infringement.

4. Do not rely on fair use, fair dealing or a similar equivalent legislation as a matter of course. Remember, in general, such legislation only exists in certain newsworthy situations where the public has the right to know. It does not apply to every piece of eyewitness media published on social media platforms.

5. If you aim to rely on fair use, fair dealing or an similar equivalent in your jurisdiction, put procedures in place before you are faced with the decision to publish. Also, ensure you understand what fair use or fair dealing in your jurisdiction covers and what this means you can and cannot use under such legal regimes.

6. If you are relying on fair use, fair dealing or an similar equivalent in your jurisdiction, ensure you credit the content creator.

7. Do not rely on verbal permission to use eyewitness media. Take the discussion offline, explain what its use may mean to the uploader and get written permission.

8. Ensure you received informed consent by avoiding obscure legal language when asking for permission to use a piece of content.

ABOUT THE AUTHOR

Sam Dubberley/@samdubberley

Sam Dubberley is a co-founder of Eyewitness Media Hub and manager of the Digital Verification Corps at Amnesty International. He has over ten years' experience in broadcast news and was head of the Eurovision News Exchange from 2010 to 2013, managing the world's largest exchange of television news content. As a fellow of the Tow Center for Digital Journalism at Columbia University, Sam co-authored a global study exploring the use of user-generated content in TV and online news output. He also lead the research on Eyewitness Media Hub's most recent project titled 'Making Secondary Trauma a Primary Issue: A Study of Eyewitness Media and Vicarious Trauma on the Digital Frontline'.

ADDITIONAL RESOURCES

First Draft, A simple guide to the complexities of copyright law
[https://firstdraftnews.com/resource/a-simple-guide-to-the-complexities-of-copyright-law/]

Dart Center, Working with Traumatic Imagery
[http://dartcenter.org/content/working-with-traumatic-imagery]

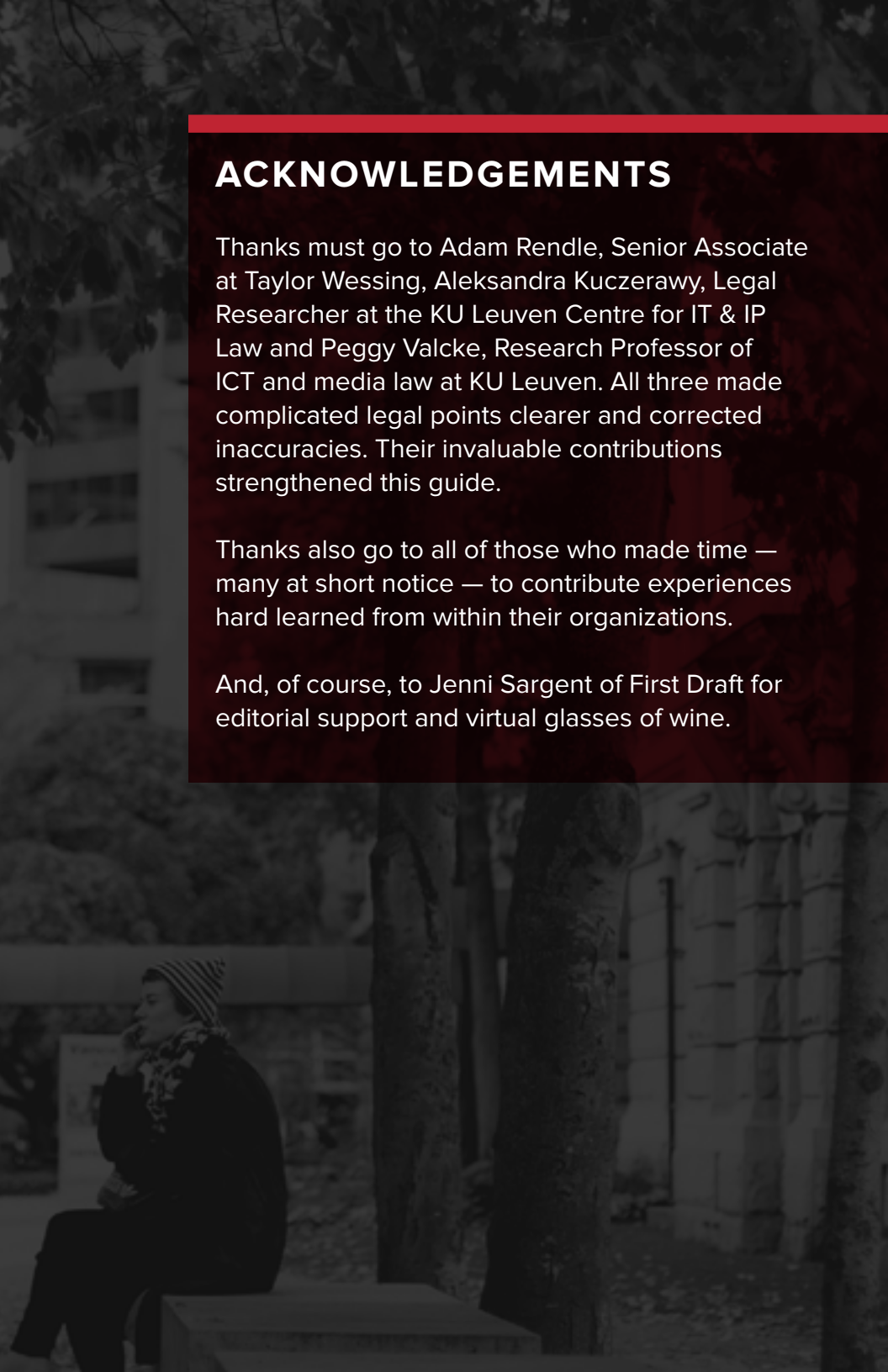
Eyewitness Media Hub, Guiding Principles for Handling Eyewitness Media
[http://eyewitnessmediahub.com/resources/guiding-principles-for-handling-eyewitness-media]

ONA, Social Newsgathering Ethics Code
[http://toolkit.journalists.org/social-newsgathering/]

WITNESS, Ethical Guidelines: Using Eyewitness Videos in Human Rights Reporting and Advocacy
[https://library.witness.org/product/video-as-evidence-ethical-guidelines/]

All of the issues and recommendations raised in this guide feature in articles and resources published on firstdraftnews.com.


PRECISE



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Thanks also go to all of those who made time — many at short notice — to contribute experiences hard learned from within their organizations.

And, of course, to Jenni Sargent of First Draft for editorial support and virtual glasses of wine.

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