# Legal Brief #9: Influencers and Intellectual Property: Introduction and Focus on Copyright

Social media influencers share creativity and innovation with the world, whether it is their own or that of a third party. The content they create is their intellectual property (IP) and should be treated and protected as such. Likewise, influencers should respect the IP of others and take care not to infringe it. They should not breach the law and, like anyone else, they could be held liable if they do. It is also important that influencers do not mislead their audience by promoting infringing goods or services (e.g. a fake cosmetic product that could damage their health or a pirated live sporting event, the profits of which could fund criminal activities). Social media influencers can play a pivotal role in fostering a culture of respect for intellectual property among their followers and fellow influencers.

# What is IP and what does it protect?

IP refers to creations and inventions of the human intellect. Most of the content an influencer shares or creates and the results of that work can be protected through IP rights. These rights enable influencers, who might also be content creators in some cases, to benefit from their work and to act against infringers.

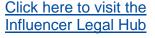
There is no one-size-fits-all IP protection measure that protects everything everywhere. Each IP right or other IP protection measure serves a specific purpose in a specific country or region. IP rights encompass copyright and industrial property rights, such as trade marks, designs, patents and geographical indications. This brief focuses on copyright as this IP right is one of the most relevant for influencers. Information on trade marks and designs can be found in legal brief #10.

**Best practices**: take a look at this <u>infographic</u> on the various types of IP rights and watch the 'IP is everywhere' video. Expand your IP knowledge with the IP basics module of the EUIPO massive open online course (MOOC) on IP Essentials. Follow Ideas Powered on Facebook, Instagram and  $\underline{X}$ .

## What can be protected by copyright and how does copyright protection work?

Copyright is an exclusive right that is granted automatically with the creation and fixation of the original work. This includes literary (e.g. a book but also computer programs fall under this category), artistic (e.g. memes), musical, visual and audiovisual works and databases. Some original short texts can be copyright protected, such as an original social media post. With a smartphone, influencers can create an original podcast, share and monetise it via online platforms, such as Apple Music, Spotify or YouTube. To be considered original, the content must be a concrete expression of the author's free and creative choices.

An influencer may also use a song in their videos, in which case, they should obtain the licence to use it in order to avoid committing an IP infringement (licensing and how to avoid copyright infringement is explained later in the document). Furthermore, there may be different rights holders involved in the song used: the author of the lyrics and musical composition, but also the performers (singer and musical instrument players). While authors benefit from copyright protection, performers and interpreters benefit from 'related rights' with a different scope and duration.







When, where and for how long? In the EU, copyright protection is obtained automatically when there is a fixation in any form of the work created. A work remains protected for **70 years** after the author's death, or 70 years after the death of the last surviving author in the case of a work of joint authorship. Copyright is a territorial right, so despite EU and international harmonisation, the copyright's scope may differ depending on the country. For 'related rights', such as a musical performance or soundtrack recording, the duration starts from the moment where the specific act took place.

What does © mean? Even if there is no obligation to register copyright, rights holders may inform others of the existence of copyright, reducing the likelihood of a potential infringement. For example, an influencer, who might also be a content creator in some case, can mark their copyrighted works by including the copyright symbol (©), followed by their name and the year of the work's creation. Some national laws allow copyright registration through non-mandatory registration systems. This may be useful, particularly where proof of possession and creation on a certain date is necessary in legal proceedings or in negotiations with potential partners.

**Best practice:** for further information explore the dedicated webpage on <u>Your Europe</u>.

## What rights are granted to authors?

#### Economic rights:

- right to **make copies** of the work (reproduction);
- right to communicate to the public (e.g. by broadcasting it online or uploading it on an online platform like YouTube);
- right to **distribute physical copies** or make them available:
- right to adapt or translate the work.

#### Moral rights:

- right of paternity (e.g. the right to be acknowledged as an author);
- right of disclosure (e.g. the right to decide whether and how the work will be published or made available to the public);
- right of **integrity** (e.g. the right to preserve the work the way the author chose to express themselves or decide in which context it can or cannot be used).

**Licensing:** authorisation for using commercially copyright protected content can be obtained via licences. Licences may include limitations in terms of territory or type of use allowed. Licensing agreements usually focus on economic rights and can also refer to the respect of moral rights, which, in principle, cannot be waived. Such licences can be granted individually or collectively via collective rights organisations. This can be the case for instance of sponsorship contracts in which influencers should pay attention to how the use of the IP rights is defined.

Sometimes authors decide to use <u>Creative Commons</u> (CC0) licensing which is a pre-established system where the rights holder defines in advance the terms under which its works can be reused and shared by an influencer.

**Best practice:** learn more about copyright with the <u>copyright module</u> of the EUIPO MOOC on IP Essentials.





## The EU copyright legislative framework

EU copyright law consists of 13 directives and 2 regulations, harmonising the essential rights of authors, performers, producers and broadcasters. EU copyright rules set out an exhaustive list of exceptions to rights across various copyright directives. Find out more about the applicable copyright legislation in the EU <a href="here">here</a>.

One of the latest adopted pieces of legislation at EU level is the <u>2019 Digital Single Market Directive</u>. It states that content-sharing service providers should get authorisation from the rights holders to make their content available on their platform or to at least show that they have done their best to obtain it. If they then remove the uploaded content that falls within one of the copyright exceptions (such as a parody), they will have to make it available again.

**Best practice**: the EUIPO <u>FAQs on copyright</u> help you navigate what is legal and what is not when using copyright-protected content on the internet in Europe.

# Copyright and new technologies

**New technologies** such as the metaverse, blockchain, generative artificial intelligence (AI) offer new ways of creating, managing, exploiting and disseminating copyright-protected works. Generative AI tools, for example, may be trained on data from the internet, including copyright works where the right holders have not opted out, and have the capacity to produce graphic and audiovisual outputs. From a copyright perspective, this raises a number of questions, notably with regard to copyright enforcement, which are still debated among European and international experts. Read further <a href="here">here</a>.

## Respecting other's copyright and how to avoid copyright infringement

There is a fine line between getting inspiration from someone else's work and plagiarism. Plagiarism is when using somebody else's work without giving credit to the author. As a creator, you might be interested in including some copyright-protected songs or pictures in your Instagram reel, in which case you should mention the right owner.

To use third party's content you must seek authorisation of the author or the rights holder either directly from the rights holder or from a collective management organisation, or using the work in the terms established in an open license. Open licenses are the most popular types of general licenses, under which users do not have to contact them each time they want to use their work.

There are also certain cases when the use of the work may fall within a limitation or exception to copyright, as it may be the case of parody, citation, or educational purposes, but these vary from one country to another.

In the EU, most of the exceptions and limitations are optional. It is for the Member States to decide which ones apply to their territory from an exhaustive list included in <u>Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.</u> There are, however, some mandatory exceptions like for 'temporary acts of reproduction as part of a technical process (transient copies)', for uses of text and data mining technologies, teaching and education purpose, preservation of cultural heritage and for certain online uses (quotation, caricature, parody, pastiche). In all cases, exceptions and limitations must apply only in certain special cases, not





conflict with the normal exploitation of the work and not prejudice the copyright holder (three-steps test).

After the term of protection expires, works enter into the <u>public domain</u> and are freely available for anyone to use. Additionally, some authors may decide to voluntarily allow their works to go into the public domain. Note that sometimes other copyrights may still be in force after works enter the public domain (e.g. translations of works Shakespeare) or some elements might be protected by a trade mark (e.g. Mickey Mouse).

**Best practices:** watch the video 'Once IPon a time' – a tale about the public domain. Whenever you want to use third-party content, you should follow the <u>step-by-step guide: How to obtain copyright clearance in 6 steps</u>.

### What is piracy and how to enforce copyright

**Piracy** is a form of IP infringement, where the infringer tries to steal the copyright of the rightful holder and unduly benefit from their creativity. It is key that influencers do not use their channels to promote pirated content, such as television content, live events (e.g. sports events, films, music or software), as they could be held liable for it and incur penalties (in case of criminal offence) and/or damages to compensate for the prejudice suffered (in case of civil liability). Influencers should also be aware that the mobile applications (apps) they use or recommend to their audiences may be infringing software, which could lead to malware that destroys users' devices. Influencers could also be held liable for misleading their audience into streaming pirated content, such as live sporting events or films. Very often, the profits of IP-infringing practices fund criminal activities. For example, IPTV crime generates a huge amount of illicit revenue for IP criminals in the EU, estimated at more than EUR 1 billion a year.

**Best practice:** the online portal <u>Agorateka</u> helps consumers to identify legal offers for music, television and film, games, books and sporting events in participating European countries.

Copyright provides influencers with the legal grounds to take action to prevent others from using their original content without their authorisation. However, enforcing copyright can be challenging. To be safe, consulting an IP specialist lawyer is recommended. It would be helpful if the influencer has proof of their work with a date, e.g. documenting their work, or considering copyright registries for some works. This will be important for any of the steps mentioned herein. If the influencer's work or a part of it has been used by a third party without their permission, a copyright infringement may be constituted. In such a case the influencer has to collect evidence of the alleged infringement and consider hiring an IP lawyer who could assist with demanding the stop of the infringing activity, e.g. by sending a cease and desist letter. If such an attempt fails, negotiating a settlement with the other party could be explored, e.g. through mediation and arbitration. If the above steps do not prove sufficient, starting court proceedings could be considered.

Regarding IP rights enforcement, it is important to be aware of the following legal instruments:

<u>Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society</u> According to the so-called 'InfoSoc Directive' Member States must provide for appropriate sanctions and remedies in case of copyright infringements. They have to ensure that rightholders can apply for an injunction against





intermediaries whose services are used by a third party to infringe a copyright or related right.

<u>Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights</u>. The so-called 'IPRED' ensures that each EU Member State provides a harmonised set of measures to empower rightsholders in defending their IP rights.

**Best practices:** for more information on resources and studies, visit the <u>European Observatory on Infringements of Intellectual Property Rights</u> web page. To assist IP rights holders in enforcing their rights, the Observatory manages the <u>IP Enforcement Portal</u>, a secure communication tool between rights holders and the EU enforcement authorities.



