



National Writers Union
(UAW Local 1981, AFL-CIO)
256 West 38th Street, Suite 703
New York, NY 10018
www.nwu.org

Contact for EU issues:
Edward Hasbrouck
+1-415-824-0214
edward@hasbrouck.org

**NWU recommendations for implementation by the EU and its members states
of Articles 8-11 on "out of commerce" works
of the EU directive on copyright in the digital single market**

November 2019

1. Criteria and procedures for determining “out of commerce” status

“Customary channels of commerce” for written works must be explicitly recognized as including new self-published digital formats such as Web pages, mobile apps, and e-mail newsletters which may have different formats, structures, and titles than print versions; give no internal indication that they include works previously published in books, magazines, or newspapers; have no ISBNs or identifiers; are listed in no bibliographic or other database; for which there is no search engine; and of which the publisher(s) of the print edition(s) containing the work are typically unaware.

The only way to determine whether a work included in the print holdings of a library is available through one of these customary channels of commerce is to ask the author.

2. Procedures for any rightsholder to, “at any time, easily and effectively” exclude any or all of their works from:

- (a) licensing pursuant to Article 8, Paragraph 1;**
- (b) exception or limitation pursuant to Article 8, Paragraph 2; and/or**
- (c) Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c)**

An “opt-out” requirement is a formality prohibited by the Berne Convention. The more burdensome the opt-out process, the more clearly it constitutes a prohibited formality.

The Directive requires that opt-out be “easy” and “effective”. These requirements should be strictly observed in implementation of the Directive, both by the EUIPO and EU member states.

For opt-out to be easy and available at any time and for all works of a rightsholder, it must be possible for a rightsholder, before any of her works have been deemed “out of commerce”, to exclude all of her works (without having to itemize them, which would rarely be easy and in many cases would be impossible) from any or all of these licensing mechanisms or exceptions, in all EU member states, through a single, one-time exclusion request through the EUIPO portal, effective in all member states.

A system that requires a rightsholder to opt out separately in each member state would be neither “easy” nor “effective”, and would not comply with the Directive or the Berne Convention.