Submissions to Copyright Review Committee

David Brophy

Preliminary remarks

I am making these submissions in a purely personal capacity as someone who has an interest in copyright and who has studied this area of law (Diploma in "UK, EU and US Copyright Law" from Kings College London and currently completing a Master's dissertation with KCL on the boundary and overlap between copyright and design rights). In day to day work I practice as a patent attorney with FRKelly Patent & Trademark Attorneys, but these views are my own and not those of my firm.

General observations on the Copyright & Related Rights Act 2000

The copyright system involves, or ought to involve, a balance between the rights granted to content creators and owners on the one hand, and the public interest on the other hand. The balance, as the Act is currently written, is heavily in favour of the copyright owner and gives minimal consideration to the public interest.

This can be seen from the fair dealings provisions. Acknowledging that Ireland was constrained by the Copyright Directive (Directive 2001/29/EC), we nevertheless failed to provide exceptions for those creating parodies[1], or for private, non-commercial use[2] such as format shifting. These failures have led to specific areas of Irish copyright law being held in disrepute by the overwhelming majority of the public: even before digital media it was commonplace to tape a copy of an album one owned for listening to in the car. Now with digital music players being ubiquitous, it would be difficult to identify a member of the public who does not consider it an entitlement to format shift music one has already bought from CD to MP3, for example. When a provision of the law is widely ignored and held in disrepute by the public it needs to be removed.

In other areas, the Copyright Act showed a similar intention to provide a bare minimum by way of exceptions, tipping the balance far towards the right holder. Take for instance the relatively broad exceptions for educational purposes in the Copyright Directive: Art. 5(2)(c) permits member states to provide exceptions to the reproduction right:

> "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage".

[1] Copyright Directive (Directive 2001/29/EC), Art. 5(3)(k)

[2] Art 5(2)(b)

Art. 5(3)(a) permits member states to provide exceptions to both the reproduction and making available rights for:

> use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;"

This is implemented, for performing a literary, musical or dramatic work in section 55 of the Copyright Act by a provision which circumscribes permitted use to a very narrow subset of the possible situations in which such a work might be used educationally: it must be performed in a school or a university, and the audience must be limited to pupils and teachers (even the presence of a parent appears to automatically render the performance an infringement). The implementation appears to be contrary to the Directive, which says in Recital 42:

> When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

This is an isolated example of a trend seen throughout the fair dealings and exceptions provisions of the Copyright Act: where an exception was introduced it was done grudgingly and in a way where it was all too easy to stray outside the exception and into the area of infringement. To be fair we simply transposed or paraphrased many of our provisions from the UK's Copyright Designs and Patents Act 1988, but the Hargreaves Report makes it clear that the UK legislation is not regarded as fit for purpose, and for the same reasons it is inappropriate to retain a law modelled on that template in many respects.

The Hargreaves Report

The Review Committee will be familiar with the contents of Hargreaves, and I would support the adoption of all of the measures recommended in that Report. In particular, recommendations 4 and 5 are particularly appropriate for this Review. Rather than restate the reasons and justifications for these recommendations, I would refer the Committee to the Hargreaves Report itself:

> 4. **Orphan works**. The Government should legislate to enable licensing of orphan works. This should establish extended collective licensing for mass licensing of orphan works, and a clearance procedure for use of individual works. In both cases, a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange.
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> 5. **Limits to copyright**. Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level

to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.

Going beyond fair dealing to fair use

I appreciate the Committee's efforts in holding a public consultation meeting on this topic. While I found it instructive, it was somewhat frustrating that the multiple criticisms of the current copyright regime (largely voiced by photographers and journalists) had nothing to do with fair use or with any change to the law. They appeared to me to be simply the frustrations of people who apparently had granted limited rights to publishers and then found their work used either by the publisher in a manner contrary to agreement, or they found the work illicitly reproduced elsewhere. None of the scenarios described would have fallen under the US fair use regime as a permitted use, and all involved straightforward and wholesale taking of an author's work.

Similarly the commentary which I have seen online and elsewhere (and which no doubt will be repeatedly voiced in submissions to this Committee) suggest that fair use spells immediate disaster for those involved in writing or creating artistic works. The first audience contributor to the public consultation was (it will be recalled) a freelance photographer who let forth the battle cry of "Fair use is simply not fair". She similarly warned that if fair use were brought in, her career would be effectively at an end. These comments bear no relation to the reality of the fact that freelance photography as a profession thrives in the USA and nobody had suggested a regime in which others would be free to take creative photographic work without attribution or payment, which appeared to be the unspoken assumption.

Accordingly, the "fair use is not fair" argument should be given little weight as it does not align with the facts. However, it might be addressed by the Committee in proposing cost-effective ways for authors and artists to enforce their ***existing*** rights, which appears to be where the real or perceived problem lies.

Fair use, as legislated for in the USA has significant advantages over specific lists of fair dealings. As with many debates over whether open or closed lists are better, however, the factors which make an open system preferable are also reasons why it can be flawed.

The United States' 1976 Copyright Act simply codified the common law position as it had been articulated in Folsom v Marsh, requiring judges to consider and balance four factors. When applied properly, a judge will weigh up whether the use is justified with an eye on the underlying constitutional justification for copyright.

However, because the judge is not constrained in this balancing act, the regime is also open to misapplication (e.g. ignoring one factor or only paying lip service to considering it), and this can result in cases which are rightly regarded as outliers, such as the recent Righthaven decision where an entire article (in which Righthaven had acquired copyright) was reposted by a non-profit organisation, and the judge ruled this to be fair use. That decision appeared to be based more on the judge's distaste for the complainant's activities (pejoratively referred to by some as a "copyright troll"), than on fairly balancing the factor of the amount of the work used against the other factors - normally wholesale reproduction without any transformation of a work will immediately disqualify the reproduction as fair use.

That decision aside (which is under appeal), the strengths of the fair use system can be seen in comparison with our own fair dealing system in cases where new technologies and uses are involved. Such areas are squarely within the terms of reference of this Review Committee. A fair dealing system cannot foresee new and innovative technologies if it is based on a closed list of what is permitted.

Take for example *Kelly v. Arriba-Soft*, 336 F.3d. 811 (9th Cir. 2003): here a search engine created small, very low resolution thumbnail images for use in presenting search results to users. Under our law this would amount to reproduction of an artistic work and would not fall within any fair dealing exception. The judge however found that the thumbnails were transformative, and that they did not affect the market for the underlying work, and thus were fair use. This decision was followed in *Perfect 10, Inc. v. Amazon. com, Inc.*, 508 F. 3d 1146 (9th Cir. 2007) where Google's framing and hyper linking using thumbnail images was also permitted.

Recent high profile statements by UK prime minister David Cameron touched on precisely this type of use: he explained that Google had told him they could never have launched in the UK because their search engine makes use of works in a way which would be regarded as infringement in the UK but is fair use in the USA. The same comments apply here in Ireland and provide the best argument for Ireland to reverse its policy, as clearly implemented in the 2000 Act, of appearing to bend over backwards in extending rights to copyright owners while doing as little as possible to protect the public interest. Companies like Google demonstrate that the public domain is sometimes as commercially important and worthy of fostering as the private domain, since many new and disruptive technologies (i.e. those which it is Government policy to attract) are based on remixing or presenting anew information which is already published. Allowing this, while not inhibiting the creation of new work, should be the underlying aim of copyright law.

There is therefore a strong case that fair use provides the flexibility to cater for disruptive new technologies while still ensuring that the commercial market for authorial works is respected.

The weakness of the system is that judges are asked to make subjective calls on four rather vague factors, and several studies of decided cases have failed to find a coherent pattern in how the four factors are applied. As Prof David Nimmer (the noted US copyright scholar and

editor since 1985 of his father's standard treatise on US copyright law, *Nimmer on Copyright*) notes in a critical analysis of sixty decided fair use cases[3]:

> Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.
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> The courts are not to blame for that state of affairs. Rather, by injecting such a high degree of subjectivity and imprecision into each factor and into their cumulative application, as canvassed above, Congress essentially foreordained that result in the 1976 Act. Thus, it is not surprising to discover, in a given case, that the district judge found each of the four factors favoring fair use, whereas the Court of Appeals, in reversing, concluded the very opposite as to each factor. To quash the facile explanation that the district judge in such a case simply failed to understand copyright law as well as did the appellate panel of three, it suffices to note that the same phenomenon has unfolded at the Supreme Court level. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, six justices analyzed each of the four factors as disfavoring fair use; three justices, in dissent, reached the opposite conclusion as to each factor.

The article therefore concludes that what is going on in these cases is that the vague four factor test is a window dressing for a more nuanced and subtle evaluation by judges as to whether they actually believe the use to be fair and justified. Nimmer ends his article with a quotation from the Supreme Court citing his own father's views on fair use[4]. To put the beginning of this quote in context, Nimmer is attempting to answer the question of whether a particular example discussed is fair or unfair:

> But the problem with the four factors is they are malleable enough to be crafted to fit either point of view [i.e. fair use or unfair use]. Where does that leave us? The Supreme Court puts it pithily: "Professor [Melville] Nimmer notes: Perhaps no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: Take not from others to such an extent and in such a manner that you would be resentful if they so took from you. This equitable rule of reason permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."
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> Father knows best. Although that formulation scarcely resolves concrete cases, it provides the beginning of wisdom by acknowledging that rigid application of set formulae may itself prove inexact. In the end, reliance on the four statutory factors to reach fair use decisions often seems naught but a fairy tale.

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3 David Nimmer, "'Fairest of them all' and other fairy tales of fair use", 66 *Law & Contemp. Probs.* 263 (Winter/Spring 2003) at 281

[4] *ibid* at 287

My submission therefore is that there is a place for fair use, and that this is something Ireland could usefully push for at European level, though it would require support from other countries to even get off the ground. Rather than hanging back and grudgingly granting fair use rights, Ireland should be visibly leading the charge. Even if it never comes to pass, our image as a leader in this regard may benefit us in our attempts to be regarded as a progressive digital economy and a suitable location for digital industry.

As to the details of a fair use system, the US model is not the correct one, in the sense that their four factor test is probably never really the reason why a work is found to be fair or unfair. More recent case law from the US has tended to focus on the question of whether a new use is transformative and whether it deprives the original author of an existing or potential market, and these two factors, along with perhaps a bright line rule prohibiting any finding of fair use where there is wholesale copying of a work without any transformation, might be a starting point for a European solution.