

**Submission from Keith Donald MA, Dip.Soc.Sc., DASS, CQSW
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Preamble

When the first performing rights societies were established – SACEM in France in 1851 was the first – one had to be in the same room as the musicians and singers to enjoy the music. When broadcasting and recording began in the early twentieth century, performing rights societies had to come to an accommodation with the broadcasters and record companies. This accommodation was effected in a way that enabled creators, broadcasters and record companies to coexist. Creators made a living and employment in broadcasting, recording and related activities expanded. Consumers were thus enabled to enjoy music legitimately in a variety of ways.

This changed in the 1970s when cassette tape was invented. For the first time the consumer was able to re-record copyright music and share it or sell it without acknowledging the rights of the creator and without paying the creator for the often industrial amounts of “bootleg” product. Cassettes never managed to swamp the legitimate market because of quality issues. The legislative response to cassette copyright was patchy and poor with only a few countries enacting legislation that allowed for a levy on tapes and on tape machines, levies that were used to compensate rights owners, including creators.

The digital era that began in the late twentieth century means that every CD is in effect a master copy and there is no diminution of quality. The advent of the internet means that the twentieth century is neatly bookended by threats to creativity: broadcasting and recording at the start, digital and the internet at the end.

If we don't manage to enact laws that protect and encourage the level, spread and amount of creativity that has happened in music, film and literature in the twentieth century, our grandchildren may well be looking back at a golden age and wondering what caused its demise.

1. The Copyright Council

The establishment of a Copyright Council on a statutory basis is progressive and worthy of support. It should be inclusive and independent with a clear mission statement. It should have a public information and education dimension.

2. Exceptions to Copyright

All exceptions to copyright sound alarm bells for creators. I have had many conversations with other composers and songwriters who wonder why any exceptions are allowed to exist. For instance, if a school is happy to pay the carpenter who supplied the desks, the ESB, the publishers of school books etc., why should it not be equally happy to pay the songwriter or composer whose work they use?

Fair Use

I wish to support IMRO's position with regard to so-called fair use (a misnomer if ever I saw one)

- Fair use is not compatible with the three step test in Berne;
- Fair use is not in line with Berne Convention or TRIPS;
- Fair use contributes much more legal uncertainty than the fair dealing exceptions in CRRA;
- Due to this uncertainty, alongside the substantial penalties that attach to copyright infringement, the cost of establishing fair use is only feasible for very large, well resourced companies that seek to benefit from fair use provisions, hence it is of no benefit to small innovative start-ups.

- The fair dealing exception via Irish and EU law achieves a better balance between the uncertainties of a US style fair use doctrine, and a rigid application of a closed and inflexible list of exceptions and limitations;
- WIPO institutions have ruled on fair use and found it to be in breach of international law;
- The arguments made to support fair use are flawed, simplistic and fail to understand the position under US law;
- Fair use must be looked at in the context of demands for broader exceptions than those currently allowed under EU law;
- There are a lot more factors at play in how the US successfully innovates than fair use;
- There is no evidence to support the assertion that the absence of a fair use doctrine hinders Irish or EU innovation and much evidence that fair dealing provides no hindrance to innovation, but rather it has fostered it.