European Federation of Journalists

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To

Irish Copyright Review,

Room 517, Department of Jobs, Enterprise and Innovation,

Kildare Street, Dublin 2, Ireland

European Federation of Journalists response to the Irish government's Copyright Review Committee consultation

The European Federation of Journalists (EFJ) represents about 260,000 journalists in 35 countries. As a section of the International Federation of Journalists it defends press freedom and social justice through strong, free and independent trade unions of journalists and calls for journalists to be recognised as authors of the works they create to be able to control further use of their works and negotiate equitable remuneration for these uses.

We are concerned about the proposals to change Ireland's copyright system because journalists (including photojournalists) throughout Europe licence works to publishers and broadcasters based in Ireland; because the proposals may affect – indeed, in some instances seem to be designed to affect – the evolution of EU regulations; and because in any case changes to Ireland's copyright system will inevitably affect the market or markets for licensing journalists' work throughout Europe.

We restrict ourselves to responding directly to the proposals which are most clearly likely to have such Europe-wide effects.

So-called "fair use": This consultation correctly reflects the extensive evidence provided in submissions to earlier rounds of consultation that the so-called "fair use" regime favoured in the United States cannot be enacted in Ireland without changes to European law. The consultation asks (in effect in questions 76 to 83 inclusive) whether the government of Ireland should "join with either the UK government or the Dutch government in lobbying at EU level" (Q 77).

It should not.

(Q77) (a) What EU law considerations apply?

Fundamentally: the "Three-Step Test" set out in EU law in the "InfoSoc Directive"[1] was negotiated carefully and with good reason, and it provides that exceptions to copyright may cover:

- *certain special cases* which
- *do not conflict with a normal exploitation of the work* and
- *do not unreasonably prejudice the legitimate interests of the rights holder*.

The first of the provisos of the three-step test is universally interpreted as specifying that exceptions are permitted only when their scope is clearly specified. One sound and powerful reason for this is that ill-specified exceptions, such as the so-called "fair use" provision in United States Code 17 section 107[2], act only in the interests of lawyers who must be expensively engaged to fight cases to determine what the exception in fact means. Such ill-defined exceptions therefore promote the interests of those with deep pockets – such as famous web search engine companies – over the interests of everyone else, including the individual authors represented by the EFJ, whose works are frequently copied without permission by the aforementioned deep-pocketed interests.In fact, it is clear to us that such ill-defined exceptions are outlawed also by the incorporation of the Three-Step Test into the World Trade Organization Treaty on Trade-Telated aspects of Intellectual Property rights (TRIPS)[3], to which the United States is a party. It is thus unclear to us how United States law is compatible with the international treaty obligations of the US in this respect (as in others, such as the almost-total absence of protection of the moral rights of the author in the US).

(Q82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

Empirical evidence on this matter was submitted by the British Copyright Council to its government in response to a parallel consultation, the Hargreaves Review[4]. The BCC found that the cost of litigation to discover whether a use was, in fact, fair would be US$1 million.

(78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?

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1 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: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML accessed 13/03/12

2 http://www.law.cornell.edu/uscode/text/17/107 accessed 24/05/12

3 http://www.wto.org/english/tratop_e/trips_e/trips_e.htm accessed 24/05/12

4 http://www.britishcopyright.org/page/223/independent-review-of-intellectual-property-growth-by-professor-hargreaves/ accessed 30/05/12

In practice an ill-defined exception to copyright is likely to *stifle* innovation, since it allows those with deep pockets to seize without compensation use of the works of innovators who, by definition, have shallower pockets while their work is at its most innovative.

What the Review fails to appreciate is that the *real* innovators are those, including journalists, who day by day produce the new creative works without which there can be no "creative economy". The majority of such creators operate as sole traders, and in most cases are dependent on much more powerful entities for the distribution of their works. In many cases there is an acute shortage of buyers for licences to exploit a particular class of work: in some there is but one such buyer, and this "monopsony" market is as open to abuse as the more familiar "monopoly" in which there is but one seller.

Ireland has a proud tradition of encouraging such individual creators, through tax arrangements and otherwise. To sacrifice their interests to those of "sub-innovators" whose contribution is to Hoover™ up the works of others and sell advertising alongside it would not serve the long-term interests of the Irish economy and still less the interests of culture in Ireland.

"Fair use" by stealth: The Consultation offers several paths toward ill-defined exceptions to copyright. For example, the Consultation asks:

> (Q50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?

No, there is not.

What is this "marshalling", other than an invitation to a certain Californian company (currently enjoying a dominant position) to organise the world's information and make money selling advertisements alongside it, without any recompense either to the original creators of that information or even the intermediaries that originally distributed our work?

> (Q55) Should the definition of "fair dealing" in section 50(4) and section 221(2) CRRA be amended by replacing "means" with "includes"?

No, it should not. Just as much as an explicit adoption of "fair use", this would would make lawyers very happy as people were forced to spend thousands, or hundreds of thousands, in court finding out what the vagueness meant, and would risk making everyone else miserable. Any amendments to the definitions of "fair dealing" should aim at increasing the clarity of the law, in line with the requirements of international law.

"Private copying": the assertion that a private copying exception may be implemented while setting the "fair compensation" required in the InfoSoc Directive in Article 5(2)b and elsewhere to zero is absurd. In general the levy system operating in the great majority of EU member states functions well

and offers authors reasonable compensation. (We find no question in the consultation document dealing with this important matter.)

The inconsistencies between levy systems in different member states, by which their opponents appear to set great store, arise as much as anything from the incremental outcomes of litigation by equipment manufacturers intended to frustrate or delay the application of Article 5(2)b.

In the meantime, there are many European court decisions underlining the necessity of the mandated fair compensation to authors and performers for the effects of "private copying" of their work: see our Appendix.

> (Q37) Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?

There is no *valid* evidence. A study by Professor Martin Kretschmer of Bournemouth University[5], though hostile to levies, reported no actual evidence that sales of iThings were higher in EU member states that have no levy.

Even if they were higher, how would it be to the benefit of innovation in Ireland to subsidise sales of equipment typically designed in California (because of the venture-capital environment, not because of weak copyright laws) and manufactured in China (because of weak labour-protection laws)?

And of the equipment that is manufactured in Ireland that might be subject to a levy, much is destined for export to EU member states that *do* have a levy.

In any case:

- As noted above, European law provides that creators (authors and performers) must obtain fair remuneration for such copying exceptions;
- Such remuneration may, possibly, be funded by means other than a levy; and
- The EU Commission is examining harmonising the schemes for such remuneration and the government of Ireland would do well not to pass legislation which it is soon obliged to repeal or rewrite;
- Nor should the government of Ireland allow itself to be used as a stalking-horse for the interests that seek to influence that EU review in their own perceived economic interest, to the detriment of our colleagues in joined-up Europe for whom the levy system works well and provides a welcome boost their ability to continue work as dedicated independent professionals.

Photographic works: the Consultation asks:

> (Q35) Should the special position for photographs in section 51(2) CRRA be retained?

5 http://www.ipo.gov.uk/ipresearch-faircomp-full-201110.pdf accessed 30/05/12

Yes. The key point here is that the concept of a "reasonable extract" of a photograph is as meaningless as that of a "reasonable extract" of a painting. While journalists who create texts generally welcome reasonable quotation of their work – on condition of proper attribution – those who create images pay the rent through payment for licenses to use entire images, or not at all.

As our photographer members would put it: how can news photographers make a living if all and sundry are authorised (or even mistakenly believe they are authorised) to copy their work without permission or payment?

Other exceptions: In general, the proposal to implement every possible exception allowed under the InfoSoc Directive[6] – to "max out" the exceptions, as the the UK government indelicately puts it – contradicts the principles underlying the negotiations that led to the adoption of Article 5(2) in 2001. The exhaustive list of exceptions that member states *may* adopt was intended to accommodate differing national practices, in effect "grandfathering" idiosyncratic national traditions. Had the intention been to offer a recipe for an exception régime the Directive would have specified that they *should* adopt these; and it does not do so, for good reason. (See Q 56).

(Q61) Should there be a specific exception for non-commercial user-generated content?

It is not at all clear how such an exception could be shoe-horned into the provisions of the InfoSoc Directive. One key question is: how would the government of Ireland propose to deal with the case where a non-commercial use *becomes* commercial; either in the case that a so-called "marshalling" service is making money by selling advertising alongside a large aggregation of such works, or in that where a user-generated work acquires a commercial life of its own?

A Digital Copyright Exchange: this proposal implies some form of "Extended Collective Licensing", though this is not addressed with any great specificity in the present Consultation. While the European Federation of Journalists notes that our members in the Nordic countries are happy with the Extended Collective Licensing schemes they have, we observe that:

- these schemes operate against the legal background of very strong protection for authors, in particular the respect for the so-called "moral rights" of identification and integrity that is integral to the *droit d'auteur* tradition that is the mainstream of international law[7]; and
- the acceptability of these schemes depends upon the trust that authors place in collecting societies that are democratically accountable to them – a trust which is encouraged by the Nordic social and legal climate.

6 *Op. cit. sup.*
7 Article 6 bis of the Berne Convention

If the government of Ireland wishes to implement such a scheme, then at the same time it needs to make additional amendments to copyright law. The following matters are not directly addressed in any of the questions which the government asks us to answer. Such changes should include:

- to give all authors automatic, non-waivable, enforceable "moral rights" and in particular to remove the exclusion of journalists from moral rights protection (under CRRA 2000 section 108 *etc*);
- to ensure that authors enjoy unwaivable rights to fair remuneration at least in respect of Extended Collective Licensing schemes, to avoid the situation in which publishers and broadcasters operating in Ireland will simply insist that all such income is assigned to them, for no extra fee – in Ireland such terms are commonly imposed under the threat that any journalist who objects will never work for that publisher or broadcaster again;
- to take steps to level the playing field on which journalists, particularly the many freelances who operate as "sole trader" businesses, negotiate over authors' rights and licences with publishers and broadcasters.

To do otherwise would be unjust, would be contrary to EU policy and likely to its law, and would undermine the potential for Extended Collective Licensing to be adopted as a legal solution to issues raised by information technology in other member states.

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Appendix: relevant court rulings

a – PADAWAN (CJEU, Private Copy, 21 October 2010):

- Padawan sets some *general* principles for both private copying & reprography. In particular it nuances the '*de minimis*' rule:

Directive (recital 35): "*In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise*"

CJEU in PADAWAN: "*However, given the pratical difficulties in identifying end users and obliging them to compensate rightholders for the harm caused to them, and<u>bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment</u>, [...] it is open to Member States to <u>establish a "private copying levy" for the purposes of financing fair compensation</u>´[...]*"

b – OPUS (CJEU, Private Copy, 16 June 2011):

- Obliges member states to set up a levy system with *effective* fair compensation for rights-holders

c – LUKSAN (CJEU, Private Copy, 9 Feb 2012):

- Mandates a high level of "adequate legal" copyright protection
- Refers to EU Charter of Fundamental Rights Art. 17: no deprivation of property without fair compensation
- *No waiver* of levy remunerations/fair compensation is possible
- CJEU in LUKSAN: *"The provision at issue authorises <u>an exception solely to the reproduction right and cannot be extended to remuneration rights</u>. [...] Imposition on the Member States of such on obligation to achieve a result of recovery of the fair compensation for the rightholders (OPUS, see above – KVD) <u>proves conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation</u>".* (cf. Belgian *Creative Commons* License)

d – VEWA (CJEU, PLR, 30 June 2011):

- Mandates dequate income for use of copyright works without authorisation

e – NORMA (Gerechtshof Den Haag - HOL, Private Copy, 27 March 2012):

- Balance 'old' v. 'new' devices when setting up levy scheme
- Dutch State condemned + financial relief ordered (but yet to be assessed)

- Insists on importance of monitoring new devices brought to market

f – Spanish Supreme Court (CEDRO/VEGAP, Private Copy/Repr., 7 March 2012)

- no independent copying function (cf. BEL: Lexmark 'PC Connect')