

Submission by

IRISH NATIONAL FEDERATION AGAINST COPYRIGHT THEFT

TO

THE COPYRIGHT REVIEW GROUP  
(APPOINTED BY THE MINISTER FOR JOBS, ENTERPRISE AND  
INNOVATION)

REGARDING COPYRIGHT LEGISLATION

## **INTRODUCTION**

INFACT (Irish National Federation Against Copyright Theft Limited) is a trade organisation representing the interests of the major Irish and international film industries, and welcomes the opportunity to make this submission to the Copyright Review Group. We have for a long number of years been involved in combating piracy of film in various forms, and, in recent times, dealing with the problem of infringement of film copyright on the internet. The audiovisual production industry has recently been estimated to employ over 14,000 people in Ireland, and is a substantial contributor to state revenue.\* Many more jobs are generated in the distribution, retail and service sectors.

The Copyright and Related Rights Act, 2000, (“CRRA”) provided Ireland with a comprehensive modern statute governing copyright. On the advice of certain stakeholders, it was drafted in a manner which allows it to apply the relevant principles to changing media. However, even such a modern statute could not envisage all the changes in these media, and in the way that we use them, in the intervening years.

The internet has completely changed the way that we communicate and receive information, both for individuals and for commercial operators. It has made endless information available and vastly increased the store of knowledge of all its users. It has made it possible for every business to market its goods or services to a worldwide customer base. It is a huge benefit to humankind. Part of its benefit is the ability to transfer and record digital entertainment product such as film, music or electronic games. This provides an opportunity for the copyright owners of films, such as members of INFACT, to promote their films to an ever wider audience. It has at the same time enabled facilities to be provided which allow substantial infringements of copyright to be carried out, both by commercial organizations putting up copyright-infringing material, making substantial profits from advertising and other revenues, and for non-commercial users to combine to create networks which also put up infringing material in large quantities, and jeopardize the survival of legitimate businesses. The internet problem is a colossal and ever growing one, which already threatens financial disaster to musicians and the music industry, and is now having the same effect on film, electronic games, computer software, electronic books and other areas. There is an urgent need to address the problem, which is being exploited globally by many infringers, including organized crime.

\* IBEC Audiovisual Industry Study 2010

The need to protect intellectual property has been recognised from the outset by the European Union. It has created a regime of directives and structures regarding patents, designs, copyright and trade marks which are guided by the principle that in order to stimulate research, innovation and enterprise, the right to a reward for creativity must be guaranteed. This regime has evolved with changing technology, but neither it nor Irish legislation should lose sight of this guiding principle.

## **BARRIERS TO INNOVATION**

Barriers to innovation in copyright legislation may be seen in two forms:-

Firstly, do the restrictions placed on the use of copyright material discourage adaption of that material and innovation which advances such fields as science, technology, learning or literature? Is there a need for a “Fair Use” doctrine such as that available in the U.S. and reflected in Section 107 of the U.S Copyright Act, 1976?\*

Secondly, do exceptions or weaknesses in existing copyright law permit rights over original material to be infringed to such an extent as to discourage innovation because of the lack, or perceived lack, of a reward for the originator? What amendments are needed?

### **Restrictions/fair use**

In relation to the first aspect above, the CRRA contains a number of exceptions or acts permitted in relation to copyright protected works. These include “fair dealing” in a work in areas such as research, study, criticism or review, and educational use. This takes in a number of the categories of exceptions under the U.S. Fair Use doctrine. They certainly do not go as far as U.S. case law has in extending the application of the doctrine.

\*\* Section 107, Copyright Act, 1976: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

U.S. case law reflects the view of the courts in that jurisdiction that each case should be analysed on its merits, and this flexibility has served the United States well. By contrast the framework set out by the EU Electronic Commerce Directive 200/31/EC and Copyright Directive 2001/29/EC which are currently partially reflected in the terms of the CRRA, provide greater certainty for parties in deciding their course of dealing. This certainty is essential in the European Union, which seeks to draw together a large number of different legal jurisdictions, some of a civil law nature and some of common law. If the common law countries within the EU were to seek to implement the “Fair Use” approach in legislation, it would create a divergence, rather than harmonisation, of the laws of EU member states.

Concerns have been expressed by interested parties regarding the position of search engines and internet service providers under EU and Irish law. Various decisions of the ECJ and courts of member states have demonstrated that the provisions of the E-Commerce and Copyright Directives are applied in such a way as to provide search engines and ISPs with the benefit of the exemptions from liability for use of copyright material which they need to function. Search engines are themselves heavily reliant on copyright, trade marks and patents to protect their own intellectual property, and stand to benefit from the greater certainty of the ongoing EU legal framework.

There is a mutuality of interest between ISPs and copyright owners in ensuring clarity about the extent of use of, and protection of, the copyright owners’ material, as the ISPs are the “shop window” for marketing of entertainment and other material, representing real, substantial and increasing profits for ISPs. Video on Demand and similar activities represent an increased service to the consumer which will enhance revenues both for copyright owners and for ISPs and cable and satellite operators.

It has been suggested that start up digital businesses are inhibited by the perceived lack of clarity on what copyright material they may use under existing exemptions in Ireland and the EU, and that this is a reason to introduce a Fair Use type approach.. We would argue that, on the contrary, to seek to extend or re-interpret these exemptions in Ireland by introducing a Fair Use case-by case structure would create greater uncertainty and would have a negative effect on business start-ups.

### **Existing Legislation/ Amendments needed**

The greatest spur to innovation, leading to economic activity and job creation, is the possibility of a financial return on the creative activity. Where the potential innovator feels that other parties, who do not have to bear the cost of creativity or research and design, can exploit the result of the activity with impunity, they will be deterred from committing effort, risk and financial investment into it. In seeking to stimulate innovation, government should constantly be examining ways in which infringement of copyright can be addressed by improving the legal provisions. In considering amendments to intellectual property legislation, government should take a holistic approach, and should consider the needs of trade mark and patent laws as well as copyright. While bearing in mind that the terms of reference of the Review Group relate to barriers to innovation in the field of copyright, it is nevertheless material to mention trade marks. A number of amendments required have been set out below.

The most notable of these relates to Article 8(3) of European Directive 2001/29EC on Copyright, which is already the subject of a process of implementation.

#### Copyright and Related Rights Act, 2001

Section 40: Implement Article 8(3), Copyright Directive to give effect to copyright owners' right to an injunction against an intermediary regarding infringing material (this is already being done).

Section 44: Provision should be made to the effect that where a transmission of infringing material by electronic means is received, or is intended to be received within the State, such infringement shall be deemed to have occurred within the State, to ensure that the capability of rights owners or law enforcement agencies to bring civil or criminal proceedings is identified. This should apply irrespective of where transmissions are originated, or where servers and data storage are held.

Section 97: Revoke this section, which provides that it is not an infringement of copyright to cause a sound recording, broadcast or cable programme to be heard or viewed in part of a premises where sleeping accommodation is provided for residents or inmates, to enable copyright owners to receive payment for such use.

Section 139: A presumption should be added to the effect that, in both civil and criminal proceedings, there was no consent on the part of the copyright owner to the acts complained of, until the contrary is proved, to facilitate processing of cases, and avoid unnecessary waste of the resources of the courts and others.

Section 140: A specific offence of *commercial* facilitation of infringement of copyright should be added to the offences, to enable the provision of facilities such as, for example, those of Pirate Bay to be punished in a meaningful way.

Section 140: A specific offence regarding the copying of audio visual works in cinemas and other showings, with the use of a camcorder or similar device, should be introduced, to take account of the fact that many infringing copies of films find their way to the internet and other ways of infringing distribution by this method, often when the relevant film is not legitimately available.

#### Trade Marks Act, 1996 ("TMA")

Section 18: The provision for damages should be amended to provide that in exercising its power to award damages for breach of a trade mark right the court may award aggravated or exemplary damages or both. This would bring the TMA into line with Section 128, CRRA to ensure that an adequate deterrent to infringing activity exists.

Section 20: A provision should be inserted in the TMA giving a right holder the same rights of application to the Court for an order for seizure, and of seizure without such application, as are contained Section 132 ,133 and 255, CRRA, to permit the right holder adequate remedies to prevent removal of essential evidence and infringing material

Section 92: The penalties for the offence of infringing a trade mark should be increased so that they are equivalent to those in the CRRA, so as to provide a meaningful deterrent.

Section 92: A further offence of making, selling, importing or possessing an article specifically designed or adapted for the fraudulent application or use of a trade mark; and search, seizure, delivery and disposal provisions should be extended to cover such articles

Consideration should also be given to increasing of criminal penalties under the CRRA, especially for significant commercial infringement; provisions governing procedures for obtaining and presentation of evidence should be reviewed, and a possible statutory body to co-ordinate investigation of criminality in the form of Denial of Service attacks, Domain Name attacks, content piracy and connected matters should be considered.

## **EU Directives**

The Review Group is asked in its Terms of Reference to consider whether changes in EU Directives should be sought. It would appear that any changes recommended by us are within the parameters of current EU directives, and accordingly no changes need to be sought.

## **SUMMARY**

Barriers to innovation exist where legislation does not adequately protect copyright material. Amendments are needed to make sure that any such barriers are removed, and, while noting that arrangements are at an advanced stage for implementation of Article 8(3) of the Copyright Directive, we would welcome the bringing forward of draft legislation in relation to other matters as soon as possible. In our view, the adoption of the US style Fair Use doctrine, while it has served the US well, would not enhance the position in either Ireland or other European jurisdictions.

INFACT and its representatives would be delighted to make ourselves available for further consultation.

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