



Copyright Review Committee
Room 517, Department of Enterprise, Jobs and Innovation
Kildare Street, Dublin 2
Ireland

Sent by email: copyrightreview@deti.ie

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Dear Dr O'Dell, Ms McGovern and Professor Hedley,

Consultation on the Review of the Copyright and Related Rights Act 2000: Comments of the International Publishers Association

The International Publishers Association appreciates this opportunity to participate in the consultation on the review of the Copyright and Related Rights Act 2000.

The International Publishers Association (IPA) is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, IPA counts some 60 national, regional and specialised publishers associations from 55 countries - including "Publishing Ireland" - among its members, and therefore the great majority of publishers together generating world-wide sales of EUR 132 billion. IPA is an accredited non-governmental organisation enjoying observer status to United Nations organisations, including the World Intellectual Property Organisation and the UNESCO. IPA's main goals are the promotion of literacy and reading, freedom to publish and the development and protection of copyright.

In our submission, we focus on commenting on the Review's underlying assumption that copyright creates barriers to innovation, and on providing an international perspective on the suggested introduction of a "fair use" doctrine.

We note that other organisations representing creators, including Publishing Ireland, the Irish Copyright Licensing Agency, The Publishers Association, and the Federation of European Publishers are submitting comments addressing general rightsholder needs and concerns, and we commend their comments to your attention.

Does the present national Copyright legislation create barriers to innovation?

IPA submits that copyright and related rights are an engine of innovation, rather than a barrier to innovation.

The Internet does not suffer from a lack of information, or content which is free of charge at the point of consumption. The key public policy challenge is to find ways of making more high-utility

and high-quality content available. Such policy consideration must look at both aspects: incentivising the investment into quality content, and incentivising the use of technologies to make such content available at sustainable prices. This requires business models allowing investors to recoup their investment. IPA notes that many innovative services, including those that are of no charge to the consumer, rely on copyright. Widely known examples include works made available under creative commons licences, works provided through ad-supported services (such as newspapers or freely accessible online maps or satellite photos), and works provided under free, time-limited trials or requiring user registration in exchange for access.

Weak copyright laws and unauthorised use of copyright protected works remain the key obstacles to innovation. Even Google Inc, a company often cited as requiring a change in copyright laws states in its latest¹ financial report: *“Any significant impairment of our intellectual property rights could harm our business and our ability to compete. Also, protecting our intellectual property rights is costly and time consuming. Any increase in the unauthorized use of our intellectual property could make it more expensive to do business and harm our operating results.”*

Irish Copyright legislation should therefore aim at being strong and effective. Changes may not be necessary in the short term to achieve this. Instead, we recommend a close cooperation between copyright owners and the relevant government institutions to identify how best to serve the needs of all stakeholders concerned.

Would the introduction of fair use remove perceived barriers to innovation?

If your Department’s aim is indeed to avoid or abolish barriers to innovation, then the introduction of “fair use” provisions would be a highly unusual path to take, a path that has been adopted by only four countries worldwide, but rejected by many, and this for reasons that can easily be transposed into the Irish context: The introduction of a fair use doctrine would:

- create legal uncertainty and hence an atmosphere hostile to creative innovation and freedom of speech;
- violate Ireland’s obligations under international copyright treaties, in particular the “three step test” of the Berne Convention, WCT and TRIPS;
- require the introduction or importation of an entire body of legal precedents, adjudications and case law into Irish jurisdiction, the introduction and interpretation of which would carry with it legal risks to an unpredictable extent.

A “fair use” doctrine works (more or less) well in a US context because of its roots in more than 150 years of case law, and significant - 35 years - experience with interpreting its codified version. It is exactly this long history that alleviates (but not silences) concerns regarding legal certainty, freedom of speech and violation of international treaty, but many commentators remain concerned also with regard to the US context.

We submit that Ireland has made more than a fair attempt at striking just balance between the varying interests of all stakeholders in the Copyright and Related Rights Act 2000, and that a review of this law should consider only tools that are less intrusive than the introduction of an entirely new legal concept.

¹ http://investor.google.com/documents/20110510_google_10Q.html page 40
www.internationalpublishers.org

“Fair use” discourages investment into content and encourages investment into technologies

Copyright provides an incentive for investment into content. In the context of book publishing, copyright allows publishers to improve quality, enhance utility and pay authors. It ensures that continuously, new content is created that addresses the need of consumers for up-to-date information. E.g. school books, whether on paper or in digital form, must comply with current curriculum requirements, medical textbooks must reflect the latest research etc. The choice of format of such content, and the technology that is developed to access this content will follow the requirements of the user. Digital formats, and innovative technologies have been created for education, research, scholarly communication and consumer entertainment in response to concrete consumer demand.

Technology companies that could claim to rely on fair use or other copyright exceptions to enable their technologies to access, select and present content that has already been created. Fair use could therefore be said to encourage or increase the reuse of existing content. Such technologies do not incentivise the investment into new content. Whilst there may be some interest in out-of-print works (and these are important parts of cultural heritage), usage patterns show clearly that users increasingly want recent, topical, and up-to-date information.

Fair use therefore threatens to skew the balance between incentivising the creation of content and incentivising the creation of new technologies.

International standards for exceptions and limitations

We are aware of only four countries worldwide which enshrined the concept of “fair use” in their copyright laws: the United States of America, Israel, Singapore, Philippines. Although considered as an option in numerous copyright reviews throughout the world, and most recently, in the UK “Review on Intellectual Property and Growth”, independent reporters always concluded that the introduction of a fair use system was undesirable. By way of example, Professor Ian Hargreaves’ report concludes that “significant difficulties would arise in any attempt to transpose US style Fair Use into European law.” Governments rejecting the introduction of a fair use doctrine after careful consideration include Australia and New Zealand.²

Given that there is no international mechanism to coordinate and resolve tensions between different applications of the fair use doctrine in different countries, there is no such thing as a single, homogenous, uniform notion of “fair use”. Shall Irish courts make use of the legal precedents of foreign jurisdictions that interpret fair use? To what extent? If they do, will they be able to interpret such precedents, which have been set within a different legal framework and experience appropriately? If they diverge from them in practice, or develop them onward, will this lead to further confusion rather than additional legal certainty?

Ireland would not be joining a family of jurisdictions that apply a single concept. It would inevitably be developing its own flavour and concept of fair use and thus not adding to legal certainty, but complexity, as US case law would inevitably be at the heart of any fair use dispute.

² Ian Hargreaves “Digital Opportunity - A Review on Intellectual Property and Growth”, May 2011, para. 5.19; other governments rejecting the introduction of the fair use concept include Australia (see Issues paper [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf) and Explanatory Memorandum [http://legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/D052936F5620B888CA25721000039385/\\$file/06157em.pdf](http://legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/D052936F5620B888CA25721000039385/$file/06157em.pdf)), New Zealand (see Position Paper <http://www.med.govt.nz/upload/2334/digital-position.pdf> at paras 160-161)

Tradition of fair dealing concept

The Irish copyright laws relating to fair dealing have been in place since the foundation of the State, and have since been applied by courts throughout the country, thereby creating an atmosphere of legal certainty. The defence is well understood as being available for three specific purposes: research and private study; criticism and review and reporting of current events. While the provisions are long established, it should be noted that the exemption for purposes of “research”, in order to comply with the EU Information Society Directive, should be confined to use for non-commercial purposes.

Creation of uncertainty

The importation of an entirely new legal concept, in particular if as loosely formulated as the “fair use doctrine”, would leave both rightsholders and users with a high degree uncertainty as to whether a given use is legal or not. This has at least two undesired consequences:

On the one hand, uncertainty will *stifle innovation*: if in doubt as to whether the use of certain intellectual property is legal or not, a creator may decide to rather not to create than running the risk of an infringement action at a later stage.

On the other hand, uncertainty impacts on one’s *freedom of speech*: if in doubt as to whether certain content can be used for criticism and review, a creator may decide to rather not say anything than running the risk of an infringement action at a later stage. As Lawrence Lessig puts it: “For in a world that threatens \$150,000 for a single willful infringement of a copyright, and which demands tens of thousands of dollars to even defend against a copyright infringement claim, and which would never return to the wrongfully accused defendant anything of the costs she suffered to defend her right to speak—in that world, the astonishingly broad regulations that pass under the name “copyright” silence speech and creativity.”³

The uncertainty surrounding the exact ambit of the fair use doctrine is apparent even today in the US – as evidenced most prominently very recently by the law suit regarding Google’s library scanning.⁴ Some have therefore concluded that “fair use” is nothing more than “the right to hire a lawyer”⁵ or the “law of deep pockets.”

Violation of international treaty obligations

It should also be mentioned that many academics question the extent to which the “fair use” doctrine is compatible with the “three step test” enshrined in several international copyright treaties.⁶ there is some controversy as to whether a fair use doctrine does indeed limit the copyright owners’ exclusive rights in “certain special cases” only. The US can point at its highly developed set of precedents that have, over decades, calmed (but not silenced) critics with regard to the ambit of the doctrine.

³ Lawrence Lessig, Free Culture, p. 187 <http://www.free-culture.cc/freecontent/>

⁴ Authors Guild, Association of American Publishers et al v. Google Inc (Case 05 CV 8136 DC)

⁵ “Fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.”, Lawrence Lessig, Free Culture, p. 187 <http://www.free-culture.cc/freecontent/>

⁶ Berne Convention for the Protection of Literary and Artistic Works, Article 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 13: “Members shall confine limitations and exceptions to exclusive rights to 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.”

If Ireland was to introduce a fair use doctrine now, without taking fully on board (how?) US precedents, the question of compatibility with the three step test would have to be freshly examined. The fact that the US had been admitted can only serve as a precedent, if the same arguments could be applied to Ireland, i.e. that the existing corpus of legal precedents has created a series of special cases exceptions that each individually are compatible with the Berne three-step-test.

Finally, we would like to remind the Irish government that one of the factors to be considered when assessing the fairness of a use is the “purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes”⁷. This means that fair use would not apply wherever the user subsequently exploits her invention commercially. Will the industries triggering the Irish Copyright Review indeed be able to rely on fair use when carrying out their innovative activities? This is highly questionable as these industries will certainly want to commercialise their creative output in some form.

In conclusion we submit that the introduction of a fair use doctrine would come with many disadvantages (uncertainty, policy imbalance at the expense of content creators, possibly violation of international treaty obligations), and even the alleged advantages may not materialise wherever the use is of a commercial nature.

In short, the introduction of fair use doctrine would shift responsibility for policy making from Parliament to the courts, thereby stifling democracy, transparency and accountability.

We remain at your disposal for any further questions you may have.

Yours sincerely,



Jens Bammel
Secretary General

⁷ US Copyright Act 1976, 17 U.S.C §107