

Dr. Eoin O'Dell
Chair, Copyright Review Committee
c/o Department of Enterprise, Jobs & Innovation
via email

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Dear Dr. O'Dell,

I am pleased to respond to the call for submissions to your review as published on the DEJI website, while noting that I intend to make a more substantial submission in response to your Committee's proposed consultation paper. Therefore, this brief submission concentrates on some possible issues or questions rather than the details of desired changes to Irish and EU copyright law. I am a lecturer in law and director of the LLM in Information Technology & Intellectual Property Law at the UEA Law School, University of East Anglia, where I teach Internet law, media and entertainment law, copyright law and constitutional law, and am a member of the media@uea interdisciplinary centre. I also hold the degrees of LLB and PhD of the University of Dublin (Trinity College) following my studies at the Law School, with the application of media law to the Internet being the subject of my doctoral thesis.

1. Although I note the terms of the reference of the Committee are focused on 'barriers to innovation', I would suggest that sustainable proposals for reform will need to consider the impact of any amendment on a wider set of issues. I believe that it is possible to comply in full with these terms of reference while still considering, for example, the consequences of a given amendment for freedom of expression or for consumer rights, to name but two. Of course, there can be useful links between innovation and other policy goals, and I trust that the Committee will be able to explore these links in due course.

2. The specific question of what the Minister referred to as 'US-style "fair use"' is a crucial one. You will of course be aware of the recent Hargreaves Review in the United Kingdom which dealt with a similar question. With the greatest of respect to that review, which I think added a lot to the debate in the UK and elsewhere, there are a number of further approaches that your Committee might try. I would suggest that the question of principle regarding the differences between the 'factors' approach of US law and the 'limited exceptions' in current Irish law could be explored. There is a difference between doing this and, as is often the case, looking at the outcomes (would situation X be permissible under Irish law?). On the outcomes, though, it would still be interesting to look at a number of examples of successful fair use defences in the US and map them to the current exceptions in Irish law - this will be useful if the ultimate recommendation is to propose

discrete additions to the existing set of exceptions (as proposed, for example, in the Gowers report in the UK in 2006 regarding parody). This should not just be about the (important) relationship between different parts of the value chain in the creative industries (e.g. use of a literary work where the rights are controlled by a publishing company by the producer of a documentary financed by a television company), but also how the law affects the individual creator, user, entrepreneur, student, or researcher who may not have a knowledgeable organisation to speak or lobby for them; access to new technologies of production and distribution create opportunities for new forms of innovation and creation, and one should ask whether existing Irish law prevents Irish individuals from making the best use of these facilities.

3. I understand from reports of the Committee's public meeting (which I was unable to attend, but I commend you and your colleagues on organising it and acting in such an open fashion from the outset) that specific issues were raised regarding the position of photographers (see e.g. <http://www.priorystudios.ie/blog/?p=699>). This was a problematic issue during debates on what became the Digital Economy Act in the UK last year, particularly in relation to the issue of 'orphan works', where associations of photographers (among others) argued that statutory change would be to their particular disadvantage. I am not yet convinced that fair use or indeed other changes would have a disproportionate impact on one format over another - not least because the issues appear, at first glance, to be derived from enforcement above anything else - but it would be very useful for the Committee to explore this question in its paper.

4. In recent years, the European Commission has referred to copyright reform as part of its work on the 'Digital Agenda' (COM(2010) 245) and more broadly as an aspect of the digital single market ('Content Online' green paper, COM(2011) 427) and of cultural and media policy (see e.g. COM(2011) 287 at 3.3.5). I do not propose that your Committee be charged with resolving the huge question of the role of law in Europe-wide cultural policy (you have more than enough to do), but acknowledging this dimension would, in my view, be useful, particularly in terms of building support for your recommendations in due course. For example, the issue of the Google Books litigation in the US highlighted, from a European perspective, how fair use, orphan works, the role of the Berne Convention and other issues of copyright law form a part of a bigger debate on access to knowledge, on anti-competitive behaviour and the fundamental question of how to preserve the cultural heritage of a particular nation or the wider global community. In that context, proposing ways that your recommendations could relate to Digital Agenda goals (such as Key Action 1, "Simplify copyright clearance, management and cross-border licensing") would be welcome.

5. At various stages over the last five years, ideas have been floated regarding the positioning of Ireland as a hub for inward investment and/or indigenous development in the areas of digital content and of rights management (e.g. the 'International Digital Services Centre' concept, discussed at <http://www.siliconrepublic.com/innovation/item/17768-digital-economy-is-the-winn>). My impression is that these ideas are at a fairly speculative level, and would in any event have to be implemented within the constraints of EU and

international law, but a realistic assessment of the role of copyright law in these issues of industrial or financial policy would be very welcome, and your Committee is better placed than most to make such an assessment.

6. Since your Committee was established, the European Commission has published its proposed Orphan Works directive (COM(2011) 289), and DEJI has also asked for comments on this proposal. It is my firm view that orphan works are particularly important to any consideration of barriers to innovation and indeed to fair use more specifically. This is because works of this nature are least likely to be managed through established, well-understood processes of negotiation and payment. Furthermore, new work that might engage an orphan work falls in one of the riskiest of legal categories, meaning that the answer to a question on legal status may be 'don't know' rather than 'yes' or 'no'. It would therefore be helpful for your Committee to touch upon this issue, particularly if you can circulate or consider any changes that might be necessary to the Commission's proposal, in the light of your own terms of reference.

I look forward to reading your consultation paper later this year and will be in touch with a detailed response at that point. My colleagues and I are willing to carry out specific research on questions of interest to the Committee, if you are minded to make such requests as part of your work.

I encourage your Committee to publish all submissions to this phase as soon as is feasible, and wish you all the best of luck with this important project.

Regards,

Dr. Daithí Mac Síthigh