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By e-mail to: copyrightreview@djei.ie

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

Re: Submission to Copyright Review

Dear Committee Members,

I refer to the open call for submissions on your consultation paper – *Copyright and Innovation*. Thank you for the opportunity to make a submission and I now offer the following observations.

General Observations

At a general level a review of copyright law in Ireland is timely. The recent introduction of a statutory instrument to facilitate rights-holders to apply to the courts for injunctions highlighted that copyright in our digitally connected world sits at the intersection of various human rights and interests.[1] Elements of this debate will no doubt be reopened in response to the judgment delivered by Justice Charleton in *EMI and ors v Data Protection Commissioner* 27 June 2012 with respect to the "*three strikes protocol*" adopted by Eircom in order to address online copyright infringement.[2]

The terms of reference for the review are therefore a disappointment. Rather than seize an opportunity to prepare for a modern revision of Irish copyright law, the review was generally limited to copyright legislation, innovation and fair use.

[1] Such rights and interests include freedom of expression, right to privacy, property rights, personality rights, moral rights of integrity and attribution, right to communicate, right to earn a living, other commercial and business interests, interests of a cultural, historical, social, scientific and educational nature and heritage and many more.
[2] *EMI and ors v Data Protection Commissioner*, (unreported, High Court, Charleton J., 27 June 2012) 2012/167/JR.

This appears to be tied to objectives in the Programme for Government 2011-2016 where it is stated that the Government will "review and update Intellectual Property legislation currently in place to benefit innovation" and that Ireland "will pioneer within the EU a model of 'fair use' in European Copyright Law." However the Minister in launching the review did not reference these objectives or goals nor place the copyright review into an overarching policy framework other than copyright's perceived impact as a barrier to innovation.

One of the outcomes of this is that your committee has therefore had to take a broad view of the terms of reference in order to incorporate suggested corrective amendments to existing legislation in order to overcome what you describe as the "unintended consequences" of a previous enactment. Your proposed amendment to section 24 of the Copyright and Related Rights Act 2000 (CRRA 2000) dealing with unpublished works is one such example.

Specific Observations: The Questions

1. **Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?**
84. **Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?**

    I feel this is an opportunity lost and a much broader review of copyright should have been undertaken with a view to a general revision of the law. This would allow for the establishment of a single piece of legislation governing Irish copyright, and possibly allow for recommendations for an express constitutional provision, within the parameters of our international obligations and incorporating the social, cultural and human rights aspects of copyright law and policy.[3]

2. **Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?**
3. **Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?**

[3] Our International obligations include the Berne Convention, World Intellectual Property Organisation (WIPO) Agreements and Treaties, and our obligations arising from membership of the European Union.

As per my response to question one, I believe this is an opportunity lost. However, a review of copyright, even one limited to innovation, must address and clarify the question of common law and constitutional copyright in Irish law. The existence and extent of both remains unclear and while a general review could have finally made recommendations regarding their position in Irish copyright law, further clarity on these issues could also be incorporated into your broad interpretation of the terms of reference.

In particular the opportunity to highlight the need for legal clarity and certainty on the extent, nature and scope of common law and constitutional copyright should be taken. The output of your committee could include a recommendation to insert an express copyright clause in our constitution and the subsequent debate would provide an excellent opportunity of placing copyright into an overall context in Irish law. It could address questions including:

- Is copyright merely instrumental or does it protect more fundamental, natural or moral rights of a creator/author?
- Should copyright and related rights be given the same level of constitutional protection as each other?
- How does the constitutional recognition of the "common good" interact with copyright?

Bunreacht Na hÉireann, being a creature of its time, did not expressly provide a copyright clause.[4] The recommendations of a copyright review committee in this regard could be brought to the proposed Constitutional Convention for further debate before being placed before the people in a referendum.

28. Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?

Unpublished works by their nature include what your consultation paper at page 36 describes as "ephemera" and other expressions of everyday life.

[4] Kennedy, Rónán, "Was it Authors Rights all the Time? Copyright as a Constitutional Right in Ireland", (2011) *Dublin University Law Journal* 253.

Many of these items are private works, communications and expression which are never intended for publication such as letters, e-mails, diaries, photographs, journal entries, audio and video recordings, and much more. The broad definition of authorship and originality mean that copyright subsists in these works from their creation.

The author may believe that they will be destroyed (deleted) upon his death or that they will be maintained with dignity and care by his heirs, as these works also have an emotional and sentimental value from the personal perspective of his family and friends. These works are unlikely to have any great or lasting economic value but may in the future be of great value to historians, biographers or to cultural and heritage institutions and donation to such institutions should be encouraged.

Unpublished works may also include preparatory works intended for publication but never completed. These also will in most cases meet the minimum criteria of originality and depending on the status of the author may hold some residual economic value as well as sentimental and cultural importance.

Copyright has a long tradition at common law of protecting rights and interests of the deceased, including privacy. The right of every man to decide if he will keep his sentiments to himself, share them only with his friends, or choose to make them public was first recognised in copyright law.[5] This perpetual copyright in unpublished works was built upon by Warren and Brandeis in their seminal work "The Right to Privacy" in the *Harvard Law Review*.

However the perpetual protection of unpublished works through common law and statutory copyright appears in many legal regimes to have been abolished and the bifurcation of traditional copyright protections between economic and moral rights has led to inconsistent approaches to permitting the posthumous publication of previously unpublished works.

The United States, through the Federal Copyright Act 1976, was the pioneer in abolishing perpetual state copyright in unpublished works (also

[5] *Millar v. Taylor* (1769) 98 English Reports 201 at 242; Yates J. (dissenting); and Warren, Samuel D., and Brandeis, Louis D., "The Right to Privacy", 4 *Harvard Law Review* 193 (1890) at 198

known as common law copyright). The duration of copyright in unpublished works of an author would endure for his life plus fifty years (later extended to life plus seventy). This was done despite the Register of Copyrights recommending that it be retained because the privacy interests of the authors and their heirs was paramount and deserved protection against unauthorised disclosure without any time limit.[6] In the pre-digital world of 1976 the effect of these works falling into the public domain (at least in copyright terms) meant that the holder of what usually was a single material copy could control access to and use of the work. This would in most cases remain in the hands of the surviving family and the private expression of the deceased would remain private in a familial sense and not truly enter the public domain.

The legal public domain is no longer made up of works which the creator has chosen to make public. It now includes unpublished works which were may never have been intended for the public domain.[7] The legal public domain now fails to reflect an author's expectation of privacy in his unpublished works. Today most of our private expressions are digital and at death these are in the hands of third party service providers and not our family and friends. In most jurisdictions legal uncertainty exists on the probate status of both access to and ownership of these items.

The duration of copyright in unpublished works in Ireland is as set out in section 24 of the CRRA and in general endures for the life of the author plus seventy years. Perpetual copyright in unpublished works is not available under statute. Its existence under common law or constitutional law as a copyright or related right would be a novel question for Irish courts.

But we also have a statutory publication right in previously unpublished works contained in section 34 of the CRRA. This creates a related right where "after the expiration of the copyright in a work, [a person] lawfully makes available to the public for the first time a work which was not

[6] Copyright Office (US), *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (10 July 1961) at 48; the report was actually printed and published by the House Judiciary Committee of the 87th Congress, 1st Session, (1961).
[7] The act of publication is the point where the creator consents to the property rights in his work being limited in time and extent by copyright law.

previously so made available." This quasi-copyright endures for 25 years but does not encompass moral rights.

The current wording of Irish law regarding copyright in unpublished works and the publication right has its genesis in the EU Term Directive 93/98/EEC. The primary purpose of the Term Directive was the harmonisaton of copyright terms across the EU. The wording of the Directive, as transposed into Irish law, regarding the expiry of the copyright term was intended as an incentive for publication of works as quickly as possible.[8] The associated publication right was designed to offer rights holders the incentive to invest in the posthumous publication of works.[9]

Your proposal to amend section 24 CRRA by the addition of the words highlighted in bold below would not alter that objective.

> s.24(1) The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective **either** of the date on which the work is first lawfully made available to the public **or of whether the work is ever made available to the public**.

However significant questions remain outstanding. Should Irish copyright law allow the personal and private expressions which were never intended for publication to fall into the public domain? Should a related right in unpublished works be provided to shield such works from the public domain? Should provision in copyright law be made to permit an author by an advance directive contained in his will or in a donation, transfer, assignment or other instrument to attach conditions for the further uses of his personal and private expressions? Should posthumous publication ever be lawful without the advance consent of the author?

[8] Von Lewinski, Silke, "EC Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights", (1992) 6 *IIC International Review of Intellectual Property and Competition Law* 781 at 801.
[9] *Ibid.*

These questions are just some which my current research on *The Law of Digital Remains* seeks to address.[10] These questions engage a wide range of rights, interests and stakeholders and are directly relevant to other questions in the consultation paper including:

73. [In the context of heritage institutions] **Should there be a presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself, unless the contrary is expressly stated?**

My current view is that the range of unpublished works needs to be further categorised possibly along the lines of particular authors and types of work. One such category would be personal or private works. A related right modelled on section 117 of the New Zealand Copyright Act 1994 should be introduced to deal with any transfer or bequest of an unpublished personal or private work and not just such transfers to archives or institutions.

Section 117 of New Zealand's Copyright Act 1994 (set out in full in the appendix) provides that if the copyright owner transfers or bequeaths a copy of an unpublished work to certain libraries, archives, or other institutions and does so subject to any conditions prohibiting, restricting, or regulating publication of the work, then publishing the work in violation of those conditions is actionable as if it were copyright infringement even if the copyright in the work has expired.

This would provide an author and his surviving family with an assurance that control of unpublished personal and private expression is maintained. This would be in line with article 8 of the European Convention on Human Rights and the right to respect for private and family life, including one's home and correspondence, article 7 of the Charter of Fundamental Rights of the European Union and the unenumerated privacy rights contained in the Irish Constitution. It would also be in line with certain statutory protections currently in place, including those regarding personal information of deceased persons contained in section 28 of the Freedom of Information Acts 1997 – 2003 and the associated regulations.

[10] For further information please visit http://www.irchss.ie/intro_slide/law-digital-remains; my research is funded by the IRCHSS.

Such a provision would also create a method of transferring such works to heritage institutions and providing clarity on how such works could be maintained and curated. It would also provide some certainty regarding the interpretation of the term "lawfully" in the publication right of section 34 of the CRRA. The use of the term "lawfully" in international copyright seems to make it clear that the author's consent is necessary in order for a work to be published.[11] Whether this subsists beyond the expiry of the copyright term in Irish law is questionable and requires clarity.

An exception must however be provided where access to or publication of the work would be in the public interest. Such a determination would be made following consideration of matters such as the work itself, the status of the author and the context within which access or publication of the work is required.

In essence I am advocating recognition in Irish copyright law that certain classes of unpublished works are not suitable for the public domain. The deceased author or his surviving family may have certain interests including privacy interests which must be considered in legislating for this area. While such a concept may appear novel, the blanket protection of common law copyright has only recently been removed and this issue is exacerbated where most unpublished personal and private digital expression is in the hands of third party service providers and needs to be addressed.

32. Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?

I am unaware of any evidence to support such a modification. While copyright infringement is not always an appropriate subject for the criminal law in my opinion, it is more appropriate to confine activities such as the surveillance of citizens and the application of resultant sanctions to the relevant public authorities and criminal law system rather than entrust

[11] Walter, Michel M., Von Lewinski, Silke, (eds), European Copyright Law: A Commentary, (Oxford University Press, Oxford 2010) at 575.

private entities to do so under commercial protocols overseen by a commercial court.[12]

I note your comments on pages 25 and 38 with respect to the separate consultation regarding injunctions. As that consultation has now ended and the regulation has been signed into law I presume that this opens this matter to consideration by your committee. In this regard I draw your attention to a joint submission made by Mr. Rónán Kennedy, Mr. Michael Coyne and myself which you might like to consider in addressing this matter.[13]

Chapter 8 Entrepreneurs (Innovation)

I have already outlined my concerns regarding the terms of reference of this review. I fear it isolates and identifies copyright only as an instrumental measure which through a proposed innovation exception contained in chapter 8 will distinguish *innovative copying* based on a presumed public good or interest of *innovation* from the traditional instrumental distinctions of *mere copying* and *wrongful copying*.

A quote from Mark Twain in a letter he wrote to Helen Keller in 1903 might help draw out the issue:

> "For substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources, and daily use by the garnerer with a pride and satisfaction born of the superstition that he originated them; whereas there is not a rag of originality about them anywhere except the little discoloration they get from his mental and moral calibre and his temperament, and which is revealed in characteristics of phrasing. When a great orator makes a great speech you are listening to ten centuries and ten thousand men—but

[12] The signing into law the European Union (Copyright and Related Rights) Regulations 2012 (S.I. no. 59 of 2012) will in my opinion ultimately lead to commercial entities setting out the "facts/evidence" obtained through various unapproved online surveillance techniques together with "preferred sanctions" in pleadings to a civil or commercial court rather than engaging with the state provided authorities to deal with criminal activities.

[13] Submission available at: http://coimin.ie/wp-content/uploads/2011/09/CRRA-Amendment-Submission-2011-July-29-final.pdf.

we call it *his* speech, and really some exceedingly small portion of it is *his*. But not enough to signify."[14]

The innovation exception seeks to recognise that ideas are in general second-hand or build on the work of others by providing a defence to the claim in copyright infringement that there was a causal link between the initial work and the innovative work.[15] This is done by sufficient acknowledgment and the requirement to inform the rights holder of the initial work after the innovative work is made available to the public. The other elements of the exception appear to be accepted copyright principles requiring that the innovative work must not unreasonably prejudice the legitimate interests of the rights holder of the initial work.

This is then tempered by providing the rights-holder in the initial work the right to claim that he had already embarked on a similar process to derive an innovative work thus negating the effect of the innovative exception.

This exception seems to be based on a presumption that the initial rights-holder if approached prior to the process of creating the innovative work would refuse to licence or assign rights to the innovator. Even if this presumption is true, the initial rights-holder may have reasonable commercial grounds to do so. Acquiring the consent of a rights-holder is fundamental to copyright and any proposed innovative exception should incorporate pre-innovation contact between the innovator and initial rights-holder.

The examples of Internet search cited could all be provided under a new fair dealing heading provided that they do not unreasonably prejudice the legitimate interests of the rights holder.

Conclusion

My submission highlights the limited nature of the terms of reference within which you must operate. Despite this, innovators require certainty and

[14] Mark Twain's Letter (Volume 2 of 2); available at http://www.lettersofnote.com/2012/05/bulk-of-all-human-utterances-is.html
[15] *Francis Day and Hunter v Bron* [1963] Ch 587.

action initiated by your committee regarding the existence, scope and extent of common law and constitutional copyright would ultimately provide greater certainty to innovators. I have also raised my concerns regarding the current legislative framework surrounding unpublished works and posthumous publication of private expression. I have also taken the opportunity to reiterate a joint submission made to the Department regarding the transposition of EU law on injunctions into Irish law. I trust these matters can be addressed as part of your review.

I thank you for the opportunity to make a submission. Should you require further clarification please do not hesitate to make contact.

Yours Sincerely,

Damien McCallig
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[16] My research on the *Law of Digital Remains* is funded by the IRCHSS, please visit <http://www.irchss.ie/intro_slide/law-digital-remains> for further details.

Appendix 1

Section 117 of New Zealand Copyright Act 1994

Right to make conditions in respect of certain unpublished works

(1) This section applies where the owner of the copyright in an unpublished literary, dramatic, or musical work, or an unpublished artistic work other than a photograph, has, whether before or after the commencement of this Act, transferred or bequeathed to an institution—

(a) the property in or possession of the manuscript of the literary, dramatic, or musical work or a copy of the manuscript; or
(b) the property in or possession of the artistic work,—

subject to any conditions prohibiting, restricting, or regulating publication of the work for a specified period or without any limit on the period.

(2) While the manuscript, copy, or work is in the possession of the institution, any publication of the work in breach of such a condition by—

(a) the institution owning the manuscript, copy, or work; or
(b) the institution having possession of the manuscript, copy, or work; or
(c) any other person—

shall, notwithstanding that the copyright in the work may have expired, be actionable as if copyright continued to exist in the work and the publication were an infringement of the copyright.

(3) Nothing in this section applies to any publication with the consent of the person who would be the owner of the copyright in the work if the copyright had not expired.

(4) In this section, the term institution means the Crown, a local body, a prescribed library or archive within the meaning of section 50, an institution within the meaning of section 159 of the Education Act 1989, or any other institution prescribed by regulations made under this Act.