

# CONSULTATION ON THE REVIEW OF THE COPYRIGHT AND RELATED RIGHTS ACT 2000

## SUBMISSION

by

THE NATIONAL GALLERY OF IRELAND

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### **INTRODUCTION**

The National Gallery of Ireland (“the NGI”) was established in 1864 as the repository for a permanent public collection of works of art. Its broad mission today is to display, conserve, manage and develop the National Collection; to enhance enjoyment and appreciation of the visual arts and to enrich the cultural, artistic and intellectual life of present and future generations. In seeking to discharge this mission fully, the NGI:

- Displays, maintains, conserves and manages the National Collection;
- Conducts a broad programme of lifelong learning and other educational courses;
- Maintains a number of library and archive collections, held in the Art Library, the ESB Centre for the Study of Irish Art, the Yeats Archive and the NGI Institutional Archive;
- Presents Online Collections of works from the Collection on its website.
- Generates significant revenue from the sale of merchandise and licensing of rights.

The sophistication and professionalism of the museum sector increasingly demands the use of new and emerging technology. NGI strategy specifically identifies the use of digital technology for optimum delivery of its remit. The engagement of the NGI with digital technology can be summarised as follows:

- To appropriately manage the collections, the NGI implements comprehensive computerised management systems.
- To preserve the Collection to the highest standard, the NGI has established criteria for the storage of material on and off site and maintains computerised conservation records relating to the collection.
- For the purposes of its records, the NGI digitises the Collection; both artworks and archival material; at the appropriate level of resolution.
- The NGI uses appropriate and up to date digital imaging and interpretative technologies for the purposes of documenting, communicating and illustrating the Collection.
- The NGI has established a number of electronic databases, holding advanced information about various elements of the Collection.
- Access to the Collection is supported by the most up to date and appropriate technologies. The NGI aims to present the entire Collection on its website on a phased basis. It is in the process of providing access to a VR Gallery on the website; maintaining an online presence for research and education services; is reviewing and expanding the provision of

multi-interpretative services, and is developing the use of flat screen and other technologies to support visitors.

- The NGI is currently developing mobile applications (apps) to promote its mission.
- The NGI is one of the Irish partners in DECIPHER (Digital Environment for Cultural Interfaces), an EU-funded project which aims to develop new solutions for the provision of access to digital heritage.
- The NGI is participating in the *Europeana* Project, an EU project providing online access to the digital resources of Europe's museums, libraries and archives.
- The NGI is currently developing an on-line Picture Library retail service.
- The NGI maintains an integrated, co-ordinated approach to the use of technology, including maintenance of security and back-up systems; remote access operations, and intranet service to facilitate internal communications.

## **COPYRIGHT AND THE NATIONAL GALLERY**

There is an inherent conflict between the legitimate interests of the copyright owner and the wider societal interest in the preservation and provision of access to objects of cultural value. Cultural sector institutions stand in the space between these competing interests and conflicting legislation. In pursuit of their mission, they must find a point of balance which incorporates respect for the creator or right holder on the one hand, and the duty of the institutions to serve the public interest on the other.

As both a user of copyright material, and a copyright owner in its own right, there are many ways in which copyright law impacts on the work of the NGI.

In relation to the *use* of copyright works:

- Up to 25% of the works in the Collection are still in copyright. Many of these are among the most popular works, including those by Yeats, Picasso, Matisse, leBrocqy and others. Although the NGI has a copyright assignment in some works, in the majority of cases the artists or their estates retain copyright. Permission is therefore sought for non-exempt reproduction or making available of such works to the public/third parties.
- The NGI holds a large quantity of material classified as "orphan", in relation to which the copyright owner is either unknown or cannot be located. The NGI has a duty to make this material available, so far as possible. In keeping with its legal obligations, the NGI has traced and continues to trace many hundreds of right owners to obtain "rights clearance" to sanction use of the material.
- The curatorial, library and archival work of the NGI is to an extent facilitated by copyright exceptions though there are areas of difficulty and ambiguity. We often strain to stay within the limits of the exceptions.
- The NGI increasingly seeks to make images from the Collection and its research and educational resources available online. It is typically necessary to locate and obtain the permission of the right holder for all works in copyright.

As a copyright *owner*:

- The National Gallery holds various copyrights:

- in certain artworks still in copyright, by virtue of assignment;
  - in commissioned photographs of public domain works;
  - in National Gallery publications;
  - in various databases created by it;
  - in works created by its employees, in the course of their employment.
- The NGI also benefits from George Bernard Shaw’s copyright, including the potential for exploitation in new media.
  - The NGI seeks where possible to benefit from the “right of first publication” provided by section 34 of the Copyright and Related Rights Act 2000.
  - Various licences are held to reproduce protected works and make them available to the public.
  - The NGI commercially exploits owned copyrights and licensed material through merchandising for its own purposes and by third party licensing.

The clarification and clearance of rights, and the licensing of own copyright in facilitating and promoting the Collection is an increasing part of the work of the NGI staff, carried out by the Rights and Reproductions Department.

## **THE COPYRIGHT AND RELATED RIGHTS ACT 2000**

The Copyright and Related Rights Act 2000 (“CRRA”) is now over a decade old. Much has changed in that period. Technology is no longer merely facilitating change: it is driving innovation. The National Gallery seeks to exploit the opportunities it presents in the interest of better discharging its public interest mission. Primarily it seeks to use digital technology for two particular purposes: to enhance the way in which its curatorial remit is discharged, and to make the Collection more widely available, especially for digitally-enabled projects and products.

However, because of the complexity and cost of securing rights clearance, the NGI is constrained in its aspiration to make the Collection more accessible by digital means. We have been obliged, for example, to adopt a general policy of not accessioning archive collections unless we can secure ownership of the copyright. Moreover, the fact that our modest resources do not allow us to invest heavily in the “due diligence” needed in connection with rights clearance often results in an overly cautious approach.

The NGI identifies the following specific respects in which provisions of the CRRA act as a particular constraint to innovation.

### **1. Library and archive exemptions**

The exemptions, contained in sections 59-70 CRRA, are of central relevance to the work of the NGI. They govern all of our library facilities, and provide the legal framework for our work in securing and preserving the National Collection.

The sections were largely drawn from the UK Copyright Designs and Patents Act 1988, drafted in a pre-digital era. The language of the sections did not contemplate digital copying. It is in general very difficult to interpret the exemptions other than in relation to traditional uses of analogue works.

For example, the narrow exemption for preservation contained at section 65 CRRA allows the making of “a copy”. However, effective digital preservation requires the creation of multiple copies through the practice of “normalizing” content for ingest on to a server; format shifting to address future obsolescence; the use of emulators to render digital works where the software is obsolete, and the creation of back-up copies on mirror servers.

The Gowers Review of Intellectual Property in the UK, in 2006 (“the Gowers Review”) demonstrated that the UK (and hence Ireland) has far more stringent restrictions on copying for archiving and preservation than other countries.

It is submitted that the library and archive exemptions need to be reviewed. They need to be re-cast in language appropriate to the digital age and that provide clarity about permitted uses. They need to take a broad and more supportive position on the curatorial functions of public libraries and archives.

At very minimum, it is essential that the current exceptions are expanded to permit libraries and archives to make digital reproductions of protected works for archival and preservation purposes and to format shift archival copies to guard against future obsolescence.

Both of these changes have been proposed in the UK, by both the Gowers Review and the recently-published report of Professor Ian Hargreaves, *Digital Opportunity*.

Both amendments are within the purview of EU Directive 2001/29/EC (the Information Society Directive) and therefore within the competence of the national legislature. Article 5 (c) of the Directive permits “specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”

There is no reason in fact why the maximum benefit should not be reaped from this Article in drafting amendments to the CRRA. There is no disadvantage. Right holders do not object to digital treatment of their works for curatorial purposes, yet the law obliges the custodians of the works to expend time and limited resources in securing their consent.

There is one provision relating to libraries and archives which is not modelled on a provision in the UK Act. This is section 66, which permits the making of “a copy” of a work in the permanent collection for various specified curatorial purposes. While sanctioning the making of “a copy” of the work, it is unclear the extent to which the section permits the making available to third parties of the “copy” of the work for the specified purposes.

In particular, while the section permits the making of a copy “for the purpose of compiling or preparing a catalogue” or “for the purpose of informing the public of an exhibition”, it does not permit the actual publication of a copy of the work in the catalogue for an exhibition.

It is submitted that the provision should be amended to permit the reproduction and making available to the public of works, when included in catalogues prepared in connection with the public exhibition of the works, by libraries and archives. This does not over-reach what is permitted by Article 5(3)(j) of the Information Society Directive, which permits both reproduction and communication to the public “for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use”

Finally, we would urge the review to recommend the adoption in the legislation of the exemption permitted by Article 5(3)(n) of the Directive, namely “use by communication or making available, for

the purposes of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”

Such a provision would sanction the making available of digitized copies of works on screens in the Gallery, where they could be accessed by visitors, and consulted for educational/research purposes. This facility is particularly important given that only part of the Collection can be displayed at any given time, due to space restrictions in the Gallery. It further enables us to minimize wear and tear on fragile materials.

## **2. Material acquired by donation or bequest.**

The NGI is the recipient of many donations and bequests. In the case of donations, current practice is to clarify the copyright status of the work and where possible to take an assignment of the copyright from the donor. In this way, the NGI can exercise discretion as to the manner in which the work will be used. In the past however, there was little recognition of the importance of copyright. The NGI holds a good deal of valuable donated material in which copyright still subsists, but in relation to which the NGI cannot identify or locate the copyright owner in order to obtain permission for non-exempt uses of the material.

It is clear to us that the fact of the donation or bequest to the NGI indicates the clear intention on the part of the donor or testator to place the material in the hands of the NGI, to use at its discretion. This is universally confirmed when we find the copyright owner. However the CRRA does not recognise this reality and the NGI is obliged to incur costs, often quite substantial, in seeking out copyright owners in order to obtain permissions for use.

We submit that a provision along the lines of that set out hereunder would be of considerable assistance to the NGI and other cultural institutions. In some cases it would release valuable material that could not otherwise be made available to the public. In all cases, it would considerably reduce the costs in seeking out and obtaining permissions from right owners and would be in the public interest.

*Where under a donation or bequest (whether general or specific) to a library, archive or other establishment to which members of the public have access, such a library, archive or establishment is entitled to a work which was not made available to the public before the death of the author thereof, the donation or bequest shall, unless a contrary intention is expressed in writing by the donor or testator when making the donation or bequest, be construed as including the copyright in the work in so far as the donor or testator was the owner thereof at the time of making the donation or bequest.*

There is precedent for this type of provision at section 93 of the UK Copyright Designs and Patents Act, and a similar but more limited type of provision at section 123 CRRA.

## **3. Posthumous unpublished material**

Under the Copyright Act 1963, it was possible for literary, dramatic, musical works and engravings to enjoy a potentially perpetual copyright term. The relevant provisions of the 1963 Act were sections 8(5) and 9(6). The Act stated that copyright subsisted in the specified unpublished works and continued to subsist, if unpublished at the author's death, for 50 years from the date of publication. If publication did not occur, the term did not expire.

The rules relating to copyright terms were altered in Ireland by the European Communities (Term of Protection of Copyright) Regulations 1995, implementing EU Directive 93/98/EEC. The new

rules provided, at Regulation 5, that where a term of protection of a literary, dramatic, musical or artistic work is not calculated by reference to the death of the author, and the work has not been published or made available within 70 years of its creation, the protection shall terminate. While this appeared to abolish the potential for a potentially perpetual term, Regulation 15 stated

“Nothing in these Regulations shall be construed as having the effect of shortening in the State a term of protection which is longer than the corresponding term provided for in these Regulations where such a term of protection is already running on the 1<sup>st</sup> day of July, 1995.”

Literary dramatic musical works and engravings, unpublished at the author’s death, would at the date of implementation of the Regulations have enjoyed an extant copyright term which would continue to subsist until 50 years from publication. Clearly this could outlast the term provided at Regulation 5.

The effect of the Regulations has been preserved in the CRRRA, by the provisions of section 9, First Schedule, Part 1, Transitional Provisions, which state:

“Nothing in this Act shall affect the duration of copyright in works in which copyright subsists on or before the commencement of Part 11 of this Act, and the duration of copyright in those works shall be determined, where applicable, in accordance with the European Communities (Term of protection of Copyright) Regulations 1995 (S.I. No. 158 of 1995), notwithstanding the revocation of those Regulations.”

Accordingly it appears that the potentially perpetual term still applies to the works identified in sections 8(5) and 9(3) of the 1963 Act.

This situation poses problems for the National Gallery. The NGI holds valuable unpublished literary records and engravings which we are unable to make available even after the normal copyright term has expired. In some cases the work is “orphan” and it may never be possible to provide legal access to it. This is clearly a barrier to innovation in the sense envisaged by the terms of reference of the Copyright Review and is against the public interest.

It is submitted that an amendment to the Act is necessary, and advisable. We suggest a provision along the following lines:

*Where, at a time more than seventy years from the death of the author of a work—*

*(a) the work has not been lawfully made available to the public, and*

*(b) the work, or a copy thereof, is kept in a library, archive or other establishment to which (subject to any provisions regulating the establishment in question) members of the public have access,*

*the copyright in the work is not infringed by any act of reproduction or making available to the public of the work by the library, archive or other establishment, or by any other person pursuant to any rules or policies established by the library, archive or other establishment.*

#### **4. Copying of material in public records**

The National Gallery is concerned that a provision contained at 73 CRRA is overly broad and exempts copying of archived material in a manner that was unintended by the legislature.

The provision states:

“Any material which is comprised in records which are open to public inspection may be copied, and a copy may be supplied to any person, without infringement of copyright”.

There is no clarification of what is meant by “records which are open to public inspection”. It may be interpreted to include all records of any kind when kept in a place in which they may be accessed by the public. It is not clear by whom the copy may be made. The provision conflicts sharply with the narrowly drawn library and archive exemptions. It also contrasts strangely with the immediately following provision, section 74, which permits the copying of material open to the public on a statutory register, under a range of strict conditions, and permits the Minister to prescribe the conditions under which this material may be made available to the public.

Section 73 appears to have been inspired by section 49 of the UK CDPA. This uses similar words to permit the copying of material in public records, but the UK exemption is confined by its terms to material in the Public Records Act 1958, the Public Records (Scotland) Act 1937 and the Public Records Act (Northern Ireland) 1923.

It is submitted that it could not have been intended that section 73 should create such a broad and uncertain exception and that it should be amended to provide clarity.

#### **5. Illustration for educational purposes**

The copying and display of a protected image to make a presentation to students or others attending an educational or other event at the NGI is an infringement. There is no statutory exemption that applies. Moreover, there is no “blanket licence” available to cover this situation. Each image would have to be cleared individually with the right holder.

It is submitted that artistic works should be accorded a similar exemption to that which applies to literary, dramatic and musical works, sound recordings, film, broadcast and cable programmes at section 55 CRRA.

### **THE WIDER COPYRIGHT REGIME**

We have set out above the specific respects in which the NGI finds barriers to innovation in the CRRA. Below we address problems in the wider copyright regime.

#### **6. Orphan works**

The National Gallery holds a sizeable quantity of material classified as “orphan”, in which the copyright owner is either unknown or may never be located. This material comprises not just artworks, usually drawings or illustrations, but letters, books, photographs and general memorabilia. The material is a valuable resource for researchers, as well as being of general interest. The National Gallery has a duty to make it available, so far as possible. Our Rights and Reproductions Department has traced many hundreds of right owners, in order to obtain for permission for reproduction and/or making available of the works.

The work involved in tracing right owners is labour intensive and expensive. There an added layer of difficulty in the case of unpublished works, by reason of the possibility that protection is perpetual (see point 3, above). In many cases we are ultimately unable to locate the right owner. In those cases we must either refrain from use of the work, or risk infringement – an unfortunate choice when the National Gallery is perfectly happy to pay an appropriate royalty. Paradoxically, the more important the work concerned, the less likely we are to take a risk, and so it is the more important material which often has to remain under lock and key.

The NGI is currently examining the EU Proposal for a Directive on orphan works, and intends to respond to the invitation of the Department Jobs, Enterprise and Innovation to comment on the proposal. It is noted that the Proposal does not cover visual works. It is also noted that the Proposal does not propose a system of licensing of orphan material.

A resolution to the problem of orphan works is imperative for the cultural sector. This fact is recognized by the European Commission. With reference to the European online database of cultural material, Europeana, Commissioner Neelie Kroes points out that

“For the moment only a very small percentage of the material accessible through Europeana is in-copyright material. That should change. And one of the key problems to solve in order to make that happen is the orphan works problem..... Europe should move forward and find innovative practical solutions for tapping the huge treasures of our culture for citizens and businesses alike.”<sup>1</sup>

It should be emphasized that while the Europeana project concerns the making available of material online, the problem of handling orphan works is much wider and extends to all forms of non-exempt reproduction, including for purposes of preservation.

We would urge the Review Committee to emphasise the importance of this issue. The UK Report of Professor Hargreaves, *Digital Opportunity*, describes the problem of orphan works as “the starkest failure of the copyright framework to adapt”. He recommends that the UK Government should legislate to enable licensing of orphan works. Legislation should provide extended collective licensing for mass licensing of orphan works and a clearance procedure for use of individual works.

The extended collective licensing model has a number of variants. It, or aspects of it, might be of use in an Irish context. However no proper study on the topic has been published in Ireland. It is submitted that in addition to consulting with stakeholders on the issue, the Minister should commission the conduct of an independent study to establish the extent of the orphan works problem in Ireland, and to explore possible national solutions that might be adopted to complement the provisions of the Directive, going beyond those provisions to provide for the licensing of orphan material.

## **7. Licensing**

The system of licensing of protected works by collective management organisations (“CMO”s), has obvious benefits for both right owners and potential users of their works. Effective licensing has a wider benefit too. It has a crucial role to play in helping to contain infringement.

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<sup>1</sup> Speech 11/163 delivered Brussels 10 March 2011 at the launch of ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana)

However beneficial the system is in theory, the practical reality of dealing with the CMOs can be very frustrating. While “blanket licensing” arrangements, such as are available in Ireland from the ICLA, IMRO and PPI appear to function well, obtaining a licence to make particular uses of individual works can be both extremely expensive and time-consuming. At the end of a process of investigation, it is possible to discover that the CMO in question does not in fact have the mandate to grant the licence.

In the UK, the Hargreaves Report recommends the establishment of a Digital Copyright Exchange, to operate as a type of online licensing platform. In an ideal world, this would already exist, and would provide multi-territorial licences. The European Commission has promised to publish a draft Directive on Collective Management before end 2011, designed to facilitate pan-European licensing. This will presumably address conditions for greater competition between societies, as well as laying down standards relating to transparency and accountability.

The longer-term solutions may have to come from the European Union, but meanwhile there are actions that can be taken at national level to improve the position. There is no comprehensive information available about collective management in Ireland (other than the very limited information which the CMOs are obliged to file annually with the Patents Office). It would be extremely helpful to potential users of protected material to know, for example:

- The full range of licensing bodies operating in Ireland
- What right holders they represent, and for what territories
- Precisely what rights they are mandated to licence
- Whether they can licence for online uses
- The terms of available licences, especially cost.

Until very recently it was not possible to obtain a licence in Ireland for the showing of films. The NGI discovered this when attempting to organize the showing of a series of art related films. While this particular gap has been filled, at least in part, by the establishment in Ireland of the MPLC, it is not clear what other gaps exist in current CMO structures.

The NGI urges the Review Committee to recommend that, as with orphan works, the Minister should consult with stakeholders on the forthcoming Proposal for a Directive. In addition, , even in advance of such a consultation and to inform future decision-making, the Minister should commission the conduct of a study on collective management in Ireland. The brief for such a study might include an analysis of the existing CMO framework; an examination of solutions for mass digitization projects and potential licensing solutions for orphan works. If such a study were to be published in advance of the consultation, it would greatly inform that process.

## **8. Enforcement**

As an institution which places images and other protected material online, the NGI shares the wide concern of right holders about the difficulties of enforcement of copyright in the online environment.

The NGI notes that the Minister is currently conducting another consultation on the content of a statutory instrument designed to effectively implement Article 8(3) of the Information Society Directive. It is hoped that this consultation might stimulate a wider examination of the extent to which the legislation is in full compliance with EU Directives, and furthermore whether there are steps that might be taken at national level to improve the conditions for effective enforcement.

The NGI makes the following points:

## 8.1 Technological measures

The NGI relies on the application to protected works of both technological protection measures and rights management information, when placing images online. We believe that firm legal protection of both is essential to an effective copyright regime.

The Information Society Directive obliges Member States to provide “adequate legal protection” against circumvention of effective technological measures. We are concerned that the provisions relating to rights protection measures at s. 370 – 374 CRRA do not actually prohibit circumvention, and to that extent at least, the provisions fall short both of the ideal and of the obligation under the Directive.

We are also concerned that in most circumstances section 376, which makes it an offence to remove rights management information from a work, is ineffective. Cultural institutions add considerable amounts of information to digitized objects, describing the provenance of the object as well as technical information on formats and characteristics allowing search engines to locate the object. This is a costly exercise and has a wider public benefit as well as protecting the interests of the NGI.

However the stripping of meta data from images has become commonplace. This results in the loss of the information applied, and makes it very difficult for the right owner to detect infringing use of the images. While it is an offence under section 376 to remove the metadata, it is practically impossible to prove at what stage in the online life of an image the metadata has been removed, and by whom. If a website carrying images from which the metadata has been removed is located outside Ireland, the person responsible for removal will not be amendable to the Irish court.

The NGI sees this as a key issue for innovation. It is essential, so far as possible, to create secure conditions for the dissemination of valuable material online. The NGI would urge the Review Committee to recommend the review of sections 370-376 CRRA to ensure that they are as robust as possible.

## 8.2 Resolution of disputes

The opportunity to resolve disputes is a key part of the enforcement structure. It is effectively unavailable in Ireland because of the high cost of litigation and the proportionately low value of most copyright claims.

It is submitted that a small claims track of some kind is needed in the court system. It is also submitted that a form of alternative dispute resolution, possibly overseen by the Patents Office (comparable to the mediation scheme provided in the UK by the Intellectual Property Office) would be of considerable benefit.

## **FAIR USE, FAIR DEALING AND FLEXIBILITY**

Contributors to the Review are asked to comment on the suitability for Irish purposes of a US-style “fair use” exemption to copyright.

It is argued by proponents of the fair use exemption that it provides flexibility and allows copyright norms to be adapted in a changing technological environment. Its detractors argue that it leads to

uncertainty, high legal costs for litigants and that it may infringe the international standard, the “3-Step Test”.

The NGI is dubious of the value of the introduction in Ireland of a fair use exemption. We believe it is unrealistic to suggest that the Irish copyright regime would benefit from the introduction of a concept that depends so heavily on litigation. The question is in any event an academic one, as it is an issue that would have to be determined at European level.

We are however interested in proposing two changes to the existing “fair dealing” exemptions in Irish law. The first of these concerns the meaning of “fair dealing”. This change is fully within the competence of the national legislator, and would provide greater certainty and more flexibility than currently exists.

a. The meaning of “fair dealing”

The fair dealing defence was introduced into copyright legislation by the UK Act of 1911. It is available when the use of a protected work is made for one of the following specified purposes: research or private study; criticism or review; reporting current events. In addition to being for one of the specified purposes, the use must constitute a “fair dealing”. The meaning of that term was historically left to the courts to determine and develop. A considerable body of judicial interpretation of the term built up over a long period, providing a level of certainty concerning its meaning. There was also flexibility, with the opportunity for the court to expand the range of relevant considerations in determining whether the use of a work constitutes a fair dealing. The factors that the court took into account included whether the alleged fair dealing commercially competed with the protected work; whether the work was already published; the amount and importance of the work used. The doctrine, as developed by the courts also allowed for the development of the doctrine by permitting consideration of “other factors”.<sup>2</sup>

In enacting the CRRA, the Irish legislature decided to depart from the historical practice and to define the term “fair dealing” in the legislation. It is contained at Section 50(4) CRRA. The operative part of the definition concerns making use of a published work “for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”.

By introducing this definition, the Irish legislature has constrained the court to make a finding by reference to the single consideration of “unreasonable prejudice” to the copyright owner. It is no longer open to the court to develop the doctrine around other considerations. In the UK, since 2000, the factor of the motive of the user has been determined by the UK court to be influential in making a finding of fair dealing.<sup>3</sup> This is also a relevant consideration under US fair use law. It is not now a valid consideration for an Irish court.

Moreover, the term “unreasonable prejudice” to the “interests of the copyright owner has not previously occurred in Irish copyright law. The phrase forms one of three parts of the international standard, the 3-Step Test. It has not been interpreted by an Irish court and has therefore introduced a level of uncertainty to the defence. From the perspective of the National Gallery, without any form of judicial interpretation it is impossible to estimate what does or does not constitute “unreasonable prejudice” and so the fair dealing defence has become problematic for us.

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<sup>2</sup> See the leading judgment of Lord Denning in *Hubbard v Vosper* [1972] 2 QB 84

<sup>3</sup> As, for example, in *Hyde Park Residence v Yelland* [2000] EMLR, para 36.

We submit that the definition of “fair dealing” should be removed from the legislation, to restore the levels of certainty and flexibility that existed prior to the introduction of section 50(4).<sup>4</sup>

b) Parody

The NCI is in favour of a new exemption to copyright to permit use for the purpose of “parody” within the framework of the fair dealing exemption. This is within the ambit of Article 5(k) of the Information Society Directive. Such an exemption exists in many jurisdictions. The lack of a parody defence in the Irish system inhibits the making available of works that quite clearly do not compete with the original work, but which cannot be fitted into the fair dealing defence for criticism or review. We believe that the Irish regime would be improved by such an exemption and that it would contribute to innovation in various media industries, both in the online and offline environments.

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<sup>4</sup> An alternative approach might be to re-define the term using alternative phraseology, such as that found in the Berne Convention: “compatible with fair practice”.

**National Gallery of Ireland  
Summary of submissions:**

**Specific changes to legislation:**

Library and archive exemptions:

- Permit digital preservation
- Permit format shifting for archival use;
- Permit publication in catalogue
- Permit digital display on the premises

Material acquired by donation or bequest:

- Introduce rule of construction as to the ownership of copyright

Unpublished posthumous material

- Introduce provision to enable publication by libraries and archives

Copying of public records

- Amend section 73 CRRA, to clarify

Illustration for teaching

- Extend the application of section 55 to artistic works

**Wider copyright regime:**

Orphan works

- Conduct an independent survey to establish the extent of the problem in Ireland and to identify possible national solutions to complement the provisions of the proposed EU Directive

Licensing

- Conduct a consultation in tandem with the publication of the anticipated draft EU Directive
- Conduct an analysis of the existing CMO framework in Ireland and examine solutions for licences for mass digitization, and potential licensing solutions for orphan works.

Enforcement

- Review the provisions of the CRRA relating to the protection of technological measures
- Examine the possibility for providing an efficient and specialized small claims track for claims, and a structured ADR framework for resolution of disputes.

**Fair use, fair dealing and flexibility**

- Amend the definition of “fair dealing” at section 50(4) CRRA
- Expand the fair dealing exemption to include use for parody, caricature and pastiche.