Response to Copyright Review Committee consultation paper

Copyright and Innovation

Irish Executive Council

National Union of Journalists

Spencer House

Introduction

The NUJ was disappointed with the review. We recognise that it does invite further consultation, under a list of questions. But these too display the misunderstanding at the heart of the review. This document is an attempt to re-orientate the debate on copyright and innovation. It is a response to the questions, but also an effort to highlight the review's underlying misconceptions.

The American corporate approach to copyright (referred to below as "US-style 'fair use'") has already devastated the US information industries, as we sought to show in our initial submission. It would have similar effects in Ireland and Europe, if introduced here. Yet the authors of this review seem to believe there's an arguable case for US-style 'fair use' on this side of the Atlantic.

Behind this lies an argument as old as industrial development itself: will any proposed new departure assist or destroy the indigenous industry, upon which our sustainable future depends? We believe our initial submission ought to have raised alarm among the reviewers. Sadly it did not.

Response to Questions 1-6 Focus of Review

We feel the very broad focus adopted in this review fails to identify, and therefore protect, crucial aspects of innovation. We would advocate a closer concentration on the needs of individual producers – the primary wealth creators in this sector. Equitable remuneration is key for these sole traders, freelances and very small businesses. Their needs are not necessarily those of enterprises with ambitious growth projections. In describing and explaining public events, they provide a highly valuable public service which is new every day. Although the authors stress that they have no settled conclusions, the review seems to miss the concerns of these people whom we represent. We believe this omission will lead to less innovation, not more.

In particular we reiterate our call for the recognition that the creator's rights over the creation are inalienable: that the personal rights of creators cannot be waived - a principle recognised under the Berne Convention and in the legislative systems of the majority of European states. Moral rights must extend to employees (as well as those on outside contracts) because no employer owns the originality of any creator. Sadly the reviewers' gaze is in another direction.

For this reason, the NUJ remains opposed to two sections of the Copyright and Related Rights Act (2000). Section 23 (1) (a) denies first ownership of copyright to the journalist who is an employee. Because we seek to retain the ownership of copyright for staff members, we also object to Section 23 (2) which only allows the "author in the course of employment

by the proprietor of a newspaper or periodical" to make use of the article for any purpose other than making it available to newspapers or periodicals. The review merely brushes our arguments aside [Pp36-7] without any serious consideration.

We also believe there are dangerous unfounded presumptions at the heart of the review itself. The authors see innovation through the blinkers of the conventional business culture: "Encouraging innovation is all about encouraging new technologies, new business methods and new companies", they write. But we would argue that encouraging innovation also includes giving individual producers the full Berne Convention rights over their work, not the limited form available under the CRRA. A large number of freelance journalists are already entrepreneurial in their approach, even if conventional business culture seems to miss this out.

We find a further assumption in the review: that technological innovation might be better fostered under more 'flexible' US-style copyright than by the authors' rights system which prevails throughout most of Europe. The constant refrain at the public meeting held under the consultation process was that "Google could not have been created in Europe". That this might have something to do with copyright legislation is a very debateable point.

We continue to agree with Professor Hargreaves; that the success of "high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture … than it does to the shape of IP law". But it would also be useful if the partisans of importing US 'fair use' to Ireland could explain how Germany and Poland (for example) manage to do so well without it. These are countries which wholeheartedly adopt the Berne Convention approach to authors' rights and their economies are powering ahead of those with the American approach.

In **Q 5**, we are asked to comment on the classification categories. From our point of view, lumping together authors & performers (creators) with those who distribute our work under the term 'rights-holders' is misleading and they should be categorised separately.

Questions 76-83 and 55: De-regulation

What lies behind the proposal for US 'fair use' is a dangerous deregulation of the copyright sphere. Far from benefitting innovation, US-style legislation would only benefit those with deep pockets who leech upon innovation and of course, their lawyers. In **Q 55** the reviewers ask if the definition of 'fair dealing' in our Copyright and Related Rights Act should be weakened by the substitution of the word 'includes' for 'means'. According to the review "this would allow Irish law to reconnect with mainstream common law developments". Of course, this would actually open up the act to fundamental re-interpretation in the courts - something the reviewers recognise. It amazes the NUJ that a legal review group should seek to make the law *less* clear than before, thereby inviting *more* litigation.

But it is the notion that the common law is 'mainstream' and that we are somehow adrift in the shallows that is most breath-taking about this proposal. We are part of the EU, a legal entity in which countries with a civil law tradition predominate. Do the reviewers really think that 'fog on the English Channel' means that 'the Continent is cut off'?

The reviewers go on to ask in **Q 77 (a)**: What EU law considerations apply? Here, as in Q 55, their target seems to be the Three-step Test under the Berne Convention and the TRIPS Agreement. They seem to be inviting correspondents to ditch the protections which only allow clearly specified exceptions which don't conflict with normal exploitation of the work and which don't unreasonably prejudice the legitimate interests of the rights holder. US-style 'fair use' has opened up these exceptions to expensive legal challenge, prejudicing the creators' rights and enabling wealthy companies to prey on these.

In the follow-up to this question [**Q77(b**)], the authors seem to mistakenly imagine that Ireland, in conjunction with the Netherlands and the UK, is in a position to remake European law on this point. This would be futile. Even if it were a worthwhile project, it is so far from likely that it would amount to waste of time (and probably squander some of this country's depleted diplomatic capital). From the Arctic Circle to the Mediterranean there is no call whatsoever for US-style law on copyright. Instead there are efficient structures which encourage innovation and are which are widely supported. We should copy these structures, not seek to undermine them.

Q 82 asks for "empirical evidence … in favour or against the introduction of a fair use doctrine". The Hargreaves Review in Britain found that the costs of litigation on this matter would be US$ 1 million. This evidence has already been submitted under earlier submission but does not seem to have been given due consideration

Question 50: Webcrawlers

The review is critical of many submissions for overblown rhetoric, imprecision and a failure to provide evidence. But the review itself seems loath to deal with evidence placed before it. Among the scenarios it proposes for consideration is one where news articles lose their copyright - ***Q 50****: Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?* In diplomatic language, this canvasses in favour of new aggregation services. We made this point in our initial submission. But, once again it seems to have been ignored, so we will repeat it.

News aggregation services are now able to derive huge profits simply by providing links to a given newspaper article or photo, even though they paid nobody to write or take it. They simply scoop up material in the hope of digital sales. As we pointed out in our initial submission there are problems with Google, but it at least provides a link to the creator's website and tends to provide very brief extracts and thumbnail sized images on its listings.

Far worse are those who steal the creation altogether as they are permitted to do in the US. Someone who has done no more than invest in a cheap and widely-available computer program is allowed under 'fair use' to copy and reap the profit from another's work. These programs, known as "spiders", "robots" or "webcrawlers", copy whole articles which aggregators then post and run ads beside them. That is what the 'marshalling' of news without copyright really means.

A 2010 case at the EU Court of Justice shows what is in the balance. In a case also involving the Danish Newspaper Publishers' Association, the court found that a news monitoring service Infopaq - an aggregator – did not have protection from copyright infringement rules under EU law, even for short excerpts. The court found that the:

possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for copyright protection.

The court's decision protects the original work of writers and sub-editors, often disregarded in common law jurisdictions. That judgement was quoted in a UK High Court case last November (2010) where a US-based news aggregating service known as Meltwater News (UK) was forced to seek a licence from the Newspaper Licensing Agency.

In that case Judge Proudman found that

text extracts (and in particular the headline and the opening text) were not merely isolated words or clauses which in themselves conveyed no meaning. They provided the tone of the article and generally had the special function of drawing the reader in to the work as a whole.

Her reasoning was partly based on the Information Society Directive 2001/29/EC on direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. It is in direct contrast to the widespread myth that "old-fashioned" European authors' rights protection stands in the way of the bright new internet future, represented by the aggregators.

In direct contrast, US federal judge Roger L Hunt in June of this year ruled in favour of a defendant who reposted an entire article. The lawsuit was brought by Righthaven, a Las Vegas-based so-called "copyright litigation factory" which has sued more than several hundred websites and bloggers for copyright infringement. The case in question involved one Wayne Hoehn who had posted an entire editorial from the Las Vegas Review-Journal as well as its headline, "Public Employee Pensions: We Can't Afford Them" on the medjacksports.com website.

The US-style 'fair use' doctrine allows a defence for copyright infringement where the creator cannot establish that they have suffered financial damage. In this case Judge Hunt ruled that "the market for the work" was not harmed. In fact aggregators of this sort are

parasitic on the real creative output of journalists. Owning a particular set of computer programs 'entitles' them to live off the labour of others. Should they succeed in having our law changed, they will actually reduce employment here – not increase it.

Question 37: Private Copying Levies

Here the reviewers ask if it is to Ireland's economic advantage "that it does not have a system of private copying levies" and if we should introduce one. In reality there's no evidence either way. Research by Prof Martin Kretschmer of Bournmouth University found that there is a "pan-European retail price" for consumer devices "regardless of divergent levy schemes" with the exception of Scandanavia, where prices were higher. In any case, the EU is at present looking into the harmonisation of such levies and we'd do well to delay hasty legislation until that process is closer to completion.

Question 35 'Special position' of Photographs

Photographs (like paintings) are different to texts in that texts may be quoted from without the value of someone's work being stolen. In fact writers frequently welcome quotation as a means of enhancing the value of their work. But you can't quote from a photograph. You either use it whole and entire, or not at all. Photographers suffer enormously from the plagiarism of their work and are justifiably aggrieved by the copying of their work without payment. At the very least, the law must recognise this problem and protect them.

Question 61: 'non-commercial' user-generated content

Q 61 asks if there should be a specific exception for user-generated content which can be deemed 'non-commercial'. But this poses serious problems. The digital world is full of instances where the non-commercial suddenly acquires a potential market and becomes commercial. To erect an exemption for something that was transformed in this way would seem unfair.

Question 13: Digital Copyright Exchange

In conjunction with our colleagues in the European Federation of Journalists, we note that many journalists are happy with the Extended Collective Licensing schemes operating in some European countries. However, these schemes operate against the legal background of very strong protection for authors' moral rights and in the *droit d'auteur* tradition that is the mainstream of international law and are democratically accountable to the journalists.

The introduction of such an exchange in this country would entail the extension of full, non-waivable, enforceable, moral rights to all journalists, in accordance with our repeated arguments. This would prevent the common practice in this country whereby publishers

and broadcasters boycott journalists who demand their rights. Without such protection, the proposal would undoubtedly fail.

Conclusion

The views of the authors of this review are very far apart from those of the NUJ and other bodies representing creators. Likewise, those of the Department of Jobs, Enterprise and Innovation seem far removed from those of European legislators and officials. It's a fair bet that little positive development will come of such an impasse. In the interests of further clarity, the NUJ would welcome an opportunity to discuss these issues further with the CRC. At least, we can certainly all agree on the importance of the issue.