

Dr Eoin O'Dell
Chair
Copyright Review Committee
c/o Room 517
Department of Jobs, Enterprise and Innovation
23 Kildare Street
Dublin 2

29th June 2012

Re: Audiovisual Federation Submission on Consultation Paper 'Copyright and Innovation'

Dear Dr O'Dell,

The response of the Audiovisual Federation to the public consultation on the Copyright Review Committee's 'Copyright and Innovation: A Consultation Paper' is set out below. The Audiovisual Federation is the principal representative body for the audiovisual industry in Ireland and is affiliated to IBEC.

Significance of Audiovisual Sector

As outlined in the 'Creative Capital' report prepared for the Minister for Arts, Heritage and the Gaeltacht in 2011 Ireland makes a disproportionate impact on the world through the output of its audiovisual sector. The dividend from the sector is both tangible and intangible. This obviously includes employment, foreign investment and export earnings. Less obviously it also includes the indirect stimulation of tourism through the projection abroad of a favourable image of Ireland.

The 'Creative Capital' report cites data to the effect that sector has over 5000 full time employees and its annual economic value exceeds €550m, a substantial part of which is foreign investment. Our analysis is that it creates substantial indirect employment through a multiplier effect of 1:1.25. The economic activity it generates is dispersed across the country. The sector includes approximately 500 Irish owned audiovisual content production companies whose output includes film, television, animation and video content.

The global audiovisual market offers Ireland a major opportunity. PriceWaterhouse Coopers in their report 'Global Entertainment and Media Outlook, 2010-2014' estimate that this market will be worth €1.7 trillion by 2013 and is set to grow by 30% over the next 5 years.

International commentators are convinced of the significance of the creative sector and the threat posed by weak copyright, inadequate enforcement and digital piracy. The report by TERA entitled 'Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative

AUDIOVISUAL FEDERATION
A Business Sector of IBEC Ltd

SECTOR DIRECTOR TOMMY MC CABE



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Industries' gives an indication of the significance of the creative sector when it states that in 2008 the sector accounted for 6.9% of GDP and 6.5% of total employment in the EU. Analysis by TERA of the damage caused by digital piracy (i.e. copyright infringement of digital media) revealed that it caused the loss of 185,000 jobs in the EU in 2008 alone. The TERA report projects aggregate job losses of 1.2m across the EU by 2015 due to the ravages of digital piracy. A simple pro rata split in line with population would imply job losses in Ireland of 12,000 over the same period. A threat of this magnitude simply can not be ignored. The brunt of the job losses will be borne by audiovisual, music and software, the sectors most exposed to digital piracy.

TERA eloquently summarise the challenge for policymakers in their report stating: "...creative industries have a positive effect on economic growth and the creation of jobs.....stemming the rising tide of digital piracy should be at the top of the agenda of policymakers in the EU"

Importance of Copyright

The 'Creative Capital' report shows the scope to increase the audiovisual sector's economic contribution and sets a target of doubling the number it employs. Not only will these ambitious plans be unachievable but also the audiovisual sector's current economic contribution will be undermined unless an appropriate copyright regime exists. The sector depends on an effective legal framework for copyright to protect and remunerate investment. Without this the viability of the sector will be eroded and future investment and employment levels will diminish enormously.

The existing copyright legislation permits the exercise of innovation while also ensuring that creative innovation is rewarded. The current statutory regime regarding copyright is essential to the audiovisual sector in Ireland. If the statutory protection of copyright is diluted the economy will be damaged because the entire creative sector will be undermined.

Alternative Approaches

The Audiovisual Federation urges that the Copyright Review Committee should review a range of alternative approaches and present them in its final report so that policymakers have full visibility of the various legislative options. The Consultation Paper provides only one approach in terms of draft legislation.

Innovation

It is implicit in the consultation paper that copyright inhibits innovation. There is also an implication that innovation is to be found mainly or exclusively in the technology sector. While there is wonderful innovation in the technology sector it does not have a monopoly. The audiovisual sector also has a wonderful record of innovation. Innovation is the lifeblood of the audiovisual sector and indeed of the wider creative sector.

Digital Copyright Exchange

The Audiovisual Federation reserves its final position regarding the Digital Copyright Exchange until the proposal is developed in more detail. However, as this proposal sounds as if it may

have potential, it should be investigated further and the Copyright Review Committee is to be commended for promoting it.

There is, however, an unavoidable inconsistency between the promotion of an international copyright exchange and any suggestion of a watering down of the protection afforded to copyright under Irish law. Indeed a jurisdiction that proceeds with the latter has no hope of succeeding with the former. This intellectual dichotomy should be addressed by the Review Committee in the course of the next stage of its deliberations.

Copyright Council

The Audiovisual Federation supports the proposal for a Copyright Council and suggests that it be established on a statutory basis with a clear and unambiguous remit. As envisaged in the consultation paper it should focus on public education regarding copyright, make recommendations on best practice and promote ongoing copyright reform. An independent Copyright Council could make a very useful contribution to public policy by providing impartial advice to the Minister for Enterprise, Jobs and Innovation and his officials on issues such as notice and take down procedures and counter notices and put back procedures.

Exceptions to Copyright

A clear list of exceptions to copyright law is provided in the Copyright Directive. EU member states do not have the power to create exceptions that are not on this list.

(a) Fair Use

Evidence has yet to be provided by the proponents of 'fair use' to demonstrate a cause and effect link between it and innovation. Its advocates suggest that there are higher levels of innovation in the US than in Ireland because the US has 'fair use'. That is an utter simplification that ignores the enormous range of differences between both countries in terms of business culture, appetite for risk and access to finance to name but a few. The US enjoyed significantly higher levels of innovation than Ireland or indeed the EU for many decades and long before the existence of 'fair use'.

The lack of evidence in support of the benefits of 'fair use' is in contrast to the strong evidence of the economic damage caused by weak copyright protection. The 'fair dealing' exception under Irish law is a superior approach because it achieves a better balance between the various interests involved and there is no evidence that it has impeded innovation.

The legal position does not support 'fair use'. It is not compatible with the Berne Convention or the World Trade Organisation's Trade Related Intellectual Property Agreement. This in turn leads to significant legal doubt and a risk of litigation where a company relies on 'fair use'. The reality is that only very large companies with significant resources can undertake the risks associated with 'fair use' and smaller companies are at a comparative disadvantage. The hotbeds of innovation are typically smaller companies. Such companies are not disadvantaged by the 'fair dealing' approach.

(b) Format Shifting

An exception to permit format shifting to legally purchased devices would be acceptable provided both the Copyright Directive and relevant case law are complied with, i.e. that copyright holders receive fair remuneration. This exception should not extend to cloud locker services.

(c) Education

An exception for education would in effect be an appropriation of the intellectual property of the creative sector and its transfer to the education sector. Notwithstanding the invaluable role played by the education sector and the current funding challenges it faces, the proposed exception is not just. This is because the proposal would penalise one sector by forcing it alone to subsidise the education sector.

Copyright Enforcement

The Audiovisual Federation campaigned strongly for the introduction of the recent Statutory Instrument on copyright. While this is a welcome development it is unreasonable that a copyright holder whose rights are being infringed has to go to the High Court to seek redress. It is also a poor use of court time. A binding code of practice should be worked out to deal with such issues when they arise between copyright right holders and internet service providers.

Conclusion

The Audiovisual Federation welcomes the opportunity to comment on the consultation paper and is available to meet the Review Committee if required or to provide any additional information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Lowe', with a stylized flourish at the end.

Andrew Lowe
Chairman