

## **BORD SCANNAN NA HEÍREANN / THE IRISH FILM BOARD**

### **COPYRIGHT REVIEW SUBMISSION**

#### **1 BORD SCANNAN NA HEÍREANN/THE IRISH FILM BOARD**

Bord Scannan na hÉireann/The Irish Film Board (“BSE/IFB”) was established under the Irish Film Board Act 1980 (“the 1980 Act”). The remit of BSE/IFB is “to assist and encourage by any means it considers appropriate “the making of films in the State and the development of an industry in the State for the making of films”. BSE/IFB has been provided by the Minister for Arts, Heritage and the Gaeltacht with capital funding of €16 million in the year 2011 which is applied towards the funding of the development, production and distribution of films as defined in the 1980 Act. It also provides funding for education and training in the area of audiovisual content production.

#### **2 AUDIOVISUAL CONTENT PRODUCTION IN IRELAND**

BSE/IFB commissioned a report from PWC which was published in December 2008. In that report it showed that almost 6,000 were employed in audiovisual content production in Ireland at that time and that the annual turnover of the sector exceeded half a billion euro. The web link to the PWC Report is:

<http://www.irishfilmboard.ie/files/reports/Irish%20Audiovisual%20Content%20Production%20Sector%20Review%20jan%2009.pdf>

The Minister for Arts, Heritage and the Gaeltacht in a recent speech at the launch of the Film Galway Partnership (“FGP”) in June 2011 announced that he believed that with the implementation of certain strategies the numbers working in audiovisual content production in Ireland could be increased to over 10,000 within the next five years and that the annual turnover of the sector in could by the end of that period exceed €1 billion. Recent Irish films include “The Guard” starring Brendan Gleeson which was produced by Element Pictures Limited and funded in part by BSE/IFB which was number one at the Irish Box Office in the first week of July 2011 and which goes on international release over the next six to nine months.

#### **3 CREATIVE AND CULTURAL INDUSTRIES**

Irish Audiovisual Content Production forms part of the Creative and Cultural Industries in Ireland. A Report published by the European Commission - Enterprise and Industry DG entitled “Priorities Sector Report: Creative and Cultural Industries” in March disclose that 3.2% of Ireland’s total employment in the Cultural and Creative Industries with the numbers employed exceeding 70,000 people overall. The web link to that report is:

[http://www.europe-innova.eu/c/document\\_library/get\\_file?folderId=148901&name=DLFE-9315.pdf](http://www.europe-innova.eu/c/document_library/get_file?folderId=148901&name=DLFE-9315.pdf)

This figure includes the audiovisual content production figures (see above) as well as the numbers of people working in such areas as cinemas, DVD and computer game stores, television, music venues ranging from concert halls to other music performance places throughout the country, galleries and museums, book publishers and book shops, IT software creation, computer games development and production and the creative elements of advertising and design. All of this employment is defined and identified in terms of its reliance on copyright protection as the basis upon which the products of the sector are protected sufficiently to enable those products to generate revenues and thereby foster and protect the employment created.

#### 4 **COPYRIGHT PROTECTS CREATION AND INNOVATION**

The underlying public purpose and benefit of copyright law is to foster and protect innovation. Without the benefit of copyright protection the commercial incentive to innovate and create is substantially diminished to the point where creation and innovation is no longer professionally and adequately remunerated. Without the benefit of adequate remuneration, creators and innovators are prevented from devoting their full time and attention to the work of creation and innovation. As a result creation and innovation would be damaged and diminished if copyright law is not fully effective and also fully enforceable, creation and innovation is diminished. If the exceptions to copyright protection are vague or unclear, creation and innovation becomes more difficult to protect and remuneration for creators and innovators is adversely affected.

#### 5 **FAIR USE / FAIR DEALING**

Fair use is a concept of US Copyright Law and is currently reflected in Section 107 of the Copyright Act 1976 (USA) as follows:

“...the fair use of a copyrighted work, including such use by reproduction in copies or phone or records or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair the factors to be considered shall include:

- (i) the purpose and character of the use including whether such use is of a commercial nature or is for non-profit educational purposes;
- (ii) the nature of the copyrighted work;
- (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (iv) the effect of the use upon the potential market for, or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

Fair use is therefore an open ended list and allows for the judicial development of the concept without further reference to the legislators. As a result of this open ended approach, the contours of the fair use doctrine remain vague and the outcome of fair use cases is said to be hardly predictable. The uncertainty of the doctrine in how a court will finally decide is part of what has led to its reputation as the most troublesome doctrine in US Copyright Law (Universal City Studios –v– Sony Corp of America 659F.2D963 and others).

By contrast the fair dealing provisions of the Copyright and Related Rights Act 2000 are set out in Sections 50, 51 and 52 of that Act. These sections clarify specifically what constitutes fair dealing in the area of research or private study (Section 50) and in the area of criticism or review (Section 51). Section 52 also clarifies the position in relation to incidental inclusion which in particular contains the following language “The copyright in a work which has been lawfully made available to the public is not infringed by the use of quotations or extracts from the work, where such use does not prejudice the interests of the owner of the copyright in that work and such use is accompanied by a sufficient acknowledgement.”

It can be seen from the above that both the fair use legislation and the fair dealing legislation are focussed generally in relation to allowing similar types of exceptions to copyright protection. The fact that the fair dealing provisions specifically define what those exceptions are whereas the fair use provisions are open ended is the only significant distinction between the two sets of provisions and it is the open ended nature of fair use which gives rise to a level of uncertainty which will not benefit creators and innovators but will instead allow users the opportunity to argue for extensions on what is permitted until the matter is resolved by case law.

## 6 AN ENCOURAGEMENT TO LITIGATION

The problem with the open ended concept of fair use is that it encourages users to seek to justify their use of copyright materials by reference to what they believe should be covered by fair use. The result would be that until such time as the copyright owner has both the capacity and the means to pursue a copyright claim against the user through the courts his copyright work including all of his innovation and creativity is being used without remuneration to him. The costs and expenses of litigation in Ireland as well as in other countries are well known. Since most copyright owners are either individuals or small scale operations (in the case of the Irish film industry most of the producers are small and medium enterprises) they do not have the resources to pursue claims against what are often major multinational users particularly internet service providers ("ISP's").

## 7 CONCLUSION

It would not therefore be the view of BSE/IFB to agree with the perception that national copyright legislation does not cater well for the digital environment and actually creates barriers to innovation and the development of new business models. On the contrary, Irish copyright legislation with its clear and well defined protections for copyright works coupled with the clearly limited and defined exceptions included in the fair dealing provisions of that copyright legislation do cater well for the fostering of creation and innovation in the digital environment.

## 8 RECOMMENDATIONS FOR CHANGE

The only changes which BSE/IFB would suggest be made to Irish copyright legislation at this stage would be the introduction of enforceable measures to enable copyright owners to enforce the protection of their copyrights against all users including internet service providers. This is a subject matter of a separate consultation by the Minister for Jobs, Enterprise and Innovation. BSE/IFB has already made a submission in relation to that consultation welcoming the draft Statutory Instrument contained in that consultation as a suitable interim solution to the problems disclosed in the UPC case in terms of Ireland's non-compliance with the EU Copyright Directive as outlined by the judge in that case.

James Hickey  
Chief Executive  
Bord Scannan na hÉireann/Irish Film Board  
Dated this 13th day July 2011