

## Consultation on the Review of the Copyright and Related Rights Act 2000

Submission by:

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I am working on a project Scibella.com to set up a Current Research Information Service (CRIS) for research being carried out by UK and Irish universities and research councils. The innovative aspect of Scibella would be a transformative re-use of UK university & research council job advertisements. These advertisements contain substantial details about researchers, what their projects are, where they are based- the core elements of a CRIS. My present problem with copyright is that these adverts, even after expiry of the application date and removal from websites, appear to retain copyright for a period of 70 years. As matters stand I would have to seek permission to re-use these adverts from well over a hundred separate institutions- a long process. Further information about Scibella can be found on the project development blog at [www.scibella.wordpress.com](http://www.scibella.wordpress.com)

In April 2011 I made a submission to the UK Hargreaves Review of Intellectual Property & Growth. This can be found, if wished, at <http://www.ipo.gov.uk/ipreview-c4e-sub-scibella.pdf>. This present submission builds upon elements of that submission, the final report from the Hargreaves Review <http://www.ipo.gov.uk/ipreview-finalreport.pdf> and further material.

### 1. Separation of moral and economic rights in copyright.

My starting point has to be my perception that copyright law in the 21st century just “doesn’t get” what the impact of moving from print to web for has been.

In the days of the printing press access to dissemination of information/knowledge was restricted through a few points – publishers- and relatively few people – “writers” who were mostly the “bourgeoisie” and above. It was not easy to write (pre word processing) & publish so writing and publishing represented substantial effort- intellectual property- which was intended to have a lasting relevance. Rather like crafting by hand a fine piece of furniture- a family heirloom. Copyright law reflected the values of this class – writing was property and the law existed as walls and bars to protect this property.

With the web has come about a immense “democratisation” of this process and more importantly a change in the purpose of writing/publishing. Most publication on the web is “ephemera” not intended to last but do a job- passing on information and opinion etc. via blog, tweet, website etc. To return to the furniture analogy – it’s Ikea not Chippendale. A primary purpose of this ephemera is self publicity for individuals and organisations- this is what I/we think- this is what I/we do. It’s aim is to spread as widely as possible- to do its job and be gone, not to be a creative monument. The creator seeks the moral right to always be attributed as the creator but not the economic rights granted by monopolistic control of reproduction, making available, distribution, rental and lending, and adaptation rights.

Yet copyright law still treats this ephemeral side of web publication in the same way as a Hollywood production, or Music Album, in which there has been a substantial economic investment in the hope of a even more substantial economic return. In theory there is an admirable democracy in this approach- all creators are automatically granted the full rights of copyright legislation no matter

whether they are an individual blogger or a large media corporation. However, also in theory, this requires those who wish to re-use, transform, and remix this “ephemeral” content to seek and obtain permissions to do so. In practice, there is a widespread implicit permission to do so, the success of Twitter is based on the re-tweet, Facebook on shared posts, press releases are republished across many blogs, and bloggers quote each other. However this implicit permission for “ephemeral material” to be freely and widely re-used is not fully reflected in present copyright legislation. “Fair dealing” and “fair use” provisions in many countries cover much of this re-use but not all cases.

This just doesn’t make sense to me. Let me be clear, I am not at all in favour of the abolition of copyright. But there are established systems for granting permissions to re-use copyrighted materials, for their licensing which could be used to distinguish between “ephemeral creativity” and “monumental creativity” . Probably, the creative commons (CC) system of licences is the best known example. Taking this approach, the default for cultural production would be an assumed granting of something akin to a creative commons CC-BY license, exertion of the moral right of attribution, but foregoing control of further rights. Those who wished for further control over their copyrights, for economic or other reasons, would have to register that wish.

The practical implementation of this approach would be through re-introduction of national/pan-european registration schemes, or establishing Digital Copyright Exchanges as set out in the Hargreaves report.

The link between registration and the ability to exert control over economic aspects of copyrights, via enforcement through legislation, is already present in the USA copyright registration scheme. I have highlighted the most relevant sections.

“Even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- **Before an infringement suit may be filed in court, registration is necessary for works of U. S. origin.**
- If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- **If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney’s fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.**
- **Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection**

**against the importation of infringing copies. For additional information, go to the U. S. Customs and Border Protection website at [www.cbp.gov/xp/cgov/import](http://www.cbp.gov/xp/cgov/import). Click on Intellectual Property Rights.”**

Source: <http://www.copyright.gov/circs/circ1.pdf>

Also in the proposed UK Digital Copyright Exchange (Hargreaves Review Chapter 4). Again I have highlighted the sections most relevant to registration and economic aspects of copyrights.

“4.34

But mere Government goodwill and blandishments will not suffice alone to bring the exchange into existence. Participation should be genuinely voluntary but the Government should also ensure that participation in the Digital Copyright Exchange confers clear benefits and that there are costs of voluntary exclusion. Incentives the Government should explore include:

- **providing that remedies, for example damages, are greater for infringement of rights to works available through the licensing exchange than for other works;**
- **making DEA sanctions apply only to infringements involving works available through the exchange;**
- requiring that an orphan works search requires checking of the licensing exchange as part of a diligent search (see the orphan works discussion below);
- giving creators the right to withdraw from future publisher/record companies contracts where the latter are not marketing a creator’s works through the exchange;
- putting publicly owned copyright material on the Copyright Exchange at day one and exerting its influence on other public bodies to do likewise;
- providing funding for the costs of establishing the exchange (including development of IT) – possibly from IPO reserves;

The Hargreaves Review report sees an advantage to the UK economy in establishing a successful Digital Copyright Exchange

“The prize is to build on the UK’s current competitive advantage in creative content to become a leader in licensing services for global content markets; in short to make the UK the best place in the world to do business in digital content. It is not fanciful to suggest that such a development would be of comparable importance over time to the UK’s position as the leading service support centre in the European time zone in financial services.”( Sec 4.29)

However, in the recent parliamentary debate on the Hargreaves many MPs present expressed serious doubts about the practicality of such an exchange. As an example I quote Mike Weatherley MP. I must apologise for the length of the quotation.

“Perhaps the most high-profile recommendation in the report is the one for a digital copyright exchange. In essence, that is a good idea. Indeed, many parts of the industry are already developing databases. Phonographic Performance Ltd, for example, has a database of 5 million recordings, and the database includes record company ownership and performer line-up. That is essential for its licences with the BBC and others, so that the broadcasters know what is in their licence and the right musicians can be paid. Book, newspaper and music publishers, along with photographers and others, are developing similar facilities. There may even be a role for Government in co-ordinating those efforts and encouraging greater co-operation between databases.

However, the Hargreaves report certainly goes a step too far. It recommends that the digital copyright exchange become a licensing platform, with flat-rate pricing available at the click of a mouse. Far from encouraging growth, that is anti-market. It is extraordinary that a review about growth should recommend a trading platform where prices are static and there is no room for negotiation. How on earth could any rights holder be expected to set a price in advance for a totally new service that at the time exists only in the mind of the creative entrepreneur? That is a recipe for stagnation.

As if that was not enough, the report also proposes introducing penalties for rights holders who do not participate in the digital copyright exchange. Such wrongdoers would be denied access to their rights under the Digital Economy Act 2010, creating a two-tier system for copyright, and that must be resisted. Effectively, it is compulsory registration by the back door, and we should not allow it. One of the great strengths of copyright is its flexibility, and the fact that it is available to all creators, big and small. The principle of not requiring formal registration to enjoy copyright is enshrined in international treaties. We should uphold that principle, not undermine it.”

Source:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110707/halltext/110707h0001.htm> (column 562WH)

If this resistance to the proposed DCE is carried through into the implementation of the Hargreaves report then the opportunity, seen in the Hargreaves report, to be the leading European DCE could well pass to another country.

## **2. Exemptions in the Copyright and Related Rights Act 2000**

Obviously all proposed exemptions would have to satisfy the “Berne Three Step Test” incorporated into the Information Society Directive as paragraph 5 of article 5.

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”

Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>  
The existing Irish legislation already acknowledges this test in for example

“50 (4) In this Part, “fair dealing” means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available

to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”

Amendments I would propose are:

### 1. Sec 52(4)

“52 (4) 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. “

At present subsection 4 is included under the heading 52. Incidental Inclusion of Copyright Material. It is not clear to me how “use of quotations or extracts from the work” can be incidental to a work. I applaud the (dare I say it) “fair use” aspect of this subsection but it would strengthen the “fair dealing” I feel is intended by this sub-clause if it was moved into clauses 50-51 which clearly set out favoured uses covered by “fair dealing”

### 2. Press at EU level for an exemption for “non consumptive” uses

The Hargreaves report recommended

5.24 We therefore recommend below that the Government should press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work (this has been referred to as “non-consumptive” use[5]). The idea is to encompass the uses of copyright works where copying is really only carried out as part of the way the technology works. For instance, in data mining or search engine indexing, copies need to be created for the computer to be able to analyse; the technology provides a substitute for someone reading all the documents. This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts. That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.[6]

[5] Urban J, 2010, *Updating Fair Use for Innovators and Creators in the Digital Age: Two Targeted Reforms*, Public Knowledge <http://www.publicknowledge.org/pdf/fair-use-report-02132010.pdf>

[6] See Supporting Document T (Text Mining and Data Analytics in *Call for Evidence* responses)

My comments on this are that the Hargreaves report uses the words (directly borrowed from *Updating Fair Use for Innovators and Creators in the Digital Age: Two Targeted Reforms*) “do not directly trade on the underlying creative and expressive purpose of the work”. It would be better to rephrase this in line with existing EU and Irish copyright legislation to “do not unreasonably prejudice the legitimate interests of the rightholder”

It could be argued that the difficulty of defining “uses of a work enabled by technology” means that any exception must fail step 1 of the Berne Test, “certain special cases”. However, Griffiths in

“Taking Forward the Gowers Review on exceptions- rhetoric & the “Three-Step Test” presents a counter-argument against too strict a interpretation of Step 1.

Source: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1602014](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1602014)

### 3. “Fair use” (S.107 US Copyright Act) applicability in Ireland

Could any aspects of US “Fair Use” be introduced into the very different environment of Irish/EU legislation?

In the Gowers Review of Intellectual Property 2006 [11] sections 4.85 to 4.87 cover “fair-use” in the USA and transformative works. Gowers explicitly links transformative works with economic innovation

“In the USA, the fair use exception allows ‘transformative works’. The purpose of this exception is to enable creators to rework material for a new purpose or with a new meaning. Such new works can create new value, and can even create new markets”

He then made recommendation 11

4.88 Recommendation 11: Propose that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test.”

However, Gowers goes on to state that for the UK:

“At present it would not be possible to create a copyright exception for transformative use ... as it is not one of the exceptions set out as permitted in the Information Society Directive ...

In the UK this recommendation appears to have fallen between two stools. It was not taken forward into the second consultation on the Gowers Review [12] presumably because it referred to a change in EU and not UK legislation.

However, EU legislators may well follow the opinion in the IViR paper “Implementation and effect in member states’ laws of directive 2001/29/EC” [13] that it does not fall within the scope of the Directive.

“The Information Society Directive does not harmonise the right of adaptation [see IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 54]. The recommendation made by the Gowers Review to amend the Directive in order ‘to allow for an exception for creative, transformative or derivative works’ is therefore based on a misconception of the provisions of the Directive. Consequently, this recommendation cannot be carried out on the basis of the Directive.”

If that is the case then perhaps Gowers recommendation for a copyright exception for transformative works could be incorporated into Irish legislation without contravening Article 5 of the Information Society Directive. The major problem would be, as in the USA, in defining what “transformative” means. But, given the potential economic impact of an Irish introduction, including perhaps inward investment/re-location by “creative industries” into Ireland to take advantage of the exception, it would be worth the inevitable problems of introduction.

- [11] <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>
- [12] <http://www.ipo.gov.uk/consult-gowers2.pdf>
- [13] [http://www.ivir.nl/publications/guibault/Infosoc\\_report\\_2007.pdf](http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf)
- [14] <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>  
footnotes 74 & 75

This opinion of IviR is set out again in their response to the EU green paper on copyright in the knowledge economy <http://bit.ly/hi6Jdq> about user created content

“First, systematically, this question seems to derive from a misunderstanding of the legal structure of the Directive. The Directive does not harmonise a right of adaptation, nor does its catalogue of permitted exceptions relate thereto. In other words, insofar as an exception would allow certain transformative uses, it would have no place in a revised Directive, unless the Directive’s scope would be broadened to include a right of adaptation. Absent harmonisation of the adaptation right, Member States remain autonomous and may elect to codify exceptions or limitations to this right to permit certain non-commercial transformative uses.”

Finally, the analysis of Professor Bently provided to the Hargreaves Review that “fair use” was compatible with UK (and by implication Irish) legislation should be published by the UK IPO office at the end of July:

“I can confirm that the Intellectual Property Office (IPO) holds the information you are seeking. With regard to Professor Bently's analysis, we are withholding that information at this time since we consider that the exemption under section 22(1) of the Freedom of Information Act applies to it, because it is information intended for future publication.

Section 22 is a qualified exemption so the IPO is required to balance the public interest in releasing or withholding the information.

The implementation work in the wake of the Hargreaves report is the immediate priority of IPO officials tasked with this work, commanding their full attention and resources. As the IPO intends to publish the analysis you seek on its website at around the end of July, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it at this time.

Having considered the public interest, the IPO's decision is therefore to withhold until formal publication.”

Source: response (05 July) to a FOI request from myself

It will be interesting to read.