

# THE COLLECTING SOCIETIES FORUM

Copyright Review  
Room 517  
Department of Enterprise Jobs and Innovation  
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**BY EMAIL [copyrightreview@deti.ie](mailto:copyrightreview@deti.ie)**  
**AND BY POST**

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ICLA

IMRO

IPSG

IVARO

MCPS

MPLC

NLI

PPI

RAAP

SDGI

**D R A F T**

**Re: Consultation on the Review of the Copyright and Related Rights Act 2000**

Dear Sirs,

We refer to and welcome the Copyright Review Committee set up by the Minister for Jobs, Enterprise, and Innovation, Richard Bruton TD, to examine the current copyright legislative framework in Ireland.

## **The Collecting Societies Forum**

The Collecting Societies Forum (“CSF”) represents all of the collective management organisations (“CMOs”) currently operating in Ireland and registered as “licensing bodies” with the Controller of Patents, Designs and Trade Marks. The members of the Forum are as follows:

- IVARO (Irish Visual Artists’ Rights Organisation) representing visual artists;
- ICLA (Irish Copyright Licensing Agency) representing literary authors and publishers;
- IMRO (Irish Music Rights Organisation) representing music composers, songwriters and music publishers;
- MCPS (Mechanical Copyright Protection Society) also representing music composers and publishers;
- PPI (Phonographic Performance Ireland) representing sound recording companies ;
- RAAP (Recorded Artists, Actors and Performers) representing performers;
- SDGI (Screen Directors Guild of Ireland) representing film directors;
- IPSG (Irish Playwrights and Screenwriters Guild) representing screenwriters and playwrights;

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- NLI (Newspaper Licensing Ireland) representing newspaper proprietors;
- MPLC (Motion Picture Licensing Company) representing film producers.

CSF therefore represents the interests of copyright holders across a range of creative industries, including film producers, directors, authors, publishers, songwriters, composers, artists, performers and record producers.

Copyright is the foundation upon which the creative industries are built. It provides a means by which income can be earned, creativity can be sustained and innovation can be encouraged. Sustaining such innovation is maximised by ensuring strong enforceable copyright protection is afforded to all those participating in the creative sector. Eurostat figures estimates there are up to 55,000 employed in the creative industries in Ireland. This amounts to 2.5% of the workforce.

The CSF in the main represents small and medium sized enterprises. These innovators and entrepreneurs take financial risks to create content. IP law ensures that the value of their ideas and products is protected. Enforcement of such laws ensures future innovation. Collection societies, through flexible blanket licensing arrangements ensure those who wish to use the intellectual property of creators can obtain licenses whilst at the same time ensuring creativity is fairly rewarded. Users have access to a wide variety of IP through innovative collective licensing. Examples include the number of new online services licensed by collecting societies to carry a wide variety of content, ensuring a legal market for the dissemination of copyright works is readily accessible to consumers. Without such blanket licensing arrangements, users of content would require individual licenses from a multitude of copyright owners which would be plainly unworkable. Ireland is more than ever dependent on the creative industries to deliver economic growth. This includes the Information Communication and Technology sectors (“ICT”). The creative and ICT sectors therefore have much in common. Both sectors have at their core a requirement for robust IP protection. In reviewing the Copyright & Related Rights Act, we need to be careful that any criticisms of the current system are genuine and that any review is not used as merely a negotiating tool to drive down the price paid by commercial operators for the use of creative works.

### **Background to Collective Management**

We think it is important to reiterate the benefits of collective management of copyrights and emphasise that such benefits are recognised worldwide by broadcasters, online content providers and other content users. This has been demonstrated via for example the support for collective management of copyrights by the European Broadcasting Union.

The Irish Competition Authority in 1995 (Competition Authority Decision of 15 December 1995 - No 445) recognised the essential role of collective administration and stated the following in its decision to grant IMRO, which licenses the making available of musical works, a licence: -

“There are considerable practical difficulties involved in the administration and enforcement of performing rights, particularly in relation to the multiplicity of smaller users, and these difficulties do point to the need for a central collective licensing/enforcement system on

behalf of creators and publishers. Substantial additional transaction costs would clearly be involved in any multiplicity of systems of administration of performing right based on licensing by individual creators. Compliant users would require a large number of licences while the cost of pursuit for non-compliance by individual creators/publishers would make this activity uneconomic except in the case of major users or events. The pursuit of breaches by smaller users would become totally uneconomic. The Authority therefore accepts that a collective system of performing right administration involves efficiencies and these would be significant in the generality of cases. Assignment of the performing right to IMRO is accepted as improving the provision of services.”

The benefits referred to in the case of IMRO above, apply equally to non- music copyrights and apply as much today in the digital age as they did back in 1995. They also reflect the views of DG Competition and other competition authorities around the world. In fact, CSF strongly believes that collective management facilitates innovation and its absence would be a severe barrier to same.

We look forward to working with the Department in its current review. We have identified copyright issues outlined below which impede innovation in the creative sector and which if rectified can be an engine for growth, jobs and real export potential.

#### **Exceptions to Copyright - Fair Dealing and Fair use**

- Media comment in the recent past has focussed on the notion that introducing US style Fair Use exceptions would somehow aid innovation. The purpose of exceptions to copyright be they **Fair Use** exceptions in the US, or **Fair Dealing** exceptions in Europe is to provide a balance between the interests of the creator and the public interest and right to access. Exceptions to copyright serve the social public good by for example granting access to libraries, archives, etc where there is no commercial gain to an individual or a commercial enterprise.
- In the United States, fair use exceptions are an open ended list which attempt to govern all types of use and is the widest limitation to copyright. In general it allows others to use a copyright owner’s work in a reasonable way without the normal permission of the copyright owner being required. No specific definition exists, but case law has built up in the USA over the years and it was codified finally in the 1976 Copyright Act. Section 107;

***“...the fair use of a copyright work including such use by reproduction in copies or phonorecords 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...”***

- It goes on to describe these factors as to whether the use is commercial or non commercial, the nature of the work itself, the amount and substantiality of the portions used and the effect on the market of the copyright work.
- However, it is more often than not left open to a judge to decide on whether a use falls under the fair use doctrine according to the four criteria laid down. As a result it has often become a costly and lengthy legal process. Due to the inordinate expense, only very well resourced corporations can rely on the section for protection.
- By contrast the Irish Copyright Act (Copyright and Related Rights Act 2000) contains specific detailed exceptions for fair dealing under Section 50, 51 and 52. In order to enjoy the benefits of a fair dealing exemption, the sections provide that the use must be for one of the following specified uses: research or private study; criticism or review; or reporting current events. In the case of the latter two, there must be sufficient acknowledgement. In addition, the use must be a “fair dealing”. This is defined to mean 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.
- The very clear unambiguous language used in the Irish Copyright and Related Rights Act 2000 and also in the UK’s Copyright Designs and Patents Act 1988 has meant that there is few if any case law in the area of Fair Dealing in Ireland and the UK. This compares with the interpretation difficulties and resulting huge costs of litigating such cases in the US. Because of this high cost, only large companies in the US will have the resources necessary to bring such actions and clearly the fair use provisions can therefore not be relied upon by small enterprises or individuals. This is inherently unfair. Innovation, enterprise and creativity can mutually flourish if the clear unambiguous fair dealing provisions remain in Ireland. Importing fair use provisions from the US will hamper such innovation and therefore restrict the supply of new copyright works. What uses currently deemed exempt in the US would not also be exempt under the much clearer Fair Dealing exceptions in Europe? We would submit that the US has a better record of innovating not because of a more lax copyright system but because of a deeply embedded culture of entrepreneurship, much deeper relationships between the business community and the University and educational sectors, and wider availability of capital. Strengthening the links between academia and innovative enterprise and creativity and encouraging wider access to capital are much better ways for Ireland to drive its knowledge economy forward in terms of both large and small enterprises. It is also arguable whether or not the US fair use exceptions are in compliance with international law under the Berne Convention.
- The Berne Convention – 3 step test: Any exception to copyright under the Berne convention must satisfy three conditions. Signatory members shall confine limitations and exceptions to exclusive rights to;

- certain **special cases**,
- that do not conflict with a normal exploitation of the work, and
- that do not unreasonably prejudice the legitimate interests of the rights holder.

These conditions are reproduced in the 2001 EU Copyright Directive. For the sake of clarity and to avoid any unnecessary legal cases, creating clear barriers to innovation, the review of our copyright act should take the opportunity to enshrine the Berne Convention three step test in our copyright act.

### **Enforcement in the Online Environment**

- Irish Law does not give appropriate protection to copyright on the internet. This affects all industries dependent upon creativity. Any review of copyright law in Ireland must take into account that this is the first and most important issue to tackle, because if it is not possible to enforce copyrights in the digital world then discussions as to how copyright law may be adapted and harnessed to encourage innovation in that digital world makes little sense.
- The Collecting Societies Forum welcome the Governments proposed amendment to the Copyright and Related Rights Act 2000, by means of a Statutory Instrument, to implement Article 8(3) of the Information Society Directive. Any review of copyright law must ensure that protections exist for the creators and innovators in the digital world and that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. This is a fundamental cornerstone of E.U. policy on Copyright and related rights in the information society and is central to any new strategy in Ireland to encourage and stimulate growth and innovation in the digital world.

We therefore urge the Department to bring the Act into line with the EU Directive without delay.

**The Controller of Patents, Designs & Trademarks ('the Controller'), licensing body registration requirements, particularly as regards tariff notification, the IPU and resolution of tariff dispute mechanisms.**

- CSF feel that a review of the role of the Controller, the IPU and registration requirements for licensing bodies under the Act is appropriate at this time.
- Under the current provisions of the Copyright and Related Rights Act 2000 (Chapter 17), licensing bodies are obliged to notify details of all licensing schemes and details of the scale of charges to be levied by the licensing body to the Controller's office and for these notifications to be then made available for public inspection. Such notifications are now available on the internet. New and innovative business models for the dissemination of content are being constantly introduced especially in the entertainment industries. Such new business models often require very specific licensing arrangements from licensing bodies. The licensees in such instances require and indeed demand commercial sensitivity surrounding their commercial offerings and they deem the details of charges paid to copyright owners as being commercially very sensitive. In such instances the requirement on licensing bodies to notify such charges and make them publicly available is a barrier to innovation and raises the possibility of innovative services not launching in Ireland because such commercial sensitive information must be published. This specific registration requirement should be repealed to allow innovative services to be launched without impediment.
- The penalties for a breach of registration requirements is that a licensing body, even for a small error or timeline missed is de-registered. This ultimate sanction we feel is severe and not in the interest of copyright owners or licensees and there does not appear to be 'correction' mechanism within the Act. We suggest this be addressed as part of the Review.
- Currently the Controller is the defacto copyright regulator. This office holder is also the Head of the Intellectual Property Unit ("IPU") in the Department of Enterprise Trade and Innovation. The IPU is the national copyright policy unit. We do not believe that the policy setting body and the regulation of such policy is conducive to good governance and respectfully submit that these offices should be separated. Resources and expertise are required at the Department to ensure that national legislation continues to keep pace with rapid technological development and the Controllers Office needs to have adequate resources to enable it carry out its role as regulator and dispute resolver
- Tariff disputes may be referred to the Controller who in turn has the power to appoint an arbitrator. The Copyright and Related Rights Act 2000 provided that the Controller shall make a decision on whether or not to refer a dispute to arbitration no later than three months after the dispute is referred. This was repealed in the Patent Amendment Act 2006. We believe that the provisions need to be tightened again to ensure all parties benefit from a speedy and efficient arbitration process.

- Consideration could also be given to having a separate Controller of copyright with the requisite expertise to deal with the issues arising in copyright tariff disputes.

The CSF would welcome the opportunity to meet with the Copyright Review Committee to discuss any of the above issues. If further information is required we will be happy to assist.

**Yours faithfully**

**For and on behalf of Collecting Societies Forum**

**Summary Recommendations**

1. Introduce the 3 step test into Irish legislation concerning exceptions to copyright
2. Introduce Statutory instrument to allow copyright holders to seek injunctions allowing meaningful enforcement of online rights
3. Repeal requirement to notify commercially sensitive confidential tariffs to Controller of Patents
4. Separate the functions of the Controller of Patents and the Head of the Intellectual Property Unit
5. Provide clarity in relation to Arbitration process