



14th July 2011

Copyright Review
Room 517
Department of Jobs, Enterprise and Innovation
Kildare St
Dublin 2

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

Dear Sirs,

We welcome the current review of our Copyright legislation and this opportunity to submit our findings on the operation of same.

About IVARO

IVARO is a non-profit organisation which represents visual artists and their heirs in relation to matters of copyright and related rights. IVARO offers copyright licensing services and collects the Artists Resale Right on behalf of its members. It has over 1600 Irish artist members and has reciprocal rights agreements with over 20 sister societies worldwide. IVARO is also a member of the Collecting Societies Forum which represents all of the collective management organisations (CMOs) operating in Ireland. This Forum has also submitted a paper for this review.

IVARO is also a member of the following national and international bodies:

European Visual Artists (EVA)

International Confederation of Societies of Authors and Composers (CISAC)

As a member of CISAC, IVARO is bound by the Professional Rules, relating to its conduct, governance, transparency, financial disclosure, administration, licensing and collections as well and the Binding Resolutions covering documentation and distribution.

IVARO is registered in the Register of Copyright Licensing Bodies and complies with the regulations laid out in the Copyright and Related Rights Act 2000.

Copyright Supports Innovation

There must be a balance between access to copyright material for users and the rights of copyright holders. Users can gain access to copyright works in a number of ways: by seeking permission directly from creators, through licensing arrangements with third parties and via exceptions as laid out in our copyright legislation.

Copyright royalties contribute to the financial sustainability of creators. These are small sums, but they are significant for creators. Copyright protection encourages creators to make works available without the concern that they will lose control over the future use of the work. Copyright seeks to achieve this by giving creators temporary exclusive rights (lifetime plus 70 years for most works) to their original creations, enabling them to exploit them economically or to licence them for use by others.

Licensing facilitates the use of copyright works, while ensuring that the copyright holder is remunerated for that use. Collecting Societies are in the best position to administer these licences.

A prospective user of copyright protected material may face several transaction costs associated with secondary licensing:

- identifying the rights holder and locating them
- negotiating with the right holder regarding conditions for the use
- agreeing on a licence fee

Rights owners face similar obstacles. For many users and rights owners working alone, the costs of identification, search and transaction time if rights owners and users licensed a work every time it was reproduced would be very large relative to the value of the reproduction rights. Collecting Societies are able to realise economies of scale by working with both rights owners and users to support a more efficient market in secondary rights. The benefit of this, therefore, is that transaction costs can be lower and these savings can be passed on to users. At the same time a reward for rights owners which supports their incentive to continue to create new works can be maintained. Collecting Societies, like IVARO, can strike a balance between providing access to content at minimum cost and maintaining incentives for the production of this content. Transactional licensing through collecting societies is a cost effective and efficient solution for customers whilst ensuring that the rights of copyright owners are respected and the use of copyright protected works are appropriately

remunerated. Collecting Societies, like IVARO, have in place standard Terms and Conditions to accompany any licences granted. They also have standard licensing rates which provide transparency for potential users of copyright material.

Digital Developments:

Online Art (OLA)

Visual arts collective management societies play a significant role in developing new and efficient ways to licence content for users. OLA facilitates licences for worldwide use of works on the internet. OLA was founded in 2002 and has more than 30,000 artist members. It offers legal certainty and acts as an interface between users and artists. OLA members share a common server where all licences are registered. In this manner, a valuable database is built up which enables OLA members to track market trends, to inform rights holders about legal issues around the world and to monitor illegal uses. There is a standard set of conditions and definitions which ensures an equal, consistent and transparent licensing service.

Picture Libraries

Traditionally picture libraries created and stored physical transparencies of artworks and photographs for reproduction purposes. This required a substantial investment in the creation of the transparencies, storage and transport to the potential user. It was a slow and inefficient process.

In the last twenty years there have been rapid digital developments. According to the Report by the Coordination of European Picture Agencies Press Stock Heritage, *Knowing Your Industry*, the Chief Executive of the British Association of Picture Libraries and Agencies (BALPA) had questioned in 1993 how any image bank could even consider going online. Less than 10 years later, in 2003, more than 90% of sales by Getty Images were being made online. Today the majority of image banks sell digital images online rather than provide physical transparencies.

Apart from reducing costs significantly as regards production, storage, preservation, conservation and delivery of image media, the digital distribution model also allows for catalogue browsing online at any time, delivery of low resolution imagery for design and layout purposes, as well as for multiple deliveries of the same image, simultaneously. This results in a fast and cost-effective service for users.

The Future

Monitoring the use of one's images online is an impossible task. In order for creators to allow their images to be displayed online, there needs to be a way of protecting these images against unauthorised and unremunerated use. The absence of a universal method for tagging visual images or for finding and monitoring the use of images in the Internet is a real problem and deters creators from putting their copyright works online.

The aim of IVARO and collecting societies is to develop licensing solutions which deliver rights to users at a fair price and delivers fair value to rights holders. IVARO is receiving an increasing number of requests from users to reproduce copyright material online. Recently, the Irish Museum of Modern Art requested the use of 24 copyright works by 16 different artists. Licensing through a collecting society, like IVARO, facilitated their wish to digitise their collection to make the works available digitally to the public. Licences of this kind enhance public access to works in these collections, while at the same time ensuring that the rights of the creator are respected and properly remunerated. This particular licence required IVARO to liaise with our Irish artist members directly and with 5 of our sister societies in France, the US, Germany and Switzerland in order to secure permission on behalf of IMMA to use these works. This eliminated the time-consuming and potentially costly task for the applicant of identifying, locating and securing permission from each rights holder and also avoided potential language barriers.

IVARO is part of a network of international sister societies in 22 countries worldwide which represent each other's repertoire reciprocally. This means that each sister society can represent the whole repertoire in their territory under their national laws. This enables IVARO to process these permission requests quickly and efficiently. European and international instruments provide a valuable framework which ensures the inter-operability of the different national systems. They safeguard a minimum level of protection for rights holders and provide a level playing field across the Berne Convention Countries. This enables fast and effective transactions between Convention countries.

Extended Collective Licensing

ECL is hugely beneficial where it is not possible, or extremely difficult, to negotiate individual licences. Where it has been enabled by national legislation, ECL can allow a copyright licensing body or collecting society, where it already represents most of the rights holders in a sector, to assume responsibility for representing and negotiating the collective rights for all copyright holders in that sector and for paying out relevant royalties regardless of whether the beneficiary is a member of that society or not. In the absence of ECL, there may be no legal

exploitation of the work at all where it is impossible or extremely difficult to negotiate an individual licence with the rights holder. The introduction of ECL would ensure that a balance can be struck between fair remuneration for creators and greater opportunities for the user. This system provides legal certainty for users, delivers remuneration for creators, and extends access to copyright works for consumers.

ECL has been in operation in the Nordic countries since the 1960s. KOPINOR, a large umbrella organisation for Norwegian collecting societies, has concluded a complex agreement with the Norwegian National Library for making approximately 50,000 works by Norwegian authors available on the Internet. This took only two months to complete. In comparison to this, securing permission for IMMA to use 24 works by 16 different artists took four months to complete due to the necessity to contact each artist or their representative organisation individually for each work.

International Rules

International Rules ensure the interoperability of licensing systems between collecting societies across the globe. The Berne Convention is the cornerstone of this system of cooperation. The Berne Fundamental Principle affords copyright protection without any formal criteria. This is essential for the protection of copyright works. This principle should be left untouched and should have overriding effect over any national requirement that may be introduced to require any form of registration of a copyright work. The argument that a registration system would prevent the creation of orphan works does not take into account that even in the US, where the registration requirement was upheld until 1989, orphan works still constitute a huge problem. In addition to this, the cost of registration may be prohibitive for many individual creators.

As outlined in the Submission presented by the Collecting Societies Forum, this review should take the opportunity to enshrine the Berne Convention three step test in relation to exceptions in our copyright legislation.

The Convention states that exemptions

- a) may only be applied in special cases
- b) may not conflict with normal exploitation of the work and
- c) may not unreasonably prejudice the legitimate interests of the right holder.

Exceptions in relation to Fair Use will be examined later in this Submission.

Non-legislative Changes: Public Awareness

Investment should be made in the promotion of greater public understanding of the importance of remuneration for the use of copyright works. Public education campaigns, educational materials and additions to the school curriculum could go a long way to improving awareness of copyright and to reducing instances of infringement. 83% of respondents to an Artists' Rights Survey carried out in 2011 by the Design and Artists Copyright Society (DACS) recommended "better public education about copyright" as an enhancement to their existing copyright framework.

Rights-grabbing / Assignment of Rights

There is a culture at the moment, particularly in relation to photographers, of requesting creators to assign their rights in a work completely. To illustrate this point, we will look at an example from a member of professional photographer's advisory network Editorial Photography UK (EPUK), which represents both UK and Irish photographers. This photographer, who was offered a commission by a company, had the offer withdrawn once the photographer refused to assign his copyright to the company, even though he explained that he could offer them an extended licence to suit their needs.

According to the Bently Report, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers:*

"Visual artists are not able to negotiate, are paid less and less, often compelled to waive their moral rights... The study showed that photographers had fared worse than any other group with 49% of photographers saying their bargaining position had worsened over the past decade, whilst a significant number of photographers (40%) reported an increase in assignments of their rights."

Enforcement

Effective sanctions are needed to reduce the creation of orphan works in the future and promote innovation and creativity. With reference to the Collecting Societies Forum submission, IVARO supports their assertion that enforcement ensures future innovation.

According to the recent Hargreaves Review in the UK, "*effective enforcement requires education, effective markets, an appropriate enforcement regime and a modern legal*

framework". Copyright cannot incentivise innovation if rights are disregarded or are too expensive to enforce. Widespread disregard for the law erodes certainty.

Rights are only as strong as their enforcement allows them to be. Unenforceable sanctions will not act as a deterrent for infringement. The high legal costs and lengthy procedures associated with enforcing copyright, in addition to the limited damages available for infringements, act as a barrier for creators to make their works freely available, or to invest in the production of new works. The incentive to innovate will be undermined if their copyright cannot be defended.

Very few artists are able to make a living purely from their activities as artists. Having to deal with additional costs through infringement of works and a lack of affordable remedies to rectify matters constitute a further deterrent to becoming an artist and to participating in the creative industries. Protection of rights in addition to meaningful deterrents for the infringement of rights would result in more creative output and greater access to creative content.

According to a Report by Lionel Bently, Kimberlee Weatherall and Elizabeth Webster, *IP Enforcement in the UK and Beyond: a literature review*, it is almost impossible to get reliable data about the extent of copyright infringement. It is therefore impossible to quantify the loss of earnings due to infringements.

DACS Artists' Rights Survey, 2011 states that creative individuals find the infringement of their rights discouraging and find the lack of enforcement as rendering their rights obsolete. Repeat infringements also lead to a damaging loss of income for which compensation can never be realised. Only 21% of respondents took legal action in instances of infringement. 42% of people who did not take legal action said it was the cost of taking the action which prevented them from doing so. Other key areas which acted as barriers to pursuing legal action were; the time involved and the lack of information on how to go about it.

The PWC Report: *An economic analysis of copyright, secondary copyright and collective licensing*, stated that:

"the assurance of income from IP rights incentivises those whose creativity drives growth" ...
"Markets for creative content can fail because, once the content is produced, it is difficult to prevent those who do not pay for the content from consuming".

Artists' Incomes

Recent research by Visual Artists Ireland (VAI) showed that artists are amongst the lowest paid members of society and that few Irish artists can make a living from their work. 67% of

visual artists in Ireland earn less than €10,000 per annum from their creative work. Copyright royalties, while the amounts are small, are therefore a hugely significant source of income for artists. - **The Social, Economic and Fiscal Status of Visual Artists in Ireland**, Visual Artists Ireland, July 2009

The 2010 Report by Towse, *“Creativity, Copyright and the Creative Industries Paradigm”*, reviewed a number of studies which demonstrated that, whilst most artists have above-average educational qualifications, they have below average earnings and, therefore, are unable to spend sufficient time on their chosen art form.

Arts Council data in relation to income arising from work as artists (after expenses and before tax) shows that:

- 25% of professional artists had income in this regard of €1,596 or less;
- 50% of professional artists had income in this regard of €8,000 or less;
- 75% of professional artists had income in this regard of €18,000 or less.

According to recent Arts Council figures, 41% of artists spend all of their working time as artists. 70% of artists who undertake other work do so because of the need to supplement their income. Proceeds from the reproduction of copyright works are an important source of income, even though these amounts are modest. Collecting societies like IVARO ensure that rights holders receive remuneration for the reproductions but they also ensure that these works are available for use by the public for a minimal fee.

Collecting societies, like IVARO, also offer associated services to artists, such as legal advice. Research by the Universities of Bournemouth and Cambridge *“Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers”* shows that there is a *“strong and positive correlation between membership of expert bodies such as unions and professional associations, with the education and support they may provide, and contractual bargaining outcomes”*. Those who could rely on advice and guidance from an expert body achieved better contractual terms, including retention of their rights, which in turn led to higher earnings and the ability to continue earning through exploitation of the retained rights in their works. The importance of supporting the creative industries and protecting the rights in their works must not be underestimated.

Copyright Exceptions: Fair Use and Fair Dealing

The purpose of the exceptions outlined in our copyright legislation is to provide a balance between the rights of the creator and access for the user.

The US concept of Fair Use appears to allow broader use of copyright works but its advantages are overstated. Again we refer to the Collecting Societies Forum Submission. In the US, fair use is an open-ended list. No specific definition exists but case law has built up in the USA over the years and is set out in s107 of the 1976 Copyright Act. It is more often than not left open to a judge to decide whether or not a use falls under fair use. As a result, it has often become a costly and lengthy legal process. The PWC Report states that *“In the context of fair dealing and fair use, we find that the principles based approach used in the US is subject to around five times more legal cases than the UK fair dealing system”*.

By contrast, the Copyright and Related Rights Act 2000 contains specific detailed exceptions for fair dealing under Sections 50, 51 and 52. This provides legal certainty for both users and rights holders. Most responses to the Hargreaves Review from established UK businesses were hostile to adoption of US Fair Use in the UK on the grounds that *“it would bring massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods”*.

Section 50 (1) of the Copyright and Related Rights Act 2000 contains a fair dealing exception in relation to artistic works for the purposes of “research or private study”. As a result of this wording, commercial uses are made of these works for the purpose of “research”. This is incompatible with Article 5 (3) (a) of the Information Society Directive which states that the exception may only be invoked for non-commercial purposes. The UK amended their Copyright Designs and Patents Act 1988 in 2003 to make it compatible with the Information Society Directive. In Section 29 (1) their exception covers “research for a non-commercial purpose”. It is imperative that our legislation be amended to bring it into line with the Information Society Directive.

The advice given to the Hargreaves Review by UK Government lawyers was that significant difficulties would arise in any attempt to transpose US style Fair Use in European law. Trying to introduce Fair Use in Ireland is not feasible where our neighbours in Europe do not operate under the same system. Many of the argued benefits of Fair Use could be introduced if necessary by using copyright exceptions already permitted under EU law. EU law confines copyright exceptions to an exhaustive list of categories such as criticism, news reporting, research or archiving. Almost all of these exceptions are restricted to non-commercial use. Individual EU countries may implement exceptions within these categories but there is no flexibility to create exceptions in new areas.

As mentioned earlier in this submission, this review should take the opportunity to enshrine the Berne Convention three step test in relation to exceptions in our copyright act.

Exemptions:

- a) may only be applied in special cases
- b) may not conflict with normal exploitation of the work and
- c) may not unreasonably prejudice the legitimate interests of the right holder.

CASE STUDY 1

IVARO was recently contacted by an artist who had been shortlisted for a prestigious portrait award. The awarding body had reservations about selecting his work as they were concerned that his painting might infringe the copyright of another artist. One of Andy Warhol's self portraits had been incorporated into the painting, as can be seen in the illustration below.



"At this time of night" 140x200cm, oil on canvas © Al Freney, 2011

Irish copyright law is clear that the copyright holder has the exclusive right to undertake or authorise others to copy a work or make an adaptation. Fair Dealing describes specific detailed exceptions when permission of the rights holder is not required. IVARO sought the opinion of the Artists Rights Society (ARS) in the U.S., which represents the Warhol Estate, to inquire how this case would be treated under Fair Use. The response from ARS was as

follows, *“in response to your inquiry of how U.S. law would apply, whether a use is a fair use is uncertain and open to analysis based on several factors and the facts of the specific case.”* In essence they could not give a definitive answer.

The US Copyright Office notes on its website that *“the distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines or notes that may be safely taken without permission”*.

Fair dealing on the other hand is clear that the permission of the rights holder is required in instances such as this. IVARO was able to quickly and efficiently facilitate the permission of the Warhol Estate and the artist was able to be included in the portrait award.

No artist creates their work in a vacuum; there are influences of other artists' works, as well as works of literature, cinema, theatre, design and advertising, to name a few. Ireland's fair dealing provides clear guidelines on what is and what is not permissible. Fair Use on the other hand results in confusion and lack of clarity. Having unambiguous Fair Dealing exceptions to guide creators allows them to innovate while remaining on the right side of the law.

Orphan Works

According to section 88 of the Copyright and Related Right Act 2000, if it is not possible to ascertain the identity of the author of a work by reasonable enquiry, and it is reasonable to assume that the copyright has expired, the work may be used without infringing copyright.

As seen in the Hargreaves Report, *“libraries and archives seek to digitise collections, and have the technological capacity to do so and to provide access to them for users, but they are unable to act where rights holders cannot be found for some of the works, because to digitise those works could be a copyright infringement. The issue is exacerbated in that where rights information is lacking, it is often not even clear whether works are still in copyright or not.”*

A number of submissions to Hargreaves Review, including that of the British Copyright Council, suggested the use of extended collective licensing on the Nordic model. The Hargreaves Review agrees with that approach.

The scheme should first of all involve a diligent search. If no rights holder can be located, a licence could be issued by IVARO, as the collecting society. The licence fee should be held by the collecting society until the owner is identified, or until a reasonable period of time has elapsed. Any unclaimed monies could then be used for social or cultural purposes.

The European Commission has recently published a draft Directive to harmonise the approach of all Member States to dealing with orphan works. It would provide organisations like libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations with a mechanism for securing licences for the use of orphan works.

We will comment further on this draft through the consultation process.

Artists' Resale Right (Droit de Suite)

Another legislative issue which affects our members relates to European Communities (Artist's Resale Right) Regulations 2006 to give effect in Ireland to Council Directive No. 2001/84/EC. The improper transposition of this Directive into Irish law requires urgent attention.

On 13 June 2006 then Minister Micháel Martin introduced Statutory Instrument No. 312 of 2006, with the intention that this would provide a temporary mechanism to allow for the collection of the artists resale right in advance of full implementation through primary legislation. When announcing the introduction of the Regulations the Minister made the following commitment:

*"I am now taking those interim steps which are open to me in the present Regulations. The intention is to revisit some aspects, such as the exemption threshold value for eligible works and the duration of the right, in the proposed Bill. While the minimum art value threshold is being set at €3,000, for now, it is intended that this will be lowered in the primary legislation. The Directive raises some other optional issues and these can only be addressed in the proposed Bill also."*¹

IVARO is mandated to collect the artist's resale right on behalf of its members in Ireland. It is also mandated through its reciprocal rights agreements to collect the royalty on behalf of the members of foreign societies who are entitled to this royalty in Ireland.

Article 3 of the Directive provides that works sold at €3,000 and above are subject to this royalty. Member States are allowed to impose a lower threshold for eligible works. Many Member States have a threshold of €1000. This option was taken up by the UK, our nearest neighbour and Europe's largest art market. Ireland implemented the right at the maximum threshold of €3000 which has resulted in a relatively small number of artists benefitting from

¹ <http://www.djei.ie/press/2006/20060619a.htm>

the right. IVARO collected resale royalties on behalf of 54 artists in 2010. In Ireland nearly 98% of art sells at auction for less than €50,000 and 50% sells for less than €1,000². A threshold of €1,000 will benefit a much wider constituency of artists and be a further stimulus for artists to create new work. This is also important for foreign artists whose works resell in Ireland due to the fact that the threshold is much lower in many countries.

In addition to this, under the Directive the minimum rate applicable to the portion of the sale price up to €50,000 is 4%, which is the rate Ireland implemented. Member States are given the option of applying a rate of 5%. This is a preferable rate for Ireland, bearing in mind that most Irish art sales do not exceed €50,000. Increasing the lower band rate will provide proportionally higher royalties to less well-established artists.

Member States also had the option to decide whether to allow sales of deceased artists to be excluded until 2012. Countries introducing the royalty for the first time such as the UK and Ireland opted to include only living artists in the scheme initially. This right will need to be extended to heirs from 1st January 2012. Our legislation must be altered to reflect this.

The inclusion of heirs in this scheme is of huge importance. They are generally responsible for maintaining the artist's legacy. This can be a very time-consuming and expensive undertaking. Some of the tasks include maintaining records, authenticating works, responding to requests to reproduce the artist's works, providing information for exhibitions and catalogues, and looking after websites. They have been losing out on important income, which would enable them to continue their valuable work. This matter needs to be attended to as a matter of urgency.

Our surveys of art market sales consistently demonstrate that, year on year, 90% of the top selling works sold at auction in Ireland are by deceased artists.

Figures from 2004 showed that 321 artworks by Irish artists were sold at auction for above the threshold figure of €3000. The total resale royalties which the artists or their estates would have been entitled to totalled € 918,890. Of this, 125 living artists accounted for € 211,709 and 196 deceased artists accounted for € 707,181. These figures were calculated based on the Annual Price Guide to Irish Art, 2004, published by the Irish Arts Review. This illustrates how valuable the resale right would be if extended to heirs. There appears to be consistency in the economic data since 2004 in that the ratio of 4:1 remains unchanged. We will provide up to date figures during the Consultation process in the Autumn.

The Artists' Resale Rights was introduced in recognition of the fact that artworks often don't achieve their full value until late in an artist's career or even after their death. The droit de

² An Investor's Guide to the Art Market by Dr. Clare McAndrew. Published by Liffey Press.

suite was initially introduced in France in 1920 in an attempt to address this issue by providing an entitlement in law for artists to share in the ongoing sales of their works and also to allow them to make appropriate provision for their families.

CASE STUDY 2

Patrick Leonard was a painter and printmaker. To supplement his artistic income Patrick worked as a teacher for most of his life. Bouts of illness often interrupted his work as both artist and teacher. In 2005, the year before the artists resale right was introduced, 8 of his works were sold at auction in Ireland with a combined value of €12,000. All of the pictures sold for less than the €3000 threshold and therefore he would have earned nothing in royalties even if the right had been in place.

Sadly Patrick died shortly before the introduction of the resale right in 2006. In the year following his death the market was flooded with his works. 128 of his paintings were sold at auction with a combined value of €761,800. One work alone sold for €40,000. Had the Resale Right been in place for the benefit of artist's heirs, Patrick's widow would have been entitled to €30,472 on the basis of auction sales alone. As the law stands she does not benefit by one cent.

A number of efficiencies could be gained by the drafting of new Primary legislation in this area. The collection of this royalty has proven problematic for artists and for IVARO who collects this royalty on behalf of its members. As it stands, artists have to be aware of any of their works which sell over the threshold. They then must seek information on the seller from the art market professional for that specific sale. The art market professional has 90 days in which to respond to this request. The artist, or in many cases IVARO, must then apply to the seller for payment of the royalty. It is a laborious, time-consuming and difficult task, especially for individual artists. This system could be streamlined with the introduction of compulsory collective management which would include reporting of qualifying sales.

Article 6.2 of the Directive allows that Member States may provide for compulsory or optional collective management of the royalty. The Irish Regulations S.I. 312 make no provision to assist or encourage collective management in Ireland. The EU Commission's *Communication on copyright management*³ comes to this conclusion: "*Collective management appears also to be the de facto basis for the operation of artists' resale right under Directive 2001/84/EC, even if it is not mandatory.*"

³ "The management of Copyright and Related Rights in the Internal market" COM (2004) 261 final

In preparation for the implementation of the Resale Right in the UK, the Arts Council of England commissioned research into best practice for collecting and distributing royalties. The report made the following recommendations⁴:

- Collection of Droit de Suite should be carried out by one central institution to maximise efficiency and ease of reporting and minimise administration and other collection costs
- Where possible, the collection agency should be the national authors' society, to make the most out of cost savings from economies of scale.
- To meet the mandatory requirement of the Directive that Droit de Suite is administered on a reciprocal basis between all Member States, all collection societies should belong to a network or umbrella organisation to enable reciprocal exchanges of rights and funds for artists internationally at a low cost through the use of common administrative systems.

If compulsory collective management was introduced and a collecting society was appointed this would mean that resale royalties would be automatically collected on behalf of all rights holders, whether or not they are members of the collecting society. Art Market Professionals would be required to supply the collecting society with data after each sale. The collecting society could then collect the royalty from the seller and distribute the proceeds to the rights holder without delay. Royalties for foreign artists whose work is resold in Ireland would also automatically be collected ensuring that Ireland complies with its obligation to *"ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed."* - Article 28, EU Directive 2001/84/EC.

Summary

The rationale and founding principle of the resale right is that artists and their heirs share in the increasing value and exploitation of their works. Together with other means of support, it represents an important factor in strengthening the artist's security and economic autonomy, without any additional cost to the exchequer. In order to maximise the efficient implementation of the resale right we make the following recommendations:

- With regards to the Artists Resale Right, the current Regulations have been in place for over 5 years now despite having been introduced as a temporary measure by the Government. It is submitted that the Regulations do not provide a regime which allows for effective implementation of the artist's resale right in Ireland, as is required by the Directive. Compulsory collective management should be implemented through full legislation to address the major obstacles in administering the right and in order to prevent the ongoing losses to artists.

⁴ *Implementing Droit de Suite (artists' resale right) in England*. Arts Council of England Report. Dr. Claire McAndrew & Lorna Dallas-Conte, 2002.

- The issue of heirs urgently needs to be addressed as the deadline for extending the Resale Right for the benefit of heirs and beneficiaries is January 1st 2012. The Government should support the extension to heirs to ensure that artists estates are able to bear the burden of preserving Irelands' cultural heritage for future generations.

Conclusion

IVARO welcomes this Review of our Copyright legislation. It is a valuable opportunity to address some of the areas that need improvement and amendment. Copyright protects and encourages innovation. Royalties, which are enjoyed on a temporary basis (lifetime plus 70 years) are hugely significant relative to an artist's low income. This does not prevent user access to copyright-protected content; it simply ensures that right holders are remunerated for this access. Copyright works are available for use via licensing arrangements, exceptions in our legislation and through permission granted directly by the rights holder.

The following is a brief outline of some of the areas that need attention:

- Greater education and public awareness of copyright is needed, as well as meaningful enforcement. The lack of a strong deterrent for infringers acts as a barrier to innovation.
- The benefits of the US system of Fair use are overstated. To adopt Fair Use in Ireland would lead to legal uncertainty and high legal costs. It is also incompatible with EU law. The Copyright and Related Rights Act 2000 contains specific detailed exceptions for fair dealing which ensures certainty for both users and rights holders. An amendment needs to be made however to bring Section 50 (1) into line with the Information Society Directive with regard to research for non-commercial use.
- We should take this opportunity to include the Berne 3-step test in our national legislation. We should also provide for a system of Extended Collective Licensing as a fast and efficient means of securing access for users and remuneration for rights holders.
- With regard to the Artists' Resale Right, the issue of Heirs urgently needs to be addressed. The Right must be extended to Heirs on 1st January 2012. There are also a number of obstacles to the administration of this right which need attention.

IVARO welcomes this invitation to submit a paper to this Review and looks forward to actively engaging with the consultation process. User access to copyright-protected material is important, but so too is the protection of creators' rights.

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