

SUBMISSION TO DEPARTMENT OF JOBS, ENTERPRISE & INNOVATION

SUBJECT:

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

SUBMISSION BY:

Nick Kelly

CREDENTIALS:

MUSICAL:

I have won many accolades as a musical performer and composer, both with my former band The Fat Lady Sings and as a solo artist. For my most recent album "Nine Lives", released under the stage name Alien Envoy, I ran an innovative 9-month project called GESTATION which sought to harness both live performance and internet technology to give fans greater access to the recording process. This project attracted a great deal of media and industry attention both in Ireland and beyond.

FILM:

I have written and directed three well-received short films, the most recent of which, "Shoe", was shortlisted to the last 10 for the 2011 Academy Awards. I am currently developing a number of feature film projects, and am in receipt of support from the Irish Film Board.

ADVERTISING:

I am one of Ireland's most prominent advertising copywriters and creative consultants, having conceived high-profile campaigns for such clients as Walkers Crisps, Aer Lingus, Dell (Recruitment), the Irish Independent, Hibernian Insurance, the Telecom Eireann IPO, Focus Ireland, AIB and perhaps most notably Guinness, for whom I've written five major TV commercials including the 2003 Clio award-winning "Tom Crean". I have worked at one time or another on most of the major mobile phone brands and for a variety of leading technology brands.

FICTION:

In 1996 my short story "Expect Jail" was a winner of the Ian St James Awards, the UK's leading competition for short fiction.

COMPUTER GAMES:

I was senior staff writer and reviews editor for games magazine Commodore User between 1987-1989, and also did various pieces of freelance work with EMAP sister magazine Computer & Video Games, during which period I met many key figures in the nascent computer games industry and gained a good understanding of that business.

LEGAL:

I did a law degree (BCL) in UCD, and qualified as a Solicitor in 1986, having served my three year apprenticeship with McCann FitzGerald in Dublin. During my apprenticeship I spent 7 months seconded to leading New York law firm Cravath Swaine & Moore, where I worked exclusively on a single major computer copyright case. While I have never practised as a lawyer post-qualification, I have retained a particular interest in the area of intellectual property – not least because I have spent most of my working life creating and trying to make a living from various forms of intellectual property.

INTRODUCTION:

My intention in making this submission is not to suggest specific legislative reforms, but rather to give a perspective on the real world to which any new law will apply and some general suggestions for how public policy in this important area might most usefully develop.

My strong feeling is that government – and society – will need to arrive at a new way of looking at, protecting, and rewarding the creators of intellectual property in which law, fiscal policy and education all have a role to play.

The perspective I come from is that of a person who has created intellectual property in several different spheres; who understands and is excited about the new opportunities offered by technology; who has experience of working as a creative consultant to both traditional and tech companies; and who has some knowledge of the law, and what it can – and can't – achieve in terms of regulating public behaviour.

I also strongly believe that Ireland's future economic well-being may depend on how we decide that intellectual property should be shared, protected and exploited.

One final introductory point: in this submission, unless the context obviously requires another reading, I use the words "creators" and "creative" in their widest possible sense – that is to say, to include academics and scientists, inventors and designers, as well as musicians, painters and writers.

OBSERVATIONS:

1. GETTING HIRED TO BUILD THE PIPELINE DOES NOT MEAN WE HAVE TO GIVE OUR OIL AWAY FOR FREE

Balancing the benefits of developing high-tech jobs and of nurturing indigenous creators of intellectual property.

When it comes to deciding whether and how to reform intellectual property law, Ireland is undoubtedly in an interesting – perhaps unique – position.

Many of the world's leading tech companies have chosen to base major parts of their worldwide operations in Ireland; these companies, by and large, are keen that Ireland's domestic intellectual property laws be reformed to relax protections on the use and dissemination of IP. These companies are huge employers and contributors to the national coffers and therefore their collective voice is loud.

However, the future of Ireland's wider economy arguably depends on our ability to create and exploit new intellectual property of our own. As a small expensive remotely-located island nation with neither the population nor the natural resources to support a major manufacturing sector, we must survive economically on our brains, not our brawn.

We're never going to have the huge supplies of oil, steel, and low-paid workers that some other countries have. But we do have both the ability and the opportunity to be a nation of creators across a wide range of fields, from media to medical science, the arts to architecture. More than perhaps any other country in Europe, we can – and need to – get paid for our thinking.

There is therefore a tension between the desire to make life as easy as possible for our locally-based global tech employers and the reluctance to remove protections from those many indigenous Irish creators of intellectual property.

Understandably in the current environment, many people want to do anything they can to keep the one sector which is growing in terms of employment and productivity – the tech sector – happy. But we should be careful that in doing so we don't deprive ourselves of the future benefit of domestically-produced intellectual property.

The added bonus for Ireland in getting this balance right is that we have the opportunity to become recognised as an international leader in the development of new IP models. The blend of our high concentration of leading global tech companies and our long-standing reputation for original content creation, means that many other countries in Europe and beyond will be paying particular attention to our efforts to deal with this issue.

2. THE DANGER OF CONFISCATING THE MONKEYS' TYPEWRITERS.

Developing a true understanding of the unpredictability and fragility of creative activity.

As someone whose working life has straddled the creative and commercial worlds, I'm very often struck by the widespread lack of understanding in the latter sphere of how intellectual property – and in particular profitable or valuable intellectual property - actually gets created.

Put very simply, in order to create valuable intellectual property, you need to create *lots* of intellectual property – and see which bits end up being valued by the market.

Much of the debate around music copyright infringement in particular tends to get distorted by the participation in the debate of successful and high-profile creators – people who have already reached the stage in their careers where no change in the law is going to dramatically change their status or circumstances.

Understandably, it is hard for the public to feel much empathy with millionaire rock stars or their representatives speaking on these issues, however articulate, accurate or impassioned.

The reality, however, is that the vast majority of creators earn comparatively tiny sums of money from their creative activities – and put far greater time, effort and personal commitment into their work than most public or private sector employees do. These creators are extremely vulnerable to even minor reductions in their already low incomes.

The advent of widespread illegal downloading of music has undoubtedly created a situation where many talented and dedicated musicians and composers have been forced to limit or cease their creative activities – put simply, they've been forced to take a day job.

This may seem like just a music business problem – but already similar things are happening in the movie, TV and media industries, and this phenomenon is likely to spread across all areas of creative endeavour where there's any kind of digital output.

It's also really important to understand the relationship between quality and quantity in creative endeavours.

Quality in most areas of intellectual property is not objectively discernible before market affirmation.

It took U2 three albums to have their first hit single. And many of the most important discoveries in science were made by people with years, or even decade, of failed attempts behind them.

Nobody knows where the next great idea is going to come from, or can predict who is going to have it.

But what we can say with absolute certainty is that if we reduce the number of people striving – on a serious full-time basis over an extended period of time - in any particular area of creativity, we reduce the chances of the next great idea happening at all.

If you give enough monkeys a typewriter, the saying goes, sooner or later you'll produce a Shakespeare.

But the corollary equally true: the more typewriters you take away, the less chance there is of one of the remaining monkeys making that leap.

To the extent that any reform of Irish intellectual property law has the effect of significantly reducing the number of domestic creators willing or able to seriously participate in creative activities, it will be reducing Ireland's ability to produce innovative new ideas.

3. COMPUTER SAYS “NO PROBLEM”.

Recognising the futility of relying on technological safeguards to protect intellectual property.

It is the terrifying genius of our digital age to break down barriers wherever they exist.

Indeed, philosophically, this is a generation that resents barriers and sees them as a challenge to be overcome.

There is no piece of technology which can ultimately prevent mass-produced intellectual property from being copied.

And once somebody's worked out how to copy it, somebody else will work out how to make that copy easy and cheap or free to access for the consumer.

This phenomenon is amplified by the willingness of a new generation of consumers to meet the hackers half way in terms of quality.

As has been remarked by Mike Walsh in “Future Shock”, the so-called “digital native” generation has agreed to trade resolution for access – most kids don't care that the quality of a downloaded MP3 file isn't anything like as good as mastered CD version of the same track, or that the latest film isn't going to look as good on a 3 inch wide phone monitor as it will on a 42-inch plasma TV screen - once they can have that song or movie *right now*.

As technologies converge – the notion of separate delivery mechanisms for music, film, TV, games, newspapers and books is fast becoming history – the trend will be towards being able to access all digital data instantly at relatively low resolution.

And, if current experience is any guide, it'll largely be accessible for free.

4. WHAT HISTORY HASN'T TAUGHT US

Addressing public lack of understanding of the rationale behind Intellectual Property and consequent lack of support for its protection.

All laws to some extent require public acquiescence and support if they are to be effective.

While people grumble about paying taxes or parking fines, generally they also appreciate the objective need for citizens to contribute to the exchequer and to abide by common rules on the roads.

In the case of Intellectual Property, I would suggest that many consumers don't appreciate the philosophical and economic theory that underpins the whole area – the benefit of a balance between incentivising creators and making the fruits of that creation available to society.

(This ignorance is understandable. The fundamental principles underpinning the protection of intellectual property date back more than 200 years to the dawn of the industrial revolution. Unless you've actually studied IP, why would you understand them?)

Until very recently, of course, this didn't matter – it was too cumbersome and expensive for the general public to access the fruits of creation without abiding by the systems set up to incentivise the creators.

Obviously you could theoretically photocopy an entire book – but much cheaper and easier just to buy it. Even the much demonised practise of home taping in the 1970s and 80s didn't really kill music because a

relatively small number of people could really be bothered to buy the blank tapes, borrow the record, and write out the track listing by hand.

But nowadays it's so easy to download something for free – so why wouldn't you? As a society, we have failed to convincingly answer this question for the vast bulk of the public – and we urgently need to remedy this.

(On a related note, there is also much anecdotal evidence that the public have a limited understanding of how much time and effort is routinely invested by creators in producing their creative products – and that therefore any monetisation initiative that relies on an “honour” system on the part of consumers is likely to grossly undervalue and underpay most creators.)

5. THE ONLY WAY IS NOT NECESSARILY UP

Challenging the notion that progress is assured regardless of legislative decisions

It is an article of faith with many apostles of the internet revolution that all technological advances will ultimately prove positive in terms of the depth and diversity of creativity and innovation in a society, and that this inevitable long-term upward trajectory justifies any short-term economic collateral damage that may be suffered by those from traditionally creative backgrounds unlucky enough to be living through this “transitional” phase.

I think that this is a very dangerous assumption – history and indeed ecology has often shown that human development can be arrested and reversed by bad choices and unfortunate events.

(Consider the Dark Ages; the fact the Ireland's population was 8.5 million in 1845; the projected decrease in lifespan for the current generation of American teenagers compared to their parents owing to diet and lifestyle issues; or modern Greek plumbing which has arguably still to regain the the lost standards of the Minoan architects at Knossos.)

Most books worth reading, news reporting you can trust, memorable films, really addictive games, research that leads to important scientific break-throughs, or music releases worth a damn are the direct result of an enormous amount of sustained, trained and undistracted effort by one or many people over months, years or even decades.

And for each one of these game-changing life-enhancing millions-generating success stories there will necessarily be 99 (or 999) examples of people who worked just as long, and as hard, and invested just as much time, money and love, but didn't quite get there.

The kinds of people who make these kinds of break-throughs aren't usually inspired by the desire to make money; but they can't do their work without it.

Tech companies regularly cite the benefits of crowd-sourcing and the empowerment of greater numbers of ordinary people to experiment with creativity online as examples of how the internet inevitably increases creativity.

But I would submit that these essentially amateur hobby-ist acts of creation – very often merely “piggy-backing” or parodying more substantial original creativity - cannot compensate for the loss of large numbers of dedicated, highly trained and vastly experienced professional creators who can't or won't continue to pursue their callings because the generally relatively meagre incomes that they traditionally relied upon to enable, incentivise and reward their efforts have dwindled below the breadline.

I fear that there is a very real possibility that poor legislative and fiscal choices could drastically reduce the numbers of serious creators operating in our economy, and that such a reduction would in turn reduce the numbers of innovative creations which our country can hope to produce, and the possible economic benefits of same.

The non-economic effects upon our society of the resulting cultural and intellectual impoverishment are harder to predict or quantify, but should not be overlooked.

6. THIS COULD BE A BEAUTIFUL FRIENDSHIP

Recognising that creators are natural supporters, not opponents, of innovation.

The irony of the face-off between the creators and the tech sector is that most creative people are instinctively disposed to embrace innovation rather than resist it.

From science and media to music and film, creatives are typically amongst the earliest of early adopters of new technology, the first to recognise and explore its potential.

Once creators are reassured that the rules surrounding the usage of new technology take account of their own legitimate interests in being rewarded for their work, many will be among the biggest fans and advocates of the tech sector's innovations.

SUGGESTIONS:

1. EDUCATE TO APPRECIATE

It is vitally important – not just in Ireland but around the world – that the public are made fully aware of the process by which most new things beneficial to society are invented and created, and the need to protect that process if society is to continue to develop.

This isn't a quick fix – it's a powerful long-term ongoing educational campaign which would need to be coordinated internationally.

But the end result should be that most people will start truly understand and value all Intellectual Property, and to think twice before copying or illicitly using same – even if they're at low risk of being caught.

We want people to look at a copyright notice like a traffic light – a rule that they're happy to obey, because they recognise that in the long run they benefit.

2. HAGGLE OVER THE PENNIES – BUT CHAMPION THE PRINCIPLE

In the heat of battle, people sometimes lose sight of the bigger picture – and the debate surrounding intellectual property reform is no exception to this rule.

Just as many creators and their industry representatives rail, impotent and Canute-like, against the incoming tide of new technology rather than trying to work with it, many of those on the other side of the argument are so keen to champion the benefits of technology to the consumer that they fail to sufficiently acknowledge the rights of creators to be incentivised and rewarded for their creations.

All players in the sector – creators and media owners / disseminators alike – have a responsibility to actively explain and promote public understanding of the *principle* that creators need to be paid for their work.

Quite where the lines should be drawn – how many years will the protection last for, what percentage of dealer price will be payable – can then be a matter for debate.

If tech companies were to genuinely express this fundamental truth a bit more loudly and consistently, many creators would be less paranoid about the threats posed by technology, and more willing to embrace the opportunities.

3. FOLLOW THE MONEY

Even if tech companies and creators agree new legal principles to govern the copying, dissemination and remuneration of IP, there is no guarantee that these new laws will, in and of themselves, solve the urgent problem of how to incentivise and reward creators today and tomorrow.

Technology will relentlessly continue to make all forms of IP ever more accessible to ordinary consumers – and there will inevitably be more opportunities to access that IP free of charge.

In the absence of a sea-change in the level of public understanding and support for the whole concept of recognising and paying for Intellectual property – something that, as I have already mentioned, will require a sustained educational campaign over years – it is hard to see that more and consumers won't avail of the ability to take this material without paying.

The private and ubiquitous nature of online consumption means that widespread legal enforcement against all but the largest and most flagrant abusers is likely to be prohibitively costly – and, because of the lack of public appreciation of IP rights, risks creating a consumer backlash.

However, there is one very obvious way in which consumers could be made pay for the personal use of Intellectual Property and the money raised could be passed on to the creators.

Access to Intellectual Property online depends upon the ability to go online.

The broadband line – or broadband-enabled mobile device – is the key to the treasure chest of Intellectual property.

Without these tools, consumers can't access intellectual property – and the ability to access intellectual property is a primary motivation for most consumers to purchase these tools.

At the risk of stating the obvious, the demand for those tools - and therefore the profit accrued by the companies who provide them – is vast and growing.

Unlike individual consumers, the companies that sell these lines or devices to the public are relatively easy to identify and engage with.

I would submit that the most practical means of ensuring that creators continue to be incentivised and rewarded for their work is to levy every customer who buys a broadband connection or broadband-enabled mobile device with a blanket annual fee for personal use of online IP – a **content licence** much like the current RTE licence – which would then be distributed to creators via the various collection agencies and representative organisations that already represent them.

While negotiating the details of such an arrangement between the service providers and the various representative bodies would undoubtedly be complex, I have no doubt that systems could be devised which would track and log usage, either on a full reporting or sample basis. There are already precedents for how unassigned income can be distributed to creators in proportion to known levels of usage and popularity from measurable sources (cf. IMRO's distribution methods for the "pool" income).