

## **BARBARA LINDBERG**

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

Submission to the Copyright Review Committee

I am a creator not an aggregator. I am a freelance press photographer who makes my living creating unique, newsworthy photographs that I supply and licence to select clients who use those photographs as a part of their news coverage. This news coverage can be in hardcopy and/or digital (including Internet) formats.

The key to my business model and my supplier/client relationship is the fact that I give permission to my clients to use my photos and I receive payment for the use of those photos. By following this business model I am able to make a living from the photos I create and can continue to create more photos. By following this business model I generate income that I use to pay Irish taxes, pay my rent, pay for the food I put on the table, and pay for necessary consumer goods thus contributing to the Irish economy.

Working as a freelance press photographer means I am running a small business. I cannot run my business without business expenditure. Whether I choose to use a camera phone or an expensive professional camera and smorgasbord of professional lenses, I cannot create photos without the equipment needed to do so.

I choose to get my equipment from a Dublin-based camera shop. This shop carries a lot of equipment that I would like to have, that I know I can use to create photos and that can help me to run a successful press photography business. However, just because I like those items, want those items, and can use those items to make my business a success, I cannot just take those items, walk out the door, and start using them for my own purposes. I must obtain permission to take those items and offer payment for those items (the former is usually forthcoming once I ensure the shop is given the latter as per the amount they indicate they will sell the items to me).

The camera shop exists as a business. The shop pays for the equipment it stocks, for its rates, for utilities, and for the people it employs. If everyone just walked out the door with camera equipment without obtaining permission and paying for it, then the camera shop could not survive. It would have to close with the resulting loss of contributions to the Irish economy and loss of jobs. Former camera shop employees might have to go on the dole.

As a freelance press photographer I exist as a business. I pay for my equipment including cameras, laptop, software, etc; for my Internet access; transport; public liability and other insurance costs; and utilities. If everyone used my news photos without permission and

without paying for them, then I could not operate as a small business. I would have to stop supplying photos with the resulting loss of contributions to the Irish economy and loss of a job. (Note that as a S class PRSI contributor I am not eligible for the dole.)

## A STORY

There are risks in setting up and operating any business. Some businesses, including those run by press photographers, have to deal with the additional risk of personal injury.

While covering what should have been a very small story I ended up at the scene of a violent crime as it took place. Instead of turning and running to a safer location as many people did, I stood my ground and photographed the events as they unfolded around me.

The resulting photos were of the type that could go viral on the Internet. Therefore I decided to supply this set of images to clients with Republic of Ireland usage only and no Internet usage restrictions. Although the clients I supplied photos to complied with these restrictions, someone in the UK accessed the photos and placed one of them online. (Note that my copyright notice plus the 'Republic of Ireland rights only, no Internet' licensing restrictions and my contact details were still imbedded in the image as it appeared on the infringing website.)

Movement of the image across the Internet was swift. By the time I'd found it on the original UK website and had the image taken down, it was already showing up on websites from places as diverse as South Africa, Australia and let's say I figured out where Azerbaijan is before Jedward did because the photo was on two websites based in that country.

For the purposes of this copyright review submission I will deal with the websites in the US that have published copies of the photo since the US has a Fair Use exception. The US websites were all various types of aggregators using photos and news content without paying for them.

One aggregator was someone on a well-known commercial website called Facebook (it is commercial - the website is worth billions). Anyone who reads Facebook's terms and conditions knows that there is a form of copyright grab for images placed on the site. Although the purpose of Facebook is connecting with 'friends' someone was using it entirely to post news stories and news photos (including mine) - an aggregator of news content. A take down notice was issued, the photo removed, and the Facebook account did disappear shortly thereafter. Fair Use should not mean my photo is 'shared' for free on a copyright-grabbing website that is worth billions. I should not have had to request a takedown notice - the image should not have been used in that way on

such a site.

Another aggregator using the photo was a blog hosted by Google. Again this blog exists solely to post news stories and news photos without having any original content or even comment. Hidden in the blog website's terms and conditions is a statement about Fair Use. Once again I had to take time to send a takedown notice but it was not that easy this time. Google replied back requesting my US copyright registration number (a photo must be registered with the US Copyright Office for statutory damages to be paid if an infringement case goes to court in the US). If a photo is registered then Google appears to be more likely to remove the infringing image. I had already registered the photo and Google did remove it.

A third type of aggregator was a racist website that collects news stories and news photos for their own purposes - although in this case they add their own viewpoints as content. The site contains a statement that clearly claims the Fair Use exception for all material used on it, offers all website content up as free for others to use under creative commons licensing, sells a few items for money, and has a PayPal feature for donations for the website's 'cause'. My photo was published beside exceedingly racist comments. The owner of the website wasn't traceable, but I did finally get the image removed by contacting the ISP.

The remaining US websites using the photo all exist as news aggregators – in this case commercial sites that pick and nick photos and words from sources from around the world for their own benefit. Because of the obvious commercial nature of these websites and the fact they are claiming Fair Use, I will have to pursue those copyright infringements through the courts in the US. The only way to resolve the issue if someone claims Fair Use in the US is via the courts - an expensive option, especially if a photo is not registered with the US Copyright Office because in such cases the courts will not award statutory damages for infringements - only actual (compensatory) damages.

A reminder that all of these US sites are aggregators of news photos and news content – most of them are not creators. Rather than expressing their own works and creativity many of them exist entirely by appropriating other people's works and creativity. All of them, even the ones that add some of their own content, are using this aggregated content to increase the hit rate of their websites, thus increasing their potential revenue from advertisements featured on those sites or items sold from those sites. This Internet usage harms the commercial value of my work because why would anyone want to pay for my news photos when they can publish them online for free by quoting a Fair Use exception.

The websites and businesses that should gain commercially by using my

photos should be the ones who have received permission to use my photos and who have paid to use my photos as content.

I do not risk both my equipment and personal injury to have my photos used for commercial gain by websites or anyone else claiming a Fair Use exception.

(The chance of a personal injury while working is real as can be noted by the fact a press photographer recently received a gunshot wound while covering an event in Belfast.)

## SUMMARY

For creators there is nothing fair about Fair Use. Fair Use is essentially a form of 'free use'. If a business bases its existence either partially or entirely on obtaining copyrighted content via Fair Use, then it is utilising a business model that depends on using other people's creative content free of charge for monetary or commercial gain (an advert on a website is a form of monetary gain). That is not innovation - that is exploitation.

The key to my business model, as mentioned previously, and many people's business models is permission and payment. Clients who use my photos receive permission from me to use them and I receive payment from them for this usage. The idea of Fair Use ignores both permission and payment. It ignores my right as a creator to control exactly who uses my photos and thus ignores my economic right to always receive appropriate payment for usage of the photos that I create.

Copyright is a property right. It is called IP - intellectual property - for a reason. Copyright is also an economic right – it allows creators the chance to make a living from their own creations.

As Frank Cullen, co-coordinating director of the National Newspapers of Ireland stated at the Copyright Review public meeting at Trinity College on 4 July 2011, "Copyright is not a barrier."

It is not a barrier. If someone wants to use copyrighted works – whether that is a photo, a news story, a news feed, or a database someone has paid to develop - they should seek permission and pay for the usage of those works. They should not hide under the cover of Fair Use to obtain for free what they could and should ask to use and pay to use.

## RECOMMENDATIONS

Australia has recently rejected the implementation of a Fair Use exemption. The recent Hargreaves Review of the UK's intellectual properties laws has also rejected the idea of replicating the US Fair

Use system. Likewise, Irish copyright law should retain the idea of 'fair dealing' and reject Fair Use.

A Fair Use exception should be rejected not only because it conflicts with already existing European copyright and intellectual property rights laws, but also because its implementation would rely heavily on a body of case law such as in the US – case law that would have to be re-created in Ireland. As mentioned previously, the only way to resolve the issue if someone claims Fair Use in the US is via the courts - an expensive option, especially for individual creators and small business owners.

A Fair Use exception should not be added to Irish copyright law because it would dilute the ability of creators to negotiate commercial value for the use of their creativity. Permission to use a creation and payment for the use of that creation should remain firmly in the hands of the creators/copyright holders – the people who made the original economic investment for that creativity by risking their money, time, and yes, sometimes personal injury. No permission and no payment should mean 'no use' not Fair Use.

END OF SUBMISSION