SUBMISSION OF THE MOTION PICTURE ASSOCIATION TO THE COPYRIGHT REVIEW

The Motion Picture Association is a trade association representing six major international producers and distributors of films, home entertainment and television programmes[1]. Its members have deep experience in the integration of technology and copyright protection in the creation of successful, global businesses. We welcome the opportunity to provide comments by way of submission to the Copyright Review.

Intellectual property frameworks, including copyright, enhances economic growth and innovation and acts as an encouragement to foreign investment[2]. In particular, copyright is at the heart of the creative industries. These industries, in which Ireland has competitive advantages, offer higher growth and employment opportunities than most other industrial sectors. Copyright protection is indispensable to their success.

A key objective in this submission is to ensure that the Review is aware of the importance and sophistication of technological innovation in the film and other copyright industries. Film has always been a technology business. Indeed, in the digital realm, since the creation of the DVD in the 1990s, the largely unseen work of industry technologists in cross-industry bodies has continued to facilitate new means of distribution of audiovisual works, such as the Digital Video Broadcasting Project, Ultraviolet and KeyChest.

The film industry has pioneered technological innovation through partnerships with technology and consumer electronics firms, as, for example, digital projection in cinemas, 3D, the DVD, Blu-Ray, and, most recently, the Ultraviolet digital access system, as well as technology to enhance production and animation. It is in fact the repeatedly-demonstrated readiness of the content sector to embrace and even anticipate new technical opportunities that has driven the consumer market.

In addition to making the comments set out below, the MPA fully endorses the submission of the Irish National Federation Against Copyright Theft (INFACT).

---

[1] MPA is a trade association representing the six major international producers and distributors of films, home entertainment and television programmes: Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

[2] *Intellectual Property: Powerhouse for Innovation and Economic Growth*, International Chamber of Commerce 2011: http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf

Creativity and the economy

Creativity in content creation is a field in which all countries, not just economic superpowers, can compete. Ireland is already a significant player. According to a 2009 Arts Council report, the GVA for the arts sector is €782 million, with €71 million attributable to film and video. For the creative industries as a whole, GVA is estimated at €5.5 billion, or 3.5% of the total economy.[3] As to employment, the Report says that the arts sector was responsible for 25,519 jobs, with 2,202 of these in film and video. In the creative industries generally, the figures are 60,855 in terms of direct employment, and 95,649 in terms of direct, indirect and induced employment.

The Irish Film Board estimates that the audio-visual production sector alone is currently worth over €550 million per annum and employs in excess of 6,000 individuals, with over 550 small and medium sized enterprises operating in the sector in Ireland.

Studies have shown that effective protection of intellectual property is a positive factor for foreign direct investment.[4]

Ireland's copyright regime

Ireland's copyright law, the Copyright and Related Rights Act 2000 ("CRRA"), requires minor modification in certain respects but is generally, fit for purpose. If copyright were weakened or watered down, innovation would be hampered, not enhanced. It is the fruitful commerce between authors as free economic actors and those who profit from the consumption of their work that produces a working economy in cultural products.

The most striking and important issue in copyright protection today is not the technical detail of legislative provision, but the practical reality of online piracy: the level of infringement of copyright on the Internet is damagingly high. According to a recent study[5], approximately 23.8% of global Internet traffic is made up of infringing content with BitTorrent specifically accounting for almost half of that amount (representing 11.4% of global Internet traffic). Infringing content delivered from cyberlockers contributed 5.1% of infringing traffic and video streaming sites (such as MegaVideo and Novamov) contributed 1.4%.

Other peer-to-peer networks (e.g., eDonkey and Gnutella) and file distribution networks such as Usenet were responsible for the rest of the infringing content. Substantially all the files containing entertainment content shared using BitTorrent, the most popular file-

[3] http://www.artscouncil.ie/Publications/Arts%20Council%20-%20Economic%20Impact%20-%20Final%20Report.pdf. The Report largely relies on 2006 data.

[4] Edwin Mansfield, Intellectual Property Protection, Direct Investment, and Technology Transfer: Germany, Japan, and the United States, International Finance Corporation Discussion Paper, No. 27 (1995); Jeong-Yeon Lee and Edwin Mansfield, Intellectual Property and U.S. Foreign Direct Investment, Review of Economics and Statistics, 78, (1996): 181, http://www.jstor.org/pss/2109919.

[5] See http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf.

sharing system for films, contain infringing content.[6] Quite apart from the loss caused to legitimate business and employment, cybercriminals use the attractiveness of film content to spread malware, spyware, viruses and other harmful items.[7]

In establishing a favourable environment for online businesses, cooperation between content providers, government agencies and Internet service providers (ISPs), including search providers, is vital. Unfortunately, the Irish copyright scheme is not yet fully adjusted so as to bring this cooperation about.

Ireland needs to complete the work of implementing the Directive on Copyright in the Information Society (2001/29/EC) ("the Directive"), so as to ensure that Internet service providers play a part in the legitimate economy for cultural products. In particular, Article 8(3) of the Directive should be implemented, which requires that right holders be able to obtain an injunction against an Internet service provider to prevent or terminate an infringement.

The impact of technology

Copyright operates to create wealth and innovation by forcing to the negotiating table those who make and those who profit from creative works. Its extension has always been a beneficial response to technology:

- printing (Statue of Anne, 1710)
- the phonograph and cinema (Berne Convention 1908; Copyright Act 1911, transposed to Part VI of the Industrial and Commercial Property (Protection) Act 1927)
- radio and television (Berne Convention 1928/1948; Copyright Act 1963)
- computer programs (Directive 1991/250/EEC; TRIPs Agreement 1994; European Communities (Legal Protection of Computer Programs) Regulations, 1993 (S.I. No. 26/1993))
- video-cassette (Directive 92/100/EEC (rental right); TRIPs Agreement 1994; Copyright and Related Rights Act 2000)
- Internet (WIPO Internet Treaties 1996; Directive 2001/29/EC; Copyright and Related Rights Act 2000).

These extensions of copyright were sometimes preceded by strong protests by those who had begun to commercialise new technology. So it was with the phonograph, the manufacturers of which asserted that "recognition would mean the ruin of their industries".[8] Similarly today, those exploiting new technologies claim that copyright is an impediment to their profitability. These businesses want to use copyright works either as a

[6] *Census of Files Available via BitTorrent*, Felten (2010): http://www.freedom-to-tinker.com/blog/felten/census-files-available-bittorrent

[7] *Digital Music and Movies Report* (2010), Greve, McAfee, https://secure.mcafee.com/us/resources/reports/rp-digital-music-movies-report.pdf

[8] (2006) Ricketson, Ginsburg, *International Copyright and Neighbouring Rights,* §3.17.

"loss leader" or as a commodity, without negotiating in the market for their use or undertaking any obligation to protect against their unauthorized use.

However, it is the commercial symbiosis of the content industries and technology-driven exploiters of that content that powered the huge expansion of both sectors throughout the 20th Century. Abandoning that market-driven approach would in the long run work against innovation and consumer choice.

Enforcement

In the debate about creative content in the online environment, copyright protection is often characterised as being at odds with freedom of expression. This is unfounded and we would note that copyright industries are leaders in defending freedom of expression. We defend freedom of speech in court every day. However, elementary economic analysis and empirical research demonstrate that where content can be had for nothing, legitimate sales are depressed, limiting the copyright industries' ability not only to enhance the economy, but also to contribute to an open, popular culture in which contemporary artistic and social issues are largely mediated through popular entertainment. It is evident from the "Top 100" list on such sites as www.thepiratebay.org that their primary use is for the illegal acquisition and making available of that popular new film releases. .

The one measure which would most improve the performance of the Irish creative industries would be to enhance the practical protection of copyright works on the Internet. Empirical surveys have shown that over 90 per cent of entertainment content traded on P2P networks is infringing. Painstaking research by industry (which has a greater need to know the true effects of piracy than anyone else) shows that there is a substantial displacement of legitimate sales where consumers are able to obtain copyright content through illegal channels. This is not to suggest that each "pirated" copy relates to a lost sale. Right holders take an extremely conservative approach to such research. On the ground, video rental stores have gone insolvent in large numbers as a result, at least in part, of substantial piracy. Film piracy is a significant area of activity for international organised crime.[9]

Of course, in the online as well as the offline world, there are many consumers who will pay for content, even where pirated copies are available at low cost. They do not want to deal with criminal operators; they fear (rightly) that downloading infringing files may expose their computers to malware; they prefer the authenticity and reliable quality of genuine product; they want to do the right thing. However, it is simple economics that as price declines, demand increases. In a competitive legal market, as, for example, between rival DVD sellers in the High Street, this produces the minimum price for the maximum number of consumers. Where illegal operators are able to join the market, however, free of the

[9] *Film Piracy, Organized Crime, and Terrorism*, (2009) RAND Corporation: http://www.rand.org/pubs/monographs/MG742.html. See also the recent reports out of Germany on the raids against www.kino.to. See e.g., http://www.google.com/hostednews/afp/article/ALeqM5iG1nGyJ0XpMUdGLfghVTolMhqFsA?docId=CNG.161978ad878421d320b7331d7af803d4.461

burdens of paying the costs of production, royalties, taxation and compliance with other regulatory obligations, legitimate operators must lose market share due to the market failure created by this unlevel playing field, sometimes to the point of insolvency. This drains revenue out of the legitimate economy, reducing employment and business sustainability[10].

It follows that an efficient, thriving market in online content requires effective measures to exclude illegitimate operators from the market. This is the role of enforcement coupled with consumer awareness activities and legal alternatives.

While the mission of reducing the exposure of intermediaries from direct infringement liability was completed more than a decade ago, the balancing measures that would encourage the growth of responsible practices by their customers have not fully been introduced. In particular, Articles 12(3), 13(2) and 14(3) of the Electronic Commerce Directive (2000/31/EC) contemplate, and Article 8(3) of the Directive requires, that right holders should be entitled to an injunction against ISPs. However, this right has not been implemented correctly in some Member States, including Ireland.

In *EMI Records (Ireland) Ltd & ors v UPC Communications Ireland Ltd* [2010] IEHC 377, Mr Justice Charleton clearly explained the technical possibilities for controlling online piracy and the need to do so. Despite the possibility for him to interpret Irish law in light of the EU law, he concluded that he had no power to issue an injunction of the sort described in Article 8(3) of the Directive, except in a case of hosting. It appears that there is no right to an injunction against an ISP acting as a mere access provider (a "mere conduit"), which is the case in relation to Peer-to-Peer piracy. Charleton J observed:

> *Solutions are available to the problem of internet copyright piracy. It is not surprising that the legislative response laid down in our country in the Copyright and Related Rights Act 2000, at a time when this problem was not perceived to be as threatening to the creative and retail economy as it has become in 2010, has made no proper provision for the blocking, diverting or interrupting of internet communications intent on breaching copyright. In failing to provide legislative provisions for blocking, diverting and interrupting internet copyright theft, Ireland is not yet fully in compliance with its obligations under European law.* [para. 138]

It is of vital importance that this lacuna in the law be rectified. Without it, there is no incentive for Internet Service Providers to come to terms with right holders as to a mutually beneficial way of preventing online piracy, as they did in the settlement of the *Eircom* case.

Irish implementation of Article 8(3) of the Directive should take into account the need to block off-shore web sites that facilitate piracy, both by enabling Peer-to-Peer or other downloads and by the streaming of infringing content. Additionally, ISPs should be in

[10] *Building a Digital Economy: the importance of saving jobs in the EU's Creative Industries* TERA Consultants, 2010: http://www.creativecoalitioncampaign.org.uk/library/files/FINAL%20Full%20Study%20TERA.pdf

position to contribute to effective methods of educating the public about responsible Internet use, while reducing the need for recourse to the legal process. As predicted by earlier surveys, evidence from France[11] shows that the Graduated Response is having a substantial, beneficial effect on consumer behaviour. This can only support growth in the market for legitimate online services and the jobs and tax revenues that they generate.

Exceptions

The Review is expressly charged with examining the US Fair Use defence to see whether it would be appropriate in an Irish/EU context. The MPA would like to be very clear on this point. The MPA fully supports the US fair use defence for the US legal system. However, while Fair Use works in the US within a regulatory culture founded on US Constitutional doctrine, the US Federal Rules of Civil Procedure (particularly the discovery rules) and accumulated precedents, it is an expensive system which could not easily be transferred to a European context. It is clear that no individual EU Member State could introduce Fair Use at this time, given that it is not one of the exceptions permitted under the Directive. In any event, both the US fair use defence and the system of enumerated exceptions in the EU copyright *acquis* are subject to the same international standards.

Fair Use is a defence to what might otherwise be a copyright infringement (in practice it operates as a limitation on exclusive rights granted under the US Copyright Act). The doctrine in the US dates back to a famous opinion of Justice Story in *Folsom v. Marsh* (1841)[12]. It was then developed by well over a century of case-law and finally codified in §107 of the US Copyright Act in 1976. §107 is a statutory test applied by the Courts. It is formulated for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research and comprises four non-exclusive factors to be used by the court to determine whether a particular use of a protected work is "fair":

- the purpose and character of the use, including whether such use is of commercial nature or is for non- profit educational purposes;
- the nature of the copyright work;
- the amount and substantiality of the portion used in relation to the copyright work as a whole;
- the effect of the use upon the potential market for, or value of, the copyright work.

As a result, this ostensibly flexible system is actually a fact-intensive, detailed code. According to the US Copyright Office, "[t]he distinction between fair use and infringement may be unclear and not easily defined." It advises that "[t]he safest course is always to get permission from the copyright owner before using copyrighted material." Recognising that

[11] http://hadopi.fr/download/sites/default/files/page/pdf/t1_etude_en.pdf
[12] *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

this is not always practicable, the Copyright Office then suggests that "use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation.... If there is any doubt, it is advisable to consult an attorney."

The introduction of the Fair Use doctrine to the United Kingdom was considered by Professor Hargreaves' Review of Intellectual Property and Growth for the UK Intellectual Property Office. The Review rightly rejected Fair Use as inappropriate for the UK, given the cost and uncertainty that it would introduce. We would suggest that similar reasoning would apply in Ireland, given its similar legal system.

It would in any case be quixotic to imagine that countries of the Civil Law tradition would accept the vagueness and discretionary nature of the Fair Use doctrine, implemented as it is in the United States through its discovery rules (See *Metro-Goldwyn Mayer Studios, Inc. v Grokster* 545 US 913 (2005)) and its procedural rules respecting summary judgment. The Fair Use defence derives from the early history of literary property as developed by England's 18th Century courts of Chancery[13]. It does not provide an obvious starting point for a modern, harmonised European copyright law.

Evidently individual ISPs and search providers believe that there is an advantage to be gained if the property rights of authors, present and future, are reduced. Fair Use operates within the general principles of copyright law. Indeed, the Google Book Project was supposedly founded on the Fair Use doctrine. It would have replaced a diverse economy of thousands of publishers with an effective monopoly, based on the ownership of a single database of digitised works. The US courts have blocked that winner-takes-all initiative, for now at least. Conversely, Google Books has launched in some EU member states through cooperation with libraries for books in the public domain.

The 3-Step Test

In international law, the "three-step test" sets the parameters for the introduction by states of exceptions to the exclusive rights of authors and other right holders. Its well-known terms provide that exceptions are only permitted 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 right holder. At the EU level, Article 5(5) of the Directive states that the exceptions and limitations permitted by the Directive shall only be applied in accordance with the test.

The CRRA employs the wording of the third part of the test in the definition of "fair dealing" at section 50(4), and in the exception for incidental inclusion at section 52(4). There is no

[13] See, e.g., *Gyles v Wilcox* (6 March, 1740): http://www.commonlii.org/uk/cases/EngR/1740/78.pdf. The seminal study of the Courts of Chancery is a work of fiction: "Bleak House" by Charles Dickens, and it is to the litigation described in that work that the opponents of copyright protection look for their inspiration. See *London-Shire Records, Inc. v.Doe 1* 542 F. Supp 2d 153 (D.Mass 2008); Joyce, Leaffer, Jaszi, Ochoa *Copyright Law 8th Ed 2010* Note 3, pp 509-510.

composite statement or inclusion of the test as an aid to interpretation of the exceptions generally. The part-use of the test in sections 50 and 52 only serves to confuse.

As the test is both an international and a European obligation, and to provide clarity, the Motion Picture Association suggests that test should be specifically incorporated into the CRRA and thereby made explicit in relation to the application of all of the exemptions and limitations contained at Chapter 6 CRRA.

Research and private study

The "fair dealing" exemption in the CRRA, at sections 50 and 51, permit the use of specific works, including film, for the purpose of "research or private study".

In failing to confine this exemption to non-commercial purposes, this provision materially over-reaches what is permitted by the Directive. The Directive contains no such broad or unqualified exemption for research. Such exemptions as permit the use of works for research purposes are limited in every instance to non-commercial purposes.

In the UK, the comparable fair dealing exemption in the Copyright Designs and Patents Act 1988 was amended in 2003 so as to bring the legislation into compliance with the Directive. The UK Act now permits fair dealing for research only when the use is for "a non-commercial purpose".

The Motion Picture Association believes that an amendment to the legislation is required in order to bring the provision into alignment with the Directive.

Hotels exemption and the Rental and Lending Right Directive

Section 97 CRRA provides that it is not an infringement of the copyright in a sound recording, broadcast or cable programme to cause it to be heard or viewed in premises where sleeping accommodation is provided for residents or inmates. This exemption is generally referred to as the "hotels exemption". It applies not only to hotels but to other institutions such as guesthouses, nursing homes, residential care facilities and so forth.

The exemption, in permitting broadcasting of film without remuneration, affects the exclusive right of the film producer.

The exemption has been challenged in the Irish courts in the case of *Phonographic Performance (Ireland) Ltd v Ireland and others (Case C-162/10)* on the basis that it is contrary to Ireland's obligations under the Rental and Lending Right Directive. A reference has been made in the proceedings by the Commercial Division of the High Court to the Court of Justice of the EU. The Opinion of Advocate General Trstenjak was published on 29 June, 2011[14]. The Advocate General concludes that the practices exempted by section 97 constitute uses for which the right holder must be remunerated.

[14] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-162/10

The Motion Picture Association draws the attention of the Review Committee of the need to of the Irish Government to keep the position in relation to this exemption under review and to respond promptly, if required by the decision of the CJEU to amend the legislation.

Technological measures

The MPA's members make a product that is expensive to produce and subject to substantial commercial risk. Technological measures enable copyright owners to be responsive to differing consumer preference and willingness-to-pay. Unlike some forms of popular entertainment, which have seen inordinate increases in price, filmed entertainment is sold in different "windows" by virtue of the different technological channels by which it is delivered, facilitating the creation of a competitive market. DRM is hence important to ensure that consumers obtain access to filmed entertainment at a reasonable, market-set price.

To this end, Article 6(1) of the Information Society Directive obliges EU Member States to provide "adequate legal protection" against the circumvention of any effective technological measures, such as access or copy controls, applied to protected works to restrict unauthorised use of the works.

In making film available online through various services, the film industry depends heavily on the security of technological measures. It is important to realise that, unlike music, filmed content has always been made available subject to content protection. The video-cassette was typically protected by Macrovision anti-copying technology, and the DVD by the Content Scrambling System. Blu-ray and Pay TV are protected by more advanced systems. With the growth of ubiquitous Internet access, content protection measures (including conditional access) will become ever more important to the construction of viable markets in content.

The Motion Picture Association believes that the CRRA provision relating to rights protection measures, contained at sections 370 – 374 CRRA, falls short of the standard required by the Directive, in the following respects:

- There is no prohibition of the act of circumvention.
- There is no remedy for the right owner, but only for the person who makes publicly available copies of a work to which rights protection measures have been applied.
- The provisions can only be invoked when the protected works have been made available and infringement has occurred.

The MPA would urge the Copyright Review Committee to recommend enhancement of the provision, so as to discharge Ireland's obligation under Article 6 of the Directive and so as to provide right owners with the level of protection they increasingly require in putting their works online.

It can be seen that all of the proposals above relate to the discharge of European and international obligations. It is crucial for Ireland, at a point when it is trying to re-build its economy and looks to vibrant innovative enterprises to make a contribution to its recovery, that it does everything within its competence at national level to match the highest European and international norms.

Licensing

The MPA's member studios have unparalleled experience of audio-visual licensing, including licensing for online uses. Their experience is that, whatever the position with other creative sectors, licensing procedures are working well in relation to their works. Evidence gathered on behalf of the UK Hargreaves IP Review confirmed that view.[15] The market works efficiently, at no expense to the State.

This efficiency is the result of concentrating the economic rights in the film or television programme in the person who takes the economic risk, namely the producer. The remuneration of the other contributors to the work is governed by contract. If there is a criticism to be made of copyright law in Europe, it is that this principle is not consistently respected. The law in Ireland, however, does not hamper the transfer of copyright to the producer and thereby facilitates effective financing, production and exploitation of audio-visual works.

The marketplace is developing innovative approaches to facilitate automated licensing mechanisms and other forms of permissions, such as the YouTube Video ID fingerprinting system[16]. Content management technologies not only enable right holders to license their works in the digital environment, but there will be a growing market for innovative technology providers to sell such solutions.

One solution directly relevant to the film industry is Ultraviolet, an interoperable standard that allows users to access and share content in a secure way among devices in the home and on mobile devices. Other examples include Open Digital Rights Language, Automated Content Access Protocol and ONIX-PL. These innovative approaches allow the content industries to deliver content to users via channels and on devices which those consumers want but whilst ensuring that their rights are protected. At the same time, readily available permissions give technology companies and start-ups certainty that they are using content within the licences granted by the copyright owner, so they too can thrive. A key public policy should be to encourage respect for these rights management regimes.

It is true that some commentators perceive a difficulty in cross-border licensing of content in Europe. In its Communication, "A single market for intellectual property rights" (COM(2011)287 Final), published on 24 May 2011, the European Union proposes to "create a legal framework for the collective management of copyright to enable multi-territorial and

[15] The VoD Sector. Copyright Issues, PACEC 2011: http://www.ipo.gov.uk/ipreview-doc-i.pdf
[16] http://www.youtube.com/t/contentid

pan-European licensing". It is suggested that this perceived problem can only be addressed at the European or, indeed, international level.

Given the limited role of collecting societies in the licensing of audio-visual content, this is a debate of greater consequence for other creative sectors. The MPA would simply point to the fact that where producers of copyright works have freedom of action in the market, efficient licensing solutions will emerge (and are emerging) as a result of normal commercial forces (see footnote 14).

Similarly, there has been much discussion of the licensing of so-called orphan works. The MPA's members do not find that there is a significant problem for such material in the audiovisual sector particularly for feature films, but we are aware that some archives and public broadcasters have argued for legislation to allow them to make orphan works available to the public across EU borders. Here too the European Commission is active, having published its proposal for a Directive on 24 May 2011.[17] It would be prudent to allow the debate to proceed at EU level, rather than creating a national solution potentially inconsistent with future European legislation.

Conclusion

Throughout the 20th Century, the development of the entertainment industries has gone hand in hand with technological innovation. The film and television industries continue to innovate at remarkable speed, with new methods of production and distribution allowing ever greater consumer choice and satisfaction. The economic foundation of this innovation is, however, copyright protection, without which an efficient market for content cannot exist. We believe that Ireland's copyright law requires no major changes. One particular issue is the lack of a speedy injunctive remedy to prevent or terminate infringements in the online environment. Once Article 8(3) of the Directive has correctly been implemented, it will be much better suited to meet the challenges of the 21st Century.

Ted Shapiro | SVP, General Counsel and Deputy MD, EMEA
Motion Picture Association | avenue des Arts, 46 | 1000 Brussels, Belgium

[17] http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf