

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

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

Recorded Artists Actors Performers welcome Minister Brutons', review of the Copyright and Related Rights Act 2000 with specific reference to barriers to innovation and the notion of US style "fair use".

Recorded Artists Actors Performers (R.A.A.P.) was set up in 2001 following the introduction of the Copyright and Related Rights Act 2000 and to date has collected and distributed over €40 million to Artists from the exploitation of their works.

R.A.A.P. is a collecting society that administers Performer remuneration from the Broadcast and Public Performance of recorded music; we also administer remuneration for Actors for their work in film and television from rental, retransmission and certain other exploitation of these works.

There is a crucial link to be drawn between performers' rights and the true incentive to create. The right of the performer to equitable remuneration for the use of their work is not linked with the rights of copyright owner of the work in question. Both the producer and the performer of copyrighted works must be incentivised to invest and create respectively; ensuring ease of access to equitable remuneration for both parties provides the best incentive for innovation. A major stumbling block to innovation in the music industry can result from the inability of producers or performers to collect performance monies and enforce their equitable remuneration right.

Although copyright ensures a strong foundation for creative industries, the neighbouring performance rights are equally as important in terms of sustaining innovation. The nature of the music industry (which is mirrored in the film industry and the performing arts) dictates that the majority of artists automatically assign the copyright over their material to record companies in order to have their support. Furthermore, it is common practice for the majority of artists to sign over all of their exclusive rights when signing contracts with producers.

Many performers rely on equitable remuneration from performances as a source of income, seeing as they no longer retain either the copyright or the exclusive rights to the work in question. In many cases, the sole financial incentive for performers to innovate comes from this equitable remuneration. The commercial reality of this situation reflects the clear need to protect this source of income for performers. As it stands, performers have the right to equitable remuneration under section 208 of the Copyright and Related Rights Act 2000 (hereafter the CRRRA). However, the right to collect performance monies lies with the producers licensing body, which is then shared with the performers licensing body. There is no legislative basis on which performers can collect and no statutory requirement that monies be split equally between the two parties. This is despite the fact that performers are equally as entitled to remuneration and indicates the lower status of performers in the eyes of the law, acting as a barrier to innovation for performers.

It is true that producers invest in music and therefore must have their rights protected to sustain this investment. However, the true innovation in this field comes from the artists themselves. In strengthening the rights of the copyright holder, without strengthening the rights of the performer, artists will not be encouraged to create and innovate. Aside from the incentive to innovate, without a guarantee of access to equitable remuneration many artists may not be in a financially stable enough position in which to innovate at all.

The 2001 European Directive on Copyright in the Information Society (Directive 2001/29/EC) recognised the importance of performers' rights in encouraging creation and innovation. Paragraph 10 of the preamble of the Directive states,

“If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work”.

In this way, it is clear that European legislation recognises the separate and distinct requirements of both producers and performers to remuneration. In particular, the Directive highlights that equitable remuneration for performers and authors is not just deserved, but a necessary requirement for performers to *“continue their creative... work”*. This is the essence of the argument for a distinct right to collect for performers. Not only does European legislation recognise that rewarding performers is the key to sustained innovation, it also places the right of performers and producers to equitable remuneration on equal footing. Recognition at a European level of the importance of a distinct performers' right to remuneration shows the need to adequately protect the ability to enforce this right in Irish legislation. At present the CRRRA provides for a right to remuneration for performers, but ties their right to collect remuneration with the collection of remuneration for producers.

Artists therefore have no directly enforceable rights against those using their work, depending instead on the collecting powers of producers licensing bodies.

The elevated status of producers' licensing bodies in Irish legislation does not reflect the equality of producers and performers as rights-holders, and does not create the most efficient framework in which performers' licensing bodies can collect equitable remuneration.

This right can be strengthened by amending the existing legislation to expressly state the right of performers to collect for the use of their work. Further, the method of dividing monies collected between producers and performers is currently based on a European norm and is in need of clarification in the law to secure performers' rights and create an environment which meaningfully encourages innovation and creativity.

It is our submission that simple modifications could be made to the existing legislation to provide for performers' rights at a national level in a way that is clear, transparent and fair. Section 38 currently provides that users may either broadcast or play sound recordings in public upon payment of equitable remuneration to the relevant copyright collecting society.

This section could simply be extended to also grant a licence of performers' rights, upon payment of a single equitable remuneration jointly to the relevant performers and producers collecting societies. Section 208 could then be deleted. An example of how this could be done is attached as an annex to this submission.

We believe that the amendments we have put forward would give performers the legal status required to provide them with the incentive to innovate, while at the same time leaving unaffected the rights of copyright holders. Further, we submit that the position of copyright holders could be significantly strengthened by the support of RAAP in negotiating and administering the exploitation of sound recordings by users.

As it stands, performers do not realistically enjoy the same rights as producers. The rights enjoyed by performers are separate and distinct to those of the copyright owner and performers should be treated in legislation as such. It is our view that this must be altered within our copyright legislation in order to sustain the incentive for innovation for artists in the music industry.

Audio-visual.

The justification for the introduction of an unwaivable right to remuneration of audio-visual authors and performers, exercisable through collective licensing, is self-evident. In terms of performers, we recognise that musicians, artists and literary authors must be entitled to equitable remuneration for the use of their work, while at the same time allowing the automatic signing over of such a right by actors and screenwriters.

This right is needed by audio-visual artists to combat the “buy out” contracts they must sign with producers. Having signed such contracts, audio-visual performers cannot benefit from further exploitations of their performance such as on demand uses. The barrier this practice creates to innovation in the audio-visual industry is huge. WIPO notes that the lack of protection at present for performers in audio-visual media affects not just actors, but also musicians whose music is recorded on a DVD for instance.

There is no acceptable justification for the presumption of transfer of performers' rights in the audio-visual field to the producer”. This must be amended in Irish law to protect the audio-visual performer.

WIPO acknowledges the lack of an audio-visual performers’ right as in need of reform, as shown by the recent work to insert such a right into international Intellectual Property law. The WIPO standing committee is in the process of consultation with member states as to the wording of a treaty enumerating audio-visual performance rights.

As of the 24th June 2011, the WIPO Standing Committee has officially announced agreement on all terms of the proposed treaty and will apply for the establishment of a Diplomatic Conference in September to finalise and bring forward the Treaty. From this it is clear that all parties involved intend to establish an international framework of audio-visual performance rights as soon as possible. For Ireland to review copyright without examining the realm of audio-visual rights would be inefficient at the least, resulting in the need to re-examine Ireland’s obligations under WIPO once the Treaty is finalised.

Seeing as an audio-visual performers right to remuneration will be introduced at an international level, Ireland should take the opportunity presented by this Copyright Review to create such a right in Irish law, rather than having to amend legislation at a later date to come into line with international obligations. Guidance in how to insert this audio-visual performance right into Irish law can be sought from other European countries where such a right already exists, such as France and Germany. The WIPO draft audio-visual performances treaty also provides a good template for Ireland to consult, especially as Irish law will be required to be in line with the final treaty WIPO develops.

The suitability of the US concept of fair use in Ireland

The concept of fair use used in the United States (US) copyright law is markedly different to that of Irish law. It is a much less concrete concept than the statutory exceptions to copyright contained in the CRRA. In essence, it is for the judiciary to decide whether a particular activity constitutes fair use, having reference to factors contained in the 1976 Copyright Act. No such concept exists in Ireland or under European Union legislation.

To transplant the US fair use doctrine to Ireland would be to insert vagueness into the law where now there is clarity. Related to the vague nature of US fair use is the problem of deciding what entails fair use. In the US, the broad fair use exception has resulted in much uncertainty and often results in cases coming before the US judiciary to determine what does and does not entail fair use. This highlights another culture difference between Ireland and the US that hinders the introduction of such a wide-ranging fair use exception, that of litigation. It is irrefutable that Ireland would not be able to sustain what Hargreaves refers to as “an American style proliferation of high cost litigation” and it is neither necessary nor desirable to introduce law that would result in such a consequence.

The concept of fair use in the US has developed through case-law over many years; to transplant it into Irish law would be to create huge uncertainty, which would no doubt hinder rather than encourage innovation.

Recorded Artists Actors Performers (R.A.A.P.) would be delighted to develop any of the issues raised in this submission.

Yours sincerely,
For and on behalf of Recorded Artists Actors Performers

Éanna Casey

Chief Executive

Annex

38.—(1) notwithstanding the provisions of *sections 37 and 205*, where a person proposes to—

- (a) play a sound recording in public, or
- (b) include a sound recording in a broadcast or a cable programme service,

he or she may do so as of right where he or she—

- (i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a producers' licensing body and to a performers' licensing body, and
- (ii) complies with the requirements of this section.

1(A) The payment described in section 38(1) shall be in the form of a single equitable remuneration paid jointly to a producers' licensing body and a performers' licensing body, which payment shall be shared out between them. In the absence of agreement between them on such sharing, it shall be shared equally.

(2) A person may avail of the right to play a sound recording in public or to include a sound recording in a broadcast or a cable programme service, where he or she—

- (a) gives notice to each licensing body concerned of his or her intention to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,
- (b) informs each of those bodies of the date on and from which he or she intends to play sound recordings in public or include sound recordings in a broadcast or a cable programme service,
- (c) makes payments to the licensing bodies at intervals of not less than 3 months in arrears,
- (d) complies with any reasonable conditions relating to payments under this section as may be notified to him or her by the licensing bodies from time to time, and
- (e) complies with any reasonable requests for information from the licensing bodies to enable it to calculate and manage payments under this section.

(3) A person who satisfies the conditions specified in *subsection (2)* shall be deemed to be in the same position as regards infringement of copyright and of performers' rights as if he or she had been the holder of a licence granted by the owner of the copyright and the owner of the performers' rights in question at all material times.

(4) Where the person intending to play sound recordings in public or to include sound recordings in a broadcast or a cable programme service and the licensing bodies fail to reach agreement as to fair payment under *subsection (2)* within a reasonable time, the terms of the proposed agreement shall be referred to the Controller for determination of the amount and terms of payment.

(5) In the case of a dispute referred to the Controller under *subsection (4)*, a person shall not exercise the right conferred by *subsection (1)* unless he or she—

- (a) gives reasonable notice to the Controller that he or she has commenced or intends to commence the playing of sound

recordings in public and that a dispute has arisen between him or her and the licensing bodies concerned as to the terms of payment and the exercise of the right; and
(b) applies to the Controller for a determination under *subsection (4)*.

(6) Where the terms of a proposed agreement are referred to the Controller under *subsection (4)* a person shall not exercise a right conferred by *subsection (1)* unless he or she—

(a) gives notice in writing to the Controller of his or her intention to exercise the right, and of the date on which he or she proposes to begin to do so, and

(b) applies in writing to the Controller for a determination under *subsection (4)*.

(7) On an application to settle the terms of payment being referred to the Controller, he or she shall consider the matter and make such order as he or she may determine to be reasonable in the circumstances and that order shall take effect on and from the date on which the applicant begins to exercise the right, and any necessary repayments or further payments shall be made in respect of amounts which, in consequence of the terms of the order, have fallen due.

(8) Where no request for payment has been made by the licensing bodies, or where the amount requested by the licensing bodies is disputed by the person exercising the right then, pending the making of an order by the Controller under *subsection (7)*, the person exercising the right shall pay to the licensing bodies such amount as he or she considers reasonable, and shall notify the licensing bodies and the Controller of his or her intention to do so.

(9) A person exercising the right conferred by *subsection (1)*, or who has given notice to the Controller of his or her intention to do so, may also refer to the Controller the question of—

(a) whether any condition relating to payment, notice of which has been given to him or her by the licensing bodies concerned is a reasonable condition, or

(b) whether any licence condition, notice of which has been given to him or her by the licensing bodies in question, is a reasonable condition, or

(c) whether any information required by the licensing bodies is information which the licensing bodies can reasonably require him or her to provide.

(10) Where a reference is made under *subsection (9)*, the Controller shall consider the matter and make such order as he or she may determine to be reasonable in the circumstances.

(11) A person exercising the right conferred by *subsection (1)* or a licensing body may apply to the Controller to review any order under *subsection (7)* or *(10)*.

(12) An application under *subsection (11)* may not be made except with the special leave of the Controller—

(a) within 12 months from the date of the order or of the decision on a previous application under this section, or

(b) where the order was made so as to be in force for 15 months or less or, as a result of the decision on a previous application,

is due to expire within 15 months of that decision,
until at least 3 months before the expiration of the order.

(13) Where an application is made under *subsection (11)*, the Controller shall consider the matter and make such order confirming or varying the original order as he or she may determine to be reasonable in the circumstances and any order made under this subsection shall be for such period as may be specified by the Controller.

(14) This section shall not apply in any circumstances where sound recordings are made available to the public by wire or wireless means in such a way that members of the public may access the sound recordings from a place and at a time individually chosen by them (including the making available of copies of sound recordings through the Internet).

(15) Notwithstanding *section 149*, in this section:

(a) a producers' licensing body means a society, a company registered under the Companies Acts, 1963 to 1999, or other organisation which has as one of its objects the negotiation or granting of licences to play sound recordings in public or to include sound recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the said sound recording or as his or her exclusive licensee, agent or designated representative and shall include a human person who has the right to negotiate or grant a licence to play sound recordings in public or to include sound recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the sound recordings and

(b) a performers' licensing body means a society, a company registered under the Companies Acts, 1963 to 1999, or other organisation which has as one of its objects the negotiation or granting of licences to play performances included in sound recordings in public or to include performances included in sound recordings in broadcasts or cable programme services, either as owner or prospective owner of the relevant performers rights in the said performance or as his or her exclusive licensee, agent or designated representative

205.—(1) Subject to *subsection (2)*, a performer has the exclusive right to authorise or prohibit the making available to the public of copies of a recording of the whole or any substantial part of a qualifying performance and it is immaterial whether the copy is made directly or indirectly.

(2) Where a copy of a sound recording is—

(a) played in public, or

(b) included in a broadcast or cable programme service,

the right conferred by this section shall be deemed to be satisfied by the payment of equitable remuneration to a performers' licensing body as specified in *section 38*.

(2A) A performer shall not assign the right to equitable remuneration under this section except to a performers' licensing body for the purpose of enabling the performers' licensing body to exercise that right on his or her behalf.

(2B) The right to equitable remuneration is transmissible by testamentary disposition or by operation of law, as personal or moveable

property, and it may be assigned or further transmitted, including by assignment, by any person who legally acquires the right..

(3) A reference in *Parts III and IV* to the making available to the public of copies of a recording shall include the making available to the public of the original recording of the live performance.

(4) There shall be a right conferred by this section which shall be known and in *Parts III and IV* referred to as the “making available right”.

(5) A reference in *Parts III and IV* to the making available to the public of copies of a recording of a qualifying performance shall include—

- (a) making available to the public of copies of a recording, by wire or wireless means, in such a way that members of the public may access the recording from a place and at a time individually chosen by them, including the making available of copies of recordings through the Internet,
- (b) showing or playing a copy of the recording in public,
- (c) broadcasting a copy of the recording,
- (d) including a copy of the recording in a cable programme service,
- (e) issuing copies of the recording to the public,
- (f) renting copies of the recording, or
- (g) lending copies of the recording without the payment of remuneration to the rightsowner.

(6) The making available right is infringed by a person who, without the consent of the performer, undertakes or authorises another to undertake any of the acts referred to in *subsection (5)*.

(7) Subject to *subsection (8)*, the provision of facilities for enabling the making available to the public of copies of a recording of a performance shall not of itself constitute an act of making available to the public of copies of the recording.

(8) Without prejudice to *subsection (7)*, where a person who provides facilities referred to in that subsection is notified by the rightsowner that those facilities are being used to infringe any of the rights conferred by *Parts III and IV* and that person fails to remove that infringing material as soon as is practicable thereafter, that person shall also be liable for the infringement.

(9) Without prejudice to *subsection (8)*, the Minister may prescribe the form of the notice to be given under that subsection and the form shall specify—

- (a) the name and address of the person claiming to be the owner of the rights in the recording concerned,
- (b) the grounds that the person requesting the removal of material has for such removal, and
- (c) a list of the material which is to be removed.

(10) Where the making available right is infringed by a copy of a recording being played or shown in public, by means of apparatus for receiving sounds, images or data or any combination of sounds, images or data, or the representations thereof, conveyed by any means, the person by whom sounds, images or data or any combination of sounds, images or data, or the representations thereof, are

sent shall not be regarded as liable for the infringement.

206.—(1) References in *Parts III* and *IV* to the issue of copies of a recording to the public shall be construed as including—

(a) the act of putting into circulation in a Member State of the EEA copies of a recording not previously put into circulation in a Member State of the EEA by or with the consent of the performer, or

(b) the act of putting into circulation outside the Member States of the EEA copies of a recording not previously put into circulation in a Member State of the EEA or elsewhere.

(2) Without prejudice to the rental right or the lending right, references in this Part to the issue of copies of a recording to the public shall not include—

(a) any subsequent circulation of copies of a recording previously put into circulation, or

(b) any subsequent importation of such copies of a recording into the State or any other Member State of the EEA, except in so far as *subsection (1)(a)* applies to putting into circulation in the Member States of the EEA copies of a recording previously put into circulation outside the Member States of the EEA.

(3) A reference in this section to circulation shall include sale, rental or loan.

(4) A performer has the exclusive right to authorise or prohibit the issue of copies of a recording to the public of the whole or any substantial part of a qualifying performance.

(5) There shall be a right conferred by this section which shall be known and in this Part referred to as the “distribution right”.

(6) The distribution right is infringed by a person who, without the consent of the performer, undertakes or authorises another to undertake the acts referred to in *subsection (4)*.

207.—(1) References in *Parts III* and *IV* to “rental” or “lending” shall not be construed as including the making available to the public of copies of a recording for the purposes of—

(a) playing or showing in public, broadcasting or inclusion in a cable programme service,

(b) exhibiting in public, or

(c) on the spot reference use.

(2) A performer has the exclusive right to authorise or prohibit the rental or lending of copies of a recording of the whole or any substantial part of his or her qualifying performance.

(3) (a) There shall be a right of the performer to authorise or prohibit the rental of copies of a recording which shall be known and in *Parts III* and *IV* referred to as the “rental right”.

(b) There shall be a right of the performer to authorise or prohibit the lending of copies of a recording which shall be known and in *Parts III* and *IV* referred to as the “lending right”.

(4) The rental right is infringed by a person who, without the consent of the performer, rents or authorises another to rent copies of a recording of the whole or any substantial part of a qualifying performance.

(5) The lending right is infringed by a person who, without the consent of the performer, lends or authorises another to lend copies of a recording of the whole or any substantial part of a qualifying performance.

(6) In *Parts III* and *IV*, and subject to *subsections (7) and (8)*—

(a) “rental” means making a copy of a recording available for use on terms that it will or may be returned after a limited period of time, for direct or indirect economic or commercial advantage;

(b) “lending” means making a copy of a recording available for use on terms that it will or may be returned after a limited period of time, otherwise than for direct or indirect economic or commercial advantage, through an establishment to which members of the public have access.

(7) The making of a copy of a recording available between establishments to which members of the public have access shall not infringe any of the rights conferred by *Parts III* and *IV*.

(8) Where lending by an establishment to which members of the public have access gives rise to a payment, the amount of which does not exceed what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage for the purposes of this section.

208