

Fair Use Is Not Fair Play

**Submission to the
Department of Jobs, Enterprise and Innovation
Copyright Review Committee**

National Union of Journalists

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Introduction:

The Minister for Jobs, Enterprise and Innovation Richard Bruton TD has set up the Copyright Review Committee to examine the current copyright legislative framework to identify “any areas of the legislation that might be deemed to create barriers to innovation” and to make recommendations “to resolve any problems identified”.

In announcing the review Minister Bruton stated: “I am determined that government will make whatever changes are necessary to allow innovative digital companies reach their full potential in Ireland. These companies make an enormous contribution to jobs and economic growth, and government must do everything it can to allow them to flourish and expand in Ireland. Some companies have indicated that the current copyright legislation does not cater well for the digital environment and actually creates barriers to innovation and to the establishment of new business models. Moving towards a US-style ‘fair use’ doctrine is one suggestion that has been made. I am determined to respond to these suggestions in a comprehensive and timely manner.”

The National Union of Journalists represents 95pc of working journalists in Ireland.

Founded in 1907, the NUJ, with 38,000 members. Is one of the largest media unions in the world. We represent more than 3,000 members in the Republic of Ireland.

The defence of copyright and the protection of the rights of creative workers is a core principle for the union.

Members work across the entire media industry – as staffers and freelance, writers and reporters, editors and sub-editors, photographers and illustrators. Members work in broadcasting, newspapers, magazines, books, in public relations and in a variety of new media.

The NUJ made a significant contribution to the review of the Copyright and Related Rights Bill and in our submission to the Joint Committee on Enterprise and Small Business on November 15th 1999 emphasised our belief that the Bill did not adequately meet Ireland’s international obligation. In particular we highlighted our concern at the decision to amend the draft Bill following

representations from the National Newspapers of Ireland to the then Minister for Enterprise, Trade and Employment Ms Mary Harney TD.

The original draft made no provision for amendment of the Copyright Act 1963 in relation to the copyright of employees. The belated amendment of the draft Bill and the circumstances in which the amendment was agreed was a grave disappointment to the NUJ. We therefore approach the current review with considerable apprehension.

It remains our contention that Irish copyright law does not go far enough in its protection of creators at present and any move towards the introduction of the “fair use” doctrine would be misguided in the extreme. This submission outlines the basis for this contention and includes our recommendations on areas where current legislation could be strengthened for the benefit of both creators and society.

The Current Situation

Irish copyright law exists in an uncomfortable no-man's-land between the free for all of US fair use and the full recognition of creators' rights enshrined in the laws of many EU countries. The NUJ believes the future for Ireland lies in the latter and a wholehearted adoption of the principles enshrined in the Universal Declaration of Human Rights and the Berne Convention.

This means full recognition of the UN Declaration of Human Rights Article 27 of which states that an Individual's right to his or her copyright is a basic human right: *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

It also entails recognition of the moral rights of authorship as expressed in the Berne Convention: *Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification or other derogatory action in relation to the said work which would be prejudicial to his honour or reputation.*

Throughout European Union countries, copyright legislation forbids the holding of copyright by a corporate entity viewing the creator and his/her intellectual property as inseparable. The Berne Convention and the Universal Declaration of Human Rights recognise this. The fact that UK and Irish law and that of the US are both out of step on this point is known by European jurists as "the Anglo-Saxon anomaly".

Copyright in all European Union states, apart from the UK and Ireland, cannot be held by a legal entity and must be held by a person. The only exception to this is where companies are formed by creators specifically to collect and distribute royalties as a matter of convenience to the original creators.

Indeed it is worth noting that in the European Union states apart from the UK and Ireland an author cannot waive the personal rights of attribution and integrity. This is consistent with the logic that an individual cannot sign away basic human rights.

What's at issue here involves the public interest. The public has a right to know who has written an article or taken a photograph. The public has a right

to know if such a work has been altered or digitally manipulated in a context that has violated the original meaning of the work.

The creator also has the right to ensure that his or her work is not abused. The copyright, moral rights and integrity rights make it possible for the individual creator to uphold the NUJ Code of Conduct and to exercise a control on how copy and photographs are used.

Furthermore, no employer owns the originality of any journalist, whether that originality reflects the diligence of a reporter's research or a particular prose style. Yet these elements are invested in the work the journalist does for the employer. Therefore, the author must be seen as the copyright holder, even when the author is an employee.

For this reason, the NUJ remains opposed to two sections of the Copyright and Related Rights Act (2000). Section 23 (1) (a) denies first ownership of copyright to the journalist who is an employee. Because we seek to retain the ownership of copyright for staff members, we also object to Section 23 (2) which only allows the "author in the course of employment by the proprietor of a newspaper or periodical" to make use of the article for any purpose other than making it available to newspapers or periodicals.

The NUJ therefore recommends that these two sections of the Act be amended to restore the rights of the author and bring them in line with the Berne Convention.

We also believe the current law should go further and place a responsibility on publishers to show that they have not infringed copyright. It should therefore be a legal requirement for publishers, both electronic and print, to maintain accurate and up to date accessible records of where all content images used have come from and that no copyright has been infringed during the publishing process.

In addition, various websites and publisher routinely scrub the metadata from image files. This activity prevents photographers and other image rights holders from keeping track of where their images are being used and preventing their unauthorised usage. The unauthorised stripping of metadata from files should be made illegal.

Fair Use Is Unfair

While it is true that companies such as Google and Facebook have claimed that Irish and European copyright law presents a barrier to innovation and thereby economic growth the NUJ argues the opposite. Failure to protect the rights of creators will undermine the economic viability of the very creative industries on which those companies rely for their content leaving both Irish society and the economy the poorer as a result.

Creators play a critical role in preserving, focusing, reflecting, and fostering the identity of a nation. Cultural identity is often most powerfully defined by creative output and Ireland has an enviable reputation as an international centre of creative people and ideas.

A healthy culture, democracy and creative economy need diverse creativity. A well-managed system of copyright legislation and provision, which facilitates individual creators, underwrites a democratic culture:

“By according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a pluralist, non-state communications media, and highlights the value of individual contributions to public discourse.”

“Asserting Copyright’s Democratic Principles in the Global Arena”, Vanderbilt Law Review 217, 1998.

These rights are also essential for the very existence of healthy independent journalism. In his report “The Information Needs of Communities”, published by the (US) Federal Communications Commission in June 2011, Steven Waldman states:

“One of the most famous phrases of the Internet era is ‘information wants to be free’. There is some truth to that. People want to distribute and receive information for free. But what that leaves out is reality that in some cases the information will not come to the fore without the work of professional reporters. And while information may want to be free, labor wants to be paid.”

This statement very succinctly sums up the reality of professional journalism; it cannot exist without a profitable media able and willing to pay for it. At its heart, “fair use” copyright allows companies which have made no contribution

whatsoever to journalistic endeavour, to siphon off unearned advertising income.

News aggregation services are now able to derive huge profits simply by providing links to the article or photo, even though they paid nobody to write or take it. They simply scoop up material in the hope of digital sales. Google at least provides a link to the creator's website and tends to provide very brief extracts and thumbnail sized images on its listings.

Far worse are those who steal it altogether and are permitted to do so in the US. Someone who has done no more than invest in a cheap and widely-available computer program is allowed under 'fair use' to copy and reap the profit from another's work. These programs, known as "spiders", "robots" or "webcrawlers", copy whole articles which aggregators then post and run ads beside them.

A 2010 case at the EU Court of Justice shows what is in the balance. In a case also involving the Danish Newspaper Publishers' Association, the court found that a news monitoring service Infopaq - an aggregator - did not have protection from copyright infringement rules under EU law, even for short excerpts. The court found that the:

possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for copyright protection.

The court's decision protects the original work of writers and sub-editors, often disregarded in common law jurisdictions. That judgement was quoted in a UK High Court case last November (2010) where a US-based news aggregating service known as Meltwater News (UK) was forced to seek a licence from the Newspaper Licensing Agency.

In that case Judge Proudman found that *text extracts (and in particular the headline and the opening text) were not merely isolated words or clauses which in themselves conveyed no meaning. They provided the tone of the article and generally had the special function of drawing the reader in to the work as a whole.*

Her reasoning was partly based on the Information Society Directive 2001/29/EC on direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. It is in direct contrast to the

widespread myth that “old-fashioned” European authors’ rights protection stands in the way of the bright new internet future, represented by the aggregators.

In direct contrast, US federal judge Roger L Hunt in June of this year ruled in favour of a defendant who reposted an entire article. The lawsuit was brought by Righthaven, a Las Vegas-based so-called “copyright litigation factory” which has sued more than several hundred websites and bloggers for copyright infringement.

The case in question involved one Wayne Hoehn who had posted an entire editorial from the Las Vegas Review-Journal as well as its headline, “Public Employee Pensions: We Can’t Afford Them” on the medjacksports.com website.

The fair use doctrine allows a defence for copyright infringement where the creator cannot establish that they have suffered financial damage. In this case Judge Hunt ruled that “the market for the work” was not harmed.

This is just one illustration of the danger to creators presented by the fair use doctrine. In fact aggregators of this sort are parasitic on the real creative output of journalists. Many are cheap-and-cheerless operations based on the notion that owning a particular set of computer programs entitles them to live off the labour of others. Should they succeed in having our law changed, they will actually reduce employment here – not increase it.

And there is an increasing body of evidence from the United States itself to support this contention. The recent Hargreaves Review in the United Kingdom (*Digital Opportunity: an Independent review of Intellectual Property and Growth* by Professor Ian Hargreaves) was initiated to the same issue as this review of Irish copyright law: whether to adopt US-style fair use.

Hargreaves states that “the economic benefits imputed to the availability of Fair Use in the US have sometimes been overstated”:

When the Review briefly visited Silicon Valley in February [2011], providing the opportunity to meet companies such as Google, Facebook, Yahoo and Yelp, along with investors, bankers, lawyers and academics, a consistent story emerged, namely that Fair Use is (from the viewpoint of high technology

companies and their investors) just one aspect of the distinctiveness of the American legal framework on copyright...

While these companies naturally favour the legislative environment under which they underwent extraordinary growth, Hargreaves nevertheless continued:

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.

The report then considers a joint approach of the British, Irish and other governments to press the EU to adopt 'fair use', which it seems to describe as a waste of time:

the result would be a very protracted political negotiation, against a highly uncertain legal background. Evidence considered by the Review on the legal arguments about the feasibility of introducing Fair Use into the EU legal framework and so into the UK is violently diverse.

Indeed, the advice from Professor Hargreaves is against the wholesale adoption of US-style fair use. And the case against the US approach is immeasurably strengthened when we look at the concrete effects it has had on US journalism in the last decade. Without a doubt, the system has helped create giants like Google and Facebook. But the downside is to be seen in the media where journalism is in crisis.

The advertising revenue stream which once flowed to the newspaper or the radio or the TV, now flows to the internet entity where the reader now finds the story. Yet that internet entity didn't commission the story and doesn't pay the wages of the reporter who wrote it.

When it comes to where people get their news, the Pew Research Centre records a two-decade-long decline in newspapers and radio with a steep rise since 2006 in online sources and a new but very popular source is the mobile phone. In 2000, US newspaper print advertising amounted to \$48.7 billion. By

2010 this had fallen to \$22.8 billion – Over 50%. Some money was made by the papers' online sites. But only a tiny proportion was recouped in this way.

One inevitable outcome was the drastic decline in the number of newspaper journalists; down from around 56,900 in 1989 to 41,600 in 2010. This has had huge consequences for democracy in the US with a drastic fall in the coverage of political (especially state or local administrations) and other serious and important but not eye-catching forms of journalism.

Overall, and including the jobs increases in newspaper and independent news websites, FCC research suggests that that there were between 7,000 and 10,820 fewer full-time journalists and a drop of between \$800 million and \$1.3 billion spending on editorial salaries, in 2008 and 2009 than in an average year from 2001 to 2006.

News reporting itself, the means by which citizens get to make informed decisions in a democracy, is under threat. In answer to this it has become a mantra among enthusiasts of the new media environment that new web-based investigators will spring up to take the strain, whether 'citizen journalists' or professionals. Indeed there has been a plethora of such websites in recent years.

But research cited in the FCC report suggests that 95% of the stories carried on these websites were based on original reporting by the traditional media. It goes on to cite Michele McLellan of the University of Missouri journalism school:

The tired idea that born-on-the-Web news sites will replace traditional media is wrong-headed, and it's past time that academic research and news reports reflect that.

It is clear then that far from facilitating innovation fair use merely allows the unfettered recycling of the original content of other creators with no compensation thereby undermining the economic basis of the initial content creation. The impact of its introduction in Ireland would not only be to damage journalism and imperil the jobs and livelihoods of the many thousands of people employed in the sector but would also put at risk the jobs of the estimated 70,000 employed by the creative industries in Ireland at present.

Access to Justice

While the law in Ireland does allow redress for those who have had their copyright breached it is not very satisfactory when it comes to facilitating it. In practice, if someone or some company uses a creator's work to profit at their expense, or uses it without crediting them, or uses it in a place or context distasteful to them, their only legal remedy is to sue them. But in the vast majority of instances the loss is only a few hundred euro, if it can be quantified financially at all, and frequently it is even less than this.

In one recent case which highlights the inequities faced by creators in this regard an NUJ photographer member took several high quality photographs of recent riots in Dublin city centre at some considerable personal risk. The photographer licensed her photographs on the condition that they would not appear online – but they did so anyway. The photographer's moral rights were also traduced when they were used for purposes of which they did not approve. Yet the individual concerned has no real means of redress other than expensive litigation which offers a very uncertain outcome.

For creators acting alone against large corporations the expense of running a legal case on this basis is just not worth the risk. A clear solution to this, and one which the NUJ recommends, is to bring copyright cases into the ambit of the Small Claims Court. There would of course have to be an upper limit on the value of cases which can be brought before the Court and the NUJ suggests one of €5,000.

This would not only address the imbalance in power which usually exists between creators and infringers, it would also provide a quite powerful deterrent against infringement in first place.

Renegotiation of Contracts

The NUJ is also concerned about the growing tendency of organisations when licensing copyright from creators to attempt to purchase all rights including for reproduction and publication in media not even invented yet. This is clearly absurd and unfair to creators. It is analogous to claiming that no television rights would be payable on certain Joyce works as the medium had not been invented at the time of their writing.

The NUJ therefore recommends the incorporation into Irish law of the principles of the 2002 German law governing contracts for exploitation of creators' works: in particular those elements providing for renegotiation of contracts in the event of "windfall" income from a work that was not envisaged at the time the contract was struck, with arbitration in the event that the parties fail to negotiate successfully.

The windfall provision is particularly important if further collective licensing or orphan works legislation is contemplated; and the Minister has already signalled his intentions in this regard.

Freelance Rights

The NUJ also has a particular concern in relation to the rights of freelance creators to share information in relation to copyright negotiation and payment rates.

The Competition Authority continues to believe that this would constitute a monopolistic and dangerously uncompetitive practice which could distort the market for the O'Briens, O'Reillys and Murdoch's of this world. This situation seriously weakens the ability of freelance journalists and other individual creators to assert their rights under copyright law.

The concept that individual creators should be denied access to collective advice and representation on the basis that such collective action would distort the market is disputed by the Government

The Irish Government, on the other hand, agreed in the last social partnership agreement, Towards 2016, Review and Transitional Agreement, 2008 – 2009, to amend the law to allow freelance workers to avail of the right to collective bargaining and freedom of association when it comes to information sharing.

9.6. of the Agreement states: The Government is committed to introducing amending legislation in 2009 to exclude voice-over actors, freelance journalists and session musicians, being categories of workers formerly or currently covered by collective agreements, when engaging in collective bargaining, from the provisions of Section 4 of the Competition Act, 2002, taking into account, inter alia, that there would be negligible negative impact on the economy or on the level of competition, and having regard to the specific attributes and nature of the work involved subject to the consistency with EU Competition rules."

The NUJ therefore calls on the Government to make good on this promise and bring the required legislation before the Oireachtas as a matter of urgency.

While this may appear to be outside the scope of the current review the constraint placed upon the ability of freelance creative workers to collective representation has a direct impact upon their ability to protect their copyright and to be adequately remunerated for their creative endeavours.

Orphan Works

A new directive on orphan works has been proposed at EU level. The Department of Jobs, Enterprise and Innovation has sought reactions from interested parties to this proposal on certain permitted uses of orphan works. The NUJ will be making a submission on this matter in the coming months.

Conclusion:

The NUJ recommends:

- That fair use doctrine not be introduced into Irish law and that the Irish Government does not lobby for its introduction at a European level;
- Sections 23 (1) (a) and Section 23 (2) of the Copyright and Related Rights Act (2000) be repealed and the overall Act be amended to restore the rights of the author and bring them in line with the Berne Convention;
- That publishers be obliged to maintain accessible and up to date records of the origin of all images and content and be required to be able to prove that copyright has not been infringed during the publishing process;
- That the unauthorised stripping of metadata from files should be made illegal;
- The Act be further amended in line with German law to allow for renegotiation of contracts to take into account windfalls not contemplated at the time the original contract was negotiated;
- That the ambit of the Small Claims Court be expanded to include copyright cases below €5,000 in value;
- That the Government follows through on the undertaking to restore the collective bargaining rights of freelance and other individual workers.