



**REPLY COMMENTS OF THE
DIRECTORS GUILD OF AMERICA**

**SUBMISSION TO THE REPUBLIC OF IRELAND
COPYRIGHT REVIEW COMMITTEE**

JUNE 28, 2012

REPUBLIC OF IRELAND COPYRIGHT REVIEW COMMITTEE

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The Directors Guild of America (DGA) appreciates the opportunity to submit these reply comments to the Republic of Ireland’s Copyright Review Committee. The DGA has reviewed all of the comments by interested parties and submits this general reply. Our global union represents 15,000 directors who reside and work both inside and outside the United States, including more than 500 members who reside and work in the United Kingdom and the Republic of Ireland. The DGA has worked closely with its colleagues in the Republic of Ireland, particularly with the Screen Directors Guild of Ireland (SDGI), for many years. This submission underscores the DGA’s support for the concerns and interests of our Irish colleagues.

General Reply Comments

We are well aware that in the digital age, a proper balance must be struck between the rights of content creators and the interests of those who utilize those creations for their own purposes. We recognize that in some instances governments will actively participate in and advocate for such a balance, and we therefore appreciate that the Committee’s Consultation Paper acknowledges their role and what they are attempting to achieve. However, we are concerned that the Paper appears to often accept an underlying premise that copyright presents a large and meaningful barrier to technological innovation. Based on the seventy-six year history of this Guild representing directors around the world, our experience, through many different decades of technological change and changes in platform distribution, has in fact shown us that copyright is not a barrier to innovation. Rather, our experience is that copyright has without a doubt been a great agent of technological change and creative growth over many decades.

First, copyright is key to both the creation and success of the films, television productions, and other audiovisual works that DGA members create. As we indicated in our original filing, those works cannot be consistently produced absent a robust and definite copyright framework.

Second, the entertainment business, far from hindering creativity and innovation, is indeed the source of the very kind of innovations the Committee seeks to foster. As we noted in our earlier filing, many modern technologies that have been embraced by both Internet companies and the public—including photo, video, editing, audio, special effects and animation technology—were invented or inspired by filmmakers striving to bring their visions to the screen. Our members’ high-quality creative content also fostered the growth of peripheral technologies such as high-definition televisions, DVDs and Blu-Ray discs, video game consoles, and other electronic devices. We do not believe that the talents and creativity of our members are any less important and vital than that of Internet entrepreneurs, and we would hope that the Committee agrees with that premise in your efforts to strike a balance among the range of stakeholders impacted by your actions.

Third, we are concerned that the Paper’s focus on Internet and digital technology companies clouds an important aspect of the Internet discussion—the force that drives most consumers to the Internet is in fact high quality *content*. For example, the financial incentive to develop streaming video technology exists because there are professionally created materials (i.e., films and television programs) to stream to the consumer. And without high-resolution images to display, there would be little financial incentive to develop advanced computer graphics cards. In other words, the high-quality content that our members create is vital to the Internet ecosystem.

We are submitting this filing with the hope that the Committee’s proposal does achieve the balance it seeks and does so without undermining the ability of our members to earn a livelihood by reaping the financial benefits of works they create. We would like to take this opportunity to put forth our concerns related to two aspects of the report: the proposed exception for format shifting and private back-up copies, and fair use.

Proposed Copyright Exceptions

Format Shifting and Copying for Private Use (Question 56(b))

Over the past decade, restrictions on format shifting have contributed to an explosion of new technologies in the distribution of digital content across a myriad of devices and platforms. Through such services, consumers enjoy audiovisual content through download-to-rent, electronic sell-through, monthly subscription, ad-supported streaming, and other innovative business models. Today’s Internet users can access hundreds of thousands of programs online (e.g., tablets, iPods, game consoles, and Internet connection television), some of which were never released in any other format. The popularity of these services has exploded and been made possible under the existing prohibition on format shifting for personal use; given that, it would appear equally as likely that existing laws have helped advance, not hinder, the marriage of digital technology and content.

Adopting a format shifting exception today would undercut this emerging digital marketplace. If users can consume content they purchase on any platform [across all possible platforms, content owners will have little reason to develop innovative business models for new devices and media platforms. For example, UltraViolet, which uses cloud technology and traditional licensing, allows users to pay a premium to store lawfully purchased copies of a work in the digital cloud and to access those works at any time and on any device.

Equally as important for DGA members, digital media distribution offers a manner of re-use through which they can earn residual compensation, which funds their pension and health plans. But, every “pirated” or “burned” copy that enters the Internet makes it less likely a consumer will access that content through a licensed distribution channel subject to residuals payments to DGA members.

We would also like to note that, to the extent consumers have a legitimate need to make back-up copies of an audiovisual disc, the entertainment industry is actively pursuing

voluntary programs, such as the Managed Copy system, to permit users to make limited electronic copies of DVD or Blu-Ray discs for legal purposes.

Fair Use

As the Committee has noted, incorporating a fair use concept in Ireland's copyright framework would represent a radical break from the country's past copyright regime, as well as from that of all Europe and most of the world. Unfortunately, there are many misconceptions about "fair use" and how it currently is applied, particularly in the United States, so it bears clarification.

The fair use doctrine in U.S. copyright law provides only a narrow affirmative defense to copyright infringement, and it applies most frequently to small samples of creative work used for commentary, education, or parody. The applicability of the defense is determined by statute and, more importantly, by over 170 years of legal precedent. Because fair use developed as part of a broader copyright framework, its effectiveness as a legal doctrine cannot be divorced from the entirety of U.S. copyright law. To the extent technological innovation has flourished under the U.S. copyright framework, it has been due to the collective effect of all aspects of U.S. copyright, including hefty damages for infringement, the anti-circumvention provisions of the Digital Millennium Copyright Act, copyright term extension, domain seizures, and recent judicial decisions regarding peer-to-peer file sharing networks.

The Committee acknowledges the submissions generally provided conclusory assertions, at best, rather than evidence and there is substantial disagreement on the role fair use plays even among digital technology companies. What little evidence exists for arguments of whether fair use restricts U.S. innovation is largely anecdotal, speculative, and, as the Committee notes, often rhetorically overblown. Given the scant nature of evidence of the relationship between fair use and innovation and the limited scope of fair use doctrine under U.S. copyright law, we hope that the Committee will proceed cautiously.

Conclusion

The creation of films and television programs would not occur without the personal investment of time, financial risk, and most importantly, the creativity, talent, and skill of our members. In turn, the content they produce spawned a broad range of technological innovation, from electronic devices to video games to Internet software to cameras to 3D technology. Creative success is difficult to achieve and fragile to maintain, so we underscore the need for creators, passionate as they are about their work, to earn a living, support their families, and grow their talent by being paid, as is everyone else, for the work they do.

The entertainment industry's business and economic models are evolving and changing to meet the challenges of the new and expanding distribution platforms the Internet offers. This change is not easy to achieve quickly, especially in the face of calls by some for systems that would diminish the ability of both creators and those who fund that creation to

reap the financial rewards. Therefore, we hope the final report of the Republic of Ireland Copyright Review Committee will set forth a public policy that recognizes the irreplaceable role content creators and film artists play, and that it reflects the needs, interests, and responsibilities of all involved. Even in this time of enormous change, the unique set of talents needed to actually create films and television programs for a worldwide audience is not diminished—nor is the need of those filmmakers and other film artists to be able to earn a livelihood. Without the content protection copyright affords it will prove increasingly difficult for those who currently work in entertainment earn a living, and equally as important, it will become a barrier to new and emerging filmmakers of the future who hope to professionally work as directors.