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**Submission by the Arts Council /
An Chomhairle Ealaíon**

To the Copyright Review Committee

In response to the Copyright and
Innovation Consultation Paper

Preface

The role of the Arts Council

The Arts Council manages the State's investment in the arts, acting as the national agency for funding, developing and promoting the arts in Ireland. Our mission is to develop the arts;

- by supporting artists of all disciplines to make work of excellence;
- by promoting public access, participation and engagement in the arts; and
- by demonstrating and facilitating the important contribution the arts make to the social and economic well-being of Ireland.

We therefore have a responsibility to locate arts policy and provision within wider public policy and the public good.

The economic value of the arts

Ireland has a long tradition of international excellence in many facets of the arts. This is evident in the success of many of our international artists across many art forms. Ireland has, for example, the highest per capita number of Literature Nobel prize winners of any nation. In addition to enriching national life, this has important economic significance. Our strong reputation as a nation with a rich cultural heritage contributes to economic performance in a number of ways, including the following:

- It impacts on Ireland's capacity to attract overseas investment, and in the location decisions of international firms.
- It enhances our tourist offering, an important contributor to the Irish economy.
- It can play a role in the development of export sales for domestic firms.¹

¹ *Report by Indecon International Consultants, Assessment of the Economic Importance of the Arts in Ireland, November 2009, available at http://www.artscouncil.ie/Publications/Arts_Council_-_Economic_Impact_-_Final_Report.pdf*

In the context of the Global Irish Forum established by Government to help promote the recovery of the Irish economy, a Government report states that:

*"In the years since the Forum took place, there has been continuing public debate on the central role that Ireland's artistic and cultural strengths play in underpinning our global reputation and on the benefits that flow for Irish trade and investment. Global Irish network members regularly recall the importance of Irish culture in the promotion of Ireland throughout the world."*²

At a domestic level, the creative sector supports a substantial number of jobs. In a 2011 follow up to a survey conducted for the Arts Council by Indecon International Consultants in 2009, *Assessment of the Economic Impact of the Arts*, it was estimated that the total number employed in the creative industries in 2010 was 49,306. When indirect employment was taken into account, the number rose to 78,900.³

In a very recent survey carried out by DKM Economic Consultants at the behest of a range of copyright stakeholders, it is demonstrated that total direct and indirect employment generated by the copyright based industries is estimated at 116,000 persons in 2011. This represents 6.4% of total employment.

Cultural and creative industries have "spillover benefits" too, which directly impact on innovation. A 2010 European Commission Green Paper, *Unlocking the potential of the cultural and creative industries*,⁴ points out that

"Beyond their direct contribution to GDP, CCIs [cultural and creative industries] are also important drivers of economic and social innovation in many other sectors.

Imaginative solutions in many different sectors stem from creative thinking in these industries, ranging from the regeneration or "branding" of countries, regions or cities to the development of Information and Communication Technologies (ICT) skills (e-skills) for lifelong learning, from stimulating research to communicating values in an accessible way...from intergenerational dialogue to intercultural dialogue and community building"

² A report by Department Jobs Enterprise & Innovation *A Report on the follow up to the Global Irish Economic Form at Farmleigh*"

³ Available at: http://www.artscouncil.ie/Publications/Indecon_Update_Report_fin.pdf

⁴ COM (2010) 183

The Consultation Paper and the creative sector.

We set our comments on the Consultation Paper against the background of the value of the arts to the Irish economy. We do this in part for the reason that the Consultation Paper adopts an approach which involves an attempt to separate the creative arts from innovation, and to place a higher value on enterprises which it perceives as representing "innovation" - primarily digital and internet based industries, many of which seek to use the opportunity of the review to broaden their access to infringing use of protected creative material. We believe that the manner in which the Consultation Paper classifies the various interested parties betrays this approach. The Review Committee fails to appreciate that creators are, by definition, innovators. It fails to afford a classification at all to the author.

Rather than acting as a barrier to innovation, copyright drives innovation. It provides the creator with the incentive and the reward to innovate, and thereby serves society in ensuring the availability of innovative products and services.

It is imperative that the value to the Irish economy of the established and proven creative industries, and the livelihood of individual artists is not damaged by far-reaching and fundamental alterations to the copyright regime. The Consultation Paper freely acknowledges the lack of economic evidence to support its proposals. We suggest that it is a risky enterprise to alter the established copyright balance without clear evidence of the economic impact that this would have on the creative sector.

The Arts Council offers the following comments to the Copyright Review Committee on the proposals contained in Copyright and Innovation - A Consultation Paper.

Copyright and Innovation - A Consultation Paper

The Arts Council notes the wide range of proposals contained in the Consultation Paper, directed at boosting innovation in the Irish economy. We identify the following, as the central objectives of the Paper:

1. Improvement of the administration of copyright law by the establishment of a Copyright Council.
2. Enhancement of copyright licensing by the establishment of a Digital Copyright Exchange.

3. Better access to dispute resolution by a twin-track approach - the creation of a small claims jurisdiction in the lower courts and the provision of a system of alternative dispute resolution outside the court system.
4. Correction of particular problems in the Copyright and Related Rights Act ("CRRA") identified in submissions to the Review Committee, and which impact on innovation.
5. Creation of new exceptions to copyright designed to boost innovation, incorporating into Irish law the full list of limitations and exceptions permitted by the EU Copyright Directive ("EUCD"), in addition to certain novel exceptions not specified in the EUCD.
6. Consideration of the issue whether Ireland should have a US-style "fair use" exception to copyright.

In our response below we focus on these objectives, and comment on the way in which the Review Committee seeks to realise them.

1. The establishment of a Copyright Council

The Consultation Paper attributes a broad range of functions to the proposed Copyright Council. While we understand the value in such a Council, we would question whether an entity which comprises a representative mix of right owners, collecting societies, public interest and users would be able to reach sufficient accord to discharge functions which involve a balancing of their respective rights and interests. A Council pre-occupied with the need to reconcile opposing positions would be unable to act effectively to deliver the remit described.

We also question how this entity could be self-funding. We suggest that, in the absence of Government support, the funding would have to be provided by parties with a vested interest in the outcome of decisions made by the Council. This would potentially taint the decision-making, or at least the perception as to the independence of the Council.

To the extent that the role of the Council is described in terms of policy-making, we suggest that this is the role of Government.

We believe that, in lieu of the governance model proposed, it may be preferable to propose the establishment of a Council similar to those established in the UK, Australia and New Zealand. These

Councils are funded by bodies representing creators and other right holders with a remit that includes raising awareness about copyright; conducting research; producing publications; holding seminars, workshops and other educational events. This is clearly a narrower concept in terms of function, but a model which has been demonstrated to be effective.

2. The establishment of a Digital Copyright Exchange

We are aware of the benefits of effective licensing, for both creators of protected works and those who seek to use them. It appears however that licensing has been slow to catch up with the technology permitting the dissemination of works, and that this is one of the reasons for the high levels of online copyright infringement. The success of iTunes, Netfliks and other high quality legal offerings demonstrates that good licensing promotes copyright compliance.

A Digital Copyright Exchange would be a quantum leap for licensing in Ireland. The Consultation Paper suggests that this could be established by the Copyright Council. It is unclear however where the funding would come from. We suggest that this would have to be an industry initiative of a group of right holders, or at least would have to command the support of those industry groups.

We note the position in the UK, where Richard Hooper has been appointed by the Government to conduct a feasibility study into the establishment of a DCE. Developments further afield may also be relevant. The ARROW initiative and the Global Music Rights Database are both funded by the European Commission to help develop digital licensing on a multi-territory basis. The European Commission IP strategy published last May stated:

"To foster the development of new online services covering a greater share of the world repertoire and serving a greater share of European consumers, the framework [for collective licensing] should allow for the creation of European "rights brokers" able to licence and manage the worlds' musical repertoire on a multi-territorial level while also ensuring the development of Europe's cultural diversity"⁵.

In the light of events in the UK and Europe, it seem prudent to wait and reap the benefit of the UK study, and to assess the impact of the proposed EU directive, before deciding whether and how a similar Irish initiative might work.

⁵ *A Single Market for Intellectual Property Rights* COM (2011) 287 final

In relation to the more general topic of collective licensing, we note that the Consultation Paper makes few comments or proposals. As mentioned above, we appreciate the value of collective licensing to artists. Collecting societies conduct activities on a collective basis which creative artists could not achieve on an individual basis. Music composers, literary authors and visual artists all realise significant royalties through their membership of collecting societies. The societies also provide a wider benefit, in providing copyright advice and support to their members and helping them to maximise their income from secondary uses of their works⁶. We would be concerned to ensure that copyright law is not altered in a way which diminishes the value that artists derive from their membership of collecting societies.

The European Commission has very recently published a Proposal for a Directive on collective management of copyright.⁷ It sets a new framework for the development of collective licensing in Europe. It points out that

"Collecting societies, as intermediaries between creators and service providers, ...are important players... It is therefore of critical importance to ensure they are encouraged to perform their tasks as efficiently as possible and to innovate"

The document reinforces the value of collecting societies:

"Collecting societies play a valuable role in lowering transaction costs because they allow users to clear rights in a large number of works, in circumstances where individually negotiating licences with individual creators would be impractical and entail prohibitive transaction costs. They allow right holders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets"

This Directive will help to promote the development of collective licensing in Europe and expand the channels through which Irish artists can disseminate their works. We urge the Review Committee to ensure that its recommendations are in general consistent with the development of collective licensing in Ireland and aligned with the approach signaled by the draft Directive. We urge the Committee too to refrain from adopting solutions which will undermine the potential for development of collecting societies in Ireland.

⁶ For example, IVARO negotiated an agreement with ICLA under which visual artists receive a proportion of the royalties collected by ICLA for licensing reproduction of literary works in schools, universities and business.

⁷ A Proposal for a Directive on collective management of copyright in the single market

3. To provide greater access to mechanisms for dispute resolution

We support wholeheartedly the proposals of the Review Committee to provide better access to dispute resolution, both by providing an expedited small-claims jurisdiction in the lower courts and a suitable framework for alternative dispute resolution outside the court system.

In so far as the proposal for an ADR framework is concerned, it would be important that it be provided by a trusted party in an independent manner. We are aware that the Intellectual Property Office in the UK makes an ADR service available, and we suggest that a similar framework could be provided in Ireland by the Office of the Controller of Patents.

4. Particular problems in the CRRA

We welcome the fact that the Review Committee has been willing to address specific problems with existing provisions in the CRRA. Certain of these are of particular interest to the Arts Council, and we comment on them as follows:

Perpetual copyright protection

It appears that there is doubt whether the copyright in works unpublished at the author's death is co-terminus with the copyright in published works. This appears to arise by virtue of Section 9 of the Transitional Provisions of the CRRA. The result is that copyright in these works is potentially perpetual. We note that the Review Committee proposes to recommend correction of this unintended effect and we welcome that decision. The problem has come to light in relation to unpublished works of James Joyce. It is clearly desirable that publication of Joyce, so long inhibited by close guardianship of the copyright, be made available now as freely as possible. While public focus has been on the works of Joyce, the same problem may affect the works of other authors about to enter the public domain. We consider this an urgent reform.

Right of first publication

Another difficulty has come to light recently, again in the context of the works of Joyce. Section 34 CRRA provides that any

person, who after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously made available, may benefit from a 25-year term of protection.

The provision appears to be open to the possibility that a person who has gained access to unpublished material may publish immediately following the expiry of the copyright, without obtaining the permission of the person who owns the physical object in which the work is embodied. The person who publishes may have gained access as a researcher, or at an exhibition or in some other manner. Unless clarified, the provision may cause exceptional difficulty for our national cultural institutions and other repositories of valuable unpublished material. We would consider this too to be an urgent reform.

Protection of metadata and technological measures applied to works online.

When placing works online, particularly visual works, professional creators customarily apply metadata identifying authorship, sometimes specifying licence terms and occasionally providing other useful information about the work. The cultural institutions, for example, provide valuable information about the provenance of works. This metadata is routinely stripped by users, and by some social media sites, with a number of unfortunate results:

- The moral rights of the creator are infringed.
- The work is effectively "orphaned", making it impossible in the future to trace the right owner.
- The work is exposed to ongoing infringement.

It is not generally understood that the removal of metadata constitutes an offence, under Section 376 CRRA. Equally, it is not generally understood by users of social media sites that the terms and conditions of use of certain of them grant consent to the removal of metadata. We ask the Review Committee to draw attention to the importance of this issue in its report.

In terms of the legal protection available, we are advised that the current level of protection of rights management information in Sections 375 and 376 CRRA is less than robust, in that there is effectively no civil remedy for the right owner to prevent or to obtain redress for the removal of metadata or other rights management information *per se*, independently of an infringement. We suggest that these shortcomings in the remedies ought to be addressed.

The position is similar in relation to the protection of technological measures, such as access controls. Circumvention is not prohibited, and is not actionable *per se* by the right holder. Again we suggest that these shortcomings ought to be addressed.

Security of rights management information and technological measures is increasingly essential in the online environment. It is a key component in ensuring that creators can safely disseminate their works online in the manner of their choosing.

Copyright to pass with donation or bequest to a heritage institution

Existing section 123 CRRA indicates that when a person bequeaths an object containing a "fixation" of a work, unpublished at the author's death, the bequest will be construed as including the copyright in the work, in so far as the donor was the copyright owner at his death, unless a contrary intention is expressed in the will. The terms "fixation" is defined in the Act in a manner which limits the effect of the provision.

It is proposed in the Consultation Paper that this provision be widened. We support the extension of the proposal to all works, and particularly unpublished works. This would be of particular benefit to heritage institutions, a number of which hold valuable material which has been donated or bequeathed, but which cannot be used because the copyright owner cannot be traced.

5. New exceptions and limitations

In many ways, the expansion of the copyright exceptions appears to constitute the heart of the Consultation Paper. The expressed aim is to broaden the base of opportunity for innovators.

The Arts Council, in its Strategic Overview *Developing the Arts in Ireland 2011-2013*, sets out its core principles, the first two of which are:

- A commitment to the long term development of the living arts, the work of contemporary artists, and their intellectual and artistic freedom
- A commitment to access to an engagement with the arts for all citizens and a determination to ensure that the returns on public investment in the arts benefit as many as possible.

Accordingly, the need to balance the interests of artists with a broader public interest is at the centre of Arts Council policy. We would support any improvements which maintain a fair balance between individual creators and the public interest. However, in contrast to the approach adopted in the Consultation Paper, we see creators and innovators as one and the same, and we do not perceive the need for any fundamental adjustment which relies on an attempt to differentiate between them. We believe that the manner in which the Consultation Paper classifies the various interested parties betrays the fact that the Review Committee fails to appreciate that creators are, by definition, innovator. We are struck, for example, by the fact that no separate classification is accorded to authors

We question whether it is a wise decision to propose the adoption as a *matter of principle* of all possible exceptions to copyright permitted by the EUCD. We understand that this closed list was designed to permit the different Member States of the EU to retain their then existing copyright exceptions. It was not intended to be used as in the manner proposed in the Consultation Paper.

More importantly, it seems ill-advised to take the decision to widen the exceptions in this way without a thorough impact assessment involving an economic evaluation of the effect on existing creative enterprises of each of the individual proposed changes, and of the cumulative effect of introducing all such exceptions together.

These negative comments aside, we are happy to support a number of the proposals. We offer the following views:

Exceptions for photographs - Question 35

We believe that the special position for photographs in section 52 (2) CRRA should be retained.

Linking - Questions 45 - 47

We do not agree with the proposed provision that a link, of itself, will not constitute copyright infringement. Whether or not this is the case depends on the circumstances. We are aware that this has been demonstrated in a number of cases in the courts of different EU Member States. Relevant considerations include whether or not the right owner made the work freely available on a website; whether the link involved circumventing a technological protection measure; whether search results linked to content which had been uploaded lawfully or unlawfully. We believe that it is simply ill-advised to provide a generalised exemption for all

linking activity. A more nuanced provision might provide clarity on the question without running the risk of sanctioning illegal uses.

News marshalling - Questions 50-53

We do not express a view on the question of marshalling of news, but we oppose the idea that such an exception might extend to "other content".

Amendment of definition of "fair dealing" - Question 55

We are not in favour of the proposed amendment to Section 50(4) CRRA. The existing fair dealing provision is a central expression of the copyright balance. To alter it in this way would create an unlimited range of possibilities and would cause uncertainty for creators and users alike.

Reproduction on paper for private use - Question 56(a)

It is difficult to follow the meaning of this new provision. It appears to sanction copying of digital material onto paper, for private use. Under the EUCD, the right holder must be compensated for private copying. It appears that an attempt to create an exception which is sufficiently limited not to attract the need for compensation has resulted in an unwieldy provision which, owing to lack of clarity, may well be interpreted as a general exception for all copying onto paper.

Reproduction for format shifting and backing-up for private purposes- Question 56(b)

We do not object to a limited format shifting exception to the extent necessary to clarify that moving legally acquired material from one device to another for personal use does not infringe copyright. However, while this may be appropriate for music and film, we suggest that it should not apply to visual works, which are not available for purchase in the same way and do not therefore lend themselves to format shifting in the manner described in the Consultation Paper.

Educational exceptions - Questions 56(c), 57, 58

The Consultation paper proposes to make a very significant expansion in the exceptions for educational purposes. In principle this appeals to the Arts Council, although we have the following reservations:

- We believe that the blunt inclusion of the word “education” in the fair dealing provision at Section 50(1) CRRA is just too broad and that any new provisions should be tailored specifically to educational uses.
- We suggest that the exception must be confined to non-commercial educational purposes, to comply with the EUCD. As drafted, commercial providers may benefit. Moreover, many entities can stretch the description of their service to incorporate an educational element, and thus seek to benefit unfairly by the provision. These issues should be addressed.
- We are in favour of the proposal relating to distance learning, within a closed access environment.
- We believe the proposal to permit the use in education of “anything found on the internet” is far too broad, notwithstanding the conditions attached, and that it would send the wrong message to students.

Reproduction for persons with a disability - Question 56(d)

The Consultation Paper contains a lengthy and very detailed set of provisions relating to the use of copyright works by persons with a disability.

We are certainly in favour in principle of provisions which make copyright materials more accessible to persons with a disability. We understand however that there are commercial imperatives (such as the cost of creating master copies) which need to be addressed. We also understand that the European Commission brokered an MoU in 2010 with stakeholders in this field and continues to work with them to ensure seamless delivery of special format materials in a safe environment across the EU.⁸ It appears therefore that there are complexities which may dictate that the best solution is to provide for regulations to be made by the relevant Minister, after consultation with the relevant stakeholders and representative bodies.

Advertising the exhibition of artistic works - Question 56(g)

We are opposed to an exception which would facilitate the publication of a range of works in exhibition catalogues, including online catalogues. Where a charge is made for an exhibition catalogue, there is little difference between it and a published monograph work. This is an activity that is licensed by IVARO, and we see no reason why the artist should be excluded from this income.

⁸ *A Single Market for Intellectual Property Rights*, COM (2011) final, at para3.3.5

Fair dealing for caricature, parody, pastiche or satire, or similar purposes - Question 56(h)

We welcome this proposal cautiously. It may offer new opportunities to creators without harming the interests of the creators of the original works. However the provision should be carefully crafted to achieve this affect. We suggest that, at very least, it would be advisable to define the terms parody, pastiche and satire. The term "or similar purpose" should not be used.

User-generated content - Question 61

We understand the reason for an exception which would legitimise, for example, non-competing derivative works on YouTube. It is however difficult to define the point at which the use of a work should require the permission of the right holder. We note the view of the European Commission that:

*"There is a growing realisation that solutions are needed to make it easier and affordable for end-users to use third-party copyright protected content in their own works. Users who integrate copyright-protected materials in their own creations which are uploaded on the internet must have recourse to a simple and efficient permissions system."*⁹

As the Commission intends to explore this issue further in the immediate future, it seems prudent to await this development before attempting to legislate at national level.

Special copyright exception for "innovation" - Question 66

Despite the cautious manner in which this provision is drafted, we are advised that it would not comply with the international "three-step test", which is incorporated in Article 5 EUCD, nor can it fit within the limits of the exceptions permitted by the EUCD. It raises the fundamental question whether "new" uses of a work ought to remain within the control of the original creator. We understand that this is an issue that has been addressed by the Court of Justice of the EU, which has ruled that if a work is distributed in a new way not envisaged by the author of the original work, it is still subject to the authorisation of the copyright owner.¹⁰

⁹ *Ibid at para 3.3.3*

¹⁰ Airfield NV

Irrespective of the legal constraints, we suggest that the proposed exception would create considerable uncertainty, both for creators (who would be unaware whether a third party proposed to exploit his or her work as an act of "innovation" until the act had effectively been accomplished) and for the "innovator" (whose investment could be defeated under the terms of the proposed provision after publication of the new work).

New definition of "heritage institutions". - no numbered question

We note that the Consultation Paper proposes that the benefit of the existing exceptions for designated libraries and archives in Sections 59-70 CRRA be extended to "heritage institutions", and that this term be defined to include all "educational establishments" (as already defined in the Act.) We are in favour of the adoption of the term, but suggest that it is inappropriate to apply it to all educational establishments. The exceptions should be confined to institutions which are keepers of the national heritage. Of course to the extent that an educational establishment houses a designated library or archive, it may qualify for the exceptions in that way.

Format shifting by heritage institutions for archival and preservation purposes - Question 67

We support this proposal

Publication in a catalogue relating to an exhibition by a heritage institution - Question 66(1)

When confined to heritage institutions, we are in favour of such an amendment.

Fair dealing for display on dedicated terminals by heritage institutions - Question 70.

We support this proposal

Fair dealing for display at a public lecture in a heritage institution - Question 70.

We support this proposal.

Orphan works issue - Question 72

We note that the question of orphan works has already been the subject of a separate consultation by Government, following publication of the first draft of the EU Proposal for a Directive

on Orphan Works. We understand that agreement has been reached recently on certain changes to the Proposal and we look forward to publication on an amended Proposal. This is an important issue for the cultural sector. Whether or not it is a matter in which a Copyright Council can play a role depends on the composition and remit of the Council, but we suggest that any national solution will have to await the final form of the Directive.

Presumption that the copyright passes with a donation or bequest -
Question 73

See our comments at para 4 above.

6. Fair Use

The Arts Council is not in favour of the introduction of a US fair use exception in Ireland. While the European copyright system has a defined framework of copyright exceptions, fair use guidelines are flexible, allowing the courts to decide cases on their individual merits. The result can be unpredictable and subjective, leading to uncertainty for both creators and those who exploit their works.

The development of the fair use doctrine depends heavily on litigation, and thus favours those who can most afford to litigate. This would be particularly inappropriate for a jurisdiction such as Ireland, with little copyright litigation due to its high cost.

We understand however that the debate is academic, to the extent that it is not possible to introduce such an exception at national level, as it falls outside the ambit of what is permitted by the EUCD.