

Bord Scannán na hÉireann/The Irish Film Board

Copyright and Innovation – Response to a
Consultation Paper

Copyright Review Committee

June 2012

Bord Scannán na hÉireann/The Irish Film Board

Geata na Banríona

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Gaillimh

Éire

1. Background

A. Introduction to the Irish Film Board

Bord Scannán na hÉireann/The Irish Film Board (BSÉ/IFB) is a state agency set up under the Irish Film Board Act 1980 as amended (“The Act”). Section 4 of the Act states that “the Board shall assist and encourage by any means it considers appropriate the making of film in the State and the development of an industry in the State for the making of films”. BSÉ/IFB therefore has a dual mandate and it fulfils that mandate both through the provision of funding for film production on the one hand and the fostering and developing of policies and relationships with the stakeholders in film production on the other hand.

B. Vision of the Irish Film Board

BSÉ/IFB vision is to enable a sustainable, successful, and expanding Irish based filmmaking through the development and employment of Irish creative, artistic and technical skills, and the development of strong Irish based companies capable of producing, financing and distributing Irish films on an international scale.

C. Mission Statement of the Irish Film Board

TALENT, CREATIVITY, ENTERPRISE. Placing Irish film talent at the centre of the Irish creative knowledge economy.

D. Goals of the Irish Film Board

1. To enable the development of distinct Irish cinematic voices through a wide and innovative support system;
2. To enable the making of film in Ireland working continuously to improve the filmmaking environment through fiscal measures and on-the-ground support to enable the growth and exposure of Irish film talent through development and production initiatives, short film schemes and talent promotion through local and international film festivals, networks and partnerships;
4. To grow the audience for Irish film in Ireland and abroad through the strengthening of the domestic marketplace and promoting the export of Irish film internationally;
5. To promote an integrated government policy for the audio-visual/digital content sector, with film at its centre through an integrated approach to creativity, enterprise and technologies;
6. To deliver value for money to the key stakeholders and all those who benefit from the BSÉ/IFB– audiences, Irish filmmakers and Irish talent, key partnerships and to Government and the Irish public justifying continued support.

E. Creative Capital

(i) The Creative Capital Report

Creative Capital: Building Ireland's Audiovisual Creative Economy is a report prepared for the Minister for Arts Heritage and the Gaeltacht by the Audiovisual Strategy Review Group and delivered in April 2011. The report was launched by the Minister for Arts Heritage and the Gaeltacht Jimmy Deenihan in July 2011.

(ii) The PWC Report

The Creative Capital Report came out of the Pricewaterhouse Coopers (PWC) report on the audiovisual content production industry which was published in December 2008. What the PWC Report looked at was beyond those working solely in feature film production and included everyone involved in all forms of audiovisual content production in Ireland. It found that the turnover of the whole sector in Ireland was over €500m per annum and that total direct employment was 5,440.

(iii) The Objectives

The first objective of the Creative Capital Report was set out as follows:

“To recommend a framework of policies and initiatives for government that will stimulate growth over a five-year period and:

- Double the value of the Irish audiovisual industry to over €1 billion;
- Increase direct employment in the industry from 5,440 to over 10,000;
- Increase exports of Irish audiovisual production”.

(iv) Headings for Growth in the Creative Capital Report

There were five headings in the key priority areas identified in the Creative Capital Report as follows:

1. Develop the industry and building strong companies;
2. Build exports;
3. Develop skills and talent;
4. A strong domestic industry;
5. Mobilisation of the industry and the whole of government.

(v) Expanded role for the Irish Film Board

The Creative Capital Report recommended as follows:

“It is recommended that the organisational structure and funding responsibilities of the BSÉ/IFB are adapted to enable the organisation to act a specialist development agency for the entire audiovisual industry alongside its current remit of developing the industry for the making of Irish film and television.

A partial or full rebranding of the BSÉ/IFB may be required to better reflect this new role and the related functions as a development agency for the whole audiovisual industry providing seamless support and leading advocacy and policy.

It should be stressed that these proposals to enhance the mandate of the are intended to provide additional remit and functions. The existing legislative purpose of the BSÉ/IFB to build an indigenous creatively-led Irish film industry that is culturally and artistically distinct should continue as BSÉ/IFB core purpose.”

F. Copyright

Copyright protection is essential for the sustainability and growth of audiovisual content production in Ireland. It is the cornerstone securing the remuneration of all the creative personnel involved in that production as well as the essential prerequisite to promoting the growth of that production industry as envisaged in the Creative Capital Report. It promotes innovation and creativity by enabling authors, writers, directors, producers artists and performers to be paid for their work both by producers and from the proceeds of the distribution exploitation of their work. Any diminution in copyright protection endangers that endeavour and adversely affects the prospects for growth and employment in Ireland.

G. World Intellectual Property Organisation (WIPO)

Audiovisual content production is covered under two of the headings for the core copyright industries within the creative industries identified by WIPO as follows (i) motion picture and video and (ii) radio and television. It is estimated that the core copyright industries in Ireland in 2011 comprised 8,600 enterprises with 46,300 full-time equivalent persons employed (70,400 persons engaged), a turnover of €18.85 billion and gross value added (GVA) of €4.6 billion. The latter, which represents the direct economic contribution, is equivalent to 2.39% of GDP. This value is heavily dependent on copyright protection.

The copyright industries, taking account of direct and indirect impacts across the economy, represent 7.35% of total GDP which is equivalent to €11.50 billion. This figure includes the GVA of the range of industries whose primary function is to facilitate the creation, production, manufacture, distribution and sale of copyright content and other protected subject matter.

Total direct and indirect employment generated by the copyright based industries in Ireland is estimated at 116,000, which represents 6.4% of total employment.

H. Online Piracy:

The importance of the creative industries to the EU and Ireland in particular are best summarised from the Tera Consultants' Report "Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries"

"The production and distribution of works by creative industries, including movies, music, television programmes and software, has been recognised as having a positive effect on economic growth and the creation of jobs. Unfortunately, over the last decade digital piracy (copyright infringement of digital media) has increasingly threatened the economic performance of the industries responsible for these creative works. For this reason, stemming the rising tide of digital piracy should be at the top of the agenda of policymakers in the European Union and elsewhere. But to make well-informed decisions in this area, policymakers would benefit from understanding the extent of the economic contributions of these industries and of the losses resulting from digital piracy."

Their analysis determined the following:

- In 2008 the European Union's creative industries, based on the more accurate and comprehensive definition, contributed 6.9%, or approximately €860 billion, to total European GDP, and represented 6.5% of the total workforce, or approximately 14 million workers.
- In 2008 the European Union's creative industries most impacted by piracy (film, TV series, recorded music and software) experienced retail revenue reduction of €10 billion and losses of more than 185,000 jobs due to piracy, largely digital piracy.
- Based on current projections and assuming no significant policy changes, the European Union's creative industries could expect to see cumulative retail revenue losses of as much as €240 billion by 2015, resulting in 1.2 million jobs lost by 2015.

2. The Intersection of Innovation and Copyright in the Submissions

It is noted that the main focus of Terms Reference of the Copyright Review Committee is upon the various barriers to innovation, if any, created by Irish copyright law. There is a fundamental contradiction implicit in this approach since the main purpose of copyright law is the promotion of innovation by seeking to protect and reward innovators for the creative work they undertake

Since copyright law is there to protect and promote innovation and creativity, it is vitally important that it is clear and robust enough to achieve those objectives, that any exceptions are clear and limited so as not to impede those objectives and that it is enforced through a system that is effective in ensuring that the creators and owners are in fact rewarded for their innovation and creativity. Chapter Two of the Consultation Paper presents a dichotomy which on the one hand states that “copyright can support innovation by the rewarding of a novelty with a long monopoly” and on the other hand states that “can deter innovation by preventing the alteration of what is already established”. Apart from the prejudicial tone of the language whereby what is protected is “a novelty” by “a long monopoly” while what is prevented is “innovation” of what is “already established” [is that a fair way to describe a creative work?] the dichotomy itself is false precisely because copyright law’s sole purpose is to promote and reward innovation and creativity in the first place.

In relation to the six main categories of the sources of submissions, we would submit that audiovisual content production crosses over all the categories. What is essential for the audiovisual content production is that all the creative stakeholders involved are properly rewarded so that the rightsholder talent continues to be able to devote time, energy and expertise to the work, that their rights are aggregated into a single work that can be distributed and promoted effectively by the entrepreneurs which own the aggregated work, that the entrepreneurs are remunerated by the intermediaries and users of the work, where applicable the rightsholder talent is paid by the relevant copyright collection societies and where applicable the work is preserved in the appropriate heritage institutions. If the chain of protection and reward is broken for example where intermediaries exploit the work without reward to the creators and entrepreneurs, creativity and innovation are inhibited. BSÉ/IFB’s role is to promote creativity, talent and enterprise in the audiovisual content production industry so that Irish and other users in particular are able to access the results of that creativity, talent and enterprise through Irish films being made available to the Irish public and internationally. This can only be done through the development of a sustainable industry and a vital part of that is the effective protection of copyright law.

Questions and Answers

- (1) Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?

We would agree with a broad focus which should include a strong focus on copyright as protecting and promoting innovation and creativity. The role of copyright in promotion Irish culture also needs to be factored in. We would not agree with the thesis which places copyright in a juxtaposition with and as opposed to innovation. It would not in our view be the correct approach that the creative and cultural industries are seen as being in some way at odds with the development of a knowledge based or smart economy. On the contrary the two are closely interrelated and should be seen as benefitting each other.

- (2) Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?

There is sufficient clarity about the basic principles of Irish copyright law as set out in the CCRA and EUCD. Some clarifications and amendments are needed to update the CRRA in the light of developments since the beginning of this century and enforcement in the online environment needs to be address specifically.

- (3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

Any substantial changes should be included in codified legislation.

- (4) Is the classification of the submissions into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions – appropriate?

For reasons stated above the categorisations should be treated as independent and inclusive. Rightsholders in an audiovisual content production context include screen directors, screenwriter's directors of photography, actors/performers, animators/visual effects creators, set and costume designers and individual producers as well as the production companies who aggregate the rights of these persons into a single audiovisual work.

- (5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?

Copyright and innovation do not really “intersect”. Copyright supports and promotes innovation for the benefit of creators authors, rights owners, distributor, intermediaries and users. Culture is supported by heritage institutions and in turn fosters creativity and innovation.

- (6) What is the proper balance to be struck between the categories from the perspective of encouraging innovation?

It is essential that the primary approach be that copyright protects innovation by providing protection and remuneration to creators, authors and rightsholders for the benefit of intermediaries and users (including heritage institutions). Without copyright protection the incentive to all those working in this area create audiovisual works would be substantially diminished to the impoverishment of intermediaries, users and heritage institutions. Clear and limited exceptions driven by the public interest provide a balance where appropriate to the protection of innovation through copyright. Whether those exceptions in themselves foster innovation has to be addressed in each particular case. It is hard to see how most and even any of them do.

3. Copyright Council of Ireland

The Copyright Council

The consultation paper suggests that while the membership of copyright councils in other jurisdictions is largely confined to rightsholders and collection societies you see no reason why the membership of an Irish council should not be more broadly based and collaborative. In our view there may in fact be good reasons why other jurisdictions have not adopted this approach and why there is a fact no precedent for such a council in any other jurisdiction. The analogy of the Press Council does not appear to us to be on all fours with what is proposed. BSÉ/IFB would welcome the establishment of a Copyright Council representing rightsholders and collection societies which would promote copyright, undertake educational events and do research, produce publications and propose policy to government. As to the various roles proposed we would comment as follows:

First: with a very wide representation developing standards of best practice could prove contentious. In the end these matters referred to need to be developed through government policy and legislation.

Second: industry bargains and contractual practices are for negotiation between the parties and ultimately regulated by statutory dispute resolution procedures and the courts.

Third: notice and takedown procedures need to be regulated through statutory enactment (cf the Digital Economy Act 2010 in the UK) and court resolution. This should not inhibit voluntary effects to achieve mutual acceptable arrangements negotiated at arm's length between rightsholders and intermediaries / users but in the end the arrangements for protection of copyright needs to have the protection of arrangements regulated by law.

Forth: While a copyright council could of course advise government on regulations to be made and other copyright issues in the end policy formation of copyright law has to be a matter for government.

Fifth: again the assembling of statistics and data could be undertaken by a Copyright Council but in the end copyright legislation is a matter for government.

Irish Digital Copyright Exchange

This appears to be a proposal very similar to what is proposed in the UK originally in the Hargreaves Report upon which research is still being undertaken. Collective rights management has a limited impact in relation to audiovisual content distribution but BSÉ/IFB would welcome the development of a voluntary digital copyright exchange.

The Council Alternative Dispute Resolution Service and the Controller:

The position in relation to the Controller both as a regulator/policy maker and adjudicator appears to be in need of clarification so that the adjudication role is separately undertaken e.g. by a Copyright Tribunal or an Intellectual Property Tribunal. There also needs to be a properly resourced policy formation remit in the Department of Enterprise Jobs and Innovation. A small claims court and a specialist court attached either to the Circuit Court or the High Court which can expeditiously deal with copyright or intellectual property rights disputes would be welcome.

Licensing Issues:

Rightsholders including the creative talent we support would not welcome a widespread extension of compulsory licensing and it would not in any event be in compliance with the Berne Convention

Windfall

The introduction of a provision for the renegotiation of contracts if an unexpected windfall income arose does not sit well with the way in which the contractual arrangements for audiovisual content production are made particularly because of the large number of rights agreements which make up a single film. If such a provision existed and a windfall came in respect of a film, the rightsholders of the film would be presented with an almost endless task of having to review its dealing with all the rightsholders they contracted to make the film e.g. writers, directors, other producers, designers, actors, visual effects teams and other members of the crew. It could also create an uncertainty in relation to contractual arrangements. Residuals and shares in adjusted gross receipts/net profits should be left to be negotiated by the parties.

Questions and Answers:

(7) Should a Copyright Council of Ireland (Council) be established?

A Copyright Council would be welcome but the makeup of the council as proposed is too wide and risks being unworkable.

(8) If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?

It should be recognised by the State preferably by statute with a clean remit which includes the matters we have indicated should be addressed by the council above. Policy formation and adjudication should be dealt with separately.

- (9) Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?

It should be made up of rightsholders and collection societies with expert support and an independent chairperson appointed by government.

- (10) What should the composition of its Board be?

See reply to 9.

- (11) What should its principal objects and its primary functions be?

See above.

- (12) How should it be funded?

Funding models Including exchequer funding would need to be explored

- (13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?

This should be addressed separately.

- (14) What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?

From the perspective of audiovisual content production we have no proposals to make in this regard for legislative changes.

- (15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?

The establishment of a Copyright Council made up of rightsholders and collecting societies could be established by statute to promote copyright (and the innovation that underlies it) and provide education on copyright. A copyright digital exchange can only be established with the willingness of the rightsholders. ADR is already covered through the legislation in relation to the Controller but consideration should be given to separating the policy making role from the adjudicative role of the Controller.

- (16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

See reply to 15

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

Consideration should be given to clarifying the name of “the Controller” as well as setting up a full service Intellectual Property Office in line with other such offices e.g. in the US.

(18) Should the statutory licence in section 38 CRRA be amended to cover categories of work other than “sound recordings”?

Compulsory licences cannot and should not be extended to the rights of primary rightsholders. Rights in sound recordings are not regarded as primary rights but instead are regarded as neighbouring rights which is the only reason a compulsory licence can be introduced.

(19) Furthermore, what should the inter-relationship between the Controller and the ADR Service be?

(20) Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

(21) Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

(22) Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary

19 20 21 and 22

A specialist Intellectual Property Court would be a welcome development whether this involves a small claims court, a specialist circuit court judge or an extension of the commercial court of the High Court. Further consideration needs to be given to this outside the remit of this consultation.

4. Rights-holders

The Consultation Paper says that “copyright law has to strike a delicate and proportionate balance between the monopoly afforded to the rightsholder and the potential to undercut diversity by preventing further developments based upon the original work”. However the whole point of copyright law is to protect and reward the development of the original work particularly if the original work is used for further development. In the absence of any concrete economic evidence that the current “copyright balance” inhibits either innovation or the development of further work from original work surely then there is no basis for changing the overall structure of the current regime.

Furthermore, there is significant evidence of wholesale online piracy of copyright works and the thrust of reform should therefore focus on enhancements to the enforcement regime. In this regard the signing of the Statutory Instrument in February of this year is to be welcome. Ireland has not however introduced legislation equivalent to the Digital Economy Act 2010 in the United Kingdom and it appears that, while substantial focus is given in the Consultation Paper to specific legislative provisions mostly surrounding additional (if not open ended) exceptions to copyright protection, no consideration is being given to legislative provisions for the protection and enforcement of copyright in the online environment. This is a major deficiency in the current consultation process and arises from the false dichotomy between copyright and innovation which underlies the Terms of Reference which has resulted in the Consultation Paper.

Questions and Answers

(23) Is there any economic evidence that the basic structures of current Irish copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?

BSÉ/IFB is not aware of any evidence which supports the thesis that the current regime of copyright in Ireland does not get the balance right between the protection of the innovation and creativity of rightsholders and the public interest in diversity.

(24) Is there, in particular, any evidence on how current Irish copyright law in fact encourages or discourages innovation and on how changes could encourage innovation?

The extent to which Irish copyright law does not address the protection of copyright in the online environment appears to us to discourage innovation. This is evidenced by the high levels of online piracy of audiovisual works and practical examples of the effect that has had for example on cinema box offices in some European countries particularly Spain. It is believed that Ireland has only escaped this misfortune through the relevant lack of development of broadband until recently. There is an urgent need for the full development of the monetisation of the innovation that goes

into audiovisual content and the current lack of adequate legislation in Ireland on online piracy discourages this innovation.

(25) Is there, more specifically, any evidence that copyright law either over- or under- compensates rights holders, especially in the digital environment, thereby stifling innovation either way?

See reply to 24

(26) From the perspective of innovation, should the definition of “originality” be amended to protect only works which are the author’s own intellectual creation?

The meaning of originality is being developed through decisions by the EU Court of Justice and does not need to be altered by legislation in Ireland.

(27) Should the sound track accompanying a film be treated as part of that film?

Yes. We see no reason why a separate copyright should be accorded to the soundtrack of a film. Sound recordings of music from the soundtrack of a film are of course separately protected.

(28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?

An unintended perpetual copyright should be amended so that the term of copyright equates with that of published works.

(29) Should the definition of “broadcast” in section 2 CRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?

The definition of broadcast should not be amended to make it platform neutral as this would indeed as the Consultation Paper states have significant (and unintended) consequences for the copyright balance.

(30) Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?

Copyright law in Ireland should continue as it has to date to be made as a matter of general principle on a technology neutral basis. However specific changes would need to be assessed on their individual merits and there are no specific changes we are aware of the need of.

(31) Should sections 103 and 251 CRRA be retained in their current form, confined only to cable operators in the strict sense, extended to web-based streaming services, or amended in some other way?

These sections should be confined to cable operators if not removed entirely.

(32) Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?

As stated above the current enforcement arrangements in the online environment in Ireland are underdeveloped and inadequate. The result is a major barrier to innovation which needs to be addressed urgently.

(33) Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation?

The provisions relating to technological protection measures and digital rights management need to be improved so that innovation in the online environment can be adequately protected which is not the case at present.

(34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?

(35) Should the special position for photographs in section 51(2) CRRRA be retained?

(36) If so, should a similar exemption for photographs be provided for in any new copyright exceptions which might be introduced into Irish law on foot of the present Review?

34,35,36 We have no comments on the protections afforded to the copyright owners of photographs particularly professional photographers.

(37) Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?

Private copying levies are being reviewed by the EU Commission and Ireland should await the outcome. Apart from existing measures in the CRRRA for private copying no further exceptions should be made at this stage.

5. Collecting Societies

Audiovisual content producers and rightsholders involved in audiovisual content production in Ireland (other than composers of music and creators of sound recordings to the extent of the making available of/communication to the public/performing rights in their work) license their works directly to users rather than through copyright collection societies (save in respect of cable retransmission right in audiovisual works). The existence of copyright collection societies and their operations do not therefore closely affect such rightsholders. The experience of film exhibitors and broadcasters in dealing with copyright collection societies would be a matter for them to comment on.

Questions and Answers

(38) If the copyright community does not establish a Council, or if it is not to be in a position to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?

(39) Are there any issues relating to copyright licensing and collecting societies which were not addressed in chapter 2 but which can be resolved by amendments to CRRA?

38 and 39 No Comment.

6. Intermediaries

The Electronic Commerce Directive provides for certain legal immunities in respect of three areas of online activity viz hosting caching and the mere conduit provisions and these were incorporated into Irish law by SI No 68/2003. What has not been incorporated in any detail into the Irish legal framework are the provisions for and regulation of the way copyright owners deal with any breaches in their copyright once allowance is made for these legal immunities apart from SI 59 of 2012 introducing the injunction remedy. Because the Consultation Paper does not address this issue there is a significant deficiency in the discussion about intermediaries and the balance between the legal immunities referred to above on the one hand and the protection of innovation through copyright on the other hand.

As to the other matters raised in this chapter our suggestion would be that the Review Committee not make any recommendations in relation to hyperlinking, information location tools and content aggregation pending the outcome of deliberations on those issues at EU level. We would also be of the view that no change should be made to the “transient and incidental uses” provision.

Questions and Answers:

(40) Has the case for the caching, hosting and conduit immunities been strengthened or weakened by technological advances, including in particular the emerging architecture of the mobile internet?

The provision for hosting, caching and mere conduit immunity do need to be reviewed in the light of the development of services where there is an editorial element and which go beyond what was intended to be covered in a content neutral environment. It is not a question of strengthening or weakening them but making sure they achieve what they were intended to achieve in a more complex and content rich online world.

(41) If there is a case for such immunities, has technology developed to such an extent that other technological processes should qualify for similar immunities?

It is not about the technologies themselves but how they handle content.

(42) If there is a case for such immunities, to which remedies should the immunities provide defences?

The introduction of SI 59 of 2012 started to process of addressing the balances in this area.

(43) Does the definition of intermediary (a provider of a “relevant service”, as defined in section 2 of the E-Commerce Regulations, and referring to a definition in

an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?

No comment

(44) If the answers to these questions should lead to possible amendments to the CRRA, are they required or precluded by the eCommerce Directive, EUCD, or some other applicable principle.

No amendments need to be made to the CRRA to extend the immunities in respect of copyright. See our general comments above.

(45) Is there any good reason why a link to copyright material, of itself and without more, ought to constitute either a primary or a secondary infringement of that copyright?

(46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?

(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?

45 – 47 See our general comments above. No changes should be made until the developments in Europe are resolved.

(48) Does copyright law inhibit the work of innovation intermediaries?

This is a very general question to which the only answer at this stage can be that we have no evidence of any such inhibition.

(49) Should there be an exception for photographs in any revised and expanded section 51(2) CRRA?

No comment

(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?

(51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?

(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?

(53) If so, what exactly should it provide?

50 -53 As to marshalling and content aggregation, no change should be made to existing law. The best solution is effective copyright licensing on an arms-length basis.

(54) Does copyright law pose other problems for intermediaries' emerging business models?

Not that we are aware of. In fact intermediaries have had the benefit of a very tolerant environment for the development of their services in Europe

7. Users

The main thrust of this chapter of the Consultation Paper appears to be the expansion of the exceptions and limitations to copyright to the maximum extent possible under the EUCD if not further. The justification for this is the encouragement of innovation but no evidence whether economic or otherwise has been advanced to support the proposals being made. The creative industries in Ireland are responsible for and support significant levels of employment and economic activity in Ireland and any arguments for changing existing legal arrangements must address the impact that such changes would have on that employment and activity. In the absence of evidence that the changes would protect and grow the creative industries in Ireland as well as fostering increased employment and economic activity, no changes should be made to existing copyright law based on unsubstantiated assertions by users (and intermediaries) that “innovation” will be encouraged by such changes. The economic evidence that is available makes it very clear that innovation is adversely affected by online piracy and it is on changes to counter that piracy that the focus of attention should be placed.

In any event any proposals to amend the exceptions in the CRRA need to address the following provisions of the EUCD:

Recital 32 states “This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public”

Article 5 (5): “The exceptions and limitations provided for in paragraphs 1,2,3, and 4 shall only be applied in certain special cases which do not conflict with normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder.”

If it’s well settled law that the provisions of the EUCD necessitate a broad interpretation of the reproduction right and the communication to the public right in order to establish a high level of copyright protection for authors and that the exceptions must be interpreted strictly. Each exception needs to be considered in the light of this.

Questions and Answers:

(55) Should the definition of “fair dealing” in section 50(4) and section 221(2) CRRA be amended by replacing “means” with “includes”?

No. This would result in legal uncertainty for rightsholders and users alike leading potential by to expensive litigation and rebounding badly on Ireland’s reputation as a well regulated copyright environment.

(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:

- (a) reproduction on paper for private use
- (b) reproduction for format-shifting or backing-up for private use
- (c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research
- (d) reproduction for persons with disabilities
- (e) reporting administrative, parliamentary or judicial proceedings
- (f) religious or official celebrations
- (g) advertising the exhibition or sale of artistic works,
- (h) demonstration or repair of equipment, and
- (i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?

No. Each exception must be looked at separately and carefully considered. In particular we would not be supportive of a broader private copying exception, a broader format shifting exception or a wide provision in relation to parodies. These exceptions would need to be considered in the light of the three step test outlined in Article 5.(5) above particularly that it would not unreasonably prejudice the legitimate interests of the rightsholders. Format shifting in particular could have a significant negative impact of film release patterns which are not in the interests of consumers as well as rightsholders.

(57) Should CRRR references to “research and private study” be extended to include “education”?

(58) Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?

57 and 58 - No

(59) Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters’ behalf?

This has apparently already been addressed in Europe.

(60) Should the exceptions for social institutions be repealed, retained or extended?

(61) Should there be a specific exception for non-commercial user-generated content?

(62) Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRA?

60 – 62 – No.

8. Entrepreneurs

Entrepreneurs (in the context of audiovisual content production usually referred to as producers) play a vitally important role in audiovisual content production. They are the people who bring the creative talent together, aggregate the contributions that talent make into a work with both cultural and commercial potential and then bring the work to the public. They are both talent and enterprise rolled into one.

The main thrust of this chapter is focussed on a new exception to copyright protection. In our view the proposed exception significantly adversely affects the adaptation right which a copyright owner is entitled to exclusively both under the Berne Convention and the CRRA. It is also difficult to see how a “special case” can be made for such a general concept as “innovation” fitting within the three step test recited previously which exceptions are required to comply with. It certainly has no apparent role of benefit in the context of audiovisual content production. “Innovation” with film content should only be undertaken with the consent of the rightsholder unless it falls within the limited exception currently in place.

(63) When, if ever, is innovation a sufficient public policy to require that works that might otherwise be protected by copyright nevertheless not achieve copyright protection at all so as to be readily available to the public?

Once again there is an inbuilt contradiction here because copyright is intended to stimulate innovation and therefore to ask in the abstract whether innovation is in itself a sufficient public policy to justify loss of copyright protection for a work that would otherwise be protected is to misconceive the basis of copyright in the first place.

(64) When, if ever, is innovation a sufficient public policy to require that there should nevertheless be exceptions for certain uses, even where works are protected by copyright?

See reply to 63

(65) When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licences?

Compulsory licences for primary rights are not permitted under the Berne Convention.

(66) Should there be a specialist copyright exception for innovation? In particular, are there examples of business models which could take advantage of any such exception?

No for the reasons stated above.

9. Heritage Institutions

The preservation of Ireland's film heritage is a vitally important part of public policy and is supported by public funding both from the Arts Council and BSÉ/IFB through the Irish Film Archive. Initiatives which are designed to support the work of the Irish Film Archive should be supported as long as they are limited to archiving and preservation and specifically preclude direct or indirect commercial use of copies so made and also do not allow any making available or communication to the public of the copies so made. Also this should be limited to libraries and archives and not extend to educational establishments.

(67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?

Yes provided it is drafted in the very limited fashion as outline above.

(68) Should the occasions in section 66(1) CRRA on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in the work be extended to permit publication of such a copy in a catalogue relating to an exhibition?

(69) Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collection of a heritage institution?

(70) Should the fair dealing provisions of CRRA be extended to permit the brief and limited display of a reproduction of an artistic work during a public lecture in a heritage institution?

68 – 70

This is not something we are in a position to comment on as the matters relate to the internal working of libraries and archives but see reply to 67 above.

(71) How, if at all, should legal deposit obligations extend to digital publications?

The proposed provisions do not appear to include film.

(72) Would the good offices of a Copyright Council be sufficient to move towards a resolution of the difficult orphan works issue, or is there something more that can and should be done from a legislative perspective?

Orphan works should be addressed after the proposed EU Directive has been finalised.

(73) Should there be a presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself, unless the contrary is expressly stated?

No. This is far too wide and could discourage rightsholders from depositing their works in libraries and archives in the first place.

(74) Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?

(75) Should there be related exceptions to permit computer security assessments?

74 and 75

These are issues outside our brief and are not easily answerable in the way they are put.

10. Fair Use

In our original submission the BSÉ/IFB made it clear that in its view fair use should not be adopted in Ireland and that a limited list of exceptions clearly drafted is the best approach to the issues that arise from the Consultation Paper. There is no compelling evidence as far as BSÉ/IFB is aware for the argument in favour of fair use. In the absence of such evidence there is no justification for introducing what the Consultation Paper acknowledges in the recital of the arguments leads to a more open ended and therefore not legally certain environment.

(76) What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?

Because some countries outside the USA have introduced fair use is not a justification in itself for doing so in Ireland.

(77) (a) What EU law considerations apply? (b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?

Continuing work on the exceptions so as to address any issues causing difficulties is the best approach rather than creating an open ended and possible litigious environment.

(78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRRA above, encourage innovation?

(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRRA above, either subvert the interests of rights holders or accommodate the interests of other parties?

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?

(81) Is the ground covered by the fair use doctrine, either in the abstract or in the draft section 48A CRRRA above, sufficiently covered by the CRRRA and EUCD exceptions?

(82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

(83) (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?

78-83

In our view if the outcome of the Consultation Paper is that there is no economic justification based on evidence then there is no basis for introduction a fair use exception. Our view would be that fair use in any event is not permitted under EU law (see Recital 32 and Article 5(5) of EU CD above) If the committee proposes to provide draft legislation on its final report and proposes (even where there is no economic justification for doing so) draft legislation which specifies what the exceptions “include” followed by a long list of amended and new exception it if should also provide a draft without the “include” fair use language and with a more limited set of exceptions which are supported by the bulk of the rightsholders so that an alternative to the fair use offer is available for consideration by the public.

(b) In particular, how appropriate is the draft section 48A tentatively outlined above?

84) Should the post-2000 amendments to CRRRA which are still in force be consolidated into our proposed Bill?

Yes there should be consolidation

(85) Should sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?

No.

11. Conclusion

(86) What have we missed?

No additional comments