

# **Copyright and Innovation**

## *A Consultation Paper*

**Response of the Irish Visual Artists Rights Organisation (IVARO)**

June 2012



**IVARO** is a non-profit organisation which represents visual artists and their heirs in relation to matters of copyright and related rights. It has over 1600 Irish artist members and has reciprocal rights agreements with over 20 sister societies worldwide.

IVARO offers copyright licensing services and collects the Artists Resale Right on behalf of its members. It is a member of the Collecting Societies Forum which represents all of the collective management organisations (CMOs) operating in Ireland. IVARO is governed by a Board of Directors that includes artists, lawyers and other professionals with an interest in artists and their intellectual property.

IVARO is a member of the following international bodies:

**European Visual Artists (EVA)**

**International Confederation of Societies of Authors and Composers (CISAC)**

As a member of CISAC, IVARO is bound by the Professional Rules, relating to its conduct, governance, transparency, financial disclosure, administration, licensing and collections as well as the Binding Resolutions covering documentation and distribution.

IVARO is registered in the Register of Copyright Licensing Bodies and complies with the regulations laid out in the Copyright and Related Rights Act 2000.

## **Consultation**

IVARO welcomes the opportunity to respond to the Consultation Paper of the Review Committee. IVARO agrees that policy and legislation should create the right conditions for economic growth in Ireland and we welcome some of the proposals outlined in the Consultation Paper. However we also have grave concerns that some of the proposals could undermine the sustainability of thousands of visual artists, photographers and illustrators who contribute to the Irish economy.

The visual creators we represent are largely self-employed individuals and small businesses creating original and innovative content which helps power the creative industries. Copyright provides powerful incentives for artists to carry on producing works. Licensing and royalty

payments benefit the very people whose work and content drives this invaluable contribution to the Irish economy.

We believe that the ambition to support economic growth and innovation through an effective copyright system needs to take into account the following:

- Promote greater understanding of the importance of remuneration for the use of artists' works in the digital domain and encourage cultural acceptance of licensing and payment for online use.
- Promote innovation and creativity in the digital domain by introducing effective sanctions against those who strip or alter Metadata attached to images.
- Introduce more effective and accessible legal remedies for visual artists who feel increasingly unable to challenge the unauthorised use of their work due to the high costs of enforcement and limited damages available.
- Any solution to the Orphan Works issue has to have as a starting point the property right of the creator in their work rather than an undefined desire from users to use works which apparently are not made available.
- As outlined in this submission, any new or extended exceptions should, where appropriate, explicitly exclude visual artistic works.
- Support the introduction of compulsory collective management of the Artists Resale Right.

## Responses to the Questions in the Consultation Paper

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

**Copyright and related rights provide creators with a means of earning a living, as well as being an important tool for those at the business end of the creative and cultural industries. The Review is largely focused on increasing exceptions to copyright which, if implemented, would eradicate certain sources of income for creators or diminish them greatly. The Review does not pay adequate attention to the established creative industries that already contribute greatly to the economy and which rely on the current copyright regime.**

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

(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?

**Yes. This would be a welcome and important step.**

(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?

**While the classification is useful we are surprised that there is no specific category for authors of artistic works (as distinct from rights holders).**

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

**See Q. 4**

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

**Innovation should not be at the expense of creators. Most visual artists are set up as micro businesses which create content that fuels and adds value to the creative economy. Business models which exist by taking content from creators without any remuneration is not innovative.**

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

**We are in favour of the establishment of a Copyright Council and believe it should be similar to those in other jurisdictions such as the UK and Australia. The British Copyright Council is composed of and funded by organisations that represent creators, performers and other rights holders, or manage rights for creative material. We believe that this is the most appropriate model as a Council composed of various mixed interest groups will find it difficult to find agreement and accomplish any meaningful**

**objectives. The role of the Council should be to advise the Government on policy and to raise public awareness of copyright.**

(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?

**See Q. 7**

(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?

**See Q. 7**

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

**See Q. 7**

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

**See Q. 7**

(12) How should it be funded?

**See Q. 7**

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

**We are generally in favour of the establishment of an Digital Copyright Exchange however there is a current UK feasibility study into such an exchange (led by Richard Hooper, IPO, UK) which is ongoing and also a European Commission Directive on collective rights management which is due imminently. Therefore we believe it would be appropriate to await the outcome of these processes.**

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

**Again we believe it would be in Irelands' interest to await the publication of the EC Directive on collective rights management which will provide guidance here.**

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

**We are in favour of an Alternative Dispute Resolution Service which should be under the auspices of the Patent Office who could maintain a register of suitably qualified mediators. The IPO in the UK provide a similar service.**

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

(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?

**The office should be renamed to take into account the broad nature of intellectual property. More importantly the office needs to be adequately staffed and resourced. We believe there is a role for the Controller in providing enhanced information and guidance on rights, providing some educational and awareness programmes to promote copyright and support business.**

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

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

**The Controller should oversee the provision of an ADR service and maintain a register of suitably qualified mediators.**

(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?

**Yes, if it is adequately resourced and with suitably qualified individuals. Visual artists feel increasingly powerless to challenge the unauthorised use of their work due to high costs of enforcement and the limited damages available. A small claims copyright court would be invaluable in helping individuals and small businesses in maintaining their legal rights.**

(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 to bring this about?

(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?

(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?

**In general the CRRA 2000 strikes the right balance between the rights of copyright owners and the ability of rights users to access works through licensing schemes, copyright exceptions and individual permissions. Copyright protection encourages creators to make works available without the concern that they will lose control over the future use of the work. Copyright royalties contribute to the financial sustainability of thousands of individuals and small businesses. However the Government could make certain changes to support innovation more effectively and one such example is extended collective licensing (ECL). ECL is hugely beneficial where it is not possible, or extremely difficult, to negotiate individual licences. Where it has been enabled by national legislation, ECL can allow a copyright licensing body or collecting society, where it already represents most of the rights holders in a sector, to assume responsibility for representing and negotiating the collective rights for all**

copyright holders in that sector and for paying out relevant royalties regardless of whether the beneficiary is a member of that society or not. In the absence of ECL, there may be no legal exploitation of the work at all where it is impossible or extremely difficult to negotiate an individual licence with the rights holder. The introduction of ECL would ensure that a balance can be struck between fair remuneration for creators and greater opportunities for the user. This system provides legal certainty for users, delivers remuneration for creators, and extends access to copyright works for consumers.

(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?

**Visual artists are under-compensated in the online environment where there is widespread infringement of artistic works. There is a direct relationship between the IP enforcement framework and innovation. Attempts to strengthen the rights of rights-holders through digital rights management technology have failed as they are circumvented soon after any new DRM system is developed. The value of an IP right to an individual artist depends on their ability to enforce it. Having to deal with additional losses through infringement of work and a lack of affordable remedies constitutes a deterrent to becoming an artist thereby stifling innovation.**

(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?

**We would not be comfortable with such an amendment. This is currently the subject of litigation in the European Court of Justice and we believe the developing case law will provide guidance here.**

***Infopaq International A/S v DanskeDagbladesForening, Case C-5/08***

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

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

**Yes, as it is clear that the effect is an unintended one, the question of a possible perpetual copyright in unpublished works should be addressed.**

(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?

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

(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?

(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?

**Online infringement has received insufficient attention in the consultation paper. Many social media web sites routinely strip or alter Metadata associated with images. Current laws do not go far enough in dealing with removal of rights management information (RMI). Enforcement needs to be strengthened in this regard. We would urge the review committee to address this in its report.**

(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

**Effective sanctions against those who strip or alter Metadata attached to images would reduce the 'creation' of orphan(ed) works in the future and promote innovation and creativity.**

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

**More explicit protection for Metadata. One of the major issues confronting visual artists (and photographers in particular) is the absence of a universal method for tagging visual images. Developing a universal protocol for locating and tagging images in the digital domain would contribute significantly to the release of images into the public domain and to ensuring the continued supply of original content by professional artists, illustrators and photographers. Coupled with effective sanctions against those who strip or alter Metadata attached to images, this would reduce the 'creation' of orphan works in the future and promote innovation and creativity.**

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

**Yes. Many photographers and visual creators, especially those working with the press, rely on this for income.**

(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?

**Yes. Addressed in Q 56.**

(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?

**Ireland is one of only three EU countries which do not have private copy remuneration. There is clearly an obligation to provide fair compensation to creators and rightsholders under Article 5(2)(b) of Directive 2001/29/EC ('The Information Society Directive') and therefore we are in favour of private copying levies or a similar system of remuneration for creators. In Germany VG Bild-Kunst administers the private copying levy for visual artists. According to their 2009 Annual Review, revenue collected for photocopying equipment alone amounted to €95,728,000 which included a retrospective settlement for the years 2002 – 2007. An additional amount of nearly €4 million is also collected annually for CD/DVD blank media levies. Rights-holders benefit significantly from the collection of these monies which they themselves would not be able to collect on an individual basis.**



(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?

**We should insure that the infrastructure is in place so that we are compliant with the EC Directive on collective rights management.**

(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 CRR?

**Increase public access to orphan works by introducing measures which allow contractual solutions for flexible licensing of orphan works through collective rights management organisations.**

**Promote innovation and creativity in the digital domain by introducing effective sanctions against those who strip or alter meta-data attached to images, thereby reducing the 'creation' of orphan works in the future.**

(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?

**40 – 44. These matters are currently being examined at EU level, not appropriate to address at national level and best to await outcome.**

(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?

**See Q.40**

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

**See Q.40**

(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?

**See Q.40**

(44) If the answers to these questions should lead to possible amendments to the CRR, are they required or precluded by the ECommerce Directive, EU Directive, or some other applicable principle of EU law?

**See Q.40**

(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?

**We are in favour of clarification that a mere 'link' does not constitute infringement. However the terms 'link' and 'linking' need to be clearly defined to avoid creation of any loophole.**

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

**We are not opposed to clarification on this issue however the terms 'link' and 'linking' need to be clearly defined. It is however important that rightsholder retain the right to prohibit unauthorised linking to their content.**

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

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

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

**No. The position should remain unchanged.**

(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?

**No. We would be concerned that activities covered by the term 'marshalling' would increase and therefore be detrimental to the position of rights holders. We believe that publishers of news are innovators and that this would not lead to a net gain in innovation. Those involved in the activities which the Committee refers to as "marshalling" can apply to be licensed by Newspaper Licensing Ireland. We of course agree that the 'news of the day' should be freely available information but we believe that the current arrangements sufficiently accommodate this and third party rights of freedom of speech.**

(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?

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

**Creators' rights must be taken into account by emerging business models and this must include fair payment for use of content produced by artists. This has to be a starting point and a fundamental principle.**

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

**We do not feel that this improves the certainty around the meaning of a "fair dealing" and would oppose this amendment.**

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

**We do not believe that the introduction of the copyright exceptions as presented is a means to achieve economic growth. Furthermore, these exceptions are not in the interest of authors of artistic works whose exclusive rights are already substantially limited by existing exceptions.**

(a) reproduction on paper for private use

**No comment**

(b) reproduction for format-shifting or backing-up for private use

**Musical works, sound recordings and films are examples where users wish to be able to format shift for private purposes the contents of products they have legally purchased. Artistic works for the most part are not available for purchase in the same way and therefore do not lend themselves to being format shifted as described in the consultation document. If any of these exceptions were to be incorporated into Irish law then visual works must be explicitly excluded.**

(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research

**As a visual artwork and an 'illustration' are somewhat interchangeable terms we would be concerned that this could be interpreted in a manner which would be detrimental to artists.**

(d) reproduction for persons with disabilities

**IVARO supports the ambition to make more content available for people with disabilities. We believe that there is scope for market-led solutions by creating positive partnership models between rights holders and user groups.**

(e) reporting administrative, parliamentary or judicial proceedings

**No Comment**

(f) religious or official celebrations

**Weddings and official celebrations are a well established and essential income stream for many photographers. We do not believe that exceptions should be introduced merely for convenience. If such an exception was introduced the use of photographs and visual artistic works should be excluded from the exception.**

(g) advertising the exhibition or sale of artistic works,

**The CRRA 2000 already permits reproduction of an artistic work for the purposes of advertising the sale of that artistic work. Any subsequent dealing with the work (such as archiving, storing**

and communication to the public) is an infringement and requires licensing through the rights holder. Auction houses are a heavy user of copyright protected artistic works in particular for their marketing needs and sales catalogues. Auction houses often reproduce artistic works which are not for sale as so called 'comparative' works which require permission from the rights holder. In our experience this is rarely sought.

We object to an exception for advertising the exhibition of artistic works by museums and galleries. These are well established primary licensing markets. Extending the exception would jeopardise the earning potential of visual artists significantly. It is important to note that other European countries which have adopted this exclusion for the advertising of public exhibitions also provide for an exhibition right under which rights-holders are entitled to receive remuneration for the public display of their work.

(h) demonstration or repair of equipment, and

**No comment**

(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?

We regularly encounter unlicensed uses of our members works which have been taken in order to create products with substantial value. We believe that a new parody exception will make matters worse, as the exception is used to justify the taking of copyright protected works, with the consequence that the creator of the original work must prove that the derivative work is not a caricature, a parody, a satire or a pastiche. We would be adamantly against the term 'similar purposes' as it is an undefined term which would be detrimental to the position of rights-holders.

(57) Should CRRRA references to "research and private study" be extended to include "education"?

**No. It is vitally important that exceptions are not introduced that would undermine the publishing sector. IVARO has an agreement with the Irish Copyright Licensing Agency (ICLA) by which visual works embedded in books and periodicals can be licensed to the education sector through a licensing scheme operated by the ICLA. These blanket licences permit limited photocopying and scanning of copyright works for internal use. IVARO distributes a share of this income to visual artists, illustrators and photographers. Reprographic licences and schemes of this nature are designed to provide users with easy to use, convenient solutions which enable them to copy and/or scan portions of books, magazines, newspapers and journals legally.**

We also question whether this approach would comply with the provisions of the EUCD, and the Berne Three Step Test.

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

**No, the exception should not be adopted. See 57**

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

(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?

**No. There is no provision in the EUCD which provides for such an all encompassing exception.**

(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 CRRRA?

**No. Rights holders must be able to define the terms on which their works are reproduced.**

(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?

**Having unambiguous Fair Dealing exceptions to guide creators allows them to innovate while remaining on the right side of the law. Any exceptions to copyright protection must be clearly defined. Copyright is a property right which grants its owner a set of exclusive rights enabling its owner to restrict certain activities. Innovation is too broad a concept to be made a special case. It also cannot comply with the Berne Three Step Test, which was adopted into European law by Article 5 subsection 5 2001/29/EC. The Three Step Test should be formally implemented in the CRRRA as obliged by the Directive. A formal adoption into Irish law would greatly improve the concept of this established principle.**

(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?

(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?

(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?

**Innovation is too broad a concept to meet the Berne Three Step test.**

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

**We do not object to this proposal.**

(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?

**No. In the case of visual artists IVARO can license the use of our members' works for inclusion in catalogues. This is an established and important source of income for visual artists. Extending the exception would jeopardise the earning potential of artists. While the sums involved may be modest they are still hugely important for visual artists who are among the lowest paid sector of Irish society.**

(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?

**No. There is no rationale given for why rights holders should subsidise the digitization projects of such institutions without being remunerated. Appropriate remuneration would foster economic activity as it would enable creators to invest more in the creation of content. A low cost licensing solution is the answer.**

(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?

**No objection to this.**

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

(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?

**Any solution to the orphan works issue has to have as its' starting point the property right of the creator in their work rather than an undefined wish of users to use works which are apparently not available.**

**Of particular interest to visual artists are the mass digitization projects of cultural institutions. Rights-holders should not be compelled to subsidise these digitization projects. Appropriate remuneration would further the goal of economic growth as it would enable creators to produce more content which in the end is the asset which stimulates growth.**

**The EC Directive on Orphan Works is due imminently. It would be preferable to wait for the wording of the Directive before making any legislative changes in this area. That said, we believe that strengthening Moral Rights by making them unwaivable (nor subject to exceptions) would assist in preventing the creation of new orphan works.**

(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 proposal is akin to ‘rights grabbing’ which restricts the earnings of artists and their heirs. We believe that this is a misguided proposal presumably for the benefit of public institutions. Government policy should be to ensure that public institutions support, rather than undermine, innovation and creativity, by promoting respect and remuneration for use of artists’ works.**

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

**No.**

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

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

**The US concept of Fair Use appears to allow broader use of copyright works but its advantages are overstated as outlined in our previous submission to the Copyright Review. In the US, fair use is an open-ended list. No specific definition exists but case law has built up in the USA over the years and is set out in s107 of the 1976 Copyright Act. It is more often than not left open to a judge to decide whether or not a use falls under fair use. As a result, it has often become a costly and lengthy legal process.**

**The Price Waterhouse Cooper Report of March 2011: *An economic analysis of copyright, secondary copyright and collective licensing*, states that “In the context of fair dealing and fair use, we find that the principles based approach used in the US is subject to around five times more legal cases than the UK fair dealing system”. By contrast, the Copyright and Related Rights Act 2000 contains specific detailed exceptions for fair dealing under Sections 50, 51 and 52. This provides legal certainty for both users and rights holders.**

**As mentioned earlier in this submission, this review should take the opportunity to encourage the enshrinement of the Berne Convention Three Step Test in relation to exceptions in our copyright act.**

(77)

(a) What EU law considerations apply?

**(a) In our opinion it is not permitted under the EU Information Society Directive**

(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?

**(b) We do not believe that Ireland should advocate the introduction of a fair use doctrine. The European approach has been to frame and define exceptions to meet the three step test, thereby providing more certainty than the US model.**

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

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

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA 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 CRRA above, sufficiently covered by the CRRA 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?

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

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

(85) Should sections 15 to 18 of the European Communities (Directive 2000/131/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?

(86) What have we missed?

**We would like to take this opportunity to voice our objection to the exception in the CRRA, section 93.—(1)(b), which allows for the commercial reproduction of “sculptures, models for buildings and works of artistic craftsmanship, where permanently situated in a public place or in premises open to the public.” While there should be an exception which allows for reproduction of artistic works in public places for private use, any commercial use of these images should require the artists’ permission and a licence.**

**Another legislative issue which affects our members relates to European Communities (Artist’s Resale Right) Regulations 2006 to give effect in Ireland to Council Directive No. 2001/84/EC. As highlighted in our previous submission, the improper transposition of this Directive into Irish law requires urgent attention. We note that the Copyright Review Consultation Paper states that “while we see the merit in exploring this argument [ . . . ] the issue does not constitute a barrier to innovation, so we do not consider that it is within our Terms of Reference.”(pg. 41). We contend that it does constitute a barrier to innovation and would urge the review committee to consider the following. The introduction of the Resale Right in 2006 has resulted in a significant increase in revenues to visual artists, amounting to nearly €1 million over the last 5 years. The**



ability of an artist to reinvest in their career and to create more content benefits the wider economy. Additionally the estates of deceased artists, who bear the burden of preserving and safeguarding Ireland's cultural heritage, would be greatly assisted in their task by the introduction of compulsory collective management and the increase in royalties that this would bring.

Article 6.2 of the Directive allows that Member States may provide for compulsory or optional collective management of the royalty. While all other EU Members States opted for compulsory collective management, the Irish Regulations S.I. 312 make no provision to assist or encourage collective management in Ireland. The EU Commission's *Communication on copyright management*<sup>1</sup> comes to this conclusion: "*Collective management appears also to be the de facto basis for the operation of artists' resale right under Directive 2001/84/EC, even if it is not mandatory.*"

A number of efficiencies could be gained by the drafting of new Primary legislation in this area. The collection of this royalty has proven highly problematic for artists and for IVARO who collects this royalty on behalf of its members. As it stands, artists have to be aware of any of their works which sell over the threshold. They then must seek information on the seller from the art market professional for that specific sale. The art market professional has 90 days in which to respond to this request. The artist, or in many cases IVARO, must then apply to the seller for payment of the royalty. It is a laborious, time-consuming and difficult task, especially for individual artists. The improper transposition of the Directive has resulted in a continuing loss of income for artists. The system must be streamlined by the introduction of compulsory collective management which would include reporting of qualifying sales by art market professionals.

In addition, the Directive includes a mandatory requirement that the Resale Right is administered on a reciprocal basis between all Member States. By failing to introduce compulsory collective management Ireland has not fulfilled its' obligation to "*ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed.*" - Article 28, EU Directive 2001/84/EC.

We ask the review committee to highlight this inconsistency in their report and to examine the merits of our proposed amendments to the Artists Resale Right Regulations by way of primary legislation.

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<sup>1</sup>"The management of Copyright and Related Rights in the Internal market" COM (2004) 261 final