



Response to the Copyright Consultation Paper

Introduction

Copyright law encourages and stimulates the creation of intellectual works by protecting the original output of creators and the efforts of publishers in bringing works to market. Driving the implementation and enforcement of copyright law is the appreciation that the welfare of society and the cultural, social and economic development of a country benefit from the on-going creative efforts of authors, artists and publishers.

Copyright industries contribute about 5% to the national GDP according to a number of studies.¹

ICLA is a collective management organisation, “CMO”, which acts on behalf of authors, artists and publishers in licensing the copying of extracts from publications by photocopying and other reprographic means such as scanning. It was founded in 1992 by the Irish Writers’ Union (IWU) and the Publishers’ Association (Publishing Ireland) on behalf of authors and publishers of books, journals, magazines and other periodicals published in Ireland. It is a not for profit company, limited by guarantee.

Themes of this submission:

- The basic premise that expanding the exceptions to copyright to their maximum will stimulate economic growth is flawed;
- The evidence does not support the case for the changes advocated;
- It is our view that many of the proposals are not possible under EU and International law and treaty obligations;
- The approach of providing exceptions only as a “safety net” where no licensing scheme exists should be supported and extended;
- Individual and collective licensing represents the best solution to access to copyright material, both from an economic and legal perspective.

¹ including “The Contribution of Copyright & Related Rights to the European Economy 2003” by the Turku School of Economics for the European Commission and the DKM report into the value of the Creative Industries in Ireland.

Responses to the Questions contained in the Consultation Paper

Chapter 2 – Copyright & Innovation

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

No, the basic premise of this Consultation Paper is flawed –that economic growth will be stimulated by the maximum possible expansion of the exceptions to copyright. This view appears to be at the expense of the current creative industries operating in Ireland and contributing both to the economy and employment. Fundamentally altering the existing copyright balance could inflict great damage to the established creative industries. This would put current jobs at risk.

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

No comment.

(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 we would welcome a piece of consolidating legislation. There have been a significant number of amendments to CRRA in the past 12 years as well as to legislation relating to other topics such as the Broadcasting Act 2009. Consolidation would make the law more accessible.

(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?

Yes. However we feel that the benefit to society from the on-going creative efforts of authors, artists and publishers has been undervalued. This is particularly noticeable as Ireland places considerable importance and value on the wealth and breadth of its artistic, creative and scientific endeavours.

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

The outcome of the Diplomatic Conference on performers should be taken into account.

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

We are not aware of any evidence that copyright law inhibits innovation. Copyright is designed to protect and incentivise innovation. It is important to remember that “innovation” should not be at the expense of the authors and publishers of copyright material, who are themselves innovators. We would question that a free re-use of someone else’s content is innovation that should be rewarded with an exception. A business model for innovation should include paying for the creative output of other people in the same way that it would include paying for a tangible object such as a server.

Chapter 3 – Copyright Council

There are three recommendations in this chapter – the creation of a Copyright Council, and Irish Digital Copyright Exchange and a Copyright Alternative Dispute Resolution Service. The chapter also looks at the role of the current statutory agency, the Controller of Patents, Designs and Trademarks and considers the possibility of establishing specialist jurisdictions within the District and Circuit Courts.

While we welcome the establishment of a Copyright Council, we feel it should be along the lines of the existing models in the UK, Canada, Australia and New Zealand. All of these models play an advisory role and are rightsholder led. We believe that such a Council can be established with the existing rightsholder organisations and contribute to a number of the tasks outlined in the chapter, ie: best practice, advising the Minister, information and evidence collecting, education. We do not believe that the Press Council model is suitable for the sector as there is no consensus on the homogeneity of interests at play.

It should *not* be the role of a Copyright Council to deal with policy formulation or regulation of copyright licensing bodies. There is a central problem with the lack of clarity as to where the responsibility for policy and implementation currently lies between the Department, the Intellectual Property Unit and the Controller. There is a lack of personnel and expertise which cannot be ignored and would not simply be resolved by the creation of a Copyright Council.

We annex hereto a comparative table of the role of Government Departments, Intellectual Property Offices and Copyright Councils in common law jurisdictions. There are three strands to these roles – policy, implementation and advice. These models have been utilised to good effect and we would recommend further investigation of the different strands before advocating a statutory solution. We also refer to the Addendum to the submission by Publishing Ireland in this regard which goes into further detail.

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

We are in favour of the establishment of a Copyright Council. We also welcome the identification of a number of areas in which the current copyright structure is deficient. However, we do not believe that the governance model proposed in the consultation paper could successfully deliver the role described. We also believe that a number of functions ascribed to the Council in the consultation paper are properly the responsibility of government and should not be allocated to a non-governmental body, in particular one which seeks to represent such diverse interests. We support the proposals in relation to the Copyright Council set out in the submission on behalf of Publishing Ireland. The diverse representation suggested would find it difficult to reach consensus and therefore be unable to accomplish any meaningful objectives.

(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 question 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?

As question 8

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

As question 8

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

As question 8

(12) How should it be funded?

As question 8

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

We are in favour in principle of a Digital Copyright Exchange. However, any such solution should be aligned with and led by developments elsewhere. There is currently a feasibility study being undertaken in the United Kingdom and the European Commission is publishing a directive on Collective Management, which will *inter alia* address the issue of Multi Territory licensing. These two events together with current collaborative projects, such as the ARROW project on orphan work licensing in the EU, of which ICLA is the National Partner for Ireland, need to be considered when looking at an Irish Digital Copyright Exchange.

It is more beneficial for the current Irish collective management organisations to explore how licensing can be expanded and improved locally and how we can offer cross-border licensing through our current bilateral agreements and under the auspices of our international umbrella bodies (eg: CISAC, IFRRO, GESAC, etc).

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

We believe that the provision of a form of Copyright Licensing Authority would promote the development of licensing in Ireland.

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

There should be the provision of a system of alternative dispute resolution and feel that this can be provided easily within the framework of the Office of the Controller of Patents.

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

No further comment

(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 role of the Controller should be expanded to incorporate a specific remit relating to copyright and the Office should be renamed . It is imperative that said office should be sufficiently resourced to carry out their functions effectively.

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

We are not in favour of expanding compulsory licensing other than for the purpose of supplying licences that are not available through the existing voluntary licencing system and which are demonstrably required in the public interest and which are possible under our existing international treaty obligations. We also note the question of statutory licensing is being examined by Baroness Wilcox as part of the current Copyright Consultation in the UK and it would be prudent to await publication of the report which is due at the end of June 2012 before consulting further on this question.

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

It would be appropriate for the Office of the Controller to oversee the provision of an ADR Service and maintain a register of suitably qualified mediators and fees. We feel this would be a simple and cost effective structure to establish.

(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 there should be a small claims jurisdiction in the court system for intellectual property matters. This should be adequately resourced with appropriate expertise. We suggest that the model of a small claims remedy in the UK Patents County Court, a specialist jurisdiction, should be examined.

(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?

We would also be in favour of a specialist jurisdiction in the Circuit Court for all intellectual property matters.

(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?

We believe this question is beyond the scope of this submission.

Chapter 4 – Rights Holders

To understand the value of copyright, it is helpful to look at it from the perspective of the author or visual creator. These are individuals who create and disseminate art, knowledge and culture. They write novels, they paint, they compose music or make films; they may be at the forefront of scientific research creating and sharing knowledge. Talented individuals who have something to say through the expression of ideas. It is that expression, protected by copyright, which contributes to the well-being of society. Scientific, technical and medical authors create knowledge and through the copyright mechanism have the choice to share their knowledge by making it freely available through creative commons licences or submit it to either open access or subscription-only journals.

Creators also have the same responsibilities as everyone else. They have to pay for housing, food, send their children to school, pay taxes. In order to meet these responsibilities they must be entitled to benefit financially from their creative endeavour.

In many cases, creators entrust professional enterprises such as book publishers or record producers to bring their work to market. These companies made significant investment in the dissemination and marketing of works and provide employment. Scientific and technical publishers invest in digital platforms which make knowledge readily available.

Creative works collectively make up our national heritage, an essential part of our identity. As a country, Ireland takes pride in our creators and artists and their success at home and abroad. It shouldn't be forgotten that a nation's cultural heritage attracts visitors and is an important element of our Tourism strategy.

Copyright is a basic right, to receive credit as the author and to receive remuneration for one's work. Copyright is also protected in Article 27(2) of the Universal Declaration of Human Rights.

(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?

We cannot find any evidence of imbalance and contend that the existing balance between rights and exceptions is appropriate.

(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?

We are not aware of any evidence that Irish copyright law discourages 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?

We are unaware of any evidence that copyright law over-compensates rightsholders. However we are concerned by the clear evidence that the digital environment facilitates wholesale copyright infringement with no remuneration to rightsholders. We are also concerned with the situation which has developed which under-compensates rightsholders and forces them to compete with "free".

(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 a definition of the term “original” in legislation. The meaning of the term “authors own intellectual creation” is the subject of developing case law both in the European Court of Justice and in the UK.

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

No comment.

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

Yes, this amendment should undoubtedly be made as soon as possible and should clarify that copyright in works unpublished at the date of death of the author is co-terminus with the copyright in published works – ie 70 years *pma*.

Given that the potential perpetual copyright was an unintended consequence, we would request that this amendment be prioritised. It has a negative impact on academic research and granting permissions for digitisation projects.

However, we do not believe that the proposed text will solve the problem. It is our view that the amendment needs to be made to Section 9 of the Transitional Provisions, otherwise it will continue to override the CRRA and any amendments to the Act.

(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?

We would not be in favour of such an amendment.

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

Change in this regard can only be evaluated and commented upon in relation to a specific proposal.

(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?

We believe they should be confined only to cable operators in the strict sense.

(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?

We submit that the most fundamental copyright problem for all right holders – that of online infringement – has not been sufficiently addressed in the Consultation Paper.

We believe that two things are needed: a thorough legal evaluation of the extent to which the CRRA provides effective remedies for online infringement, followed by a piece of primary legislation to make good such deficits as may be identified. The legislation should provide specific workable

procedures and remedies which take account of the legal rights of stakeholders as well as the fundamental rights of users.

This falls under the remit of the IP Unit of the Department of Jobs, Enterprise and Innovation but we suggest that it is incumbent on the Review Committee to recommend it.

(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?

We would be of the view that certain forms of innovation depend on both technological protection measures and rights management information and it is important, therefore, that they are given robust protection. We are concerned that the existing provisions do not go far enough in outlawing any tampering with TPMs and removal of RMI. Articles 6 and 7 of EUCD specifically require protection of DRMs and TPMs. We also believe that provisions in relation to online infringement are relatively ineffectual and that this situation hinders innovation.

(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 applied to photographs would assist in discouraging infringement and in providing a remedy when it occurs.

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

Yes

(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

(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?

We would submit that the issue of levies is currently being examined by the European Commission following the decision in the *Padawan* case. We also feel that it is necessary to observe the obligation of "*fair compensation*" in relation to private copying.

As we will address further on in this submission, EUCD provides an exhaustive list of exceptions to the exclusive rights of reproduction, communication to the public and making available to the public which Member States can implement in their national laws. Articles 5.2(a) and 5.2(b) state that exceptions and limitations for reprography and private copying may be introduced "*provided that the rightholders receive fair compensation*". Thus the alternatives are either no exception for such uses or an exception with a fair compensation², which is often a levy.

It is worth noting that the levy mechanism is not a tax. It provides payments to remunerate rightholders for certain uses permitted by law under exceptions and limitations and it does not pay

² This is without prejudice to Recital 35 of EUCD which states that "in certain situations where the prejudice is minimal, no obligation for payment may arise".

the State. Piracy, the copying of whole journals or books, or other large scale copying is not legitimised by an exception, nor should it be, being a form of theft.

Levies are a practical way of compensating rightsholders for uncontrolled private copying and would have to be considered should the exceptions and limitations suggested in the Consultation Paper be introduced.

The EUCD³ assessed the issue of whether or not equipment levies distort competition between equipment manufacturers in the Internal Market and concluded that levy systems do not create major barriers to same. There is neither evidence that levies inhibit market development in countries where they operate compared with non-levy countries, nor a correlation between the retail price of a device and the existence or non-existence of a levy on it. No evidence has been put forward to show that this situation has changed. Levies can also be collected easily without further administrative burden on the importers.

As the levy system currently operates in 24 of the EU 27, we suggest that in terms of harmonisation they should apply in all 27 countries.

The European Commission has made a commitment to bring forward a legislative initiative on private copying in 2013. We recommend revisiting the issues of levies when the position of the European Commission is known.

Chapter 5 – Collecting Societies

Our first observation in relation to the chapter on Collecting Societies is that we do not accept the characterisation of licensing schemes and the registration of collecting societies as *“bewilderingly byzantine in practice, beset by opacity and fragmentation, and no little suspicion”*.

Collective management organisations act as intermediaries between copyright holders and users. They manage the licensing of works to users, collect the payments and pass them on to the copyright holders. Through a network of representation agreements with similar organisations in other countries, CMOs offer an international repertory for licensing. The system of collective management provides a real service to both consumers and creators alike. Collective management started in 1777 and has continually developed solutions to create access to copyright works ever since.

We feel that the current trend is for user groups to reach for the nuclear option of further exceptions to copyright in the absence of sufficient consultation with copyright owners. This combines with the current trend for “free” to undermine the economic viability of the creative industries.

ICLA was set up as a joint initiative of authors and publishers in 1992. We have worked hard to ensure that licensing practices are transparent and meet the needs of users. We comply fully with the registration procedures put in place in CRRA 2000 and are full members of the international body of reproduction rights organisations, IFRRO. As such we are also bound by the IFRRO Code of

³ Recital 37

Conduct for Reproduction Rights Organisations⁴. Our reciprocal agreements with sister societies around the world include paper and digital rights and allow for the possibility for cross-border licensing.

We would also point out a Directive on Collective Management is imminent and that changes to the supervision and regulation of collective management in Ireland cannot be discussed in isolation.

(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 believe that the current framework for resolution of issues relating to licensing will become increasingly important and requires careful consideration and consultation.

Current developments within DG Internal Market are also relevant. A proposal for a Directive on Collective Management is due to be published imminently. It will prescribe governance standards and may require some oversight at national level. We suggest that an infrastructure is in place to facilitate compliance with the EU Directive.

(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?

Additional issues relating to copyright licensing in the area of orphan works and whether or not we should adopt extended collective licensing to facilitate mass digitisation projects to preserve our cultural heritage will need to be explored. These questions are currently being explored in the Consultation underway in the UK and we would urge the Review Group to recommend close examination of recommendations arising out of that process. It would be expedient to make use of the work done in a jurisdiction with similar legislative background and user needs and expectations.

Chapter 6 - Intermediaries

(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?

Questions 40 to 44 relate to the immunities contained in the E-Commerce Directive. The Commission has stated⁵ that it does not intend to revisit the directive but rather seek to improve its implementation. These questions are, therefore, academic.

(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 answer to question 40

⁴ <http://www.ifrro.org/node/25>

⁵ A coherent framework for building trust in the Digital Single Market for e-commerce and online services – January 2012

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

See answer to question 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 answer to question 40

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

See answer to question 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 strongly oppose the introduction of a generalised and simplistic provision. The question of whether a link from one site to another constitutes an infringement of copyright or an authorisation of infringement depends entirely on the circumstances of the case. We would strongly oppose any attempt at clarification being used to circumvent the current copyright licensing carried out by ICLA.

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

No. A rightsholder must retain the right to prohibit unauthorised linking to his or her website or specific information on that website.

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

We believe there is no substantial evidence to support this proposal.

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

There is no evidence to support this claim.

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

The position regarding photographs 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?

We believe that in so far as news is concerned, the current fair dealing exception for reporting current events provides a fair framework. This can be supplemented by licences provided by Newspaper Licensing Ireland.

We would contend that the interpretation of the reproduction right in Article 2 EUCD in *Infopaq* prevents the possibility of extending exceptions to facilitate the “marshalling” of content. This form of curation is licensable.

The phrase “and other content” is extremely loose and ought not to be considered.

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

See above.

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

No.

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

See above

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

We believe that emerging business models should take into account the rights of the creator of original content. Licensing models can be developed to meet the needs of intermediaries’ use of copyright content and this should not be dealt with through a broad exception which negates the fundamental rights of the creator.

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

We are opposed to this amendment. The interpretation would be that anything is possible and nothing is excluded which would create uncertainty around an exception which is supposed to provide certainty.

Note: We note that no question was specified in the Consultation Paper relating to the amendment proposed at par 6.2, concerning temporary acts of reproduction. We are opposed to the proposed amendment. We believe that there is no legal case for it. We are also concerned at the broad nature of the proposed amendment and that fact that the proposed S 87(2) is not tied to the conditions at s87(1).

Chapter 7 - Users

We are very concerned that the approach taken in the Consultation Paper – to broaden exceptions to the absolute maximum permitted under European law (and, in our opinion, beyond) demonstrates a casual disregard for the established creative and copyright-dependent industries. Each of the proposed changes should be examined on its own merits, after an assessment of the economic consequences of making the change, the effect on existing business models and the overall impact on the copyright balance.

Ireland is a party to the Berne Convention and accordingly is obliged as a matter of international law to comply with its terms. Article 9(1) provides that authors of literary and artistic works protected by the Convention shall have the sole right of authorising the reproduction of these works “*in any manner or form*”, together with Article 9(2) which provides for permissible exceptions under the so-called Three Step Test, namely that *any exceptions and limitations shall:-*

- i) only apply to certain special cases,*
- ii) which do not conflict with the normal exploitation of the work, and*
- iii) do not unreasonably prejudice the legitimate interest of the rightholder.*

It is clear that any exception which adversely impacts on the sale of the original product infringes the 3 Step Test as it must conflict with a normal exploitation of the work.

ICLA’s licensing activities represent one of the main ways in which rightholders exploit their works. Collective blanket licences are of benefit to both rightholders and users and obviate the need to engage in time consuming and administratively costly individual permissions for vast numbers of permissions per year. This is clearly a situation which is handled more efficiently on behalf of multiple rightholders by a collective management organisation.

Licensing has become more and more the business model of copyright owners. More and more works are now published and/or sold in electronic form where the transaction consists of the grant of a licence as opposed to a sale of a physical product. The licence granted may be individual (ie: directly between the copyright owner and the user) or collectively through a licence issued through a CMO. Thus, it is clear that collective licensing has become a “normal exploitation” of works by copyright owners. Therefore, any exceptions introduced which prevent this form of normal exploitation by the copyright owner are in contravention of EU and international law.

It is particularly important to bear in mind the third strand of the 3 Step Test (unreasonable prejudice to legitimate interest). Where a reproduction does not conflict with a normal exploitation (ie: passes step 2), step 3 ensures that national laws only permit copying on any scale without permission *if* authors are reasonably remunerated. In other EU Member States this is achieved through levy and other mechanisms to ensure equitable remuneration is payable to authors. In the UK and Ireland, voluntary licences offered by CMOs are the only solution to compliance with step 3.

The requirements of the Berne Convention are reinforced in Article 9 of the TRIPS Agreement which requires its members to comply with Articles 1 to 21 (excluding Article 6*bis* on moral rights).

The Berne 3 Step Test has also been incorporated into EU law by means of Article 5.5 of the EUCD and apply to the exceptions and limitations set out in Articles 5.2 and 5.3.

It is ICLA’s view that many of the proposals affecting the various exceptions that are applicable to educational establishments would be of doubtful validity in terms of Ireland’s obligations under EU law and International Treaties and open to challenge on that basis.

Exceptions concerning education:-

The solutions offered by national laws in the member States are not homogeneous. We would recommend that no changes are made to the current exceptions for education without considerable consideration and consultation as to the wording of any such new exception. We would argue that

the wording “*use for the sole purpose for illustration for teaching*” must be narrowly interpreted so as to exclude any use that is not specifically intended for teaching (not every act done within the context of an educational establishment will amount to *teaching*), as exceptions and limitations should be clearly defined and narrow in scope. Following this narrow interpretation, and in line with the corresponding provision in Article 10(2) of the Berne Convention, we seriously doubt that the inclusion of teaching material under the concept of “illustration for teaching” would pass the three step test in Article 5(5) as this would clearly conflict with normal exploitation of the work.

The currently licensing schemes eliminate the necessity for clarification as to what materials can be copied through the blanket licence with limited, defined exclusions.

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

In general we believe that the exceptions already contained within CRRA are adequate to permit fair dealing. There is also no evidence that the current licensing system or exceptions create a barrier to innovation.

(a) reproduction on paper for private use

The proposed amendment is problematic.

In the first place, the exception for reproduction on paper for private use exists in European systems in circumstances in which the use is remunerated by equipment levies. We do not have such levies.

Secondly, the proposed exception appears to *exclude* reprography, the principal object of the EUCD provision.

Thirdly, the conditions attached to the provision are near impossible to interpret – for example, what is meant by making a reproduction on paper in a form different from the form in which the work is embedded? Is the proposal aimed at the making of paper copies of text or visual works in digital format?

Fourthly, there appears to be overlap with the format shifting proposal.

And finally, but of most significance, the proposed exception – while having the appearance of having limits - **would probably be interpreted as a general exception legitimising all private uses.** This would in turn further weaken the copyright structure at a time when all right holders are suffering severely from problems with enforcement. The absence of fair compensation and damage to the voluntary licence currently in place clearly fails steps two and three of the 3 Step Test.

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

We believe that an exception for format-shifting should be confined to legally owned or specifically licensed material and to shifting to a medium which is also owned by the person availing of the exception. The types of works affected should also be specified. There should be appropriate exclusions – for example, rented material should be specifically excluded. The definition of “lawful user” is too broad for this purpose. The *Padawan* case must also be taken into consideration here and avoiding TPMs must not be possible.

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

We have concerns as stated above with the proposed amendment concerning “illustration for education, teaching or scientific research”. There are difficulties with the meaning of “illustration”. Ricketson & Ginsberg⁶ agree that entire chapters taken from books for teaching purposes are not covered by the “illustration for teaching” concept but need to be remunerated on the basis of licensing schemes. We do have considerable difficulty with the general inclusion of “education” in the fair dealing provision.

The retention of the licence over-ride is welcomed and our main objection is on the grounds of clarity.

(d) reproduction for persons with disabilities

We are aware of the concerns that are raised in relation to the current provisions for access to content for the reading disabled. The CRRA does not take into account digital copies and the opportunities and risks that new technologies provide. There are no provisions for personal use. Accessible copies are not readily available and this is particularly important in relation to the provision of educational materials at primary, secondary and tertiary level. There is also no provision for obtaining accessible copies from outside the jurisdiction, “cross-border copies”.

We would contend that many of the problems arising from Section 104 CRRA arise from the fact that the Minister has not designated sufficient bodies for the exception to work easily. There are also ongoing funding difficulties. With any exception, timeliness will be a matter of funding rather than legislation. We note that the current provision does not create a barrier to innovation.

The definition of “disability” would appear to be too broad in the suggested exception. The definition of “reading disabled” must be broad enough to extend to include people with dyslexia (a cognitive rather than visual impairment) but narrow enough to exclude people with an unrelated disability.

We note that the Consultation Paper refers to the UK legislation but omits the CLA Print Disabled Licence which resolves issues of cross-border licensing and facilitates the creation of a central database showing what accessible copies are available from other “designated” bodies, thus obviating the need to re-master an original unnecessarily.

The Paper does not address the issue of providing rightsholders with incentives to make innovative use of new technologies that will enable the making of standard copies accessible. Publishers can build accessibility into EPUB3⁷ for the latest digital reading devices and software.

We feel that it is important that any amendment is in line with international developments, includes licensing and a database of accessible works which would also allow Ireland to participate in the TIGAR⁸ project for cross border availability of accessible works.

⁶ *Ricketson & Ginsburg*, § 13.45, p. 792.

⁷ <http://idpf.org/epub/30/spec/epub30-overview.html>

⁸ <http://www.visionip.org/tigar/en/>

We would recommend that this issue is addressed with some speed and this can be facilitated by amending S104 to permit the Minister to make regulations on this issue. ICLA is happy to engage in stakeholder consultation with the Minister and relevant bodies to arrive at a range of acceptable solutions.

(e) reporting administrative, parliamentary or judicial proceedings

We are concerned by the proposed addition of the term “administrative” in Section 71. The meaning of the term must be made clear. We have no objection to the term being used to cover deliberations by statutory bodies such as the Labour Court or Competition Authority and tribunals of enquiry. However, we would have concerns that this will be interpreted to cover all forms of business administration and therefore further jeopardise the legitimate interest of rightsholders and the ICLA business licence.

(f) religious or official celebrations

We would suggest that any such exception be limited to funerals and weddings, as is proposed in the UK. This exception should specifically exclude artistic works, including photographs. The wording used is too broad and loose.

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

CRRRA already includes permission for the reproduction of an artistic work for the purposes of advertising the sale of that artistic work. Any further dealing with the work requires permission of the rightsholder.

The use of a work for the purpose of advertising an exhibition is currently licensed through IVARO and should not be used to extend to the use of artworks on the internet without permission.

(h) demonstration or repair of equipment, and

We do not see how this is a barrier to innovation.

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

We would submit that concerning the new fair dealing for “caricature, parody, pastiche or similar purpose” that:-

- The exception should be limited to parody;
- It should be restricted to cases in which the purpose is comedy or satire;
- The words “or similar purpose” should be removed. The words “satire, or similar purpose” do not appear in the EUCD.

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

We suggest that the blunt inclusion of “education” in the fair dealing exemption as well as in Sections 92, 229,234, 245 and 329, is too broad, and does not take into consideration the effect on existing licensing schemes, which provide an incentive for authors and publishers to produce educational works. The provision in the EUCD is clearly confined to non-commercial activity. Many enterprises can stretch the description of their services to include some educational element, and could thus come within the protection of the section. This is hardly intended.

The interaction between the inclusion of education in the fair dealing provisions and the additional exception for “illustration for education, teaching and research” in Section 57 is problematic. It is likely that all educational institutions will seek to avail of the fair dealing exemption, maintaining that they are not conducting sufficient copying to prejudice the interests of the right holders, and decline to take licences. The educational licences granted by ICLA will become redundant until such time as a court gives clarity to the exception. Creating a lack of clarity in an exception is hardly the intent.

The proposal clearly over-reaches what is permitted by EUCD where Article 5.2(a) and 5.2(c) are limited to non-commercial uses. We would also reiterate that this means that CRRA references should be limited to “non-commercial research and private study”.

We would remind the CRC of the words of Minister Kitt when introducing S57 CRRA:-

“it is absolutely necessary to impose very strict controls no reprographic copying exceptions, however, worthy their object, because of the power of photocopying to produce large numbers of inexpensive copies to the great prejudice of rights holders’ legitimate interest. It is necessary to remember that reprographic copyright royalties are expenses legitimately incurred by educational establishments. Something similar could be said about electricity bills, expenses for the renewal of furniture and repairs to the fabric of the building.”⁹

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

We feel that should an exception for distance learning be introduced it should be incorporated in Section 57(1) CRRA and remain subject to the licence over-ride in Section 57(3). To do otherwise, would render the reprography provision obsolete.

We also feel that the distance learning provision, in order to remain within the ambit of EUCD, the material would have to be communicated to registered student via a closed system with access controls. This should be specified. Any exception in this regards should be confined to “non-commercial purposes”. It should not cover commercial activity.

There is no question but the proposed exception for utilisation of works available through the internet falls well outside the 3 Step Test. This exception also sends out a clear message to students that everything on the internet is free. This is a flawed perspective and will undoubtedly be a barrier to future innovation.

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

No comment

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

No comment

⁹ 160 Seanad Debates Col 120

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

This proposal encompasses **all** non-competing non-commercial derivatives, of **all** works in **all** media, irrespective of the type of use (other than that it must be non-commercial). We suggest that it is well outside the scope of EUCD.

We would support a new exception (over and above existing exceptions) permitting use of works found on the internet (and which are not subject to a prohibition on use, do not infringe licence terms or circumvent TPM) for non-commercial *recreational* purposes, subject to the same terms as are set out in the draft provision

(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?

We do not feel that the wording of Section 2(10) CRRRA needs to be altered.

Chapter 8 - Entrepreneurs

We would reaffirm the point made at question four, that creators and publishers are innovators and entrepreneurs and we feel that there is insufficient consideration given to the existing creative industries in the framing of this chapter.

(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?

Copyright exists to protect innovation and as such is a driver of innovation.

As to the existing proposal:

- This proposal could not comply with the three-step test. “Innovation” is far too broad a concept to be regarded as a “special case”.
- This is not an exception for a transformative use, but an exemption for a work which is a substantial transformation of the original work. It is not the nature of the use that qualifies it, but whether or not it is substantially different from the original work. If it is substantially different, is it not the case that it cannot be a substantial copy of the original and would therefore not infringe?
- As an exception, it cannot fall within the limits prescribed by the EUCD.
- As drafted it has the problem that the new use can be defeated *after* the investment has been committed to the creation of the new work. This makes it impractical from a user’s perspective.

(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?

It isn’t.

(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?

This is too broad a question.

(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?

There is no way in which this proposal complies with the 3 Step Test, falling at the first requirement of being a special case.

Chapter 9 – Heritage Institutions

We are concerned with the intention to introduce a new definition of heritage institutions for the purposes of Section 59-70 and note that this is not addressed in the questions relating to this chapter.

The proposal is to extend the exceptions in those sections to “educational establishments” and the “Boards and authorities” referred to in Section 198(1) – legal deposit.

We strongly object to this proposal. It would have the effect of broadening further the free educational uses and when combined with the other proposals relating to educational exceptions would undoubtedly lead to the demise of educational licensing.

We have already pointed out that educational licensing has come to represent a normal exploitation of literary works and would contend that this proposal goes well beyond the terms of the 3 Step Test. The damage to the educational publishing industry and the knock on effect to the wider publishing sector cannot be warranted and would certainly be a barrier to innovation.

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

We have no objection to this proposal as long as the limits of Article 5.3(c) EUCD are observed.

(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. This use is subject to licence by IVARO or individual rightsholders.

(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?

We have concerns that this proposal overrides currently licensed activity and the status quo is not a barrier to innovation. Any such provision must observe the limits of Article 5.3(n) EUCD.

(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?

Subject to the confinement of these provisions to designated libraries and archives, we do not object to this proposal

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

We are concerned that the proposed provision is impracticably wide. Some limiting language is required and this provision should be designed in consultation with the National Library of Ireland, Trinity College Library and the rightsholders to create a workable solution to the preservation of our national heritage. We also believe that this is an opportune moment to re-evaluate the nature of the current legal deposit provisions which we would consider are too onerous in quantity.

We refer to the restrictions on use of non-print deposit materials in the UK legislation¹⁰ and recommend that the same are introduced into Irish law. This would maintain the position of Trinity College Library as a UK as well and an Irish deposit library.

(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?

As previously referred to, ICLA is the national partner in the ARROW project which will facilitate the identification of orphan works for the purposes of mass digitization projects and integration in projects such as *Europeanna*.

We would again refer to the fact that there is an imminent directive on Orphan Works due to be published by the European Commission and there are interesting proposals under consideration in the UK. This is not an issue which can be addressed without consultation between the stakeholders involved.

ICLA shares the overall aim of the proposed EU Directive on certain uses of Orphan Works to provide legal certainty for the access to orphan works contained in publicly accessible libraries and other establishments specified in the proposal. ICLA facilitates ease of access to text and image based works that are protected by copyright, while ensuring that the creators are properly remunerated for the use of their works.

Orphan works will be best administered through collective management and licensing. ICLA already has experience of identifying such works. Regulation and establishment of conditions for uses of an orphan work should be as decided by authors and publishers of the categories of works concerned while respecting the right for remuneration.

ARROW is a project of a consortium of European national libraries, publishers and collective management organisations, and a number of national organisations. It is a distributed system for facilitating rights information management in any digitisation programme, scalable to further applications and reduces time¹¹ and costs involved in obtaining rights information and clearance. The establishment of an Orphan Works Register is one of ARROW's specific aims. ARROW Plus aims at refining the ARROW system, increasing the number of countries in which it is used and broadening the types of works for which it is used to include visual material. ICLA is the national partner in this project and participation in the ARROW database will be complete by September 2013.

¹⁰ <http://www.legislation.gov.uk/ukpga/2003/28/contents>

¹¹ <http://pressandpolicy.bl.uk/Press-Releases/Electronic-clearance-of-Orphan-Works-significantly-accelerates-mass-digitisation-524.aspx>

(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.

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

We are of the view that an exception for text and data mining is ill-advised without a very clear view of the potential for these techniques, and the affect they might have on copyright. This is being explored in both the UK and in Canada. We note that the UK Consultation Paper refers to unforeseen risks and the need for further research. We share these concerns. In the UK there is support for the development of an opt-in licensing solution for text and data mining.

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

No comment

Chapter 10 – Fair Use

We note that the Review Committee feels unconvinced by the arguments on both sides. We have already made our submission to the effect that we do not believe that such an exemption would either be of benefit to the Irish copyright system, or indeed can be accommodated within the existing EU regime of exceptions.

We would like to reiterate our view that adopting a “fair use” system would violate Ireland’s obligations to enact copyright legislation in harmony with international treaty obligations and would undermine existing business models.

In relation to questions 76 to 82, we refer you to the Federation of European Publishers (FEP) Paper supplied to you by Publishing Ireland.

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

See FEP Paper

(77) (a) What EU law considerations apply?

As we have already said, we do not believe that “fair use” is permitted within the framework of the 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 EU CD exception for non-consumptive uses or more broadly for a fair use doctrine?

We understand that the European approach has been to attempt to frame all copyright exceptions so as to meet the requirements of the Three Step Test in the primary legislation, providing a greater

degree of certainty than the US doctrine. We, therefore, conclude it would be inappropriate to lobby for a lesser degree of certainty than currently exists.

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

See FEP Paper

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

See FEP Paper

(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?

See FEP Paper

(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?

See FEP Paper

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

See FEP Paper

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

See FEP Paper

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

See FEP Paper

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

As we have already stated, we believe that a consolidated piece of legislation would be beneficial.

(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

(86) What have we missed?

We note that the Review Group did not examine the issue raised by ICLA in our original submission that the current exception for “research and private study” already overreaches the exception permitted in Article 5.3(a) of the Information Society Directive. The comparable exception in the UK Copyright Designs & Patent Act was amended in 2003¹² to bring the legislation into line with the Information Society Directive. This amendment has facilitated the development licences that provide what businesses need while also providing revenue streams to rightsholders for the commercial reuse of content through CLA’s Business Licence. This opportunity has been denied to Irish right holders and we would call on the Review Group to take this anomaly into consideration.

We are surprised that given the comprehensive nature of the Consultation Paper, this issue has not been addressed in any way other than to reiterate the existing *status quo*. We submit that there is no question but that a comparable amendment to the UK provision is needed to bring Irish law into alignment with EUCD. Should the opportunity not be taken to address same, it is likely that the issue will form subject of a contest to the provision.

¹² <http://www.legislation.gov.uk/ukxi/2003/2498/regulation/9/made>

Appendix

	UK	Australia	New Zealand	Canada	US	Ireland
Policy Making	Government Department (BIS) IPO - strong support by extensive research and consultations	Attorney-General Advisory Council on IP	Government Department	Industry Canada Copyright & Intellectual Property Directorate/ Copyright Policy Branch of Department of Canadian Heritage	Library of Congress Copyright Office	Government Department (DJEI)
Copyright Tribunal for licensing disputes	Yes	Yes	Yes	Yes	Yes	No - by the Controller
Copyright Services by IPO	Research Policy support Education and training; Extensive information on website Small business support; Legal practitioner support Mediation facility	Minimal information on website	Minimal information on website	Registrations; information on website	Registrations; extensive information on website Policy support	Minimal information on website Occasional information events
Copyright Council	Self funded	ACC Government funding	NZCC - Funded by members	CIPC - Funded by members		
Role of Copyright Council	Promote Copyright Research Propose policy Education & Training	Promote Copyright Research Propose policy Education & Training Legal Advice Service	Promote Copyright Research Propose policy Education & Training	Lobby for stronger IP		