1. Name (required)

Irish Hotels Federation

2. Postal address (required; will not be disclosed)

3. Email address (required; will not be disclosed)

4. Are your responses confidential?

No

5. Website (if any; will not be disclosed)

6. Of the six categories into which the Paper classified the first round of submissions, which one (if any) best describes you?

user

Representative body of category of users

7. Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?

1.The questions raised by the Committee under Section 7 do not address issues that are specific to the IHF and its membership. However, we consider it appropriate to make submissions under this section in relation to Section 97 of the CRRA, since it is included in the category of permitted acts/clarifications to the rights under the same Chapter 6 of the CRRA. Similar comments apply to the questions raised by the Committee under Section 10.

2 Specifically, the Committee will be aware of the recent decision of the ECJ in PPI –v- Ireland (Case C-162/10) in relation to Article 8(2) of the Rental Directive (2006/115/EC), holding that the provision of TVs and/or radios and/or other apparatus in guest rooms to which broadcast signals may be distributed or from which sound recordings could be played or heard constituted a communication to the public which was subject to the right of equitable remuneration. The ECJ also determined in this case that the "private use" limitation in Article 10(1)(a) of the Directive did not apply in the case of hotel bedrooms. The Committee will also be aware of the similar ECJ decision in relation to authors' rights and Article 3(1) of the EUCD in SGAE –v- Rafael Hoteles (Case C-306/05).

3 However, in a reference decided on the same day as the PPI –v- Ireland case, the ECJ also determined, in what would appear to be a contradictory decision in SCF –v- Marco Del Corso (Case C-135/10), that Article 8(2) of the Rental Directive did not cover the broadcasting, free of charge, of sound recordings within private dental practices (and so by analogy with similar situations) and enjoyed by the patients of those practices without any active choice on their part.

4 The decisions in these cases are clearly contradictory, and the reasoning in each does not align. Guest rooms were found to be places in which a communication to the public could take place (in summary) because:- (a) there was alleged to be some type of intervention by the hotel/guest house to give access to the broadcast or sound recording which the listener would otherwise not have. The suggestion was that the hotel/guest house provided some means to boost the signal, and not just merely that it provided apparatus via which such recordings could be heard. (Even if the latter was

the case, this would appear to go against the reasoning in the Amstrad case, whereby the making available of apparatus by means of which copyright works could be used did not, of itself, constitute copyright infringement.) However, firstly, the decision did not account for a situation in which no such "boost" is given to the broadcast and the TV with normal antenna may be switched on and used by the guest in the confines of their private room. Secondly, the provision of music by the dental surgery, for example by a specially laid sound system or even via an ordinary radio was not regarded as giving rise to a right under Article 8(2); (b) the audience for the work in the hotel/guest bedroom was considered to be an indeterminate number of successive users, meaning that no one user could be treated in isolation. However, similar principles apply to successive patients in a dental surgery or similar premises; and (c) the communication in the hotel/guest bedroom was deemed to be of a profit-making nature and was an additional service provided to customers which influenced the hotel's or guest house's standing and the price of its rooms. However, this is not the case. The provision of TVs and radios, rather, is considered to be part of the basic or minimum service provided by hotels and guest houses to their guests, similar to showers or air conditioning. Further, similar arguments can be made in relation to the dental surgery: the patient is charged for a service, part of which is a relaxed ambiance created by the music played in the surgery. It is an indirect part of the service which makes the overall service economically attractive.

5 There are a number of other reasons, including privacy rights of guests staying in hotels and guesthouses which serve to make the space of the guest room a private rather than public space, why the guest room should rightly be considered and legally clarified as a private space such that any use of copyright works in that space (howsoever they are made available) should not be made the subject of a royalty payment by the provider of the premises

6 Given the anomalies between the decisions in the PPI –v- Ireland, SGAE and SCF –v- Marco Del Corso cases, and given the significant additional burden of royalties that is likely to be pushed onto hotels and guest houses in light of the PPI litigation which the industry simply cannot afford, we submit and respectfully request that the Committee recommend that the Irish Government lobby at EU level for changes to the EUCD and to the Rental Directive for clarification that the likes of the hotel and guest bedroom is a private space and uses of copyright works in that space are not subject to control by the copyright owner or to the payment of a royalty. We do not consider that such a clarification would offend the three-fold test in relation to the operation of copyright exemptions, since it would merely be a clarification of where the public/private line is to be drawn in such a situation, and it could be justified based on the rights to privacy now contained in the TFEU and in the EU Charter of Fundamental Rights.

7 Further, we note that under Section 10, the Committee raises questions in relation to possible lobbying at EU level that could be undertaken by the Irish Government in relation to a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine. Equally, the IHF requests that the Committee considers a recommendation that the Government lobby for a clarification at EU level that the hotel / guesthouse bedroom or similar space is treated as a private area within the hotel / guesthouse, etc. as set out above.

8. Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD? [Note: CRRA is the Copyright and Related Rights Act, 2000; and EUCD is the European Union Copyright Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society)].

5

9. 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

10. 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

13. Should a Copyright Council of Ireland (Council) be established?

The IHF's view on this is no, on the basis, respectfully, that such a Council is only likely to add to copyright users' costs and serve as a talking shop on issues when money could be better spent elsewhere, e.g. on a more affordable dispute resolution procedure for royalty disputes.

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

Leaving aside its views on the Council itself, the IHF is of the view that any forum which might allow for an easy one-stop shop for users of copyright and that serves to reduce licensing costs for copyright users is welcome. Equally, it would be useful for collecting societies to compete with each other on a pan-European basis to licence the use of copyright works in individual member states in order to bid down licence fees. It is not clear whether an Exchange could achieve this goal.

20. What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?

Taking the issues as they exist currently, and apart from improving access to affordable and effective dispute resolution procedures (see responses below), it would be useful if the CRRA secondary legislation made provision for a better searchable database of information on licensing bodies. At the moment, the Patents Office is simply uploading to its website full pdf copies of all documents lodged with it by licensing bodies. It would be far easier and more transparent for users if basic information in relation to the licensing body, its tariff structures and tariffs was uploaded to a searchable database, similar to the type of searchable information that is available in relation to Community Trade Marks on the Community Trade Marks Office database. The Patents Office could also provide links to the actual licence agreements and tariff structures on offer by the licensing bodies.

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

Again, leaving aside the IHF's views on the establishment of a Council, the IHF considers that it would be worthwhile to have a relatively inexpensive, accessible and

quick ADR Service, in particular for the resolution of disputes in relation to licence fees / royalty payments.

22. How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

The IHF is of the view that a good deal of the architecture, including time limits and (where possible) costs of the ADR Service, should be legislatively prescribed, otherwise there is a danger that the ADR Service will not work effectively. Consideration might be given, as part of the ADR Service, to the establishment of a panel of experts from which the decision-maker will be chosen absent agreement by the parties on the decision-maker, and that the qualifications for membership of this panel (in terms of expertise and experience in copyright matters, with a range of legal and economic disciplines) be in some part prescribed. There should also be a non-inclusive range of considerations prescribed in relation to the assessment of what is a fair licence fee. At the moment, the considerations are that the royalty payment is fair and equitable, including by reference to similar payments, but these criteria are not objective enough and very little specific weight is given to the considerations of users and the costs to users, particularly in these difficult economic circumstances. For example, there has been no suggestion by rights-holders or their collecting societies that royalties would be reduced in the recession, even though most other service providers have been forced to reduce their costs to compete in this economy. One factor in assessing the fairness of a royalty fee should be general economic circumstances and reductions in the costs of goods or services generally in the market.

23. 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?

Yes, the IHF is of the view that the Controller's office might be renamed to something like the Intellectual Property Office, since the current title is too long and tends to get abbreviated to "Patents Office" thereby causing confusion to those who are accessing the trade mark, design and/or copyright services of the Office.

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

Yes. Currently, authors' rights-holders can demand payment of their proposed licensing fees even in the face of disagreement about that fee, and if the fee is not paid, they can injunct the use of the copyright work. They generally tend to exercise these rights through collecting societies, thereby giving them double the bargaining power (i.e. the absolute right to authorise or prohibit, coupled with exercising that right through a collecting society). Often, a user will be highly reluctant to engage in the time and cost of disputing the proposed licence fee. It would create a greater balance in the bargaining power between the user and the rights-holder if the remit of the statutory licence under Section 38 was expanded to include any and all copyright works which are administered through a collecting society (the rights-holder having clearly made a decision in such circumstances that their works are available for commercial licence).

25. Furthermore, what should the inter-relationship between the Controller and the ADR Service be?

This is difficult to comment upon. The IHF would want to see a more effective dispute resolution procedure than that which exists at the moment, where the

Controller will effectively refer the dispute to arbitration, which is in many cases as costly and time-consuming as High Court proceedings. The IHF does not have a strong view on the inter-relationship between the Controller and the ADR Service as long as the ADR Service is effective, cost-efficient, fast and accessible (as above).

26. 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?

No, the IHF is not necessarily convinced that it would be appropriate to provide the District Court with jurisdiction to deal with intellectual property small claims. The IHF considers that it would be difficult, given resources, to appoint District Court judges who have the necessary expertise and experience of intellectual property matters, and who could devote the requisite amount of time to intellectual property disputes on top of their other, more diverse workloads.

27. 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?

Yes, the IHF considers that it would be useful to provide the Circuit Court with a specialist copyright jurisdiction, in particular for statutory appeals from any ADR Service. Again, it would be important that the judges have the necessary expertise and experience in copyright law and/or are given appropriate training in this regard. In terms of structure, a similar structure to that which has been put in place in relation to, e.g. appeals from determinations of / notices issued by the Data Protection Commissioner could be considered, which is really just a simple section in the legislation prescribing the jurisdiction of the Circuit Court to hear such appeals, and that the appeal takes the form of a statutory appeal. It would also need to be prescribed that the Circuit Court has unlimited jurisdiction in relation to such appeals (as often the amount at stake may be greater in value than the ordinary jurisdiction of the Circuit Court).

28. 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?

The two main issues are probably costs and timing. Users would need some comfort that their costs would be kept low and that they can access the Court quickly

93. Do you have any further comments on the Consultation Paper?

1 The Irish Hotels Federation (IHF) welcomes this opportunity to provide submissions on the Copyright Review Committee's Consultation Paper on Copyright and Innovation. Irish hotels and guesthouses are of course primarily users of copyright works, and the hotel industry has featured prominently in certain disputes that have arisen in relation to the use of copyright works in Ireland in recent years, most notably in relation to the reduction of fees payable to PPI for the public performance of sound recordings in nightclubs (including those attached to hotels); and in the recent cases involving whether Section 97 of the CRRA may be retained or whether the provision of TV sets and similar music-playing apparatus constitutes public communication of copyright works such that royalties are payable to IMRO and PPI. This latter subject remains a very important one for the hotel industry, as any repeal of Section 97 would have a highly detrimental effect on hotel industry costs. The decision in the PPI (coupled with that in the SGAE case – see below) results in

additional layers of costs being imposed on hotels and guesthouses at a time when many premises are struggling to survive.

2 Further, as a user of copyright works and/or as an entity which enables the consumption of copyright works by guests, hotels and guesthouses are primarily interested in keeping their copyright costs as low as possible and in ensuring the most efficient and streamlined access to works. In the latter case, this means being able to source any required copyright licence or pay any required copyright fee to one single licensor, if possible, and for there to be competition between collecting societies in relation to the licensing of works to hotel users.

3 In light of the above matters of interest, this submission deals primarily with three sections of the Consultation Paper and related questions raised: Section 3 relating to the Copyright Council of Ireland and similar proposals; Section 7 dealing with Users; and Section 10 dealing with Fair Use.

4 For reasons of the importance to the IHF and its membership of Section 98 of the CRRA, this submission deals firstly with Sections 7 and 10 of the Consultation Paper in that specific context. We deal with these two Sections together. Sections 3 and 7

5 The questions raised by the Committee under Section 7 do not address issues that are specific to the IHF and its membership. However, we consider it appropriate to make submissions under this section in relation to Section 97 of the CRRA, since it is included in the category of permitted acts/clarifications to the rights under the same Chapter 6 of the CRRA. Similar comments apply to the questions raised by the Committee under Section 10.

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recording which the listener would otherwise not have. The suggestion was that the hotel/guest house provided some means to boost the signal, and not just merely that it provided apparatus via which such recordings could be heard. (Even if the latter was the case, this would appear to go against the reasoning in the Amstrad case, whereby the making available of apparatus by means of which copyright works could be used did not, of itself, constitute copyright infringement.) However, firstly, the decision did not account for a situation in which no such "boost" is given to the broadcast and the TV with normal antenna may be switched on and used by the guest in the confines of their private room. Secondly, the provision of music by the dental surgery, for example by a specially laid sound system or even via an ordinary radio was not regarded as giving rise to a right under Article 8(2); (b) the audience for the work in the hotel/guest bedroom was considered to be an indeterminate number of successive users, meaning that no one user could be treated in isolation. However, similar principles apply to successive patients in a dental surgery or similar premises; and (c) the communication in the hotel/guest bedroom was deemed to be of a profit-making nature and was an additional service provided to customers which influenced the hotel's or guest house's standing and the price of its rooms. However, this is not the case. The provision of TVs and radios, rather, is considered to be part of the basic or minimum service provided by hotels and guest houses to their guests, similar to showers or air conditioning. Further, similar arguments can be made in relation to the dental surgery: the patient is charged for a service, part of which is a relaxed ambiance created by the music played in the surgery. It is an indirect part of the service which makes the overall service economically attractive.

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recommendation that the Government lobby for a clarification at EU level that the hotel / guesthouse bedroom or similar space is treated as a private area within the hotel / guesthouse, etc. as set out above.