

**SUBMISSION IN REPLY TO THE COPYRIGHT AND  
INNOVATION CONSULTATION PAPER**

**IRISH RECORDED MUSIC ASSOCIATION**

AND

**PHONOGRAPHIC PERFORMANCE IRELAND**

## **SUBMISSION IN REPLY TO THE COPYRIGHT AND INNOVATION CONSULTATION PAPER**

This submission is being presented by the Irish Recorded Music Association Limited (IRMA) and by Phonographic Performance Ireland Limited (PPI). IRMA represents the interest of Irish record companies. PPI is a collecting society for the recorded music industry and performers.

This submission follows the individual paragraphs in the consultation paper and comments on the issues of interest or concern raised in each paragraph as in some circumstances the issues in these paragraphs do not appear in the questions and this format allows us to give a more comprehensive overview of our views and the reasons for them, before answering the questions raised briefly at the end of each chapter.

### **Part 1 Background**

IRMA indicated its concerns about the manner in which this review is being undertaken in its first submission. IRMA reiterates here that the overriding statement that “*There is a perception in certain industries that national copyright legislation does not cater well for the digital environment and actually creates barriers to innovation and the development of new business models*” indicates that the premise of the review is that there is something wrong with copyright protection as it stands and that in order for technological innovators to flourish, the rights of creators of original content must necessarily be diluted. There is an absence of regard for the benefits to the economy of copyright and both IRMA and PPI submit that it would be misguided to reduce copyright protection in order to foster innovation without objective and independent proof that this would be conducive to innovation or provide a net benefit to the economy.

As a consequence of this the Irish copyright industries commissioned a study from DKM Economic Consultants, to establish the economic importance of copyright to the Irish economy. It examines the contribution of copyright based industries to the Irish economy and considers the economic implications for those industries of further liberalisation of the copyright laws. The industries which are the subject of this study, based upon the WIPO classification are (1) Press and Literature (2) Music, Theatrical Production, Operas, (3) Motion

Picture and Video (4) Radio and Television (5) Photography (6) Software and Databases (7) Visual and Graphic Arts (8) Advertising Agencies (9) Copyright Collection Societies, being the creative industries in the Irish economy which are dependent on copyright. As stated by DKM in the executive summary **It is the very existence of copyright protection which allows these industries and activities to develop a continuous stream of new creative content, grow and innovate, in the knowledge that they are properly rewarded for their creative efforts.** Copyright provides them with the impetus to continue to invest in their businesses, thus creating economic value and economic activity including jobs, and taxation revenues.

The study finds that the core copyright industries in 2011 comprised 8,600 enterprises with 46,300 full-time equivalent persons employed (70,400 persons engaged), a turnover of €18.85 billion and gross value added (GVA) of **€4.6 billion**. The latter, which represents **the direct economic contribution, is equivalent to 2.93% of GDP**. This value is heavily dependent on copyright protection.

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

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

| <b>Economic Contribution of Copyright Based Industries in Ireland</b> |              |              |                    |
|---|--------------|--------------|--------------------|
|   | <b>GNP</b>   | <b>GDP</b>   | <b>Employment</b>  |
| Direct Copyright Contribution (share)                                 | 3.71%        | 2.93%        | 2.56%              |
| Indirect Copyright Contribution (share)                               | <u>5.58%</u> | <u>4.42%</u> | <u>3.87%</u>       |
| <b>Total Direct and Indirect Copyright Contribution (share)</b>       | <b>9.29%</b> | <b>7.35%</b> | <b>6.43%</b>       |
| Induced Copyright Contribution (share)                                | 5.01%        | 3.97%        | 3.47% <sup>1</sup> |

<sup>1</sup> Source: DKM analysis based on CSO

The Consultants state that if copyright is further liberalised there will be adverse economic consequences for the copyright based industries which have been prioritised for national job creation in the next phase of Ireland's economic recovery. Any dilution of the current legislation would significantly undermine and diminish the current value added (€11.5 billion) of the copyright industries, thus damaging employment prospects in the sector and recommended that any legislative change in an Irish context should be fully assessed in terms of costs and benefits, recognising that the benefits could be lower and/or the costs higher than under the status quo. Otherwise the status quo should remain until a convincing case for change can be made.

The Committee's broad focus on economic and technological aspects of entrepreneurship and innovation is to be cautiously welcomed as far as it goes, but without more it is too limited a premise from which to begin a comprehensive review of Irish copyright law, since it is only one of many important aspects of copyright policy. The Committee's broad focus should also include other important aspects, including whether copyright protection is adequate and effective to guarantee the availability of satisfactory returns on the investment required to produce copyright products, to name but one.

No evidence is presented in the Consultation Paper in support of the proposition that copyright may be a barrier to innovation. Indeed it is difficult to imagine that innovative technology companies such as Microsoft, Intel, Dell, Google, eBay, Facebook, HP, SAP, Siemens, EMC, Cisco and Paypal, would have located substantial operations in Ireland if they had considered Irish copyright law to be a barrier to any material degree. The Committee should rigorously scrutinise the evidence base before making any recommendations, otherwise there is a significant risk that the recommendations that flow from the review could damage rather than strengthen innovation and growth.

Nevertheless, the Committee's review seems to proceed on the basis that changes in copyright law have the potential to substantially boost innovation and growth. Copyright law, and the wider IP framework, is of course just one factor among many affecting innovation and growth. But issues relating to innovation and growth in technological and business development are varied and complex, and may be due not only to copyright law but also to other factors such as access to investment capital, attitudes to risk-taking, the nature of the labour market, the tax

regime, the political environment, and other factors. In IRMA's view it is unlikely that changes in the copyright framework would boost innovation to a material extent as suggested in the premise of the Review.

In the music sector copyright has not been a barrier to innovation. The music sector has undergone tremendous change over the past few years, and music companies including IRMA's members have been at the forefront of enabling new business models and responding to the needs of new online services and user demand. Consumers today have access to a greater variety of music in different formats and price points (including free) than ever before. Online licensing in the music sector far exceeds that of any other content industry.

However the single biggest factor limiting the growth of licensed music services is piracy – the easy availability of unlicensed free digital music. This has the effect of substantially eroding the return on investment available to both record companies and digital music services. Growth and innovation would be stimulated if more action were taken to reduce the competition digital music services face from online piracy.

Another aspect that the Committee should consider is that the dominance of certain technology platforms, and their role in making possible illegal uses of copyright content, may itself be stifling growth and innovation. Powerful players such as Google and Apple have developed platforms which have become dominant in key markets. For example, Google's dominance in search, and Google's and Apple's dominance in the app store space may materially reduce the ability of smaller competing companies to grow their businesses. Furthermore, Google through its presentation and prioritisation of unlicensed music services in search results plays a significant role in directing internet users to illegal sites and services in preference to licensed services, distorting the market for content and holding back the growth of legal digital search results. The Committee should carefully examine the evidence as to whether the dominance of these players and the role of search engines in facilitating unauthorized uses may be a barrier to innovation in the content creation, technology or other sectors.

## **Part 2 The Intersection of Innovation and Copyright in the Submissions**

The consultation document at paragraph 2.2 states *“the established film, music and news industries have struggled to find successful business modes in the face of widespread*

*infringement of the copyright in their content”* the document then goes on to state “*as digital content delivery and online payment mechanisms become easier, safer and more robust and they are likely to become increasingly widespread. If so, successful digital content business modes would burgeon, **and there would be greater levels of copyright compliance.***” {emphasis added}. It is indeed true that film, music and news industries have suffered from widespread internet piracy. However these statements misunderstand not only the core function of the music industry, but also the state of development of the digital music market. The primary role of the record company is in identifying, investing in and promoting musical talent, rather than the creation of music distribution platforms. However, record companies have been very active in licensing a wide range of new business models for the distribution of recorded music on internet and mobile platforms. A list of twenty licensed services operating in Ireland under a range of business models (including services that are free to the consumer) can be found below. The idea asserted by some critics of the music industry that continuing widespread piracy (which continues to be the major factor inhibiting further growth and innovation in the legitimate market) is due largely to the absence or insufficiency of a compelling legal alternative to unlicensed services is neither plausible nor supported by any substantial evidence. Nor has there been any evidence whatsoever given, for the belief apparently held by the Committee that those individuals accustomed to using the internet to take copyright material anonymously for free from unlicensed services, would alter their behavior by using licensed services (whether free or paid), merely because it became safer and easier to do so, in the absence of some effective sanction. There are already many safe and easy to use legal services..

The paper goes on to state that “*A well balanced copyright regime attuned to the process and benefits of innovation would reward novelty without deterring further enhancement*”. Whilst this statement is self evident, it is impliedly making the case that the present copyright law is not “*well balanced*”. This may be a claim that is made by those who seek to alter the balance that currently exists by diluting the rights of creators and those who invest in creative content, however it is in IRMA/PPI’s respectful submission the wrong starting place.

This is not the first time that the issue of copyright and innovation has been considered in a legislative context. In the early part of the last century phonogram producers and broadcasting organizations were regarded as innovators and entrepreneurs and in 1961 the Rome Convention was enacted to give them protection whilst at the same time stating specifically that

the “*Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works*”. We point this out to remind the Committee that it is possible to assist innovators without damaging the protection afforded by copyright.

The Paper states at paragraph 2.3 “*If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation*” The Committee’s terms of reference expressly involve an examination of US Style “fair use” to see if it can be incorporated into Irish Law. The fact is however that the scope of the “fair use” doctrine, which some assert offers greater flexibility (and hence better supports innovation) than a list of permitted uses which is the current approach of Irish law, is unclear and gives rise to widespread misunderstanding as is evidenced by the extensive and very costly litigation in this area in the US. The extensive body of case law which interprets fair use does not appear to have resulted in any greater certainty about its scope, given the number of US legal actions involving fair use. The Irish Copyright and Related Rights Act 2000 contains specific detailed exceptions for fair dealing under Sections 50, 51 and 52. In order to enjoy the benefits of a fair dealing exemption, the use must be for one of the following specified uses: research or private study; criticism or review; or reporting current events. In the case of the latter two, there must be sufficient acknowledgement. In addition the use must be “for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”. If a use is not a fair dealing or covered by a specific exemption set out in Chapter 6 of the Copyright and Related Rights Act 2000 then the creator is entitled to remuneration. This approach provides a reasonable balance between certainty and flexibility and there has been negligible litigation in this area in Ireland, suggesting that the current regime is not a substantial barrier to innovation in Ireland. The Committee should carefully consider the risk of increasing the burden of litigation on Irish businesses, and whether there is any compelling evidence that introducing a fair use exception would increase innovation in Ireland.

### **Innovation in the digital music sector**

The recorded music industry has been a digital pioneer for the creative sector in the last decade. Today, record companies globally derive 32 per cent of their revenues from digital

channels, a proportion that eclipses the newspaper (5%), book (4%) and film (1%) industries combined.<sup>2</sup>

Major and independent record companies worldwide have championed new business models by licensing an estimated 20 million tracks and more than 500 diverse digital music services. This has led to the development of a global digital music sector with a trade value to record companies of more than €4 billion last year.<sup>3</sup>

In Ireland alone, there are at least 20 licensed digital music outlets, including download stores, subscription offerings, video streaming sites and a music service bundled with a broadband package. These various services generated 34 per cent of the recording industry's trade revenue in Ireland last year, or more than €14 million.

Revenue generated through these licensed digital channels is reinvested by record companies in discovering, nurturing and promoting artists. It is estimated that launching a new pop artist in a major market can cost up to €800,000 (US\$1M). This figure includes the payment of an advance to an artist, recording and video production costs, tour support and promotional costs. Investing in artists is a high-risk business, with only a minority of campaigns proving commercially successful.

Digital music consumption has become more varied in recent years as the market has evolved. The increasing penetration of smartphones and tablets has increased the demand for music, while new access-driven streaming services have supplemented the more traditional download stores. Record companies have transformed their business models to meet consumer demand.

Download stores, such as iTunes and 7Digital, enable consumers to buy digital albums or tracks. Some commentators believed that digital channels would eliminate demand for the album, but sales figures have confounded this assumption. Today, almost a third of albums bought in the US (31%), the world's largest recorded music market, are purchased digitally.<sup>4</sup> In Ireland, digital album sales account for 34 per cent of the industry's digital trade revenues.

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<sup>2</sup> (PWC *Global Entertainment and Media Outlook*)

<sup>3</sup> (IFPI)

<sup>4</sup> (Soundscan)



The development of new “cloud” technology has boosted the functionality of download stores. It enables consumers to store their digital music collections on remote servers and access them from a range of devices that they own. One of the first fully licensed “cloud” service is iTunes Match, which has been rolled out in more than 40 countries worldwide, including Ireland, in the last 12 months.

Subscription services, such as Deezer, offer consumers the opportunity to access huge online music collections for a monthly fee. Deezer opened for business in Ireland in December 2011, offering unlimited streaming access to its catalogue of more than 16 million tracks for €9.99 per month. Subscription services are expanding rapidly worldwide. In 2011, the number of consumers accessing such services globally increased by nearly 65 per cent to more than 13 million people. Subscription services accounted for 10 per cent of the record companies’ trade revenue from digital channels in Ireland in 2011, a higher proportion than the UK (8%) and Germany (5%)<sup>5</sup>

Subscription services have brought huge benefits for consumer choice. They often operate on a “freemium” business model, aimed at offering consumers a “free” service supported by advertising, with the possibility of upgrading to to a “premium” paid-for service that offers enhanced functionality and benefits such as the opportunity to enjoy music access without advertising and on portable devices.

Broadband and phone companies around the world are increasingly offering access to music as part of a bundled tariff to customers. Such technology companies offer music services as part of their strategy to attract and retain customers, while record labels find them attractive partners because of their sizable customer bases and regular billing arrangements. In Ireland, Eircom has launched MusicHub, which offers free streaming to existing broadband customers, or a package of unlimited streaming and a set number of downloads for €5.99 or €12.99 per month.

Video streaming services, such as VEVO and YouTube, are proving hugely successful with consumers. The most popular music videos have been watched hundreds of millions of times.

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<sup>5</sup> (IFPI)

VEVO reports that in the six countries it operates in, including Ireland, it streams an estimated 3.6 billion videos per month to more than 415 million users. The services are free for consumers to use, with revenues supported by advertising, placed to reach the huge audiences generated by such services.

Many services choose to launch first within a number of the more major music markets for obvious commercial reasons, expanding into smaller markets at a later stage in their development, and as a result there are some major international digital download stores and subscription services that are not yet available in Ireland. However the return on investment in smaller markets can be a material concern for services as the commercial justification for launching services in economically marginal markets can be undermined by online piracy.

The lively and diverse existing Irish digital music market demonstrates that existing copyright law is not an impediment to the establishment of a variety of licensed services or innovation in the online music sector. Record companies have licensed different types of service to operate in Ireland in recent years and remain committed to working with all kinds of viable business partners to ensure the music they release can be enjoyed by the widest possible audience.

### **Licensed Digital Music Services available in Ireland**

7digital, ArtistXite, Bleep.com, CD World, Deezer, Eircom MusicHub, eMusic, Golden Discs, iTunes Ireland, Last.fm, Meteor Music Store, Music Unlimited, MUZU.TV, MySpace, Nokia Music, rara.com, Vodafone Music, We7, VEVO, YouTube

### **List of Questions from Chapter 2**

|   | <b>Question</b>  | <b>Comment</b>   |
|---|--|--|
| 1 | Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review? | <b>In the submission of PPI &amp; IRMA it starts from the wrong premise i.e. that there is something wrong with copyright.</b> |
| 2 | Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?                                  | <b>PPI / IRMA think that as is the case with other laws, the specific rules laid down in statutory</b>                         |

|   | <b>Question</b>  | <b>Comment</b>  |
|---|--|---|
|   |  | <p><b>provisions are supplemented with a body of case law in which those rules have been interpreted and applied as new fact situations arise, including the case law of the European Court of Justice. We are willing to consider specific issues where there is a perceived lack of clarity in Irish copyright law, however the basic principles of Irish copyright law as set out in CRRA and EUCD are sufficiently clear, and are not the subject of widespread misunderstanding about their scope.</b></p> |
| 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?   | <p><b>It would make a lot of sense and would assist clarity (2 above)</b></p>   |
| 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? | <p><b>No Opinion</b></p>  |
| 5 | In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?   | <p><b>No Opinion</b></p>  |
| 6 | What is the proper balance to be struck Between the categories from the perspective of encouraging innovation?   | <p><b>The proper balance is one in which innovators and rightholders are able to freely negotiate market-based solutions that afford each party a</b></p>   |

|  | Question | Comment   |
|--|----------|---|
|  |          | <p><b>commercial share of the value that is jointly created, and that provides effective enforcement mechanisms to address the widespread infringement that is the single biggest barrier to innovation in the copyright based creative industries.</b></p> |

### **Part 3 The Copyright Council of Ireland**

PPI / IRMA agree that there should be a better clearer and more defined administrative structure for copyright in Ireland. The present situation is not ideal, the Intellectual Property Department and the Office of the Controller of Patents Designs and Trademarks are under resourced and inappropriately interdependent, access to the Courts is in many cases prohibitively expensive and there is an absence of any body providing for the representation of copyright and the copyright industries generally, the education of the public as to the nature extent and necessity for copyright, or the development and oversight of such matters as standards of best practice / codes of conduct / fair model contracts in the copyright industries generally. A Copyright Council, which PPI / IRMA would welcome, could fill in many of these gaps and should fit within a structure containing the separate elements of the IP Department of the Government, the office of the Controller of Patents Designs and Trademarks, and the Courts. Each of these separate elements has different roles and should have different competencies appropriate to their roles. Accordingly the IP department/ Minister should be responsible for Government policy on copyright, the Controller should be responsible for administration of licensing, licensing bodies, dispute resolution between users and licensing bodies including alternative dispute resolution such as arbitration and mediation. The Courts should continue to be the venue of last resort for disputes and the Copyright Council should represent the copyright industries generally and copyright as a concept and could act, in addition, as a consultative body and a resource for the IP department. PPI/IRMA does not think it would be desirable or realistic for the Copyright Council to perform many of the functions suggested in the consultation paper.

The Copyright Council should follow established and working models such as exist in the UK, Australia, New Zealand and Canada. It should represent, as in all international examples, **only** rights owners (including collecting societies) but also including innovators that are rights owners and it should be statutorily recognised by the Government. If participation in the Copyright Council were extended beyond rights holders to, as the paper suggests, representatives from the public interest and copyright users it would make the Council unworkable. There is indeed a necessity for the public interest and users to be represented in the structure but this is and should be done at the level of the IP Department (public policy), Controllers office (oversight of licensing bodies and disputes of copyright users with licensing bodies) and the Courts (Small claims court).

The board structure of the Copyright Council should be decided upon by the members of the Copyright Council itself.

The IP Department, presently depleted, should have dedicated specialist copyright staff and it should be independent of the Controllers office.

The Controllers office should be independent of the IP department and should also have specialist and dedicated copyright staff with appropriate resources.

The Courts should continue with their normal role. It has been suggested that a specialist Circuit Court should be developed to deal with Copyright matters. In the view of PPI / IRMA this is not the complete answer. Some disputes are by their very nature appropriate for the specialist procedures, time limits and experience of the Commercial Court. In other cases parties simply cannot afford the legal expenses involved in even the Circuit Court, which in matters of technical legal difficulty such as copyright are often only marginally less expensive than the High Court. It would be beneficial if a genuinely cheap copyright jurisdiction was added into the remit of the small claims court. There for instance, without the necessity for retaining a solicitor, individuals affected by for instance a graduated response protocol being operated by an Internet Service Provider to protect copyright on the internet could complain in the event that they felt that they had been unfairly treated. Statistics show that only 0.02% of copyright infringers ever get to the stage of disconnection accordingly that particular addition to the functions of the Small Claims Court would be a small burden on that Court.

Within this structure the following functions should be allocated:

1. The IP Department / Minister should:-
  - 1.1 Formulate Government policy on copyright issues generally including for instance a policy on the publication of royalty rates <sup>6</sup>a policy on windfall Income<sup>7</sup>, and orphan works.
  - 1.2 Initiate research and consultation with interested parties, international bodies (EU Commission, EU parliament, WIPO, etc) to enable Government develop policy on all copyright issues
2. The Controller of Patents Designs & Trademarks should:-
  - 2.1 Continue to operate functions relating to the oversight of copyright licensing, licensing bodies, schemes and royalty payments. In the submission of PPI the present system works well in practice. Disputes may be decided by the Controller himself, and the Controller is inclined to do so when the dispute is small and particularly when it involves an individual user member of the public. If however the dispute is large and/or particularly complex and/or is between organisations representing rights holders and users then it is possible for an arbitrator to be appointed. The arbitrators' fees and venue costs in these circumstances are all discharged by the parties to the dispute thus lessening the burden on the Controllers office. A full statutory appeal is in fact available (as opposed to a judicial review), in these circumstances as long as the parties to the dispute agree upon the "identity" of the arbitrator only. <sup>8</sup>Indeed this function has been used by PPI.
  - 2.2 Administer all dispute resolution mechanisms. This should include the mechanisms already operated and could include alternative dispute resolution mechanisms including a mediation system. Such a system should operate under the auspices of the Controllers office so as to be seen as independent but could operate independently using standard mediation clauses and procedures and could be self financing. All the Controllers office would need to do is provide an approved list of mediators and set fees agreed with the mediators in advance. The paper however suggests that there should be a "*quick fair and free*" alternative dispute resolution service available – it

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<sup>6</sup> (para 3.7)

<sup>7</sup> (Para 3.8)

<sup>8</sup> S(367)(5) CRRA.

would appear to IRMA/PPI that if it is to be free then the only way that this can be done is for the Controllers office to employ mediators.

3. The following functions should reside with the Courts:-

3.1 Dispute resolution not undertaken by the Controller. A specialist copyright jurisdiction would be beneficial in the lower courts, with judges of sufficient expertise and ongoing training but not at the expense of removing the jurisdiction from the higher courts in matters of serious commercial importance. The most valuable addition would be a jurisdiction in the small claims court where individuals could have access without the cost of a solicitor.

3.2 PPI/IRMA does not support the removal of notice and take down or any counter notice procedure being removed from the remit of the Courts. The system operates appropriately at present. The Copyright Council is simply not an appropriate place for such a matter to reside though it could consult/engage with the Commission on its "horizontal initiative on notice and action procedure" as should the IP Department as this will influence future legislation in this area.

4. The Copyright Council should:-

4.1 Get involved in initiatives to increase public awareness of copyright and involve itself in educating the public and rights holders on the role and value of copyright law.

4.2 Provide an information forum for the public and rights holders

4.3 Gather evidence to support the process of ongoing copyright reform

4.4 Provide a voice for rights holders as a collective

4.5 Provide guidance to rights holders in commercial negotiations with other rights holders

4.6 Consult / make submissions to Government on copyright related issues and provide a source of information and research for the IP Department when issues are being considered at both Government and EU level e.g. orphan works, cross border copyright licensing, etc.

- 4.7 Draft, institute and oversee codes of best practice / voluntary standards for copyright holders and collection societies
- 4.8 Propose model agreements and clauses for collective and individual copyright licences and
- 4.9 Provide guidance and leadership on copyright issues of the day **amongst** copyright holders.
- 4.10 Support and encourage the setting up of and contribution by its members to a Digital Copyright Exchange.

The Paper suggests that the Press Council, which sets up a system of self-regulation in the print media, is an appropriate template for a Copyright Council. PPI/IRMA fail to see why any such body is necessary or appropriate. The print media are regulated by the Press Council, the Broadcast media by the Broadcasting Authority of Ireland and the collecting societies are regulated by the Controllers office. The various copyright groups are far too disparate to be capable of regulation together.

### **3.3 An Irish Digital Copyright Exchange**

The UK is working on a digital copyright exchange and since a large section of Irish rights holders are connected with rights holders in the UK they will most likely participate. It would appear appropriate to wait and see what happens there rather than forging ahead in Ireland, because creating a DCE is likely to involve some work, complexity and investment, and it would therefore seem sensible to avoid duplication where possible, particularly given that the UK is already some way along the track, so that it is unlikely an Irish initiative starting later would be able to overtake it.

IRMA as an industry support an open, standardised approach to data and the goal of driving improvements in rights information provided to supply chain partners and end users, and facilitating licensing by developing an infrastructure for effective communication of copyright and rights data online. In addition to database projects our members and collecting societies



are already working on, we are, for example through IFPI, part of the European Commission-approved Linked Content Coalition initiative.<sup>9</sup>

In any case the idea of an Irish digital exchange is not new. Representatives of rights holders including music, literary, artistic, graphic, film, broadcasters, newspapers, journalists, museums and galleries met in 1998. An EU project under INFO 2000 was attempting to set up a network of interconnecting “one stop shops” across Europe because of the perceived difficulty in indentifying owners of rights and belief that the costs involved were a barrier to the development of the multimedia industry.

A working party was set up comprising of a representative from each of, the Artists Association of Ireland, IMRO, ICLA, RTE Commercial Enterprises, National Gallery of Ireland and the Provincial Newspapers of Ireland, and they drew up a template for the appropriate organisational structure for what was called a One Stop Shop initially but later called a multimedia clearance association (MCCI). Terms of reference and Memoranda & Articles of Association were also drafted and a company limited by guarantee was formed.

The only reason to look at MCCI now is because there was a considerable amount of time put into deciding upon a workable structure for the type of organisation that would manage a clearance function and would be acceptable to the varied types of rights holder. The company is gone but the original terms of reference and drafts of the Memo & Arts survive and we would be able to provide further details on request. PPI/IRMA would support the idea of a copyright one stop shop.

### 3.6 Licensing Issues

Licensing issues arise in this section of the Paper in the context of a copyright Council. PPI/IRMA do not agree that statutory licensing provisions should be extended and question whether there is any evidence that such extension would have a material positive effect on innovation. A Copyright Council as an honest broker could encourage more extensive voluntary collective licensing. The music industry is already licensing extensively on an individual right holder and collective basis, however we would be willing to consider specific suggestions on a case by case basis if evidence leads the Copyright Council to the conclusion

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<sup>9</sup> [http://www.linkedcontentcoalition.org/Home\\_Page.html](http://www.linkedcontentcoalition.org/Home_Page.html) .

that a specific suggestion would lead to greater innovation. Innovations that that would lead to increased access to content involving a benefit to its members would be welcomed by IRMA accordingly the idea of a digital exchange or one stop shop referred to above would be favourably considered.

In the digital world the business of the record companies now centers around licensing both directly by record companies and collectively through PPI. Licensing as a business model allows internet services to combine content and technology and allows copyright holders to be paid and accordingly is the route to respect for copyright, whilst allowing and encouraging innovation and growth. If action in this area is needed it is to facilitate and remove barriers to licensing.

Certain rights are suitable for administration by individual rights holders and other rights are not. Collective licensing suits high volumes and relatively small sized payments. PPI offers one stop licenses to broadcasters, public venues and internet streaming services. Users benefit from easy access to the repertoire and rights holders have an efficient licensing service which they control and the entire system is subject to the supervision of the Controller.

PPI is subject to section 38 compulsory licensing in respect of public performance broadcast and cable rights. This has arisen and is permissible because of Article 12 of the Rome Convention whereby broadcasting and any communication to the public of sound recordings is subject to the payment of equitable remuneration. The record producer in respect of these particular rights does not have the right to authorise or prohibit but only has a right to equitable remuneration. Record producers do have the right to "authorise and prohibit" in respect of other rights such as the right of reproduction and adaptation – so here compulsory collective licensing is not legally permissible without amending international treaties.

It is the view of PPI/IRMA however, whatever about legal permissibility, compulsory licensing systems distort the market by removing the mechanism for normal negotiation to establish a market rate and compulsory licensing also inhibits innovation as services are constructed around the statutory limitations rather than consumer demand

### **3.7 Publication of royalty charges**

PPI / IRMA support the views of IMRO in this respect.

### List of Questions from Chapter 3

|    | <b>Question</b>  | <b>Comment</b>   |
|----|--|--|
| 7  | Should a Copyright Council of Ireland (Council) be established?  | <b>Yes</b>   |
| 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?                                | <b>It should be statutorily recognized but not a public body</b>   |
| 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? | <b>Rights holders including innovators that are rights holders and collecting societies only</b>   |
| 10 | What should the composition of its Board be?   | <b>To be decided by the copyright council</b>  |
| 11 | What should its principal objects and its primary functions be?  | <b>The same as the UK, Australian, New Zealand and Canadian models</b>   |
| 12 | How should it be funded?   | <b>Self funded</b>   |
| 13 | Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?  | <b>Yes it certainly could</b><br><br><b>But perhaps it would be more cost effective to wait for the UK model to emerge and participate in that</b> |
| 14 | What other practical and legislative changes are necessary to Irish copyright licensing under CRRRA?   | <b>See part 5 supra</b>  |

|    | <b>Question</b>   | <b>Comment</b>  |
|----|---|---|
| 15 | Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?   | <b>This is more properly a matter for the Controller</b>  |
| 16 | How much of this Council/Exchange/ ADR Service architecture should be legislatively prescribed?   | <b>The council could receive statutory recognition. There is no need for the Exchange to be legislated for. The ADR service would require a change in the role of the Controller to be inserted in the legislation</b>  |
| 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?                 | <b>It should have copyright in its name!</b>  |
| 18 | Should the statutory license in section 38 CRRA be amended to cover categories of work other than "sound recordings"?   | <b>No see above at para 3.6</b>   |
| 19 | Furthermore, what should the inter-relationship between the Controller and the AD R Service be?   | <b>The ADR service should be under his remit but could be self funding</b>  |
| 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? | <b>The existing Small Claims Court has a list of areas in which it operates– simply include in the remit of the small claims court certain specified areas where individuals can apply such as if they are cut off from their broadband due to Graduated Response</b> |
| 21 | Should there be a specialist copyright (or even   | <b>PPI/IRMA don't see the</b>   |

|    | <b>Question</b>  | <b>Comment</b>   |
|----|--|--|
|    | intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?   | <b>benefit of a Circuit Court jurisdiction but think that a small claims jurisdiction would be beneficial in addition to the specialized High Court Jurisdiction in large / important commercial matters</b> |
| 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? | <b>PPI/IRMA do not think that the Circuit Court is the appropriate forum.</b>  |

## **Part 4 Rights-holders**

### **4.3 Rights-holders, copyright and innovation**

We are concerned that the Consultation Paper may be overstating the scope of copyright protection. Copyright is not in fact a monopoly. Copyright protects the expression of an idea and not the idea itself. This is fundamental to understanding the intersection of copyright and innovation. All that is prohibited by copyright law is the copying of the expression of the idea without the consent of the author. New ideas and their expression, old ideas expressed in novel ways do not, by their very nature, breach copyright law. This in itself provides protection for the public domain.

Copyright presently does not compensate rightsholders sufficiently due to the lack of enforcement on line. To diminish copyright protection would be to exacerbate this situation. The greatest problem facing innovators in the music industry is the lack of investment. This is due to the mass availability of unauthorised, unpaid-for music, made available via the Internet, through illegal file sharing. The music industry is highly risky with only an estimated one in ten artists making a commercial return on the money invested in them.

Internationally Record companies, large and small, invest around US\$5 billion a year in music talent, support a global roster of thousands of artists and typically spend US\$1 million to break successful pop acts in major markets. It is estimated that the recorded music industry spends around 30% of its total revenues - around US\$5 billion a year - discovering, developing and promoting talent. Of that, a global average of 16% is spent on A&R, with a higher than average level in certain countries such as the UK (where A&R investment totalled 23% in 2007).

Global music industry investment in A&R is considerably higher than similar investments in other industries

A&R spending today, however, is under greater pressure than ever from the impact of illegal file-sharing and other forms of piracy. In France, industry data shows record companies invested 12% of their turnover in marketing artists in 2009, a proportion that fell from 15% in 2006, at a time of reduced revenues which have been largely attributed to illegal file-sharing.

The IFPI report on *Investing in Music* outlines the very substantial investments involved in developing and marketing successful artists. In the UK and US, it is estimated that it typically costs more than US\$1 million to break a pop artist. This is spread across an advance paid to the artist, recording costs, video production, tour support and promotional work. A typical example of the breakdown of the costs of breaking a new pop act in major markets is as below:

|                     |                      |
|---------------------|----------------------|
| Advance             | US\$200,000          |
| Recording           | US\$200,000          |
| 3 videos            | US\$200,000          |
| Tour support        | US\$100,000          |
| Promotion/marketing | US\$300,000          |
| <b>TOTAL</b>        | <b>US\$1,000,000</b> |

- *Payment of an advance to the artist.* Such an advance allows an artist to give up their day job and concentrate on writing, rehearsing, recording and performing music. Advances are recoupable from an artist's sales, but are not recouped if those sales do not reach certain levels, leaving the record company bearing the risk of investment. A typical advance paid

to a new pop act in major markets is US\$200,000, but often will be higher. Advances for an established "superstar" act will commonly be in excess of US\$1 million.

- *Financing of recording costs.* Costs could be over US\$200,000 for a new artist to record an album, though employing a top producer can drive this above US\$50,000 per track. Hiring large numbers of session musicians or an orchestra can also drive up the budget. In this way, investment in recordings benefits a wide community of musicians and technicians.
- *Production of videos.* Video costs can also range widely. Some of the most expensive ever produced involved days of filming and editing, costing around \$1 million. A typical cost for filming videos to promote a new artist's album is around US\$200,000.
- *Tour support.* New artists in particular need to be heavily supported by record companies. The level of tour support required is highly dependent on the nature of the artist. Tour support would typically cost around US\$100,000 for a new artist in one market.
- *Marketing and promotion.* These are often the biggest budget items for a record label taking an act to the public. Labels invest heavily in marketing and promoting artists to a broad audience. Such promotion builds the brand identity from which artists can then earn income from numerous sources, such as live touring or merchandise. A typical investment in marketing and promoting a new act is US\$300,000.
- *Royalty payments.* Payment of royalties is usually based on a percentage of revenues, licensed or synchronised income revenue streams. Teams in music companies are responsible for collecting and distributing royalties to the featured performers, producers and copyright owners.<sup>10</sup>

In the past record sales could support long term livelihoods and careers and generate economic activity and jobs in other sectors. One of the most common excuses for justifying internet piracy, thrown at the music industry is that artists can earn money from live gigs and touring. This may be correct for artists that have developed in a time when they could in fact earn an income from the sale of their records and their record companies could afford to invest in them. In 2011 Deloitte plotted the top 20 grossing US tours based on data from Pollstar, the music industry's trade publication, by age of lead singer. The majority of artists were now in their 50s and 60s with a massive 40% being 60+.

A significant decline in sales, primarily due to Internet piracy has diminished the ability of record

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<sup>10</sup> Source – ifpi Report – Investing in Music

companies to fund new artists and invest in careers. If there is no reasonable prospect of obtaining a return, then investment activity will cease or significantly decline and with it the investment in Irish talent and musical creativity with Spain being a case in point. The Spanish market has been particularly hit by digital piracy and local artists in particular new acts have been the principal victims of the crisis. Until 2004 at least one Spanish act would sell more than one million albums across Europe. In 2007 one Spanish artists did, but no other Spanish act has done so since then. In the past two years not a single new Spanish artist has even featured in the countries Top 50 chart which compares with 10 in 2003. Local acts suffer more than international acts.<sup>11</sup>

A & R investment in Ireland has fallen by 80% in the last six years. It would be fair to say that any investment is structured on the basis of a Risk/Return model. The reduction in A&R investment all over Europe is hitting artists who have a Local or regional fan base harder than it is hitting artists who have broken internationally.

Local artists who by definition do not sell their music beyond their National borders have a smaller pool of potential buyers of their music. The massive growth in illegal file sharing and Cyber Lockers has led to the pool of potential music buyers diminishing exponentially and a very good example of this would be the Dublin band Aslan. Aslan are working musicians, they have spent the last twenty five years recording albums and playing live in venues around Ireland. In the past it was always guaranteed that an Aslan album would sell in the region of 35,000 copies. Their second last album sold 6,000 copies. Industry experts had at that time (June 2009) tracked in excess of 22,000 copies of the album which were downloaded for free. This reduction in investment in Local Artists is a downward spiral as no local artists will have the opportunity to establish and break into markets beyond their own border if they have not had the investment to establish in their own market first.

Established artists are the “safer bet” for music companies to invest in, as they have established their potential outside of their local market, and even though they are suffering from the same reduction in sales because of illegal downloading, they still have the potential to show a return on investment by virtue of the larger potential market. All products / brands have a

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<sup>11</sup> Source Impact of Piracy on Cultural Diversity of European Music ifpi/



lifecycle and it is inevitable that today's established artists will diminish in their potential as they get further on the natural course of that lifecycle. They are not being replaced by investment in new artists as is demonstrated above.

The fall in Music sales in Ireland that is clearly demonstrated in the industry figures (a drop of 60% in sales between 2005 and 2011) identifies the reduction in potential audience for a record company bringing any product to market whether established or new artists. Failure to gain any return on investment in bringing new artists to market and diminishing return on established artist investment is creating a risk averse environment when it comes to artist development .

Ireland has always punched above its weight when it comes to establishing artists of International acclaim when compared with other smaller English speaking markets such as New Zealand and even Australia and Canada. None of these markets could boast the success Ireland has experienced with U2 , Enya , the Corrs, Westlife, Boyzone ,Sinead O'Connor , The Thrills, Riverdance and Lord of the dance etc. This is a resource we should be protecting.

#### **4.6 Authors**

In this section is a reference to contractual practices that mean that rights holders cannot exercise their CRRA rights against other rightsholders due perhaps to contractual imbalances. It is perhaps the kind of issue that might be taken up by a Copyright Council by way of model contracts and codes of conduct and / or by publicly airing the issues in a discussion forum

#### **4.8 Technological Protection Measures and Rights Management Information**

PPI/IRMA support the provisions relating to TPM's and RMI. Technological measures used in connection with the distribution of music and other copyright works are an essential tool enabling the development of a flourishing digital music market. They implement the varying terms and agreements upon which copyright content is made available.

Consumers can be offered a wide range of options, involving different levels and durations of use for different prices, including free. They may choose to purchase a disc, burn a copy, subscribe to a monthly service, listen to streamed music, or download singles or albums. Payments can be tailored to usage, benefiting consumers and rightholders alike.

Technological Protection measures perform several beneficial functions. Most important, they allow works to be enjoyed at different prices for different levels of use. They for instance provide the means for keeping a subscription as a subscription, a rental as a rental, and a download to one customer from becoming an upload to the rest of the world.

Consumers understand that when they purchase music online, their chosen form of enjoyment comes with certain functionalities and certain restrictions, reflecting the bargain they have struck. Thus, they may pay one price to experience the music by listening to streams, another to retain copies temporarily, and another to burn a number of permanent copies. For this reason, in 1996 WIPO Internet Treaties required countries to prohibit such circumvention.

If the legal protection is to be effective, it must outlaw the provision of devices or services that enable consumers themselves to engage in widescale acts of circumvention.

The role of such measures in developing digital markets has been a striking success. A variety of new online distribution models are thriving, and more music is available to the public than ever before in more formats and distribution channels. It is critical to ensure that technological protection measures can continue to be deployed to maximize consumer options while respecting copyright. This requires providing leeway for the ongoing evolution of acceptable marketplace solutions, backed up by effective legal protection for the technologies on which they rely.

#### **4.9 Remedies**

There is substantial academic evidence to show that effective intellectual property rights protections spur innovation, growth and benefits such as foreign direct investment. In its study of IP systems worldwide from 1990 to 2008, the OECD found that effective IPR protections directly correlate to innovation and growth: “A strengthened IPR framework can create spill-overs, incentivise innovation, increase trade and trade-related investment, and boost intellectual property-intensive economic activity.”<sup>12</sup>

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<sup>12</sup> Source

Legal enforcement of its intellectual property rights is not the first choice for the music industry. In addition to licensing many new and exciting legal services the music industry has launched numerous public awareness and education campaigns, in an effort to provide and make consumers aware of the alternatives to piracy. While providing appealing legal alternatives for consumers and promoting awareness are key elements in the fight against piracy, they have not solved the problem. Cooperation from Internet intermediaries is indispensable to curbing the new forms of digital piracy and Ireland was hampered by the fact that the Irish Government had not enacted Article 8.3 of the Copyright Directive correctly however that has now been remedied by The European Union (Copyright and Related Rights) Regulations 2012 which was the subject of a separate consultation process.<sup>13</sup>

The consultation paper asks if there are arguments that remedies should be graduated so that minor or unintentional infringements would not necessarily be treated in exactly the same way as serious, intentional or wholesale infringements.

The recorded music industry has long advocated that a response to peer to peer infringements of copyright on line should be dealt with in a graduated manner. IRMA has particular experience in this respect. When peer to peer infringements started to cause serious damage to the recorded music industry it appeared that the way of dealing with it was to identify the infringers and take them to Court. Between 2004 and 2006 IRMA made applications to Court by way of Norwich Pharmacal applications. This procedure involved giving the Court proof of infringement and the Court ordering the relevant ISP to release the name and address of the subscriber to the IP address found to be infringing copyright. Having identified the subscribers the record companies then wrote to and if necessary issued proceedings against these subscribers seeking and obtaining in most cases damages, undertakings as to future conduct, and legal costs.

This procedure was unsatisfactory to the music industry for a number of reasons the most pressing of which was that in the words of a High Court Judge Judge Peter Kelly in the eircom case: "*these measures* (i.e. Norwich Pharmacal Orders and then issuing proceedings) *proved*

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Ricardo H. Cavazos Cepeda, Douglas C. Lippoldt, Jonathan Senft, *Policy Complements to the Strengthening of IPRS in Developing Countries* (OECD Trade Policy Working Papers 104, 14 Sept 2010).

<sup>13</sup> S.I. 58/2012

*useless as they had to pursue individuals with, presumably, little assets and as, as a logistic matter, they could only identify finite numbers of infringers while meanwhile the infringing activity was going on wholesale and in the words of Judge Peter Charleton in the UPC case: “The evidence establishes, however that this process is burdensome and, ultimately, futile as a potential solution to the problem of internet piracy”.*

The point however that is important to note here is that this process was also unsatisfactory from the point of view of the internet subscribers themselves because in some cases the first time a subscriber finds that there is anything untoward happening on their internet connection they are the subject matter of legal proceedings.

The solution that IRMA identified and put into operation with eircom of Graduated Response involves a process whereby IRMA notifies eircom of IP addresses that have been used for infringement. Eircom notifies the account holder and gives them educational messages whilst requesting that they take action to stop the infringement. If they are found to infringe again they are given a further notice and if they do so again they are suspended for seven days. In the event that they are found to be infringing a fourth time then they are disconnected for one year. This type of system is a proportionate deterrent sanction involving a fair procedure in which the subscriber is informed about the infringement taking place on their account and provided with information about the actions they can take to bring the infringement to an end, without any sanctions, without the subscriber’s identity being made available to IRMA, and without the need to engage lawyers. The existence of a proportionate deterrent sanction encourages early action to deal with the infringement and reduces the likelihood that a sanction will ultimately need to be applied.

IRMA firmly believes that Graduated Response is not just a vital tool in the control of internet piracy but the only effective method by which peer to peer piracy can effectively be dealt with. It is also effective with less than 11% of uploaders needing to receive a second letter, less than 1% requiring a third letter and with 0.2% ever requiring a sanction such as suspension or termination of their account. It is exactly as Mr. Justice Charleton predicted when in the UPC case he said *“There is a strong possibility that a graduated response would yield a majority level of desistance from the practice of illegal downloading on a first warning”.*

#### 4.10 Levies

The consultation paper is clear in its view that levies are a blunt instrument and might amount to a tax on innovation. Nonetheless the consultation paper is advocating format shifting for private use and the making of back up copies <sup>14</sup>without a levy. PPI/IRMA do not advocate such a change but in any case do not think that such a change can legally be made without a levy.

Article 5(2)(b) of the Copyright Directive provides that if a private copying exception is introduced fair compensation must be granted to rights holders. In many EU member states this has taken the form of a levy on the technology or media that are typically used by consumers or businesses to make copies. The Court of Justice of the European Union (CJEU) has clarified that fair compensation should compensate for the harm suffered by rights holders as a result of the unauthorised reproduction of their works made possible by the introduction of an exception to their exclusive right of reproduction – such as format shifting or the making of a back up copy. Given the practical difficulties in identifying private users the CJEU has considered private copying levies to be a valid form of providing for fair compensation. <sup>15</sup>

Currently all member states except the UK Malta Cyprus and Ireland provide for a private copying exception. This exception is accompanied by a levy scheme in these countries with the exception of Luxembourg. The levy is fixed on a wide variety of technology including blank CD's and DVD's, MP3 players, hard drive memories, and now also PC's and mobile phones. In Norway and Sweden there is a state fund set up to compensate for private copying.

On the 2<sup>nd</sup> of April 2012 Commissioner Barnier (DG Internal Market) appointed a mediator Mr. Antonio Vitorino to see how some elements of the levy systems could be harmonised and how to use levies to encourage the development of business models. It would appear to PPI/IRMA that the second aim is particularly apt to this review given that he goes on to say that *“...it is essential to take proper account of the opportunities offered by the current development of new business models. Such models deliver new forms of authorised access to copyright protected content. They should at the same time enable rightholders to better control the use of their content and the manner in which they are remunerated for it.”*

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<sup>14</sup> in paragraph 7.3.4

<sup>15</sup> (Padwan v SGAE Case C 467/08) and (Stichting de Thuiskopie –v- Opus Supplies C-462/09)

Mr. Vitorino expects to finalise his consultation after the summer and to present his conclusions and policy recommendations to Commissioner Barnier by the end of 2012.

IRMA/PPI suggests that the Copyright Review Committee should await the conclusions of Mr. Vitorino and perhaps at that stage reassess its position on the possible introduction of exceptions for format shifting and backups and corresponding levies.

PPI/IRMA take the view that the right holders should exercise and enforce their exclusive rights whenever possible. Private copying exceptions should only apply exceptionally, if the exclusive rights cannot be exercised. In addition, when a private copying exception exists in national legislation, it must grant fair compensation, as required by the EU Copyright Directive. In such case, private copying levy systems are the most appropriate system to remunerate right holders.

Any private copying exception that is introduced should permit consumers to transfer their own lawfully held music, onto their own devices that are within the user's ownership and control, for personal use. More specifically it should satisfy the Berne "three step test" by which the legitimacy of national copyright exceptions is measured. Accordingly a private copying exception:

1. Should only apply to content that is legally owned by the consumer. It would be perverse if the exception was a license to pirate and an invitation to breach copyright.
2. Should only cover copying for personal use, where the copy remains under the control of the beneficiary of the exception. The user should be in control and ownership of all devices that store the content.
3. Should not permit the content to be transferred to a third party in any form, including for cloud storage. Transfer to a third party service would result in the copy no longer being under the control of the initial owner. That copy cannot therefore be maintained as a "private copy". In addition such a transfer would interfere with the potential licensing fees that could be obtained by IRMA members from those same services.

4. Should not extend or be interpreted to allow sharing with e.g. a close domestic circle, friends and family, or those living in the same household. Defining these groups would be difficult, would allow multiple copies of the same recording to be shared with people that might only be within a shared household for a short time e.g. a student household, and would reduce music sales.
5. Copyright exceptions should be able to be overridden by contract. The freedom to override exceptions by contract is one that allows innovation and certainty in a market for the benefit of growth.

#### **4.12 Broadcast**

We believe that there is no innovation argument for making the definition of “broadcast” platform neutral and as such there is no reason to consider the question as part of this review.

In addition any such amendment would be unfair as it will have the effect in the CRRA of making simulcasting and webcasting subject to a statutory license pursuant to section 38 in so far as sound recordings are concerned but not the copyrights of other rightsholders, such as for instance composers, and for this reason in addition to being unfair it might be unworkable. It would also mean extending the special permissions given to broadcasters in the CRRA to another group of users and type of usage that was never intended to benefit from the exception, in the absence of any evidence that such a change is needed.

Furthermore it is legally impermissible by virtue of Irelands’ obligations pursuant to the Rome Convention since it seeks to include the exclusive rights which record producers have pursuant to Article 12 of the Rome Convention with rights for which they have the lower right to equitable remuneration thereby down grading their exclusive rights.

In the UK the amendment to section 6 of the CDPA as referred to in the Consultation paper does not have the effect of making the activities subject to a compulsory license.

#### 4.13 Cable retransmission and web based streaming

It appears to PPI/IRMA that it should be and is intended to be confined to cable operators in the strict sense particularly when section 174 CRRA is taken into account. Web based streaming is dealt with in section 40(1)(a) CRRA. Furthermore it is legally impermissible by virtue of Ireland's obligations pursuant to the Rome Convention since it seeks to include the exclusive rights which record producers have pursuant to Article 12 of the Rome Convention with rights for which they have the lower right to equitable remuneration thereby down grading their exclusive rights.

#### List of Questions from Chapter 4

|    | Question   | Comment  |
|----|--|--|
| 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? | <b>Please see paragraph 4.3 above. We do not believe that there is any evidence that the balance is not right. The basic legal framework of copyright is sound and already contains sufficient protections for the public interest. The DKM Study referred to at Part 1 states that the status quo should remain until a convincing case for change is made.</b> |
| 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?   | <b>The absence of effective enforcement of copyright law online has led to a reduction in investment in Irish artists and accordingly a reduction in innovation where Irish recorded music is concerned. Any changes that reduce the</b>   |



|    |  |  |
|----|--|--|
|    |  | <b>scope or effectiveness of copyright law will reduce innovation in this area. See para 4.3 above</b>   |
| 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? | <b>See reply to 24 above</b>   |
| 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?                                  | <b>No we do not see how raising the bar for copyright protection would incentivize innovation.</b>   |
| 27 | Should the sound track accompanying a film be treated as part of that film?  | <b>No Opinion</b>  |
| 28 | Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?   | <b>No Opinion</b>  |
| 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?                                     | <b>No.</b><br><b>See reply to paragraph 4.12 above</b>   |
| 30 | Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?   | <b>See reply to paragraph 4.12 above</b><br><br><b>We do not believe that any such changes are necessary.</b><br><b>In any case, technology-neutrality should not be an objective in itself, the review should examine any evidence of specific practical problems that cannot be addressed by a licensing arrangement, and determine whether a change</b> |

|    |  |  |
|----|--|--|
|    |  | <p>is needed to address that practical problem.</p> <p>If any change is needed, technology neutrality should be achieved by removing the unfair privileges the old media enjoy, such as the compulsory licences for broadcasters, and applying fair commercial terms to all electronic media platforms and users</p> |
| 31 | Should sections 103 and 251 CRRRA 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? | <p>Yes they should be confined to cable operators in the strict sense. Web based streaming is dealt with in section 40(1)(a). This appears to be exactly what was intended c.f. section 174.</p>   |
| 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?                                       | <p>See response to paragraph 4.9 above.</p>  |
| 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           | <p>Yes</p> <p>See reply to 4.8 above</p>   |
| 34 | How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?   | <p>No Opinion</p>  |
| 35 | Should the special position for photographs in section 51 (2) CRRRA be retained?   | <p>No Opinion</p>  |
| 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  | <p>No Opinion</p>  |

|    |  |                                  |
|----|--|----------------------------------|
|    | the present Review?  |                                  |
| 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? | <b>See paragraph 4.10 above.</b> |

## **Part 5 Collecting Societies**

PPI is the collecting society acting for the recorded music industry and accordingly this paragraph is answered on its behalf.

The EU is currently working on a directive text on collective rights management. The thinking behind it is that collecting societies should be transparent to users and accountable to rights holders. PPI believes that it is already is completely compliant with the likely terms of the proposed directive and if it transpires that it is not completely compliant then it will immediately ensure that it becomes compliant.

Certainly PPI would become a member of the Copyright Council and would contribute to the development of a code of conduct.

### **Suggested amendments**

Section (367)(2) of CRRRA provides that the Controller shall make a decision on whether or not to refer a dispute to Arbitration no later than 3 months after the dispute has been referred to him. This section has been used beneficially by PPI in arbitrations in the past. In the earlier Copyright Act 1963 there were no time limits and the Controller could and did take significant time to make such a decision resulting in disputes taking many many years to reach a conclusion. This provision in CRRRA was lobbied for very heavily by PPI. For some unknown reason and without PPI realizing it was happening this section was repealed in s(48) of the Patents (Amendment) Act 2006. It should be reintroduced as its removal was a completely retrograde step slowing down the resolution of disputes.

The effect of the various provisions of Chapter 17 of CRRRA dealing with the Registration of Copyright Licensing Bodies is that even for a small error of a timeline being missed a licensing

body is de registered. This provision is too harsh, there should be a mechanism on the act to address non material errors and omissions.

We suggest that it would be a good idea if the certificate of registration issued under s(175)(8) of CRRA be a perpetual certificate rather than an annual certificate. Presently the registration process involves the reproduction of the same documents every year and is unnecessary. A provision allowing for this process to be undertaken only when there are changes or allowing for only the documents that have been changed to be filed would appear to be a reasonable way of reducing the burden on both licensing bodies and the Controllers office.

### List of Questions from Chapter 5

|    | <b>Question</b>  | <b>Comment</b>  |
|----|--|---|
| 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? | <b>The copyright community is anxious to establish a copyright council. Drafting a code of conduct for collecting societies – perhaps following the publication of a draft directive on collecting management is definitely a function that the Copyright Council should carry out.</b> |
| 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?   | <b>The Controller and the Head of the Government Intellectual Property Unit should not be one and the same person</b><br><br><b>See paragraph entitled suggested amendments above</b>   |

## **Part 6 Intermediaries**

### **6.2 Intermediaries in copyright law**

There was serious antagonism at the public meetings with particular intermediaries maintaining that an intermediary should not have to protect copyrights at all. They maintained that they themselves were not infringing and if their pathways were being used to breach copyright – let the copyright holder go after the infringer.

IRMA has of course taken action against individual infringers who were sharing large amounts of copyright material on P2P networks. This was certainly not our first choice and is only one of many complementary activities: the industry recognizes and accepts that we need to strive to make attractive legal content available to consumers, and to drive educational initiatives, as well as fighting piracy. However IRMA's experience in suing individuals is that it is expensive, inefficient and ultimately ineffective.

While industry has its part to play, cooperation from intermediaries is indispensable to address the problem of online piracy. This is already recognized in the European legal framework (see recital 59 of the Copyright Directive below):

*“(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States”.*

Internet intermediaries are in essence the gatekeepers to the Internet - it is through their pipes and by using their services that consumers obtain the content they want. Internet Service

Providers (ISPs) have the technical ability to control how, where and at what speed content flows. They also have direct relationships with consumers that allow them to set contractual terms and communicate on an ongoing basis. Furthermore, they have a commercial interest in increased consumption of legitimate content online. Without creative works there would be less to transmit over their networks, without copyright works that take up large amounts of bandwidth ISPs would not be able to profit from their customers' requirements for seeking greater bandwidth and more complicated functionalities.

It is reasonable and appropriate to expect Internet intermediaries, as lawful businesses, to help prevent the abuse of their services for illegal purposes. There are many steps they can take that have been proven to be effective without being unduly burdensome.

A system of graduated response is a feasible and reasonable step for ISPs to take, and we have a working example here in Ireland with Eircom which estimates that only 15 to 20 per cent of users continue to infringe after the first warning letter and only 10 per cent after the second. The consultation paper states only that "such systems are controversial"; however this is to ignore the evidence of their effectiveness in various countries around the world. Graduated response systems are up and running in France, New Zealand and South Korea, with promising results: In France, since the program started in October 2010 more than 1 million first warning notices and 93,500 second warnings had been sent resulting in a significant decline in P2P piracy of 24 per cent – from 6 million users to 4.6 million users. In parallel iTunes sales increased by 23 per cent. The graduated response scheme in New Zealand which came into effect in September 2011 and started working in November shows similar results with a decline in P2P usage of 18 per cent. Finally, in South Korea since July 2009, online services like cyberlockers are required to forward notices to their subscribers and suspend accounts used for the making available of infringing content, and in fact this system has proven to be successful: In 2011 cyberlocker usage went down by 40 per cent and overall piracy declined by 22 percent. In the UK, the government is moving ahead to implement the graduated response provisions in the Digital Economy Act.

Graduated response is a system that is best suited to address P2P piracy. For non-P2P piracy, based on websites, the appropriate solution is website blocking: expeditious measures or procedures requiring ISPs to block access to illegal web-based services dedicated to the dissemination of infringing material. Eircom is already blocking access to The Pirate Bay in

Ireland, and ISPs in several other EU countries have been ordered to block access to infringing sites: Austria, Belgium, Finland, the Netherlands, Greece and the UK.

Search engine intermediaries also have a role to play. Search engines have increasingly become the portal through which consumers locate content, including infringing content. Studies by Harris Interactive in the UK found that 23 per cent of consumers regularly download music illegally using Google as their means to find the content (September 2010). Further research in New Zealand by Ipsos MediaCT (August 2011) also highlighted that 54 per cent of users of unauthorised downloads said they found the music through a search engine. This is not surprising as typically, the majority of first page search results for popular songs are for infringing sites. For example, IFPI research found that when entering the name of the top five artists in the Billboard Top 100 chart on 1 November 2011 plus the term “mp3” – the dominant legal and illegal file format for digital music, the majority of search results were infringing. For instance, a search request for “Adele” plus “mp3” shows 77% of infringing results on Google, 62% on Yahoo and 70% on Bing. On average, 17 of the first 20 Google results for singles and 14 of the top 20 search results for albums linked to known illegal sites.<sup>16</sup>As well as encouraging piracy, this is an unsatisfactory situation for consumers, who tend to rely on search engines for quality search results.

The business of search engines is premised on producing quality search results, ranking those search results according to criteria, and selling advertising against the search results. Search engines could therefore take positive steps to contribute as responsible players in the fight against piracy, by doing the following:-

1. “de-ranking” infringing sites – i.e. according a lower ranking in search results to websites that are repeatedly shown to make available unlicensed content in breach of copyright;
2. prioritising websites that obtain certification as a licensed site under a recognised scheme;
3. taking measures to ensure that they do not advertise or promote illegal sites (by way of “sponsored links or otherwise), sell key words associated with piracy, or offer suggestions associated with piracy in their auto-complete or suggest functions.

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<sup>16</sup> (BPI tests as of November 2010).

The consultation document appears to proceed on the basis that “new” technologies and business models should be given the benefit of copyright exceptions as the technology develops. This is an entirely wrong-headed approach: search engines in particular have become established and integral players in the functioning of the internet ecosystem and by virtue of their position, have a great deal of influence over consumer behavior. They should be required to act responsibly in connection with piracy.

**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?**

**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?**

IRMA will answer questions 40 and 41 together.

By way of background, the present system of limitations on liability derives from the “deal” struck between ISPs and rightholders, whereby ISPs could take advantage of certain safe harbours in exchange for taking certain steps in connection with piracy. So for example an ISP that is a host provider can take advantage of a safe harbor if the ISP acts expeditiously in response to a notification of infringement, to remove or disable access to the infringing content, and if certain other criteria are met. In particular (a) a host provider that is aware of facts and circumstances indicating infringement, even if not specifically notified, must also act in order to take advantage of the safe harbor<sup>17</sup>, and (b) safe harbours are only available for activities that are no more than technical, automatic and passive in nature<sup>18</sup>. This “deal” was reflected at EU level in the Ecommerce Directive which provides for limitations on monetary relief and criminal liability for the activities of conduit, caching and hosting.

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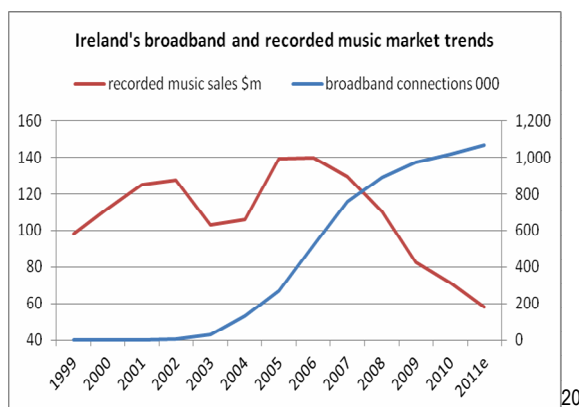
<sup>17</sup> See ECJ C-329/04, *L’Oreal/ebay* (para 124): “Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31”.

<sup>18</sup> See ECJ C-236/08 and C-238/00, *google adwords* (para 113): “In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.”



The policy underlying these arrangements was a desire to allow the internet to develop unhindered and without fear of unreasonable liability (this policy is well documented in the background documents to the EU framework). The policy was not, as the consultation document seems to believe (page 45 and 49), to accommodate particular business models of intermediaries. It was recognized that certain *technical functions* (conduit, caching and hosting), not specific business models, were fundamental to the development of the internet and should enjoy limitations on liability. Importantly, the limitations on liability apply only to specific technical functions and do not, and should not, apply to exempt entire business models from liability.

While the present system may not be perfect, it has certainly served its purpose of allowing the internet to develop without fear of unreasonable liability. In Ireland in particular, the telecommunications industry is worth USD 472 million and across Europe, digital growth continues as the number of broadband connections is rapidly increasing: Whereas in 2001 there were only 2,000 broadband connections<sup>19</sup> in Ireland, only 10 years later in 2011 the number has increased up to 1,064,000 connections. This is in the line with developments overall Europe with 6,534,000 broadband connections in 2001 in comparison to 164,062,000 broadband connections in 2011.



Against that background, the consultation document invites submissions as to whether the present system should be re—opened in Ireland, in particular to consider limitations on liability

<sup>19</sup> A broadband connection is defined as an internet connection with data transfer speeds of at least 150kbit/s in one direction (SD).

<sup>20</sup> Source: IFPI and Screen Digest

for further activities. IRMA strongly opposes any extension of the system of limitations on liability for the following reasons:

1. No evidence or credible argumentation has been put forward as to why an extension is needed. The consultation document contains a number of vague and unsupported statements. For example the document states that “intermediaries run up against the copyright interests of rights-holders” without describing the nature of this concern; “there are wider issues here ... [t]here are issues relating to the case for these immunities” although no issues are identified or outlined in the paper.
2. The evidence in fact suggests that the internet and technology sectors have thrived under the present system – see above – and have not been held back by any concerns relating to copyright.
3. While we believe that the existing copyright framework is sound and strikes the proper balance, any consideration of a change to the framework of limitations on liability must consider the potential impact on all sectors, and the other changes needed in order to maintain a proper balance. The review appears to take the view that the internet and technology sector requires protection from copyright liability and should be given a “free pass”; however the balance of evidence (including the figures showing the damage to the Irish music industry from piracy as outlined above) suggests that in fact rightholders are in need of improved measures to fight piracy.
4. The introduction of new limitations on liability carries the risk of abuse by copyright infringing sites. Under the current system, pirate sites and services regularly attempt to rely on the safe harbours under the Ecommerce regulations (for example The Pirate Bay sought to argue it should be immune from liability as a host provider). This aspect requires careful consideration, against the background of any evidence (which we have not yet seen) indicating the need to expand the limitations.
5. Finally regarding the question of mobile internet – no information is provided in the consultation document as to what issue the review wishes to receive input on, and we were unable to find any reference to mobile internet issues in the submissions to the review. In the circumstances it is not possible to comment, beyond stating that we have not seen any evidence to justify a change in the existing framework due to changes in mobile architecture.

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

IRMA does not believe that any additional limitations on liability are required, however it has been a fundamental element of the existing system that the safe harbours apply only to monetary relief and criminal liability (as set out in the Ecommerce Directive) and do not affect the ability of rightholders to obtain injunctive relief. The right to injunctive relief is in fact granted under Article 8(3) of the Copyright Directive enacted in Ireland by virtue of the European Union (Copyright and Related Rights) Regulations 2012 on the 29<sup>th</sup> of February 2012 and further supported by articles 12(3), 13(2) and 14(3) of the Ecommerce Directive.

**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?**

The definition of intermediary is sufficient and is in line with the EU framework. The assessment of whether a particular function being formed by an intermediary is in fact within the scope of a safe harbor is a more complex analysis that is intended to, and should, be left to the courts. The analysis includes a consideration of whether the service is “merely technical, automatic and passive”<sup>21</sup>, whether it has “deliberately collaborated”<sup>22</sup> with an infringer and whether the activities for which it is seeking an exemption are truly to be considered as hosting, caching or conduit.

IRMA does not recommend any attempt to set out in statute the various types of intermediaries for a number of reasons:-

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<sup>21</sup> See recital (42) of the ecommerce Directive: “The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over information which is transmitted or stored.” And recital (43) ecommerce Directive: “A service provider can benefit from exemptions for “mere conduit” and “caching” when he is in no way involved with the information transmitted; that requires among other things that he does not modify the information that he transmits (...)”.

<sup>22</sup> See recital (44) ecommerce Directive: “A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of “mere conduit” or “caching” and as a result cannot benefit from the liability exemptions established for these activities”.

1. the limitations on liability apply to specific technical functions not generally to specific business models, and the activities of hosting, caching and conduit are easily understood in the context of any business model
2. a description of specific business models is not technology neutral and would become quickly outdated
3. such descriptions would be open to abuse – infringing sites and services would have an opening to try and escape liability by claiming that they are operating one of the business models listed in statute

**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?**

The EU framework underlying the system of limitations of liability that exist in Ireland has been described above. It is clear that amending Ireland's law in the manner suggested would involve a departure from the EU framework, principles and practice and requires careful examination.

It is also relevant to take into account the fact that this framework of limitations for conduit, hosting and caching is reflected in several other countries around the world (including for example the US, Australia, Singapore, Malaysia, New Zealand and Hong Kong), as a result of broad consensus as to the appropriate principles to be applied.

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

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

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

IRMA will answer these questions together.

We start by saying that, as with other sections of this review, there is no evidence of any practical problem or harm that needs to be addressed by introducing an amendment to state

that linking is not in and of itself a copyright infringement. We are not aware of any cases having decided that a link, in and of itself is a copyright infringement and it would be surprising if there was such a case. Further we are not aware of any business or intermediary whose business consists of providing a link “in and of itself”.

On the other hand the introduction of such an amendment would be open to abuse. While the Committee views linking as a trivial activity, the provision of links to copyright content is in fact the basis of a large proportion of online music piracy. Approximately 60% of the music industry’s piracy problem in Ireland is based around P2P, the remaining and growing proportion is attributable to non-P2P piracy, in the form of unlicensed blogs, cyberlockers, stream ripping sites and link aggregation sites that are structured so as to encourage and enable infringement. It is common for these sites and services to argue that because they do not store copyright material and only link to it, they should not be liable for copyright infringement. In fact the argument of The Pirate Bay and many other pirate sites is that they are “just like Google” and therefore should not be held liable.

In the case law, the courts have taken views based upon the particular circumstances of each case and because of this are able to make nuanced assessments on whether or not a particular activity that includes linking constitutes either primary or secondary infringement of copyright. In some cases, a service that includes elements of linking has been held to be liable or indeed criminally responsible (e.g. TV Links, The Pirate Bay, Mininova) and in some cases it has not. A provision along the lines proposed by the review does not assist in either case, since the analysis of the court is nuanced and fact specific; however it would likely give infringing sites and services more basis for argument, in circumstances where there is no evidence that it is needed in order to exempt any legitimate business from unreasonable liability.

#### **48 Does copyright law inhibit the work of innovation intermediaries?**

This is a broad and undefined question. The concept of “innovation intermediary” is not defined or explained in the consultation document. It is important to clarify and emphasise that the responsibility of intermediaries is not limited to taking down content in response to a notification; intermediaries that obtain awareness of facts and circumstances indicating

infringement are also required to act.<sup>23</sup> . In any case, the area of notice and action is currently being reviewed at EU level and does not require further comment in this context.

The description of the work of “innovation intermediaries”<sup>24</sup> and the reasons why an exception is needed for their work is vague at best. It is said that “innovation intermediaries facilitate innovation by bringing together a range of different players to facilitate and coordinate innovation” and again “Technology can facilitate the potentially vast area of collaborative innovation by bringing together the various players online”. We are not sure what this means and in any case we cannot see the relationship to copyright, let alone any evidence that would support a change in the legal framework.

## **Page 46 – Transient and Incidental Copies**

There is no question in the review concerning the temporary copies exception, however, without presenting any evidence of the need for it, the consultation document proposes an amendment to the exception,

IRMA does not believe the amendment is necessary, and in any case no evidence has been presented to suggest that the amendment is needed. If the intention is to codify the case law as a result of the ECJ decision in *FA Premier League v QC Leisure and Murphy v Media Protection Services Ltd* C-429/08<sup>25</sup> the proposed amendment does not do that as it takes only one aspect of the case law. In addition to that it is not clear what the scope of paragraph (2) of the Committees draft section 87 is and IRMA doubts that this is consistent with the ECJ's interpretation of Article 5(1) EUCD which highlights that it is clear from the case law that the conditions set out above must be interpreted strictly, because Article 5(1) of EUCD is a derogation from the general rule established by that directive that the copyright holder must authorize any reproduction of his protected work<sup>26</sup>. Any changes must therefore respect this interpretation as well as the three step test and the acts of reproduction must not have

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<sup>23</sup> See ECJ C-329/04, *L'Oreal/ebay*, para 124: “Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.”

<sup>24</sup> on page 50 of the Consultation document

<sup>25</sup> [2011] ECR-I nyr, [2011] EUECJ C-403/08 (04 October 2011) [161]

<sup>26</sup> ECJ C-403/08 and C-429/08 above and ECJ C-5/08 *Infopaq International* (para56,57)

independent economic value. IRMA's preferred approach is to leave the statute as is, and the court will of course take into account case law in interpreting the provision.

## 6.6 News and marshalling

### Fair dealing : criticism or review

The Consultation Paper suggests that the current section in the CRRRA dealing with criticism and review should be extended. As it stands presently it is open to abuse by commercial operators issuing products under the guise of criticism and review and hence avoiding license fees. Criticism and review should not be an opportunity to steal content and market it without adequate compensation for the rights holders. All criticism and review of recorded music online should point to a legal copy of a piece of music where the track can be accessed rather than be allowed to infringe copyright by hosting or selling music without license or without adequate payment for rights holders.

### List of Questions from Chapter 6

|    | <b>Question</b>   | <b>Comment</b>                  |
|----|---|---------------------------------|
| 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?   | <b>See detailed reply above</b> |
| 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?  | <b>See detailed reply above</b> |
| 42 | If there is a case for such immunities, to which remedies should the immunities provide defences?   | <b>See detailed reply above</b> |
| 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? | <b>See detailed reply above</b> |
| 44 | If the answers to these questions should lead to possible amendments to the CRRRA, are they required or precluded   | <b>See detailed reply above</b> |

|    |  |   |
|----|--|---|
|    | by the ECommerce Directive, EUCD, or some other applicable principle of EU law?  |   |
| 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? | <b>See detailed reply above</b>   |
| 46 | If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?   | <b>See detailed reply above</b>   |
| 47 | If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?                                   | <b>See detailed reply above</b>   |
| 48 | Does copyright law inhibit the work of innovation intermediaries?  | <b>See detailed reply above</b>   |
| 49 | Should there be an exception for photographs in any revised and expanded section 51 (2) CRRRA?   | <b>No Opinion</b>   |
| 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?                     | <b>An exception should not be an opportunity to appropriate the investment of the newspapers.</b>   |
| 51 | If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?                                   | <b>No Opinion</b>   |
| 52 | In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?                                | <b>No</b>   |
| 53 | If so, what exactly should it provide?   | <b>See reply to 52 above</b>  |
| 54 | Does copyright law pose other problems for intermediaries' emerging business models?   | <b>We have not seen any evidence of a practical problem that cannot be solved by the intermediary obtaining a license on reasonable commercial terms.</b> |

## Part 7 Users

In this part the stated assumption is that the adoption of all exceptions permitted by EUCD will promote innovation. This is too broad an assumption. Each individual exception must be examined individually and only adopted if there are good economic reasons to do so.



## 7.2 Users and innovation

The Consultation paper whilst referring to the innovative role that users play in delivering transformative works (whether with or without payment to the original creator is not clear), point to a *“long tradition of transformation in music (from genres like Irish traditional music and jazz, through parodies and tribute songs to remixing and sampling)”*. It is important to note that this tradition operated within the context of rules that did not allow the substantial taking of copyright material without payment. The songwriter/composer was paid and the person who innovated got their own copyright thereby allowing that person to be paid. So if a composers song was to be covered or sampled there was a set of rules.

If you wished to cover or sample a composition you had to comply with certain rules. These used to be set out in section 13 of the Copyright Act 1963. Pursuant to this section any person might manufacture a record of a musical work or an adaptation of that work in the State so long as they complied with section 13. This section no longer exists nonetheless the practice persists with MCPS offering a license to all under broadly similar conditions but including in particular a provision that does not allow anything to be done with the work that would in the view of the composer / artist bring the work into disrepute. When users want to sample part of a sound recording, a licence can, and very often is, made available within the context of the usual copyright and licensing framework. Some examples include:

- Madonna *“Hung Up”*; use of Abba’s *“Gimme Gimme Gimme”*;
- Eminem *“Stan”*; use of Dido’s *“Thank You”*;
- *“Gangsta’s Paradise”*; use of Stevie Wonder *“Past-time Paradise”*;

### 7.3.1 Users and copyright exceptions

Under this section there is a suggestion that Fair Dealing: research or private study should be amended to change the word “means” to “includes” in PPI/ IRMA’s view. If this were to be accepted, the definition would become open ended and it might result in allowing fair use in by the back door! Legal certainty is important in any legal system, the introduction of such a system would result in more litigation.

The document states in this paragraph *“we agree that as a matter of Irish Law these exceptions ought to be made available to users, for the benefit of users and if properly defined should have*

*little or no impact in rights holders”* We are concerned that the review pre-supposes that it is beneficial to maximize the exceptions to copyright without properly considering economic or other evidence. PPI/IRMA suggests that the Committee should not assume that transfers of value from copyright holders to innovators will promote overall innovation as it may well stop creators innovating. Recital 10 of the Copyright Directive states:-

*(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.*

The consultation document then states that the introduction of these exceptions will benefit the internet intermediary to which a user might upload any generated content. PPI/IRMA can see how that might be so, but it then goes on to say that *“they can also benefit established music companies which can discover and promote talent online”*. The established music companies would be obliged if the committee would clarify what they mean by this since any music company can discover and promote talent online already.

The Consultation paper says that they intend to bring in all of the EU exceptions and limitations to ensure that Ireland is not at a competitive disadvantage but is there actually any evidence that the absence of these sections puts Ireland at a competitive disadvantage?

### **7.3.3 Reproductions on paper for Private Use**

The issue of concern to PPI/IRMA in this section is a suggestion that there be a definition of “lawful user” included in the interpretation section 2 of CRRA though there is no reference to it in the questions. It is an extraordinarily general definition. It is too dangerous to apply such a general definition independent of the particular circumstances. It would particularly have application in areas of format shifting and backups where it seems it is intended specifically to

allow copying to cloud services. PPI/IRMA would be against any such general definition being inserted in CRRA.

#### **7.3.4 Reproduction for private use : format shifting and back ups**

This area is particularly relevant to the music industry but since the commission are “*not minded*” to introduce a levy despite planning to introduce the exceptions PPI /IRMA doubts that it could comply with article 5(2)(b) of the Copyright Directive and the CJEU decision in the Padwana Case.<sup>27</sup> Exceptions of the nature suggested could not be introduced legally without compensation to rights holders. The issue of levies is addressed earlier in this reply to the Consultation Paper at paragraph 4.10.

#### **Underlying law.**

Recital 39 of EUCD is as follows:-

*“When applying the exception of limitation on private copying, Member States should take account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.”*

Article 5(2)(b) of EUCD permits Member States to introduce an exception:

*“in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned”.*

Furthermore exceptions and/or limitations must comply with the three step test:-

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<sup>27</sup> Padwana v SGAE C-467/08

1. They can only apply in certain special cases- so an exception needs to be clearly particularized and have a special purpose underlying it,
2. There must be no conflict with the normal exploitation of the work. Since by their very definition all exceptions will have some conflict with normal exploitation of a copyright work, otherwise copyright would be an absolute right, the key measure is whether a proposed exception prejudices the ways that copyright owners normally extract value from a work and,
3. They must not unreasonably prejudice the legitimate interests of the copyright holder so a proposed exception will fall foul of the three step test if the prejudice reaches an unreasonable or disproportionate level.

In considering the three step test in relation to exceptions in the electronic environment recital 44 of the Copyright directive is particularly important:-

Recital 44 states that exception should *“duly reflect the increased economic impact that such exception or limitation may have in the context of the new electronic environment. Therefore the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works”*.

### **Copying onto Devices**

IRMA takes the view that those who have legitimately purchased sound recordings, say for instance on CD or other physical format should be able to transfer them onto their own devices for their personal non – commercial enjoyment. Music purchased from legal digital services already enable this through licensing. It is of course perfectly justifiable for Ireland not to have levies presently, because there is no private copyright exception but if the suggested amendments or similar ones allowing format shifting and backup are introduced then a system of compensation will have to be introduced. It is not unreasonable because part of the value taken by manufacturers of devices is derived from the fact that music can be copied and transferred onto these devices. Accordingly if they are to be the beneficiaries of an exception allowing this to occur, part of the value created by the creators of music should be shared with the creators of music.

A private copying exception (when we use this term in this section we intend to refer to both format shifting and the making of backups) onto Devices (and here we refer to such devices as MP3 players, phones and tablets) should:-

1. Only apply to content that is legally owned by the consumer i.e. copied from a physical or legally purchased digital copy. An exception that allows private copying of unlawfully obtained, or lawfully obtained but not owned content as set out in the draft legislation is too broad and would not comply with the first step of the test.
2. Only apply to copying for personal, private and domestic use
3. Not allow the copying by a third party or distribution of the copied content to a third party in any form. The draft sections 106B and 106C allow for the copies to be made by a “lawful” user and this is problematic as set out below.
4. It should be a strict requirement of a private copying exception that the copy remains in the control of the owner of the legal copy. The reference to “household” in the draft sections are problematic as set out below.
5. It would also require compensation pursuant to article 5(2)(b) as elaborated upon in the CJEU case of Padwana –v- SGAE <sup>28</sup>where the court held that private copying must be regarded as an act likely to cause harm to the author of a work, that there is a presumption that the person copying has caused harm to the author, and that even though this harm may in individual cases be minimal, the harm caused by private copying must be assessed cumulatively.
6. Finally it must respect technological measures<sup>29</sup>) and the present drafts do not mention this.

Research, conducted by Oliver and Ohlbaum Associates and peer reviewed by Professor Ken Willis (Professor of Environmental Economics) at the University of Newcastle for the UK music industry in March 2012 was undertaken to gain an insight into music usage and trends and to identify and isolate the value of the ability to play music copied from CD on devices found that

- between 32% and 53% of the value of MP3 devices
- between 0.28% and 4.13% of the value of phones and
- approximately 6.7% of the value of tablets

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<sup>28</sup> (Case C-467/08),

<sup>29</sup> (Recital 39 EUCD and Article 5(2)(b) EUCD

derive from Music<sup>30</sup>

### **Copying onto the Cloud**

By using the terms “or lawful user” throughout both suggested sections 106B and 106C it would appear that these would allow copying by persons other than the lawful owner and could thereby apply to copying to cloud services. Any uploading of content to a cloud service necessarily involves the transfer of a copy to a third party, the cloud service, and the copy is therefore no longer under the control of the initial owner. That copy cannot therefore be maintained as a private copy. Furthermore if there is a desire for the private copying exception/back up provision to be “technology neutral” it would a fortiori apply to cloud services as well as hardware devices.

### Conflicting with legitimate licensing

The private copying exception should not conflict with the normal exploitation of the work and if it were to allow copying to the cloud then it would be in direct conflict with the normal exploitation of the work by the Record companies since they have already begun to license cloud services. There should not be an exception in respect of an emerging market that copyright owners have already begun to license.

Companies that provide cloud services monetize the storage service they provide on an ongoing basis through subscription payments, advertising revenue or through revenues they capture from increased sales of other devices. Such companies use locker services to add functionality into a device ecosystem that they control. They generate revenues from the copying functionality they provide in a locker often through increased sales of devices. It is only fair that these revenue streams should be shared with content providers that provide the raison d’etre for the services in the first place. It is not appropriate that the operator of a commercial service exploiting music with full knowledge of and control over the files uploaded

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<sup>30</sup> (<http://www.ukmusic.org/news/post/270-uk-music-publishes-new-oliver-ohlbaum-research>)

onto their service should be taken out of the ambit of copyright law under a private copying exception or back up provision.

The demand for all cloud services is driven by a number of different factors. One of which is the desire for consumers to back up and access music. Just as broadband companies benefit from greater traffic on their network by being able to sell broadband cloud services can increase charges to provide greater storage of music content and some of that value should be shared by rights holders. Functionality of cloud services licensed includes the ability to automatically stream and re download multiple copies of music files purchased from the applicable online stores to up to 10 additional devices and the licensees therefore have specific constraints that are part of the commercially negotiated contracts. An exception along the lines of that drafted in the Consultation paper would override the ability of companies to make commercial deals with cloud operators and it would be particularly problematic if the exception were to be extended in hand with not allowing contract override exceptions. <sup>31</sup>

### Household

The definition of household which appears in both 106B and 106C is problematic. Explicitly allowing the sharing of the copy within a household or a family rather than just listening access, would allow multiple copies of the same track to be shared with people that may only be within a shared household for a short time. This would create the problem that copies made within a household might then be retained and used by individuals even though no longer part of the household e.g. students temporarily sharing accommodation. The real problem however would be that this section could be used as a defence in circumstances where it would be impossible for the music industry to prove that copies were not made whilst an individual resided in such shared accommodation. It might become impossible to ever prove that a copy was made illegally.

Since part of the value associated with a device or other facility such as a cloud upon which music is stored is attributable to the music and creators of music should participate in that value. The research, conducted by Oliver and Ohlbaum referred to above was also to

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<sup>31</sup> Paragraph 7.3.24 and Q.62 below.

identified that 28% of the value of a basic cloud locker can be ascribed to the ability to store music files.<sup>32</sup>

### Potential for infringement

Cloud services are an ongoing threat to lawful sale of content through ease of enabling copyright infringement. Cyberlockers are unlicensed locker services that are widely used for infringement and there is a gray area between them and legitimate clouds services. The problem lies in identifying which services are fully legitimate and which allow the unlicensed sharing of sound recordings and the cost of monitoring and detection is substantial. If the exception is framed too broadly then it may contribute to the subsequent unlicensed distribution of content. If all legitimate lockers require licensing then the cost of enforcement will be lower.

The impact that these exceptions will have on enforcement, undermining new business models and technological protection measures has simply not been thought through and PPI/IRMA does not support any such amendment to CRRA.

### **7.3.8 Education, teaching and research**

The Consultation Paper states “Given that a great deal of education policy is directed to innovation, there are good innovation reasons to include “education” in the “research or private study” exceptions”. This may be self evident to the Committee since two of its members are professional educators but it is not clear to PPI/ IRMA why innovation would be assisted if the creator is not paid however?

PPI / IRMA are opposed to all attempts to force creators to give music as a free input into research and education. If music is to be used in an educational setting it should be licensed. This is particularly important given the difficulties of defining appropriate limits around educational use and in any case many educational establishments are profit making commercial enterprises, and there is a serious potential for the abuse of any such exception to obtain private benefits from obtaining free copies of music. For instance EMI published an

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<sup>32</sup> (<http://www.ukmusic.org/news/post/270-uk-music-publishes-new-oliver-ohlbaum-research>)



album of “songs we learnt at school” performed by the artist Mick Spillane. Teachers thought it was brilliant and they freely admit that they made multiple copies for themselves their families and their students without a thought for the intellectual property rights or livelihood of the artist or the record company that had invested in the production of the album. No one was in the least bit embarrassed about this. The record company and the artist did not chose to enforce their rights in this instance, but it is indicative of the fact that any exemption of this nature has the potential to be abused.

PPI/IRMA do not agree with adding the word education across the board into already existing sections allowing exemptions for research or private study. It does not appear that Article 5(3)(a) is amenable to this. This article allows an exception for “user for the sole purpose of *illustrating for teaching*”...and goes on to refer to the .....“*non commercial purpose to be achieved*”. Recitals 40 and 42 limit educational exceptions to establishments rather than persons engaging in education and also to reproductions only. The proposed new exceptions are not confined to non-commercial purposes. They should be confined to designated educational establishments that have proven their non commercial purposes and not be extended to all educational providers. It appears that the addition of the word “education” simpliciter to the sections dealing with fair dealing for research or private study is in complete contravention of the three step test. The WTO Panel Decision<sup>33</sup> interpreted the scope of the three step test and it was held inter alia that a broad exemption to a complete sector of commercial users cannot be justified under the three step test. Furthermore it certainly could not be introduced without compensation for rights holders. In the absence of appropriate return for right holder in this area the quality of educational materials will necessarily suffer.

#### **57B – Use by educational establishment of work available through the internet. –**

This section would be highly damaging to PPI/IRMAs anti piracy programme. It is highly dangerous because it completely fails to recognise the problems of enforcement online and it seems to be designed to send the message to students that anything found on the internet is free for use.

It is true that this exception is confined to educational establishments but it refers to all works

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<sup>33</sup> United States – Section 110(5) of the US Copyright Act of June 15 2000

available through the internet. This cannot comply with step one of the three step test as “all works” cannot be a “special case”.

The provisions relating to knowledge and the clearly visible notice would be unworkable, in that it would be impossible for either the educational establishment or a right holder to establish after the event that the conditions had been complied with.

### **7.3.12 Proceedings**

PPI/IRMA do not really have any objection to the inclusion of the words “of public security, for the purposes of administrative,” but fail to see how it can have any bearing on innovation!

### **7.3.14 Religious or official celebrations:**

IRMA/PPI do not believe that any private institution including religious movements should be able to copy, distribute, and use copyright material without licensing. There is a value to music in all circumstances as with other inputs consumed by religious organizations and public bodies. There is no justification for forcing rightsholders to provide their produce for free to the Government or to a religious organization. Rights holders should have the ability to charge for their content if used in religious or official ceremonies and importantly the choice for it not to be used if they do not agree with the use of their music in that way. By way of example, which is admittedly extreme, the Swedish Pirate Party has launched the religion of “kopimism” with the freedom to carry out their holy sacrament of copying information from the internet and this has been granted the status of a valid religion by the state. Such an exception would be detrimental to the moral rights of rights holders.

PPI chooses not to license the use of sound recordings at ceremonies which are part of the normal observance and rites of religious worship, but would oppose a statutory exception as this may bring in other activities which are organised under the auspices of a religious congregation but are quasi commercial or commercial in nature. PPI has always taken a pragmatic approach to such activities and has either waived the requirement for a PPI licence or licensed the activity for a nominal fee. Such an exception would be open to abuse by persons claiming a religious aspect to their commercial event or public authorities claiming that

an unreasonably wide variety of events were official celebrations (PPI does not, for example seek to licence the use of recorded music at St Patrick's Day parades and other public festivals, or Christmas street music). As it stands it allows PPI to act flexibly ensuring that deserving cases are treated fairly.

### **7.3.18 Caricature, parody, pastiche and Satire**

This exception was introduced in the copyright directive at the request of France, Belgium and Spain, which had such an exception in their national law. Parody has been part of their copyright legal tradition for a long time and the notion and the conditions of this exception have been refined by case-law over the years.

CRRA already has a number of exceptions which would provide a defence to copyright infringement in the case of genuine parody, i.e. fair dealing for criticism and review<sup>34</sup> incidentally inclusion<sup>35</sup> and / or use of quotations or extracts<sup>36</sup> and is unaware of any problems occurring in the music industry as a result of a lack of a distinct exception.

A parody exception could only be acceptable if the moral and economic right of the original creator "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to the authors honour or reputation" is fully respected.

PPI/IRMA would recommend that strong evidence of a problem should be available before proceeding with an exception, and that the exception is framed with the following in mind to ensure it fits the purpose of parody rather than be a vehicle for unlicensed use of works:

1. Is it a proportionate use of the work for the purpose of parody, i.e. is it an excerpt for reason of parody rather than a lift of a complete work?
2. Is it intended for commercial gain, and if so is the creator properly credited and paid for their work?
3. Is the parody likely to cause harm to the creator of the content?

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<sup>34</sup> s(51)(1) CRRA

<sup>35</sup> s(52)(3) CRRA

<sup>36</sup> s(52)(4) CRRA

4. Is it a parody of the underlying work, as opposed to a use of the work as a vehicle to make an unrelated comment or to parody something else?
5. Is more taken than necessary to make it a good parody?
6. To what extent does it substitute for the original or harm its market?

In addition it would need to be drafted in a way in which the three-step test is satisfied:

To comply with step one of the three step test, any exception that might be granted for parody must constitute a distinct, special case. It must be clearly defined, and not be too general in scope. For example, any given parody would have to be a parody of the underlying sound recording that it uses, as opposed to using that work as a vehicle to make an unrelated comment, or to parody something else. Likewise, parodies would have to use only as much of the relevant sound recording as was necessary to convey the parodic message. Copying of significant parts of a sound recording that were not being directly parodied would not be acceptable.

Secondly, the proposed parody exception must not conflict with the normal exploitation of the sound recording referenced or incorporated into the parody. Should the exception be too broad, this usage could conflict with sales of the original work or deprive the rightsholder of licensing income (for example if there were a confusing similarity between original and parody, or if the parody were so unfavourable as to deter purchasers or potential licensees of the original work).

Thirdly, any proposed parody exception would have to avoid prejudicing the legitimate interests of the owner of the copyright in the sound recording referred to in the parody. An example of such prejudice might be that the loss of sales or licensing revenues described above would be so significant that owner of the copyright in that sound recording suffered considerable economic loss.

Simply stating that parody, caricature and pastiche do not infringe copyright without tightly defining the terms is fraught with problems. The term Pastiche, in the OED "*an artistic work in a style that imitates that of another work, artist, or period*" implies it is using the underlying work to create another work without adequate rights to do so accordingly it could run counter to the laws of "passing off". Parody and caricature have an implied meaning that they are for satirical or comedic value however there must be a clear distinction between parody and comedy,

parody must be an imitation of a style for comedic effect, rather than a straightforward lift of an artists' work or a stylistic interpretation that is not designed for comedy.

PPI/IRMA do not think that the consultation paper has made out an economic case for the exception but would not object to a carefully drafted exception. The draft proposed is too broad for the reasons set out above.

### **7.3.19 Non-commercial user generated content**

PPI/IRMA are not opposed to non-commercial uses as such but they need to be appropriately limited because the term UGC is often used by pirate services to claim legitimacy when the content is not user generated but user uploaded, and because non-commercial UGC is often posted to commercial platforms which then derive revenue from it. An exception should not allow UGC platforms to benefit while cutting out right holders.

Users should respect copyright and related rights in the works used for the purpose of creating their own content. Existing exceptions in combination with the three-step-test provide a proper framework. Any use beyond that should be covered by the applicable exclusive rights and subject to the requirement to obtain appropriate licenses.

In discussing a possible “user-created content” exception, it must be noted that there are two distinct (creative) processes. The first is consumer created content, such as individual blogs, podcasts, texts and music. A second type of process involved “the use of existing copyright protected content for creating new or derivative works”.

These are two different concepts. We can distinguish between the two concepts as “user generated” and “user adapted.” The former is the act of origination by the user, whose very own creative impulse has brought the work into existence. The latter is the mixing or combining of someone else’s acts of origination, albeit in a novel way. In this context it should also be noted that the taking of whole (or substantial parts of) copyright protected works, such as films, music, photographs and books, and uploading them in another guise or under another name should not be regarded as user-created or –generated content. This is plain copyright infringement / piracy.

As to the first concept (user-generated or user-created content), there is no requirement for any particular exception. Such content is simply a new work which can avail itself of copyright protection in the same manner as any other work. A person who creates a blog or a new piece of music in their bedroom benefits from the very same copyright protection as does the established band, working with a top producer in the very best studio facilities.

As to the second content (user adapted content), there is no justification for the introduction of a new specific exception. If only very small portions of works are used in a reasonable manner, there may not be a problem. However, if larger or more characteristic portions are used, this would be damaging to the legitimate interests of right holders. Whereas the existing exceptions will in most cases cover the first scenario, a general exception, which would inevitably cover both scenarios, would be in breach of the three-step-test.

First such a transformative use exception cannot be considered a “special case” as it would introduce what would in effect be a blanket permission to reproduce sound recording extracts.

Second, it is highly likely that the normal exploitation of a work would be adversely affected by the use of it in another work. If one considers the example of a dance record which samples a distinctive drum and bass riff from a previous dance record. This riff (as is often the case in dance tracks), although musically basic and perhaps only two bars in length, will be the chief characteristic of the original – the element of it which sparks familiarity and popularity. The use of it in a new work, even if overlaid with a completely different harmonic, lyrical and melodic treatment, will lend that new work a degree of instant recognition. This could clearly impact upon the commercial success of the original work.

Thirdly, this could clearly prejudice the legitimate interests of the author, the performer(s) and the producer (i.e. their right to be rewarded for the use of their work). Moreover, the original right holder will have no ability to control the use of his work in the usual way. If the new track is used, for example, in an advertising campaign for a product with which they do not want to be associated, they will have no possibility to prevent it. As current and recent popular music history shows, there is a very strong commercial market in the use of adaptive works. There are a number of recent releases which have seen commercial success, in which existing work

has been adapted to arrive at a new work. In these cases, the underlying work makes a very significant musical contribution to the overall feel of the new work.

A “top five” from recent years includes:

- Madonna “*Hung Up*”; use of Abba’s “*Gimme Gimme Gimme*”;
- Sugababes “*Freak Like Me*”; use of Tubeway Army’s “*Are Friends Electric*”;
- Eminem “*Stan*”; use of Dido’s “*Thank You*”;
- Coolio “*Gangsta’s Paradise*”; use of Stevie Wonder “*Past-time Paradise*”;
- Coldplay “*Talk*”; use of Kraftwerk’s “*Computer Love*”.

The riffs and phrases used in these tracks (and many others like them) are distinctive, prominent and integral to the overall new work. Critically, in all of these cases, the current copyright regime was easily able to facilitate the use of the original work. Permissions were sought and granted, ensuring that the originators of the derived work received due reward, through a licensing fee or royalty payment.

The commercial arrangements behind these transactions are readily understood and utilised by record companies, publishers, and their relevant rights societies. For users not initially familiar with these processes, guidance is readily available from a range of legal and advisory sources. Musical creators generally respect their fellow music creators and fully recognise the moral imperative of ensuring that payment is made where it is due.

The licensing of content on social networking sites covering user-generated content is becoming an increasingly important source of income for right holders. Therefore, introducing any additional exception for such use of recorded music would seriously undermine this.

### **7.3.20 Demonstration & Repair**

PPI does not support the inclusion of this exception as it will cause detriment to its members. This would also be subject to abuse. A user could claim that it was using the music for demonstration and not ambience. It is not clear how such an exception would promote innovation. Even when retailers wish to use sound recordings to demonstrate equipment it does not follow that the person has to use music in the PPI repertoire as it can use out of

copyright or freely licensed recordings. If retailers are choosing to use commercially released sound recordings for demonstration purposes this must indicate that there is a benefit to them in doing so and accordingly the rights holder should be appropriately remunerated.

This exception was introduced in the Directive at the request of Germany and Austria. These countries had an exception for such uses in their national legislation. However, this exception has remained limited to these countries and the uses concerned have not given rise to any problems in any other countries.

We do not see a need to introduce such an exception in Irish copyright law. It belongs to countries with a different legal tradition and is likely to create more confusion and controversy without any necessity.

#### **7.3.24 Consumer Protection**

IRMA/PPI does not agree that copyright exceptions should be protected from override by contract. It could be that someone is willing to agree to a restriction in order to receive a particular benefit in return. That contractual freedom should not be undermined. Parties may prefer to treat a particular use of copyright as being licensed even though it may be covered by an exception. Such an approach may provide certainty where some of the licensee's activities are covered by the exception whereas others are not and it would be difficult to differentiate the two.

There may be many legitimate business reasons why parties to a contract may wish to permit only specified consumer uses in terms and conditions. They might do so in order to be able to launch a service at a particular price point. Providing that exceptions must override contractual terms would prevent certain licensing business models and would hinder innovation.

The suggested amendments are too far reaching and since no one actually even suggested that this section should be amended it is not clear why it has been revised. It goes far too far to state that a particular provision should be void in all cases.



## List of Questions from Chapter 7

|    | Question   | Comment   |
|----|--|---|
| 5  | Should the definition of "fair dealing" in section 50(4) and section 221 (2) CRRA be amended by replacing "means" with "includes"?   | <b>No there is certainty in a confined definition – changing “means” to “includes” would have the effect of creating uncertainty and hence expensive litigation</b>   |
| 56 | Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:<br>(a) reproduction on paper for private use<br>(b) reproduction for format-shifting or backing-up for private use<br>(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research<br>(d) reproduction for persons with disabilities<br>(e) reporting administrative, parliamentary or judicial proceedings<br>(f) religious or official celebrations<br>(g) advertising the exhibition or sale of artistic works,<br>(h) demonstration or repair of equipment, and<br>(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes? | <b>Yes if they, considered on their own individual merits, comply with the three step test and can be shown to have a net beneficial economic effect</b><br><br><b>(a) No</b><br><br><b>(b) See reply to 7.3.4 above</b><br><br><b>(c) no to inclusion of education without fair payment</b><br><br><b>(d) No Opinion</b><br><br><b>(e) do not see how the suggestions have any effect on innovation</b><br><br><b>(f) No see reply to 7.3.14 above</b><br><br><b>(g) No Opinion</b><br><br><b>(h) No see reply to 7.3.20 above</b><br><br><b>(i) See reply to 7.3.18 above</b> |

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|----|--|--|
| 57 | Should CRRA references to "research and private study" be extended to include "education"?   | <b>No</b>  |
| 58 | Should the education exceptions extend to the<br>(a) provision of distance learning, and the<br>(b) utilisation of work available through the internet?            | <b>(a) No</b><br><b>(b) See reply to 7.3.8</b>   |
| 59 | Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters' behalf?  | <b>Yes</b>   |
| 60 | Should the exceptions for social institutions be repealed, retained or extended?   | <b>S(97) is presently before the High Court following the ECJ decision on Hotel Bedrooms</b> |
| 61 | Should there be a specific exception for non-commercial user generated content?  | <b>No see reply to 7.3.19 above</b>  |
| 62 | Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRA? | <b>No</b><br><b>see answer to paragraph 7.3.24 above</b>                                     |

## Part 8 Entrepreneurs

The consultation document has set aside a chapter especially for “entrepreneurs” who appear to be given a special status over and above ordinary “users”. The document notes that “entrepreneurs are a key source of innovation” and proceeds to outline the issues that apply to “online start up companies” that “wish to generate their own content”, “seek to develop and transform existing content” or “want to provide platforms to allow others to generate or transform content”. The document concludes by proposing a specialist exception for innovation. While PPI/ IRMA is a supporter of innovation, in response to question 66, we do not believe that such an exception should be introduced, for the following reasons:

1. we have not seen any evidence that innovation has been inhibited by the need to obtain a licence for copyright content

2. in fact the evidence indicates that the tech companies that are proposed to take advantage of such an exception are thriving under the current system
3. the impact of the proposed exception on innovation in other sectors has not been identified or properly analysed - introducing an exception of this nature could inhibit innovation in the creative sector
4. the proposed draft exception is said to draw on existing concepts of copyright law but in fact these concepts have been taken out of context and used incorrectly in ways that are likely to undermine foundational principles in Irish copyright law
5. the proposed exception, which is apparently intended to exempt entire business models from the need to obtain a licence, is inconsistent with Ireland's obligations under international treaties and the European framework
6. the need for innovation can sometimes justify exceptions from copyright protection but these can be accommodated within the current framework.

We urge the review to note at the outset that “online start up companies” are not the only entrepreneurs that derive value for the Irish economy. Record companies are themselves entrepreneurs in what is an extremely risky business – the business of finding and breaking new artists. Substantial investment is required to develop a new artist and bring their product to market. This investment is risky – only one in ten albums are commercially successful, and the others do not cover their costs.

Effective copyright protection is the framework which ensures that investors and entrepreneurs in the record business and other creative industries can enjoy a return on their investment if their creations are popular and successful. The review should be aware that the introduction of an exception that is intended to assist “online start ups” to exploit copyright content without a licence or payment to the original innovator, who has invested substantial sums to create the content, carries a high risk of inhibiting innovation and entrepreneurship in the creative industries.

We also urge the Committee to closely and critically examine the evidence that has been put forward in favour of an innovation exception. The consultation document notes that “we were given a few examples of startups that ran into problems with copyright” and “other submissions felt they were in a legal grey area”. This can hardly constitute evidence that an exception is needed for innovation, and is little more than anecdotal. It is usual for a new business to have

startup and compliance costs and if a business is seeking to exploit copyright content, obtaining a licence on reasonable commercial terms will be one element of those startup costs. Rather than proposing an exception that would make copyright content available for free to a loosely defined group of “innovators”, the review should first look to see whether the innovator has sought a licence for the use in question and whether a licence is available on reasonable commercial terms. The recorded music industry is open to consider licensing arrangements and to facilitate new and innovative business models that exploit music and make it widely available – the plethora of varied licensed digital music services clearly illustrates this point.

In fact the evidence points in the opposite direction: innovation of this kind has flourished under the current system. Search services are identified in the consultation document as a “key example” of the kind of innovation which would be allowed by the exception. However Google, the dominant provider of online search in Ireland, is already a highly successful company. In October 2011, Google Ireland, the headquarters for Google’s EMEA operations, reported that its turnover had jumped to €10.9 billion in 2010, an increase from the 2009 figure of €7.9 billion.<sup>37</sup> Google attributed the jump to continued growth in the digital economy which had fuelled good growth in the company’s core business of search advertising. There is simply no evidence that Google and other search businesses have been inhibited by copyright.

Another example cited in the consultation document is businesses that wish to provide a platform for others to post transformative works. Youtube, owned by Google, is perhaps the most well known platform for user-generated content. In 2010, press reported Google’s CFO as reporting that Youtube’s revenues more than doubled to a total of nearly \$1 billion. This is hardly a business in need of a copyright exception to encourage innovation.

Other examples of online businesses that are purportedly in need of the exception are cited: indexing data, targeted online advertising, reporting of twitter trends and review sites which provide ratings based on analysis of online reviews/internet traffic. The review notes that the copyright status of these is “unclear as a matter of Irish law”. However we have not seen any evidence that such businesses have been inhibited by fear of copyright infringement lawsuits, and/or have been unable to obtain a licence on reasonable commercial terms for copyright

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<sup>37</sup> [<http://www.irishtimes.com/newspaper/finance/2011/1008/1224305453767.html> ].

content that they wish to exploit. We cannot see any evidence for the review's conclusion that without an exception these businesses will be "stifled".

We also urge the review to consider the impact of such an exception on established businesses that operate with appropriate licences for copyright content. The review seems to have been convinced that online startups have some inherent value because they process data on the internet. This is to ignore other sectors of the Irish economy that derive value and create jobs.

The statement at page 89 that " .. if the UK's copyright law over-regulates to the detriment of the UK, then Ireland's similar copyright law must similarly over regulate to the detriment of Ireland" is hardly supportable without evidence.

Despite the lack of any credible evidence of the need for an innovation exception, the consultation paper goes on to propose one. The consultation paper states in a number of places that the proposed exception draws on concepts from existing law including copyright law. However a careful analysis of these statements shows that they are mistaken and these concepts have been taken out of context and not given their proper meaning, as follows:

1. The consultation paper states that because the adaptation right has not been harmonized at European level therefore the Copyright Directive does not preclude the development of an exception for innovation. This statement is wrong. The reproduction and making available rights have been harmonized in the Copyright Directive, together with a closed list of exceptions that can be enacted in national law. While some of the exceptions allow for certain types of innovation for specific purposes, there is no possibility within the EU framework to create a broad exception based on innovation.
2. The paper outlines the requirements of Article 9(2) of the Berne Convention, which is also incorporated into TRIPs (and therefore subject to enforcement within the WTO framework), the "three step test" for permitted exceptions. The proposed exception includes reference to steps two and three of the test, but ignores step one "certain special cases". The requirement of "certain special cases" means that exceptions must be clearly defined and for a specific purpose or use. The proposed innovation

exception cannot hope to meet this requirement as it could apply to a broad and undefined category of uses, and in fact purports to exempt entire business models rather than specific uses of copyright works.

3. In the proposed drafting for the exception, an “innovation work” is to be given special status if it is an “original work” and “substantially different” or a “substantial transformation of” the initial work. While the concepts of “original work” and “substantial part” are well developed in copyright law, they are used wrongly in the proposal. Not only is their use unlikely to achieve the desired outcome, it is also likely to create confusion and uncertainty that will flow to the rest of the CRRA. For instance:

Originality – The proposal appears to equate “originality” with some element of novelty, creativity, or innovativeness. Subjective concepts of novelty and innovation (based on comparison with “prior art”) are ones which come from patent law, and it is dangerous to conflate these with copyright law. “Originality” in copyright law merely requires that the work “originates” from its author, in the sense that it has not been copied from someone else. It provides for a minimal threshold for copyright protection. When the term “original” work is used in its correct copyright sense it is effectively redundant in the drafting of the proposed section, as any work which is not original (ie. has been copied from someone else) simply would not qualify for copyright protection in any event. The area where there has been debate in copyright law in recent years around the concept of originality concerns whether informational works (such as databases) can be regarded as original if they involve only “sweat of the brow” or labour on the part of their author, or if some minimal “intellectual effort” should be required. This issue is briefly touched upon in section 4.5 of the Consultation Paper. The mistaken use of “original” in the drafting of the proposed “innovation” exception will simply lead to considerable confusion, and fail to achieve the desired outcome.

Substantiality – Again, the Consultation Paper’s proposal to use “substantial” as a criteria for identifying the works that are to be given this new special status misuses, and would undermine, a foundational concept in Irish copyright law. The concept of “substantial part” has a very specific meaning derived from section 37(3) of the CRRA, which provides that any act undertaken in relation to a work also relates to any “substantial part” of the work. It has the effect that it is an infringement of copyright to copy a “substantial part” of a work, and accordingly, no infringement to copy less than a substantial part. This requires an assessment

of the amount and nature of the copyright material that has been copied. The concept of “substantially different” simply has no meaning in copyright law. It will lead to confusion, and will create considerable difficulties to apply in practice. Rather, the better approach is to make no change to the current statutory framework, which has the effect of providing that there is no infringement where less than a substantial part is copied.

4. The consultation paper states on page 92 that “there is some statutory precedent for this kind of development”. This is entirely wrong – such a broad and undefined exception to IP protection, which would undermine foundational copyright principles, is unprecedented both in Ireland and internationally. The reference to the system of innovation patents in Australia is unhelpful, as it applies to an entirely different statutory framework and species of intellectual property right. Patent protection is afforded to work which is novel and which involves an “inventive” step. “Innovation patents” were introduced in Australia relatively recently as a replacement for the old “petty patent”, and were intended to provide a class of patents that could be granted without certification, and to which a lower threshold of “innovative” rather than “inventive” step applied. Innovation patents enjoy a lesser period of protection than a standard patent. It is worth noting that there is some debate in Australia about whether the innovative threshold is too low, with the result that too many patent monopolies are being granted such that innovation might be stifled. As noted above, these subjective concepts of novelty, inventiveness, and innovation have never been a part of copyright law, which requires only that a work be original (in the copyright sense) to enjoy protection. The promotion of innovation and inventiveness through the granting of statutory monopolies is a matter properly dealt with through patent law, not copyright law.
5. The paper also seeks to draw on the concept of “transformative use” from elsewhere in copyright law and proposes to give a special status to uses that involve a “substantial transformation” from the original. This aspect of the proposal further confuses existing copyright concepts in ways which will lead to uncertainty, and are unlikely to achieve its intended purpose. The concepts of “transformative use” and “transformed” are well known in US copyright law in particular, where it has presented some difficult challenges to apply in practice. For instance, when considering whether a specific use of copyright material constitutes “fair use” under s.107 of the US Copyright Act, the Courts take account of whether there has been a “transformative use”. This is a

notoriously “grey” area of US copyright law. It is made more difficult by the fact that copyright owners in the US also enjoy the exclusive right to authorize “derivative” works which includes works that have been “transformed” from one or more pre-existing works”. This means that there is a tension between the right and the exception. It is not clear how the Irish proposal would resolve these tensions. Nor is it clear how it is intended that the proposal would avoid conflicting with the author’s exclusive right of adaptation provided for in article 12 of the Berne Convention (which has been incorporated into TRIPs). Further, if the intention is to replicate the approach to “transformative use” in the US fair use exception, a closer examination of the US cases suggests that many “innovative” online businesses would fail to qualify as having created “transformative works”. For a start, if the use of the work is commercial, that may be found to detract from its transformative nature. The “innovative” nature of many business use of copyright content is unlike to lie in what is done with the content, but how it is delivered. Consider for example, *UMG Recordings Inc v MP3.com Inc*<sup>38</sup>, where the court found that the “space-shifting” function of an online distribution system was innovative, but not transformative, because it added nothing to the works.

The review seems to draw some comfort from the fact that words that currently appear in copyright law also appear in the proposed new exception. However the review should be in no doubt in light of the above discussion that although the same words are used, these are not concepts properly derived from copyright law or applied, and the proposed exception would be unprecedented in intellectual property law both in Ireland and internationally.

### List of Questions from Chapter 8

|    | Question   | Comment  |
|----|--|--|
| 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? | <b>We cannot conceive of a situation where innovation would justify denying copyright protection to a category of works. In any case, the framework of rights and exceptions laid down in international treaties and</b> |

<sup>38</sup> (SD NY) 92 F. Supp. 2d 349 (2000)



|    |  |   |
|----|--|---|
|    |  | <b>at EU level does not allow rights to be denied on the basis of a third party's desire to "innovate".</b>   |
| 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? | <b>Innovation may, on occasion, be part of the justification for an exception to copyright protection. For example fair dealing with a work for the purposes of criticism or review allows for innovation. However the broad concept of "innovation" in itself is not a suitable basis for a new category of exception because it is undefined and is not in itself a public policy goal.</b> |
| 65 | When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licenses?                    | <b>We cannot conceive of such a situation. Again, the broad concept of innovation is not a suitable basis for a compulsory licence system because it is undefined.</b>  |
| 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?        | <b>We do not believe there should be such an exception for the reasons outlined above.</b>  |

## **Part 9 Heritage Institutions**

The definition of Heritage Institutions at pg 59 prescribing libraries and archives but including all educational establishments is highly problematic as in this way it extends the educational exemptions way beyond what is permitted by EUCD. The comments we made at paragraph 7.3.8 above are particularly relevant here.

There are only three articles in EUCD that can apply to education as follows:-

1. Article 5(2)(c) permits an exception to the reproduction right in favour of publicly accessible libraries, educational establishments, museums and archives for specific acts which are not for direct or indirect economic advantage;
2. Article 5(3)(a) permits use for the sole purpose of illustration for teaching, subject to an acknowledgement where possible, and to the extent justified by the non-commercial purpose to be achieved.
3. Article 5(3)(n) permits communication for research or private study to individual members of the public by dedicated terminals on the premises of the establishments referred to in Article 5(2)(c) of works not subject to purchase or licensing terms, which are contained in their collection.

And it is not permissible to include other exceptions by dint of an amendment to the definition of Heritage Institution.

## **9.7 Donations**

Copyright is made up of numerous rights such as the right to reproduce, right to adapt, right of communication to the public. It is an established tenet of law that copyright cannot be assigned except in writing. Accordingly any right that is not clearly stated to be transferred is not transferred. This change would make it so that all rights in the possession of the transferor would be transferred unless reserved. This would cause uncertainty and confusion as it might not be clear what rights the transferor had when the transfer deed was made. It would not only create uncertainty but it would undermine existing bargains and contracts.

It would have the potential to cause havoc in the music industry where cable broadcast and public performance rights are traditionally assigned to collecting societies.

## **9.8 Text and Data Mining**

The exceptions in EUCD are exhaustive accordingly such an exception is not possible other than is already allowed under section 50(1) – fair dealing for research and private study.

If however it were thought that the existing section 50(1) could be clarified to allow non-commercial data-mining the three step test would have to be considered and the exception confined to cases where that no licensing scheme exists for such use or where securing the necessary licence would be impracticable.

To go further would be to raise a concern that it might include search engine and indexing activities in general and be an attempt by search and indexing companies to have the indemnities of the E Commerce Directive extended to cover them. The balance created by the E-Commerce and EUCD should be respected. Any extension or clarification would have to be very careful not to undermine enforcement efforts against infringing sites.

### List of Questions from Chapter 9

|    | Question   | Comment  |
|----|--|--|
| 67 | Should there be an exception permitting format-shifting for archival purposes for heritage institutions?   | <b>No objection to format shifting to ensure the preservation of historic sound recordings for storage within appropriate institutions provided it complied with 5(2)(c). Definition of heritage institution problematic</b> |
| 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? | <b>No this is a licensed activity so would not comply with Art 5(3)(n) EUCD</b>  |
| 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   | <b>The terms of Article 5(3)(n) EUCD would need to be observed accordingly it should exclude, works subject to</b>   |

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|    | heritage institution?  | <b>purchase or licensing terms.</b><br><br><b>Definition of heritage institution problematic</b>   |
| 70 | Should the fair dealing provisions of CRRRA be extended to permit the brief and limited display of a reproduction of an artistic work during a public lecture in a heritage institution?                             | <b>No Opinion</b>  |
| 71 | How, if at all, should legal deposit obligations extend to digital publications?   | <b>No opinion it excludes sound recordings</b>   |
| 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? | <b>It would be best to wait for the Directive</b>  |
| 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?                         | <b>No this would change established principles of copyright law that copyright cannot be assigned except in writing – it would have unexpected ramifications</b> |
| 74 | Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?   | <b>See reply to 9.8 above</b>  |
| 75 | Should there be related exceptions to permit computer security assessments?  | <b>No Opinion</b>  |

## Part 10 Fair Use

IRMA does not think that fair use is appropriate for Ireland for all of the reasons expressed in its initial submission. In brief:-

1. Most importantly, there is in fact no evidence that Fair Use would have facilitated innovation in Ireland and that its absence is holding back innovation. This review and the Hargreaves review in the UK appear to have been kick started by a quote from the Google founders that they could “never have started their company in Britain” though Google deny ever having made this remark.
2. The debate concerning fair use is often framed as a fight to make content available for new and innovative uses. The debate is really about whether third parties should pay a reasonable licence fee for content that they wish to use, in developing products and services that they will then seek to monetize.
3. We have not seen any evidence that any companies or individuals wishing to develop innovative products and services have not been able to do so because they were unable to obtain a licence or afford a licence fee in connection with copyright content that was required for their work to continue
4. Fair use would result in uncertainty which would only benefit those with deep pockets for litigation and make work for lawyers.
5. When economic strength and accordingly bargaining power is unequal and the law is uncertain then the benefit of that uncertainty will go to those who are better able to afford risky litigation.
6. The very clear and unambiguous language used in Irish law has provided certainty and because of this there has been negligible litigation in this area. The opposite is the case in the US where there is a more open fair use exception.
7. The experience from other countries suggests there is no reason for Ireland to go down a path that has been rejected in Australia, New Zealand and Canada, among others.

8. A doctrine of fair use which leaves open the cases to which exceptions can be applied, such as that proposed in draft section may not comply with the three step test from the Berne Convention, as incorporated by TRIPs
9. Fair use is proposed as a mechanism to achieve flexibility; however there is sufficient flexibility within the current regime of exceptions to accommodate the interests of rightholders and users

IRMA submitted in its initial submission to the Review Committee an expert opinion by the leading international copyright professor Graeme Austin, Professor of Law at Victoria University of Wellington (NZ) and Melbourne University (Australia). Professor Austin examined in detail the US system of fair use and reviewed US case law and concluded that that fair use is a very poor regulatory tool. In his view fair use has introduced a significant degree of uncertainty into US law and it is often impossible to predict the outcomes of cases in which the fair use issue arises and this is costly risky and wasteful. Professor Austin states that claims that fair use contributes positively to levels of innovation are likely to prove unsustainable and that accurately identifying any causative connection between fair use and economic growth without consideration of other relevant factors is likely to prove impossible and points to the fact that:-

*“Many cultural, economic, social, and legal factors affect levels of innovation, including: domestic infrastructure supporting innovation finance;<sup>39</sup> levels of education;<sup>40</sup> labour productivity;<sup>41</sup> the current state of “entrepreneurial culture” and the presence of innovation hubs;<sup>42</sup> levels of direct or indirect public-sector support of innovation, including military funding;<sup>43</sup> taxation; the cooperative character of the research culture;<sup>44</sup> and obligations imposed on researchers to provide for a “public stake” in research outcomes”*

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<sup>39</sup>United Nations Economic Commission for Europe, *Financing Innovation Development: Comparative Review of the Experiences of UNECE Countries in Early-Stage Financing* (2007) [“Financing Development”].

<sup>40</sup> Jérôme Vandenbussche, Philippe Aghion, Costas Meghir, *Growth, Distance to Frontier and Composition of Human Capital*, 11 J Econ Growth 97 (2006).

<sup>41</sup> ARTHUR BLAKEMORE & BERTHOLD HERRENDORF, *ECONOMIC GROWTH: THE IMPORTANCE OF EDUCATION AND TECHNOLOGICAL DEVELOPMENT* 7(2009).

<sup>42</sup> UNECE, *Financing Development* (2007).

<sup>43</sup> Wesley M Cohen, Richard R. Nelson & John P. Walsh, *Links and Impacts: The Influence of Public Research on Industrial R&D*, 48 Mgmt Sci 1 (2002).

<sup>44</sup> John P Walsh, Ashish Arora & Wesley M. Cohen, *Working Through the Patent Problem*, 299 Science 1021 (2003).

## Other Countries

The Consultation Paper at question 76 asks what is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland? From a review of a number of countries it appears to IRMA that it is incorrect to say that the fair use doctrine is spreading and being picked up by several countries.

While the consultation paper outlines a couple of countries that have introduced such a doctrine, including Israel and the Philippines, it is misleading to say as the consultation paper does that “*other countries are moving in a similar direction*”, citing the UK and Australia as examples. In the UK the Hargreaves report did not recommend the introduction of a fair use doctrine and neither has the government taken that position.

In 2005 Australia rejected the fair use and expanded fair dealing models based on concerns that they do not comply with the three-step-test mandated by the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) It concluded that adopting either system “*is not consistent with treaty obligations to include such general uses in a flexible exception*”.<sup>45</sup> Whilst it is true to say that in Australia, the issue may be included together with a number of other issues in the terms of reference for a report from the Law Reform Commission which is due to report back to government in 2013, it would be too early to suggest that this indicates an inclination of the government towards introducing a fair use exception.

Concerning India, the Consultation paper notes that the pending Copyright Amendment Bill (2010) would introduce “an expanded fair dealing exception that goes a very long way down the road to a fair use doctrine”. However, the Copyright Review Committee’s assertion is not accurate in this regard. In fact, the Indian Copyright Amendment Bill which came into effect on 21 June 2012 does not introduce an “expanded fair dealing exception” similar to the US fair use doctrine but only slightly expands the existing list of fair dealing exceptions to also cover “personal use” (in addition to the existing “private use”) and for the purposes of reporting of

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<sup>45</sup> Kimberlee Weatherall, “Fair Use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia” (Background paper to oral presentation, SNAPSHOT 3 20 May 2005

current events and affairs.<sup>46</sup>In addition, the scope of the provision was broadened in so far as the fair dealing exception now applies to “any works” and not only to the previously listed “literary, dramatic, musical or artistic works”. Most importantly, the list of purposes for fair dealing is exhaustive and is not to be considered as a list of mere examples open for further fair dealing purposes. It should be noted that back in 2010, all stakeholders including ISPs expressed strong concerns regarding the expansion of the exception for private purpose to cover also “personal use” esteeming that the “words personal or private use were very vague a, wide and undefined and that it was not reasonable to extend the fair dealing provisions for private use” as it would only help pirates.<sup>47</sup>

New Zealand also rejected fair use *inter alia* because it might not comply with the three step test.<sup>48</sup>

There had been quite a push to have Canada adopt fair use by adding the words “such as” to the listed fair dealing exceptions in S.29 of the Act. These submissions were implicitly rejected by the government as the sought after amendment was not made. Rather than adopting an open ended fair dealing regime, the government decided to enact a series of new exceptions. These exceptions are subject to specific conditions but are not tied to the fairness of the dealing.

Finally the experience in the US is outlined in the paper provided by Professor Graeme Austin – it has resulted in litigation and has proved to be a less than satisfactory regulatory tool.

## **EU & International Law**

The Consultation paper at paragraph 77 suggests that the Irish Government might lobby the EU to change EU law to allow for a fair use doctrine. IRMA does not think that this is desirable or warranted but in any case a general fair use doctrine would be incompatible with the EU legal system. Fair use is an unknown concept under EU law and is totally foreign to the continental legal systems in particular that do not rely on case-law. It would lead to major legal uncertainty across Europe, in stark contrast with the harmonization objective of the Internal Market.

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<sup>46</sup> (see Section 52a Copyright Act as of 21 June 2012).

<sup>47</sup> (No. 19.9 of the 227<sup>th</sup> Report of the Related Parliamentary Standing Committee, November 2010, No. 19.9).

<sup>48</sup> see Digital Technology and the Copyright Act 1994 : A Discussion Paper (July 2001) at para 192 – 194;260



Introducing a new open fair use exception in the EU CD would not be in line with the aim of the Directive, and is not necessary in our view. The list of exceptions included in Article 5 of the Copyright Directive aims at providing a minimum harmonization in that field across the EU, while respecting the principle of subsidiarity. The closed list of exceptions provides legal certainty across Europe as to which types of uses can be allowed. At the same time, the list is optional and the exceptions are framed in a relatively open way in order to respect the different legal, cultural and social traditions of the Member States, the principle of subsidiarity, and to enable adaptation to the evolution of technology and usages. The three-steps test intervenes as a general safety net to the exceptions, in particular for some of them that are not defined in detail (eg the private copying exception).

In any case EU law cannot be seen as independent of international law. The international legal framework that Fair Dealing and EU CD exceptions exist within is based upon international conventions and treaties and the guiding principles of the three step test which is the central instrument in international copyright law for examining exceptions and limitations to copyright. The Consultation Paper mentions the three step test but appears to misunderstand it in so far as it appears to accept that a Fair Use doctrine would be consistent with the three step test as long as it is mentioned in the draft. The present structure of Fair Dealing is one that one would interfere with at one's peril since there is no certainty whatsoever, indeed there is considerable doubt as to whether a general Fair Use doctrine, whether generally or as proposed in draft section 46A could comply with the three step test at all. This is because the cases to which the exception could apply are not defined in the legislation.

Many authorities have reviewed the fair use system for compliance with the three –step test and have expressed the opinion that it is non-compliant. Writing for the WIPO Standing Committee on Copyright and Related Rights in 2003, the well-respected Australian copyright scholar Sam Ricketson <sup>49</sup>concluded that the “*open-ended, formulaic provisions*” contained in s.107 of the U.S. Copyright Act were vulnerable to the three-step test stating that whilst it “*was quite possible that any specific judicial application at S.107 will comply with the three-step test as a matter of fact*”, he concluded that “*The real problem, however, is with a provision that is framed in such a general and open-ended way. At the very least, it is suggested that the*

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<sup>49</sup> in a paper entitled WIPO Study on Limitations and Exceptions of Copyright in the Digital environment SCCR/9/7 (June 2003)

*statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).”*

The consultation paper proposes a draft section with significant similarities to S107 of the US copyright act – but it should be clear from the foregoing that the simple fact that the section mentions the three step test is not per se sufficient to make it compliant with the three step test!

### **Fair Use and Innovation**

We have not seen any evidence that fair use necessarily encourages innovation and there is no empirical case made out for it in the Consultation Paper. In contrast there is evidence in the DKM Report to indicate that the creative industries provide jobs and value to the Irish economy and they advise that a dilution in copyright protection will have a damaging effect on those industries. Their advice is clear, the status quo should remain until a convincing case for change can be made.

It is important to emphasise that with respect to music, licences are available and there are mechanisms to allow third party innovators to seek and obtain licences for content that they wish to use. The discussion concerning fair use is actually a discussion about which uses should appropriately be permitted without payment and we have not seen any compelling evidence that innovators that wish to use copyright content to develop innovative products and services have been refused a licence or are unable to afford the reasonable cost of a licence.

The language in the consultation document concerning fair use focuses on the IT competitiveness index as a factor to judge the success of the fair use doctrine in India and Israel, for example. Of course to consider IT competitiveness is to consider one branch of the technology sector in isolation from all the other sectors that contribute to the Irish economy, including the creative sector. In order to properly compare the countries that have fair use defences with those that do not we would need to undertake a full review of the other elements of the law of those countries; and the impact on all sectors and the economy as a whole.

### **Uncertainty and Flexibility**

Presently copyright owners and copyright users have clarity as to the scope of copyright and as to the scope of the permitted acts. If a fair use doctrine was introduced there would be uncertainty at least until a body of case law is developed. When fair use was codified into section 107 in 1976 it followed more than 150 years of judicial interpretation. Adopting fair use into legal system without this case law would leave copyright owners and users guessing where copyright ends and user rights begin. It would also hamper effective enforcement against infringement, because users would always say that their use was “fair”. It has to be borne in mind also that “fair use” in the United States is closely bound up with the constitutional guarantees of free speech, privacy, freedom from regulation, and free competition and it is not at all clear how it would interact with the Irish Constitution.

In our view the current system of the Directive is adequate in that it provides both flexibility for the Member States, and a minimum of legal certainty and predictability required by the stakeholders, in particular users.

Rather than introducing a general fair use exception, the Commission and Member States should examine (1) whether any new uses can be clearly identified, (2) whether these uses cannot be accommodated by the existing exceptions, (3) whether such uses are necessary and are legitimate taking into account the interests of the right holders.

If it appears that particular situations do seem to require accommodation, we recommend that they are dealt with via a clearly identified and specific permissions, rather than any open-ended clauses.

#### List of Questions from Chapter 10

|    | Question  | Comment   |
|----|---|---|
| 76 | What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?   | <b>See paragraph above entitled Other Countries</b>                             |
| 77 | (a) What EU law considerations apply?<br>(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>(a) see section above entitled EU and International Law</b><br><b>(b) No</b> |

|    |  |  |
|----|--|--|
| 78 | How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?   | <b>There is no evidence that it does see Professor Austins paper and paragraph above entitled fair use and innovation</b>  |
| 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                    | <b>It would leave rightholders and users guessing, and it would hamper enforcement</b>   |
| 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?             | <b>See paragraph above entitled uncertainty and flexibility. The EUCD exceptions do indeed provide flexibility whilst avoiding unwelcome uncertainty</b>   |
| 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?                                       | <b>The current system of exceptions IS flexible and has sufficient flexibility to address the uses that should be free</b>   |
| 82 | What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?   | <b>See DKM Report for empirical evidence that the Irish Creative Sector is valuable to the Irish economy and any dilution of copyright protection such as the introduction of a fair use doctrine will damage it and should not be undertaken without a convincing argument for change</b> |
| 83 | (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?<br>(b) In particular, how appropriate is the draft section 48A tentatively outlined above? | <b>PPI / IRMA do not think that a fair use Doctrine should be introduced in Ireland for all of the reasons set out above</b>   |

## 11. Conclusion

|     |  |  |
|-----|--|--|
| 84. | Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed bill?   | <b>Yes</b>   |
| 85  | Should sections 15 to 18 of the EU Directive 2000/31/EC) Regulations, 2003 be consolidated into our proposed Bill(at lease in so far as they cover copyright matters)? | <b>No</b>  |
| 86. | What have we missed?   | <b>Section 50(1) CRRA in its existing form over-reaches what is permitted by EUCD. The provision must be confined by its terms to non-commercial purposes.</b> |