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RESPONSE OF MICROSOFT TO THE

IRELAND COPYRIGHT REVIEW COMMITTEE

CONSULTATION ON COPYRIGHT AND INNOVATION

31 May 2012

Background

1. **Microsoft welcomes this opportunity to give evidence to the Copyright Review Committee in its continuing consultation on copyright and innovation (the 'Review').** As the Committee is aware, Microsoft develops and offers software and other creative content and services both offline and online. Microsoft is also the developer of many of the technologies and devices widely used for the delivery and enjoyment of content and services online. The company is thus well positioned to understand both the vital importance of copyright and other forms of intellectual property (IP) and the need for balanced, workable rules in the online environment.

2. **Microsoft has a long investment in and commitment to Ireland, and to the growth and competitiveness of the Irish industry and economy.** Microsoft has been operating in Ireland since 1985 and the early days of the PC industry, and now maintains four businesses here covering research, operations, sales and marketing, and a major new data centre here, representing €13.4 billion in annual turnover and direct employment of 1,600 full-time employees and contractors, with a much wider impact on the economy as described below. Microsoft re-invests a significant proportion of its annual revenues in further research and development—13% (US$ 9.04 billion) of its global revenues in fiscal year 2011—including in its research facilities in Ireland and elsewhere in Europe.
3. **Microsoft and virtually every other company in the software and technology sector rely heavily on copyright and other forms of intellectual property (IP) to fund and promote on-going innovation.** From the largest enterprises to the smallest entrepreneurs, virtually every company in the software sector relies on copyright in various ways to help fund innovation, to maintain their development and distribution models, and/or to help secure the return on investment needed for further innovation. Of course, while Microsoft relies on copyright, it also relies on liability limitations and other standard international norms and practices in the development of its online services, such as its online marketplaces and search engines. Microsoft and other companies have already invested in Ireland for the future with cloud services in major data centres. These are giant investment decisions that were taken at least two years ago based on existing Irish laws, including its world-class legislation in the IP and e-commerce areas.

4. **Executive Summary**

- ***Encouraging innovation is one of the main benefits of copyright. The existing Irish copyright and other IP laws encourage and do not present barriers to innovation. These laws are largely fit for purpose, and support a vibrant market for technology, creativity, innovation and growth, among a wide spectrum of companies and industries.***

- ***Ireland's copyright system has already been updated substantially to deal with new-technology issues, and has proved flexible enough to support this wide variety of new innovations, works and services. There is no need to 'reinvent the wheel'.***

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- ***Government, IP-based industries and other stakeholders should be encouraged to address the relatively few open issues that need to be addressed, and to streamline particular practices. The priority issues that would benefit from work in Ireland and at the EU level – described throughout this response – are as follows:***

  (#1) 'orphan works' and improved rights information and clearance,

  - ***Recommendation: Permit use of 'orphan works' under carefully defined conditions where a diligent search has not identified and located the rights owner.***

  (#2) collective licensing practices,

  - ***Recommendation: Encourage pan-EU licence clearance. Promote collection society transparency and competition.***

  (#3) private copying levies,

  - ***Recommendation: Avoid copyright levies. Encourage levies reduction and/or harmonisation in other EU countries. Consider whether there is a need to broaden 'time shifting' exception to encompass legitimate consumer 'format shifting'.***

  (#4) copyright enforcement-related rules, and

  - ***Recommendation: Consider civil procedure improvements, such as summary judgements, to improve the efficiency and cost-effectiveness of copyright litigation.***

  (#5) internet co-operation.

  - ***Recommendation: Encourage cross-industry collaboration to develop more effective mechanisms for dealing with internet piracy. Encourage the EU to reconcile data protection rules with the legitimate need to enforce IP rights.***

- ***Restructuring the framework of specific exceptions in Ireland or the EU, for example to introduce a general-purpose 'fair use', 'data mining', 'marshalling' or 'innovation' exception, is not necessary. Allowing commercial scale copying under the guise of such exceptions would only serve the commercial interests of particular companies; it is not relevant to nor impeding the health of innovation in Ireland. Any changes that would require or instigate a general re-opening of EU copyright or e-commerce directives should be avoided.***

- ***Innovation depends on a wide variety of market characteristics and national policies outside copyright. The Government has rightly identified and is pursuing several such initiatives that will have a much more substantial impact on innovation.***

GENERAL OBSERVATIONS

5. **Ireland's IP system is part of an EU and international intellectual-property framework that is interdependent, largely governed by consistent rules and principles, and rightly championed for a long time by Ireland as a vital policy support for innovation.** It is important to keep in mind that the IP system works in Ireland as it does globally, and that Ireland has been able to enjoy the advantages in innovation and competitiveness that other countries that apply similarly robust IP protections enjoy.

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5.1. **Copyright and other IP protections provide the 'intellectual currency' that provides needed market-based incentives and rewards to develop innovations and engage in on-going R&D.**

- Under accepted economic theory, inventions, creative works, brands and other such valuable intangibles are 'non-rival' and 'non-excludable'—that is, if these are not protected by legal rights, they could and would be used fairly easily by market competitors (or anyone else for that matter) and could not be easily defended against imitators.

  Greenhalgh, C. and Rogers, M., Innovation, Intellectual Property and Economic Growth, pp. 32-33 (2010).

  In plainest terms, without adequate IP protection, not only could small firms take and use large firms' innovations and works without remuneration or cost, large firms like Microsoft also could take small firms' inventions and works freely and use them to compete against such firms with impunity. It is thus easy to see how firms that are not sufficiently rewarded due to such free-riding—whether this is through reduced IP protection, inadequate enforcement, or overbroad exceptions—do not have much incentive to engage in R&D and other innovative and creative activity.

5.2. **Copyright and other IP protections are positively associated with innovation.**

- IPR strength is a particularly significant determinant of economic growth, and of domestic innovation in developed countries.

  Gould, D., and W. Gruben (1996) The Role of Intellectual Property Rights in Economic Growth, Journal of Development Economics 48:2, pp. 323-350.

  Thompson, M. and F. Rushing (1999) An Empirical Analysis of the Impact of Patent Protection on Economic Growth: An Extension, Journal of Economic Development 24, pp. 67-76.

  Kanwar, S., and R. Evenson (2001) Does Intellectual Property Protection Spur Technological Change?, Yale University, Economic Growth Center, Discussion Paper No. 831.

  Furman, J., M. Porter, and S. Stern (2002) The determinants of national innovative capacity, Research Policy 31, pp. 899-933.

  Allred, B. and W. Park (2007b) The influence of patent protection on firm innovation investment in manufacturing industries, Journal of International Management.

- The OECD has found that a 1% increase in the strength of copyright protection correlates to a 3.3% increase in domestic R&D in developing countries as well. (By comparison, a similar increase of trademark and patent protection correlates to a 1.4% and a 1% increase in domestic R&D.) (Cavazos Cepeda et al., 2010)

  Cavazos Cepeda, R., Lippoldt, D. and Senft, J., Policy Complements to the Strengthening of IPRs in Developing Countries, OECD Trade Policy Working Paper No. 104, pp. 21-22 (14 Sept. 2010), http://www.oecd-ilibrary.org/trade/policy-complements-to-the-strengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en.

5.3. **IP protection helps firms that use IP succeed better than those that do not, and attracts investment in technology-related industries, both at the macro level (foreign direct investment) and micro level (venture capital).**

  See generally ICC, Intellectual Property: Powerhouse for Innovation and Economic Growth (2011), http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf.

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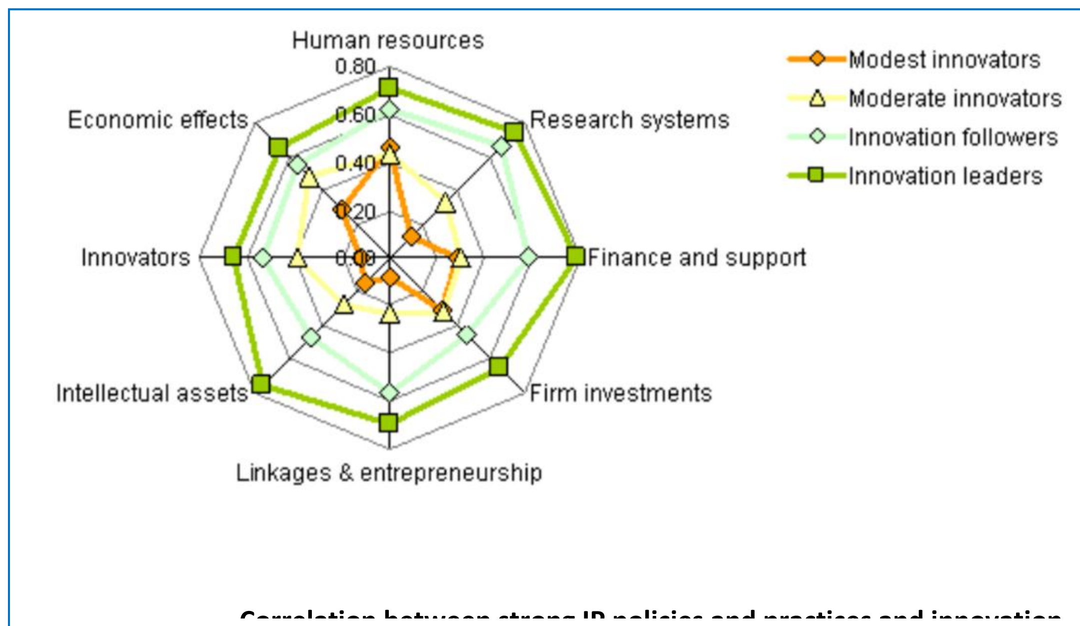
5.4. **Indeed, it is *inadequate* copyright and intellectual-property protection that undermines innovation.**

- The European innovation observatory Pro Inno has reported that strong IP protections and practices (which it terms 'intellectual assets') are strongest among the EU's leading innovative countries. IPR deficiency is one of the most frequently observed factors in the EU countries where innovation lags behind.

  Pro Inno Europe, Innovation Dimensions, [*http://www.proinno-europe.eu/inno-metrics/page/33-innovation-dimenstions*](http://www.proinno-europe.eu/inno-metrics/page/33-innovation-dimenstions).



6. **The issues presently affecting innovation in Ireland are largely outside the area of copyright and IP: There is no reason to think that particular changes to the Irish copyright system could make a measurable improvement on innovation**. Innovation depends on a wide variety of national policies and market characteristics. Innovation and the attraction of innovative companies depend on a number of factors: access to capital, regulatory hurdles, size of the potential market, talent, and skills to name just a few. The IP system is one of the important factors that help to provide incentives for innovation, which can be measured and has been demonstrated at a macro level, but there is no reason to think that particular changes to the copyright law in Ireland will directly or measurably improve innovation. Given the interplay of IP with other regulatory and market factors, the longstanding and inextricable role of IP in hundreds of billions of Euros of investment and commerce in Ireland and world-wide, and the fact that some types of IP (notably copyright) are not registrable rights and thus are difficult to measure with any kind of precision, it is a mistake to think that particular changes to the system – or indeed new exceptions to protection – can be justified by precise economic theory or concrete evidence to the effect that these might affect innovation.

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6.1. The World Economic Forum has rightly noted that IP is not the sole driver of a successful economy, but along with macroeconomic stability, rule of law, business environment, education and infrastructure is a vital contributor to economic growth. The benefits of IP protection are amplified as these other drivers in the economy improve**.**

In the 2011-2012 World Economic Forum competitiveness survey, there is a high degree of correlation between a country's intellectual property ranking and its overall competitiveness ranking for all 142 countries surveyed. In the latest WEF surveys Ireland was ranked 10th in the world as to intellectual property protections (ahead of the UK at 11th), 23d as to innovativeness and 29th as to competitiveness overall.

World Economic Forum (WEF), The Global Competitiveness Report 2011-2012, Table 3, p. 15; Table 7, p. 22; Ireland Country Profile, Table 2.1, p. 211, http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf.

6.2. In the words of the UK's recent Independent Review of IP, "The success of high tech companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law." In these broader areas, Ireland has many advantages in human resources, education, language, and tax benefits, and is already engaged in innovation in many areas of societal need.

I. Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth, p. 45 (May 2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf.

6.3. **The Government has rightly identified quite a number of initiatives that are likely to have a much more direct effect on innovation than any changes to the copyright system as such.** These laudable initiatives are well worth pursuing:

- R&D supports and seed-capital schemes.
- Investment in ICT in schools, the health sector and Cloud computing.
- Increased predictability as to the use of IP developed at Higher Education Institutions.
- Investment in technology research, development and commercialisation.
- Focus on areas of technology expertise and technology clusters.
- Tax credits on R&D expenditures, particularly for SMEs.

Fine Gael and Labour's Statement of Common Purpose for the Irish Government, p. (6 Mar. 2011), http://www.finegael.ie/upload/ProgrammeforGovernmentFinal.pdf.

6.4. The present R&D tax credits in Ireland, which broadly apply to include applied research and product development, are one of the many smart, business friendly schemes that already encourage investment, provide incentives for innovation in new technologies and business processes, and thereby create high value jobs and growth in Ireland.

6.5. The Irish Government is right to focus on the importance of copyright as one of the drivers of a successful economy, but macroeconomic stability, rule of law, business environment and investment, education, infrastructure and other broad factors are also vital contributors to innovation economic growth. The benefits of IP protection are amplified as these other drivers in the economy improve.

I. NO BARRIERS TO INNOVATION (Questions 1-6)

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

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

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

(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?

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

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

Encouraging innovation is one of the main benefits of copyright. The existing Irish copyright and other IP laws encourage and do not present barriers to innovation. The laws are largely fit for purpose, and support a vibrant market for technology, creativity, innovation and growth, among a wide spectrum of companies and industries.

7. **The Review's focus on innovation is the right one for this review.** As with copyright law internationally, there is ample clarity about the rationale, principles and function of copyright in Ireland and in the EU. Parsing into various categories those who have any dealings with copyright or copyrighted material—which now includes virtually everyone in society—can be illuminating, but there is no one correct list of categories of those affected by copyright.

8. **The foundations of copyright are built on promoting innovation and creativity; balance is already an inherent feature of the copyright system in Ireland, the EU and internationally.** The essence of copyright is that it gives the creator of protected expression the right to control whether and how his or her material is used – vis-à-vis other commercial entities or indeed the rest of the world that may well want to use it without consent from or payment to the creator. There are solid economic and equitable reasons for this rule – it gives economic incentives and market-based rewards for such innovation and creativity, and provides a 'currency' or valuation mechanism for trading in such rights, and well as for the goods, services and licences based on such rights. Balance is a fundamental part of this system that is well established in international treaties: exceptions to protection that benefit anyone other than the copyright owner are indeed permitted – so long as they do not conflict with the rights owner's normal exploitation of the work, or otherwise prejudice his or her legitimate interests. The EU and Irish copyright system are solidly built on, and should continue to adhere faithfully to, these fundamental principles.

9. **Ireland's strong innovation track record and market in copyright-related fields provides overwhelming evidence that its copyright system is already fit for purpose in spurring innovation.** As described further below, Ireland is an innovative country, and attracts investment from innovative world-leading companies based in no small part on its state-of-the-art copyright and intellectual property regulation. The Irish copyright system plays a vital role in helping to attract investment, promote R&D and help Irish business succeed. The Irish economy, exports and competitiveness depend in substantial part on Ireland's existing copyright and IP system for their success.

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Ireland has a superior IP system already in place, which has already been updated substantially to deal with new-technology and digital issues, and has proved flexible enough to support a wide variety of new technologies and innovations. There is no need to 'reinvent the wheel'.

10. **Substantial attention has been given to 'new technologies' issues in the copyright law over the past 15 years. Whilst there are 'tweaks' to be made, on the whole there is no need for large-scale change—this would only destabilise settled market expectations and undermine innovation.**

10.1. **Software copyright protection.** When the PC software industry was a relatively new technological phenomenon – one of the first truly 'digital industries' – software developers and other industry stakeholders urged EU, Irish and other legislators to update copyright protection for software in order to provide more clear and consistent rules across Europe. Working with industry and users, the EU adopted the Software Directive in 1991 – a harmonised, balanced framework for copyright in software now included in the Copyright and Related Rights Act 2000.

- This Software Directive and the Irish laws on which it is based work as well today as they did on adoption 20 years ago. The Directive and similar measures eliminated a broad range of disparities and uncertainties between Member States' laws, and enabled software companies to create a genuine single market for software in Europe, reducing inefficiencies in product distribution and lowering prices for customers. In part as a result, the software industry in Europe has grown dramatically between 1991 and today, and now accounts for over half of the employment in IT in Europe.

10.2. **E-Commerce Directive.** The digital age also raised questions as to the responsibilities of third parties such as telecommunications carriers, internet web hosts and similar third parties when their customers use such services to break the law, including intellectual property rules. The WIPO Copyright Treaties of 1996 dealt with this issue to a limited extent: The Treaties deemed the 'mere provision of physical facilities' not to constitute a communication to the public and thus not to constitute a copyright-relevant act for purposes of the service provider's liability. (Agreed Statement Concerning Article 8.) These issues were subsequently debated in much more detail, first in detailed dialogue among the broad cross-sectorial group of affected stakeholders in negotiations sponsored by the US Congress, and then among similarly situated stakeholders in Europe.

The result was remarkably consistent legislation (in the 1998 US Digital Millennium Copyright Act and the 2000 EU E-Commerce Directive) that allocates third-party liability largely on the basis of the two main types of activities that service providers provide – communications transport ('mere conduit') and data storage ('hosting'). Whilst injunctions can always be sought, 'mere conduit' activities bring no liability for damages because these are passive activities. Hosting activities – a more active service where the provider may have knowledge and control – can bring liability where the provider has knowledge or awareness of illegal activity and does not act.

- The E-Commerce Directive provides the correct, technology-relevant and equitable principles on which to judge intermediary liability. These have functioned well in dealing with such issues for more than 10 years, and form part of the consistent international rules for dealing with these issues. These rules have helped to facilitate the boom in internet-based services that has taken place over the past 10 years, with very few unpredictable results.

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10.3. **EU Copyright Directive.** Similarly, the entire framework of copyright law for music, film and other types of works has been updated in Europe in recent years to deal with digital technologies, and to provide greater consistency from country to country. The basic principles of copyright did not need to change – creators and their assigns have the right to control the economically relevant uses of their works. However, the ways that this had been applied specifically to internet-based activities had been done differently in different countries, in particular as to which copyright-relevant exclusive rights were implicated (e.g. communication, distribution), and what digital-related exceptions should be permitted that did not conflict with the normal exploitation of the work.

The EU's 2001 Copyright Directive resolved these issues following a very tough negotiation between the Member States, a wide spectrum of rights owners, service and hardware providers, and user interests. This Directive established a set of harmonised rights, a few mandatory exceptions to protection, and a limited set of other permissible exceptions that in all events could not interfere with the normal exploitation of works. This was done in a way consistent with the structure of Ireland's copyright law and that of every copyright system in Europe – specific rights and specifically defined exceptions to cover copyright-relevant activities and permitted uses.

- The Copyright Directive has provided stability, a reasonably high degree of consistency and predictability between Member States, and flexibility for Member States to adapt exceptions within reasonable bounds as they see fit. It has dealt with virtually all of the 'big issues' around copyright and new technologies. In Ireland and all across Europe, a vast number of online sales, streaming, storage, Cloud and other businesses and sites offering copyright material have been built, with the support of and in reliance on this Directive.

10.4. **Recent EU and other consultations.** The Review does not write on a blank sheet, of course, nor does it raise issues that have not been evaluated numerous times over the past several years, both in Ireland and elsewhere in the EU. As described above, the idea of updating the IP system to deal with issues of innovation and particularly new ICT technologies in fact began in the mid-1990s as personal computers, the internet and digital use of IP-based materials appeared on the scene.

- Over the past five years, numerous further reviews of this type have been conducted at the EU level, including two separate On-Line Content consultations (2006, 2008), a Green Paper on Copyright in the Knowledge Economy (2008), a Reflection Paper on Creative Content in a Single Market (2010), the Digital Agenda and Digital Single Market Act initiatives (2010), and a consultation on review of the e-Commerce Directive (2010).

- The Ireland Department of Jobs, Enterprise and Innovation (DJIE) conducted a similar consultation on the Copyright and Related Rights Act 2000 last year, to which Microsoft made an extensive submission. The UK has undertaken not less than six such reviews over the past several years, culminating with its most recent 'Hargreaves Review' (Independent Review of IP and Growth).

- These many consultations have demonstrated that the work of updating IP law to deal with modern technologies has largely been accomplished. What has emerged is a relatively short list of issues that would benefit from further work – for copyright in particular, orphan works, collective licensing and enforcement-related issues. These are discussed further below.

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10.5. **The wheel does not need to be re-invented. Major changes are not needed.** What does need to happen is serious, thoughtful work among the Irish and other EU governments on the short list of priority issues already well recognised.

II. SPECIFIC ISSUES TO BE ADDRESSED

Government, IP-based industries and other stakeholders should be encouraged to address the relatively few open issues that need to be addressed, and to streamline particular practices. The priority issues that would benefit from work in Ireland and at the EU level are as follows:

(#1) 'orphan works' and improved rights information and clearance,
(#2) collective licensing practices,
(#3) private copying levies
(#4) internet co-operation, and
(#5) copyright enforcement-related rules.

A. Copyright Council (Questions 7-12)

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

(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?

(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?

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

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

(12) How should it be funded?

11. **A Copyright Council in Ireland might make sense if it were voluntary and market-driven.** To the extent that the relevant industries believe that a common organisation would be helpful for discussing and resolving issues of mutual concern, this should be encouraged through voluntary co-operation. As the Review has pointed out, this is what has happened in the development of the Copyright Councils of the UK, Australia and New Zealand. There does not seem to be an industry groundswell calling for such a body in Ireland at present, but this could be explored. Particularly in these difficult economic times, we do not see the need for developing another quango or talk shop for its own sake, for theoretical opining on various issues, or for carrying out any quasi-regulatory function.

B. Digital Copyright Exchange (Questions 13-14)

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

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

12. **Whilst a Digital Copyright Exchange might prove useful for certain rights owners and users, it should in all events be truly voluntary, and should recognise and encourage existing and future licensing mechanisms in different sectors and for different users that develop in the market.** As we explained in our response to the UK's similar consultation on the idea of a Digital Copyright Exchange (a copy of which can be made available to the Review if it so wishes), it is important that at heart, copyright licensing remains at the full discretion of the rights owner. The international copyright system requires as much. Under the 1971 Berne Convention[i] and the 1994 WTO TRIPs Agreement,[ii] the right of creators and other rights owners to determine whether and how to license their material must not be interfered with except in special cases that do not conflict with the normal exploitation of their work and do not unreasonably prejudice their legitimate interests. Even though copyright licensing can sometimes can be complex, under international rules there is nothing that would warrant a general departure from market-based licensing of works that takes place at the discretion of the rights owner.

13. **The market in trading, transferring and licensing copyrights and copyright-based material is largely robust, and should be relied upon to deal with perceived needs as they arise.** There is also no reason to second-guess or undermine licences that have been developed voluntarily in healthy, commercial negotiations in the market, or to introduce new involuntary arrangements or exceptions. Indeed, it would seem entirely appropriate and helpful for a DCE to could refer users to numerous existing licensing mechanisms in Ireland have been in operation, sometimes for quite a long time, to enable a wide variety of copyright-related activities.

    Even beyond the problem of orphan works, the problem of 'information infrastructure' for copyright transactions online persists throughout many copyright sectors. Whilst the European Commission has taken initial steps in stakeholder dialogues to encourage music rights societies in particular to develop and integrate better databases for music copyright information, much more can be done in this area.

14. **Priority: Collective licensing practices.** As we described in our July 2011 submission to the DJEI, licence clearance for music services among multiple EU territories can be difficult among the music authors' collecting societies. The characteristics of an effective licensing system are that it be pan-European, transparent, automated to the extent possible, with accurate rights-management information. Streamlining multi-territorial music licensing should be encouraged as a matter of good business practice, whilst insisting on more transparency, efficiency and competition among collecting societies. This should be largely achievable under existing laws, stakeholder dialogues and competition challenges without re-writing the substantive copyright law. Governments have a particular role to play in getting the stakeholders to the table and pressing them for workable solutions.

C. Dispute Resolution (Questions 15-22)

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

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

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be? Copyright Review Committee 134

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

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

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

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

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

15. **The effective enforcement of copyright remains an important priority, given Ireland's software piracy rates and the negative effects that piracy and ineffective enforcement have on innovation.** Piracy rates remain at 34% in Ireland for business software, need effective procedures and sanctions in order to be addressed. Reduction in the piracy rate is the measurement by which the business software sector and Microsoft itself gauge whether enforcement is working.

- The business software industry measures piracy rates according to a standard formula, expressed in terms of a percentage derived from the discrepancy between expected sales and actual sales of business software in a country. These are based on a reasonable estimate of the number of programs used on the average personal computer in the market (determined by survey data). Using the number of personal computers shipped in the market during the relevant year, this percentage is used to estimate the value of pirated product based on business software's commercial value.

  Ninth Annual BSA Global Software Piracy Study (2012), http://portal.bsa.org/globalpiracy2011/.

- Business software piracy rates in Ireland have been reasonably low and stable over the past several years:

  Business Software Piracy Rates: Ireland – BSA/IDC

2011	2010	2009	2008	2007
34%	**35%**	**35%**	**34%**	**34%**

- While Ireland's 34% software piracy rate compared favourably to the world-wide average of 42% in 2011, the commercial value of this piracy in Ireland has grown to approximately €115 million ($144 million) annually. Ireland's piracy rate is higher than the average among western European countries (32%), trailing such countries as the UK (26%), Finland (25%), Belgium (24%) and Austria (23%). Ireland also has higher piracy rates than Japan and the United States, which have business piracy rates of 21% and 19% respectively. Japan's efforts in recent years have been a good model of effective enforcement of IP rights and encouragement of legitimate use of software, and have succeeded in reducing business software from 29% in 2003 to 21% at present.

Ninth Annual BSA Global Software Piracy Study (2012), http://portal.bsa.org/globalpiracy2011/.

- It should also be noted that in the area of computer software, counterfeit and pirated copies and the lack of effective enforcement can also affect the security of users' computers and data, disrupt business operations and fund organised crime.

  Microsoft, Addressing Global Software Piracy (2010), http://www.microsoft.com/presspass/presskits/antipiracy/docs/piracy10.pdf.

  Global Consumer Perception Research: Attitudes on Counterfeit Software (2010), http://www.microsoft.com/presspass/presskits/antipiracy/docs/perception_study.pptx .

- The OECD's summary of the economic effects of counterfeiting and piracy—which simply represent the natural result of inadequate IP protection or enforcement—reads like a checklist of problems that governments emphatically want to *avoid* in trying to make their economy more conducive to innovation:

  - Reduction in incentives to innovate.
  - Adverse implications for R&D and other creative activities.
  - Reduced firm-level investment.
  - Shift of employment from rights holders to infringing firms, where working conditions are often poorer.
  - Negative effects on levels of foreign direct investment flows.
  - Increased risk of going out of business.
  - Increased flow of financial resources to criminal networks.
  - Substandard products carry health and safety risks.
  - Substandard infringing products can have negative environmental effects.
  - Lower tax and related payments (such as social charges).
  - Increased enforcement costs for government.

  In short, it is naïve in the extreme to think there are any positive effects from IP counterfeiting and piracy and inadequate enforcement.

  OECD, The Economic Impact of Counterfeiting and Piracy (2008), p. 134.

16. **Priority: Improved civil procedures in copyright cases. Improvements to Irish civil procedures should be developed to allow the speedier resolution of copyright and other IP enforcement cases through more expedient and cost-effective civil procedures in the Commercial Division of the High Court.** As a practical matter it can take five years or more for an infringer to be brought to justice. As a result, the cost of such procedures can escalate to levels often above the value of the claim itself, and in many instances the legal costs incurred in Ireland are higher than those found in comparable jurisdictions. These timing and costs issues together do not serve the IP environment in Ireland well, and in particular serve as a barrier to access to justice for SMEs and other small litigants. They pose a significant risk for all rights owners in that justice delayed, or justice at too high a price, can become 'justice denied'.

17. **The establishment of the Commercial Division of the High Court was an important step in addressing some of the concerns raised above**. However at present, the speedy resolution of disputes in the Commercial Court procedures can be denied to a plaintiff if the amount in controversy is not 'significant' or the issues in the case are not of sufficient commercial importance. Whilst the need for a €1m+ euro claim does not apply to IP cases being entered to the Commercial Court, the threshold sets the tone. The

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Commercial Court process is not always best equipped to deal with financially modest, but commercially significant, matters related to IP infringement. This may result in cases being taken in the normal High Court list with the attendant potential for delay that this often entails.

The Government should consider reviewing how IP dispute resolution in Ireland can be more effectively managed by, in particular addressing:

(i) the fact that any defence raised, however insubstantial, generally requires a full plenary hearing;

(ii) there is no procedure in Ireland for summary judgement in IP cases as such (motions to strike out a defence are dealt with in ordinary hearings);

(iii) there is no pre-trial settlement, mediation or ADR-type procedure required that would encourage more prompt resolution of disputes by the parties;

(iv) a final judgment in the normal High Court list can take two to three years to be handed down;

(v) any injunction or other remedy in the High Court (or the Commercial Court) may be suspended upon the lodging of an appeal to the Supreme Court, and a Supreme Court judgement in such an appeal can take up to three more years;

(vi) unlike in the UK, we have no civil procedure rules specifically applying to IP matters – as a result, for example, Ireland has extremely onerous discovery obligations often prolonging cases at significant additional costs to litigants.

As developers and companies locate more and more cloud based services in data centres in Ireland, it will become even more imperative that procedures in the Irish courts are speedy as well as effective. We strongly recommend that the dispute resolution procedures available in Ireland be reviewed to align with the Government's drive towards a knowledge and innovation-based economy. There are significant opportunities to take the lead in Ireland on cases with pan-European significance by providing more expedient and cost-efficient procedures.

18. **Done well, reforms to civil procedures should include at a minimum:**

- **More routine access to fast-track procedures**.
- **Prompt access to true 'summary judgement' in appropriate cases**.
- **Mandatory settlement conferences, mediation or ADR – which could be at a defined stage such as following the exchange of pleadings but prior to discovery – in order to encourage prompt resolution by the parties.**
- **No routine suspension of essential remedies, particularly injunctions, pending appeal.**
- **Introduction of a set of civil procedure rules dealing specifically with IP matters.**
- **Other cost-reduction measures.**

These would go a substantial way toward providing, in the words of the WTO TRIPs Agreement, effective action against any act of infringement and expeditious remedies to prevent and deter infringements.

19. **A small-claims court procedure in particular could be helpful for copyright cases involving direct copying.** A small-claims track in the District or other Court could be useful for small (€25,000) copyright and even

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trademark cases involving direct copying; more complex cases still would need to be litigated under the usual procedures. It is important that any such cases would be decided by a judge without the need for jury. Rigorous procedural and evidentiary mechanisms (e.g. presumptions of ownership and infringement, reasonable judicial determinations about quantum of damages) would be needed to ensure that such cases do not all turn into complex litigation cases as a matter of routine.

20. **Compulsory licences, in general, are to be avoided.** As described above, it is important that at heart, copyright licensing remains at the full discretion of the rights owner. The specific questions of whether and how statutory licences should apply to music rights owners are best addressed by those rights owners.

D. Copyright and Innovation (Questions 23-25)

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

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

(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?

21. **The Irish copyright system is as competitive and supportive of innovation as any copyright system in the world. It is well-balanced, fairly compensates rights holders, attracts investment from all over the world, and does not need major changes.**

- Ireland's Creative Industries – those copyright-dependent sectors including film, music, publishing, broadcasting, software and related industries – were reported by the Department of Arts, Heritage and the Gaeltacht in 2009 to account for as much as €11.8 billion or 7.6% Ireland's Gross Value Added (GVA). These industries account for more than 170,000 jobs or 8.7% of total domestic employment.

  Similar studies elsewhere indicate that the software sector accounts for a large proportion of the economic contribution of the Creative Industries. In the UK, for example, the software sector accounted for 2.5% of GVA, or 45% of the entire Creative Sectors' GVA contribution of 5.6% to the UK economy, in 2008.

  Press Release, Department of Arts, Heritage and the Gaeltacht, 'Cullen – "Creative ideas are the lifeblood of innovation and economic success"' (19 Sept. 2009), http://193.178.1.186/publications/release.asp?ID=100663.

  DKM Economic Consultants, Economic Impact of the Cultural Sector (2009), reported at http://dublinsouthcentralarts.wordpress.com/2009/10/30/economic-impact-of-the-cultural-sector-dkm-economic-consultants/.

  Cf. INDECON, Assessment of Economic Impact of the Arts in Ireland (Nov. 2009) http://www.artscouncil.ie/Publications/Arts_Council_-_Economic_Impact_-_Final_Report.pdf (indicating 3.5% of GVA in 2006).

  Council of Europe, Compendium of Cultural Policies in Europe: Ireland, Specific Policies and Recent Debates, http://www.culturalpolicies.net/web/ireland.php?aid=423.

  DCMS, Creative Industries Economic Estimates (Dec. 2010), http://www.culture.gov.UK/publications/7634.aspx.

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- The economic contribution of Ireland's copyright-based sectors compares favourably with those elsewhere in the developed world. In the G8 countries, copyright-based industries and interdependent sectors on average account for approximately 4-11% of Gross Domestic Product and 3-8% of employment.

  World Intellectual Property Organisation (WIPO), Economic Contribution of Copyright Industries, http://www.wipo.int/ip-development/en/creative_industry/pdf/eco_table.pdf.

  Tera Consultants, Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries (Mar. 2010), http://www.teraconsultants.fr/assets/publications/PDF/2010-Mars-Etude_Piratage_TERA_full_report-En.pdf.

  Japan Copyright Institute, Copyright Research and Information Center (CRIC), Copyright White Paper – A view from the perspective of copyright industries, JCI Series No. 19, Vol. 3 (Aug. 2009), http://www.cric.or.jp/cric_e/cwp/cwp.pdf.

  ICC, Intellectual Property: Powerhouse for Innovation and Economic Growth (2011) , http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IP_Powerhouse%20for%20Innovation%20and%20Economic%20Growth%20(2).pdf.

- The ICT sector, which is at the forefront of innovation and serves in various roles as developer, user and technical enabler of copyrighted material, is also thriving in Ireland under the current copyright system. According to the OECD, the ICT industry in Ireland in 2008 represented the second highest business value-added sector in the world (at 13%), secured more than 50% of all venture capital domestically, and ranked as the third largest exporter of ICT equipment and the fifth largest exporter of software world-wide. With eight of the world's top ten ICT companies operating in Ireland, ICT accounts for 22% or €35 billion of the nation's exports.

  OECD Information Technology Outlook 2010, http://www.oecd.org/document/20/0,3746,en_2649_33757_41892820_1_1_1_1,00.html.

  IDA Ireland, Information & Communication Technologies, http://www.idaireland.com/business-in-ireland/information-communication/.

22. **Microsoft and many other small and large ICT firms conduct research and development and have produced a number of world-class innovations in Ireland, developed in reliance on and protected by the Ireland's robust copyright and other IP rights protections.**

- Microsoft was among the first PC software companies to establish an important hub in Ireland, having set up its first operation here in 1985. It presently conducts four operations in Ireland, involving research, operations, sales and marketing, and data centre businesses, representing €13.4 billion in annual turnover and direct employment of 1,600 full-time employees and contractors.

- Irish business supports many other small and large Irish companies in the 'Microsoft ecosystem' – these include software vendors that write their own applications that run on Microsoft platforms; companies that sell devices running Microsoft software; resellers that sell and distribute these products; and service firms that install and manage Microsoft-based solutions, train consumers and businesses on Microsoft products, and service customers for their own applications.

  These Irish companies employ 41,000 people; for every euro that Microsoft makes in Ireland, these other companies make €9.22. In addition, IT-using organisations employ another 17,000 IT professionals who work with Microsoft software or the products and services based on it.

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IDC, Aid to Recovery: The Economic Impact of IT, Software, and The Microsoft Ecosystem on The Economy (Oct. 2009), http://download.microsoft.com/download/5/3/8/5384A1B0-58D6-4F6F-8AD3-0A8224E5B031/Ireland_IDC_2009_Study.pdf

- Microsoft's **European Development Centre** in Dublin has 570 employees and is involved in a wide range of innovation across the full lifecycle of software development – from research and development to engineering, and localisation across many of Microsoft's different business groups. EDC is involved a wide array of research projects involving features and improvements to Microsoft's internationally renowned products, from work on the Windows Media Centre, to Windows Live development, to security and anti-virus research. EDC also manages the localisation of over one hundred products and services, from Microsoft Office to MSN and the Xbox 360, into over 30 languages.

  http://www.microsoft.com/ireland/about/.

- The teams at EDC collaborate with sister centres based in Denmark, India and China and are part of the Microsoft Product Group R&D organisation. As exemplified by these teams, Microsoft re-invests a significant proportion of its annual revenues in research and development—13% (US$ 9.04 billion) of its revenues in fiscal year 2011—including in the EDC in Ireland and research facilities elsewhere in Europe and internationally.

- Several cutting-edge research projects are being conducted in Ireland in co-operation among ICT industry partners, Irish universities and government research programmes. For example, Microsoft is a partner of the **Centre for Next Generation Localisation** based in Dublin, for example, where over 100 researchers are developing novel technologies to address the key challenges of **machine translation** – volume, access and personalisation. Industry partners include major companies and SMEs including IBM, Symantec, Traslán, SpeechStorm, Alchemy, VistaTEC, Dai Nippon Printing and SDL, as well as Dublin City University and other Irish universities.

  http://www.cngl.ie/about.html

- Moreover, Ireland has become a magnet for innovative facilities such as Microsoft's **European Data Centre**, into which Microsoft has made a €300 million investment since 2009. This centre is an important pillar of Microsoft's **Cloud computing** offering that allows customers to run applications remotely, store data, and scale their computing power quickly and without capital expense. As the Irish Government has recognised, the trend towards Cloud computing has the potential to be a major growth area for the local economy. According to a study by Goodbody Economic Consultants, Cloud computing could

  - Generate €9.5bn in sales annually for Irish-based companies by 2014;

  - Create 8,600 new local jobs in Cloud Services

Microsoft's Dublin data centre, an important development

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and Cloud Development;

- Create 2,200 new non-IT SMEs in Ireland, leading to 11,000 new jobs;

- Lead to ICT cost savings of least €0.5bn per annum, and lower the cost of delivery whilst improving the quality of public services in Ireland.

Goodbody Consultants, Ireland's Competitiveness and Jobs Opportunity (Jan. 2011), http://www.microsoft.com/ireland/cloudreport/.

IDA Ireland, Cloud Computing Industry can create jobs and restore competitiveness - Goodbody Economic Impact report (24 Jan. 2011), http://www.idaireland.com/news-media/press-releases/cloud-computing-industry/.

- **Small and medium enterprises (SMEs) are likewise important innovators in Ireland, and rely on copyright and other IP protections.** Per capita, Ireland has one of the highest number of start-up and small ICT companies participating in the BizSpark programme, for example, than any other European country. BizSpark is a Microsoft-sponsored programme that gives participating software start-up companies a range of tools, marketing opportunities, and access to potential financing and business partners. BizSpark members get access to all the Microsoft tools and server software that they need for three years, plus access to a range of 144 BizSpark network partners, including investors, start-up incubators, innovation centres, universities, entrepreneurship networks, banks, law firms and other partners – both commercial and non-profit. BizSpark events, and the on-line BizSpark Connect tool, allow these companies to profile their companies, products and services and events, and make contact with venture capital (VC) firms and other support organisations to discuss funding and needed services.

  There are presently more than 455 start-up companies in Ireland participating in BizSpark – all less than three years old, privately held, with less than $1 million in annual revenues, and producing software or software-as-a-service as their principal business.

http://www.microsoft.com/bizspark/Default.aspx.

- All kinds of IP rights are very important for innovative SMEs in the ICT sector. According to the survey conducted by IDC for the European Commission of small and medium enterprises in the ICT sector within the EU (including Ireland), 89% of the surveyed ICT SME companies used some form of formal or informal IP rights, and 4% more had plans to do so. Formal IP rights that these SMEs relied on or planned to use included copyright (46%), trademark (40%), patents (32%), registered designs (19%) and utility models (16%).

- At least 10% more of the surveyed SMEs that used IPR reported growth during the previous 12 months in each of the areas of turnover, market share and employment than those SMEs that had not used IPR. 61% of firms that had used IPR reported turnover growth versus 51% among firms that had not used IPR. The comparisons for market share growth were 49% versus 39%, and for employment growth 42% versus 22%, among IPR user and non-user SMEs respectively.

IDC, IPR for ICT-Producing SMEs (2008), http://ec.europa.eu/enterprise/archives/e-business-watch/studies/special_topics/2007/documents/Study_08-2008_IPR.pdf .

- The problems that SMEs face in using the intellectual-property system are not principally related to the legislation but its practical aspects: (1) cost and other barriers to access, (2) lack of awareness as to the benefits and workings of the IP system, and (3) venture-capital and other constraints that are not IP-specific.

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23. **Microsoft and other on-line companies have found the Irish copyright system fit for purpose for other innovations that that they have offered in Ireland, including on-line services, search engines and digital content services.**

   - **On-line services – MSN.** Microsoft's MSN launched in 1995 in the US as one of the very earliest on-line services, and subsequently has launched domestic sites in Ireland (ie.msn.com) and more 45 other countries internationally. MSN and its co-branded Windows Live services have evolved over the years from a dial-up internet access service and on-line website to be a rich outlet for news and local content, communication and social networking, and email and messaging. MSN has 1.8 million unique visitors monthly to its Irish site, making it one of the most visited website in Ireland.

     ComScore (Oct. – Dec. 2010).

   - **Search engines – Bing**. Microsoft's search engine platform was launched as MSN Search in 1998 and subsequently rebranded, becoming Bing in 2009. Although dwarfed by market leader Google, which more than 90% of internet search volume in Ireland and the EU, Bing (which now also provides search results to the Yahoo! search engine) received nearly 3% of Irish search-engine visits in March 2012. As one of the early search engines services to operate in Ireland, Microsoft has found no difficulty under previous or current Irish copyright law in operating its search engine service. The other search engines also seem to have thrived in Ireland under existing legislation.

     StatCounter, http://gs.statcounter.com/#search_engine-IE-monthly-201105-201204.

   - **Digital services for copyrighted content** have begun to appear in Ireland, particularly for music. More than sixteen on-line music services presently operate in Ireland, and new services have been announced in other sectors such as video-on-demand.

     http://www.pro-music.org/Content/GetMusicOnline/stores-europe.php.

24. **All of these innovations, products and services have been developed on the basis of Ireland's existing copyright and other IP laws. The copyright and IP system overall are working well in their role of providing the 'intellectual currency' to support innovation.** Microsoft – like the rest of the ICT sector – has worked for many years under Ireland's copyright law, other IP laws and e-commerce and related legislation, and has found these reasonable and workable on relevant issues including adequate protections, licensing requirements and liability. There is simply no evidence that the copyright system in Ireland is inhibiting innovation.

25. **Microsoft relies on Irish law (including its copyright and contract law) and Irish courts to commercialise, protect and enforce its IP already.** Microsoft's **EMEA Operations Centre** (EOC) employs over 600 full time employees and over 250 outsourced vendors and manages the manufacturing, software licensing and distribution of more than 120,000 customer contracts in Europe, Middle East and Africa every year. The EOC manages order processing, distribution, transaction queries and product launches with several hundred distributors and resellers who sell its software and services to customers in EMEA and Microsoft sales offices in over 80 EMEA countries. The EOC co-ordinates the global manufacturing and supply chain for our hardware, consoles and gaming businesses including the tremendously successful **Xbox 360** and **Kinect** console, which sold in excess of 80 million units in the first three months after its release in 2010—a world record. The EOC has lead innovative and transformational business practices such as the push for digital distribution and downloading of our products and services. **All contracts are subject to Irish law**. The strong and predictable rule of law in Ireland is an important reason why Microsoft has located its operations HQ in Ireland and has been successful in Ireland these past 27 years.

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26. **The existing copyright, e-commerce and other world-class laws in Ireland have also been among the incentives that have drawn many other technology companies and innovative enterprises in other sectors to locate substantial European operations in Ireland.** Any substantial change in this regulation could have a potentially massive negative impact, upsetting settled business expectations, requiring widespread changes to contracts, and/or otherwise changing the dynamic that presently attracts enthusiastic investments by innovative companies in Ireland.

E. Specific Changes to Scope of Copyright Rights (Questions 26-31)

(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?

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

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

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

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

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

27. **We see no pressing need to make these changes.** The definition of 'original' has suitable clarity through long years of case law. The specific questions of how film sound tracks should be treated are best addressed by their relevant rights owners. The definitions of broadcasting and cablecasting should not include internet activities – if they are interpreted or changed to do so, this could bring a host of unintended and unwanted consequences.

F. Remedies (Questions 32-33)

(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?

(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?

28. **Ireland's remedies and related enforcement rules already reflect some best practices that should be promoted among other EU Member States.** The Review should be aware that industry promotes several aspects of existing Irish copyright legislation and practice with other EU governments. In particular, the legislation's provisions for **aggravated and exemplary damages** (Sec. 128(3)) are particularly useful measures against counterfeiting and piracy that would be helpful for the Government to promote with other governments in its discussions in the EU. (Similarly, robust **presumptions of copyright existence and ownership** (Sec. 139, Copyright and Related Rights Act 2000), **hearsay rules allowing confidential testimony** (Sec. 132(3)-(4)), are to be applauded.) We do not recommend any amendments to these remedies as such, or to the technical protection measures rules.

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29. **High Court practice with respect to injunctions remedies does need reform.** See paragraphs 17 and 18 above.

G. **Copyright in Photographs (Questions 34-36)**

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

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

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

30. **The specific questions of how photographs should be treated are best addressed by their relevant rights owners.**

H. **Copyright Levies and Other Licensing Issues (Questions 37-39)**

(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?

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

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

31. **Priority: Avoid private copying levies. For technology vendors, the priority is elimination of 'private copy levies' among other EU countries, or at the very least harmonisation.** As described repeatedly in previous submissions to the EU Commission and other Member States, private-copy levy schemes in Europe essentially impose blanket royalty fees for consumer copying of music, films and other works which in many cases are unrelated to the relevant market value, usage or appropriate payee. This undercuts new market-based online options, and renders some business models impossible and others less viable and less attractive. Non-market levies in many cases undermine the very usage and pricing flexibility that the digital revolution was meant to promote, and instead promote a return to one-size-fits-all content offerings of the past.

    Given the advent of direct music purchasing options for consumers, levies have become an out-dated way of compensating creators, and should be eliminated. At a minimum, these systems need to be more objectively justified and restrictive, much closer to market realities and much better harmonised—particularly in light of the fact that levies are presently imposed indiscriminately in some countries on computing devices that are not even used for private copying. The Commission's announcement that it would be making another attempt to rationalise the levies system is very welcome, and one that we hope the Irish Government will support.

    SGAE v. Padawan, Case C-467/08 (CJEU, 21 Oct. 2010).

    Communication from the Commission, A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe,

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COM(2011) 287 final (24 May 2011), pp. 12-23, http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf

32. **With regard to licensing issues, see paragraph 14 above.**

I. Intermediaries – Mere Conduit, Caching, Hosting (Questions 40-44)

(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?

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

(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?

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

Any changes that would require or instigate a general re-opening of EU copyright or e-commerce directives should be avoided.

33. **The E-Commerce Directive rules on liability and the Irish rules based on this Directive work well and should not be re-opened.** As described in paragraph 10.2, the E-Commerce Directive provides the correct, technology-relevant and equitable principles on which to judge intermediary liability. These have functioned well in dealing with such issues for more than 10 years, and form part of the consistent international rules for dealing with these issues. These rules have helped to facilitate the boom in internet-based services that has taken place over the past 10 years, with very few unpredictable results.

34. **It is unnecessary and would be unwise to make any proposals that would provoke a general re-opening of the EU E-Commerce Directive or Copyright Directives themselves.** Given the 'open season' nature of the EU legislative process in particular, any move of the sort discussed here that would require re-writing or adding to the E-Commerce Directive would likely damage long-settled rights and liability rules, destabilise market expectations and ultimately hurt Irish industry. The EU E-Commerce Directive and indeed the Copyright Directives with which it interacts are a basis for legal certainty and trust as they stand, and under which the market can and does act efficiently because the rules are stable and well-understood. These Directives and the Irish implementation of them are sufficiently technology-neutral to be future-proof.

J. Other Exceptions (Questions 45-61)

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(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?

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

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

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

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

*(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions? **Copyright and Innovation** A Consultation Paper 57*

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

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

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

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

(a) reproduction on paper for private use

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

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

(d) reproduction for persons with disabilities

(e) reporting administrative, parliamentary or judicial proceedings

(f) religious or official celebrations

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

(h) demonstration or repair of equipment, and

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

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

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

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

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

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

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35. **The Review has not demonstrated the need for, or any particular economic growth that would result from, adding a whole new set of exceptions to Irish copyright law.** As we explained in our response to the UK's Digital Copyright Exchange feasibility study, for example, such claims as the purported growth of billions in the GDP 'if barriers in the digital copyright market were reduced' through a new copyright exchange or new exceptions appear illusory. Some of these figures appear to have been derived from broader estimates about the possible GDP impact of improving Europe's overall 'digital single market'. Copenhagen Economics had done an estimate for the European Policy Centre – of which Microsoft itself is a sponsor – as to the potential economic gains if a wide variety of policy and infrastructure changes could be made to improve e-commerce generally across Europe.[iii] The assumption of that report was that not just improvements in IP-related areas but across a whole spectrum of areas, including broadband infrastructure and penetration, data privacy and various other regulatory areas, standards, and ICT skills would be needed to achieve such broad e-commerce and GDP goals. In other words, any claimed growth from new copyright exceptions seems to rest on very unreliable assumptions.

36. **Indeed, the success of the Irish copyright-based sectors operating under the current statutory scheme vis-à-vis the lesser success of most other countries overseas would militate against major new exceptions to copyright in Ireland, or re-opening EU copyright directives for re-fighting of old battles over exceptions.** Microsoft does welcome the Irish Review's efforts to address copyright exceptions where particular issues have been widely recognised, under the framework of existing EU law. However, we see no need to introduce a whole range of new exceptions, particularly ones like 'user generated content' that require reopening EU legislation for major battles over exceptions – which would unnecessarily undermine stable, workable market expectations. Indeed, the international success of Irish copyright-based sectors has demonstrated concretely that the Irish copyright system is already largely fit for purpose.

37. **Many of the proposed new exceptions cannot apply to computer programs.** We note that the consultation proposes rather generally that a range of new exceptions should be adopted across the board. We would remind the Review that exceptions are not permitted for computer programs unless these are specifically mentioned in the list of carefully negotiated exceptions provided by the 1991/2009 Directive on the Legal Protection of Computer Programs. The 2001 Directive on Copyright and Related Rights in the Information Society makes clear that "Articles 5 and 6 of that [Computer Programs] Directive exclusively determine exceptions to the exclusive rights applicable to computer programs." (Recital 50)

K. Mandatory Exceptions (Question 62)

(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?

38. **The proposal to make all copyright exceptions mandatory and to override all contractual provisions that deal with such issues in any different way, is unprecedented, unwarranted and ill-advised.**[iv] While certain exceptions in the software area and a very few other situations have been designed for specific reasons so as not to be overridden by contract, treating all exceptions this way would be inconsistent with longstanding Irish and EU law and international practice.

    In EU Directives, US law and virtually every other copyright law world-wide, copyright exceptions are the designated *default usage rules* in the absence of contractual agreements allocating permitted usage differently. This makes complete sense, given that statutory rules are typically ill-suited for anticipating and supporting enabling the whole potential range of different business models, usage options, and financial arrangements that the market can and typically does come up with and that evolve over time.

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We agree completely with the Business Software Alliance's analysis and recommendation in this area: "Indeed, contractual usage terms for copyright material – often implemented through technological usage rights – are the precise mechanism by which the options available to users can be made more varied, offered under different usage models, and made available at different price points. By contract, copyright owners can offer different numbers of particular types of copies at different prices, monthly usage rights at a flat price, or temporary usage rights for free, for example. Rather than overriding such useful competitive market offerings with mandatory rules for unlimited or a particular level or type of use, it would be more appropriate to respect and uphold agreed licensing terms, and leave exceptions to work as a reasonable default when the usage terms and conditions have not been defined by contract."

This is how the vast majority of the market already works under the 'default rule' for exceptions in Ireland, the EU, the US and elsewhere. Contracts should not be undermined but affirmed here as an efficient and effective market licensing mechanism. There is certainly no need to 'reinvent the wheel' here by overriding contracts through mandatory exceptions. As explained above, there is also no need to override technical measures that similarly manage usage rights under market-based transactions.

L. **Innovation and Archival Exceptions (Questions 63-73)**

(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?

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

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

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

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

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

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

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

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

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

(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?

39. **We see no need, justification or helpful purpose for diverging from international or EU standards to redefine what is copyrightable, to create novel exceptions such as for 'innovation', or to implement new**

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compulsory licences. It is the copyright rules in place and the market-led licensing and commercialisation of works based on these rules that are actually spurring innovation. We also see no need to change the international presumption that copyright stays with the author or other copyright owner unless an express assignment is given.

40. **Expanding library and archival exceptions could be done in conformance with EU and international rules.** European legislation does permit museums as well as libraries and archives to benefit from a limited exception to the reproduction right for archival activities along the lines that the Review envisions. By way of precedent, for example, the UK's CDPA Section 28A permits any intermediate copying needed to produce legitimate archival copies. It should be noted that such an exception can only apply to 'non profit making establishments' ('not for direct or indirect economic or commercial advantage'), and 'should not cover uses made in the context of on-line delivery'.

41. **Quantitative, technical, user and usage limits are appropriate** to ensure that activities subject to any expanded exception continue to treat the archival copy 'like a book', and thus do not multiply the number of copies actually in use at any one time by any library patron, staff member or other person over and above the number of original copies of the books or other materials originally acquired by the library. Any other rule could well violate the 'three-step test'.

42. **More detailed issues of the appropriateness and function of any expanded library or archival exception are best addressed by the industries affected, including the extent of any additional** archiving actually needed with respect to sound recordings and broadcasts. As elsewhere, market-based licensing should be given pre-eminence wherever rights owners enter into voluntary arrangements with libraries, archives and museums.

43. **It should be firmly kept in mind that the exceptions contained in the 1991/2009 EU Software Directive, including its carefully crafted exception for 'back up copies', as enacted in the Irish Copyright Act, are the only ones that can apply to computer programs.**

44. **It is important to improve copyright information flow, including for orphan works.** Microsoft has found that determining who is the rights owner for purpose of rights clearance is a problem that a modern copyright system needs to address. The new reality is that transactions around copyrighted works online need to happen at a scale and speed that is much faster than the current systems of copyright information can handle. This problem is most pronounced in the case of 'orphan works', works as to which even after undertaking a diligent search for the copyright owner he cannot be found, and no conversation about a licence can even take place. In response to previous consultations we have explained that this could be dealt with in a carefully drafted national liability limitation without impinging on EU law – compensation damages (but not injunctions) could be limited if the person using the copyrighted work was unable to determine who was the rightholder after a diligent search. We are pleased that the Irish Government is working with the EU to develop a workable system for dealing with 'orphan works'. Our detailed comments on particular orphan-works issues have been submitted to the Irish Government previously, and are attached for ease of reference.

45. **More generally, the problem of 'information infrastructure' for copyright transactions online persists throughout many copyright sectors.** Whilst the European Commission has taken initial steps in stakeholder dialogues to encourage music rights societies in particular to develop and integrate better databases for music copyright information ('rights management information'), much more can be done in this area.

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M. **Data Mining (Questions 74-75)**

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

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

46. **We have two practical concerns with the proposed 'data mining' exception.** The first stems from experience in the United States, where the litigation over the Google book scanning project reflects how claims to mere 'data mining' are used to justify wholesale appropriation of the copyrighted material of others by a commercial entity (see paragraph 52 below). If new exceptions in these areas are deemed necessary in Ireland – they should be carefully drafted and limited to avoid this very sort of unintended consequence.

47. **Access that is open, non-exclusive, and non-discriminatory in every respect also should be available to works used under any library, archive, orphan works or data-mining exception.** We do recommend that institutions that benefit from such exceptions not be allowed to create monopolies in, grant discriminatory access to, or erect other barriers to public use of such works in any way. When a library, cultural institution or other beneficiary of such an exception seeks to make archival material or other material subject to the exception accessible to the public, all members of the public should be allowed to make any permitted use of those works, whether in the reproducing and making available of the work itself or in the searching, indexing, data mining or other valuable use. We note with concern, for example, that the British Library's recent deal with Google for scanning the library's public-domain collection effectively requires the imposition of DRM on – and restricts even the library's use of – the digital copies of those public-domain works; gives Google exclusive rights to make such digital copies available for download, redistribution, copying, printing, indexing and other uses; and requires Google's permission even if the library wants to allow academic and non-commercial entities to search and index the material.[v] Such arrangements, inappropriate in the context of increasing public access to public-domain materials, must also be avoided with respect to any material digitised under such exceptions. We do recommend that any access and use of works under such exceptions must be open, non-exclusive and non-discriminatory in every respect.

48. **We see no pressing need for a 'computer security' exception.** This would appear to require re-negotiation of EU directives in the area, which would be unnecessary given the virtually complete absence of disputes in this area.

N. **"Fair Use" and Private Copying (Questions 76-83)**

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

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

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

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

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

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

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

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

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

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

Restructuring the framework of specific exceptions in Ireland or the EU, for example to introduce a general-purpose 'fair use' exception, is not necessary.

49. **The underlying structure of Irish and Continental European copyright law, which has long consisted of clear rights and specific exceptions in cases considered appropriate, does not need to be changed.** Calls for such changes as a US-style fair use exception reflect an overly-simplistic and one-sided view of important copyright issues, and should be rejected. Instead, the Government should adopt a more thoughtful approach to preserving flexibility in the copyright system which recognises the following:

    49.1. As noted below, Microsoft has operated several online services that rely on exceptions and flexibilities in national copyright laws, including common law doctrines like fair use in the United States, and believes strongly that appropriate flexibilities are critical to a well-functioning system. Contrary to the claims made to support adoption of US-style provisions, however, we have not found the Irish copyright system to lack necessary flexibilities for these services to operate. Companies like Microsoft and other innovative tech companies can operate under a system like that of Ireland with specific copyright exceptions equally well as they can under the general-purpose 'fair use' rule in the US.

    49.2. US-style fair use is a common law, court-based doctrine, not a legislative/statutory mechanism, that allows courts, in specific cases and under specific circumstances, to determine that certain activity is non-infringing. The common law approach in the Irish system has likewise developed doctrines – such as 'substantial copying' and 'assisting infringement' – that have been used to provide needed flexibility in technology-related copyright cases. For example, dual-cassette recorders, videotape players, and similar devices have been found not infringing in common law countries on the basis of these doctrines, which have similar application to new digital devices and services. It has not been shown that the Irish common law system is incapable of addressing the needs of promoting innovation through case law development or that legislative amendments are needed.

    49.3. The flexibility of US-style fair use has its costs that must be understood, namely that it is capable of being stretched too far and justify activity that is quite harmful to a robust copyright system. The litigation over the Google book scanning project is a good example of this downside.

50. ▶Google's alleged attempt to scan millions of books into its commercial search engine database, without permission from or payment to any of the authors or publishers, was defended on the ground that the use of the copyrighted titles was fair use. The expensive litigation dragged on for several years, and resulted in a controversial proposed settlement that was rejected by the US District Court based on opposition from a wide array of stakeholders, including the governments of the United States, France and Germany.

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Google's claim that the fair use doctrine covers its alleged wholesale unauthorised copying of tens of millions of copyrighted books for commercial purposes serves as a cautionary tale about the limits of US-style fair use.

Authors Guild v. Google Inc., No. 05 Civ. 8136 (DC) (S.D.N.Y. 22 Mar. 2011) (Opinion rejecting settlement proposal), http://thepublicindex.org/docs/amended_settlement/opinion.pdf .

50.1. Note also that under the rejected settlement, Google's proposed solution was to make this database of books proprietary – i.e. only available to Google itself and not any other commercial use by others. It is hard to see how the company can 'have it both ways' on such issues even in the name of fair use—seeking free reign to copy millions of other people's copyrighted books, but keeping control over the access and on-going commercial benefit of such works all to itself.

51. ▶Whilst in the US fair use can be used as a way of reaching compromises on copyright issues by way of litigation rather than legislation, experience from other common law jurisdictions may be instructive. The Australian Government in 2005 considered adoption of a fair-use provision in its own legislation, and decided not to do so, highlighting some difficulties:

- There are no clear-cut rules for distinguishing between infringement and a fair use.
- The only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in a court, but outcomes in fair use disputes can be hard to predict.
- Applying the statutory principles can be difficult for the courts and fair use cases have been characterised by decisions in lower courts that have been overturned in courts of appeal and reversed again in the US Supreme Court.
- Defending a fair-use claim in court can be expensive and is mainly undertaken by corporations with considerable financial resources.

Fair Use and Other Copyright Exceptions, An examination of fair use, fair dealing and other exceptions in the Digital Age, Issues Paper (May 2005), http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf.

52. Similarly, the UK's Hargreaves Review of Intellectual Property and Growth rejected proposals for a general-purpose 'fair-use' exception, given its incompatibility with European copyright systems, the uncertainty and litigation that such a rule generates in the US, and the workability of particularly crafted exceptions in Europe. In the words of the Review, "The economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated…. Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not."

I. Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth, p. 45 (May 2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf.

53. In sum, reducing the important issue of flexibility in copyright to one of simply 'porting' US fair use into the Irish system is a mistake. Instead, a more detailed and thoughtful inquiry into the necessary flexibilities in specifically identified areas, such as mechanisms to address 'orphan works' or consumer 'format shifting' as described herein, should be undertaken. Fair use would be a 'sledge hammer to crack a nut' here – it doesn't ask or answer the relevant questions of what is needed to deal with priority issues like these that need addressing.

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54. **A 'format shifting' exception for appropriate private copying by consumers of their legitimately acquired content – which is what most people think of as 'fair use' – could be helpful.** Besides the inappropriate calls sometimes made by commercial companies to be able to make extensive use of others' copyright material without permission or payment, most of the discussion of 'fair use' has centred on how consumers can legitimately use purchased music CDs on other devices. Whilst this does not appear to have been a major issue in Ireland, a specific 'format shifting' exception was proposed by the Hargreaves Review in the UK to deal with these issues. Such a provision could likely be also implemented if needed in Ireland under existing EU legislation covering 'private copying'—perhaps by broadening out the Copyright Act's Sec. 101 'time shifting' exception to include carefully defined format-shifting behaviour—without the need to re-open or restructure the framework of other specific exceptions in the Ireland or EU.

    Copying of music CDs to portable music players is widespread. Formalising a carefully crafted 'format shifting' exception to cover such practices would appear to have virtually no economic or practical impact (i.e. obviating the need for any compensation in the form of 'levies'), given that consumers already have the expectation that the ability to do these things is included in the price of the CD. The music industry in the UK, for example, has implicitly – if not explicitly – authorised this kind of personal copying, making clear to the public that it would not take legal action against such copying:

    - *We want to "make it unequivocally clear to the consumer that if they copy their CDs for their own private use in order to move the music from format to format, we will not pursue them".*
    - *"[W]e must educate the consumer that to copy is okay, to give away is not okay."*
    - *"Traditionally the industry has turned a blind eye to private copying and used the strength of the law to pursue commercial pirates.... We believe the latter must remain an infringement and we believe that we have to authorise the former; in other words, to make the consumer unequivocally clear that he has the right to copy any music that he buys for his own use, multiple, from format to format, anything at all that he wishes to do for his own use he is able to do."*

    BPI Executive Chairman Jamieson to Select Committee on Culture, Media and Sport http://www.publications.parliament.UK/pa/cm200607/cmselect/cmcumeds/509/6060604.htm; http://www.publications.parliament.UK/pa/cm200607/cmselect/cmcumeds/509/6060605.htm (6 Jun. 2006).

    UK music fans can copy their own tracks, BBC (6 Jun. 2006), http://news.bbc.co.UK/1/hi/5053658.stm

O. **Other (Questions 84-86)**

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

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

(86) What have we missed?

55. **Priority: Internet co-operation.**

    55.1. **Some practical mechanisms would also be helpful to address mass internet infringement fairly and proportionately.** The issues raised in *EMI v. UPC* and *EMI v. Eircom* relating to notices to internet users, possible sanctions, and the availability of injunctions against internet infringements

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raise important questions that may need to be addressed, particularly to ensure that such measures are proportionate, effective and respecting of due process.

We believe that such measures are developed and implemented most effectively through rights owner and ISP co-operation, along the lines of the initial agreement reached between music rights owners and Eircom. Generally, cross-industry collaboration and stakeholder dialogues are the best way to reach workable solutions on such complex issues. The underlying eCommerce Directive rules on liability do not need to be re-opened to achieve such solutions.

EMI Records (Ireland) Ltd v. UPC Communications Ireland Ltd, [2010] IEHC 377, (Unreported, High Court, Charleton J., 11 Oct. 2010), http://www.scribd.com/doc/39104491/EMI-v-UPC.

EMI Records (Ireland) Ltd v Eircom Ltd, [2010] IEHC 108 (16 Apr. 2010), http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/7e52f4a2660d8840802577070035082f?OpenDocument.

55.2. **Data protection rules in the EU need to be reconciled with IP enforcement rights in the EU.** In order to bring effective civil enforcement against IP infringement, it is necessary to collect evidence of such infringement and determine the identity of those behind infringing internet activities, subject to reasonable privacy and due-process protections. The High Court recognised these realities in *EMI Records v Eircom,* in permitting the plaintiff copyright owners to search for internet infringements of their works using internet protocol (IP) addresses, where the plaintiffs could only get access to the identity of the users behind those IP addresses by court order.

EU data protection rules do in fact prevent this kind of civil evidence collection in certain cases of internet infringement in several European countries (e.g. Spain, Italy, Belgium), however. Not just personal privacy, but protection of intellectual property itself and access to justice are also fundamental human rights under the relevant European Human Rights Convention. These fundamental rights can and should be implemented in a complementary and consistent way throughout the EU both to protect privacy interests and to permit rights owners to protect their IP through both civil and criminal enforcement. Ireland has an important role to play in on-going discussions in the EU to allow effective enforcement of copyright and other intellectual property rights under data protection legislation.

EMI Records (Ireland) Ltd v Eircom Ltd, [2010] IEHC 108 (16 Apr. 2010), http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/7e52f4a2660d8840802577070035082f?OpenDocument.

Charter of Fundamental Rights of the European Union, O.J. 2000/C 364/01, Arts. 7-8, 17(2), 47 (2001), http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

55.3. **Broader consideration within the EU of the option of 'pre-determined damages' would be helpful.** Compensation and other damages due in enforcement cases can be difficult to prove as a factual matter. To address this situation, *ten EU Member States already provide for alternative measures of 'pre-determined' damages* that allow reasonable lump-sum or multiple damages awards in certain copyright and/or trademark enforcement cases. Effective enforcement would be greatly facilitated through adoption of such a system of lump-sum or pre-determined damages as an alternative means of proof in Ireland and the EU.

Legal Experts' Group, EU Observatory on Counterfeiting and Piracy, http://ec.europa.eu/internal_market/iprenforcement/docs/damages_en.pdf.

56. **The EU also should be encouraged to continue to make effective protection and enforcement of copyright and other IP rights a high priority in its discussions with Ireland's and the EU's trade partners.**

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Piracy and inadequate IP rights and enforcement in third countries are a big drain on all kinds of creative and innovative Irish and EU companies as they seek to expand their markets overseas.

- In the business software sector, piracy rates range as high as 92% in some countries. China, Brazil, India and Russia are important markets that should be particular priorities where Ireland and the EU should encourage improved IP enforcement and domestic piracy reductions. The value of business software piracy in each of these markets is more than $2.8bn annually ($8.9bn in China alone). Business software piracy rates are 77% in China, 63% in Russia, 63% in India, and 53% in Brazil.

  Ninth Annual BSA Global Software Piracy Study (2012), http://portal.bsa.org/globalpiracy2011/.

- The US Trade Representative does a comprehensive annual review of third countries' IP laws and enforcement, which has been a significant catalyst for improvement of global trade in IP-protected goods and services. Information collected and posted in relation to this 'Special 301' review is one of the best sources of specific evidence on a large number of third countries' IP enforcement rules and activities. The US President has also named a United States IP Enforcement Co-ordinator, Victoria Espinel, to co-ordinate US Government policy on IP enforcement issues across all relevant agencies. Her office prepared a Joint Strategic Plan on Intellectual Property Enforcement in 2010. These are model initiatives which should be considered by Ireland and EU for helping IP-reliant domestic companies to protect their rights and expand overseas.

  See USTR Releases Annual Special 301 Report on Intellectual Property, http://www.ustr.gov/about-us/press-office/press-releases/2012/april/ustr-releases-annual-special-301-report-intellectual (30 April 2012).

  USTR, 2012 Special 301 Report, http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf.

  IPEC, Joint Strategic Plan on Intellectual Property Enforcement (June 2010), http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf.

- The European Commission's DG Trade conducts its own reviews of third-countries' enforcement regimes in the interest of improving EU countries' trade in IP-protected goods and services to those countries. The Commission's 2009 IPR Enforcement report and its 2006 predecessor have proven to be useful tools, both for setting the EU's external trade priorities to deal with IP problems abroad, and also for providing intelligence to European IP owners (especially SMEs) on the problems that others face in trading with particular countries. Conducting these reports more regularly—ideally, annually—would be of great value. It would also be helpful for these and other IP-related policies that the Commission and the Member States develop to include concrete objectives that they would expect to see met, in order to measure the practical progress and effectiveness of these IPR Enforcement Reports and other initiatives.

  DG Trade, Report on intellectual property right (IPR) infringements targets countries for closer cooperation (21 Oct. 2009), http://trade.ec.europa.eu/doclib/press/index.cfm?id=470.

57. It should be noted that initiatives to promote effective IP enforcement in third countries does not just benefit Irish and other EU companies, it promotes foreign direct investment and development in those countries themselves. See paragraphs 5.2 – 5.4 above.

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Yours sincerely

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[i] Berne Convention for the Protection of Literary and Artistic Works (1971), http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf .

[ii] WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[iii] The Economic Impact of a European Digital Single Market: Final Report (Mar. 2010), http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf, *cited in* Supporting Document EE: Economic Impact of Recommendations, Review of Intellectual Property and Growth (2011), p. 13.

[iv] See Response of Microsoft to the UK Independent Review of Intellectual Property and Growth: Call for Evidence (4 March 2011), http://www.ipo.gov.uk/ipreview-c4e-sub-microsoft.pdf.

[v] See Google Ireland – The British Library, Cooperative Agreement (31 Mar. 2011), http://www.openrightsgroup.org/assets/files/pdfs/BL%20Google%20Contract.pdf; and the related blog, J. Ruiz, Open Rights Group, Is the Deal Between Google and the British Library Good for the Public? (24 Aug. 2011), http://www.openrightsgroup.org/blog/2011/access-to-the-agreement-between-google-books-and-the-british-library.

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