



## Submission to the Copyright Review Committee May 2012

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### STATEMENT OF BELIEFS

Boards.ie believes that the Internet is not, and should not be, exempt from the law of the land. We believe that users are responsible for what they say and do and intermediaries operating in good faith should not be punished for the misdeeds of others. We believe that poorly formed, unclear or biased copyright legislation will stifle innovation and that there is an overriding need for clarity and balance in any new copyright legislation.

### FAIR CONDUIT

Boards.ie is in favour of a US-style Fair Use doctrine which would allow users of the Internet to share, comment and discuss content without fear of reprisal from rights-holders. There is little point however, in protecting users under the concepts of Fair Use and Fair Dealing if there are no companies willing to take the risk of transmitting user generated content for fear of possible copyright breach.

For these concepts to make any sense they need to be accompanied by a user right to "Fair Conduit". This protects a user's reasonable expectation to be allowed to publish their work. This will only happen if conduits are protected against unintentional copyright breach before they are made aware of it. We are in favour of enshrining this term, "Fair Conduit", into any proposed Fair Use policy.

### CLARITY

- Clarify repercussions on intermediaries of users posting copyrighted content
- Establish a "notice and takedown" policy for copyrighted content, recognising that the intermediary has limited knowledge of potentially copyrighted content
- Introduce a fair usage policy, and clearly define what constitutes fair usage
- Clarify whether users linking to content constitutes a breach of copyright
- Clarify whether users embedding content constitutes a breach of copyright
- Clarify whether users streaming content constitutes a breach of copyright

### BALANCE

- Law should recognise that users are responsible for their own postings
- Law should not favour any one stakeholder
- Law should not put the onus on intermediary to establish copyright ownership
- Remedies for breaches of copyright should be proportionate

- Mechanism for addressing copyright breaches should not be financially burdensome on intermediary or copyright holder
- Composition of any proposed council should be balanced with all stakeholders fairly represented

## WHO IS BOARDS.IE?

Boards.ie is part of the Distilled Media Group, which employs over 100 people in Dublin and is Ireland's largest online publisher.

Founded in 1998, Boards.ie is today one of Ireland's biggest websites with over 2.3 million unique users each month. Boards.ie employs 13 staff directly, and along with a team of over 600 volunteer moderators, manages a community of over 500,000 people.

## RESPONSES TO SPECIFIC QUESTIONS

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

We feel that the scope of the current Review, focussing solely on the economic and technological aspects of entrepreneurship and innovation, is insufficient. Attention should also be given to the cultural impact upon users when considering copyright legislation; poorly formed legislation will stifle creativity such as parody and satire, music and video mash-ups, remixes and sampling, and other derivative arts. Copyright legislation should at all times respect the rights of consumers/users as well as the rights-holders.

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

No. As an internet company we feel that Ireland's current copyright law is seriously lacking clarity, particularly with regard to the online environment. Many companies, Boards.ie Limited included, operate in a grey area, trying to interpret legislation to the best of their ability, but unsure of the consequences should there be a breakdown in procedures, or should users breach our Terms of Use.

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

Yes, provided the interests of each of the six identified categories are represented equally. The proposed Council must be, and must be seen to be, a fair arbiter of copyright disputes. Having a Council that is just another lobby group of copyright holders would serve no purpose.

### **(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?**

The Council should be a public body, established by and reporting to the Minister, with full transparency as to its composition, appointment process, and its work, if it is to operate in the public interest.

**(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?**

The Council should represent the rights and interests of all groups that have an interest in copyright in Ireland. A Council which is merely another lobbying group would serve no purpose.

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

The Committee has identified six main categories of persons with an interest in Irish copyright. Any proposed Council should ensure that each of these categories has an equal voice. We would propose that 1-2 representatives from each category are appointed and each representative/ category of representative has an equal vote.

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

The primary functions of the Council should be to clarify the existing law, to identify inequalities in existing legislation and propose new legislation where current legislation is found to be lacking, to put in place a robust dispute-resolution framework and to encourage copyright compliance and awareness.

The primary objectives of the Council should be to ensure balance and clarity in relation to copyright in Ireland and to report to the relevant Minister where the Council believes action is required.

**(12) How should it be funded?**

Ideally the Council would be composed of volunteers, giving their time on a pro bono basis, however we realise this may not be practical. The Council would therefore presumably be funded by the taxpayer, through the relevant government department, if the Council is to act in the public interest.

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

We acknowledge the UK's move towards an Exchange and whilst it would simplify the licensing process in Ireland, it is not the solution to the current issues regarding copyright legislation in Ireland.

Whilst we are in favour of standardising, insofar as is possible, the procedures around licensing, an Exchange that relies on a central/ comprehensive database of licensable works this may not

be practical. It may not be possible to keep the database continually up to date, the costs attached to maintaining such an Exchange would be significant, and the majority of copyright that is disputed is not Irish.

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

The CRRA is deficient when it comes to many of the issues relevant to an Irish internet company. For example the CRRA mentions the word “Internet” only three times, it does not address the issues of linking, embedding files, streaming, hosting etc. Irish copyright legislation must remain current, future-proof, and should address current technologies.

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

We are in favour of a quick, cost-effective dispute resolution process as the majority of SMEs could not bear the costs of High Court proceedings. Before an ADR is established however, consideration will need to be given to whether the ADR’s rulings will be legally binding, and whether an ADR would duplicate the recourse that currently exists in the courts system.

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

The entire architecture of the Council/ Exchange & ADR Service should be prescribed in legislation, with clear guidance on whether recommendations are legally binding, rights of appeal etc.

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

Yes, provided recourse is to offenders, i.e. those who breach copyright, and not to intermediaries/ mere conduits. We are not in a position to comment on what legislative changes are necessary.

**(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?**

Yes, provided recourse is to offenders, i.e. those who breach copyright, and not to intermediaries/ mere conduits. We are not in a position to comment on what legislative changes are necessary.

**(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?**

Yes, Boards.ie Limited is required, in order to protect shareholder value, to retain paid “moderation” staff to monitor grey areas of copyright legislation. Copyright holders have no similar burden, which is unjust since we are protecting the copyrights of others, for no consideration.

Channelling resources into “moderation” staff, whose role is to maintain the status quo, obviously means we have fewer resources available to put into development of new products and platforms.

We believe that a fair Notice and Takedown policy, in conjunction with a Fair Use policy, as currently exists in the US, would be extremely beneficial to innovation in Ireland.

**(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?**

Yes, the recent Statutory Instrument which has been passed into law heavily over-compensates rights holders, in that they can effectively take down “mere conduits”, without prior notice, for undisclosed reasons, without any regard for proportionality or proof, through an injunction.

This legislation is a blunt instrument which panders entirely to copyright holders and punishes not the offenders, but the intermediaries. We believe that this SI will turn away inward investment as it makes Ireland a far riskier place for Internet businesses to locate.

**(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?**

Yes, the definition should be platform neutral. However the law should clarify certain grey areas around what constitutes broadcasting. For example, does embedding a video clip onto a webpage constitute broadcasting? Is a person deemed to be broadcasting if they have a video camera in their bedroom, pointing at a television screen which happens to be showing a football match and the image from their camera is being streamed over the Internet?

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

Infringements cannot be prevented. If they occur, copyright holders should be compensated retrospectively and such remedies should be proportionate to the infringement.

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

No. We do not believe that the treatment for photographs should be any different to the treatment for any other copyrighted content.

**(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?**

The case for these immunities has been strengthened. Technological advances such as Cloud Computing bring into stark relief the requirement to grant immunity to caching, hosting and conduits. Failure to do so would mean that innovation in these areas will be sharply curtailed.

**(43) Does the definition of intermediary (a provider of a “relevant service”, as defined in section 2 of the E-Commerce Regulations, and referring to a definition in an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?**

The current definition is not sufficient. It should be amended to include everyone from point to point. EUCD states that “Information society services span a wide range of economic activities which take place on-line” and goes on to list various examples of types of activities. These examples should be expanded to specifically include content aggregators, search engines and sites that make Fair Use of data for the purposes of retrieval and comment by users.

**(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?**

The EUCD provided scope to increase the types of activities covered.

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

We do not believe that a link in itself has any content. It is simply a pointer to a location. It should not therefore constitute a breach of copyright, as no copyrighted material is being displayed to the user by merely displaying a link.

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

Yes, linking in itself should not constitute a copyright infringement.

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

We believe that a provision should be alongside the existing exceptions.

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

Yes. Irish copyright law as an area is “grey” and therefore, open to interpretation. This lack of clarity has a chilling effect on innovation. Copyright law is unclear with regards to many technological advances (Cloud Computing for example) which will stifle innovation in Ireland.

From a commercial point of view, in order to protect shareholder value, Boards.ie deems it necessary to hire moderation staff, which obviously diverts funds that could otherwise be used to develop the site as a platform, however a recent action by Newspaper Licensing Ireland Limited (“NLI”) against the ‘Women’s Aid’ charity could have potentially far-reaching consequences.

This action centres around a demand by the NLI for Women’s Aid to enter into a paid license agreement “to scan clippings...”, based entirely on the fact that Women’s Aid have linked from their website to certain newspaper websites.

Whilst there is currently no specific exemption for linking in Irish law, we believe this action by NLI to be illogical, ill-conceived, unjust and nonsensical for the following reasons:

- Linking in itself is not, in our opinion, a breach of copyright; it merely points the user to another location.
- No copyrighted material is being re-published.
- The entire internet is centred around the concept of linking from one place to another. An internet without links could not exist.
- The majority of newspaper websites encourage sharing of their content through social media sites, and offer services such as RSS feeds, apps and mobile sites, all with the aim of driving more users to their content, the same result as linking. Offering a piece for consumption without a paywall or even a basic control mechanism (like login/password) encourages their readers to re-tweet, Facebook and share their stories.

If this action is successful, and the courts find that NLI are correct in demanding license fees, the end result will presumably be a requirement on ALL websites that feature links (Boards.ie, Google, Twitter, Facebook etc. etc.) to pay royalties for all links to newspapers retrospectively, since the courts would simply be clarifying a point of existing law.

With many of the world’s biggest Internet companies currently located in Ireland, a successful outcome for the NLI would be disastrous for innovation and existing jobs in the Irish internet industry as a whole.

If a single issue encapsulates the inadequacies and lack of clarity in Irish copyright law we feel that it’s the fact that the NLI could conceivably bring such a nonsensical case through the courts.

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

No. We do not believe that photographs should be treated differently from other forms of copyrighted material.

**(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?**

Yes. There are many examples of sites and mobile applications which are extremely successful in other jurisdictions whose business models rely on marshalling news and repackaging existing content. The most notable are Google and Facebook, but other sites such as The Huffington Post and TheJournal.ie (also part of Distilled Media Group) are also extremely successful.

Content which is posted to the World Wide Web should be considered to be posted/ published worldwide, and in the absence of any instruction to the contrary should be available under a Fair Use regime. Furthermore, the technology for marshalling of news and other content has been in existence for over ten years as RSS feeds.

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

Any published articles should have a clear expression of copyright. Unless the copyright owner clearly states differently, redistribution should be permitted, provided that credit is given to the source and that a link to the source is provided. We believe a clear Fair Use policy, in conjunction with a fair Notice and Takedown policy, would be appropriate.

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

Yes we believe this would work, however a general "Fair Use" policy would be more future-proof and a more elegant solution than an exception.

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

Please refer to our responses to questions 51/52 above. Copyrights should be respected, but in the absence of specific instructions to the contrary, standard procedures (credited and linked to source) should apply.

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

Yes, this would provide a broader definition.



**(56) Should all of the exceptions permitted by EUCD be incorporated 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?**

Yes, we believe that incorporation of as much of EUCD into a single Irish Act would simplify copyright legislation in Ireland.

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

Yes, particularly important in light of the government’s aim of developing the “Smart Economy”.

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

Yes.

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

Non-commercial user-generated content should have the same protection as copyrighted works. A Fair Usage policy would apply to both categories of works equally.

**(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?**

If something is deemed by the Minister or the relevant government department to be of sufficient public interest, and that public interest is deemed to outweigh the copyright holder’s interests, then the works should be made publicly available. The government should reimburse the copyright holder for their copyright, through a one-off payment.

**(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?**

As above, if something is deemed by a Minister or relevant government department to be sufficiently innovative so as the public's interest outweighs the interests of the copyright holder, then the Minister should be permitted to issue a compulsory license. Reimbursement to the copyright holder should be through a one-off payment.

**(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?**

We believe that all Intellectual Property should be afforded the same protections. There should not be a specialist copyright for innovation. Legislation based excessively on exceptions is not good legislation in our opinion, and exceptions are not the solution to Irish copyright law.

Innovative business models could easily be encouraged if intermediaries could operate in the confidence that they would not be pursued for users who breach their terms of use, i.e. if the "business" requirement for intermediaries to moderate content was eased and if copyright legislation were to be explicit in stating that users are always 100% responsible for the creation of their content, not intermediaries.

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

Yes.

**(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?**

Yes.

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

"Scientific and other researchers" would need to be clearly defined within legislation, but in principle there should be exceptions for researchers to use modern text and data mining techniques. It should be noted however that such an exception would not be necessary if a robust Fair Use policy was introduced.

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

We believe that copyright legislation is not the correct place to legislate for this.

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

A Fair Use doctrine has operated in the US for many years. That country has nurtured and produced the vast majority of the largest and most innovative online companies.

**(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?**

The government should lobby aggressively for a Fair Use doctrine at EU level.

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

From the point of view of Boards.ie, a clearly defined “fair use” policy would remove a lot of ambiguity and have the knock on effect of reducing the business requirement to moderate content.

It would also avoid situations where the State’s obligation to protect the interests of rights-holders are unfairly passed onto “mere conduits”.

**(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?**

A true “fair use” policy should be exactly that - fair. It should neither favour rights holders, nor should it ignore their copyrights.

A Fair Use policy should accommodate the interests of users of information by allowing them to share, comment, discuss and parody content without fear of reprisals, whilst also ensuring that the copyright holder does not lose out financially or otherwise from such usage. We believe a Fair Use policy should be of benefit to copyright holders as it will encourage legitimate dissemination of their content or works.

**(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?**

A favourable fair use doctrine should allow creativity, innovation and the emergence of new media and cultures. We believe that the legislation would benefit from a non-exhaustive list of relevant examples, to put the fair use policy into context for those who wish to rely on it.

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

It should respect the rights of all parties involved. It should be fair, be balanced and be clear.

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

It appears to be broadly fit for purpose.

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

Yes, the fewer pieces of independent legislation the better, provided the amalgamated legislation still meets the two over-riding criteria of being balanced and clear.

**(86) What have we missed?**

**1. Defamation**

There are two main legal risks in Boards.ie Limited - breaches of copyright and defamation. Both are similar from our point of view, as both stem from user generated content.

Boards.ie Limited is a responsible company and does not publish or post defamatory or copyrighted material. Whilst we rely on our status as a “mere conduit” under the EU eCommerce Directive, we could at any time be served with an injunction or sued for failing to remove material. Our company is operating in a grey area with regard to both copyright and defamation.

The Defamation Act 2009 will shortly be up for review and we would encourage a similar public consultation on this legislation as has been done for Copyright.

**2. S.I. No. 59/2012 — European Union (Copyright and Related Rights) Regulations 2012**

We believe that S.I. No. 59/2012 — European Union (Copyright and Related Rights) Regulations 2012 is strongly biased in favour of rights-holders and in no way serves the interests of any other stakeholders.

Furthermore we believe that it significantly increases the uncertainty around copyright in Ireland, makes Ireland a much less attractive place for international internet companies to locate and stifles home-grown start-ups as it’s anti-entrepreneurial. As a piece of legislation it

does not attempt to punish those who break the law, rather those intermediaries, like Boards.ie Limited, who are entirely innocent of any wrongdoing.

### **3. Free Speech**

Free speech should be a cornerstone of any copyright legislation, and rights-holders should, under no circumstances, be able to interfere this.

Current legislation is unclear as to where intermediaries stand in the event of a copyright (or defamation) dispute. EU eCommerce Directives, and indeed Minister Sherlock himself, have expressed the view that we can rely on the “mere conduit” defence, which would imply no liability (even secondary liability) provided we act within a reasonable timeframe to take down offending material where it is made known to us.

We believe that any move in copyright legislation which would require intermediaries to proactively monitor for copyright breaches would have a chilling knock-on effect with regard to defamation. Any requirement to monitor copyrights must therefore not be proactive.

The recent SI however would suggest that a rights-holder could injunct Boards.ie, effectively shutting down the site without prior warning, and without guidance on remedies, as a result of copyrighted material being posted to the site.

Boards.ie receives numerous emails every day which allege defamation and/ or copyright infringement. Whilst we can make a judgement call on whether we “think” a posting is defamatory (bearing in mind we are not legal professionals), we have no way of verifying whether material is copyrighted.

As a company we therefore have two choices:

1. Leave the content online, “take our chances” by relying on the “mere conduit” route, and hope that we don’t receive an injunction, or
2. Remove the content from our site, thereby removing not only the potentially offending content, but also fair comment on that content. Taking such action damages our business, as Boards.ie is a place where people come to talk to each other.

By way of a single example, we were recently forced to remove almost 500 comments in a single thread, because we received legal threats from the State Broadcaster over content which they found objectionable.

We were left with the choice of engaging our solicitors, at our own expense, to engage with RTE’s legal team, or removing the entire thread, thereby removing the fair comments and opinions of hundreds of individuals. As a website which is archived by the National Library of Ireland, with an aim to “collect, preserve, promote and make accessible the documentary and intellectual life of Ireland” we do not feel that we should have to take these types of actions.

We do not believe it is just that Boards.ie should be the target for legal threats over user generated content. Users should be responsible for their own postings and the law should be clear in that regard. To this end we would be in favour of a clearly legislated “Notice and Take Down” regime where the onus on deciding whether material is removed from public view falls back the user/ poster, i.e. the 4R regime - reporting of material, removal of material, response by the author and replacement of material.

#### **4. Moderation of User Generated Content**

As with many similar sites, Boards.ie relies on volunteer moderators to “police” our community. Moderation serves a few purposes; it keeps the community “in check” and on topic, but also aims to remove copyrighted and defamatory material promptly where it’s been identified.

Should a breakdown in this volunteer moderation process occur, we believe that Boards.ie should not lose its defence as an intermediary on the grounds that if the moderation process implies knowledge of, and therefore liability for, material which is in breach of copyright.

Legal advice would suggest that we could lessen the risk of being sued for breach of copyright (or defamation) by removing moderation entirely, and only reviewing content where copyright/defamation are explicitly brought to our attention. As a responsible organisation however we endeavour to protect copyrights, and endeavour to ensure that defamation does not occur on our site, despite the increased risk to our business.

We believe that this is contrary to the spirit of the law, and we should at all times be able to rely on a robust defence as an intermediary, provided we act responsibly and promptly within an established notice and takedown procedure. Any new legislation should respect the efforts made by companies such as Boards.ie to moderate content, and should not punish efforts to respect and protect copyrights.

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