ATEAC Business Center
Rond Point Schuman 11, Suite 406
1040 Brussels, Belgium
Tel +32.2.256.7500
www.ccianet.org

Computer & Communications Industry Association

May 31, 2012

Via Electronic Mail

Copyright Review
Department of Jobs, Enterprise and Innovation
Room 517
Kildare Street
Dublin 2

Re: Consultation Paper on Copyright and Innovation

Dear Sir or Madam:

On behalf of the Computer & Communications Industry Association (CCIA), I write to you to contribute to the copyright review in Ireland and the Copyright Review Committee's currently published consultation paper. CCIA is a not for profit trade association dedicated to open markets, open systems and open networks. CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies with more than $200 billion in annual revenues.[1]

As we have already expressed during the first call for submissions, CCIA welcomes Ireland's initiative to revise the country's copyright regime for the benefit of innovation and economic growth. It is our strong conviction that the consultation paper leads the review in the right direction and that it constitutes an important step forward. A balanced and modern copyright regime can be a major driver for innovation in the economy in general and in the digital economy in particular. A modern copyright regime should leave enough flexibility for all companies, from start-ups to the biggest in the Internet business, to experiment with new business models, services and applications. Since major Internet companies have increasingly chosen Ireland as a center of their European operations, we see the country in a unique position to benefit from a modern copyright regime that spurs one of the most dynamic parts of the economy – and depending upon the choices made in response to this consultation, as an even more attractive destination for business operations for the ICT sector.

The consultation paper rightly puts Ireland's copyright reform efforts into the broader European and international context. The copyright regime can definitely create a comparative advantage over other countries or trading blocs. On the international level, the paper highlights various countries that have either undertaken or are in the process of a thorough copyright reform. The objective of creating a competitive advantage over other countries is a crucial factor

[1] This response reflects the views of CCIA, and is submitted on the Association's own behalf, rather than any individual Member.

in these reform efforts and it is worthwhile to point out that due to the global, borderless nature of the Internet, potential benefits can be considerable in the digital economy. The same reasoning is true for the European context. The Netherlands and the UK are comparatively advanced in their copyright law overhaul but will surely not remain so for long. The debate over a balanced copyright regime has picked up speed in Eastern European countries, such as Poland and the Czech Republic. Largely as a consequence to enduring street protests over the Anti-Counterfeit Trade Agreement (ACTA), these governments initiated broad public policy debates on all aspects of copyright.

These reform processes provide the Irish government with a unique opportunity to build coalitions with European partners and advocate for a medium- to long-term overhaul of EU copyright law. The current Copyright Directive does not provide for consistent and harmonized exceptions and limitations throughout the EU, which results in divergent copyright regimes in the various Member States. This increases the cost of doing business in the European market and weakens Europe's competitiveness since new, innovative business models are hampered in supplying pan-European services. This approach seems particularly maladapted to the digital economy as innovation continues to move forward increasing the gap between existing regulations and technological advancement. It is our conviction that flexible copyright laws across Europe would lead to greater economies of scale for the benefit of consumers, entrepreneurs and the economy as a whole.

With regard to the consultation paper's chapter on exceptions and limitations, CCIA strongly supports the Review Committee's willingness to incorporate the full list contained in the EU Copyright Directive[2] to ensure that future innovation is not hampered. In the United States, Internet innovators greatly benefit from the U.S. Copyright Act's Fair Use provision,[3] which generally permits the use of portions of copyrighted work, so long as the normal economic exploitation of that work is not undermined. The resulting flexibility provides the level of legal confidence many of today's digital innovators require to invest and experiment with novel business ideas. CCIA latest study[4] based on publicly available data shows how greatly industries relying on the US Fair Use doctrine contribute to the US economy. Thus, in 2008 and 2009 Fair Use industries generated revenue averaging $4.6 trillion, a 35% increase over 2002 revenue. These industries' 'value added' to the US economy averaged $2.4 trillion, approximately 17% of total US current dollar GDP. Employment in industries benefiting from fair use and related limitations and exceptions increased from 16.9 million in 2002 to 17.7 million in 2009 for an average payroll of more than $1.2 trillion during 2008 and 2009. Despite the economic downturn, Fair Use industries grew at a faster pace than the overall economy.

EU copyright law has no such equivalent doctrine and the current Copyright Directive takes a prescriptive approach that provides for a finite list of specific and narrow exceptions and

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
[3] 17 U.S.C. § 107.
[4] Rogers, T. & Szamosszegi, A. (2011). Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use. Available online at: http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000535/CCIA-FairUseintheUSEconomy-2011.PDF

limitations to copyright protection. A study[5] commissioned by CCIA in 2010 revealed that EU industries relying on exceptions and limitations to copyright make significant contributions to Europe's economic growth. The value added generated by these industries amounts to EUR 1.1 trillion, or 9.3% of EU GDP. Nearly 9 million people are employed in these industries amounting to 4% of all EU employees. Employees earned EUR 307 billion in wages and salaries. Furthermore, between 2003 and 2007 these industries grew 3% faster than the EU economy. Given the conservative approach of the study, these numbers should not be underestimated. The lower proportion in Europe, when compared to the US, could be attributed to the fact that more robust and harmonious limitations and exceptions have created more robust fair use-dependent industries, such as the Internet sector.

These numbers provide further support to the placement of robust and flexible exceptions and limitations at the heart of promoting innovation and economic development. From a law and economics perspective, scholars have long established that an "excessively strong copyright regime that tolerated little fair use would raise transaction costs and copyright-based earnings" and consequently "raise the costs of creation to artists that seek to build on previous works".[6] This inevitably results in less creative output and has a particularly negative impact in the digital era. As rightly noted by the consultation paper, various Internet platforms like e.g. user-generated sites enable people to create all sorts of new, transformative works.

With regard to the notion of 'transformativeness', it is worthwhile to point out how this standard helped industries dependent on limitations and exceptions to develop and grow in the US. Hence, in the 1994 judgment in *Campbell v Acuff-Rose Music*, the Court stated "the more transformative the new work, the less will be the significance of other factors, like commercialism".[7] This judgment confirmed that commercial entities could use works in new, transformative ways, which would not detract from the underlying market for the work, and thereby add new economic value without competing with the rightsholder. This transformativeness standard has proven particularly relevant in the digital age, where Internet applications, services, and consumer electronics all make countless digital copies of works each day. Rather than undermining the value of a work, transformative uses increase value to the consumer, and by extension right holders, either by making a work more useful, as is often the case in consumer electronics, or making it more easily found and transmitted, as is often the case in the online environment.

Against this background, CCIA strongly welcomes the Review Committee's statements on quoted material by online search engines. It is true that innovative online business models like search technology are dependent on robust limitations and exceptions. With trillions of webpages online, indexing is the only practical means to generate reliable, instantaneous search results. Compiling such indices, however, requires copying – the copying of billions of websites which might be considered as infringing the website creator's exclusive rights. In this context, it is

[5] Akker, I., *et al.* (2010). Economic contribution of EU industries relying on exceptions and limitations to copyright. SEO Economic Research. Available online at:
http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf

[6] Handke, C. (2010). The Economics of Copyright and Digitisation: A Report on the Literature and the Need for Further Research, p. 38. Available online at:
http://www.ipo.gov.uk/ipresearch-economics-201005.pdf

[7] 510 US 569, 579 (1994).

important that future legislative changes provide for the exceptions and limitations that subject these kind of valuable activities to greater legal certainty. It is also worthwhile to highlight that any future law should be flexible enough not only to cover services and business models that already exist, but also future innovations.

As shown in the previous paragraphs, robust and up-to-date exceptions and limitations to copyright are one crucial ingredient for growth in the digital economy. Various safe harbors designed to limit online services' liability for third-party misconduct have also proven essential for the development of Internet companies. It is important to understand that the regulatory environment affecting both flexibilities in copyright and the liability of online intermediaries has a decisive impact on venture capital investments into start-up companies that want to help entrepeneurs take advantage of the vast opportunities the Internet offers. Recent studies undertaken by *Booz & Company*[8] in the EU and the US made that point very clear. Accordingly, after surveying 54 European angel investors and prominent venture capitalist from the EU and the US, the study came to the conclusion that increased liability for content providers would have a greater negative impact on early-stage investment than would a weak economy and an increased competitive environment combined.[9]

In the same vein, the Booz study makes clear investments in start-ups would be significantly affected if online intermediaries were liable for the content uploaded by users. The pool of interested angel investors would be reduced by 68%. Increased clarity in copyright law also constitutes a major concern for these investors since their decisions are heavily influenced by uncertainty related to the probability of a lawsuit for copyright infringement, as well as the size of damages in the event of liability. All of the investors surveyed reported that they are uncomfortable investing in business models that operate under an ambiguous regulatory framework. It is interesting to see that very similar results were obtained in a corresponding study measuring the impact of copyright regulations on early-stage investment in the US. There the pool of angel investors would be reduced by 81% if online intermediaries were to face liability for content uploaded by users.[10]

This considerable impact of copyright policy and enforcement on venture capital investment is further supported by a report[11] commissioned by CCIA that investigates the implications of the 2008 "*Cablevision*"[12] U.S. appellate court ruling for cloud computing

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[8] Le Merle, M. et al. (2012). The Impact of E.U. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study. Available online at: http://www.booz.com/global/home/what_we_think/reports_and_white_papers/ic-display/50136149

[9] Le Merle, M. et al. (2012). The Impact of E.U. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study. Available online at: http://www.booz.com/global/home/what_we_think/reports_and_white_papers/ic-display/50136149

[10] Le Merle, M. et al. (2011). The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study. Available online at: http://www.booz.com/global/home/what_we_think/reports_and_white_papers/ic-display/49953075?tid=39964387&pg=all

[11] Lerner, J. (2011). The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies. Available online at: http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000559/Cablevision%20white%20paper%20(11.01.11).pdf

[12] *Cartoon Network, LP v. CSC Holdings,* 536 F.3d 121 (2d Cir. 2008).

companies. The case dealt with Cablevision's Remote Storage Digital Video Recorder (RS-DVR) which, similar to a traditional video recorder, allowed customers to record and replay television content on a hard drive. The difference to traditional home DVRs, however, was that Cablevision's RS-DVR was located remotely, playing back from remote servers. This caused a consortium of US television and copyright holders to file a complaint against Cablevision in 2006 over alleged copyright infringement. In reversing the District Court's first judgment on appeal, the Second Circuit Court held that Cablevision's technology does not infringe the plaintiff's copyrights. Without going further into the details of the case, it is noteworthy that *Cablevision* is considered to have greatly increased the legal certainty around a variety of new business models that are based on cloud computing services. Our report found that this judgment led to additional incremental investment in US cloud computing firms that ranged from $728 million to approximately $1.3 billion over the two-and-a-half years after the decision. Particularly interesting is that after the *Cablevision* decision, venture capital investment increased significantly in the US relative to the EU. Against this background, CCIA welcomes the Review Committee's recognition of innovation intermediaries as important drivers of innovation.

In this context, we would also like to highlight a new study[13] by *Copenhagen Economics* that delivers valuable data on the economic impact of the E-Commerce Directive provisions on intermediary liability limitations.[14] Generally speaking, these provisions were devised to protect intermediary service providers like online auction sites or social networking sites from the wrongful conduct of their users. Even though these provisions do not absolve these providers from any duty to effectively stop infringements, and even though legal clarification is still needed, they are very widely understood to form the backbone of a vibrant and inclusive digital economy according to the *Copenhagen* study. Thus, intermediary activities in the EU contributed around EUR 310 billion to European GDP based on latest available data from 2009. This number consists of intermediaries' direct contribution of EUR 160 billion and an indirect impact of EUR 150 billion through their positive impact on other firms. In addition, it is estimated that these intermediaries provided a value of free services to European consumers corresponding to an additional EUR 35 billion in 2009. In the coming years a steep increase is predicted.

With regard to copyright enforcement in the digital ecosystem, CCIA reiterates concerns that we have already addressed to the Taoiseach in a letter in December 2010 as well as in our first submission to the copyright review. Following the High Court of Justice decision in *EMI Records v. UPC*[15], CCIA outlined how certain approaches to copyright enforcement that are promoted by some rights holder constituencies curtail Internet users' freedom. Examples include the 'Three Strikes' rule or similar government-mandated policies obliging Internet service providers (ISPs) to monitor subscribers' usage for infringing activity and filter electronic communications. It is noteworthy that in *Scarlet v. SABAM*[16] the Court of Justice of the EU

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[13] Thelle, M. H. & Jesperson, S. T. (2012). Online Intermediaries: Assessing the Economic Impact of the EU's Online Liability Regime. Available online at: http://www.copenhageneconomics.com/Files/Filer/Intranet/Documents/1253-01%20Edima%20Online%20Intermediaries%20Report%20FINAL%2010JAN2012.pdf

[14] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Art. 12-15.

[15] *EMI Records (Ireland) Ltd and others v UPC Communications Ireland Ltd* [2010] IEHC 377.

[16] Case C-70/10 *Scarlet Extended v Société Belge des auteurs, compositeurs et éditeurs (SABAM)*.

(CJEU) ruled that filtering and blocking systems that have to be implemented by ISPs constitute a restriction on a couple of fundamental rights. This line of reasoning was subsequently upheld and reiterated by the CJEU in the *Netlog*[17] case. Given that the European Commission's Intellectual Property Rights (IPR) strategy[18] foresees a greater role for ISPs in enforcing IPRs online, CCIA strongly believes that Internet users' fundamental freedoms must not be restricted by disproportionate IPR enforcement policies.

Implementing proportionate copyright enforcement policies demands evidence-based policymaking. In some cases, economic damage estimates have proved to be unsubstantiated. This results in part from the fact that it can be very difficult to estimate the economic impact of IPR infringements since there is no reliable data due to the illicit nature of piracy and counterfeiting. In a report to Congressional Committees, the Government Accountability Office (GAO) of the US has concluded that because of "significant differences in types of counterfeited and pirated goods and industries involved, no single method can be used to develop estimates [since] [e]ach method has limitations, and most experts observed that it is difficult, if not impossible, to quantify the economy-wide impacts".[19]

On the other hand, there is increasing evidence that the Internet industry has provided key growth opportunities for entertainment content over the last decade, and that these opportunities continue to grow. In this context, CCIA released a key study[20] that analyzes the economic state of the entertainment industry in an unbiased and neutral way. The study is based on data from public institutions as well as from other independent studies and systematically assesses the markets for film, book publishing, music, and video games. All numbers in the study revealed one consistent observation across the wider entertainment industry: overall it has been continuously growing, particularly in the last decade and despite technological change brought by the Internet. For example: from 2000 to 2008 consumer spending on entertainment as a percentage of their household income rose 15%; from 1998-2010 the value of the worldwide entertainment industry grew from $449 billion to $745 billion; entertainment sector employment grew 20% during the last decade and 43% for those identified as independent artists. In the words of the study's authors, it appears that we are living in a true Renaissance era for cultural production. For consumers today it is an age of absolute abundance in entertainment and for content creators, more than anything, the Internet has brought new opportunities to create, promote, distribute and monetize their works.

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[17] Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*.
[18] COM(2011) 287, Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee and the Committee of the Regions, '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'. Available online at:
http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf
[19] United States Government Accountability Office. (2010). Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods. Available online at:
http://www.gao.gov/new.items/d10423.pdf
[20] Masnick, M. & Ho, M. (2012). The Sky is Rising: A Detailed Look at the State of the Entertainment Industry. Available online at:
http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000586/TheSkyIsRising7-130.pdf

These findings are further supported by a recent study published by the US Department of Commerce on the role of intellectual property in the US economy.[21] According to this study, copyright-intensive industries prospered during the Internet era as measured by employment numbers.[22] This adds to a growing body of evidence undermining the assertions by some stakeholders that the Internet is causing a decline in the economic opportunities for creators or the apocalyptic predictions of some that it will destroy creative industries. In the same vein, scholars like Joel Waldfogel analyzed whether information accessibility enabled by online intermediaries has negatively affected the supply of new recorded music.[23] The results are instructive: "the supply of recorded music appears not to have fallen off much since Napster, and there is at least suggestive evidence that independent music labels, which operate with lower breakeven thresholds, are playing an increased role in bringing new works to market".[24] While industry sectors' experiences have varied, the positive evidence above sends a strong signal to policymakers to be careful in devising new policies that run the risk of being inadequate and disproportional to the real effects of the problem, or that are not business-model neutral in their impacts.

We thank you for your time and consideration of these important issues.

Respectfully submitted,

Matthew Schruers
Vice-President, Law & Policy
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006

Jakob Kucharczyk
Associate Director, CCIA Europe
11 Rond Point Schuman, Suite 406
B-1040 Brussels

[21] US Department of Commerce. (2012). Intellectual Property and the U.S. Economy: Industries in Focus. Available online at:
http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf
[22] See in particular Figure 2. on p. 40.
[23] Waldfogel, J. (2011). Bye, Bye, Miss American Pie? The Supply of New Recorded Music since Napster. Available online at:
http://www.nber.org/conf_papers/f56062/f56062.pdf
[24] Ibid., p. 28.