**Submission to the Copyright Review Committee**
**July 2011**

## The Value of the Internet

The innovations brought about by the Internet have delivered, and will continue to deliver, enormous benefits to creators, users and the underlying economy. According to the recent McKinsey Global Institute Study, *Internet Matter*s, the internet has contributed an average of 21% to the GDP growth of mature countries over the past five years, with 75% of its impact arising from traditional industries. The internet has also been a major catalyst for employment generation with 2.6 jobs created for every one lost.[1]

Ireland too has greatly benefited from the development of the internet. The ICT sector currently employs over 82,000 people and has created 2,100 new jobs already this year. The sector's high growth continues in spite of the ongoing unprecedented economic crisis and is starkly illustrated by the fact that, while the national unemployment rate increased by 6% in 2009, employment in the ICT sector grew by the same amount.[2]

Harnessing the economic and employment potential of the internet will be a key driver of Ireland's economic recovery. With 9 of the top 10 global ICT companies and a growing ecosystem of over 7,000 SMEs and entrepreneurs, Ireland already has the foundation of a European digital hub in place. Creating the right innovation environment will be critical to fulfilling that potential.

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[1] http://www.mckinsey.com/mgi/publications/internet_matters/pdfs/MGI_internet_matters_full_report.pdf
[2] http://www.forfas.ie/media/egfsn100701-national_skills_bulletin_2010.pdf

One of the necessary conditions of digital innovation is a flexible copyright regime that enables and encourages new technologies. A great many of these new internet business models depend on being able to produce copies, and therefore require copyright laws that can adapt to accommodate new forms of copying and content delivery.

We believe, therefore, that this review is a timely contribution to the discussion about how to stimulate innovation and economic growth in Ireland. We very much welcome the Minister's determination that the "government will make whatever changes are necessary to allow innovative digital companies reach their full potential in Ireland" and believe that a number of key changes will have a very real and significant impact on increasing innovation in the digital space.

**About Google**

Google supports copyright policy that protects artists and fosters innovation in ways that help people create, distribute, and access information. Our mission is to organize the world's information and make it universally accessible and useful, so encouraging the creation of information is essential and complementary to our business. For example, YouTube, Google Books and Blogger provide music, video and literary creators and innovators with a platform to reach billions of fans and to monetise their content. Similarly, our open platforms and services like Android and Google Maps enable other technology developers to create new phones, web services and applications within their own products.

Google Ireland contributes to the economy in a wide variety of ways. Our products and services enable large and small Irish companies and creators to reach new customers and create new business models. We also employ over 2,000 people in our Dublin campus, which is now home to Google's European Headquarters and is a critical part of our global operations. Our recent purchase of the 3 Europlex buildings consolidates our long-term commitment to Ireland and provides the springboard for further growth and expansion.

**How the Internet is Fostering Innovation**

The growth of the Internet has seen an explosion of creative activity as well as the development of new business models that benefit creators, Internet users and the economy as a whole. Today, more music, movies, and other original content are created than ever before. Consider just a few indicators of how content creation is flourishing today:

- On Youtube, over 48 hours of video content are uploaded each minute
- On Blogger, 250,000 words are written each minute
- Flickr users upload more than 3,000 photos each minute
- Sites like MySpace and SoundCloud are stimulating musicians to record and distribute new works in record numbers. More than 13 million bands have a presence on MySpace and SoundCloud recently passed the 5 million users mark

There are ever increasing numbers of individual artists whose careers have been created and developed exclusively through the Internet, providing significant and sustainable revenue streams. For example, BalconyTV is a leading daily online viral music show that features bands, musicians and other variety acts on balconies around the world. It was founded in Dublin in June 2006. BalconyTV has featured and supported hundreds of up-and-coming performers, along with many established and recognized acts such as The Script, Mumford & Sons, Brian Kennedy, Aslan. They operate from locations in Dublin, London, Hamburg, Nashville, Auckland, Poznan, New York, Brighton, Austin, Toronto, Paris and Prague, with more locations on the way.

Similarly, the internet has removed multiple barriers to entry to traditional markets and created countless new markets for a whole range of businesses. For example, Yogatic is owned by a Dutch couple who live in Cork. They create yoga videos from their home studio and sell DVDs with their longer form instructional yoga sequences. They use YouTube as a promotional platform for their DVDs and also for revenue to fund their business.

Services like YouTube, Spotify, iTunes and many others are creating business opportunities by enabling creators to make money from their work and enabling Internet users to access a wealth of entertainment, cultural, educational and other content. Global digital music sales have grown 1000% over the last six years,[3] there are more music purchases than ever before,[4] and digital sales have started to drive growth in overall album sales as well.[5] As new online movie services

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[3] See IFPI Digital Music Report (2011), http://www.ifpi.org/content/library/DMR2011.pdf.

[4] See Jeff Price, The State of The Music Industry & the Delegitimization of Artists (Oct. 14, 2010), http://blog.tunecore.com/2010/10/music-purchases-and-net-revenue-for-artists-are-up-gross-revenue-for-labels-is-down.html.

[5] See Techcrunch, Say What? Thanks To Digital Music, Album Sales Up For The First Time Since 2004 (July 6, 2011), http://techcrunch.com/2011/07/06/say-what-thanks-to-digital-music-album-sales-up-for-the-first-time-since-2004/

like Netflix have begun to develop,[6] global box office receipts for all films released around the world reached an all time high of $31.8 billion, an increase of 8% over 2009.[7] Meanwhile, Amazon is selling more eBooks than paperbacks,[8] and the global e-book market is expected to rise to $9 billion by 2013.[9]

Although the Internet has created challenges for some traditional media companies, new services and technologies are evolving and progress is being made, as consumption has shifted to online services. By its nature, technology requires markets to adapt, and media companies' business models are adapting.

For our part, Google works with artists and publishers to help them make the most of new Internet opportunities. We make it easier for people to discover artists' work online, helping those artists promote their work and make money. For example, last year, Google paid to web publishers globally $5.72 billion from ad revenue generated by our AdSense programme. We send news publishers more than 4 billion clicks per month, delivering eyeballs and opportunities to generate revenue directly to news publishers' websites. On YouTube, there are 20,000 partners spread across 21 countries to which YouTube pays out millions of dollars a year.

And Google continues to develop new partnerships with content providers in exploring innovative models for the distribution of content. In the past quarter, we have launched Google eBooks in partnership with book publishers and the One Pass programme - a payment platform for news online - in partnership with newspaper publishers. Both services enable users to get greater access to creative content and the rights holders to generate new revenue streams.

It is clear that the growth of the digital sector has been phenomenal. The right copyright regime

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[6] See Greg Sandoval, Netflix Delights Studios with Big Checks, CNET News.com (July 29, 2010), http://news.cnet.com/8301-31001_3-20012024-261.html; Brooks Barnes, In Hollywood, Everybody's a Digital Revolutionary, N.Y. Times (July 24, 2010) (digital sales of movies and TV programs generated $1.1 billion in the first six months of the year, up 23 percent from the period last year), http://www.nytimes.com/2010/07/25/business/25steal.html.

[7] According to the MPAA " In 2010, global box office receipts for all films released around the world reached an all time high of $31.8 billion, an increase of 8% over 2009. The U.S./Canada market repeated its peak performance from last year but remained flat at $10.6 billion. International box office increased by 13%, with the largest growth in Asia Pacific which grew by 21%" MPAA http://www.mpaa.org/resources/b14b3a65-ece2-45fb-869f-529b953a286e.pdf

[8] See Matt Hambien, Amazon.com touts more e-book sales than paperbacks, Computerworld (Jan 28, 2011), http://www.computerworld.com/s/article/9207019/Amazon.com_touts_more_e_book_sales_than_paperbacks?taxonomyId=12.

[9] Mark Walsh, In-Stat: E-book sales to hit $9 billion in 2013, MediaPost (June 1, 2009), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=107040

will drive and accelerate that growth even further.

**Copyright in the Digital Age**

Copyright flexibility has been shown to have enormous benefits not only to the digital sector but to the wider knowledge economy. The Computing and Communications Industry in Europe found that in 2007 the value added generated by European industries that rely on exceptions and limitations to copyright amounted to €1.1 trillion or 9.3% of GDP. These industries employ nearly 9 million people and between 2003 and 2007 they grew 3% faster than the EU economy.[10]

The economic benefits of copyright exceptions and limitations are even more pronounced in the US, where the availability of fair use has proved a major catalyst for innovation and economic growth. According to the CCIA's study, in 2008 and 2009, companies benefiting from fair use accounted for one out of every eight jobs, represented one-sixth of total U.S. GDP, and generated average revenue of $4.6 trillion.[11]

While these figures demonstrate the value of flexibility to the economy generally, it is arguably the digital sector that relies most heavily on flexible copyright. The very nature of the internet is to make and disseminate copies of information. Whether it be through web search where internet pages have to be copied and stored to be indexed or through sending emails where copies of our emails are stored on remote servers until we access them, internet tools need to make multiple copies in order to deliver the kinds of essential services we now take for granted every day.

We believe that the lack of flexibility in the current EU and Irish copyright regimes is hindering innovation in the digital economy and that reform could enable new innovation, creativity and economic growth. We support the need for copyright to incentivise and protect creators and investors, and we believe that flexible exceptions can be introduced that accommodate technological development without undermining the business model of rights holders. In fact, flexible exceptions have the potential to produce new business opportunities for artists, publishers and other rights owners by enabling innovative new business models to emerge. The

[10] http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf

[11] CCIA 'Fair Use in the US Economy' 2011, http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000535/CCIA-FairUseintheUSEconomy-2011

key is to create an environment that is pro-innovation online, to the benefit of right-owners, users, and innovators alike.

Innovation depends on a legal regime that allows for new, unforeseen technologies. However, the EU copyright system consists of a statutory list of 22 specific circumstances in which permission to use a copyrighted work is not required, called ‘Limitations and Exceptions’. The full range of Limitations and Exceptions are set out in EU law, but all except one are optional for each country to decide which to implement at the national level. This means both that the exceptions in question are not sufficiently flexible to adapt easily to technological change, and that there is a lack of harmonisation of copyright across Europe.

Google - a technology business founded in the US - has been able to innovate and develop new services precisely because of the flexibility offered by the US copyright regime. We believe that a flexible, technology neutral approach - adopted by countries such as the US, Singapore, Israel and the Philippines - is better suited to encouraging new innovation. Even the wisest legislatures cannot anticipate and draft laws addressing future disruptive innovation. Closed lists are the copyright equivalent of a centrally controlled economy where only a law written years ago can determine ways in which innovators can be creative: no single entity or company is all- seeing about the way technology might develop in the future. As such, the current system precludes (or at best delays) innovation emerging in new areas.

In this submission, we will indicate some of the ways in which it is possible to increase flexibility in Irish copyright law today, without recourse to change at the European level. Within the Information Society Directive, there is scope for Ireland to implement new measures for flexibility, which we develop in detail below. To introduce flexibility at the European level, greater harmonisation in the Limitations and Exceptions regime would be required; as well as the introduction of greater flexibility through, for instance, European issued guidance on the interpretation of the three-step test.[12]

Some commentators have argued that if the market opportunities for reuse of copyrighted material are sufficient then rights holders will be incentivised to licence their content to innovators, and accordingly that we do not need more flexibility or limitations to copyright

[12]This has been proposed by some of Europe’s leading academics in copyright, in the following paper: http://www.law.qmul.ac.uk/events/docs/Declaration%20Three-Step%20Test.pdf

law. This argument ignores two factors. Firstly, as mentioned above, digital and internet technology requires constant, continuous copying of material often on vast scales and globally. But secondly, economic research suggests the market does not support more licensing of copyright when it involves 'disruptive innovations'. These innovations focus on creating brand new markets and often yield initially lower profit margins than 'sustaining innovations' which focus on improving product performance for existing customers. As a result, it tends to be new market entrants that want to invest in these disruptive innovations, and market incumbents are unwilling to support their success. This market failure undermines the argument that copyright owners - who enjoy monopoly control over their rights - are willing and able to licence their content to new players in such a way as to stimulate all types of innovation.[13]

Three examples of fair use in action illustrate the ways in which flexibilities in copyright have acted as as a boon to innovators, consumers, and creators alike:

- Digital indexing and retrieval;
- Remixing and sharing remixed videos online; and
- Space-shifting (particularly in the "cloud").

While web search engines are now a familiar service to millions around the world, it is important to remember that the era of digital indexing, search, and retrieval has just begun. A copyright system must be sufficiently flexible and scalable to not only permit the development and growth of these technologies; after all, if works cannot be found, then innovators, users, and copyright owners alike will be worse off. For example, the content identification tools relied upon by copyright owners also require the making of copies in order to extract metadata "fingerprints" used for both monetisation and copyright enforcement online. In the US, courts have relied on the fair use doctrine to make room for new and emerging indexing technologies, including image search engines and anti-plagiarism tools used on student papers.[14]

A second illustration of the value of copyright flexibilities is the explosive growth of "remix culture" made possible by "user-generated content" (UGC) hosting services, in particular video hosting platforms like YouTube, Daily Motion, Vimeo, and similar sites. Today more than 48

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[13] See Fred von Lohmann, Fair Use as Innovation Policy, 23 Berkeley Tech. Law Journal 829. See also Clayton M Christensen + Michael E Raynor, The Innovator's Solution: creating and sustaining successful growth 2003 / The Innovators' Dilemma: when new technologies cause great firms to fail 1997

[14] See Perfect 10 v. Amazon, 487 F.3d 701, 726 (9th Cir. 2007); iParadigms 562 F.3d 630 (4th Cir. 2009).

hours of video are uploaded to YouTube each minute, and more than 3 billion videos are viewed each day. This profusion covers the gamut from videos of infants intended for sharing within family circles to the political expressions that were an important catalyst for the revolutionaries involved in the Arab Spring uprisings. Much of this content involves "remixing" existing copyrighted materials - whether excerpts from TV news programs, movies, or popular music - together with original UGC footage. In fact, in our increasingly media-saturated age, it is more and more natural for individuals to "remix" the media around them for expressive purposes. In this context, copyright must find room to accommodate these adaptations, particularly if these new amateur creators are to have a path to become tomorrow's commercially successful musicians, critically acclaimed film producers, and politically influential satirists. In the US, it is fair use that provides the breathing room for these creators[15] (and indirectly for the platforms that have made these new channels of communication possible). Likewise, the Dutch Minister for Economic Affairs supports fair use for UCG specifically in his *Digitale Agenda.NL* published in May.[16] In Canada, in contrast, there have been legislative efforts to fashion an exception specifically to cover these kinds of remixes.[17] However it is accomplished, some flexibility in copyright is necessary to support this incredibly rich new vein of creative activity, and thereby also support the innovators in software, online services, and ancillary technologies that serve these new creators.

It is important to recognise that the need to provide flexibility for the reuse of material in new creative works is not new. In fact, it is the content industries who most often invoke fair use in the courts, as demonstrated recently in the spat between Warner Bros. and a tattoo artist over the appearance of boxer Mike Tyson's tattoo in *Hangover* 2.[18] The challenge today is ensuring that the law allows such creative re-uses to flourish in the digital environment.

A third illustration of the importance of copyright flexibilities relates to personal copying, whether expressed as "space-shifting" or "time-shifting" or migration to "cloud" services that

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[15] See 2009 DMCA Rulemaking http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf (approving an exception to anti-circumvention provisions for decrypting DVDs in order to make remix videos, recognizing that this can be a fair use).

[16] http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/notas/2011/05/17/digitale-agenda-nl-ict-voor-innovatie-en-economische-groei/282931-e07-digitale-agenda.pdf

[17] See Bill C-32 http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=4580265&File=45#7.

[18] See Noam Cohen, "On Tyson's Face, It's Art. On Film, a Legal Issue," New York Times (May 20, 2011), http://www.nytimes.com/2011/05/21/business/media/21tattoo.html?pagewanted=all ("Warner Brothers in its brief also invoked the 'fair use' defense for 'Hangover Part II,' namely the right to parody what has become a well-known tattoo since it first appeared on Mr. Tyson's face in February 2003.").

allow users to store their own digital media online and then access it from a multitude of devices. Of course, technologies that enable personal copying have long been with us, including photocopiers, audio cassette recorders, VCRs, and DVRs. However, new digital technologies have unlocked enormous new investments and economic growth. The economic opportunities enabled by personal copying are exemplified by Apple's iconic iPod. Apple's stock valuation has increased seven fold since the iPod was launched. And a whole new market worth billions of Euros has grown around MP3 player accessories, all stimulated by the launch of this single consumer product. In the US, fair use has traditionally been thought to cover many of these activities and technologies.[19] Unfortunately, Ireland has not exercised its full rights to adopt a private copying exception and therefore does not allow individuals to shift the format of a piece of music for personal use. As Professor Hargreaves points out in his recent review of UK IP law, the legal system as a whole is undermined when millions of citizens are daily, often unwittingly, breaching the law without consequence. Furthermore, the opportunities that arise for innovation in this space - such as the development of apps and devices - are stymied. The legal rights of individual users make the technology platform possible; the technology platform in turn provides the foundation for additional innovative and creative output.

It is critical that personal copying be recognised broadly in the digital age. A narrow private copying exception runs the risk of approving yesterday's technologies, without affording the flexibility to embrace tomorrow's cloud-based services. For example, today's consumer is looking forward to leaving her iPod at home in favour of accessing her personal collection of media on her mobile phone by streaming from the "cloud." A private copying exception aimed at "space-shifting" must consider not only the end-user's liability, but also how a provider of a cloud service should be treated for providing the platform that makes it all possible. The citizens of Ireland should not be fated by a rigid copyright regime to be the last to receive new cloud services, nor should Irish innovators be forced to move their servers abroad in order to deliver cloud services globally. The need for reform is made all the more compelling given the Government's vision set out in the Programme for Government to "*make Ireland a leader in the emerging I.T. market of cloud computing by promoting greater use of cloud computing in the public sector, organising existing State supports for cloud computing into a package to promote Ireland as a progressive place for I.T. …*"

[19] See Sony v. Universal City Studios, 464 U.S. 417 (1984) (approving time-shifting of televisions programming as a fair use).

These illustrations make it clear that recognising the need for flexibility in copyright need not entail a radical remaking of copyright principles. The goal, rather, is to enable courts to embrace the *spirit* of existing exceptions and other public policy imperatives, even where the *letter* of existing exceptions might not apply. So, for example, flexibility can accommodate the spirit of a private copying exception, where new technologies might otherwise exceed the letter of the exception. Similarly, flexibility may be needed where a noncommercial "remix" video falls into the gaps between existing doctrines excusing parody, quotation, and adaptation.

By lacking sufficient flexibility we are in danger of missing out on ever more opportunities in the future. Given the rapid evolution of technology, the numbers of occasions when innovators might want to use copyrighted material to generate new products in ways that the closed list of EU exceptions did not anticipate is only likely to increase. Judges have made rulings under the Fair Use law that have enabled technological innovation for many new purposes. For example:

- Activities that permit the ordinary operation of search engines in indexing and extracting thumbnail snapshots of images online[20]
- Reproduction for the purpose of indexing in order to detect plagiarism[21]
- Private copying that has enabled the development of the VCR industry and the iPod[22]
- Copying of software as necessary for interoperability purposes by both users and competitors[23]

It is important to recognise that the new markets that are created by exceptions and flexibilities to copyright law do not just help technology innovators and the consumer product markets. Consumer products bring more value to content creators too. Being able to enjoy your music, film or books collection on the move, in the car or on your iPod makes an initial purchase more appealing. This complementarity is best demonstrated by the relationship between VCRs and films. Despite much hand-wringing from the film industry at the launch of the VCR in the late-1970s, the movie industry quickly moved to capitalise on the new consumer products and

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[20]Kelly v. Arriba Soft, 336 F.3d 811 (9th Cir. 2003); Perfect 10 v. Amazon.com, 508 F. 3d 1146, 1168 (9th Cir. 2007); and Field v. Google, 412 F. Supp. 2d 1106 (D. Nev. 2006)

[21]Kelly v. Arriba Soft, 336 F.3d 811 (9th Cir. 2003) ; A.V. v. iParadigms, 562 F.3d 630 (4th Cir. 2009)

[22]Sony v. Universal, 464 U.S. 417, 425, 454-455 (1984); Fred von Lohmann, Fair Use as Innovation Policy, 23 Berkeley Tech. Law Journal 829 (describing reliance of VCR, DVR, and iPod on fair use in U.S. law).

[23]Sega v. Accolade, 977 F.2d 1510 (9th Cir. 1992) (copying to create interoperable programs is fair use); Sony v. Connectix, 203 F. 3d 596 (9th Cir. 2000) (copying to create software emulator is fair use); 2009 DMCA Rulemaking, pages 91-100 (copying and modification of iPhone operating system to allow "jailbreaking" is a fair use).

enabled the creation of a whole new distribution market for films at home which has brought in double the revenues collected at the box office - but at a time when box office admissions also showed strong growth.[24]

## Recommendations

### 1. Introducing Flexible Exceptions to Stimulate Innovation

It is clear from the above that the cost of a lack of copyright flexibility to the digital and knowledge economy can be very significant. If the Government is to realise its stated ambition to develop Ireland into a 'digital island', it is vital that it take immediate and tangible measures to ensure the Irish copyright regime conduces as much as possible to digital innovation. If the goal is to make tomorrow's digital innovators recognise Ireland as the best place to introduce new products and services into Europe, then the Irish Government should introduce all the copyright limitations and exceptions possible under the 2001 Copyright Directive. This would include:

- parody
- format shifting
- educational, research and archiving exceptions

The Commission arguably intended for individual countries to introduce as many of the exceptions as possible. Recital 2 of the Copyright Directive recognises the need 'to create a general and flexible legal framework at the Community level in order to foster the development of the Information Society in Europe.' Recital 3 refers explicitly to the need to comply with 'the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.' Recital 31 refers to the need to safeguard a 'fair balance of rights and interests' 'between the different categories of rightholders and users of protected subject-matter'.

As well as introducing all allowable exceptions, the Irish Government should also amend the existing exceptions so they are as widely drawn as possible. Widening the scope of Ireland's current exceptions is not only desirable as a means to widening the possibilities for innovation, it is, we believe, an obligation on Ireland set by EU law.

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[24] Fred von Lohmann, "Fair Use as Innovation Policy," 23 Berkeley Tech. Law Journal 829 (2008)

The following sets out some of the key changes that can and should be introduced:

Article 5 (2)(b) of the Infosoc Directive confers a very broad exception and allows all copying for private use by natural persons for non-commercial purposes. This is subject to “fair compensation” which takes into account the application or not of technological measures. However, only two “private and domestic use” exceptions are granted under Irish law, namely time-shifting of broadcasts or cable programmes, and photographs of television broadcast or cable programmes. We believe that limiting this exception to broadcast activities renders the Irish provisions outdated and would strongly recommend that broad exceptions for personal use are introduced. As mentioned above, the omission of an exception for format-shifting is depriving Irish entrepreneurs of the ability to innovate in this ever-expanding and profitable area.

Of course, any exception in favour of private use must be forward-looking and accommodate “cloud-based” services that consumers increasingly want. When a user accesses their own media stored “in the cloud,” more rights may be implicated than just the reproduction right. Thus, an exception for private use should extend to all relevant exclusive rights. Moreover, because a service provider is inevitably involved in cloud computing, the legislation should be appropriately integrated with the existing protections afforded to online service providers in Irish law.

Likewise Ireland has chosen not to exercise all of its rights under Article 5(2)(c), which allows for copying by libraries, educational establishments, museums and archives. While Article 5(2)(c) is limited to “specific cases”, the exceptions in the Copyright and Related Rights Act (CRRA) are narrower and, unlike the Directive, some require fair remuneration (sections 56 & 57). In some cases the provisions covering education exceptions (Sections 53 to 58) and libraries and archives (Sections 59 to 70) are disapplied where there are certified licensing schemes and do not extend to museums. Given that the institutions in question are invariably focal points of innovation and creativity, we would urge the Government to widen and re-cast these exceptions in Irish law.

There is no specific exception for “illustration for teaching or scientific research” under the

CRRA despite its availability under Article 5(3)(a) of the Infosoc Directive. A new exception should be introduced under Irish law and made as expansive as possible to facilitate and foster innovation and research in this crucial area, including for remote teaching activities in social media like YouTube and Facebook. For example, if a music teacher wishes to include a short musical example in a lesson aimed at teaching children to play the guitar, it should not matter whether that event occurs in a classroom or on YouTube.

The Irish exception for press reproduction is similarly much narrower than the Copyright Directive allows. Article 5(3)(c) permits not only 'use of works or other subject-matter in connection with reporting current events' but also 'reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved and as long as the source, including the author's name, is indicated....unless this turns out to be impossible.' It is our view - shared by others - that this in fact constitutes two exceptions under the InfoSoc Directive. As it stands, Section 51 of the CRRA that deals with fair dealing for criticism or reviews is poorly implemented and there remains very significant scope to extend this exception in Irish law. In addition, it is important that the provision recognise that today the conception of "the press" extends to a broad array of media beyond traditional broadcast and publishing, including bloggers, podcasters, and vloggers.

Similarly, Article 5(3)(d) that permits quotations goes well beyond Ireland's current definition of 'fair dealing for criticism or review.' The Berne Convention states 'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.' It is our view that this statement requires Ireland to adopt a far broader exemption for quotations than that currently provided under Section 51 of the CRRA Act.

It is worth noting that at the Council meeting, on Sept 15, 2000, the Netherlands highlighted that 'Member States remain free to further define in their legislation the notion of 'press.'' In other words, the definition of "press" can adapt to evolve with changing technology.

Section 89 of the CRRA is limited to the reporting of current events or broadcast/inclusion in a

cable programme. This limitation is not included in Article 59(3)(f), and we would recommend its removal from Section 89.

Ireland has not implemented the caricature, parody or pastiche exception granted under the Infosoc Directive. Its failure to do so has denied Ireland's many artists, satirists and comedians the opportunity to launch websites and tap into the ever-growing market at the nexus of online entertainment and political commentary.

We would recommend that the Irish Government takes an appropriately expansive view of the entire list of EU exceptions, both in terms of the number and the breadth of exceptions allowed, to provide Irish technology innovators with as open a market as possible.

Beyond this Article 5 list of exceptions, we believe that there is scope for Ireland to introduce exceptions to adaptation and translation. A number of leading commentators have concluded that Article 5 is limited in its effect to exceptions relating to three rights - reproduction, communication and distribution - and therefore leaves any other alteration to national law.[25] We would therefore urge the Government to exercise its right to take a leadership role in providing the flexibility that an exception to adaptation and translation would provide to the digital sector. The wording of the exception could be along the following lines:

> "It is not an infringement of copyright to make available to the public, adapt or arrange a making available to the public, an adaptation or an arrangement of the work (other than a cinematographic adaptation of the work), where:
>
> > As a result of the adaptation or arrangement, a new work with a substantially different meaning, or a significantly different genre is created; and
> >
> > The exploitation of the new work does not significantly compromise the interests of the copyright owner."

A similar amendment could be made to the translation right, namely:

> "The exclusive right to translate a work is not infringed by making a temporary translation of the work [or a reasonable extract from the work] using an automatic

[25] Michel Walter in Walter & Lewinski, *European Copyright Law* (Oxford: OUP, 2010) 964 (para 11.2.4). See also Lewinski in *ibid* at 1479 (paras 16.0.35-6).

translation programme."

**2. The Fair Use Doctrine**

The Review seeks opinions on the appropriateness of a US-style Fair Use doctrine in an Irish/ EU context. The United States' 'Fair Use' doctrine has played an important role in enabling US copyright law to adjust to the new digital reality and enable the legal creation of Internet services. Based on hundreds of years of precedent as well as guidance from Congress, the Fair Use doctrine enables courts to judge whether or not unlicensed uses of copyrighted materials should be allowed, on a case by case basis, considering

- the purpose and character of the use
- the nature of the copyrighted work
- the amount of the portion used in relation to the work as a whole
- the effect of the use upon the market for or value of the copyrighted work

These factors give courts the tools systematically to assess both the social value of new innovations and the market fairness to earlier creators - courts must inquire "whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character."[26] The body of fair use law is shaped by a long history of inquiry into the central motivating factors for creation of new works and protection of the public interest. The doctrine's flexibility has enabled it to protect both creative cultural output, such as parody or news commentary, and technological innovation built on digital copying. Fair use is a centuries-old laboratory enabling courts over the years to respond quickly and responsibly to ever-evolving cultural developments, technologies, markets, and creative processes without the need for further law making. At the same time, the legislature remains free to revisit fair use determinations that it believes are in need of modification.

Professor Pamela Samuelson, a noted copyright scholar in the U.S., has recently assembled[27] a taxonomy that describe the kinds of cases where courts have employed the fair use doctrine to balance protection and limitations:

1. Free Speech and Expression Fair Uses

[26]Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579.

[27] Pam Samuelson, "Unbundling Fair Uses," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834

2. Authorship-Promoting Fair Uses
3. Uses That Promote Learning and Preservation of Information
4. Foreseeable Uses of Copyrighted Works Beyond the Six Favored Purposes

5. Unforeseen Uses

Fair use is regularly referred to as the key tool by which the US fosters innovation by attempting to maintain a balance between the monopoly rights of the original creator, and the socially and economically beneficial output of subsequent creators or innovators. And the results speak for themselves: no country in the world can compete with the U.S. for the most innovative search technologies, social networks, video and music hosting platforms, and for the sheer generation of the most jobs and wealth in the Internet domain. If one is looking for evidence of how innovation succeeds, the best way is to look at those places where innovation has succeeded.

In fact, fair use is a legal tool providing critical protections to cultural producers as well as technologists, enabling everything from comic parody movies to collage artwork and illustrated history books. As the Supreme Court has explained, the purpose of fair use is to 'avoid rigid application of copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster'.[28] Appellate Judge Pierre Leval, in an influential article in the Harvard Law Review, stressed that the reuse that Fair Use allows 'is not some unforeseen byproduct of our IP system; it is the system's very essence'.[29]

While the review explicitly cites the US doctrine of fair use, it is worth noting that other countries have also crafted flexible exceptions, and other countries have recognised the clear importance of doing so. Whether called "fair use," "fair dealing," or something else, the common theme emerging is a recognition of the need for flexibility as technology evolves. Canada, Israel, the Philippines, and Singapore have similar, multi-factored balancing tests.

We believe that Ireland should aim to create a regime that seeks to mirror the flexibility embodied within these regimes. As emphasised in the UK's recently-released "Review of Intellectual Property and Growth", there is a need for "an approach to exceptions in copyright which encourages successful new digital technology businesses both within and beyond the creative industries."[30] Equally, the Dutch Ministry of Economic Affairs recently recognised

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[28]Stewart v Abend, 495 US 207, 237 (1990)
[29]989 F.2d at 1517
[30] http://www.ipo.gov.uk/ipreview-finalreport.pdf.

that the “[r]apid technological developments and the opportunities arising for consumers put the existing exhaustive list of copyright exceptions under pressure.”[31] We accept that the introduction of some elements of such a regime will require reform at the EU level, and we strongly urge the Irish Government to take the lead in seeking the introduction of a broadly defined exception for ‘transformative use’. In doing so, it will be worth remembering that the Institute for Information Law, on commission from the European Commission, have previously recommended that "the EC legislature should strive to establish a more flexible and forward-looking regime of limitations on copyright and related rights. A non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise in the dynamic information market. Such an open-ended regime would best reflect the principles of subsidiarity and proportionality."[32]

However, in addition to campaigning at the European level, and in order to provide some more flexibility to the European copyright exception regime in the interim, the Government should also take the lead in undertaking a new, balanced interpretation of the three-step test.

A declaration from some of the most renowned European academics in the field of copyright on “A balanced interpretation of the “three-step test” in copyright law” provides a clear basis for developing such guidance. The declaration rightly identifies that: “The Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions.” The Declaration further established a set of basic guiding principles on the interpretation of the Three-Step Test.[33]

This more balanced interpretation of the three-step test should be applied by Ireland’s courts. But the Government should also support the application of such an interpretation at European level to ensure a consistent application of the test across the single market.

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[31] http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/notas/2011/05/17/digitale-agenda-nl-ict-voor-innovatie-en-economische-groei/282931-e07-digitale-agenda.pdf

[32] http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_summary_2006.pdf

[33] http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf

**3. Creating Certainty for Online Platforms**

The Review asks for comment on any areas that are perceived to create barriers to innovation. In addition to fully transposing the exceptions allowed under the Directive, we believe that giving clarity and certainty around appropriate statutory limitations on intermediary liability is also crucial to fostering digital innovation.

In this regard, we are very disappointed with both the existence and content of the separate consultation on the draft Amendment to the Copyright and Related Rights Act (CRRA), 2000. Providing certainty around secondary liability is a crucial element of any successful copyright regime and, as such, should be a key consideration of the Review Committee. Not only does the existence of a separate consultation greatly undermine the prospect of a comprehensive and coherent copyright regime emerging from this process, the proposed Statutory Instrument itself creates great uncertainty for service providers. The SI grants the right to apply for an injunction against a service provider whose facilities are being used by one or more third parties to infringe copyright, but then leaves key considerations such as limitation of liability exclusively to the courts to determine. Under this proposal, service providers will be operating in a highly uncertain environment that will embroil them in lengthy and costly court battles for the foreseeable future. We strongly recommend therefore that the consultation and decision on the SI be suspended and the terms of reference of the Review Committee be amended to allow for more thoughtful and holistic consideration of the issue of secondary liability.

Many technology providers create ‘platforms’ that can be used to share content, from global players like Flickr to YouTube to Irish innovators like Journal.ie or Politics.ie. Although the vast majority of users are engaging in activity that does not infringe copyright, there are a minority who do - and whose activities lie beyond the control of the platform creator.

The concept of intermediaries being protected from liability when their services are unknowingly used by infringers is already present, in both the US safe harbors regime and the E-Commerce Directive which immunises an innocent host from financial liability. Indeed, the rules on Information Society Service Providers (ISPs as defined in the E-Commerce Directive 2000/31/EC) liability are at the core of the Internet’s development: without them, no network or service enabling expression and access to information can be sustainable. Making ISPs indiscriminately liable for content accessed or made available through their services, would effectively require ISPs to systematically monitor this content. This would contradict the

provisions set out in Article 15 of the E-commerce Directive, establishing that intermediaries have no general obligation to monitor the information that they transmit or store nor a general obligation to seek facts or circumstances indicating illegal activity. Even looking narrowly within the context of copyright, infringing content cannot be identified without cooperation from copyright owners. In a technological and legal environment where a great amount of content is protected by copyright, there is no automated way to determine whether a particular use is licensed or covered by an exception to copyright law.

It is worth underlining that the "no obligation to monitor" principle is necessary for the limitations in Articles 13 and 14 of the Directive to work. If the intermediary had a general obligation to monitor, then they are more likely to be held to have actual knowledge for all content, rendering the limitations pointless and useless. The current structure therefore, is that intermediaries do not have to proactively check content, but only to react promptly from the moment they actually have the requisite knowledge. Courts are able to make orders requiring the intermediary to terminate or prevent infringement (Articles 12(3), 13(3) 14(3) and in relation to IP Article 11 of the IPRED). However, it is crucial that such injunctions are appropriately limited so as to not contravene the text and purpose of the "no obligation to monitor."

There are two ways the Government could amend the CRRA and embed these principles in Irish copyright law:
1. Clarifying the 'authorisation right' to protect second and third party liability, for example by stating that:

> '"*The mere provision (by any means) of a technology (of any kind) that enables copying, translation or making available, or services being used to infringe is not to be regarded as authorisation of any acts of infringement carried out using that technology or service*", and
> "*the provision of hyperlinks to material on the Internet should not, of itself, be regarded as authorisation of any act of infringement that occurs if and when someone uses the link to access the material*".

To be clear, this provision is only intended to protect legitimate businesses, and would not preclude legal liability for those who actively pursue or engage in infringing activities.

2. Limit the financial liability of platform providers or other internet services who have behaved 'innocently' for example by stating that

"*Where an action for infringement of copyright is shown that at the time of the infringement the defendant acted in good faith without reason to believe that its acts infringed copyright, the plaintiff is not entitled to damages or an account of profits against them.*"

We are at only the start of the internet revolution: if we are not making the most of the possibilities allowed by the existing EU legislative regime, we risk losing the competitive opportunities we currently have. By fully exercising its rights under EU law as set out above, Ireland has the opportunity to make its copyright regime a unique competitive advantage in Europe and become the location of choice for digital entrepreneurs and innovators.

**4. Licensing**

The complexity of the licensing regimes operated by Irish and EU audio-visual collecting societies is also creating barriers to innovation in the digital space. Collecting societies do not tell licensees (and licensees have no way of assessing) what repertoire they represent. Historically, where the collecting society controlled 100% of the repertoire in a country, then this was less of an issue. However, that landscape has changed dramatically, with a licensee potentially dealing with 4 or more licensing bodies to ensure that 100% of the repertoire is licensed for a particular territory. As a result, without this information, technology platforms are required to make commercial decisions concerning the value and reasonableness of any licensing fees in a vacuum, and to report all exploitations of works on their service (e.g., an online video streaming service) in the territory concerned to each licensing body controlling repertoire in that territory. In addition, any one licensing entity retains "veto" power over the licensee's ability to obtain 100% coverage and thus launch a product because a licensee cannot distinguish licensed content over unlicensed content. These bodies then calculate - in a so-called black box - what royalties are owed by the rights-users and to whom.

The market for music licensing rights, for example, is rapidly changing with major publishers such as EMI Music Publishing, SonyATV, Warner Chappell and UMPG electing to withdraw their Anglo-US repertoire from collecting societies and licensing directly at a rate chosen by them on a pan-EU basis via joint-venture structures or a small number of selected societies. At the same time, collecting societies can now theoretically licence their local repertoire on a pan-EU basis. These developments - combined with many collecting societies' outdated licensing structures and opaque information management and accounting systems - leave businesses

seeking licences across Europe in an untenable position.

Google has consistently argued for a wholesale reform of the collecting societies system. We believe they should work quickly with licensees to develop new and transparent licecsing models that allow all parties involved to monetise the use of content efficiently. A more efficient and effective system would benefit everyone: in enabling more content to be licensed, businesses, consumers and artists would all win.

Most of the challenges with licensing copyrighted content in Ireland are not created by the legal framework, though it is often left up to a licensee and society to argue over the need for certain rights for various, usually new, methods of distribution. Some collecting societies have effective and well-run operations. But this is not a universal situation. We believe that because of the economic and consumer benefits that will be generated from further reform the public policy case for Government to take a lead in encouraging, driving and incentivising the reform across collecting societies is strong.

We believe that any collecting society reform should consider at least these concrete steps to ensure fair, fast, and effective licensing:

1. Facilitate transparency:
For a potential online licensee, it is often impossible to identify who to licence content from when some entities have withdrawn repertoire because no single entity can isolate and define its repertoire. This situation could be easily resolved if collecting societies were required to make public their database of rights in a licensee-friendly way. Prospective licensees must be able to easily determine who owns the rights to a work, match the publishing rights with the relevant sound recording rights, and know precisely what works are included in a licence. As such, databases that provide publicly available, territorially specific, ownership data for compositions, as well as data to match publishing rights to sound recordings are essential.

2. Streamline licensing by eliminating “double dipping” and forced bundling of rights:
The current licensing system separates rights into performance, reproduction and publishing rights. This split is an anathema in the online world where copying and streaming the content doesn’t have its own category of licence. Rather than making online services negotiate three separate licences - with all the legal and time cost this requires - we would recommend that

collecting societies issues one ‘online’ licence that covers all purposes and makes the system much simpler. Further, in the creation of the online licence, societies should not “bundle” unnecessary rights into the single rate.

3. Where markets fail, craft appropriate solutions to provide fair, efficient rate determinations and enable the creation of innovative services:
To facilitate more efficient licensing, rate-setting and arbitration systems have existed in many contexts around the world. These systems facilitate resolution of rates by an independent party after reasonable attempts by a prospective licensee to directly negotiate one. In order to enable effective licensing for the online environment, it is worth exploring the evolving role that rate-resolution systems could play. While existing licensing systems are tailored to traditional business models, that means they’re often slow to adapt to new types of offerings. It can take years to negotiate licenses across multiple rights holders and collecting societies, by which time the market opportunity for the new product may be passed.

Orphan Works are another challenge that should be addressed. Those works whose owner cannot be found represent a largely untapped wealth of information and insights. Orphan Works not only represent an untapped opportunity for online innovators wanting to create new business models but also can help identify creators whose works are not truly orphaned, and who do not realise they have works available for licensing purposes.

Any solution to the problem needs to both make owners of works findable for licensing and allow greater use of works whose owners cannot be found. Each of these opportunities benefits copyright holders, consumers and online businesses. But in order to make Orphan Works a positive stimulant to the growth of online innovation in Ireland, the transaction costs of finding owners and licensing works needs to be as low as possible. Without this, it will only the very large existing players who seek to create new products with this unlocked content.

## Conclusion

The internet’s contribution to economic growth is phenomenal and growing. While the digital sector has already emerged as one of the central drivers of Ireland’s economic recovery, we believe that with the right environment it can develop into the ‘digital island’ of Europe.

Reforming Ireland's copyright laws will be key to our success. Although EU level change is desirable, we believe the Government can take immediate and tangible steps to ensure that Ireland has the most progressive and certain copyright laws in Europe. Such a regime would provide us with a unique competitive advantage in attracting new digital enterprises from abroad as well as providing our indigenous innovators with the flexibility and the confidence to compete globally.

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