Submission to the Copyright Review Committee
June 2012

The Copyright Review Committee has in its Consultation Paper produced a thoughtful and comprehensive set of potential reforms of the Irish Copyright Act aimed at removing barriers to innovation. Google Ireland Ltd. appreciates the opportunity to submit these comments on the Paper.

Introduction

In his announcement of the Review of the Copyright and Related Rights Act 2000, the Minister for Jobs, Innovation and Enterprise, Richard Bruton, TD., explicitly set out his rationale behind its establishment: "to maximise the potential of digital industry in Ireland." In so doing, the Minister not only recognised "the enormous contribution to jobs and economic growth" made by digital companies here but also the potential for the sector's further development and expansion.[1] That thesis has been repeatedly verified by a number of recent studies that have quantified both the existing and potential size of the internet economy. McKinsey Global Institute's *Internet Matter*s study demonstrated that the internet has contributed an average of 21% to the GDP growth of mature countries over the past five years and that internet-related consumption is now bigger than both the agriculture and energy sectors.[2] Likewise, in its most recent report *The Internet Economy in the G-20: The $4.2 Trillion Opportunity*, the Boston Consulting Group (BCG) revealed that the internet economy is growing at over 10% per annum in G20 nations and is projected to reach a value of $4.2 trillion in 2016 - nearly double its size in 2010.[3]

BCG has also conducted a number of country-specific reports. They estimate that the UK's internet economy is worth £100 billion per year, representing some 7.2% of GDP and exceeding

---

[1] http://www.djei.ie/press/2011/20110509.htm

[2] http://www.mckinsey.com/Insights/MGI/Research/Technology_and_Innovation/Internet_matters

[3] http://www.bcg.com/expertise_impact/PublicationDetails.aspx?id=tcm:12-100491&mid=tcm:12-100464

the contribution made by the construction, transport and utilities sectors.[4] By 2015 it will have grown to 10% of GDP. While they did not attempt to quantify the full extent of job creation attributable to the internet, they did estimate that around 250,000 people were employed by 'pure play' companies that enable the internet i.e. Internet Service Providers (ISPs), software and device providers, online retailers, etc. This figure alone is equivalent to approximately 1% of the UK's working age population. Similarly, in Sweden, the internet contributes over €22 billion a year to the local economy, amounting to some 6.6% of GDP and significantly above the agriculture (2%) and construction (5%) sectors. It has also generated significant employment, with some 60,000 Swedes now working in companies that are primarily internet-based. It is forecast that the internet economy will be worth 7.8% of GDP by 2015.

Ireland too can lay claim to a sizeable and growing internet economy. The ICT sector currently employs almost 100,000 people, giving Ireland one of the highest concentrations of ICT employment and activity in the OECD. Indeed, despite the slow pace of recovery in the wider economy, the sector continues to grow and diversify and has seen some 4,000 new jobs announced already in 2012. 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.

A copyright regime that provides both flexibility and certainty to innovators is a vital element of such an environment. In recognition of this, several countries have already begun reviews or implemented copyright reforms to encourage innovation, growth, and new online business models. As noted in the UK Hargreaves review:

> "Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would

[4] http://www.bcg.com/documents/file62983.pdf

be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work."[5]

Similarly, the Dutch, Canadian, Australian, and Japanese governments have all to varying degrees begun to look into the possibility of increasing innovation, promoting creativity and encouraging new business models through copyright reform.[6] New legislation incorporating fair use has recently been passed in Korea[7] and Israel has had fair use-style flexible copyright exceptions in its national copyright acts since 2007.[8] Canada,[9] Singapore[10] and India[11] have fair dealing provisions which, in practice, function as fair use provisions through court decisions.

As the Review Committee repeatedly points out, such international developments have serious implications for Ireland's competitiveness in the digital, and indeed broader innovation, space. As more and more countries take steps to grant greater legal flexibility for innovation, Ireland's international standing as a "global innovation hub" and our ability to compete for international investment will be increasingly undermined. As Barry O'Leary, CEO of IDA Ireland, has said, "That increasing level of competition means we have to be nimble and fast, awake to new things and to always establish a leadership position early on."[12] Introducing copyright reforms that provide both certainty and flexibility is, we believe, the single best way that Ireland can establish that leadership, assume a unique competitive advantage within the EU and position ourselves as an international location of choice for digital entrepreneurs and innovators.

This Review is, therefore, a timely contribution to the discussion about how to stimulate innovation and growth across Ireland's internet economy. We very much welcome the nature

---

[5] http://www.ipo.gov.uk/ipreview-finalreport.pdf, pg. 8

[6] See, for example: http://www.rijksoverheid.nl/ministeries/venj/documenten-en-publicaties/toespraken/2012/02/10/towards-flexible-copyright.html
http://www.google.com/url?q=http%3A%2F%2Fwww.ag.gov.au%2FConsultationsreformsandreviews%2FDocuments%2FFinal%2520-%2520Revised%2520draft%2520terms%2520of%2520reference%2520ALRC%2520review.pdf&sa=D&sntz=1&usg=AFQjCNFgf3zaFxotf6qqNIpdbxa9eGY-YQ

[7] http://en.wikisource.org/wiki/Copyright_Act_of_South_Korea, Article 1: "The purpose of this Act is to protect the rights of authors and the rights neighboring on them and to promote fair use of works in order to contribute to the improvement and development of culture."

[8] http://cyberlaw.stanford.edu/node/5670

[9] *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13.

[10] See *Patry on Fair Use*, Section 8.12 (2011 update, West Publishing Company).

[11] *Ibid.* section 8.9.

[12] http://www.idaireland.com/innovation_ireland_review/, pg. 4

and ambition of the reforms being considered by the Review Committee and believe that their realisation will have a very real and significant impact on increasing innovation in Ireland.

Section 2: The Intersection of Innovation and Copyright

Section 2:2 makes a welcome attempt to establish a workable definition of "innovation." We appreciate the Report's recognition that "[i]ntermediaries facilitate innovation by bringing together a range of different players to facilitate and coordinate innovation. They can connect inventors with industry and users and bring new products and services to market. They therefore provide a wide and varied, even holistic, role for their clients in the innovation process."[13] As a result, the Committee recognises that innovation is "not only a linear top-down process, it is also an iterative and interactive one in which users play increasingly important roles." The internet, in particular, is the locus and source of much innovation, particularly through the "interactive user innovation" it encourages.

Not all of the activities commonly considered to be innovative concern the creation of new works; some concern new business models and ways of bringing creative works to market. Without proper business models, neither a creative work nor an invention can realise its potential. As one scholar of innovation observed,

> "The value of an idea or technology depends on its business model. There is no inherent value in technology per se. The value is determined by the business model used to bring it to market."[14]

This does not detract from authors of copyrighted works, but rather recognises that those who invent new technologies and distribution platforms play an important role in ensuring that authors are compensated. These platforms have powerful cost advantages for artists; artists no longer need to bear manufacturing, packaging, shipping, and overhead costs, which traditionally consumed large proportions of their royalties. Artists do not need middlemen; they can interact directly with their audiences and reap the financial rewards of doing so. Google is committed to finding new, innovative ways to connect creators to the marketplace and believes that the Committee's work will greatly assist in this effort.

---

[13] http://www.djei.ie/science/ipr/crc_consultation_paper.pdf pg. 50
[14] Henry Chesbrough, *Open Innovation and the New Imperative for Creating and Profiting from Technology* (Harvard Business School Press 2006).

We therefore welcome the Consultation Paper's recognition that technology brings opportunity; it is for this reason that the UK Hargreaves Report was entitled "*Digital Opportunity*," rather than, for example, "*Digital Challenge*." There is a growing body of evidence of the internet's positive impact on creativity and economic growth. A recent report entitled *The Sky is Rising*, by Mike Masnick, showed that throughout a decade of economic and technological upheaval in the U.S., the entertainment industry grew 50% between 1998 and 2010 as a result of increased consumer spending.[15] Simultaneously, creativity and culture are thriving, with new online distribution and access models making it easier than ever for creators to start a business. According to a study of the creative industries in Australia undertaken by Boston Consulting Group, the Australian media industry will grow significantly over the next four years, with projections of a rise in revenue to $29.1 billion and of 15,000 new jobs being created.[16] The internet will be a key driver of that growth.

While the current economic evidence is impressive, there is nevertheless great potential for the technology and creative sectors to develop further, to the benefit of innovators and creators alike. Moreover, the evidence suggests that a country's legislative and regulatory environment can significantly impact that potential. Private investment is critical to the development of future technologies. A recent analysis by Booz & Co. of angel investors and venture capitalists demonstrated that the operative legal environment was the single biggest factor in investment decisions. The study found that 47% of their investment decision is driven by the presence of a dynamic legal environment, which roughly equates to the combined weight accorded to the variables of the economy, competition, and expected returns."[17]

Two studies undertaken for the Computer & Communications Industry Association by Harvard Business School professor, Josh Lerner, provide empirical support for Booz's findings. Lerner studied levels of investment in both the U.S. and in Europe in the wake of court decisions involving copyright disputes over cloud computing services, which are emerging as a very promising source of innovative services. In the aftermath of a 2008 U.S. court opinion, *Cartoon Network et al. versus Cablevision*, in which no liability was found for the offering of a cloud service digital video recording service, Lerner discovered that the average quarterly investment

---

[15] http://www.techdirt.com/skyisrising/

[16] *Culture Boom: How Digital Media Are Invigorating Australia* -- http://www.bcg.com/expertise_impact/publications/PublicationDetails.aspx?id=tcm:12-101244

[17] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf pg. 19-20

in EU cloud computing increased by 27% compared to an increase of 41% in the U.S. The increase in the EU, while significantly smaller, was still welcome, and may be attributed, at least in part, to optimism that European courts would make similar rulings. Those hopes were dashed by subsequent decisions on similar services in the national courts of France and Germany, which had the effect of stopping the services being offered.[18] Professor Lerner concluded that

> "decisions around copyright scope can have significant impacts on investment and innovation. We have tested a number of models and consistently find that the French and German rulings led to reduced investment in French and German cloud computing companies compared to the EU experience. Our results suggest that these rulings led to an average reduction in VC investment in French and German cloud computing firms of $4.6 and $2.8 million per quarter, respectively, implying a total decrease in French and German VC investment of $36.6 million and $50.4 million, respectively, after these rulings through the end of 2010. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of $113.5 to $115.2 million in traditional R&D investment."[19]

Each of these three studies into the impact of regulation on investment decisions show that greater uncertainty with respect to intermediary liability on digital content services led to a lower likelihood of investment. This was true of investors working both in the US and the EU.[20] These findings will be of particular interest to the Irish Government given the comparatively scarce availability of venture capital to Irish companies and its renewed focus on attracting increased investment.[21] As stated in the *Programme for Government 2011*, the Government has made a commitment to "support the development of a more dynamic, venture capital industry in Ireland by seeking to attract top tier venture financing and investment companies to Ireland, such as Silicon Valley Bank."[22] Likewise, the Government's *2012 Action Plan for Jobs*

[18] Josh Lerner, "T*he Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*;" Josh Lerner, "*The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies*" (June 2012). As Prof. Lerner points out, the negative impact of the German decision stems from copyright owners' ability to refuse licensing, pg. 6

[19] *Ibid,* pg. 27-38

[20] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf

[21] Ireland ranked 88th out of 135 for venture capital availability in the WEF/INSEAD 2010-2011 Global Information Technology Report: http://www3.weforum.org/docs/WEF_GITR_Report_2011.pdf

[22] http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf

and Growth points out that increasing the amount of private investment available to new and expanding businesses has become ever more important in a credit-strapped economy.[23]

By putting in place the right legislative regime, governments can make a very real and significant contribution to encouraging growth. We note the commitment in the *Action Plan for Jobs and Growth* to

> "[r]eview the equity investment landscape in Ireland with a view to introducing actionable steps (enterprise supports, tax, etc) to support equity investment in productive firms"[24]

and submit that a reform of copyright law affords one of the best opportunities to realise this objective.

Innovation and creativity are, by their nature, dynamic rather than static. A defining attribute of the internet is its unplanned, distributed nature, where "distributed" refers to multiple autonomous computers and software, all interacting without a central command. It is precisely the absence of a central command and control that has made the internet's phenomenal growth possible, and what makes digital creativity so exciting. Digital creativity is something we all engage in, without regard to borders or to traditional cultural and market gatekeepers. Thanks to innovative digital technologies, creativity is no longer a central command activity; it is a dynamic and democratic one. But if we truly want to encourage this new creativity and innovation, we need dynamic, flexible laws that reflect their dynamic nature. Static, inflexible laws enshrine and underwrite existing business models and create barriers to innovation. As Dr. Francis Gurry, Director General of the World Intellectual Property Organisation argued, a successful copyright policy must be based on neutrality of technologies and business models, and should not "preserve business models established under obsolete or moribund technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests."[25] The proposals being considered in the Consultation Paper are consistent with these views. On pages 6 and 7, the Paper rightly observes, "It is important that copyright law be technology-neutral. It is equally as important that it be capable either of adapting or of being easily adapted to unforeseen technological innovations. These are standards by which

[23] http://www.djei.ie/publications/2012APJ.pdf

[24] http://www.djei.ie/publications/2012APJ.pdf

[25] Francis Gurry, *The Future of Copyright,* addressed delivered in Sydney, Australia, February 25, 2011.

to judge both existing copyright and any possible amendments." We would argue that the only way those standards can be met is through laws that are flexible enough to continuously adapt to new developments and innovations; it makes no sense to have a goal of adaptability but laws that are rigid. We would also caution that flexibility is not a derogation of authors' rights or creativity; to the contrary, flexibility is the best way to ensure that copyright laws can best serve all interests in the future and not merely for a matter of months after new laws are enacted.

Section 2.4 Classification of the Submissions

The Consultation Paper classifies the submissions to the Committee into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions. The Paper is quick to point out that these are simply the Committee's impressions and not formal or legal definitions, and that there is a fluid overlap between the categories. Indeed, as the Paper itself states, "in many cases, it is in these overlaps that the opportunities for entrepreneurship, innovation, and new business-models reside, as in the case of platforms that marshal user-generated and other online content." As the owner of the world's largest such platform, YouTube, we agree with this assessment, but submit that reliance on these categories unhelpfully perpetuates the "them-versus-us" division that has proved so inimical to the development of a unified approach to removing barriers to innovation and creativity. The inadequacy of the classification scheme manifests itself most tellingly in Section 4, which concerns rights-holders. In the world of digital creativity and automatic copyright, we are all rights-holders, we are all users, and we are all distributors.

We now address the specific questions posed in Section 2.5.

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

Yes; as pointed out above, our digital sector continues to be one of the primary engines of economic growth and makes an enormous contribution to the generation of employment, entrepreneurship and innovation in Ireland. Furthermore, with the right enterprise regime, its potential for future growth is unlimited. The Government has repeatedly set out its ambition to develop Ireland into a "digital island" and must therefore, as pointed out by the Minister at the launch of the Review, "do everything it can to allow [digital companies] to flourish and expand

in Ireland."[26] By focussing on the economic and technological aspects of innovation, the Review goes a long way towards meeting the Minister's challenge and advancing the Government's overall ambition. In addition, the biggest issues facing copyright law are economic and relate to the intersection of technology and business models.

(2) *Is there sufficient clarity about the basic principles of Irish copyright law in CRAA and EUCD?*
It is critical for Ireland's continued competitiveness and openness to innovation that our copyright law can adapt to evolving and future technologies and marketplaces and that this principle is enshrined therein. The Booz & Co. report, discussed above, demonstrates that certainty is the most important factor in investor decision-making. In the end, though, the appropriate legal environment is possible only through actual laws, rather than expressions of principles, and thus we stress the importance of implementation.

(3) *Should any amendments to CRAA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to the CRAA?*
Yes; it is the best way to ensure that the CRAA is a rational, deliberate, unified policy instrument.

(4) *Is the classification of the submission into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions - appropriate?*
The classification has utility in drafting provisions that are specific to those groups but, as noted above, often it is the overlap among groups that engenders innovation and creativity.

(5) *In particular, is this classification unnecessarily over-inclusive, or is there another category where copyright and innovation intersect?*
We do not find the classifications over-inclusive. However, as noted above, it is important to note that the categories are not strictly inclusive, rather they overlap as the result of technological and market innovation. Creativity and innovation are of one piece.

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

[26] http://www.djei.ie/press/2011/20110509.htm

encouraging innovation?

As set out above, these categories are not mutually exclusive. Creativity and innovation work hand-in-hand: a new generation of technologies enabling creators to reach their audiences and monetize their work; and the adoption of new technology being driven by consumers keen on consuming creative content. Similarly, the overlap and partnership between public interest bodies and private enterprise, between entrepreneurs and rights-holders, will drive the innovation that ultimately benefits all players in this environment. Therefore we would argue that the reforms being considered should be approached from the perspective that a mutually beneficial reform is possible. Elsewhere in our response we lay out potential areas of benefit for the various stakeholders.

Section 3. Copyright Council of Ireland

A main issue considered in the Consultation Paper is whether there ought to be a Copyright Council of Ireland. In our opinion, it is valuable to encourage dialogue between those affected by copyright laws. A properly constituted Council -- one that takes into account all the various interests and performs a role of providing information -- would be beneficial.

If such a body were to be established, it is vital that it provide a platform for balanced participation from a broad spectrum of stakeholders, including libraries, consumer groups, technology companies, and rights-holders.

For example, the Paper proposes that such a Council could put forward best practices on important issues, including orphan works, the notice-and-take-down provisions of Article 14 of the E-Commerce Directive and section 18 of the E-Commerce Regulations. The Paper also suggests that the Council could be consulted by the Minister before orders and regulations are made, assemble evidence to inform debates about future amendments to Irish copyright law, and engage with the European Commission on notice-and-take-down procedures. In so doing, there is a danger that the Council will create another layer of bureaucracy whose deliberations will effectively be rendered moot by the EU's likely mandating of solutions of many of these issues. In addition, these are all issues where there are significant opposing interests. If the Council, almost certainly in the wake of heavy lobbying, takes a strong position on one of these issues, the losing side or sides will protest. In short, the Council is in danger of institutionalising the very "lobbynomics" that have been such a central feature of copyright debates in the past.

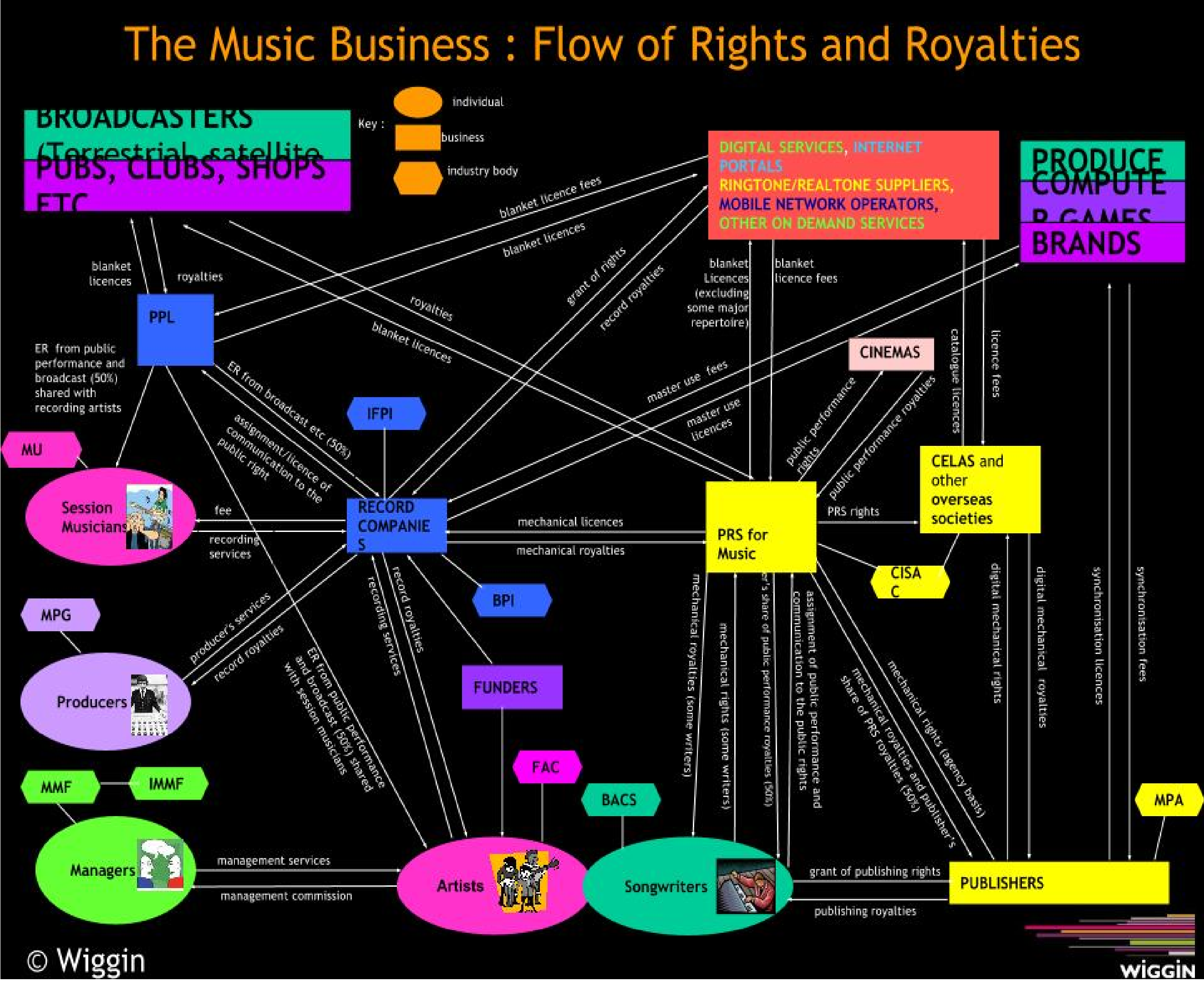
We propose instead that the Government encourage, but not mandate, the creation of an informal council, which would host seminars and facilitate exchanges of information. As discussed below, we also agree that an informal council could assist in the development of an alternative dispute resolution service.

Irish Digital Copyright Exchange

The Booz & Co. study of investment decisions found that a change in licensing that provided digital platforms with easier access to licensed content would increase investment.[27] Specifically, the study found that the pool of possible investors would increase by 85% if the costs and complexity of obtaining licensing were reduced through new regulations.[28] The Consultation Paper rightly points out how inefficiencies in licensing can stifle innovation, and as importantly, result in authors not being paid. The chart below, prepared by Wiggin, graphically illustrates the problems with the current system:

[27] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf pg. 16

[28] *Ibid.* pg. 18



In Google's view, the inability to license material efficiently and ensure transparency in royalty payments to authors will be the single biggest issue for a digital exchange project. Improving licensing will enable rights-holders to take advantage of a currently untapped market, and evidence shows that it will go a long way to reducing piracy. This has been borne out empirically by a number of studies, including those conducted by Professor Michael D. Smith of Carnegie Mellon University into the effects of the removal of NBC content from Apple's iTunes store in December 2007 and its restoration in September 2008. Smith found that NBC's removal of its content from iTunes resulted in an 11.2% increase in the demand for pirated content, which amounted to an extra 49,000 downloads a day for NBC's content and approximately double the amount of total legal purchases on iTunes for the same content in the period preceding the

removal.[29] Conversely, the researchers found that ABC's decision to make available its content on Hulu resulted in a 37% decrease in unauthorised downloads.

Music registries, digital exchanges, and other efforts to facilitate licensing are a win-win. The Consultation Paper notes the recommendations in the Hargreaves Review for a single UK Digital Copyright Exchange and suggests there may be a first mover advantage for Ireland in establishing its own Exchange. We agree with the Committee that such an initiative would make a strong statement internationally about Ireland's leadership in copyright and innovation and we would encourage further examination of the proposal. We would, however, recommend that any new Irish initiative take into account the need for interoperability, given the global reach of the internet, and the undertaking of similar projects in the UK and elsewhere (notably the European Commission's Global Repertoire Database project).

Copyright Alternative Dispute Resolution

Litigation is expensive for everyone. The Consultation Paper proposes an alternative, voluntary dispute resolution system. The Uniform Domain-Name Dispute Resolution Policy (UDRP) is one system that seems to have functioned well and may prove instructive in designing an ADR system. In order to avoid incurring the very types of expenses that ADR is intended to reduce, a minimum of bureaucracy should be involved and deliberations should be final and binding, as per normal arbitration rulings. Every effort should thus be made to ensure that the system is as rigorous and fair as possible.

We now address the questions posed in Section 3:11.

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

Such a council could be useful, if it were representative of the needs of a variety of stakeholders and decreased rather than increased bureaucracy for entrepreneurs and rights-holders.

(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?*

We would recommend a private body.

[29] *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy,* Michael D. Smith, Brett Danaher, Samita Dhanasobhon and Rahur Teland, June 2010

(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 membership should be as broadly based as possible in order to garner wide support for its work. For such a body to represent the needs of all stakeholders, it should be equally comprised of rights-holders, consumers, libraries, the technology and entrepreneurial sector.

(10) *What should the composition of its Board be?*
As above, it is important that the board equally represents the wide range of interests affected by decisions on copyright.

(11) *What should its principal objects and its primary functions be?*
To provide a forum for the discussion of issues raised by copyright law and their impact on creativity, enterprise, innovation and the public good.

(12) *How should it be funded?*
The Council should be funded by the Government to ensure impartiality and avoid domination by private interests.

(13) *Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?*
Along with the Controller and other interested parties, the Council could assist in the development of a Exchange.

(14) *What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?*
Through digital technology, authors have an unprecedented opportunity to license their works and to view uses of those works. We believe that transparency in collecting societies and a greater use of the collective administration of rights will assist in these efforts. Accordingly, we believe that the Government should consider how to expand collective administration of rights for all works, including in the music and film industries single source licensing, and through extended collective licensing.

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

The Council should consider putting in place an ADR Service. Booz & Co. have found that the "pool of investors interested in investing in a particular [Digital Content Intermediary] would increase by nearly 111 percent if copyright regulations were clarified to allow websites to resolve legal disputes quickly, thereby lowering their costs to comply with regulations."[30]

(16) *How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?*
Encouraging an industry-led exchange mechanism would have the benefit of making participation voluntary, of speeding up progress on the Exchange, and avoiding the lengthy process of legislating. We would recommend, for the sake of speed and consensus, that the Government push industry collaboration on the exchange, and we would be happy to provide technical and other expertise in this area as required.

(17) *Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?*
Yes, it should be renamed. Its powers should be enhanced to facilitate expanded collective licensing and assist in initiatives such as the creation of an Irish DCE.

(18) *Should the statutory licence in section 38 CRRA be amended to cover categories of work other than "sound recordings"?*
Yes; an extension of the definition of broadcast in the CRRA could create new revenue opportunities for the creative industry. Similarly, widening the statutory licensing provisions of 38 CRRA beyond the current narrow limitation to sound recordings, would (a) constitute a welcome modernisation of the law, as there is and ever decreasing distinction between music content and visual content: e.g. music videos, and (b) make dissemination of the content less complex and therefore create new revenue opportunities for the creative industries.

(19) *Furthermore, what should the inter-relationship between the Controller and the ADR Service be?*
The ADR Service could be established under the Controller.

(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*?

---

[30] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf pg. 17

There may be a few categories of copyright cases that are well-suited to adjudication in a small claims court, but there are many more categories of cases that are not. We are not confident that the categories of cases that would benefit from small claims court treatment can be defined *ex ante*, and therefore doubt that a statute defining the jurisdiction of the court is achievable.

(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?*
We believe that there is merit in examining this proposal further and suggest that the success of the UK model in achieving efficiency and lowering costs provides an instructive example.

(22) *Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?*
Establishing a mechanism for the filtering out of frivolous claims and defenses would be helpful, perhaps through heightened standards of evidence at an early stage.

Section 4. Rights-holders

Section 4 raises fundamental questions about the actual workings of the incentive structure of copyright law. There can be little doubt that some copyright laws, such as extensions of the term of copyright and the European Database Directive, have been counterproductive or have failed in their purpose. Numerous academic studies have shown that extending the term of copyright by an additional 20 years has not created any appreciable economic incentive for authors, but has exacerbated the already serious problem of orphan works.[31] A recent study by Rufus Pollock, for example, demonstrates that only 19% of available books are in the public domain today instead of some 52% of books had the UK adhered to the copyright terms set out under the Statute of Anne.[32] Similarly, the European Database Directive has led not only to a reduction in the production of databases within the EU but also to a reduction in the competitiveness of European database producers vis-a-vis American database producers, notwithstanding the lack of protection in the U.S. The EU's own impact study on the Directive points out that "the 'sui generis' protection has had no proven impact on the production of databases" and highlights a

[31] See, for example, http://www.law.upenn.edu/currently/seminars/lawandeconomics/papers/VarianCopyrightExtensionOrphanWorks.pdf
[32] http://rufuspollock.org/2010/05/26/the-size-of-the-public-domain-without-term-extensions/

significant reduction in the number of databases entered in the Gale Directory of Databases in the period 2001 to 2004.[33]

We now address the specific questions posed in Section 2.5.

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

Having sought similar evidence, the Hargreaves Review concluded that amending UK law to better reflect the realities of innovation in the digital era will result in

> "stronger rates of innovation and increased economic growth. An economic impact assessment conducted by the Review team, and of course subject to the high degree of uncertainty inherent in such projections, estimates that this would add between 0.3 per cent and 0.6 per cent to annual GDP growth."[34]

That the current Irish copyright regime likewise disproportionately favours rights-holders to the detriment of the public good is starkly and notoriously demonstrated by the Estate of James Joyce. Since the 1980s the Estate has exercised stringent, and sometimes litigious, control over the use of Joyce's work, which has resulted in the restriction or suppression of countless cultural creations, including revised editions, re-enactments and anthologies.[35] The Estate's refusal to allow a quote from *Ulysses* to be used in a Kate Bush song[36] or to allow eighteen words from *Finnegans Wake* to be used in a choral piece[37] and its issuance of a cease-and-desist order to a scientist who coded a quote from *A Portrait of the Artist as a Young Man* into the DNA of a synthetic microbe[38] highlight the extremeness and absurdity of its control of copyright. As Professor Robert Spoo of UCD writes of the Joyce Estate example,

> "Extremely long copyrights have given artificial voice and weight to the personal

---

[33] http://ec.europa.eu/dgs/internal_market/evaluation/evaluationdatabasesdirective.pdf

[34] http://www.ipo.gov.uk/ipreview-finalreport.pdf, pg. 7

[35] http://www.scotsman.com/news/international/ireland-enjoys-her-liberty-to-play-with-james-joyce-s-jewels-1-2360703

[36] http://www.telegraph.co.uk/culture/music/music-news/8426915/Kate-Bush-can-use-words-of-James-Joyce-for-new-song.html

[37] http://www.ucd.ie/joyce2012/writings-on-joyce/articles/the-end-of-copyright-discovering-who-joyce-really-is-robert-spoo/index.html

[38] http://www.forbes.com/sites/davidewalt/2011/03/14/craig-venters-genetic-typo/

> predilections of heirs who, in the absence of such rights, would be ordinary participants in the development of art and letters like most of the rest of us. These protracted monopolies have allowed mere rights-holders, temporally and perhaps temperamentally remote from the authors whose works they control, to become privileged and arbitrary custodians of culture."[39]

The number and diversity of Joyce activities emerging in the wake of the expiration of the copyright control provide additional positive evidence of the damage done to the public interest by overwrought protections.

Furthermore, there is growing evidence that the primacy accorded to rights-holders is having a detrimental effect on the diversity of e-books available through libraries and other lending institutions. In the U.S. the control being exercised by publishers over the distribution and sales of e-books has resulted in libraries being denied the ability to lend certain works.[40] The International Federation of Library Associations and Institutions has highlighted a similar trend emerging in many other countries, where some of the main publishers are withholding sales of e-books to libraries.[41]

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

Traditionally in common law countries such as Ireland, the goal of copyright law has been to encourage the creation of works of authorship that would not have been created but for the existence of protection. Copyright is thus based on a "but for" proposition: but for the legal protection afforded by copyright laws, we would have fewer works. Of course, the need for some protection does not tell us how much protection is necessary to encourage the protection of new work; at any rate, historically copyright law had nothing to do with encouraging innovation since innovation was thought of in terms of inventions (the realm of patent law) or business models (usually not the subject of law at all).

Copyright's relationship with innovation fundamentally changed when copyright was expanded

---

[39] http://www.ucd.ie/joyce2012/writings-on-joyce/articles/the-end-of-copyright-discovering-who-joyce-really-is-robert-spoo/index.html

[40] http://www.vcstar.com/news/2012/apr/16/libraries-publishers-struggle-over-e-books-boom/?print=1

[41] http://www.ifla.org/files/clm/publications/ifla_background_paper_e-lending_0.pdf

by efforts to make manufacturers of technologies secondarily liable for consumers' use of that technology. This occurred first with photocopiers and later with video cassette recorders. In the digital era, these efforts have vastly expanded to encompass search engines, video hosting platforms, music services, blogs etc. Copyright owners, through technological protection measures (TPMs) have sought to control the design of consumer goods and services. Through significant civil damage awards (e.g. statutory damages in the U.S.) and criminal penalties, the focus of copyright has radically shifted away from encouraging the but-for creation of new works, and toward a rearguard effort to reshape innovative technologies and services. This has been true even in the United States, but in countries such as Ireland, which lack robust fair use provisions, the consequences are far more dramatic.

Innovations have historically clustered in certain areas for a number of reasons, but they usually include a concentration of talented people willing to share and an environment in which risk-taking is encouraged. Silicon Valley is one such environment: it has world-leading universities with faculties that emphasize real-world applications, a well-educated, curious and young population, excellent research laboratories (such as Xerox's famous PARC Center), and access to venture capital. Crucially, it also has a legal system that provides fair use, which enables start-ups to take the necessary risks. The Booz & Co. study of investment decisions by angel investors and venture capitalists explicitly demonstrated that the right legal environment was the single biggest factor in investment decisions, concluding that

> "[o]ur survey found that a substantial majority of angel investors believe the U.S. copyright regulatory framework to be a more attractive environment for investment than the E.U. regulatory framework; similarly all of the VCs we interviewed said they would prefer investing under the regulatory environment in the U.S."[42]

(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, of the many examples, we offer one of overcompensation and one of over-inclusiveness.

The first concerns problems in licensing. These problems result in authors and composers not

[42] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf pg. 23

being paid the monies they are due. As noted in the Hargreaves Review:

> "Examples of inefficiency in copyright licensing are not difficult to find. The BBC has said that it took nearly five years to assemble the rights necessary to launch its popular iPlayer service. Among a group of young technology SMEs the Review met at a meeting at TechHub, half claimed to have had difficulty licensing others' IP across all rights. One SME, providing on demand streaming of radio shows and DJ mixes, reported it took about nine months of lobbying music collecting societies to make any headway on licensing. Others said that licensing discussions are inconsistent, with some users offered access to licences and others denied without clear explanation. Some were met with threats of legal action rather than a business discussion about terms. Others reported that it was simply impossible to get the information needed on what terms might be available, since there was no precise clarity about who should be contacted and how to discuss licensing needs."[43]

A 2011 study found that due to inefficiencies in the European licensing regime, only 19% of the potential digital market was being captured due to inefficiency and lack of transparency.[44] Making licensing easier and more efficient would provide a boon for rights-holders as well as encouraging innovation in services for discovering and consuming copyrighted material.[45]

The second problem concerns over-inclusiveness, which involves the effects of technological protection measures (TPMs). TPMs, have stifled innovation in the digital environment and have resulted in making unlawful some conduct that would be lawful in the analogue world. The cultural implications of TPMs have been spelled out by Professor Tarleton Gillespie, who refers to them as DRM, in his book *Wired Shut*:

> "While it poses a challenge for copyright in a new medium, DRM is also an intervention in a very old struggle: the relentless commodification of culture by its powerful commercial providers. Marketing strategies not only shape the

[43] http://www.ipo.gov.uk/ipreview-finalreport.pdf, pg. 26

[44] http://mpra.ub.uni-muenchen.de/34646/1/MPRA_paper_34646.pdf

[45] http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CFwQFjAA&url=http%3A%2F%2Fmpra.ub.uni-muenchen.de%2F34646%2F&ei=bsbET7PDL82ZhQfFkannCQ&usg=AFQjCNFrCBeId9PHktFhirIWRN5d7SQV1Q&sig2=u1I4xvvbBiVselcsgz5NuQ

production and distribution of culture in ways suited more to the corporations' economic self-interest than to democratize society; they also shape our experience of culture in similar ways. The manner in which cultural goods are served up as commodities choreographs how users are likely to engage with them, and how they envision their subject position vis-á-vis culture. . . . The concern, broadly, is that we are moving inexorably toward a "pay-per-use" society, in which every instance in which we interact with culture will be commodified."[46]

"Business practices are forever outpacing the law's consideration of them, and it is time once again to ask whether this is the case with copyright. DRM is, primarily if not wholly, a way to regulate the sale of cultural expression, and it does so in ways that profoundly reshape what users can do with culture once they have it."[47]

The irony of the TPMs is that they impose control over a technology — the internet — which presents an unprecedented opportunity for perfect information and for consumers to make their preferences known, thereby enabling both buyers and sellers to possess complete knowledge about each other (and all other buyers and sellers), instantaneously updated as new information arises. Under these conditions, consumers can choose the best products and the market will reward, with higher sales, those copyright owners who make the best products.

At a minimum, measures that prohibit the circumvention of TPMs should be subject to an innovation exception and limited to TPMs that are directly connected to acts of traditional infringement.

(26) *From the perspective of innovation, should the definition of "originality" be amended to protect only works which are the author's own intellectual creation?*

It is unclear to us what effect this change would have in practice, particularly the extent to which this amended definition might be applied to new types of works. We would therefore suggest that the present definition be retained, as it allows the courts to apply their discretion appropriately to future developments.

---

[46] Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (2007) pg. 275

[47] *Ibid*, pg. 278

(27) *Should the sound track accompanying a film be treated as part of that film?*
We are not best placed to comment on this.

(28) *Should section 24(1)CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?*
We are not best placed to comment on this.

(29) *Should the definition of "broadcast" in section 2 CRAA (as amended by section 183(a) of the Broadcasting Act, 2009), be amended to become platform-neutral?*
Amending the definition of "broadcast" to become platform-neutral could bring some internet broadcasts within the remit of the copyright protections afforded to "broadcasts" under the CRRA. In the interest of achieving a fair balance, we would suggest an approach similar to that taken in the UK (section 6 of the CDPA) whereby only certain broadcasts are protected. We would support such a change on the basis that it could create incentives for innovation in content services and would not impact upon the scope of regulation of internet broadcasts, since Irish laws relating to the regulation of broadcasts (as set out in the Broadcasting Act 2009) are distinct from those pertaining to copyright protection (as set out in the CRRA). We do not support extending the scope of regulation to internet broadcasts since this would stifle innovation in this area.

(30) *Are there any other changes necessary to make CRAA platform-neutral, medium neutral or technology-neutral?*
The definitions of "cable programme" and "cable programme service" should also be amended so that technology-neutrality is achieved. We would again support the approach taken in the UK, which has created a single technologically neutral definition of "broadcast" in place of the old technologically specific definitions of "broadcast" and "cable programme".

(31) *Should sections 103 and 251 CRRA be retained in their current form, confined only to cable operators in the strict sense, extended to web-based streaming services, or amended in some other way?*
Whilst we are neither for nor against extending the scope of sections 103 and 251 to web-based streaming services, we believe the correct approach is that which is most likely to (1) encourage healthy competition between broadcast service providers, (2) help to improve the choice and

availability of content for users, and (3) advance, and not restrict, advances in technology.

(32) *Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?*
As shown by the Booz & Co. study cited above, increasing penalties on intermediaries or other uncertainties for entrepreneurs reduces investors' willingness to enter markets, thereby limiting innovation. A predictable, flexible environment is an important precondition of innovation, which benefits entrepreneurs and creators alike.[48]

(33) *Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation?*
To the contrary, as discussed in our answer to Question 25 above, strengthening TPMs would have a detrimental effect on innovation and consumer choice.

(34) *How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?*
As with other works, copyright protection is important for photographs. It is worth noting that strong technical standards like robots.txt already afford rights-holders a great deal of control online.

Google believes effective, efficient notice-and-takedown mechanisms are important to enable rights-holders to report infringements and have their content taken down quickly. To this end, we have invested significant resources in our own mechanisms and have achieved industry-leading takedown times.

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

(36) *If so, should a similar exemption for photographs be provided for in any new copyright exceptions which might be introduced into Irish law on foot of the present Review?*
We would propose that in place of treating different forms of copyrighted material differently, industry and rights-holders should continue to work together to improve mechanisms for

[48] http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf

notice-and-takedown while building new products and services for users to access content legally.

(37) *Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?*
We believe that private copying levies are neither legally required nor desirable and the current approach should be maintained.

Section 5 - Collecting Societies
Collective administration of rights can minimize transaction costs for both licensees and rights-holders so that more of the revenue streams available from the marketplace reach the ultimate beneficiary, whether author, publisher, performer, or record label. Societies should therefore always minimize their administrative and overhead costs and promptly disburse its collections to the authors and publishers.

Transparency is critical to ensuring that rights-holders receive their monies due. Digital services and platforms have a direct interest in this because the lack of transparency affects licensing and causes market distortions. Lack of transparency creates costs that are borne by everyone. Financial transparency induces efficiency and cost control, which in turn allows for lower licensing costs without a reduction in income to creators and publishers. More detailed information about repertoires being licensed would mean that more money would flow to creators more quickly, and the cost for new businesses to deliver licensed content would decrease. Thus we should see a twofold improvement: better remuneration for artists today and more commercial opportunity for the creative sector in the future. This would benefit all players in the market. Where a society receives work-level attribution of usage from a licensee, the society should be required to allocate revenue on the same basis. For example, if YouTube reports granular usage to a society, that society should not allocate revenue based on radio play.

To improve the speed and accuracy of income flows from sources like Google, it is imperative that there exists an easy ability to 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 license. As such, databases that provide publicly available, territorially specific, ownership data for compositions, as well as data to match composition rights to sound recordings are essential.

Collecting societies perform a variety of important and necessary functions, including granting licensing for different types of uses and managing revenue streams from sources where rights need to be aggregated, such as use in public venues. However under the current regime, it is typical for a creator to designate a single society to perform all the functions: licensing digitally, for broadcast, enforcing the need for licenses in physical establishments etc., which may or may not be in the best interest of the author. Instead, allowing creators to choose how they wish specific rights categories to be licensed would foster choice and competition. The efficiencies in societies would be improved by the implementation of flexible mandates that allow authors to determine the most advantageous manner in which to license their rights. Authors and composers could then select the party best positioned to serve their needs for a given right, e.g. licensing to digital services, rather than being bound to a specific collecting society for all forms of exploitation.

Since Google's interest in this matter is limited to digital services, our recommendation is that collecting societies must provide in their membership agreements a clear and easy ability for creators to choose whether they want the society to manage the licensing of the creator's assets for digital services. Digital services should be able to license all relevant composition rights from a single source for a given use, and prohibit charging for rights not needed for a particular service. Sub-categories of rights in the same composition should not be divided amongst different licensors: today, the right to reproduce a copy and the right to communicate it may in some cases be controlled by different parties. In the offline world, this made sense, as the different rights corresponded to separate, distinct uses (e.g. sales of physical copies versus performances). However, online service providers often face "double dipping": reproduction and performance licensing entities claim that a license is needed for a single use of a single composition. This is plainly inefficient as it creates unnecessary transaction costs and the potential for hold-out problems, which is not in the best interest of the ultimate beneficiaries.

Even where a particular service provider only requires one subspecies of rights (such as a pure streaming service), licensors are known to insist that a licensee also take on licenses for additional rights. Where this kind of forced bundling is used to justify higher licensing costs, it should be considered a form of double payment that distorts a well functioning market.

(38) *If the copyright community does not establish a Council, or if it is not to be in a position*

to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?
The development of technological solutions would go some way towards solving the licensing problem. Increased rights information can only make licensing speedier, and the proposal of a copyright exchange would be constructive in this regard.

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

Section 6 - Intermediaries

The Committee writes on page 45 that the "challenges posed for copyright law by technological developments lie at the heart of the present Review." Technology has always presented both a challenge and an opportunity for creators. Unless singing unaided by mechanical means, musicians have always relied on technology, in the form of instruments, printing presses for sheet music, metronomes for tempo, and later, broadcasting and recording equipment for access to mass audiences. Simultaneously, performers feared that the advent of piano players, jukeboxes, and phonographs, as well as talking movies, would reduce the number of live performances. There is no solution for this delicate intersection between technology as an enabler of creativity, and technology as a threat to the status quo. Rather, it is an age-old process of adaptation, both to the challenges and to the opportunities. The role of law should generally be to stay out of the way; legally mandating forms of technology that have lost their market is not an advisable approach. This applies most acutely today, given the unprecedentedly rapid pace of technological innovation. As a result, it is more critical than ever that laws are not technologically based, but rather are employed to set standards. At the same time, existing technologies present discrete issues that require attention and resolution. We believe the Committee has done a singularly laudable job in its effort to navigate the Scylla and Charybdis of technology as a challenge and an opportunity. Specifically, the Committee makes the following amendments:

Caching, Conduits, and Hosting

Consideration is given by the Committee to the altering of the wording of the transient copying exception that would more closely align with the CJEU position in the *Premier League v QC Leisure* and *Murphy v Media Protection Services* cases. We support this proposal and its

drafting. We further agree with the Paper's discussion on pages 48 and 49 regarding conduit and hosting activities. As the Paper notes, "ISPs simply provide the means by which users post data online." Links are, as the Paper observes, content neutral. To hold ISPs secondarily liable for such ordinary conduct would be to deny the innovative forms of creativity that the internet makes possible.

<u>Linking</u>

As the court decisions highlighted on page 49 clarify, links simply convey, via HTML code, "something that exists. ... links do not, by themselves, publish, reproduce or communicate [copyrighted] content." As with caching, linking is a part of the architecture of the internet. It is absolutely necessary for the internet to function in the way that was intended.

<u>News and marshalling</u>

Section 6.6 of the Consultation Paper discusses websites that point to or gather news from other websites. As the Paper rightly points out, this activity takes many different forms and thus no single appellation will capture its variegation. The Committee reviews existing provisions in the CRAA and the EUCD, and notes that the definition of news in CRAA is far more confined than the definition in the EUCD, and inquires whether sections 51(2) and Article 51(2) of the CRAA could be combined in a revised and expanded section 51(2). The Committee does not offer an amendment of Section 51(1), which would, in our view, defeat the Committee's objectives. We therefore propose the following:

Section 51.

> 51.—(1) Fair dealing with a work for the purposes of criticism or review of that or another work or of a performance of a work shall not infringe any copyright in the work where the criticism or review is accompanied by a sufficient acknowledgement unless to do so would be impossible for reasons of practicality.
>
> (2)(a) It is not an infringement of the rights granted under this Act if works on current economic, political or religious topics or other subject-matter of the same character are reproduced, displayed, performed, or

> made available in the process of reporting on them or communicating them to the public for purposes of furthering public discussion of those topics; provided the reporting or communication is accompanied by a sufficient acknowledgement unless to do so would be impossible for reasons of practicality;
>
> (b) Where a reproduction, display, performance, or making available is exempt from liability under subsection (a), is subsequently sold, rented or lent, or offered or exposed for sale, loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes.

Unlike present law, there is no exemption from the exemption for photographs. Whilst we fully recognise the value and importance of photographs and photographers, we have not seen a compelling argument for favouring photographs over other works that are subject to the exemption.

The Committee also discusses but does not propose language for a "marshalling" provision. We agree with the Committee that the Berne Convention and the EUCD provide Ireland with the flexibility for such an exemption, and are in favour of such an exemption. We certainly agree that private parties have entered and may enter licensing arrangements for providing news products to the public. Google itself has done so. We respectfully question the Committee's suggestion on page 55 that "there may be room for a compulsory licensing regime by which marshalling sites could gain access to copyright[ed] news and the rights-holders are compensated for this re-use." News itself is not subject to copyright. There is thus no need for permission to use it, and therefore no room for a compulsory licensing scheme under which those who wish to use uncopyrightable material have to pay for its use. Nor is the use of snippets of news, in the process of providing access to the full article on the copyright owner's site, actionable. This activity is no different than card catalogues for books. There should be no permission or payment necessary for this activity. For wholesale replication of entire articles, we doubt rights-holders would favor a compulsory licensing scheme, although it is for them to

state their own view, of course. We assume that if rights-holders wished to license their works in this manner, they would have done so already. In short, we fail to see any significant scope for compulsory licensing.

We now address the specific questions posed in Section 6.7.

(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 has been strengthened since the number of devices that rely on these activities have increased exponentially. It is expected that the total number of mobile phone subscribers worldwide will reach 4.81 billion by the end of 2012. The Commission for Communications Regulation estimates mobile phone penetration of 121.5% in Ireland, with over 5.2 million mobile subscribers.[49] Moreover, some 35% of Irish mobile phone users report that their mobiles are internet-enabled, putting us ahead of the European average for mobile internet. It is clear that the use of smartphones is rapidly becoming the means of access to the internet, especially amongst young people.

The intermediaries that operate in this space are generating growth and employment for European economies. A recent study by Copenhagen Economics showed that online intermediary activities contributed €160 billion to European GDP in 2009, which corresponds to 1.4 % of the EU27 GDP.[50] Furthermore, strengthening immunities for these activities in Ireland seems a prerequisite to Government realising its ambitions for the doubling of the film and audiovisual sector by 2016. The 2012 Action Plan for Jobs and Growth has as a specific action to encourage "cross-pollination of ideas and ventures from the film, television and audiovisual sectors to the games and mobile content sectors."[51] That weak protection for these providers will act as a barrier to entry and innovation is self-evident.

(41) *If there is a case for such immunities, has technology developed to such an extent that other technological processes should qualify for similar immunities?*

---

[49] See http://www.clickatell.ie/solutions/mobile_marketing.php

[50] Online Intermediaries: Assessing the Impact of the EU's Online Liability Regime -- http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf

[51] http://www.djei.ie/publications/2012APJ.pdf, pg. 120

We are unaware of any other processes at this time and believe that any future changes of this nature should be advanced at the EU level.

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

The E-Commerce Directive has set forth a standard for intermediary liability limitation that has, much like the American Digital Millenium Copyright Act, laid the foundation for technological development in Ireland and in the EU. These protections from liability should be maintained in order to ensure continued technological advancement to the benefit of European creators, consumers and innovators.

(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?*

As per the previous answer, we believe this to be the case.

(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?*

We believe Ireland has the flexibility necessary to legislate in this area.

(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?*

No, considering it as such would call into question a fundamental and legitimate practice on the internet, and would harm consumers, innovators, and rights-holders alike.

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

Whereas we believe that linking is permitted under existing law, to bring complete legal certainty to this issue, we would recommend inclusion of a specific exception for linking. As the Committee points out there is a growing judicial trend towards recognising that a link is not a publication, reproduction or communication of content and as such, is not an infringement of copyright. By recognising this in statue, Ireland will provide innovators with the certainty to

develop new business models and services based on linking.

Additionally, linking drives revenue for rights-holders, for whom finding an audience is key to the monetisation of content online. For example, Google sends news publishers more than 4 billion clicks each month: 1 billion clicks from Google News and an additional 3 billion from services like web search and iGoogle. That amounts to some 100,000 business opportunities being provided to publishers every minute.

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

(48) *Does copyright law inhibit the work of innovation intermediaries?*
Yes. The lack of clarity on some fundamental issues surrounding the basic functioning of digital technology, the use of technological protection measures to prohibit or limit consumer goods and services, the ability to refuse to license material that should be licensed, the extremely long term of protection, and the lack of fully flexible fair dealing provisions are significant barriers to innovation.

(49) *Should there be an exception for photographs in any revised and expanded section 51(2) CRRA?*
As per above, photographs should not be treated differently than any other work.

(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?*
Whereas we believe that news marshalling is permitted under existing law, to bring complete legal certainty to this issue, we would recommend inclusion of a specific exception for marshalling of news and other content. We believe there are many benefits which flow from news marshalling online, including new revenue streams for traditional publishers, ease of discovery of content for consumers and the creation of new products and services around discovery services. Ireland has shown early promise in this area with companies such as Journal.ie and Broadsheet.ie demonstrating the economic and innovation uplift from such services. News marshalling also brings the additional benefit of better informing the public.

(51) *If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?*
The type of activity that falls under marshalling is exceedingly diverse.

(52) *In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?*
As per the answer to Question 41, we are not aware of a need to extend E-commerce immunities at this time. Instead, we believe that legal certainty can be brought to news marshalling by inclusion of a specific exception along the lines suggested in our answer to Question 53.

(53) *If so, what exactly should it provide?*
We propose a provision along the following lines:

> It shall not be an infringement of rights under this Act where a party provides the public with headlines or insubstantial portions of news reports as an adjunct to providing links to the news report itself.

(54) Does copyright law pose other problems for intermediaries' emerging business models?
Broad secondary liability through the making available of authorization rights tend to collapse direct and secondary liability. This is especially true in cases where copyright owners argue they should not have to prove that there has been direct infringement (e.g. by a consumer). Under this approach, any business model whereby consumers can arguably be said to be engaging in authorized activity becomes problematic since the creators of those business models may have no or little ability to control consumers' behavior. In many cases, a new technology or business model has dual uses: uses that have nothing to do with potential copyright infringement, and uses that do. Photocopy machines were an early example, as were video cassette recorders, but more recently Torrent technology, frequently attacked as used by "pirates," has been used by Viacom International and other media companies. Use of secondary liability must take into account evolving uses and evolving business models.

<u>Section 7 - Users</u>

Section 7 discusses various exceptions, focussing on those permitted by the EUCD but

not present in the CRRA. We wish to reiterate the points made above in the discussion of classifications that just as ‘rights-holders’ as a category may create an artificial divide, so too does ‘users’. This divide is artificial and has always been artificial. All authors are users of other authors’ works; to quote Northrop Frey, “Poetry can only be made out of other poems; novels out of other novels.” Digital technology has collapsed the previous gatekeeper function performed by traditional distributors, resulting not only in more authors but more opportunities for reaching audiences. As the Committee puts it,

> “The internet particularly encourages such interactive user innovation. Without users, there would be no internet, from consumers of movies, music, ebooks and games, to producers of user-generated content. A great deal of internet innovation has gone into business models constructed around not only the delivery of content to users but also the formation and transformation of content by users. Clarity around the rights of users is therefore crucial, not least because such clarity can encourage transformative uses.”[52]

Copyright laws should promote this transformative activity and the development of healthy business models around it. Due to the lack of appropriate provisions, the CRAA fails to achieve that objective. The Consultation Paper proposes to remedy these deficiencies. We support these efforts.

Amendment to Section 50(4), Fair dealing

The Committee proposes amending section 50(4) by replacing “means” with “included.” We strongly recommend that this amendment be made. It puts into words and practice one of the primary aims of the Review; to provide the necessary flexibility for the development of innovative ways of creating and transforming works of authorship.

On page 60, the Committee enquires whether the CRAA should be amended to take advantage of the full exceptions envisaged in the EUCD. We believe the CRAA should be so amended. A failure to do so will put Ireland at a competitive disadvantage, one that has been further sharpened by the recent commitment of the UK Government to introduce all EU-sanctioned exceptions. The Committee and EUCD recognise, as the CRRA has yet to, that innovation and

[52] http://www.djei.ie/science/ipr/crc_consultation_paper.pdf pg. 58

creativity are of a piece. The term “limitations and exceptions” falsely describes a natural state of affairs where authors have unfettered rights in their works and where the public interest, if considered, bears a heavy burden of proof that a socially beneficial use should be permitted to override the laws of nature. In all legal systems, even continental *droit d’auteur* systems, copyright laws are positive law, enacted to serve the public interest, of which authors are a part, but not the only part. There is no basis to regard any one interest as more important than another because all work is for the common good. There is, therefore, no limitation or exception to a natural state of affairs benefitting solely rights-holders. The provisions in the EUCD and recommendations in the Committee’s Consultation Paper are important public interest provisions, which further innovation and creativity and should be adopted into the CRAA.

We now address the specific recommendations and questions in Section 7.4.

(55) *Should the definition of “fair dealing” in section 50(4) and section 221(2) CRRA be amended by replacing “means” with “includes”?*
Yes, as set out above, doing so will provide the necessary flexibility for innovation and creativity.

(56) *Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:*
(a) reproduction on paper for private use.
Yes, this exception comports with citizens’ expectations about law and does not harm the copyright owner’s economic interest.

(b) reproduction for format-shifting or backing-up for private use.
Yes; as documented by the Hargreaves Review, this exception has the potential to substantially impact innovation and growth in the digital music industry. It estimates that introducing it into the UK will generate between £0.3 and £2 billion for the economy.[53] Moreover, this exception comports with citizens’ expectations about law and does not harm the copyright owner’s economic interest. Its introduction would greatly restore people’s faith that the law makes sense, as has been seen in the Canadian public’s reaction to similar provisions in Canada’s reform legislation.

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

[53] http://www.ipo.gov.uk/ipreview-doc-ee.pdf, pg. 26 - 27

Yes, this is a classic public interest exception. The Hargreaves Review cites as one example the impediments created by existing law to the advancement of malaria research. Of a huge body of journal papers that could assist in the development of malarial treatment and prevention, the Review writes:

> "It is often impossible to establish who are the copyright holders in these articles, many of which appeared in long defunct journals – they are orphan works. Copying them to make them generally available in online form would break the law. Reproducing individual illustrations and diagrams in articles is not possible. If the orphan works problem could be overcome it would still not be possible to text mine them – copy the articles in order to run software seeking patterns and associations which would assist researchers – without permission from the copyright holders who can be found, since there is no exception covering text mining. Even overcoming those obstacles would not guarantee that text mining would be possible in future cases. For that any new text mining exception must also include provision to override any attempt to set it aside in the words of a contract.
>
> The malaria papers remain unavailable to researchers because of rights clearing requirements which appear out of all proportion to any benefit the rights-holders would be likely to want if they could be found."[54]

(d) reproduction for persons with disabilities.
Yes, this is one of the great copyright civil liberties causes of the last 30 years. As noted by Copyright 4 Creativity, less than 5% of all books are accessible to those who are fully or partially blind.

(e) reporting administrative, parliamentary or judicial proceedings.
Yes, this is a classic public interest exception.

(f) religious or official celebrations.
Yes, subject to two conditions: that the works in question were not intended for such celebrations in which case an exemption would harm the principal markets for such works; and

[54] http://www.ipo.gov.uk/ipreview-finalreport.pdf, pg. 46-47

that all authors have the non-economic moral right to object and stop the use of their work on the ground that it will conflict with the author's reputation or integrity.

(g) advertising the exhibition or sale of artistic works.
Yes, such use assists in the sale of works and thus benefits authors, provided that the copies being advertised are lawful copies.

(h) demonstration or repair of equipment.
Yes, such use does not distort any legitimate market for the underlying software. The exemption will also prevent binding arrangements that create barriers to innovation.

(i) *fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?*
Yes, this is a necessary exemption both for the economic and cultural development of a country long recognised as the birthplace of some of the world's leading comics, satirists and parodists. Not only does its absence continue to put Ireland at an economic disadvantage with EU countries such as France, Spain and Belgium where a similar exception exists but it is almost certain that the UK too will shortly introduce permissions for such uses on foot of the Hargreaves Review. That there is a direct economic advantage to this exception is verified by the *Supporting Document to the Hargreaves Review*, which has estimated that the introduction of a comedy exception would add between £130m and £650m to the UK market every year.[55] Accepting that this range could be a conservative estimate, the report continues:

> "Even if the comedy market is only worth one per cent of the global entertainment market (probably an under estimate) it is possible the UK would gain one per cent of this market with one or two successes under a comedy exception, and up to five per cent if it enabled a global hit."[56]

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

[55] http://www.ipo.gov.uk/ipreview-doc-ee.pdf pg. 29
[56] *Ibid.*

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

Yes. There is an increasingly urgent need for the introduction of this exception given Government's ever stronger emphasis on distance and digital learning at all levels of the education system. The *Programme for Government* sets out the Government's vision for 21st century schools and its commitment to

> "[g]reater use of online platforms will be made to offer a wide range of subjects and lessons online, and to enable schools to 'share' teachers via live webcasts. These online lessons will be made available through a new Digital School Resource, bringing together existing resources from National Council for Curriculum Assessment, Department of Education and other sources as a cost effective means of sharing expertise between schools."[57]

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

Yes, broadcasters too will benefit from innovative and efficient services.

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

They should be retained. As the Committee notes, the current exception is neither a barrier to innovation nor a promotion of it. We would add that the exception does not harm copyright owner's economic interests.

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

Yes; this a critical exception, which is also available in the Canadian Copyright Reform Act. The amendment recognises today's creativity and the technology that makes this possible. It is almost certain that the absence of such an exception will put Ireland at a competitive disadvantage vis-a-vis other Member States. As stated by a recent Dutch report:

> "Thanks to technological developments, it has become easier for consumers to edit and publish existing works, such as movies and drawings. The cabinet wants to include a fair use exception in the law that stimulates reproduction (for non

[57] http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf

> commercial purposes)."[58]

Such a disadvantage is further sharpened by the Netherlands active ambition to emerge as the applications hub of Europe, through initiatives such as Appsterdam.[59]

(62) *Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRA?*
Yes; strengthening Section 2(10) would provide legal clarity that such terms or conditions are deemed void.

Section 8 - Entrepreneurs

Beyond the expansion of the existing Irish exceptions and limitations, the Committee considers the introduction of a specialist copyright exception for innovation, because "[t]he essence of innovation is that it creates value; and these new insights, new goods or new services will have the capacity to generate economic growth and deliver benefits to society as a whole." We agree.

The Report puts entrepreneurs at the heart of the innovation ecosystem and asks whether such an exception is a necessary condition of their growth. Such an exception would permit innovators to make use of part of a copyright work, i.e. to adapt it. Given that adaptation rights have not been harmonised by the EU, the Committee believes that the Directive does not preclude their introduction. We agree. The Report maps out the necessary features of such a right, namely: "The essence of innovation is a substantial development or transformation that creates new value. In language that is at the core of copyright law, this can be expressed as a substantial development that results in a new original work".

With respect to search engines such as Google, the Committee states that

> "[w]hat internet search does is to produce an original work in the page of results which is substantially different from the underlying websites being quoted and linked to. Not only does this search not conflict with the normal exploitation of the websites being quoted and linked to, or unreasonably prejudice the legitimate interests of the owners of those sites, the potential of driving internet

[58] http://www.rijksoverheid.nl/onderwerpen/ict/legaal-downloaden-en-fair-use

[59] http://www.appsterdam.com/

traffic to those sites is a benefit to them."

The Committee considers online search to be a type of data analysis, which includes activities such as indexing, targeted advertising and review sites, and it considers each of these activities to "provide original outputs that differ substantially from the initial inputs." i.e. data analyses do not infringe copyright as they are original works. The Committee adds, "If copyright law is not to stifle these kinds of innovative business models, a copyright exception to promote innovation such as that tentatively proposed above is likely to be necessary." The Committee therefore proposes the following amendment:

> (1) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a work (the initial work) derives from it an innovative work.
>
> (2) An innovative work is an original work which is substantially different from the initial work, or which is a substantial transformation of the initial work.
>
> (3) The innovative work must not —
> (a) conflict with the normal exploitation of the initial work,
> (b) unreasonably prejudice the legitimate interests of the owner of the rights in the initial work.

We strongly urge the introduction of this exception and believe it will collapse many of the existing barriers to digital innovation. As exemplified by both the Lerner and Booz & Co. studies, there is a growing body of evidence that increasing flexibility in copyright law is critical to unlocking investment and increasing innovation. Moreover, such an innovation exception would position Ireland as the leading location in the EU for innovation and R&D. This exception would grant creators a space, beyond that created by the EUCD and absent in any other Member State, to lawfully undertake cutting-edge experimentation and innovation without undermining the rights of copyright holders. The very language and intent of the article would set Ireland apart as a unique location where transformation and innovation is encouraged and protected. The innovation exception will also go a long way towards bridging the competitiveness gap

between Ireland and other fair use jurisdictions and ensuring we retain and foster indigenous entrepreneurship and attract additional foreign innovation funds.

We would, however, caution against the requirement included in the draft provision that the creator of the innovative work inform the owner of the original work of the availability of the innovative work. We fail to see how this requirement can serve any practical purpose since the owner of the original work cannot prevent the availability of the innovative work and there is an acknowledgment requirement.

We now address the questions in Section 8.4.

(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?*
We believe the appropriate question is not whether a public policy exception for innovation should render a work not protectable, but rather what are the circumstances in which there should not be infringement.

(64) *When, if ever, is innovation a sufficient public policy to require that there should nevertheless be exceptions for certain uses, even where works are protected by copyright?* We disagree with the premise of the question since it assumes that the default rule is that there are no exceptions and that a heavy burden is required to overcome the default.

(65) *When, if ever, is innovation a sufficient public policy to require that copyright protected works should be made available by means of compulsory licenses?*
There are reasons beyond innovation policy for such licenses, including that licensing is the best way to ensure that authors can be paid.

(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 exceptions?
As set out above, we strongly support the introduction of a specialist copyright exception. Such an exception would provide the flexibility for heretofore unimagined technologies to be created, without requiring new laws to be introduced. It would position Ireland as the leading European location for the testing and development of new products and services, and the private funds

that make them possible. As PWC has pointed out:

> "The continuing shift towards digital platforms and digital distribution of content at a global level presents considerable opportunities for Ireland and companies based here – from indigenous start-ups to multinationals. Disruptive technologies and innovative approaches to content generation and distribution will continue to emerge, and Ireland needs to do all it can to encourage and support companies and ideas in this area given the opportunities that exist on a global scale in this industry."[60]

Technologies like remote DVR services and format-shifting technologies are all examples of innovations that have benefited from the openness enshrined in U.S. law to new technology.

Section 10. Fair Use

The Committee recognises that the legal environment is a critical determinant of IT competitiveness, and draws attention to the existence of or move towards fair use in key competitor nations such as India, the Philippines and Singapore, as well as the United States and Israel. We note that while Canada operates a fair dealing system, in practice its courts analyze fair dealing in almost exactly the same way U.S. courts analyze fair use, often citing U.S. cases.[61] This is also true for Indian courts which use the terms fair dealing and fair use interchangeably. None of this is surprising given that fair use is a creation of the UK common law courts. Why did the UK courts create fair use? What problem is fair use intended to solve? UK judges were quite clear about the rationale for fair use and the related doctrine of fair abridgment (covering what might under the Committee's recommendations be called an innovative work). In the 1740 case of *Gyles v. Wilcox*, Lord Hardwicke remarked that a genuine abridgment should be permitted because "it may, with great propriety be called a new book, because the invention, learning, and judgment of the author is shewn in them … ." In the 1803 case of *Cary v. Kearsley*, Lord Ellenborough, remarked

> "That part of a work of one author is found in another, is not itself piracy or

---

[60] http://www.pwc.ie/global-entertainment-and-media/press-release.jhtml

[61] Canadian law now includes an idea of a 'user right' as part of fair dealing – see *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339. See also D'Agostino, *op. cit.*, 309, noting that this decision effectively elevated the narrow exceptions to the level of a general principle, despite the fact that a 'user right' is not reflected in the legislation.

> sufficient to support an action; a man may fairly adapt the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public ... ."

The rationale for fair use, then, is the same as for copyright protection itself: to promote learning. The UK and U.S. common law judges recognised, as we must today, that learning proceeds through a transformative use of the past: "If I have seen further it is by standing on the shoulders of giants", as Newton famously explained. Fair use is designed, as the U.S. Supreme Court held, to avoid "stifl[ing] the very creativity which that law is designed to foster."[62]

The fair use doctrine has become contentious, based in part on a misunderstanding of its meaning. It is sometimes, wrongly, dismissed as a derogation of authors' rights. Far from it, fair use in the United States allows for legitimate re-use, while protecting authors' interest and copyright. Fair use has been a part of U.S. law for almost 200 years. Everyday across America corporate lawyers make fair use determinations with substantial consequences. All American media companies are both copyright owners and daily copiers of others' materials for which they rely on fair use. Viacom, Inc. depends heavily on fair use for its popular "Daily Show with Jon Stewart" and the "Colbert Report." HBO's recent movie about former Vice Presidential candidate Sarah Palin, "Game Changer," would have been impossible without fair use.[63] For this reason, Fritz Attaway, Executive Vice President and Washington General Counsel for the Motion Picture Association of America stated, "The beauty of fair use is that it is a living thing ... like our Constitution ... that can adapt to new technology."[64] The idea that fair use reduces copyright owners' rights is belied by the regular practice of U.S. media companies applying fair use every day in their commercial decisions.

We agree with the Committee's conclusion that the introduction of Fair Use into Irish national law is possible under EU law:

> "In principle, given both Ireland's shared common law heritage with the

---

[62] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994). We wish to point out an error in the Consultation Paper's discussion of fair use in the U.S. On page 112, the Paper states that U.S. courts "have taken the view that the fourth factor, which specifically focuses on the potential market impact of the work, is the most important ..." Before the Campbell decision, a few court had taken this view, but Campbell rejected it and the view is therefore no longer good law in the U.S.

[63] http://www.kansascity.com/2011/09/19/3153835/sample-this-show-authors-say-use.html

[64] See http://twitter.com/#!derekslater/status/27445125989

> common law countries which either have or wish to adopt the doctrine, and Ireland's shared EU membership with member states which also wish to adopt the doctrine, there is no reason why a transplant of the doctrine should necessarily fail. The real problem is not the suitability of the Irish soil, but the suitability of the plant (the doctrine itself) and of the wider environment (in particular, EU law)."[65]

The problem that fair use addresses is the same in all countries: how to encourage creativity and innovation. We do not believe creativity and innovation can be furthered by closed lists of permitted uses enshrined in legislation. The reason for this is simple: markets and technologies are constantly changing as are the forms in which authors create. Closed lists of permitted activity cannot keep pace with even incremental changes in creativity and innovation. Closed lists must be regularly updated on penalty of crushing technological or market innovations. No legislature, no matter how prudent or foresightful, can define all current forms of creativity and innovation, much less technologies and business models not yet in existence. The rapid pace of technological innovation brought about by the internet and digital tools has forced businesses to adapt much more quickly to change. It is critical that our laws can do the same.

Detailed rules cannot be prescribed for dynamic situations; they require guiding principles. The problem, then, is how to stay out of the way of progress while still ensuring that the goals of copyright are achieved. The answer is to provide flexible laws governed by principles. This is what fair use statutes around the world seek to recognise and perpetuate. Fair use has existed in common law countries for almost 300 years. There are centuries of case law proving that flexible provisions like fair use are the solution to ensuring that the principles of copyright are upheld.

We now address the specific questions posed in section 12.

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

Fair use is a common law doctrine that is the shared heritage of Britain, Ireland, the U.S., and Canada. The doctrine of fair use has emerged gradually and incrementally. English judges were quite explicit in articulating their rationale for permitting the use of one author's work without his consent by a subsequent author. That rationale, found initially in the "fair

[65] http://www.djei.ie/science/ipr/crc_consultation_paper.pdf pg. 116

abridgment" context,[66] was that the second author, through a good faith productive use of the first author's work, had, in effect, created a new work that would itself benefit the public.[67] Since the 1710 English Statute of Anne gave no guidance on the standards to be applied in determining infringement, the English courts looked to the statute's purpose of encouraging authors to "Compose and Write Useful Books." Fair use was believed to be necessary to fulfill that purpose. English judges accordingly acted boldly to achieve that purpose.

Operating under a similar lack of statutory guidance and a similar (but constitutional) goal of promoting "the Progress of Science," U.S. courts incorporated and further developed the fair use doctrine to ensure that subsequent authors and the public may build upon the work of earlier authors. Fair use recognises copyright laws can on occasion stifle the very creativity they were designed to foster. Fair use is thus designed to ensure that the balance between encouraging authors to create through the grant of a limited monopoly and the need to permit reasonable, unapproved and uncompensated uses by second authors and the public is not upset by an overbroad assertion of rights. Fair use should not, as U.S. Judge Pierre Leval put it, "be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design."[68]

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

We believe EU directives do not make "automatically unlawful" all forms of copying made possible under technological advances, if by copying one includes copying required by automatic processes that do not harm the copyright owners' markets for sale of the original work.

(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 recent moves towards more flexible copyright laws elsewhere in Europe present the Irish Government with a timely opportunity to form a coalition with the UK and Netherlands to seek reform of the Directive or the introduction of a doctrine of flexible exceptions at EU level. We agree with the Hargreaves Review, which concluded that the UK should begin

---

[66] Gyles v. Wilcox, 2 Atk. 141 (1740).

[67] Gyles, 2 Atk. 141. *See also* Cary v. Kearsley, 4 Esp. 168, 170–171 (1803).

[68] Leval, [Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1110–1112 (1990)]

> "exploring with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers."[69]

The Dutch Government, likewise, has already anticipated a debate on fair use exceptions in Europe and seem very well disposed to pursuing joint efforts for reform.[70]

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

A fair use clause is necessary to encourage innovation because the dynamic nature of innovation and creativity require dynamic laws. Static laws, whereby Government determines *ex ante* what forms of innovation are to be legally allowed, cannot anticipate or keep pace with technological change and are therefore a barrier to innovation. As such, there is a growing body of evidence, including the Lerner and Booz & Co. studies cited in this submission, to show that introducing flexibility into a copyright regime can promote innovation to the benefit of consumers, rights-holders and technologists alike.

(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?*

As discussed above in our answer to Question 76, it is not true that fair use pits one set of interests against another, namely authors against users. In the U.S., the most frequent beneficiaries of fair use are large media companies who rely on it daily for their own creative works. Fair use should be regarded as an essential tool for all authors to create and innovate.

(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?*

Fair use determinations are made against a backdrop of almost 300 years of case law. Large U.S. media companies make fair use determinations every day, involving important works and substantial amounts of money. This would be impossible if fair use was so vague as to be unclear or uncertain.

---

[69] http://www.ipo.gov.uk/ipreview-finalreport.pdf pg. 47

[70] http://www.rijksoverheid.nl/onderwerpen/ict/legaal-downloaden-en-fair-use: "The cabinet wants to include a fair use exception in the law that stimulates reproduction (for non commercial purposes). This is to anticipate the discussion in the European Union on fair use exceptions in the European guideline on copyright. Such a provision is missing right now."

(81) *Is the ground covered by the fair use doctrine, either in the abstract or in the draft section 48A CRRA above, sufficiently covered by the CRRA and EUCD exceptions?*
We believe more can be done, in both the CRAA and the EUCD exceptions, but we strongly support the draft section 48A set out in the Paper.

(82) *What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?*
As documented above, there is significant evidence that our laws have fallen gravely behind technological and digital developments and pose real barriers to innovation.

(83) (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?
As discussed by the Review Committee, it is possible to implement various elements of Fair Use into Irish law and we support the approach adopted in the draft section 48A.

(b) *In particular, how appropriate is the draft section 48A tentatively outlined above?*
We believe that, in conjunction with the other proposed changes in the consultation document, the introduction of draft section 48A would significantly increase Irish copyright law's flexibility and openness to new technology without prejudicing the interests of rights-holders.

Conclusion

The Review Committee has in its Consultation Paper provided a comprehensive analysis of the current Irish copyright law and has identified the possible barriers it creates to innovation as well as potential solutions. We applaud the scale and ambition of the Committee's work. We believe that a flexible copyright regime is a necessary precondition of digital and technological innovation. If laws are to facilitate and further innovation, they must be able to adapt to the quickly changing environment in which innovation takes place. We therefore strongly support the adoption of all the exceptions and limitation permissible under the EUCD, the creation of a new specialist innovation exception and the introduction of a fair use doctrine into Irish law.

For further information, please contact:
Sue Duke,
Head of Public Policy,
Google,
Gasworks, Barrow Street, Dublin 4.
sduke@google.com