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Dear Ms. Patricia McGovern, Dr. O'Dell and Professor Hedly,

RE: COPYRIGHT AND INNOVATION, A CONSULTATION PAPER

Response by: Hewlett-Packard Ireland Limited.

Hewlett-Packard ("HP") would like to thank the Copyright Review Committee for the opportunity to provide our thoughts in respect of the Copyright and Innovation consultation paper ("Paper") and process.

Opening Remarks

In general terms HP considers the review of copyright law in Ireland as a necessary step in assisting the ambition to create Ireland as an innovative and vibrant technological hub for Europe. It has also been over a decade since copyright law in Ireland was assessed earnestly and as such in order to keep pace with the new digital age it is important for copyright law to be brought into line with the technological realities.

When looking at the economic growth prospects of Ireland in the coming years it is crucial to consider Copyright law and policy as a key component and building block for innovation and investment (as well as assisting cultural growth). Any New Copyright Act should look to give innovation the best environment to flourish and provide the opportunity for Ireland to be the location of choice for businesses in line with the technological advances. Leveraging from the commonalities of the European systems and also language benefits from the US and UK are traits which Ireland should continue to exploit in any new Copyright Act.

For example, with the advent of Cloud services and simpler data transfer, it is important for Ireland to embrace legal protections for the rights holders whilst also not stifling innovation. By way of example the draft communication from the Commission on an integrated Cloud Computing strategy[1] recently commented:-

"*Some technologies used for digital content can reduce the number of copies which are made on consumers' devices, e.g. streaming does not imply the making of permanent copies. Cloud computing moreover makes it possible to remunerate rights holders s by licence, without a need to establish an exception based*

[1] Communication from The Commission to The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: An Integrated Cloud Computing Strategy For The European Union.

compensation. It is essential to take proper account of the opportunities offered by the current development of such business models that give new forms of authorised to copyright protected content.[2]"

The point being that technology has provided new avenues for the copyright community and new ways of ensuring that copyrights holders s can develop, protect and exploit their works. In order for any new law to be successful it should try and anticipate the likely uses of the legislation. Clearly the Cloud Computing Strategy ties very closely to Copyright law and this together with the establishment of a Digital Exchange, proper transparent governance for the management of Copyright in Ireland (and Europe), maintaining the private copying exceptions and rejecting copyright levy schemes, protecting rights-holders are important factors for the new Irish Copyright Act. HP also sees the "status quo" as regards to whether or not Ireland should adopt a "fair dealing" exception as a missed opportunity, given the economic and innovative benefits. In our responses we will expand on these comments, but remain at your disposal should you wish to have any follow up conversations or written submissions.

The Paper clearly invites comment from the whole of the copyright community, however we have responded from a commercial and technological growth point of view only. To that end we have set out below our responses to certain submission questions only.

Submission responses in relation to Paragraph 3

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

Yes, HP believes this would be a good initiative depending upon the objectives and mandates it acquires.

3.11 (8) If so, should it be an entirely private entity, or should it be recognized in some way by the State, or should it be a public body?

Often such questions are answered with some sort of political bias, HP's intention is not to further that discussion. However it seems to us that the most effective system would be to allow the State to have some control over a new Copyright Council of Ireland ("Council") through a private company. The mechanism by which this could be achieved will vary. The most effective in HP's view is that the Minister for the Department of Jobs, Enterprise and Innovation would grant a statutory permission under license to interested parties to set up a private company beholden to the rules as set out in the license grant.

[2] The functioning of private copying and reprography exceptions for digital access to copyright protected content is being reviewed in the on-going mediation process led by Mr. Antonio Vitorino. See: Section 3.3.4. COM(2011) 287 A Single Market for IPR. Please see Exhibit 2

The most recent successful Irish examples of this working are those adopted for the licences granted by the Department of the Environment to establish organizations such as ERP Ireland Limited which is concerned with the management of WEEE in Ireland[3].

In that regard vested interests by the various industry leaders are represented at the board and membership levels. The entity is run as a private company, in order to maintain commercial scrutiny and efficiencies but under license to ensure the charter is aimed at supporting the so called 'Ireland inc'.

HP would be delighted to support such an initiative.

3.11 (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?

Given the recent pronouncements by the Commission regarding the role of collection societies[4], which has called for more scrutiny and tighter controls to be placed on the collection societies, it would seem prudent for the Council to have the ability to control these within the context of all Irish copyright community. To that end it is important that the Council be seen as an objective organization in order to establish credibility for "Ireland Inc" and accordingly the Council must be comprised of all interested parties. International experience such as the Copyright Council of New Zealand, British Copyright Council or the Australian Copyright Council seems to draw their membership from one side of the copyright community or the other rather than having a broad representative body. HP would want to support a broad community membership.

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

HP's view is that the Board should be run as efficiently as possible in order to maximize the effectiveness of the Council in all of its operations. As such the Board should contain representatives from all vested parties as well as independent nominees. However the Board should not be unwieldy and so it is with some marked concern from HP's point of view that the Paper suggests (on page 28) under paragraph 3.12 as set out in the draft Fourth Schedule, that the Board's composition shall be comprised of 13 directors.

A Board of 13 directors in our view would be bureaucratic in nature and would lack the credibility against a fast moving environment. If you consider most commercial boards

[3] SI 340 Waste Management Regulations 2005 (as amended)

[4] Please see the comments contained within the Collective Rights Management Directive comment by Mlex 25th June 2012 as Exhibit 3

would feel "over burdened" by more than 6 directors, 13 is very top heavy and indeed the experience of successful boards is that a limited number of directors is more effective (and cheaper to run). However this does not mean that the various interests of the industry should not be incorporated into the structure. Quite the opposite, in that, clear responsibilities should be assigned within the Directors and the subsequent operations of the Council. These standards and responsibilities are those which should be, in HP's view, ones which are mandated in the License permissions from the respective Minister.

Moreover it is HP's view that industry (manufacturers and retailers of devices / software and cloud service providers) should and must be included within the composition of the Board in order to provide balance across the copyright industry. Perhaps it is the intention of the Paper's proposal that these parties will be represented through the director's serving the public interest? We believe this point should be clarified. HP would be delighted to offer its assistance and nominations for serving in such a capacity.

However in the interests of ensuring the smooth running of the Council it would be our proposal to limit the number of public interest directors to a maximum of three. Furthermore we see an overlap between those who are to serve and represent rights holders and collection societies and accordingly would limit those to one each. This suggestion should be seen within the context of supporting and creating the charter to use the Council to support "Ireland Inc" and having the flexibility to respond to a fast adapting environment.

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

In simple terms the Council should have a broad charter for the furtherance of copyright in Ireland, to include amongst other items awareness of copyright law, fostering EU and International relationships and using copyright expertise as a differentiator for "Ireland Inc". In that regard it should also have a linkage with Government on intellectual property policy.

3.11 (12) How should it be funded?

In HP's view the Council should be self funded. Given the international aspects of the Council's likely activities and handling disputes as we have suggested it is probably not realistic to make this a non for profit organization, but it would make sense to have this goal in mind, and ensure that profits are allocated by way of the license rules such as the proper promotion of Copyright within Ireland.

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

Undoubtedly yes and in fact the establishment of an Exchange should be seen as a priority

in order to foster Ireland's competitiveness. The UK has moved ahead in this regard and sees it as an important competitive advantage.[5]

The European Commission, in response to the fragmented nature of the copyright systems in Europe and in response to the anti-competitive enforcement actions against various collection societies have sought to provide a new alternative in recent months which will reduce complexity and 'sanctionable' practices. In part this has led to the Mediation[6] process being tasked with adopting a transparent and open system for rights holders. The European Parliament has set out its proposals with regards to governance and transparency, which includes control items around "cross border" flow of royalties. For Ireland as a potentially early adopter for a Digital Exchange which embraces the governance and transparency insisted upon by the European Parliament, it will enable "Ireland Inc" to get ahead of the competition especially those who are burdened by the vested interest groups supported by the collection societies. The Digital Exchange should have the mandate to permit rights holders to conclude agreements directly with online service providers (either individually or through a collection society, which is important from an anti-trust point of view) and consumers. The European Parliament and Commission has expressed its view that these direct agreements would be of benefit to the rights holders and give transparency to foster not only pricing but also a voluntary aggregation of repertoire through a system of "European Licensing Passports". This is important in that it is a clear movement away from some sort of centralized portal where collections societies could pool their repertoire and grant multi-country licenses in a single transaction and is to be avoided on anti-trust grounds: Also it also allows the historic device based systems to be retired to a fairer system for the rights holders s.

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

HP's believes this is an essential role to be fulfilled by the Council. ARD will speed up the ability of all parties to find a resolution and will an important access for rights holders to be able to get assessments quickly thus avoiding expensive litigation processes.

3.11(16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

HP would suggest as noted above that the Council should be given authority under legislation for the Irish copyright community.

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[5] *Government policy statement: consultation on modernising copyright* and *BIS press release*, 2 July 2012.

[6] Statement by Mr. António Vitorino on the mediation process concerning private copying and reprography levies (2.04.2012) http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20120402/statement_en.pdf

With respect to a Digital Exchange you will have seen HP's response to question 3.11(13) The Hargreaves review[7] recently returned its report confirming, amongst other comments, its view that a Digital Copyright Exchange was an essential step in policy development. Accordingly it is our submission that the Digital Copyright Exchange should be given legislative backing and be governed within the operational framework of the Council.

HP's belief is that the ARD Service should be permitted as a "forum of first instance" as a matter of legislation, but that the processes and framework should be prescribed more as one of a conciliation forum. It should be within the rights of any party in dispute to revert to the courts, but as a matter of getting an initial adjudication and assessment the ARD Service should be mandated in legislation as a process to be used. Typically in most commercial contracts (at the world wide level) the experience is that parties contract to use some sort of arbitration forum prior to resorting to litigation. If Ireland mandated the use of the ARD Service for copyright disputes as part of the legislative framework, it would provide the comfort to global companies and start-up companies alike with a preferred method of adjudication. Currently there is a trend to move towards US or UK jurisdictionally based contracts largely over cost and language, which means a move away from Ireland. However such a bold move would set Ireland apart as being a center of excellence in the industry whereby technology companies would adopt Irish law as a preferred jurisdiction for their contracts to assess any complaints. HP would be happy to consult further on this point.

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

In HP's View the Controller should be removed from the ARD service and it should not be a function of the Controller.

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

Yes HP believes there should be but has no specific comment on the legislative changes. However it is noted that the District Court in Ireland already has a small claims procedure in place[8]. HP's view is that this is perhaps limited in its scope as regards Intellectual property claims on the grounds that it is aimed at firstly business to business claims, which is not suitable for copyright law in Ireland. Often individuals are the owners of the rights and disputes arise on the illegal exploitation of those individually held rights. Secondly the financial limitation for a claim of €2000 is very low and is normally easily exceeded in intellectual property claims. The UK by contrast has moved to the idea for similar small claims for being around £15,000 (STG), which whilst higher than Ireland is still relatively low. For Ireland to gain an advantage for Ireland Inc we would recommend a limit of

[7] *House of Commons, Business, Innovation and Skills Committee: The Hargreaves Review of Intellectual Property: Where next?, First Report of Session 2012-13, 27 June 2012*.

[8] Order 53A of the District Court Rules

€30,000. We acknowledge however that changes to a number of the courts parameters would need to be revised accordingly.

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

Yes HP believes there should be. This would allow for expertise to be built up and assist with the preferred choice of law question for commercial contracts within the EU as part of building Ireland Inc. As many US multinationals are based here and new software businesses are being attracted to Ireland as start-ups or as international staging posts it is important that this recommendation is taken up to further the Innovation agenda.

Submission responses in relation to Paragraph 4

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

HP's view is that when compared to Civil Law based jurisdictions the general approach of Irish law is broadly the correct one. Those jurisdictions which have adopted a more restrictive approach to copyright through a system of levies have stifled economic activity. We have noted elsewhere in our response some of the issues arising. By way of another example in 2010 the IFPI report noted that the disparities in per capita spend on digital music also highlight that developed markets without market-distorting private copy levy claims have higher digital music spends (USA, Japan, UK, Austria), as well as robust creative industries driving growth and jobs (e.g. the UK Government estimates that 2 million people are employed by the UK creative industry).[9]

We would also add that the commentary regarding the introduction of a fair dealing concept into Irish Law is one which HP would support. It may be the case – although we are not entirely convinced- that the legal position in the EU does not permit a fair dealing concept to be introduced into Irish law. However there may be a compromise which could be introduced where the New Copyright Act would embrace the concept of "incidental use" in a more broad sense than currently described in the draft Act. We appreciate this is a subjective term which could only really be settled through the courts in determining what may or may not constitute and incidental use, but that is no bad thing. From an Ireland Inc point of view it would bring Ireland closer to a fair dealing concept, but would also support the center of expertise policy as part of the Innovation agenda.

4.16 (25) Is there, more specifically, any evidence that copyright law either over- or under-

[9] Nokia analysis based on raw data from IFPI report 'Recorded Music Industry in Numbers 2010'

compensates rights holders, especially in the digital environment, thereby stifling innovation either way?

Perhaps the question should be the other way round. In the new IT age it should be the case that rights holders can directly protect and exploit their own works securely and receive fair compensation as set by themselves. Currently in Ireland this is the general thrust of the Copyright Act, but in fact is open to abuse unless the position is confirmed in law. For example in Europe the levy system has had a massive detrimental effect on consumers, device manufacturers and has led to litigation, expense and a recognized need by Governments to reform the system. It is to Ireland's credit that it does not have a levy system akin to those in Europe and it is HP's belief that this should be maintained. As noted above, those countries which have not adopted a levy system, have benefitted from higher online music sales and thereby encourages more commerce and innovation.

There are a number of studies regarding the impact of levies which HP kindly draws your attention to:-

Profs Legros & Ginsbourgh commented that removing Copyright Levy can create Welfare gain of up to 1.8 BN€ for the EU Economy[10], and

Prof Ferreira commented that 50 Cent are wasted from 1 € Levy from an economical perspective[11] ;and

Prof Kretzschmar Continental Copyright Levy Regimes are deeply irrational;[12] and

Prof Hargreaves stated that " Compensation for Private Copying should be put into the Original Work[13]."

The Paper discusses in some of the suggested drafting for the new Act that copies made through a series of processes should in effect be considered as a single copy for the purposes of any rights holders s ability to recover on an exploitative basis. In our view this is the correct interpretation of the law.[14] Please also refer to our response to question 4.16 (37) and the comments made by the Director General of BEUC with respect to over compensation and consumer harm.[15]

[redacted]

[redacted]

[10] Please refer to Exhibit 1
[11] Please refer to Exhibit 1
[12] Please refer to Exhibit 1
[13] Please refer to Exhibit 1
[14] Infopaq international A/S v Danske Dagblades Forening.
[15] Please see Exhibit 5 hereto.

In a recent Opinion[17], the European Economic and Social Committee (EESC) stresses the unfairness of private copying levy as "private copying is an integral part of fair use". Moreover, the opinion underlines that "it should certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities." (Point 1.5 of the Opinion). In its final point, the Opinion states that a tax levied in order to cover the cost of private copying is based on the presumption of guilt, and that "private copying is a legitimate practice which enables the user to change media or hardware and which should be recognised as a right of the legal holder of the license for use under the concept of fair use" (point 4.6.7).

As long as the damage has not been quantified and not even clearly verified, no tax should be raised to compensate an unknown damage. Some other solutions could possibly solve the "problem" encountered, such as a compensation scheme based on the sale price of the work. That would firstly solve both the issue of the compensation of the alleged loss of creators and the question of who is liable to pay for this compensation, and secondly, that would avoid problems in cross-border sales. All of which supports the idea of a direct rights holder / consumer relationship with a charge applied to a work rather than a device based system.

4.16 (26) From the perspective of innovation, should the definition of "originality" be amended

[16] Article 5 of the Directive 2001/20/EC

[17] Opinion EESC on the "Communication from the Commission — A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe" (6.03.2012) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:068:0028:0034:EN:PDF

to protect only works which are the author's own intellectual creation?

CRRA is generally silent on the requirement for a work to be the author's own intellectual property creation in order for it to be original. In the common law experience there has been a traditionally low threshold of "not copied/ originality from the private author" as being the base line test. In HP's view this has allowed for innovation to occur more easily and is one of the factors for the emergence of large IT companies and why US multinationals look to locate their EMEA headquarters in Ireland. It is one of the building blocks for making the geographical decisions.

But it has already been argued that European case law has created a harmonized definition of "originality" of "author's own intellectual creation." The common law experience would dispute this with the Infopaq[18] decision being distinguished from the Civil law experience. Either way, certainty of what can be considered a copyright work will support the innovation agenda, by virtue of that very certainty. Ireland should not therefore adopt a continental description of originality as this would be more restrictive to the current system and continue with the system which "investors into Ireland" are aware and familiar. Take for example CRRA section 2 which refers to a computer programme as a "programme which is original in that it is the author's own intellectual creation". To change that would be a huge concern to the international employers in Ireland where Software is seen as a key driver of the new economy.

As a separate issue and only in relation to the scope of copyright law as it relates to software your kind attention is also drawn to a recent decision from the European Court.[19] It held that no copyright protection is available for *"the functionality of a computer program ... the programming language and the format of data files used in a computer program in order to exploit certain of its functions".*

The judgment also confirms that reverse engineering of software is legal provided that the conditions of the software copyright directive are met: *"a person who has obtained a copy of a computer program under a licence is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that licence and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program."*

This judgment in essence confirms the existing interpretation of EU copyright law (as set out in the software copyright directive). HP's view is that the New Copyright Act should

[18] Infopaq international A/S v Danske Dagblades Forening

[19] SAS Institute Inc. v World Programming Ltd, Judgment in Case C-406/10

confirm this position and also go further by allowing for a new right for unstructured data analytics to be included as mentioned elsewhere in this Response.

4.16 (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?

Your attention is kindly drawn to a recent study[20] on the impact of copyright policy changes on venture capital investment in cloud computing companies. It was conducted at Harvard University and analyzes the effect on venture capital investment in cloud computing firms of the U.S. Second Circuit Court of Appeals' decision in *Cablevision*. (This decision effectively legalized remote storage DVR/VCR service in the US - there was also a similar decision in Australia last month.)

Here is a summary of the findings
"*Our findings suggest that decisions around the scope of copyrights can have significant impacts on investment and innovation. We find that VC investment in cloud computing firms increased significantly in the U.S. relative to the EU after the Cablevision decision. Our results suggest that the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from $728 million to approximately $1.3 billion over the two-and-a-half years after the decision. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of $2 to $5 billion in traditional R&D investment.*"

These findings and reports are interesting from an Irish perspective. With the advent of Cloud computing and unstructured data analytics it is clear that for Ireland Inc to get ahead of the curve and develop a large I.T. industrial base it needs to ensure its copyright law is capable and flexible enough to adjust to the market place. We would support any initiatives which allow for a new copyright right to exist where unstructured data (even if copyrighted in its own component aspects) when processed through an unstructured data analytical process would result in a copyright right being applied to the resultant output of the unstructured data analytical process. In one sense this might be seen as drawing upon other items such as caching and incidental use, but it is our belief that there is economical value to having a specific protected copyright right for unstructured data analytics. HP

[20] The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies, By Josh Lerner and Jacob H. Schiff Professor of Investment Banking at Harvard Business School, Harvard University, Cambridge,UK.

would be happy to consult further on this point, as it is a key step for Ireland to enable it to cultivate an environment which would allow for the next "massive" IT based business such as Facebook and Google. This is especially the case where the doctrine of fair use is not anticipated to be within the new Copyright Act.

4.16 (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?

HP's strong view is informed from a number of areas within the EEA and further abroad. In short we believe that a system of private copying levies, in whatever form is fundamentally detrimental not only to innovation, industry and consumers, but also to the copyrights holders s themselves. It is on this point perhaps more than most in HP's submission responses which causes HP the greatest concern. The Paper correctly sums up some of the arguments against a private copying levies system and below we have set out some of the supporting factors to aid the consultation process to reinforce that view.

The law – a brief summary

Article 5 of the Directive 2001/29/EC allows Member States to provide an exception for private copying of works protected by copyright upon the condition that rights holders receive fair compensation. The Directive does not however inform or provide Member states with a framework by which they can chose how to ensure that same fair compensation. Perhaps not surprisingly therefore a number of disparate systems and schemes have developed which have resulted in the stalemate and litigation we see in Europe today regarding copyright levies.

The first sentence of recital 39 to Directive 2001/29/EG also answers the question above: "When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available."

Nowadays rights holders s are able to manage the usage of their work in digital areas by, for instance, using DRM-systems. Thus, they have total control of the extent of downloads/reproductions as well as the tradeoff. By this rights holders s can directly claim their compensation for reproductions of their work from the end user/debtor. Levies, that were introduced in the analogue world for lack of control, now lapse in the digital age.

According to Article 17 I, II of the EU Charter of Fundamental Rights the rights holders alone has the right to use his intellectual property and to set conditions for its utilization. This is done by authorizing reproductions, for instance. Such an (implied) authorization

exists if the rights holders approves printing by making a printable version available or if he makes his work available on the internet for free. He then has to anticipate that his work might be printed.

In its "Padawan" decision, the Court of Justice of the Euroropean Union[21] stated that it is clear that the notion and level of fair compensation is linked to the *harm* resulting for the author from the reproduction for private use of his protected work *without his authorisation*. If the rights holder approved the use of his work no harm is caused. Compensation for the prejudice to rights holders s is thus unnecessary. The condition of fair compensation does not exist.

Taking the European legal position together it is clear that there is a need to acknowledge that the obligation to pay any levies – where levies exist – should be based on a proportionate harm based scheme by the consumer to the rights holder directly. Commercial reproductions are excluded from the private levy scheme under Padawan[22]. The forthcoming Mediation process has been convened to try and work through the disparate systems that have arisen with the goal of achieving the following characteristics: -

Future-proof.

Does not hinder the Single Market.

More fairly compensates rights holders s and is fair to consumers, without double-dipping.

Compatible with new business models.

There are a number of indications that across Europe the private copying schemes are in decline having taken note of the debilitating effect on innovation and commerce arisen largely through the device based levy schemes. Governments (and the Mediation process) also acknowledge that the advent of new technologies provide for better methods than some of the current analogue based schemes. For example:-

DIGITALEUROPE believes that licensing agreements should govern all uses of content including private use; and

Spain is now in the process of assessing the best non hardware based system; and

Norway opted for a State budget; and

UK has reaffirmed commitment to remain levies-free; and

Holland froze the system since 2007 and the Government is planning to phase out hardware-based levies system; and

Finland has announced that it will have an alternative by 2013.

[21] Padawan SL./.SGAE (C-467/08)
[22] Padawan SL./.SGAE (C-467/08)

And of course in the Paper the existing position for Ireland is reaffirmed, whereby a levy regime should not be introduced. HP wholeheartedly supports the Papers view that the current legal position is maintained.

Indirect taxation

Copyright levy schemes have been analyzed in many ways, but most, when looking at the subject conclude that it results in an indirect tax on devices and supports the contention of reimbursing rights-holders for illegal copying. Technology is being used all the time which allows rights-holders to adequately protect and recoup the costs of production and of course exploit their creative work and artistic work. Please see the comments in relation to recital 39 to Directive 2001/29/EG above under "the Law – a brief summary" heading. We have also attached at Exhibit 4 an article from Note Entry regarding the indirect taxation of copyright levies which is harmful to economies.[23]

The View from the consumers

The Director General of BEUC, the European consumer group, as recently as March 2012 gave an interview and explained that the systems of levies across Europe is harming consumers between €875 and €1.8bn per year. The article is attached to this submission as Exhibit 5. It is telling that the Director General comments that the existing systems of levies were set up (broadly speaking) in the 1980 and does not cope with today's digital age fairly or adequately:-

"…consumers often end up paying levies to the copyrights holders several times over for the same content. Think of a consumer who buys music from an online store. Though he has paid for the content, it is then saved on a device for which the consumer has also paid private coping levies when he bought it. Consumers are also levied even if they simply store content created by themselves without any intention of involving copyright protected content for private use. It is also a source of great concern that levies are applied to multifunctional devices which are not primarily used for private copying such as mobile phones and digital cameras. "

In answer to the question "*Is the current system compatible with the digital single market*" Monique Goyens commented " *Not at all. Differences between national copyright levy systems have been identified as key obstacles to cross-border e-commerce and major barriers of the establishment of a digital single market."*

[23] Please refer to Exhibit 4 attached.

It is significant to note that the comment from the Director-General endorses the legal position whereby private copying levy schemes have been set up in such a way as to consequently hinder the free movement of goods and services as required by law in the EU.

The EESC ("Committee") recently published in the OJEU a report about the communication from the EC dealing with IP internal market, where the EESC criticizes levies.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:068:0028:0034:EN:PDF

The Committee insists on the need for advance, meaningful consultation of the organisations representing the rights and interests at stake, including those of users and employees; it also underscores the need for transparency and monitoring of the bodies managing copyright and related rights which must take precedence in the proposed system for collecting copyright revenue. As regards the private copying levy, the Committee believes that this is unfair given that private copying is an integral part of fair use. It should certainly not apply to hard drives, printers and similar devices used by businesses in the course of their industrial and commercial activities. Also the levy schemes do not distinguish between those who use devices or storage media for copying or those who copy materials that were licensed by right-holders (e.g. itunes music and Amazon e-books downloads, etc.) and those who don't.

Given the comments and current European situation it would be a backward step for Ireland to put in place a new levy scheme and should in our view push forward in advance of other countries to allow for private copying exceptions and encourage rights-holders to use licensed based protection methods as befits their choice.

Submission responses in relation to Paragraph 5

5. [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?

HP's view as articulated earlier in this response is that the Council should be established.

5. [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?

The only additional points here concern making sure that rights holders are protected by a proper licensed based system administered with full transparency and disclosure. For example collection societies should publish their fees and cost burdens to ensure the rights holder can decide whether to employ a collection society or rely upon his\her own rights licensing scheme directly with the end user. Without this flexibility and governance Ireland

will not create the credibility for a system which supports Innovation and licensed permissions, both in compliance with local and European law.

For the sake of ease we have produced below a summary aid memoire of the Commissions observations[24] with regards to the management of collection societies.

1. Collecting Societies

The draft Directive commences with provisions dealing with the governance and management of collecting societies.

a) Membership: All rightholders are to have the right to authorise a collecting society of their choice to manage their rights for the Member States of their choice and to terminate this authorisation or withdraw any of the rights for the Member States of their choice.

Collecting societies are also required to accept all rightholders as members if they fulfill their membership requirements. Furthermore, they will have to provide mechanisms of participation of members in the decision-making process, allow members to communicate by electronic means and keep updated records of members.

At least once a year, a general meeting of members shall be convened to approve any amendments to the statute or membership terms, the annual transparency report and the auditor's report. They shall also take decisions on:

- The appointment, dismissal and remuneration of the directors
- The policy on the distribution of the amounts due to rightholders
- The use of the amounts due to rightholders
- The general investment policy and the rules on deductions from rights revenue
- The appointment and removal of the auditor

[24] Commission Recommendation2005/737/EC on collective cross-border management of copyright and related rights

Any restrictions on the right of the members to participate and to exercise voting rights can only be based on two criteria: the duration of membership and the amounts received or due to a member.

b) Governance:

(i) Supervisory function All collecting societies will have to establish a supervisory function responsible for continuously monitoring the activities and the performance of the duties of the persons entrusted with managerial responsibilities. Any acquisition of immovable property, setting-up of subsidiaries, acquisitions of other entities, taking-out of loans, granting of loans and provision of security or guarantee for loans will have to be approved by the supervisory function.

However, Member States are free to decide if the supervisory function is required for small collecting societies which do not exceed the limits of two of the three following criteria on their balance sheets:

- Balance sheet total: €350 000
- Net turnover: €700 000
- Average number of employees during the financial year: 10

(ii) Obligations of the persons who effectively manage the business and directors In addition to requiring that managers and directors of collecting societies use sound administrative and accounting procedures and internal control mechanisms, the proposed Directive stipulates procedures must be designed to avoid any conflicts of interest. They shall include:

- An annual individual statement by directors and persons who effectively manage the collecting society to the body entrusted with the supervisory function where any interest, remuneration or amounts received as a rightholder in the collecting society must be revealed
- A declaration on any actual or potential conflict of interest

(c) Management of rights revenue

(i) Collection and use Rights revenue and derived income must be kept separate from the society's own assets and derived income. They cannot be used for the society's own account except for the deduction of its management fees.

Pending the distribution of the amounts due to rightholders, the collecting society can invest the rights revenue and derived income in accordance with the general meeting's policy and the best interest of members. The assets shall be invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole and shall be diversified to avoid excessive reliance and accumulations of risks.

(ii) Deductions Agreements governing the relationship of the collecting society with its members and rightholders shall specify deductions applicable to the rights revenue. Where a collecting society provides social, cultural and educational services funded through those deductions, members must be entitled to them on the basis of fair criteria, even if they have terminated or withdrawn their authorisation to manage rights.

(iii) Distribution The collecting society must distribute and pay amounts due to all rightholders no later than 12 months from the end of the financial year in which the revenue was collected. However, if these amounts can't be distributed five years after the end of the financial year in which the revenue collection occurred, the

collecting society shall decide on the use of them if all necessary measures to identify and locate the rightholders have failed.

(d) Management of rights on behalf of other collecting societies A collecting society must treat equally rightholders whose rights are managed under a representation agreement with another collecting society and its own members.

It shall not apply deductions, other than management fees, to the revenue collected from the rights it manages under a representation agreement unless the other collecting society expressly consents to such deductions.

(e) Licensing Both the collecting society and the user who seeks a licence from it must negotiate in good faith.

Licensing terms are to be based on objective criteria. Tariffs for exclusive rights must reflect the economic value of the rights in trade and of the service provided by the collecting society. Generally the collecting society must, in the absence of a law which establishes the amounts due, base its determination of the amounts on the economic value of the rights in trade.

(f) Transparency and reporting

(i) A collecting society must make available once a year and by electronic means:

To rightholders:

- Any personal data which the rightholder has authorised it to use
- The rights revenue collected on behalf of the rightholder
- The amount due to the rightholder and details per category of rights and types of use
- The period during which the uses took place for which amounts are due
- The deductions made for management fees and other purposes
- Any outstanding amounts due to the rightholder
- The available complaint handling and dispute resolution procedure

To other collecting societies on whose behalf it manages rights:

- The amounts due to rightholders with details
- All deductions made
- Information on the licences and rights revenue pertaining to works included in the repertoire covered
- Resolutions of the general meeting

(ii) A collecting society must also make available by electronic means and at the request of any rightholders whose rights it represents, collecting societies on whose behalf it manages rights and users:

- Standard licensing contracts and applicable tariffs

- The repertoire and rights it manages and the Member States it covers
- A list of representation agreements it has entered into

Furthermore, if requested by any rightholder or other collecting society, all information on works for which a rightholder has not been identified must be provided.

(iii) A collecting society must publish on its website:

- Its statute, membership terms and terms of termination of the authorisation
- The list of the persons managing the business and the directors
- Rules on distribution of the amounts due to rightholders, on the management fees and other deductions and on complaint handling and dispute resolution procedures available

(iv) A collecting society must publish an annual transparency report on its website for each financial year. This report must contain the information requested in Annex I of the Directive and a special report on the use of the amounts deducted must be attached. Annex I sets out a detailed list of requirements, chiefly focused on financial information but including also a report on activities, on remuneration of directors and on deductions for social, cultural and educational services.

2. Multi-territorial licensing of online rights in musical works by collecting societies

(a) Requirements for collecting societies which grant multi-territorial licences for online rights in musical works The draft Directive sets out minimum requirements which any collecting society who wishes to engage in multi-territorial licensing must be able to meet, as follows:

(i) Capacity to process the data needed for the administration of such licences The collecting society should be able to:

- Identify the musical works, rights and rightholders represented
- Use unique identifiers to identify rightholders and musical works
- Take into account any changes of this information without undue delay
- Identify and resolve inconsistencies in data held by other collecting societies granting multi-territorial licences

(ii) Transparency The collecting society shall provide to online music service providers, rightholders and other collecting societies up to date information allowing the identification of the online music repertoire it represents (musical works, rights and Member States represented).

Procedures shall be put in place to enable rightholders and other collecting societies to object to the contents of this data. Furthermore, the collecting society shall provide rightholders with means of submitting information on their musical works or rights.

(iii) Invoicing The collecting society shall monitor the use of online rights in musical works which it represents by online music service providers to which it has granted a multi-territorial licence for those rights and offer to them the possibility of reporting their actual use electronically. Invoicing shall be by electronic means, without delay after the actual use is reported and it shall identify the works and rights which are licensed and the corresponding actual uses. The collecting society shall have procedures in place for the online music service provider to challenge the accuracy of the invoice.

(iv) Payment to rightholders The collecting society shall distribute amounts due to rightholders without delay after the actual use of the work is reported. It shall also provide information to rightholders on the period and the Member States in which the uses took place, the amounts collected, distributed and the deductions made for each online rights and each online music service provider.

(v) Outsourcing Outsourcing of elements of its service by a collecting society does not affect the liability of the collecting society towards rightholders, online services providers or other collecting societies.

(b) Agreements between collecting societies for multi-territorial licensing

(i) Non-exclusive nature Any representation agreement between collecting societies shall be of a non-exclusive nature.
The members of the mandating collecting society shall be informed of the duration, the costs and any other significant terms of the agreement.

(ii) Obligation to represent another collecting society for multi-territorial licensing: A collecting society which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire can request another collecting society that meets the requirements to enter into a representation agreement. The latter society shall accept if it is already granting or offering to grant multi-territorial licences for the same category of online rights in the repertoire of one or more other collecting societies.

(c) Access to multi-territorial licensing If a collecting society does not grant or offer to grant multi-territorial licences or does not allow another collecting society to represent those rights for such purpose by one year after the transposition date of this Directive, rightholders will be able to grant such licences themselves or through another collecting society or other party they authorise.

(d) Derogation for online music rights required for radio and television programmes: None of these requirements shall apply to collecting societies which grant, on the basis of the voluntary aggregation of the required rights, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material produced by the broadcaster which is ancillary to the initial broadcast of its radio or television programme. This provision is explained in recital 35 as being needed because broadcasters generally rely on a licence from a local collecting society for their own broadcasts of programmes which include musical works. What is envisaged here is that the society which grants the broadcasting licence should also be able to grant a multi-territorial online licence for simultaneous or delayed transmissions online of television and radio broadcasts, even if that society does not meet the requirements set out in this part of the draft Directive.

3. Enforcement measures

(a) Collecting societies will be required to make available to their members effective and timely procedures for dealing with complaints and for resolving disputes, for instance as to withdrawal of rights, deductions and distributions.

(b) Member States must ensure that disputes between collecting socierties and users concerning licensing conditions and tariffs and any refusal to grant a licence can be submitted to a court and if appropriate to an independent and impartial dispute resolution body (such as the UK's Copyright Tribunal).

(c) In respect of multi-territorial licensing, alternative dispute resolution bodies are to be available as a means of recourse in respect of disputes between collecting societies and actual or potential online music service providers, between collecting societes and rightsholders, and as between collecting societies.

(d) Complaints procedures are to be set up for members of collecting societies, rightsholders, users and other interested parties to submit complaints to competent authorities with regard to the activities of collecting societies.

(e) Administrative sanctions that will be 'effective, proportionate and dissuasive' are to be available.

(f) Administrative authorities are to ensure that the requirements of the Directive in relation to multi-territorial licensing of musical works are complied with by collecting societies when granting such licences.

(g) Finally, the draft Directive requires exchanges of information between the competent authorities of Member States and the Commission on the development of multi-territorial licensing and requires the Commission to hold regular consultations with stakeholders. The Commission is required to assess whether further steps are needed to address any identified problems.

Submission responses in relation to Paragraph 6

6.7 [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?

HP's view would be to use the opportunity of the New Copyright Act to ensure that technological processes such as analytical unstructured data processes should be allowed as a new exception to copyright, or perhaps rather that they attract their own right despite building upon other copyrighted material. This is a complex technological area and HP would be happy to consult in this area.

Submission responses in relation to Paragraph 7

In relation to submissions (55), (56),(57), (58), (59),(60),(61) and (62) HP's view is that these should all be answered affirmatively and agrees with the submission that these are good inclusions into the new Copyright Act. With respect to submission (55) we would go further and want to support the inclusion of "incidental use" within the definition of "fair dealing".

Submission responses in relation to Paragraph 8

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

HP's strong view is that there should be a new exception for innovation. As a way of enticing and keeping innovation based in Ireland this would be an important step. HP

believes that a specific analytical unstructured search exception would be a positive move for the new Act. HP would be happy to consult on this area further.

Submission responses in relation to Paragraph 10

10.7 [77] (b) Inparticular, should the Irish Government join with either the UK government or the Dutch governement in lobbying at the EU level, either fron a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?

HP's view is formed by its experience internationally and your attention is kindly drawn to other observations in our responses. The fair use doctring would have a beneficial economic impact upon Ireland and also would continue to put Ireland as the "centre of expertise" and experience in the key intellectual property right for the digital age.[25]

Summary

The New Copyright Act and its challenges should be guided by the words from Philippe Aigrain whose book on Culture and the Economy in the Internet Age is a very useful commentary for Innovation and social aspects on cultural demands.

"Many analysts apply outdated models, to new activities, analyzing Internet use with tools that were appropriate to study, for example, the impact of photocopying on book publishing. They thus reduce the use of computers to the action of copying. A similarly misleading viewpoint consists in treating Internet merely as a new distribution channel. Both approaches ignore the new ways of interacting with information, which the Internet opens for everyone. These lead to new practices: listening, viewing, annotating, recommending to others, re-using, tailored programming (as in programming a radio or a TV), remixing, and creation. The Internet, coupled with widespread access to computers, provides an environment in which new cultural practices are developed and appropriated by the public."

Within this context copyright law should embrace a wider and more transparent regime which supports innovation and removes current barriers to creativity. As such Ireland should adopt the Digital Exchange as a high priority with a view to ensuring that this (and other aspects of the copyright community) are managed by the Council in an open and efficient way. It should establisj a legislative framework which allows for new Innovation copyrights (data analytics) to

[25] The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies, By Josh Lerner and Jacob H. Schiff Professor of Investment Banking at Harvard Business School, Harvard University, Cambridge,UK

be created and further a levy free licensed based regime inclusive of broad based private copying exceptions.

There are a number of points raised by the Paper and HP's responses. It is hoped that should any follow up be requried that you wuld not hesitate to contact Hewlett-Packard and the corresponder. In essence HP believes there is an important opportunity to be taken upon the issuance of a New Copyright Act in Ireland and one which will support the Innovation agenda.

Yours sincerely

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Exhibit 1

Articles referred to in response to QU 4.16 [25]

Exhibit 2

Communication from The Commission to The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: An Integrated Cloud Computing Strategy For The European Union.

Microsoft Office
Word Document

Exhibit 3

Communication regarding reports on greater scrutiny of collection societies.

MLex_Content.pdf

Exhibit 4

DOCUMENT PREPATED BY "ENTER" SUPPORTING THE ECONOMIC ARGUMENT THAT A LEVY WORKS AS AN INDIRECT TAX.

Nota Enter 35.pdf

Exhibit 5

ARTICLE WITH DIRECTOR GENERAL OF BEUC, MONIQUE GOYENS MARCH 2012.

BEUC March FY12.pdf