INTERACTIVE **SOFTWARE**
FEDERATION OF EUROPE

Response by the Interactive Software Federation of Europe to the Copyright Review Committee's Consultation on Copyright and Innovation

Introduction

The Interactive Software Federation of Europe ('ISFE'), representing the European videogame industry, welcomes this opportunity to give evidence to the Copyright Review Committee in its continuing consultation on copyright and innovation. ISFE's membership comprises major international game publishers, together with national trade associations that in turn represent both national and international game publishers. The three main manufacturers of today's videogame consoles are also members of ISFE. The videogame industry is the fastest growing of Europe's creative sectors and is a major employer across the EU, including Ireland. The industry regards Ireland's young and highly educated population and its government's focus on encouraging technological development as potent engines for future investment, innovation and growth.

We would like to respond to the Copyright Review Committee's specific questions set out in Appendix 3 to its Consultation Paper as follows:

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

The Committee's broad focus does seem to be the right one for this Review. However, the Committee's Terms of Reference appear to proceed on the premise that there is a conflict between protecting creativity and promoting and facilitating innovation, and that a better balance between the two needs to be found. We believe that this is a false premise. The protection of creativity is precisely what has and always will promote and facilitate innovation, growth and employment.

The current Irish copyright and other IP laws encourage innovation and are largely fit for purpose. They support a vibrant market for technology, creativity, innovation and growth, among a wide spectrum of companies and industries.

The videogame industry's successful and ongoing innovations and its unparalleled growth have been founded on the certainty provided by copyright law. While ISFE certainly favours the adaptation of copyright law to keep pace with technological development, we believe that this should never be at the cost of undermining the certainty provided by existing legal structures that we regard as vital to the legal underpinnings of the innovation, development and distribution models that are the essential features of the industry today.

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

We believe that there is indeed sufficient clarity about the basic principles of copyright in Irish and EU law. In the ten years or more since the introduction of CRRA and the 2001 EU Copyright Directive and given the level of technological development, innovation and change there has been a negligible level of uncertainty evidenced by litigation or other legal challenges in Ireland or at EU level.

(3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

N/A

(4) Is the classification of the submissions into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions – appropriate?

The categories appear to constitute a useful classification with which to organise the submissions received and the consultation paper. As the paper acknowledges, however, they "are neither hermetically sealed nor mutually exclusive" especially as creativity and modes of innovation and exploitation develop in tandem with the advent of new technology. Games companies, for example, increasingly provide services that allow gameplay as opposed to simply solely providing games themselves.

(5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?

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

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

A Copyright Council would be helpful as a forum to discuss issues of mutual concern between rightholders, we believe that this should be facilitated through voluntary co-operation between those righsholders.

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

The Council should be recognised by the State and should be a private body.

(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?

It should involve rights-holders and their authorised representatives only.

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

This should be a matter for the membership of the Council.

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

Regular review of the creative, legal and business environment for copyright creation in this country and the submission of related views to government.

(12) How should it be funded?

It should be funded by membership.

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

A Digital Copyright Exchange might prove useful for some rights holders and users, but it should in any case be voluntary, and should recognise and encourage existing and future licensing mechanisms in different sectors and for different users. Copyright licensing should remain at the full discretion of the rights holder, as provided for by the international copyright system including treaties such as the Berne Convention.

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

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

The existing systems run by the Controller of Patents and Trade Marks could better fulfill this role if the role is updated and properly resourced.

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

The Exchange should not be legislatively established though the Council would benefit from statutory recognition. As stated above an ADR service is better run under the aegis of the Controller.

(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?

It seems strange that given the long established role of the Controller in the area of Copyright that this subject is not included in the name. The powers of the office seem adequate at the present time.

(18) Should the statutory licence in section 38 CRRA be amended to cover categories of work other than "sound recordings"?

We do not favour such an extension.

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

The ADR Service should be run by 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?

A small claims copyright jurisdiction in the District Court could be useful for small copyright and even trademark cases involving direct copying.

(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 the established IP jurisdiction of the High Court to be be the appropriate forum for the resolution of most copyright disputes, We leave the matter of necessary legislative changes to bring this about to those more qualified to comment on it.

(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?

See response to Question 21 above.

(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?

We have not seen any evidence of this type.

(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?

We do not agree that current Irish copyright law discourages innovation and feel that it rewards and protects innovation as currently constituted.

(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?

Although digital technology improves means of production and delivery, ease of distribution can make existing business models less secure and less remunerative and therefore sometimes act as a disincentive to invention and innovation

(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?

No

(27) **Should the sound track accompanying a film be treated as part of that film?**

Yes

(28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?

(29) Should the definition of "broadcast" in section 2 CRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?

(30) Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?

(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?

We do not believe that the definitions of broadcasting and cablecasting should include Internet activities, as this could lead to ill-conceived, negative and unintended consequences.

(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?

We believe that rampant online piracy of intellectual property to be the greatest threat to innovation in our society today. Ensuring that IP rights are protected and properly and effectively enforced provides industry with the certainty it requires to invest in the research and development that leads to innovation, growth and employment. Content creators need to feel secure that they will reap the benefits of their creations.

The remedies available in Ireland already reflect some best practices that should be promoted among other EU Member States, such as provisions for aggravated and exemplary damages and strong copyright presumptions.

(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.

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

N/A

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

N/A

(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?

N/A

(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 agree with Ireland's lack of a private copy levy system. The EU Copyright Directive clearly anticipates that levies could be phased out as it states (inter alia) that levies should take account of the existence or otherwise of copy protection measures. Even if levies are warranted, which they are not, they are an imperfect and unjust concept and are currently imposed in an inconsistent, fragmented and distorted way throughout the EU. Our members do not participate in copy levy systems or receive copy levy revenue as under EU law, no private copy of a game, being software, is possible.

(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?

(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?

(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? DM

While the case for these immunities may indeed have been weakened by technological advances, this has not yet occurred to a degree that they should be modified or abandoned. The co-operation of Internet intermediaries is essential to combat increasing online piracy and efforts to encourage such co-operation must be maintained. However, we do not believe that the liability exemptions in Articles 12-14 of the Directive should be destabilised or re-balanced at this time.

(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?

We do not believe that the immunities should be expanded at this time.

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

The immunities should only provide defences to claims for damages. Injunctions and other remedies should always, we believe, remain available to rights holders.

Like the other content industries, our industry suffers serious economic damage from widespread illicit file-sharing on P2P networks. In addition, and increasingly these days, the threat comes via other channels, such as the rapid growth of "linking sites" used to distribute links to pirate files hosted on "one-click hosting sites" or "cyberlockers". Casual infringements, consisting of otherwise law-abiding people worldwide downloading tens of millions of pirate copies of video games every month, are now exacting a far greater toll on the industry than in the past. This toll is a notorious example of what has been called "the tyranny of small decisions that have ruinous economic consequences".

We believe that the cooperation of ISPs is integral to any solution to this growing problem of online piracy. As expressly recognised in Recital 59 of the Copyright Directive, such intermediaries are best placed to bring infringing activities to an end.

Experience has, however, demonstrated that if they are not legally obliged to prevent their networks from being used for illegal purposes, ISPs will generally not do so, and that those that do will be at a competitive disadvantage.

(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?

See response 42 above

(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? DM/DS

This will depend entirely on the amendments being considered. However, we would be opposed to any changes that would require or provoke a general re-opening of the EU Copyright or e-Commerce Directives.

(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?

There is probably no good reason why a single link to copyright content, by itself and without more, ought to be considered as an infringement of copyright in that content. The content itself might not, of course, be infringing and the link may well be welcomed by the owner of the copyright in that content. In the case of infringing content, however, a link, however innocent, merely furthers and facilitates infringement.

The wholesale use of such links to facilitate the downloading of pirated content by millions of users worldwide has become an enormous problem for all of the content industries. Linking sites feature one-click links to millions of infringing files that have been uploaded by users, and that are stored on hosting sites or 'cyberlockers.' These links are posted by users who are generally "members" of, or affiliated with, the linking sites concerned. The videogame industry finds several million illegal game files on hosting sites every year and routinely sends electronic requests to the administrators of these sites to take down the infringing material. Despite such takedown efforts, infringing files on hosting sites are accountable for a significant and rapidly growing segment of illegal file downloads on the Internet. The industry finds tens of millions of links to such infringing game files that are stored on various cyberlockers.

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

In general in EU Member States, providers of hyperlinks and search engines are not subject to any special liability regime, but they can be liable in appropriate circumstances for copyright infringement and/or secondary or contributory copyright infringement.

Some member states have enacted a specific 'safe harbour' or limitation on liability for providers of hyperlinks. We do not believe that such a limitation is necessary, and we think that it is potentially dangerous.

While there are, of course, legitimate providers of links and search engines, other providers have a business model that consists of deliberately and systematically making infringing content available through the provision of links, and these providers then seek to argue that they should not be liable because they do not host infringing content on their servers.

We believe that an expansion of the current set of safe harbours to include providers of links and search engines would risk providing even further opportunity for these illegitimate operators to flourish.

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

Any such provision should, in our view, be a stand-alone provision.

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

Not to our knowledge.

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

N/A

(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?

N**/A**

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

N/A

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

We do not support any expansion of the existing immunities at this time**.**

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

N/A

(54) Does copyright law pose other problems for intermediaries' emerging business models?

Not to our knowledge.

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

No, certainty is this area and within copyright law in general is needed more than ever in the current environment. Such changes would increase uncertainty.

(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:
(a) reproduction on paper for private use
(b) reproduction for format-shifting or backing-up for private use
(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research
(d) reproduction for persons with disabilities
(e) reporting administrative, parliamentary or judicial proceedings
(f) religious or official celebrations
(g) advertising the exhibition or sale of artistic works,
(h) demonstration or repair of equipment, and
(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?

We would note that exceptions are not permitted for computer programs (including video games and interactive entertainment) unless specifically mentioned in the list of exceptions provided for by the 1991/2009 Directive on the Legal Protection of Computer Programs. The Copyright Directive makes clear that "Articles 5 and 6 of that [Computer Programs] Directive exclusively determine exceptions to the exclusive rights applicable to computer programs." (Recital 50) All the above exceptions were listed in the Directive pursuant to a desire at the time of finalisation of the text that all national exceptions were covered. This is not the same as a desire to introduce all national exceptions in every EU territory. Introduction of any such exception must therefore be considered on its own terms in each case.

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

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

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

N/A

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

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

We see no need to introduce such an exception which would require the reopening of EU legislation and the undermining of stable, workable market expectations.

(62) Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict an act permitted by CRRA?

Any proposal to make all copyright exceptions mandatory and to override contractual provisions that deal with such issues, would be unwarranted, ill-advised and inconsistent with longstanding Irish and EU law and international practice.

(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?

(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?

(65) When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licences?

We are against the imposition of compulsory licences which we see as a devaluation of the fundamental rights of the creator. Any perceived need for statutory licences will be reduced as rights management techniques continue their rapid development.

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

No. Such an exception would clearly suggest a conflict between copyright protection and innovation. We don't believe that any such conflict exists, or that there is any need, justification or useful purpose for such an exception.

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

N/A

(68) Should the occasions in section 66(1) CRRA on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in the work be extended to permit publication of such a copy in a catalogue relating to an exhibition?

N/A

(69) Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collection of a heritage institution?

N/A

(70) Should the fair dealing provisions of CRRA be extended to permit the brief and limited display of a reproduction of an artistic work during a public lecture in a heritage institution?

N/A

(71) How, if at all, should legal deposit obligations extend to digital publications?

We do not agree with a compulsory deposit obligation

(72) **Would the good offices of a Copyright Council be sufficient to move towards a resolution of the difficult orphan works issue, or is there something more that can and should be done from a legislative perspective**?

N/A

(73) Should there be a presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work iself, unless the contrary is expressly stated?

N/A

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

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

“Security assessment” is regularly used as an excuse by those who hack the TPMs used by our members to protect their IP rights. We would not support any such exceptions.

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

N/A

(77) (a) What EU law considerations apply? (b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine? DS/DM

We believe that the Irish government should not join with any other EU governments to lobby for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine.

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

See responses above

(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?

Our industry has seen how those who are opposed to copyright and to the use of TPMs to protect copyright have sought to use “fair use” arguments to justify the hacking and defeating of game console Technical Protection Measures.

(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?

We believe that fair use amounts to an unclear and unwelcome doctrine because it leads to unnecessary, unpredictable and costly litigation.

(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?

Yes

(82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

N/A

(83) (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it? N/A (b) In particular, how appropriate is the draft section 48A tentatively outlined above?

N/A

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

Yes

(85) Should sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?

(86) What have we missed?

Measures to Combat Online Piracy

The co-operation of Internet intermediaries is essential to combat increasing online piracy and we believe that efforts to encourage such co-operation should be maintained. Practical, effective and proportionate measures to address mass online infringement could be developed and implemented through cross-industry cooperation and dialogue.

Internet intermediaries should be required to maintain and enforce “repeat infringer” policies as well as their own terms of service with their customers. Their failure to do so in many cases undermines the entire value of such terms and their oft-repeated claims to value and respect IP rights.

Traditional hosting providers (that host and connect websites to the Internet) frequently fail to verify the identity of their customers and as a result often host anonymous websites that have registered with false or insufficient identity details and that pay through anonymising payment providers.

Such hosting providers should be required to verify their customers' identities, which would enable rights holders to hold the responsible persons liable. Such providers should also be required to suspend services to customers who have registered with false or insufficient identity details as soon as they become aware of such false registration.

Data Protection

We believe that it is vital that the enforcement of IP rights online is not jeopardised by disproportionate use of data protection provisions to protect those infringing copyright. The Internet has introduced entirely new entertainment experiences and provides for a cost effective development and distribution channel for the videogame industry which must be allowed to continue to develop.

Civil enforcement by rights holders against online infringers has been rendered virtually impossible in some EU Member States due to overly restrictive interpretations of privacy and data protection laws. In Italy, for instance, the Data Protection Authority has ruled that the systematic monitoring of P2P users and the collection of their IP addresses is illegal under the Privacy Code and the EU Privacy Directive.

We believe that legislative steps should be taken at EU level to make sure that the public interest in ensuring an adequate level of data protection is properly reconciled with other important public policy objectives, such as the need to combat illegal activities and to protect the rights and freedoms of third parties. As the right to property, including intellectual property, is a fundamental right, it should not be secondary to the right to the protection of personal data. We fully acknowledge the importance of the right to the protection of personal data, but pirates should not be allowed to hide behind data protection laws so as to protect their illegal actions. Member State governments should be required to clarify the ability of rights holders to gather non- personally identifying IP addresses through appropriate tools, and consistent with the European Court of Justice decision in the Promusicae v. Telefonica case, to provide appropriate mechanisms to facilitate the ability of rights holders to obtain the necessary information related to such IP addresses in order to take appropriate civil actions to protect their rights in the online environment.

We would like to have assurances that the proposals contained in both the EU's Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, will not in any way prevent the effective implementation of any IP enforcement measures. There is concern that the proposed regulation could have an impact on the effective implementation of IP enforcement measures operating in member states. ISFE would therefore like clarity on whether a legitimate interests exception would still apply to the processing of the data of an alleged copyright infringer, without the data subject's consent. ISFE believes that obtaining consent from individuals under investigation from enforcement bodies would likely compromise such operations.

We also believe that it would be helpful to get greater clarity as to whether IP addresses are, without any other identifiers, personal data per se. The definition of personal data remains "directly or indirectly identifiable data". We therefore question whether IP addresses collated by third party Internet scanners should be regarded as personal data when the IP address will not be used to identify the individual.

Damages

It should be clear from the massive growth in the levels of counterfeiting and piracy that damages awards have not effectively dissuaded infringers from engaging in illegal activities. In addition, or as an alternative, to actual damages, we believe that consideration should be given to allowing courts in EU Member States to award a sum based upon a pre-established tariff, set at a figure sufficiently high to compensate the rights holder and the public purse, and to act as a deterrent. Such pre-established damages are particularly important where infringers have eliminated evidence, making it virtually impossible to determine actual damages.

Should you require any clarifications on the above responses or any further information, please do not hesitate to contact us.

ISFE Secretariat
Rue Guimard 15
1040 Brussels

www.isfe.eu

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