Internet Service Providers Association of Ireland

Response to the Consultation Paper of the Copyright Review Committee

General Introduction

The ISPAI is an industry association representing businesses in Ireland which provide publicly available Internet infrastructural and electronic services to customers in Ireland and abroad. The Association deals with regulatory and legal issues which potentially impact the ISP business environment and affect all our members. As part of this, the ISPAI coordinates ISP industry self-regulation, administers the industry code of practice and ethics, and runs the Hotline.ie service. The Hotline supports ISPAI members in complying with Irish/EU law by responding to notices of illegal content and assisting international cooperation in the area.

The principal aims of the Association are:

- To promote accurate and unbiased media coverage of the Internet Service Providers and users.
- To provide a focal point for discussion with political groups and others likely to impact the industry.
- To establish a Code of Practice for service providers.
- To establish accepted standards of service and a uniform code of practice acceptable to members.
- To sponsor research into trends likely to affect Internet Service Providers.
- To communicate to members, issues and developments relevant to the industry, and to foster communications between members.
- To encourage an open and competitive environment, and to resist anti-competitive policies and practices.
- To address any technical issues of specific relevance to the Irish Internet Community.
- To foster co-operation with related organisations worldwide.

ISPAI Response

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

Yes, we at the ISPAI believe it is appropriate to focus on the economic and technological aspects of entrepreneurship and innovation in this Review. Since the European copyright legislation in this area was drafted, and indeed since the CRRA was signed into law in 2000, technological advances have been huge. These laws were not drafted with this in mind, and have thus proved problematic, for all of the stakeholders involved. It is vital that this is addressed, in order to create a sustainable and proportionate copyright environment where entrepreneurs and innovators may thrive.
Whilst, the CRC paper makes consistent reference to entrepreneurship, innovation and technology throughout, it equally refers to its evidence based approach and asserts the need for economic and other evidence upon which to base any changes which may be introduced. The ISPAI feels however

that it is extremely difficult to establish actual evidence any kind of a direct link between innovation or lack thereof, and the current copyright framework, without being somewhat hypothetical or anecdotal, and we wish to highlight that point with the Committee. We do feel that the CRRA in its current form is indeed a barrier to innovation, and we will endeavour as best we can to convey this in an evidence based fashion, as far as practicable. We cannot show a causal link between the CRRA and innovation, and Ireland is so small in terms of the global Internet development, yet we feel this is evident for example in the lack of Irish innovation in the content area and the lack of home-grown content applications as compared to other online areas where Ireland has punched above its weight, for example e-government and e-trade.

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

The general basic principles are clear but more clarity is required in applying these general principles in such a way as to create laws that are flexible enough to accommodate technological advances, and keep pace with such modern technologies.

We also feel that a general principle or objective of stimulating innovation should be present. The flexibility which is required to create a space where such innovation can occur is not currently there, and a general principle to encourage this would be particularly beneficial, especially in the current economic climate.

(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?

We believe it would be advantageous to consolidate all amendments into one single piece of legislation.

(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 ISPAI feels that the classification into these six categories may have been suitable for the purposes of drawing up a succinct set of questions to pose to stakeholders, however we feel it is most important that the overlap between these categories is acknowledged. It should also be acknowledged that as well as the overlap, there may in fact be distinct groups within each category. For example, as was very eloquently put by one audience member at the Digital Rights Forum whose organisation acts on behalf of numerous rightsholders, not all rightsholders are represented by the larger corporations such as EMI and Sony to name a few, and in fact strongly disagree with the approach and views of these corporations. It would be a false premise entirely to assume that each category has its own unified interests which are exclusive of those other categories'.

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

We feel that creative artists are not represented in the Committee paper, however it is not appropriate for the ISPAI to expand further on the needs of this category. We do feel though, that a creative artist can be very different from a rights holder and they can have very different interests. Creative artists are constantly seeking to create new works, and wish to embrace new business models using technology.

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

The legislation must be sufficiently flexible so that it may be adapted to developing technologies but at the same time, must be certain, clear and predictable. Legal certainty is something that is hugely important to innovators and potential new businesses which may wish to locate in this jurisdiction. Furthermore, the law should be proportionate so that it is not over-burdensome on one particular stakeholder over another.

This area must not be overregulated and focussing on stricter enforcement alone is not the appropriate route. Fortunately, this review has a broader focus and all of the exceptions which are permissible under the EU legal framework, and not currently available in this jurisdiction, should be introduced into Irish legislation, in order for us to realise our potential as a forerunner in technology and innovation.

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

The ISPAI agrees with the sentiments of a Copyright Council, and would support this if it was to have equality of representation of stakeholder categories, to include Internet Service Providers.

(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 ISPAI does not have a view on whether this should be a public or private entity, but this would obviously depend on its role and powers.

(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?

Its membership should be as broadly based as possible equally representing all interested parties.

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

This would depend on the function of the Board. Ideally, the Board would draw from its wide-ranging interests. It should represent the public interest, industry and other stakeholders, and have an independent Chair.

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

Its principle objective should be to provide a forum for the discussion of issues raised by copyright law and their impact on enterprise and innovation and it should have an educational and awareness function.

(12) How should it be funded?

It would ideally receive government funding in order to maintain impartiality, but the ISPAI recognises the difficulties with this. In the absence of government funding, we acknowledge that this would ultimately be a self-funding organisation, through membership fees and the generation of funding through other various actions as per the Committee paper. The ISPAI would however be

concerned about any imbalance which may arise as a consequence of larger fee paying members exerting a more powerful influence in the organisation.

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

This is outside the scope of our submission.

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

This is outside the scope of our submission.

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

Yes, though this would depend on how the Council is formed. If it were a Council with rightsholders making up the full membership, then the ADR service would not be impartial.

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

If the Council is to be formally recognised, this will need to be included in legislation but minimally. The Exchange and ADR Service should be legislatively prescribed however.

(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?

This is outside the scope of our submission.

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

This is outside the scope of our submission.

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

This is outside the scope of our submission.

(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?

If the introduction of a small claims copyright jurisdiction would mean that rights could be vindicated in a more efficient and cost effective way then the ISPAI would support this. Ideally, a copyright holder should be in a position to seek redress without having to incur huge legal fees, against persons infringing their intellectual property rights. The wrongdoer alone should be at the receiving end of any hypothetical lawsuit.

Under the current framework, the cost of access to the courts to obtain the kinds of court orders necessary for this is notably high. The costs of obtaining these injunctions versus the recompense obtained has meant that rightsholders have turn their attentions toward innocent access providers seeking injunctions to block websites, filter traffic on their networks, or implement a "three strikes" system. There has developed a perception in recent years of ISPs as 'defendants' in prominent copyright cases, when the reality of the matter is that they are merely the data administrators. If a District Court were to have a small claims copyright division, and actions could more easily be taken against the perpetrator of the alleged copyright theft, this would alleviate the need for such injunctions, and not force ISPs into an unworkable position.

There is also a downside to this type of scenario since many individuals or small businesses will not be in a position to defend claims in copyright litigation, whether defending their own intellectual properties or defending allegations of infringement. This may perpetuate the imbalance which already exists between the larger corporations and the smaller business owner or user. It is also difficult to define the types of cases which would benefit with a small claims copyright jurisdiction, so to legislate for this would be difficult.

(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?

As above.

(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?

A copyright holder should be able to obtain the requisite information to identify the infringer, by court order only, without having to do so in the High Court where the costs are preclusive.

It would be advantageous to define and put in place safeguards to prevent frivolous claims, through standards of evidence or otherwise.

(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?

There most definitely exists an imbalance between rightsholders and the public interest as a result of the current copyright framework. It is difficult to emphasise this by means of economic evidence as opposed to anecdotally.

[paragraph redacted]

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Another example is the litigation offensive which has occurred against the large access providers in this jurisdiction. There exists a public interest in net neutrality and promoting an open Internet, which comes under threat when intermediaries are made responsible for something which is beyond their control. This affects the ability and the willingness of these companies to be innovative, and to roll out new infrastructure if the constant threat of litigation lingers, thus stifling development and innovation.

(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?

As above.

(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 not specifically addressed in the Committee paper, the Statutory Instrument which was signed into law in February, is now part of the copyright framework in this jurisdiction, and it must be highlighted that this has created an environment where all of the rights have essentially been accorded to the rightsholder, and other stake holders have been placed in an impossible position. This bestows a large amount of control on them at the expense of users, entrepreneurs, innovators, intermediaries and so on, in a very unbalanced manner. Again it is difficult to indicate this evidentially, but the chain of events that led to the introduction of this SI, and it's consequent signing into law, is testament to the level of control and influence exerted by gargantuan record companies, who contrary to popular belief, do not represent the interests of a vast majority of intellectual property rights holders.

(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?

This is outside the scope of our submission.

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

This is outside the scope of our submission.

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

Yes. An unintended perpetual copyright is never in the public interest.

(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?

The ISPAI believes that it may be advantageous to extend the definition to include online services, or to allow for some online transmissions to be treated as broadcasts for copyright purposes, similar to the UK. Different rules should not be accorded to a broadcast, simply because it occurs on two different platforms. However this may not apply to online transmissions. This shift has been recognised to an extent already, where for example, Minister for Communications Pat Rabbitte has suggested that the television license fee be replaced by a single broadcasting license fee which does not depend on the ownership of a particular device.

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

In order to make the CRRA as platform-, medium-, and technology-neutral as possible and as future-proof as possible, the ISPAI feels that legislating for a general set of principles may be the way forward. We feel that legislating for exceptions is the wrong approach here, as it is impossible to anticipate what developments will inevitably occur in the coming years.

(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?

In the context of innovation, the ISPAI believes it would be unwise to create more restrictions, which may become barriers to innovation somewhere down the line.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

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

They may be remedied in a small claims court process per Q20.

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

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(40) Has the case for the caching, hosting and conduit immunities been strengthened or weakened by technological advances, including in particular the emerging architecture of the mobile internet?

The case for the above immunities has indeed been strengthened by technological advances. Copying is an integral part of legitimate Internet use, and cloud computing technologies amplify this. The importance of the Internet and technology cannot be overstated. The Internet Service Providers who provide the technical infrastructure of the Internet itself, and access to this invaluable resource, could probably not exist if the law did not protect them from liability for the copying which is technologically required in the provision of a legitimate service, or for abuse committed by their users.

It is important to strike the correct balance, so that the development of online businesses, whose innovation is stimulated in the knowledge that they will be free from liability in such cases, may continue. It is also necessary to embrace the technological advances which we are currently experiencing all around us, with new business models and flexible laws which can be adapted to the online environment.

Ireland has secured many large international online businesses to locate here. There are also many successful indigenous online companies servicing international markets. Together they account for a sizeable chunk of our export revenues. These companies utilise the Internet infrastructure of ISPAI members, as do the Internet using public. The ISPs and many of these online service companies have business built on handling data or content belonging to other people. The whole sector is very buoyant, provides many thousands of jobs in Ireland and is bucking the recessionary trends and to jeopardise these immunities would have disastrous consequences for such businesses.

(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?

The problem is that we cannot anticipate future developments, and as described above, the legislation must be drafted in a principles-based fashion to create a space where such developments can flourish.

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

The immunities should provide defences to all available remedies in the case of the kinds of intermediaries which do not play an active role in facilitating infringements (see answer to subsequent question). This further highlights the difficulty which exists around the lack of a definition of intermediary, or perhaps more appropriately the lack of a differentiation of the different types of intermediaries.

Firstly, an Internet access provider, sometimes inappropriately and incorrectly referred to as the 'gatekeepers of the Internet', should never be liable for damages paid to a copyright holder for the infringements of those people using their infrastructural services. Furthermore, they should not be injuncted to install costly filtering and blocking systems on their networks. The Internet infrastructure is a fragile one, and to tamper with the actual hardware of the Internet to deal with an issue such as copyright infringement is the wrong approach. Rather, the ends of the network should be used to intervene in such cases. Short term cosmetic pseudo-solutions such as DNS blocking should not be forced upon ISPs, because they interfere with the workings of the Internet, they are easily circumvented, and they are a waste of resources which could be used to implement a more long term and realistic solution. The topic of openness on the Internet and net neutrality is outside the scope of this consultation. However, as a neutral 'mere conduit' service provider, it is necessary that they be immune from these types of remedies, which according the CJEU in the Scarlet SABAM case, interfere with their right to conduct a legitimate business.

Those kinds of intermediaries, such as the indexing and referencing services of *Newzbin* or *The Pirate Bay*, for example, who play an active role in facilitating an infringement, may not be immune from any of the remedies. It is therefore necessary to distinguish between these different types of intermediaries, and to be clear and precise as to which intermediaries exactly these defences may apply.

(43) Does the definition of intermediary capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?

European case law differentiates between hosting providers, access providers and index and search providers and the courts have treated each category very differently. Those intermediaries who play a neutral role will generally enjoy the protection of the 'mere conduit' safe harbour, while the more active intermediary will not. Furthermore, European legislation, which states that injunctions should be available against intermediaries whose facilities are used by third parties for infringement, does not specify clearly which kinds of intermediaries it is referring to. This legislation was drafted long before the Internet as we know it today, and web 2.0, with its huge amounts of user generated content, was in existence.

The term ISPs encompasses not only Internet Access Providers who provide the 'mere conduit' over which information flows on the network but also includes indexing and search services which are actively facilitating (or in other words aiding and abetting) illegal file sharing as opposed to inadvertently enabling misuse, and hosting providers which lease server space to their users. The courts treat these very differently. The approach of the courts has usually been consistent in Member States in relation to its treatment of index and search providers. For example, *Newzbin* is a search and indexing site which was held to be liable for primary and secondary copyright infringement in the UK. *Newzbin* provides a specific form of indexing services for the Usenet system, in such a way as was deemed to facilitate infringement.

The intermediaries which provide space on their servers to their subscribers, to allow them to connect a website to the Internet for instance, are known as host providers. A host provider does not make available its own content but instead merely provides a third party with connectivity by technically enabling them to publish their own content. It can be confusing because sometimes access providers also offer hosting services. When you add social media sites where the site user generates the content, or bulletin boards such as *boards.ie*, to the mix it is hardly surprising that the waters muddy.

To further confuse the matter, the referencing service provided by *Google Adwords,* was held by the CJEU to be an 'information society service' within for the purposes of the E-Commerce Directive. Whether they were exempt from liability depended on whether they played a neutral role. In other words, "merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores"[1]. If the service provider has not played an active role then it "cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned"[2]. Thus a service provider, provided that they do not have knowledge of the infringing activity they will be allowed to avail of the article 14 hosting exemption. This then raises the question of what exactly is knowledge. A claim from a rightsholder without evidence to back this up should not amount to knowledge. This is perhaps something which could be discussed by interested parties in the Copyright Council if one of its functions was to formulate notice and takedown procedures. The ISP industry would of course require proper representation in such discussions.

This neutrality based test was again advocated in the subsequent case of *L'Oreal v Ebay,* when it was recognised that liability is not automatic but that if the operator of an electronic marketplace provides a service that is not "merely technical and automatic" and has played an active role having knowledge of, or control over, the data in relation to the goods offered for sale, they cannot rely on the article 14 exemption.[3]

When it comes to access providers, and orders to implement blocking measures, there have been divergent court opinions from Member State to Member State. Generally however, a principle of proportionality must be adhered to. Specific national copyright provisions differ from country to country also. It is the opinion of the ISPAI that access providers should not be forced to implement blocking systems, however if these systems were to be imposed, it should be on a statutory basis, as part of well thought out legislation and the intermediary must know with certainty what is required of him. It is also the opinion of the ISPAI, that the different types of intermediary, depending on their level of activity in the infringement, should be differentiated in the legislation to provide the clarity and legal certainty which is currently lacking.

(44) If the answers to these questions should lead to possible amendments to the CRRA, are they required or precluded by the E-Commerce Directive, EUCD, or some other applicable principle of EU law?

Per the submission of Simon McGarr et al, the European Directives establish a floor and not a ceiling and as such extension is permitted.

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[1] Joined Cases C-236/08 – C-238/08

[2] Joined Cases C-236/08 – C-238/08

[3] Case C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay (UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi* [2011] ECR

(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?

ISPAI does not believe that linking should amount to a copyright infringement.

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

Yes, we believe that the law should provide for this.

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

As we have explained above, with innovation in mind, it is not the correct approach to legislate for exceptions but rather to legislate in a principles-based fashion. A broadly defined fair use policy could include linking, in its various forms. Since there are different forms of linking, different rules may apply. For example if a webpage embeds an image, as a link, without citing the source of the image, thus giving the impression to users that this image is their own, then this may not be accepted as fair use.

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

It is not currently flexible enough to allow for maximum innovation. The law should also be sufficiently clear in order to provide a legally certain framework within which the innovators can operate.

Again, evidence of this is counterfactual.

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

This is outside of the scope of our submission.

(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?

Some of the most successful tech companies such as Twitter, Facebook and Google, have made huge innovations by rearranging the way existing information is made available and accessed. Although Ireland has been successful in attracting some of these companies here to date, this is largely the location of choice for back-office functions only and we currently have the opportunity to create an environment which will attract the content and data processing sides of these companies too. Marshalling of news and other types of content provide many and varied possibilities for emerging online business models. The ISPAI believes that the marshalling of news and other content should not be an infringement of copyright. We recognise that there may be issues with citation etc, which must be ironed out in order for this to be workable.

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

We do not think there is a 'best blend' due to the diversity of possibilities which fall under the broad term 'marshalling'.

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

As above, this could be provided for in a broadly defined fair use type policy.

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

As per the Google submission, the language could read something like 'It should not be an infringement of rights under this Act, where an online party provides the public with headlines or insubstantial portions of news reports as an adjunct to providing links to the news report itself'.

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

Yes. The restrictive nature of the existing framework has a chilling effect and discourages new business models from being created due to the risk of litigation. Again, evidence of this is counterfactual.

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

Yes. This would alter the closed ended definition and give an amount of flexibility which would be beneficial.

(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?

Yes. ISPAI believes that all of the above exceptions permitted by the EUCD should be incorporated into Irish law. The majority of these exceptions serve a public interest and do not harm, and can even enhance, the economic interests of the rightsholder.

There is also the argument for restoring the faith of the citizens in copyright and copyright laws. The introduction of the above exceptions will be welcomed by citizens, and copyright can regain legitimacy, rather than being seen as a bad thing, which is quite often the case nowadays, or indeed as a barrier to innovation.

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

Yes.

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

Yes.

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

Yes.

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

This is outside the scope of our submission.

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

This is outside the scope of our submission.

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

This is outside the scope of our submission.

(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?

It is the opinion of the ISPAI that unduly constraining innovation is undesirable. The wording of this question seems to be based on a premise that there would be situations where a work would not be protected at all in the interests of innovation but we believe it is more appropriate to say that a work is protected, but innovation would provide a type of exception and that infringement would not occur in this case. It may be necessary to implement safeguards to prevent bad faith innovators.
The ISPAI believes that innovation is for the public good and that it should be a public policy objective. As is the case with any copyright exception, the three step test would still apply and there would thus still exist adequate safeguards for the rightsholder, in that the use of the copyrighted material must not interfere with the normal exploitation of the work or unreasonably prejudice the legitimate rights of the creator.

There must be a balance between rules on liability for secondary infringement against society's need for new technologies. The Sony rule could be implemented into a new fair use policy providing that if a new and innovative technology has "substantial non-infringing uses", the fact that it is possible to use it to infringe, does not mean that liability will be imposed.[4] Again, legislation allowing for innovation must be as forward-looking and as neutral as possible.

[4] *Sony Corporation v Universal City Studios, Inc.*, 464 U.S. 417 (1984)

(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?

As above.

(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?

Compulsory licences provide a means for compensation to the author and as such should be required in certain circumstances such as in the case of innovation policy.

(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?

As we have stated above, to legislate for exceptions is not future-proof enough, however a general innovation principle which incorporates the Sony rule, could come under a broadly defined fair use principle. That said, an innovation exception would be a very welcome introduction and would in fact go a long way towards allowing us to compete with the USA and other nations which have enshrined fair use policies into their copyright frameworks, and indeed those other countries which are now also considering adopting an innovation exception themselves, for example Australia.
Ireland is renowned for its highly educated workforce and technology expertise but entrepreneurs, technologists and developers do not currently have the freedom to experiment without the deterrent of potential litigation. The risk factor associated with innovation has serious chilling effects.

The ISPAI views an innovation exception as essential to economic recovery and growth. This would not only encourage home-grown entrepreneurs and online start-ups but would further encourage the larger technology giants to choose Ireland as their ideal business location. It would go a long way towards fostering the digital and cloud computing hub to which our government so frequently refers.

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

Yes. Innovative digital services are necessary so that works do not get lost over time due to changes in technology. We also believe this should be extended to back-up service providers and not just heritage institutions.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

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

This is outside the scope of our submission.

(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?

This is outside the scope of our submission.

(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 itself, unless the contrary is expressly stated?

This is outside the scope of our submission.

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

This is outside the scope of our submission.

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

Yes but a specific exception may not be necessary.

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

The United States has led the way in innovation in certain areas due to the successful operation of a fair use doctrine for a number of years.

(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?

This is outside the scope of our submission.

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

Ireland is now in a position whereby the adoption of a fair use policy can place us on an even keel competitively with the US and other countries which have adopted the doctrine, but also could put us at a competitive advantage over those which are currently considering adopting it and of course those countries where it does not exist.

(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?

This doctrine would accommodate the interests of all parties concerned, by allowing for us as a nation to legislate in a principles-based fashion, in a way which will not lag behind the technologies which could be developed here, without having to specify explicitly every single type of technology which warrants an exemption from infringement.

(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?

As above.

(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?

This is outside the scope of our submission.

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

This is outside the scope of our submission.

(83) (a) If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?

This is outside the scope of our submission.

(b) In particular, how appropriate is the draft section 48A tentatively outlined above?
This is outside the scope of our submission.

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

This is outside the scope of our submission.

(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)?

This is outside the scope of our submission.

(86) What have we missed?

No response.