

Consultation on the Review of the Copyright and Related Rights Act 2000

Ireland
Department of Jobs, Enterprise and Innovation

Submission by
Nokia Corporation
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About Nokia

Nokia is a world leader in mobility, driving the transformation and growth of the converging Internet and communications industries.

At Nokia, we are committed to connecting people. We combine advanced technology with personalized services that enable people to stay close to what matters to them. Every day, more than 1.3 billion people connect to one another with a Nokia device – from mobile phones to advanced smartphones and high-performance mobile computers. Today, Nokia is integrating its devices with innovative services through Ovi (www.ovi.com), including music, maps, apps, email and more. Nokia's NAVTEQ is a leader in comprehensive digital mapping and navigation services, while Nokia Siemens Networks provides equipment, services and solutions for communications networks globally.

In 2010 Nokia spent Euros 5.9bn (£5bn) on R&D globally representing 13.8% of net sales. Nokia's business is premised on innovation and Intellectual Property is a key asset of the company.

Many world-class artists and creators hail from Ireland, and we believe that Irish artists and creators, as well as Irish innovators, stand to benefit from the establishment of an EU Digital Single Market in order to allow them greater access and new opportunities to reach the EU's 500 million consumers.

1. Copyright in the digital environment

Nokia and Digital Music Services

In this section we take the opportunity to focus on the role of **copyright in the digital environment**, in particular in the context of music licensing, where Nokia has gained substantial experience as a leader and innovator.

Comes With Music is an example of an innovative service which Nokia launched first in 2009. This service was later re-branded Ovi Music Unlimited. Relevant devices include unlimited downloads from the Nokia Ovi Music store for a defined period, typically one year. Downloaded music can be transferred between the registered Ovi Music Unlimited device and one registered personal computer. After the subscription period ends the consumer is entitled to keep and enjoy all the music downloaded.

Nokia recently announced a change in the availability of devices bundled with an Ovi Music Unlimited subscription. In certain markets (including the EU) we have discontinued production of Ovi Music Unlimited-edition devices for the time being, while in some markets we are looking to continue production. Although licensing is a factor in such decisions, Nokia's decision in the EU was not primarily motivated by the complexities of licensing. The Ovi Music a-la-carte store, which is available in Ireland, remains unaffected, and the Ovi Music Unlimited service shall continue to be accessible for consumers who obtain an Ovi Music Unlimited-edition device or whose subscription period has not yet ended.

This decision is part of Nokia's mission to continue to improve the Ovi experience for the millions of consumers who use it. **We are actively pursuing and planning new music and entertainment services for 2011** with our eco-system of partners and will make further announcements at a later date.

The digital copyright eco-system

The digital market place is going through an extremely vibrant phase of experimentation with new consumer propositions and business models, aiming to deliver a rich and flexible digital experience - benefiting Irish and European consumers and rights holders alike.

Nokia has published a White Paper in which we propose a more **holistic approach to copyright reform**. A copy of the Nokia White paper accompanies this submission.

Our key proposition is that access to legal digital content must be made easier and more attractive across a Digital Single Market in Europe. To this end, the highest priority of digital copyright policy should be to (i) foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, where (ii) right holders are fairly compensated; and which (iii) is supportive of Europe's unique cultural wealth and diversity, but (iv) is intolerant of unauthorized copying.

Fair use vs. (private copy) exceptions

The Nokia White Paper specifically addresses the question of whether private copy exceptions (and indeed the other exceptions prescribed in European) are appropriately circumscribed. Europe has developed a catalogue of precisely-defined exceptions, some of which are optional for Member States, including the private copy exception. Arguably, these exceptions are too precisely defined and too inflexible to accommodate technological, business and societal developments, particularly those impacting private copy behavior in the digital environment. Nokia would encourage Ireland to take a lead in further exploring and conducting economic research into the comparative benefits of a 'fair use' system¹, or even an extended fair use system (possibly including some limited business usage), in Europe.

For example, activities such as platform or format shifting as well as time shifting of legitimately acquired content by private individuals, which does not cause appreciable harm to rights holders, could fall under a 'fair use' doctrine. This repurposing of legally acquired content within the sphere of contemplated private use should not trigger levies because the use would be contained within a permissible sphere. This would be compatible with a system in which the consumer has acquired

¹ For example, the US has a broadly stated fair use defence, aimed at balancing the interests of the stakeholders and those of society.

rights to licensed digital content - the 'fair use' provision would then merely "mop up" the reasonable private use of such content, excluding illicit copying, i.e. piracy. Of course the fair use doctrine would need to be carefully circumscribed.

However, without a full and proper economic impact analysis, "fair use" should not be assumed to be some kind of miracle cure to the issue of 'adaptability' of the copyright framework. Indeed it would have the serious disadvantage that it would take years, possibly decades, to establish a body of case law sufficient to impart any degree of legal certainty, and by definition this *ex-post* determination would not give any 'up-front' legal certainty – or any prospect of a speedy resolution – for new and evolving business models until the courts had the opportunity to opine perhaps many years later. This may itself chill experimentation in new business models, perhaps more so than the "exceptions" environment we have today, where the scope is at least prescribed *ex ante*.

Format shifting and platform shifting

In any case, Nokia would be in favour of introducing an express, limited private copying exception for format shifting in order to reflect and regularise the reality of the situation we have today, where it is commonplace for consumers to copy digital content for playback on different devices, such as from a CD to a MP3 player or from a PC to a portable player or CD. We believe this will help provide clarity and restore credibility and confidence in the copyright regime in the UK, not only among consumers, but also among stakeholders including rights holders and technology providers. This is consistent with the findings of Professor Hargreaves' recent Review of IP and Growth conducted for the UK Government: <http://www.ipo.gov.uk/ipreview.htm>.

As a matter of general principle the exception should, on the one hand, be drawn as broadly as possible to embrace all those acts of format shifting which everyone knows are happening as a matter of course, and that most reasonable people believe already are, or should be, permissible. On the other hand, it is imperative the exception remains narrow and sufficiently limited so that it causes no significant harm to rights holders² and, as such does not give rise to a requirement for payment of compensation in accordance with the EU Copyright Directive 2001/29/EC. This is the critical balance that has to be struck.

The exception should fundamentally apply only to individual consumers for personal private use, so that the owner would be able to make the work accessible in another format for playback on a device in their legal possession. Having said that, however, we do believe that extension to the family circle is an important consideration. Importantly, the exception should not be place specific, to reflect the fact that devices may be portable or mobile (so taken out of the home) or located in a different place (e.g. in the car or even in a second home).

Private Copy Levies

It is an important economic advantage for the digital economy that Ireland does not have private copy levies on digital equipment and media (see Economic Picture below). Rights holders receive their rewards fairly through market-based royalties, not from levies dictated unilaterally by national monopolies.

Introduced in some European countries as a crude remuneration model in a bygone analogue era as a quid pro quo for consumers being able - and permitted - to copy unlicensed content, notably from

² And of course remaining compliant with the Three Step Test.

radio onto blank cassette tapes, private copy levies are no longer appropriate or fair in the world of digital content. And the whole private copy levy concept becomes even less appropriate and outdated as digital technology advances, e.g. towards cloud-based systems where end-users are actually replicating less on their personal local devices. Promoting consumer-friendly access to attractive legal offers of digital content means focusing on licensing not levies, following the stellar example of the UK.

Private copy levies should never be, or allowed to become, the primary or significant revenue source for digital content. This would serve only to discourage licensing at a time when service providers are making substantial investments in developing and launching new digital.

The reality is that the levy system is an impediment to the development of effective licensing models because licences can be structured to carve out activities where private copy levies are regarded as potentially more lucrative than direct licensing. Full-scope licensing is critical. To this end it must remain possible to include within a licence all uses embraced within the so-called private copy exception, which as a matter of policy should not be accorded 'imperative' status.

The more digital content and authorised usage that consumers are able to acquire as part of a fully licensed service, the less need there is for private copy levies by way of compensation. Furthermore, direct licensing means financial returns are closely correlated to actual use of content. By contrast, levies systems are regarded as "rough justice" even for artists and creators because, notoriously, they do not always see their just rewards. In particular less money is distributed to rights holders than is collected because of administration and management overheads, and cultural subsidies.

Also, the more that content is made easily accessible through services that appeal to the consumer, the less incentive there is for consumers to indulge in piracy by acquiring unauthorised copies. By contrast, the private copy levy system is inherently serving to perpetuate piracy because it tends to give rise to the misconception that the device owner can download content indiscriminately whether authorised or not.

There is indicative empirical evidence that, on average, better music industry performance (measured by growth in sales) coincides with a low ratio of copyright levy revenue to overall revenue from music sales.

Ireland should recognise these success factors and continue to foster a climate conducive to the development of a vibrant and thriving market for the distribution of legitimate digital content through attractive and innovative services for the benefit of consumers, based on direct licensing.

To maintain a dynamic market-based commercial licensing environment, it would be a damaging and retrograde step if ever Ireland were to consider introducing copyright levies.

At European level there needs to be a fundamental reform of the private copy levy system. Private copy levies should be phased out for all digital products in favour of alternative licensing-based approaches which ensure rights holders and creators are properly and fairly rewarded. We would encourage Ireland to become a thought-leader and champion of this cause in the EU political and legislative arenas.

2. The Economic Picture

EU comparative performance

Based on a sample benchmark of the US digital music market in 2009 and per capita spending on digital music in the US and Japan, a conservative extrapolation suggests that the European digital music sector could have reached a value in 2009 of €1 to 3 billion greater (i.e. over 100-330% larger) than the estimated actual value.

In our view two prominent reasons for the EU shortfall are: (1) the lack of a true Digital Single Market and (2) the inflexibility of a collecting society-led licensing regime to accommodate new services and innovation through bespoke, bilaterally negotiated, licensing arrangements. Copyright levies are also a factor.

COMPARISON BETWEEN THE EUROPEAN DIGITAL MUSIC MARKET AND THE USA

	EU	US	EU as percent of US
Population	501 million	310 million	162%
GDP	EUR 12,8 trillion	EUR 11,1 trillion	115%
Digital Music Market	EUR 900 million	EUR 2,7 billion	33%
Digital percentage of the Recorded Music Market	13%	43%	30%

- The EU market is substantially larger than the US market in terms of population and overall economic output, whereas we estimate the EU digital music market, in our estimate, is approximately one-third of the US market.
- This deficit, in our view, cannot be explained by levels of broadband penetration or other technical factors including piracy.

Comparative performance in the EU

Upon examination and comparison with larger EU markets, the higher per-capita spending on digital music in Ireland and the UK stand out. In the case of Ireland, such statistics are even more significant considering the relative size of the Irish market compared with more populous markets like France, Germany and Italy. We would like to see greater digital growth in all EU Member States matching or exceeding the high figures in the USA and Japan. We encourage Ireland to embrace an EU Digital Single Market on behalf of Irish creators and innovators, because the European creative and cultural industries as a whole should benefit from increased innovation and accelerated growth in the digital sector.

COMPARISON OF PER CAPITA SPEND ON DIGITAL MUSIC IN KEY TERRITORIES

	EU	USA	JAPAN	UK	IRELAND	FRANCE	GERMANY	ITALY
2009 per capita spend on digital music	€1,80	€8,60	€8,05	€5,15	€3,35* *estimate	€2,30	€2,05	€0,57

The disparities in per capita spend on digital music also highlight that developed markets which also do not have market-distorting private copy levies have higher digital music spends (USA, Japan, UK, Ireland), as well as robust creative industries (e.g. the UK Government estimates that 2 million persons are employed by the UK creative industries³).

COMPARISON OF DIGITAL TRADE VALUE OF RECORDED MUSIC INDUSTRY IN KEY EU TERRITORIES

	2007	2008	2009
UK	€ 106,9 million	€ 155,8 million (+45,7%)	€ 230,1 million (+47,7%)
FRANCE	€ 75,4 million	€ 104,6 million (+38,7%)	€ 102,6 million (- 1,9%)
GERMANY	€ 72,3 million	€ 98,7 million (+36,5%)	€ 121,3 million (+22,9%)
IRELAND	€ 6,5 million	€ 8,4 million (+29,2%)	€ 10,1 million (+20,2%)

- The UK digital music market exceeds other large EU markets both in value and in speed of growth, supported by a relatively favourable copyright licensing framework and business environment for innovation.
- The German digital music market is smaller than the UK market and is growing at a slower pace.
- The French digital music market actually shows a decline, compared with 47,7% growth in the UK.
- The Irish digital music market shows steady growth with a market size, measured per capita, greater than either France or Germany.

Music Licensing

Pan-European Licensing for Digital Music Services

A Digital Single Market⁴ embracing a pan-European licensing framework based on market principles is critical to the success and growth of the EU digital music market. We see the preferred option for growth will be through the implementation of a market-orientated system as follows:

- Licensing must move to true pan-European, repertoire-specific licensing (meaning pan-European commercially-negotiated royalties and service accessibility across all Member States to all EU consumers)
- Freedom to negotiate with principal rights holders

³ The UK Government's Department for Culture, Media and Sport also states "Employment in the sector [of the creative industries] has grown at double the rate of the economy as a whole" (http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx).

⁴ A report published by the European Policy Centre indicates that a Digital Single Market in the EU presents economic growth potential of **€500 billion or over 4% of EU GDP** over ten years, part of which would benefit the creative and cultural industries: <http://www.epc.eu/dsm/> & <http://www.epc.eu/dsm/1/>

- Avoid a single EU one-stop shop
- Allow a reasonable number (e.g. 6-10) of licensing entities offering different, competitive repertoires on a pan-EU basis (limiting the amount of aggregation to avoid/limit monopolistic distortions); currently the EU/EEA region has 30+ licensors, which is many and discourages service providers from entering many territories, hurting UK and EU rights holders and the UK's and EU's creative and cultural industries
- No more "Territory-of-destination licenses": one Europe means creating a Digital Single Market and facilitating commercial negotiations for pan-European royalties
- Each license for a given repertoire must grant any and all rights and authorisations in such repertoire (e.g. mechanical/reproduction and performance/communication rights for all uses authorised by a service) to create a functioning system
- Licences should be "full-scope" covering all legitimate consumer uses specified within the terms of the service (exhausting additional claims for private copy levies)

Subject to the above, if the EU societies wish to pool their remaining repertoires (i.e. those not licensed directly by publishers) in several "hubs", we would see that as a positive step forward:

- PRS For Music in the UK offers pan-European licenses on behalf of IMRO, MCPS Ireland and other rights holders
- The societies of France, Italy and Spain announced a hub called ARMONIA several years ago
- There is talk of a Northern Hub including the societies of the 8 Nordic and Baltic countries
- This would mean the number of licenses in the EU/EEA could fall from 30+ to 7+ (PRS For Music, CELAS EMIMP, WCM PEDL, SATV, UMPI DEAL, ARMONIA, Northern Hub), which facilitates licensing and lessens the existing monopolistic distortions

Rights Clearance

It would be an important step forward to develop sufficient transparency as to the repertoire of musical works controlled by each licensor. This would not only aid front-end licensing from the point of view of rights clearance (as a commercial licensee we must know what we are licensing) but also back-end payment processing and administration of licenses.

In the case of musical works, we propose including metadata identifying the author/composer(s), ISWC code, music publisher(s), licensor(s) and splits (of rights) of each musical work. There are benefits to rights holders if digital service providers also had access to such metadata, as we could provide more detailed reports, enabling rights holders to make faster and more accurate distributions. Significantly, having insight into the repertoire available for licensing from a rights holder enables a service provider to make better and more informed commercial decisions in licensing discussions, thus facilitating the entire licensing process for the ultimate benefit of the consumer.

At the initiative of EU Commissioner Neelie Kroes a group of stakeholders was brought together as the Global Repertoire Database Working Group ("GRD WG") to look at how a Global Rights Database ("GRD") for musical works might be created and deployed. Nokia has been an active participant in the GRD WG, which in November 2010 published several specific recommendations as to how the concept of a GRD for musical works can be moved forward in the context of wider stakeholder commitment and involvement, see:

[http://globalrepertoiredatabase.com/GRD-077-GRDRecommendations\(Finalv1.0\).pdf](http://globalrepertoiredatabase.com/GRD-077-GRDRecommendations(Finalv1.0).pdf)

Audiovisual works

The discussion above focuses on digital music where Nokia has most experience. However, it is also important to accelerate development of a Digital Single Market also for audiovisual works, including films, television productions, music videos and podcasts. Licensing of audiovisual works could be extremely complicated and burdensome (even more so than for music), as the number of rights holders with rights requiring licenses in any single audiovisual work could vary considerably (and differently in different countries), and all rights holders may not even be identifiable by the licensee. Similarly, operational duties relating to audiovisual works could be complex and costly. In order to continue the digital evolution of goods and services in Europe, it is vital to ensure that audiovisual producers (e.g. film studios or TV producers) can and do grant service providers a single-source full-scope license for all necessary rights for all uses of the audiovisual works, and any creative content contained or embodied in such content, as offered by the terms of the service.

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