



## Copyright and Innovation: A *Consultation Paper*

### Submission of Publishing Ireland

#### 1.0 Introduction

Publishing Ireland is the Irish Book Publishers' Association. It has over 100 members, 93 of which are professional book publishing companies. Our members have 458 full-time and 111 part-time employees. Annual sales turnover of our members is almost €86 million, educational publications accounting for €55 million of this.

Publishing Ireland welcomes the opportunity to respond to the *Consultation Paper* of the Review Committee. It is vital for us to represent the response of Irish publishers to a range of proposals that threatens to fundamentally undermine the viability of the sector.

Despite declining consumer spending, the sector continues to make substantial investment in innovative products such as enhanced e-books, multi-content platforms, and open access (author pays) journals. It is particularly difficult however to recoup this investment when revenues are being eroded by persistent online infringement.

A recent case before the German courts illustrates the scale of the problem. It involved two Irish based websites (library.nu and ifileit.it). One of these was described in court as one of the *largest pirate web-based businesses in the world*. It was reported that library.nu had posted links to approximately 400,000 illegal copies of books, mainly academic publications.

“According to the 17 publishing groups who helped to build the case, the operators of the site earned more than \$10 million annually from advertising and donations.”<sup>1</sup>

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<sup>1</sup> Article in the *Financial Times*, at: <http://www.ft.com/cms/s/0/58e1e534-6785-11e0-9138-00144feab49a.html#axzz1t3co7odS>

“The biggest issue publishers face right now, bar none, is free [books] crowding out paid”, Brian Napack, President of Macmillan, told the *Financial Times* on the occasion of the London Book Fair in 2011, “You go to Google and [unauthorised copies of] every one of the top 10 New York bestsellers are there. The top textbooks are there on the day they’re published.”<sup>2</sup>

We welcome certain of the proposals of the *Consultation Paper*. We welcome in particular the proposals to improve the infrastructure for enforcement. We also welcome the fact that the Review Committee has taken a broad view of its remit, to include correction of some problematic provisions of the Copyright and Related Rights Act with an indirect impact on innovation.

## **2.0 The Economic Context for Change**

### **2.1 *The lack of economic evaluation***

The Hargreaves Review noted that the lack of economic evidence underpinning discussions regarding copyright policy often leads to a polarisation of views between right holders and user groups. We suggest that the *Consultation Paper* exemplifies this, in analysing the regime by reference to the *interests* of the various stakeholders and taking the approach, *uninformed by any economic evidence*, that to relax the copyright rules to the greatest degree possible under European law will promote “innovation.”

Without any reliable economic evaluation of the potential benefit of the proposed changes, as well as an impact assessment of the potential damage that may be done to established copyright industries in the creative sector, it would be indefensible for the Review Committee to stand over far-reaching changes to the legislation on which these industries rely.

### **2.2 *The value of the Irish creative industries***

In the period since the publication of the *Consultation Paper*, a representative group of the creative industries has commissioned a study from DKM Economic Consultants to demonstrate the value of those industries to the Irish economy (“the DKM study”). This has been furnished to the Review Committee. It demonstrates that:

- Core copyright industries in Ireland cover about 8,500 enterprises which, between them, have 70,400 employees (46,300 full-time equivalents),

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<sup>2</sup> Article in the *Financial Times* published during the 2011 London Book Fair: [www.ft.com/cms/s/0/58e1e534-6785-11e0-9138-00144feab49a](http://www.ft.com/cms/s/0/58e1e534-6785-11e0-9138-00144feab49a)

- The turnover of these industries is €18.9 billion p.a. and the gross value-added (direct impact) contribution is €4.6 billion.
- When added to an indirect contribution of €6.9 billion, it is estimated that these industries contributed a total of €11.5 billion, or 7.35% of GDP to the Irish economy in 2011.

WIPO published a Report in 2012 which presented data from 30 national studies on the economic contribution of their respective copyright industries that had been completed up to end 2011. It found that the contribution to GDP varies significantly but averages around 5.4%. Measured against the WIPO Report, the DKM study shows that Ireland ranks towards the high end in terms of total economic contribution.

## 2.1 *The spill-over effects of the creative industries*

Although clearly different in scale, the economic conditions for the creative industries in Ireland are broadly similar to those in the UK. For the purposes of the current UK Government Copyright Consultation, CLA, the sister society of the ICLA - which represents literary publishers - along with ALCS, PLS and DACS, commissioned Price Waterhouse Coopers to provide an economic analysis of the impacts of copyright, secondary copyright and collective licensing in the UK (“the *PwC Study*”)<sup>3</sup>, and a supplementary report on the potential impact of proposed changes to the education exceptions in the CDPA (“the second *PwC Study*”).<sup>4</sup>

The *PwC Study*<sup>5</sup> demonstrates that the creative industries drive a number of innovative spill-over effects, including:

- They support the application of advanced technologies, thereby encouraging better organisational models which foster creativity and enhance production processes.
- They have a track record of generating ideas which, when commercialised, contribute directly and indirectly to the broader economy through generation of new products and services. This effect is called “hidden innovation.”
- The large proportion of small firms in the creative industries helps to inspire risk-taking and entrepreneurial culture, often organising successful clusters of activity and working in open and collaborative models.
- Workers in creative occupations develop and embody skills and competencies which create value across the economy. This is apparent when professionals take their ideas and knowledge to other sectors. The skills of creative works are seen as especially valuable in other sectors.

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<sup>3</sup> 2011 [http://www.cla.co.uk/data/corporate\\_material/submissions/2011\\_pwc\\_final\\_report.pdf](http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf)

<sup>4</sup> [http://www.cla.co.uk/data/corporate\\_material/submissions/an\\_economic\\_analysis\\_of\\_education\\_exceptions\\_in\\_copyrig ht\\_-\\_pwc\\_final\\_report.pdf](http://www.cla.co.uk/data/corporate_material/submissions/an_economic_analysis_of_education_exceptions_in_copyrig ht_-_pwc_final_report.pdf)

<sup>5</sup> At p.25.

- Sales of creative goods and services lead to product spill-overs as they increase demand for complementary goods in other sectors. For example, the UK's position as a leading educational publisher contributes to attracting foreign student enrolment in the UK. The impact is potentially substantial: £2 billion per year in revenue is provided to universities by foreign student enrolment.

### 2.3 ***The link between copyright and “innovation”***

The Terms of Reference of the Review raise the question whether innovation is influenced by copyright law – whether by changing copyright law, it is possible to promote innovation.

The creative industries are clearly drivers of innovation. However, it is not necessarily the case that innovation can be driven by copyright. If this is so, it is all the more risky a project to alter copyright law to chase a perceived, but perhaps illusory benefit.

The *PWC study*<sup>6</sup> looked at the impacts of copyright, including the longer term effects on innovation. It pointed out that there is extensive literature demonstrating the positive contribution that successful innovation makes to competitiveness and economic growth. Moreover, there is also a broad literature which analyses the many elements of the “innovation system” which influence how successful an economy is in promoting innovation. However, the study notes that although it is assumed to be one of the factors which have an influence, there is “a paucity of evidence linking IP (including copyright) and innovation.” The World Economic Forum's Global Competitiveness Indicators show that, although there is a positive correlation between perception of the IP framework and overall competitiveness, some countries are highly competitive despite having relatively poorly perceived IP frameworks (e.g. the US and Japan), while other countries are less competitive than might be expected given their highly rated IP framework (e.g. France and Luxembourg).

### 2.4 ***The economics of copyright exceptions***

The economic rationale for copyright exceptions has been the subject of a number of influential studies. Some of these are summarised in the *PwC Study*. It is suggested that exceptions should be judged in the following terms:

- Where consumers' demands can be met by a collective licensing scheme, exceptions should not be applied.
- Where market development is unlikely, and transactions costs associated with licensing remain significant, an exception should be applied.

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<sup>6</sup> At p.21.

- Where a market could develop if copyright was enforced, and transaction costs are reduced, the absence of an initial market should not automatically lead to the implementation of an exception.<sup>7</sup>

These points are particularly important in an Irish context. Licensing of literary material is developing in Ireland at a significant pace, although still behind the UK. To undermine licensing with broad new exceptions to copyright may severely compromise the development of collective licensing in Ireland. The *PwC Study* gives an example of how this occurred in Australia in relation to digital publishing, and the resulting loss to the Australian economy.

The Australian Government provided a broad exception for digital copying in libraries, before allowing right owners, CMOs and libraries to develop a functioning licensing market. This stifled the Australian digital publishing industry, as incentives to invest were weakened. The impact was to slow the introduction of digital publishing models, despite the significant cost saving relative to traditional publishing and potential efficiency gains for the economy as a whole. It was estimated that the net loss to the economy by 2012 would be in the range AUS\$45 million – AUS\$65 million per annum.<sup>8</sup>

The *PwC study* concludes, inter alia, that exceptions must not get in the way of innovation and new business models, as technology changes the way copyright content can be produced and consumed. The research suggests that exceptions currently in place should not automatically be transferred to a new platform – rather it is better to wait and see whether right owners, CMOs and users supply a voluntary licensing arrangement.<sup>9</sup>

### **3.0 The Legal Context for Change**

#### **3.1 *International and European obligations***

As a starting point for our detailed response to the proposals contained in the *Consultation Paper*, we refer to the legal framework which sets the boundaries for national legislation.

At the most fundamental level, intellectual property is protected by Article 1, Protocol 1 to the European Convention on Human Rights. Article 17 of the Charter of Fundamental Rights of the European Union, in addition, specifies that “intellectual property shall be protected.”

The competence of national legislatures is also constrained by international conventions and EU Directives, the most relevant of the former for present purposes

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<sup>7</sup> P.50, *PwC Report*.

<sup>8</sup> P.52 *PwC Report*.

<sup>9</sup> *Ibid.*, p.50.

being the Berne Convention and the TRIPS Agreement, and of the latter, Directive 2001/29/EC (the “EUCD”).

The Berne Convention provides, at Article 9(1), that authors of literary and artistic works shall have the sole right of authorising the reproduction of their works “in any manner or form.” Article 9(2) provides for permissible exceptions under the so-called “three-step test”, namely that any exceptions and limitations shall:

- i) Only apply in certain special cases,
- ii) which do not conflict with the normal exploitation of the work; and
- iii) do not unreasonably prejudice the legitimate interests of the rightsholder.

The requirements of the Berne Convention are reinforced by the so-called TRIPs Agreement, Article 9f TRIPs obliging its members to comply with Articles 1-21 of the Berne Convention.

The EUCD provides a closed list of permissible exceptions and limitations, a number of which contain within them restrictions and/or limitations on the extent of the exceptions (for example, the requirement for “fair compensation”). The EUCD also incorporates the three-step test, at Article 5(5).

In addition to the provisions of the EUCD, it is necessary to take into account certain principles, articulated in the Recitals to the EUCD and established by the CJEU. These are:

*Exclusive rights must be interpreted broadly*

It is well settled that the rights of reproduction and communication to the public accorded to the right holder as described in the EUCD must be given a broad interpretation, in order to establish a high level of protection for authors.<sup>10</sup>

*Exceptions must be interpreted restrictively*

As pointed out by the CJEU, for example in *Infopaq*,<sup>11</sup> “the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly.

*New public*

In interpreting the meaning of “the public” for the purposes of the right of communication to the public, the CJEU has also elaborated the concept of a “new public”, holding that when a work is disseminated to the public in a manner not

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<sup>10</sup> See, for example, Recital 9 EUCD.

<sup>11</sup> *Infopaq International A/S v. Danske Dagblades Forening, Case C-508*, at para.56.

envisaged by the author and hence a greater public, that “new use” requires the authorisation of the author.<sup>12</sup>

### 3.2 *Irish legislation*

The Copyright and Related Rights Act 2000 is now a decade old. Because there is so little copyright litigation in Ireland, the Act is not often put to the test. Owing to litigation instigated by the music industry, it has been demonstrated twice in the last two years that the CRRA is incompatible with the EUCD.<sup>13</sup> The CRRA was enacted before the final text of the EUCD was known and so a degree of incompatibility is understandable. We suggest that it is paramount on this occasion to take the opportunity to correctly align the CRRA with the relevant international and European instruments. Ireland looks to foreign direct investment for economic recovery. It is held out as the ideal gateway to Europe for US, Asian and other non-EU entities seeking access to the European market. Rather than seeking to lead an adventurous charge in Europe for internet users, we suggest that what Irish Government agencies most need in order to attract copyright-related FDI is a stable and effective regime, in harmony with international norms and in full compliance with the EU *acquis communautaire*.

We respond below to the questions raised in the *Consultation Paper*, on a chapter by chapter basis, following the scheme of the Paper.

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<sup>12</sup> See, for example, *Airfield NV* C-431-09 & 432/09.

<sup>13</sup> *EMI Records & Others v. UPC Communications Ireland Ltd* [2010] IEHC 377; *Phonographic Performance (Ireland) Ltd v. Ireland and the Attorney General*, CJEU, Case 162-10.

## 4.0 Responses to the Questions of the *Consultation Paper*

### Chapter 2- Copyright and Innovation

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

We recognise the value of the investigation stimulated by this review. We are alarmed, however, by an assumption that appears to underlie the *Consultation Paper* – that economic growth will be stimulated by the maximum possible expansion of the exceptions to copyright. *There is no evidence that this is so.* Great damage could be caused to the established creative industries by fundamentally altering the existing copyright balance.

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

No comment.

**(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 welcome this proposal. There have been a substantial number of amendments to the CRRA since it was enacted. Amendments are moreover to be found in legislation relating to other topics, such as the Industrial Designs Act 2001 and the Broadcasting Act 2009. The law would be a great deal more accessible if it were consolidated in one 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 *Consultation Paper* seeks to distinguish copyright holders from innovators, failing to acknowledge that creators of copyright material are, by definition, innovators. Publishers, in taking the risks associated with publication, are, by definition, entrepreneurs. The classifications tend to support certain misconceptions underlying the *Consultation Paper*.



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

No comment.

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

As mentioned in the preamble, we believe it is a flawed approach to measure the copyright balance in terms of how it affects different types of stakeholder. This has never been the purpose of copyright law, which grants rights to creators, and then limits those rights when necessary in the public interest.

## Chapter 3 – Copyright Council

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

We believe that the Paper correctly identifies a number of areas in which the copyright infrastructure is deficient. To remedy these would make a great difference to the Irish regime. However we do not believe that the governance model proposed could successfully deliver the role described. We also believe that a number of the functions are matters which are properly the responsibility of government and ought not to be allocated to a non-governmental body, particularly one which seeks to represent such diverse interests.

In an addendum to this submission, we set out the copyright infrastructure in a range of common law countries. This shows the role of a Copyright Council in those countries.

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

We suggest it should be a right holder 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?**

See above.

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

As determined by its members.

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

Ditto.

### **(12) How should it be funded?**

Ditto.

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

We are in favour in principle of a Digital Copyright Exchange. It can only be effective if it is either led by right holders or commands the support of a critical mass of right holders. We believe that a national digital licensing solution would need to be led by and to align with developments elsewhere. A feasibility study into the establishment of a DCE is being conducted in the UK. The European Commission intends to lay the

ground for multi-territory licences in Europe in a Proposal for a Directive due to be published shortly. Collaborative projects such as ARROW are developing rights management information systems, which will facilitate cross-border licensing solutions.

As to what is possible in a national context, we suggest that it would be beneficial for the Irish collecting societies to explore how licensing can be expanded and improved locally, and how Irish societies can prepare for cross-border digital licensing. Irish publishers will support this approach through their involvement in the Irish Copyright Licensing Agency, and the participation of ICLA in the Irish Collecting Societies' Forum, an ad hoc grouping of the Irish collecting societies.

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

We are in favour of broadening the licensing system to include licensing of orphan works, and to appropriate use of extended collective licensing. We note that both questions are being explored in the current Copyright Consultation in the UK and await the Report of Baroness Wilcox, due on or before 30 June. That report might inform what is possible or advisable in an Irish context.

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

We very much welcome the proposal to establish an ADR service. As to how this can be established, see our comments in the Appendix hereto. We believe that this should be provided under the auspices of the Office of the Controller of Patents.

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

See our comments above.

**(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?**

The role of the Controller should be expanded to incorporate a specific remit relating to copyright, and the Office should be renamed so as to reflect the range of its functions.

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

We are not in favour of expanding compulsory licensing other than for the purpose of supplying licences that are demonstrably required in the public interest but which are not available through the existing voluntary licensing system.

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

The ADR service should be provided by the Office of 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?**

We are very much in favour of a small claims track for intellectual property claims. It is a piece of the enforcement mechanism that is currently missing, and raises questions as to whether Ireland is in compliance with its international and European obligations to provide accessible remedies. We suggest that the principal challenge in creating this would be to ensure the availability of specialised judges to hear claims in either or both the District and Circuit courts. The UK Government has resolved to provide a small claims remedy in the UK Patents County Court, already a specialised jurisdiction. We suggest that this precedent may be worth examination.

**(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?**

See the 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?**

It is beyond the scope of this submission to suggest specific legislative changes.

**(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 question the fairness of the way in which this question is phrased. We believe that the existing balance between rights and exceptions is largely appropriate.

**(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 are not aware of any evidence that current copyright law discourages innovation.

**(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?**

In the digital environment, all right holders who invest in the creation and making available of quality content are forced to compete with “free”, including their own copyright works offered for free by pirates, and are increasingly for this reason under-compensated. This inevitably curtails the ability of right holders to continue to make that investment.

## Chapter 4 – 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?**

We do not believe that the term “original” ought to be defined in the legislation, in particular as the meaning of the term “author’s own intellectual creation” is the subject of developing case law both in the Court of Justice of the EU and in the UK. We refer to references heard by the CJEU such as *Infopaq*,<sup>14</sup> *Eve- Maria Painer*,<sup>15</sup> and *Football Dataco*,<sup>16</sup> and, in the UK, the case of *Newspaper Licensing & Ors v. Meltwater Holdings BV*,<sup>17</sup> under appeal.

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

No comment.

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

This is a point of particular importance to publishers and which impacts directly on innovation. An amendment should be certainly be made in order to clarify that copyright in works unpublished at the date of death of the author is co-terminus with copyright in published works – i.e. 70 years after the death of the author.

Note, however, that we do not believe that the amendment proposed in the *Consultation Paper* will solve the problem of potentially perpetual copyright. We are advised that an amendment to section 9 of the Transitional Provisions (which is set out below) is required. Otherwise, for works in copyright at 1 January 2001, potentially perpetual protection for works unpublished at the date of death of the author will continue to be available.

Section 9 of the Transitional Provisions provides:

*“Nothing in this Act shall affect the duration of copyright in works in which copyright subsists on or before the commencement of Part 11 of this Act and the duration of copyright in those works shall be determined, where applicable, in accordance with the European Communities (Term of Protection of Copyright) Regulations 1995 (S.I. No.158 of 1995, notwithstanding the revocation of those Regulations.” [emphasis added].*

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<sup>14</sup> *Infopaq International A/S v. Danske Dagblades Forening*, Case C-508.

<sup>15</sup> *Eve-Maria Painer v. Standard Verlags GmbH and Ors*, Case C-145/10.

<sup>16</sup> *Football Dataco & Ors v. Yahoo! Ltd & Ors*, Case 173/11.

<sup>17</sup> *Newspaper Licensing Agency & Ors v. Meltwater Holdings BV*, [2011] EWA Civ. 890.

It is beyond the scope of this response to suggest the precise manner in which the Transitional Provisions should be altered, but unless altered, the continued application of the 1995 Regulations will continue to over-ride both the existing provisions and any new provisions inserted in the body of the Act.

### *The right of first publication*

A second, and related problem relates to the “right of first publication” at section 34 CRRRA. This section implemented Article 4 of the EU Term Directive. It provides that any person who, after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously made so available, shall benefit from a 25-year term of protection equivalent to the rights of the author.

It is self-evident that to the extent that potentially perpetual protection exists in an unpublished work, the right of first publication cannot arise, thereby defeating the purpose of section 34. This problem will be cured if the issue of potentially perpetual copyright is dealt with effectively.

However, another problem with section 34 is illustrated by the recent public dispute between Joycean scholar Danis Rose and the National Library of Ireland relating to valuable unpublished Joycean material owned by the NLI. Section 34 in its present form is open to an interpretation which may allow a scholar or researcher, who is given access to scholarly material, to publish this immediately it comes out of copyright without the consent of the owner of the material, thereby securing the 25 year term and preventing the owner of the material from publishing the work.

We suggest that it is imperative that it is clarified that the term “lawfully makes available”, means that the consent to publication of the owner of the physical object in which the work is embodied is required. This is the case under UK law, where Article 4 of the Term Directive was implemented by regulations 16 & 17 Copyright and Related Rights Regulations 1996. These provisions make it clear that the right of first publication cannot be acquired by a person who publishes a previously unpublished work without the permission of the owner of the physical object in which the work is embedded.

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

We are not in favour of such an amendment. The legislature saw fit in 2009 to provide a new definition of “broadcasting.” A broad amendment to it, such as suggested, would need to be carefully researched and the impacts evaluated.

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

Any proposed change can only be evaluated in the context of a specific proposal.

**(31) Should sections 103 and 251 CRRR 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?**

These should not be expanded. They were appropriate to the technology of the time but are no longer relevant.

**(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?**

The most fundamental copyright problem for all right holders is that of online infringement. We believe that this needs to be acknowledged and addressed in the report of the Review Committee. We believe that two things are needed: a thorough legal evaluation of the extent to which the CRRR provides effective remedies for online infringement, followed by a piece of primary legislation to make good such deficits as may be identified. The legislation should provide specific workable procedures and remedies which take account of the legal rights of stakeholders as well as the fundamental rights of users. This is a task for the IP Unit of the Department of Jobs, Enterprise and Innovation but we suggest that it is incumbent on the Review Committee to recommend it.

**(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**

It is imperative that both technological protection measures and rights management information are given robust protection. Many existing business models across all sectors are based on them. In the digital future for licensing, they will be increasingly important. Publishers will invest in expensive innovations such as apps and enhanced ebooks only if there is a prospect of return on investment, and the investment can be secured by DRM.

We are concerned that the existing provisions do not go far enough in providing effective remedies for circumvention of TPMs and removal of RMI. We suggest that they do not meet the standard of “adequate legal protection” required by Articles 6 and 7 EUCD.

Specifically, in relation to technological measures:



- There is no prohibition of the act of circumvention
- There is no remedy for them right holders, but only for the person who makes available copies of a work to which rights protection measures have been applied.
- The provisions can only be invoked when the protected works have been made available *and* infringement has occurred.

Where rights management information is concerned, the shortcomings are similar:

- There is no remedy for the right holder.
- The rights management information is not protected in its own right.
- Protection is not independent of an underlying infringement.

We urge the Review Committee to address these deficiencies in the legislation. We suggest that the provisions at Chapter 12 of the US Copyright Code (Sections 1201-1205) provide a useful reference point for a comprehensive range of remedies.

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

More explicit protection for metadata applied to photographs would assist in discouraging infringement, and in providing a remedy when it occurs.

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

Yes.

**(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?**

Yes. See further below.

**(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?**

As matters stand, Ireland has limited exceptions which permit private copying, the most notable being the fair dealing exception for research and private study, at section 50 CRRA.

Any private copying exception has to be evaluated within the framework of Article 5 EUCD, under the terms of which “fair compensation” is required. While the CRRA provisions have thus far – whether correctly or not - been viewed as being beneath

the radar of the EUCD, any expansion of exceptions relating to private copying will automatically raise the issue of compensation and the possible need to introduce levies comparable to those applied in most mainland European countries to compensate authors for private copying.

The *Padawan* decision of the CJEU<sup>18</sup> has determined that the concept of “fair compensation” is “an autonomous concept of European Union law which must be interpreted uniformly in all of the Member States that have introduced a private copying exception.”

The decision makes a very strong case in relation to levies. At paragraph 56, the court states that “the fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users”

At paragraph 44, the court clarifies that the criterion for assessing the compensation is not only the actual harm caused to the author but the *possible* harm: “Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned.”

In the wake of the *Padawan* decision, the European Commission has made a commitment to bring forward a legislative initiative on private copying in 2013.<sup>19</sup> We suggest that it is pointless to debate the issue of levies until the position of the European Commission is known.

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<sup>18</sup> *Padawan SL v. SGAE and Ors*, 21 October 2010, Case C-467/08.

<sup>19</sup> *A Single Market for Intellectual Property Rights*, COM (2011) 942, at p.7.

## Chapter 5 – Collecting Societies

**(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?**

Licensing is developing in Ireland. The size of the market has dictated a slower pace of development than, for example, in the UK. However, the combination of digital technology and the impetus in Europe to achieve cross-border licensing, will bring momentum to the development. We believe that the current framework for the resolution of issues relating to licensing will become increasingly important and that this will require a specific and specialised forum. We urge the Committee to consider recommending the establishment of a Copyright Licensing Board or Authority.

At European level a Proposal for a Directive on CMOs is due to be published very soon. It will prescribe governance standards for collecting societies. These will presumably require some oversight at national level. We suggest that we should have an infrastructure in place to accommodate the European proposals. It is possible that this might be facilitated by the establishment of a Copyright Licensing Board.

**(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?**

Additional issues concerning licensing relate to the extent to which Ireland might provide a system of licensing of orphan works and whether we should adopt extended collective licensing for this and/or other purposes. These questions are currently being explored in the Consultation underway in the UK. We would urge the Review Group to recommend close examination of recommendations arising out of that process.

We note that in Canada, licensing of orphan works is conducted by the Copyright Board, and we suggest that might be yet another potential role for an Irish Copyright Licensing Board.

## Chapter 6 – Intermediaries

**(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 legal framework for the caching, hosting and conduit immunities is contained in the EU E-Commerce Directive. The European Commission, in its communication of January 2012 entitled “A coherent framework for building trust in the Digital Single Market for e-commerce and online services”<sup>20</sup> has stated definitively that it does not intend to consider a revision of this Directive, but that it will seek to improve its implementation, through a horizontal framework for “notice and action” procedures. We suggest therefore that these questions are academic.

**(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?**

See above.

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

See above.

**(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 above.

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

See above.

**(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?**

We are strenuously opposed to the generalised and simplistic provision proposed. The question whether a link from one site to another constitutes an infringement of

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<sup>20</sup> COM (2011) 942.

copyright, or an authorisation of infringement, depends entirely on the circumstances of the case. It is not possible to generalise. As all search engine and directory activity depends heavily on the use of hyperlinks, the potential damage that could be done to right holders by an ill-conceived blanket provision could be enormous.

Moreover, it is imperative that a right holder should retain the right to prohibit unauthorised linking to his or her website or to specific information on the website. The proposed provision would remove the right holder's autonomy in this regard.

See our further comments below, at paragraph 47.

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

See above.

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

The UK Government conducted a consultation in 2006 to establish whether there was a need to extend the liability privileges of the E-Commerce Directive to hyperlinks and information location tools.<sup>21</sup> In its report, published December 2006, It concluded that there was no substantial evidence to support the proposal. The report states moreover that there are disadvantages in Member States individually extending the limitations of liability as this hinders the development of a uniform approach, with the knock-on effect of increasing uncertainty for providers.

The terms "hyperlink" and "location tool service" have become increasingly complex, and the services they facilitate increasingly diverse. It is simply not appropriate to seek to legitimise all linking activity on the basis of a single sentence.

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

This question is so general as to be incapable of an answer in the context of this response.

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

Yes. The position concerning photographs should remain unchanged.

**(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?**

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<sup>21</sup> DTI Consultation on the Electronic Commerce Directive: The Liability of Hyperlinkers, Location Tool Services and Content Aggregators.

News marshalling does not require a change in the legislation. The existing fair dealing exception for reporting current events provides a fair framework. This can be supplemented by licences available from the NLI. As an example of what is possible, we refer the Review Committee to UK licensed media monitoring services such as Durrants and Precise. These are thriving businesses. They are constantly innovating to keep up with what technology offers and manage to be compliant with copyright law at the same time.

The interpretation of the reproduction right in Article 2 EUCD in *Infopaq* and other cases militates against the possibility of extended exceptions to facilitate the “marshalling” of content.

Where content forms part of a database, the opportunity to introduce new exceptions is limited to those exceptions permitted by the Database Directive.

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

See above.

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

No. See our comments above.

The UK Government considered this possibility in its 2006 consultation referred to above. As with hyperlinks and information location tools, its report concluded that it was not appropriate to extend the immunities to content aggregation service providers. It concludes that the question whether (and if so how) Articles 12-14 of the Electronic Commerce Directive should be amended is a matter for the European Commission. As noted above, the Commission has very recently stated its intention not to review these provisions, but to look at their implementation. We suggest that it is neither possible nor appropriate to alter the position unilaterally at national level.

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

See above.

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

Undoubtedly the need to obtain permission for the use of protected content is regarded as problematic for certain emerging internet enterprises. The debate surrounding the Review process suggests that at least some of these enterprises are unaware of the existing copyright exceptions on which they could rely, and others are simply unwilling to avail of licences which are available.

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

We are opposed to this amendment. It creates too broad a range of possibilities (as everything is possible and nothing is excluded). It would render the term uncertain for right holders and users alike.

**Note:** We note that no question was specified at the end of this chapter of the *Consultation Paper* relating to the amendment proposed at paragraph 6.2, concerning temporary acts of reproduction. We are opposed to the proposed amendment. We believe that there is no legal case for it. We are also concerned at the broad nature of the proposed amendment and that fact that the proposed section 87(2) is not tied to the conditions at section 87(1).

## Chapter 7 – Users

We preface our answers to the questions in this chapter with some general comments.

We are very concerned that the approach taken in the *Consultation Paper* - to broaden the copyright exceptions to the absolute maximum permitted under European law (and indeed beyond) - demonstrates a casual disregard for the potential damage that might be done to established creative industries. We are alarmed that the Review Committee should consider this approach without any economic evidence to justify it. Each of the proposed changes should be examined on its own merits, after an assessment of the economic consequences of making the change, the effect on existing business models and the overall impact on the copyright balance.

Many of the proposals in the *Consultation Paper* are of questionable legality in terms of Ireland's Treaty obligations and the EUCD. In particular we refer to the lack of a mechanism for fair compensation and to the fact that the three-step test is incompletely and haphazardly applied in the proposals. The proposals constitute a patchwork of some 33 measures to loosen copyright protection. We suggest that a large number of them are exposed to the possibility of legal challenge. Taken together, we suggest that they constitute an unprecedented contest to the property rights accorded to right holders by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.

**(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?**



As to the proposal to adopt all of the permissible exceptions in the EUCD, see our comments above.

***(a) Reproductions on paper for private use***

In the first place, the EUCD provision permits reproduction on paper only when the right holder receives fair compensation.

Secondly, the proposed exception appears to *exclude* reprography, the principal object of the EUCD provision.

Thirdly, the conditions attached to the provision are near impossible to interpret – for example, what is meant by making a reproduction on paper in a form different from the form in which the work is embedded? Is the proposal aimed at the making of paper copies of text or visual works in digital format?

Fourthly, without compensation, the provisions of the three-step test cannot be met. There is no limit to the amount of the work that may be copied. A permitted copy will therefore replace the need to purchase a copy of the work and must therefore conflict with the normal exploitation of the work, in addition to prejudicing the legitimate interests of the right holder.

Fifthly, the exception appears to overlap with the format shifting proposal.

And finally, the proposed exception – while having the appearance of having limits - would probably be interpreted as a general exception legitimising all paper copying. This would further weaken the copyright structure at a time when all right holders are suffering severely from problems with enforcement.

***(b) Reproductions for format-shifting or backing-up for private use***

With the passage of time, licensing solutions have developed to facilitate format shifting. Music files can now be played on a number of devices under the terms of most licensing or purchase models. At the same time, new business models are enabling new ways for consumers to format shift audiovisual content and access content from the “cloud” securely through direct licensing. In the publishing sector most e-books services operate on the basis of licenses, from a cloud facility.

A format shifting exception would be extremely counter-productive to the development of licensing in all of these sectors. This would not be to the advantage of the consumer. It would moreover conflict with the three step test, on the basis of conflict with the normal exploitation of the work.

It must be a condition of any private copying exception that there is lawful access to the work as well as ownership of the physical carrier. It must also be clear that

reproduction of works obtained via the “cloud” do not fall within the scope of the exception, Cloud providers are not copying for their own use and are not free to make material available without a licence.

Any such exception would presumably have to exclude rented material (such as audiovisual rentals), computer programmes and databases.

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

There is a fundamental difficulty with this proposal. The meaning of “illustration” for the purposes mentioned is unclear. It is capable of both a very broad and a very narrow reading. Walter & von Lewinski<sup>22</sup> are of the opinion that “the work or other subject matter used must serve only as an example in order to illustrate or explain what is being taught.” They say it is a limiting principle – “to illustrate a lesson, it will often be sufficient to use a part of a work only.” However, it is easy to see that a broad interpretation is possible of what is required for the purposes of “illustration.”

For so long as this exception only applies when a licence is not available (as is the case in the proposed draft) our objection here is primarily on the grounds of the lack of clarity. We would urge the Review Committee to avoid recommending the incorporation of terms in legislation that cannot be readily understood.

***(d) Reproduction for persons with disabilities***

A number of issues arise in relation to the proposed new exceptions. Firstly S104 CRRA provides a very broad allowance for the making and provision by designated bodies of modified works of all kinds to persons with all types of disability. Sub-section 104(3) allows the Minister to designate bodies for the purpose, but this has not generally occurred. The provision is not therefore being used, to the understandable dissatisfaction of persons suffering from disabilities.

We suggest that the problems will not be solved by the proposed new provisions. In most instances it is not possible for individuals to modify their own copy of a lawfully acquired work. The creation of modified works can be expensive. Moreover if the market for the provision of such works is destroyed by an exception, there will be no incentive for the creation and making available of such works on a business basis.. This will not benefit disabled consumers, whose priority is to have access to copyright material at the same price and the same time as non-disabled individuals. With digital publishing, meeting that need is becoming increasingly feasible.

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<sup>22</sup> Walter & von Lewinski, *European Copyright Law, A Commentary*, OUP 2010, at p.

We are aware that there is a problem to be addressed, but there are potential licensing solutions which will provide a far more effective result than the proposed amendments to the legislation.

For example, the CLA in the UK has a Print Disabled Licence. Equally, all CLA blanket licences to organisations for internal copying include permission to make accessible copies for print-disabled staff, students and employees. If there is a “licence over-ride” for the making of all copies, it will facilitate the exchange of repertoire agreements between ICLA in Ireland and its counterparts overseas, resulting in the availability of a much broader range of works. It will also facilitate Irish participation in the chain of “trusted intermediaries” that is being established internationally, to facilitate the low-cost availability of accessible copies. None of this will be possible if the proposed amendment is enacted.

A voluntary licensing scheme contains the potential for the creation of a central repository of accessible works, of the “intermediate copies” needed to create them, or an index of the same, allowing institutions to avoid duplication of creation of accessible copies when one already exists, and allowing niche publishers of commercial editions of accessible copies to target their efforts where such commercial editions are most needed.

Publishers in the UK are voluntarily allowing access by institutions to pre-production digital files, which makes the process of creating an accessible copy easier and cheaper. It is highly doubtful that this process would continue in the face of the exception proposed.

We suggest that the issue should be addressed by amending section 104 to permit the Minister to make regulations in relation to the issue. Publishing Ireland will be happy to engage in stakeholder consultations with the Minister and with relevant representative bodies, to arrive at a range of acceptable solutions which will represent a much more effective and sustainable result for print disabled persons.

***(e) Reporting administrative, parliamentary or judicial proceedings***

This proposed amendment is much broader than suggested in this sentence. It covers anything done for the purposes of public security, as well as administrative parliamentary or judicial proceedings or for reporting those proceedings. This is potentially very problematic. The meaning of “administrative” is unclear. It could encompass the entire working of the public service, for example. The ambit of what may be done “for the purposes of public security” is equally vast.

The proposed amendment moreover does not faithfully follow the wording of EUCD, which is narrower.

We suggest that this is a classic “facilitating” provision of the EUCD, and was never intended to be adopted without elaboration of the meaning of the terms.

Where “administrative” proceedings are concerned, we suggest that the intention of the EUCD provision was to cover the administrative courts in the civil law system.

We suggest that the existing provision at section 71 CRRA is more than adequate. We are not aware that there is any dissatisfaction with it.

#### ***(f) Religious and official celebrations***

We submit that the wording used for this proposal is too broad and loose. The proposal cannot be evaluated in the absence of some qualifying wording. A religious celebration might be defined as a wedding or funeral. An “official” celebration should be confined to an event of a special nature organised by a public authority.

#### ***(g) Advertising the exhibition or sale of artistic works***

Inclusion of artistic works in a catalogue published in conjunction with an exhibition is normally a commercial activity. It is licensed by IVARO and covered by Reciprocal Rights Agreements between IVARO and visual arts collecting societies in other countries.

Section 66 CRRA acknowledges the limits of what a designated library or archive may do, in confining the exemption in that section to reproduction “for the purposes of compiling or preparing a catalogue” or “for the purpose of informing the public of an exhibition.” It can be noted that a distinction is drawn between the preparation of the catalogue and its dissemination, and that the purpose of advertising is clearly limited to direct acts informing the public of the fact of the exhibition.

We do not object to an exception strictly limited to advertising an exhibition, but provided it does not extend to cover exhibition catalogues.

Walter and von Lewinski say:<sup>23</sup>

“...also, the publication and sale of catalogues for an exhibition or auction is not covered by lit(j), since they do not have the purpose of advertising (while they may have advertising effects) but instead aim at accompanying the exhibition by further explanations and background information”

We suggest that both the existing provision at section 94(1) and any proposed amendment ought to clearly distinguish between the publication of a work for the

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<sup>23</sup> At para.11.5.66.

purposes of advertising or sale, and the inclusion of a work in a catalogue accompanying an exhibition, auction or other sale.

***(h) Demonstration or repair of equipment***

No comment.

***(i) Fair dealing for the purposes of caricature, parody, pastiche or satire, or for similar purposes***

We are not opposed to a narrowly-drawn exception to parody, but provided:

- The exception is limited to parody;
- It is restricted to cases in which the purpose is comedy or satire;
- The words “or similar purpose” are removed. Neither the words “satire” nor “similar purpose” appear in the EUCD.

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

This proposal would cause very significant harm to educational publishing. It would decimate the income of the ICLA (owned equally by authors and publishers), and indeed probably render it unviable. In the long run it would significantly impair the quality of educational publications available to the educational sector, especially those that cater purely for the small Irish home market at primary and secondary level. Indeed, in time it would render these uneconomic and Irish schools would have to rely on books produced for other, larger countries, without the focus on Irish culture, history, geography and language.

If the provision were to be enacted, there would be no impetus for educational establishments to obtain a licence for reproduction. Amended section 57 CRRRA would become academic. Why would an educational institution take a licence when it could instead rely on the fair dealing exemption? And how could right holders establish whether the use in educational establishment falls within the fair dealing exemption, when in the absence of a licence there is no opportunity for the licensing agency to evaluate the copying made by the educational establishments.

It is not only educational publishers however that would be affected by this proposal. All works will be free for use in “education”, as long as the use is a “fair dealing.” The term “education” is not defined. All education providers would benefit, including commercial providers. Many enterprises can stretch the description of their services to include some educational element, and could thus some within the protection of the section.

The proposal clearly over-reaches what is permitted by the EUCD, where Article 5(2)(c) and Article 5(3)(a) are available only for non-commercial activities.

Moreover, we suggest that the proposal clearly creates a conflict with “the normal exploitation of the work”, as the normal exploitation of the work includes licensing of secondary uses of the work. The proposal is therefore in conflict with the “three-step test.”

In the context of the current Copyright Consultation in the UK, the broadening of educational exceptions is under consideration. The proposals would involve restricting the scope of the CMO to licence for educational purposes – exactly the same effect as would be achieved by this proposal. The effect of this is evaluated by the second *PwC Study*. The study says:

“restricting the scope of the CMO to license would have the largest impact on industry stakeholders. Revenue would be redistributed from publishers and authors to educational establishments. The cost savings for educational establishments would be small: copyright licensing payments make up less than 0.1% of an educational establishment’s expenditure. In comparison the loss borne by educational authors and publishers would be significant”

In Ireland, the cost of licensing to an educational establishment is lower than in the UK, and the percentage of expenditure that it represents would be proportionately smaller. The income lost to authors and publisher would be in the region of €1.5 million per annum.

The *PwC Study* continues:

“over the longer term, losing this income will reduce content creators’ incentives to invest in educational works: a 10% decline in CLA income would result in a 20% drop in output, according to authors surveyed by the ALCS, whilst a 20% decline in secondary licensing income would result in a 29% decline in output. We would estimate that this would equate to a fall of around 2,870 works per year.”

In Ireland the position would be worse. Our educational publishing market does not have the scale or strength of the UK market. Licensing income is a good deal lower. Any significant reduction in the income of ICLA will threaten its viability, and the whole secondary licensing project may be lost entirely.

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

(a) We are not in principle opposed to the extension of existing exceptions to include distance learning, but provided it is contained within section 57(1) CRRA and is thus subject to the licence over-ride in section 57(3), rather than, as drafted, contained in a new section of the Act. Moreover, in order to stay within the confines of the EUCD, it would be necessary that dissemination of material would take place via a closed system with access controls.

(b) This proposal, for a new section 57B CRRA, would permit both the reproduction and the communication to the public by educational establishments of any “work that is available through the internet.” While there are some constraints, the proposal fundamentally undermines both the reproduction right and the right of communication to the public. The provisions relating to knowledge and the clearly visible notice would be unworkable, in that it would be impossible for either the educational establishment or an aggrieved party to establish after the event that the conditions had been complied with. The most significant problem however with this clause is that it sends the message to students that anything found on the internet is free for use.

There is no question but that this exception falls well outside the “Three-Step Test”. Even though the benefit of the exception is confined to educational establishments, the extension of it to all works available through the internet must remove it from the category of “special cases.” Where the EUCD is concerned, there is no basis on which it can be justified.

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

No comment.

**60. Should the exceptions for social institutions be repealed, retained or extended?**

No comment.

**61. Should there be a specific exception for non-commercial user generated content?**

In its drafting, the proposed provision is very similar to that proposed at section 22 of Canadian Bill C-11 – the Copyright Modernisation Act, currently before the Canadian Parliament.

There are some differences between the draft and the Canadian proposal:

- The Canadian provision applies only to published material.
- In the Canadian proposal the new work must be a work in which copyright subsists.
- The Canadian provision is a “fair dealing” exception.

Accordingly, the proposal at paragraph 7.3.19 of the *Consultation Paper* is a good deal broader in scope than the comparable Canadian proposal. The provision would cover all non-commercial non-competing derivatives, of all works, in all media, irrespective of the type of use and whether or not the work was published. It would cover the whole work.

Measured against Article 5 EUCD, it is possible that an exception for the new work might fall within Article 5(3)(c), if it involved reporting current events, or Article 5(3)(d), as a quotation of published material for purposes such as criticism or review, in each case subject to the conditions specified in the provisions. In order to bring a novel provision for user-generated content within the ambit of the EUCD, it would be necessary to limit it to the circumstances in one or other of these permitted exceptions of the EUCD – both of which in fact already exist under Irish law.

**(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?**

We suggest that the words in S2(10) were carefully chosen. The intention was simply to make clear that the statutory defences in the Act remain open, notwithstanding the provisions of a contract. This does no more than reiterate the position at law. The statutory defences remain open irrespective of contract terms. Hence the choice of words in section 10 (2): “*it is irrelevant whether or not there exists any term of condition...*”.

This is quite different from rendering contractual terms null and void. The proposal constitutes a wholly unjustified interference in contract law. It is a blunt approach which fails to take account of the complexity of the market solutions on which the creative industries rely. It fails to take account of the nuances of various provisions of the EUCD. In its drafting, it fails to take account of the variety of conditions attached to the exercise of number of the permitted acts.

The combination of the proposed provision with a private copying exception would seriously undermine the existing business model for the sale of e-books. Combined with a fair dealing exception for “education”, the provision would render ineffective all licences for educational use. In both cases, the result must be a conflict with the normal exploitation of the work and thus a failure to comply with the three-step test.



## Chapter 8 – Entrepreneurs

**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?**

This question is ill-conceived in our opinion. Copyright exists to protect innovation and for this reason acts as a driver of innovation. They are not in opposition to each other.

**(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?**

Ditto.

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

This is too broad a question for the purposes of this response.

**(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?**

This proposal could not comply with the three-step test. “Innovation” is far too broad a concept to be regarded as a “special case.”

As an exception, it cannot fall within the limits prescribed by the EUCD.

As drafted it has the problem that the new use can be defeated *after* the investment has been committed to the creation of the new work. This makes it impractical from a user’s perspective.

## Chapter 9 – Heritage Institutions

Concerning this Chapter, we note at the outset that a proposal of a fundamental nature is not mentioned in the questions at the end of the chapter. This is the proposal to provide a new definition for “heritage institutions” for the purposes of sections 59-70, which currently apply only to libraries and archives. The proposal is to extend the exceptions in those sections to “educational establishments” and “The Boards and authorities referred to in section 198(1) (the digital deposit provisions).

We strenuously object to this proposal. It would broaden yet further the free educational uses, and when combined with the other proposals to extend educational exceptions, would probably spell the demise of educational licensing and quite possibly of educational publishing, especially of Irish-specific educational publishing.

We suggest that the combined effect of these provisions is such as to push them well outside the three-step test because of the manner in which they aim to destroy the established licensing market, which over 20 years has come to represent a normal form of exploitation of literary works.

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

Subject to the confinement of these provisions to designated libraries and archives, we do not object to this provided the limits of Article 5(3)(c) EUCD are observed.

### **(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?**

No. See our comments relating to catalogues at paragraph 56(g).

### **(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?**

Subject to the confinement of these provisions to designated libraries and archives, we have no objection to this, provided the limits of EUCD Article 5(3)(n) are observed.

### **(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?**

Subject to the confinement of these provisions to designated libraries and archives, we do not object to this proposal

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

The proposed provision relating to digital deposit is impracticably wide. Any publisher of any digital publication (which might include for example, web content, webcasts, podcasts, slides on a facility such as slideshare, artworks in digital format, software including open source software and so forth) must comply. There is no definition of “publisher.”

We believe that it would be impossible to apply the provisions, as drafted, to e-books. In many cases these are made available on the basis of a licence only, and are hosted in the cloud.

There should be appropriate exclusions, such as artistic works.

We suggest also that the format should be that in which the publication was published, and on the same terms, rather than, as suggested, in a format determined by the Board or Authority.

**(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?**

We are in favour of a broader system of licensing of orphan works than is expected to be provided by the forthcoming Directive on Orphan Works. We note the proposals currently under consideration in the UK and would urge the Review Committee to consider these, when the report of the Copyright Consultation is published at end June 2012.

**(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?**

No. This is impossible. It would mean, for example, that the copyright would pass with the transfer of ownership of an art work. Copyright has always been held independently of the physical object in which the work is embodied.

We note that section 123 CRR provides that copyright passes with a bequest of a material thing containing an original fixation of a work unpublished at the author’s death. We suggest that the definition of “fixation” appears to unnecessarily limit the range of works to which this section applies and that this might be rectified by referring instead to the material thing in which an original work is embodied.

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

We are of the view that an exception for text and data mining is ill-advised without a very clear view of the potential for these techniques, and the effect they might have on copyright. This is being explored in both the UK and in Canada. We note that the UK *Consultation Paper* refers to unforeseen risks and the need for further research. We share these concerns.

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

No comment.

## Chapter 10 – Fair use

We note that the Review Group is unconvinced by the arguments on both sides of this issue. We have already made our submission to the effect that we do not believe that such an exemption would benefit the Irish copyright system, nor indeed can it be accommodated within the existing EU regime of exceptions. In further evidence of our position, we are happy to provide a paper prepared by the Federation of European Publishers, which compares the fair use doctrine with the European framework of exceptions.

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

We refer to the FEP paper furnished herewith which refers to the application of the doctrine in the US.

**(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?**

(a) We refer to the FEP paper.

(b) The Irish Government should take an active part in the current European Commission process of review and reform of the copyright *acquis*. It is a matter for Europe to develop its own solutions to the challenges of the internet.

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

See FEP paper.

**(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRRA above, either subvert the interests of rightsholders or accommodate the interests of other parties**

See FEP paper.

**(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?**

See FEP paper.

**(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?**

See FEP paper.

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

See FEP paper.

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

**(b) In particular, how appropriate is the draft section 48A tentatively outlined above?**

The draft is not appropriate. It is not possible to introduce such a defence within the framework of the EUCD.

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

We believe that a consolidated piece of legislation would be welcomed by all copyright stakeholders.

**(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)?**

No. This is best left as is, inter alia for the reason that these are matters of E-Commerce within the European legal order. It is preferable to align with this distinction.

**(86) What have we missed?**

One important point has been missed. In our earlier submission we drew attention to the fact that the fair dealing exception at section 50 CRRA is not – as is necessary for alignment with the EUCD – confined to non-commercial uses. We referred to the fact that in the UK, a legislative amendment was made to take account of this fact. We submit that it is incontrovertible that a comparable amendment to Irish legislation is needed, and we are puzzled as to the reason why, in view of the comprehensive analysis in the *Consultation Paper* of submissions by interested parties, there is no mention of this point. This issue may well form the subject of a contest to the provision. We submit that it is a question that ought to be addressed in the report of the Committee.

**(87) We would be delighted to receive any responses to any of these questions. It is not necessary for any submission to seek to answer all of them.**

We commend the Review Committee on a thorough set of proposals to amend copyright law. We hope that this submission will help to inform its final report.