SUBMISSION

TO

THE CONSULTATION ON THE REVIEW OF THE COPYRIGHT AND RELATED RIGHTS ACT 2000

14 July, 2011

THE REGIONAL NEWSPAPERS AND PRINTERS ASSOCIATION OF IRELAND

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To

THE COMMITTEE FOR THE REVIEW OF IRISH COPYRIGHT LAW
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Introduction

The Regional Newspapers and Printers Association of Ireland ("RNPAI") was incorporated in 2008. It represents an amalgamation of the former Provincial Newspapers Association of Ireland (established 1919) and the Irish Master Printers Association. With a membership of 37 companies, the RNPAI represents its member title and printing companies on many national bodies including the Press Council, the Advertising Standards Association of Ireland, the Institute of Advertising Practitioners of Ireland, IBEC, Fas, and the Joint Industry Committee.

Regional press has been serving the local communities of Ireland for over 150 years, with many of its members in existence for even longer periods. A special bond exists between the newspaper and the community that is unrivalled in other media. The paper is the prime medium for local businesses to advertise their products and services in a cost effective way. In fact, regional newspapers are among the three most important advertising platforms in Ireland. After TV and national newspapers, they represent the best value-for-money means by which leading brands can reach the population in every town and country across Ireland.

There has been phenomenal change in the newspaper industry over the last 20 years, the current driver of change being the rapid expansion into electronic media. Although the paper copy of the newspaper is still valued, as our readership and advertisers are moving online, our members have followed suit, providing copy through websites accessible by our readers through mobile applications ("apps"), on their PCs and iPads. We are also using digital technology to drive more efficient production methods and to deliver a better quality print.

The speed at which news can now be delivered, and the public appetite for instantaneous services increasingly signals that newspapers must either innovate in the online environment or they will become redundant. This process however demands investment. Our members have made significant investment in technology, in staff training, in new editorial systems and so forth to deliver online services. It is very difficult at this point in time to recoup this investment because, as yet, a profitable business model has not been established by either national or regional newspaper publishers. While there is a clear understanding that online presence is essential to protect each publisher's brand, the industry continues to struggle to develop a profitable revenue stream from e papers and online content.

It is crucial to the whole fabric of our industry that the investment by the industry in innovative technology and delivery by digital means is understood and supported by the legal framework.

The newspaper and copyright

Copyright underpins the newspaper industry. The industry revolves around the creation and delivery of "content". Without quality content we would have no readers; without readers no advertisers. Copyright has long protected newspaper content as literary material, and the typographical arrangement of the published edition. It is this protection that enables the newspaper proprietor to monetise the investment in production of the newspaper. Without that protection, there would be no newspaper.

In general RNPAI believes that existing copyright legislation in the form of the Copyright and Related Rights Act 2000 ("the Act") holds a fair balance between right holder and user. This balance has been developed over a very long period and has

been adjusted to respond to technological advance as it has occurred. The Act was designed to adapt the law to the best European and international standards developed for the internet age. It has been supplemented by the implementation of various additional European Directives which regulate, for example, the liability of the internet service provider for copyright infringement. The legislation may need to be updated in some respects, in particular to achieve a better alignment with EU law, but RNPAI believes that any weakening in the copyright structure and any attempt to shift the fundamental balance between right holder and user would be a disaster for the newspaper industry at what is a delicate time in its evolution.

We wish to make the following submissions:

Enforcement

There are several problems for the newspaper industry associated with enforcement of copyright law.

1. Infringement by news aggregation websites

Newspaper copyright is infringed routinely in the online environment. RNPAI online content is reproduced and disseminated on a daily basis by search engines such as Google and Yahoo. It is "scraped" and used over and over by every conceivable type of commercial operator. Some of these offer content created and owned by our members for free. Others sell services based on copy taken from newspaper sites. News sites carrying unauthorised content base their business model on the theft of copy from legal newspaper sources. When taxed, they argue that the law needs to be changed.

There has been litigation in other jurisdictions relating to the activities of Google and other news aggregators. Very recently, Google failed to overturn a Belgian ruling forcing it to remove links and snippets of articles from local newspapers on its site[1]. In the UK, the High Court determined last November in the *Meltwater* case that online media monitoring services which provide links, titles and snippets from newspaper sites require licences from the UK Newspaper Licensing Agency[2]. These decisions demonstrate unequivocally that unauthorised news aggregation and dissemination is not lawful, that it is not fair practice and that it damages the interests of the legitimate news providers.

We believe that Government has not been sufficiently vocal about copyright infringement. Moreover, an impression has been created that the current review of copyright law is to serve the needs of the internet service providers and digital media operators, many of whom seek changes in the law to justify their current unlawful use of content.

We submit:

It is incumbent on the Review Committee to articulate a clear position on copyright infringement.

2. The question of licences.

While at an earlier stage in the development of internet services, entrepreneurs seeking to develop digital media services based on news content might have

justifiably claimed that it was impossible to obtain legal licences to use the content, that is no longer a valid argument. Licences are available, with mechanisms for determining fair pricing. In Ireland, Newspaper Licensing Ireland was established in 2002 to provide licences for the commercial use of newspaper content. It is mandated by eight national and 24 regional newspaper publishers. The mandate includes website content. Through reciprocal rights agreements with similar organisations in other countries, NLI is able to licence the use of a number of international newspapers.

Licensing is the "other side" of the enforcement problem. When legal licences are available at a reasonable cost, provided the law is adequate and is enforced, those who wish to use protected material will ultimately avail of the licences. Infringement levels will reduce. It has been shown by Eircom, which now provides a legal offering for music downloads through its music hub, that levels of illegal peer to peer file sharing have reduced. This has occurred through a combination of the "graduated response" process employed by Eircom and the advertising of the availability of legal offerings. RNPAI believes that the connection between licensing and infringement has not been sufficiently understood, or applied, in Ireland.

We submit:

The Review Committee should draw attention to the need for vocal and practical support by Government for all forms of legal licensing of content;

The Review Committee should recommend to Government that there should be collaboration with licensing entities to devise means of heightening public awareness of copyright and to promote the availability of legal offerings.

3. The need for affordable forms of legal redress.

While the question of the unauthorised use of news content has been addressed in litigation in many other countries, it has not been litigated in Ireland. One of the principal reasons for this is that litigation in Ireland is prohibitively expensive. In consequence, there is no legal redress for many infringements. Our members cannot afford to litigate. Ireland cannot claim to be compliant with its international and European obligations to provide effect legal redress for infringement when this is the case.

We submit:

The following is needed:

- The provision of a small claims track in the courts system for claims of low monetary value;
- Either a specialised court for the hearing of intellectual property matters or a programme of specialisation of judges, so that claims can be heard quickly and efficiently throughout the court system,
- The establishment of a structured system of alternative dispute resolution, with options for arbitration or mediation, administered by the Patents Office, or some other suitable public body.

4. The need to address the lacuna in the law exposed by the "UPC" case.

It is important that Irish legislation is in conformity with current international and European obligations. In the case of *Eircom Records (Ireland) & Ors v UPC Communications Ireland Ltd*,[3] it was demonstrated that Ireland had failed to effectively implement Article 8(3) of the Information Society Directive and that in consequence, the court was not empowered to grant injunctions against internet service providers, although justified on the merits.

It is noted that a second stakeholder consultation is underway relating to the implementation of Article 8(3). It is proposed to transpose the Directive by a bare Statutory Instrument. This fact, coupled with the assertions on the website of the Department of Jobs Enterprise and Innovation that the Government does not intend to introduce a piece of legislation akin to the French "Hadopi" system or the "three-strikes regime" of the UK Digital Economy Act sends the wrong message entirely. It conveys an unwillingness to look at the issues thoroughly and to consider introducing substantive legislation, if that is what is needed.

We submit:

The Review Committee should recommend that the consultation on the proposed Statutory Instrument should be broadened to encompass the question whether a more comprehensive piece of legislation is needed to implement the obligations in Article 8(3) of the Information Society Directive.

5. Technological measures

Our members use variable technological protection measures such as access controls, and apply rights management information to online content. We expect increasing reliance on these methods of protection and are concerned to ensure that they are sufficiently protected in law.

The Information Society Directive obliges Member States to provide "adequate legal protection" against circumvention of effective technological measures. We believe that the provisions in the Act may not provide such protection, when the act of circumvention is not actually prohibited at Chapter 1 Part VI of the Act.

We are also concerned that the offence created by section 376 is ineffective in the online environment. It is practically impossible to prove at what stage and by whom rights management information might have been removed from online content.

We believe that the protection of technological measures is a key element in the protection of online content. By making content more secure, it will promote innovation and encourage investment.

We submit:

The Review Committee should flag the importance of this issue to Government and to recommend the review of section 370-376 of the Act to ensure that the levels of protection are at par with the best international standards as well as being in keeping with our European obligations.

Fair use and fair dealing

The RNPAI is not in favour of the introduction of a US-style "fair use" defence. Undoubtedly the arguments against the introduction of such a defence will be well set out in other submissions. We join cause with those who make the case that it is a concept that depends too heavily on litigation. It is far preferable to have the certainty of good legislation than to depend on the variability and the very high cost of litigation.

We do however propose two changes to the "fair dealing" defence.

1. Fair dealing for commercial research

The Act permits fair dealing with specific works, including both literary works and typographical arrangements of published editions for the purpose of "research or private study". This exemption is outside the boundary of what is permitted by Directive 2001/29/EC ("the Information Society Directive"). The Directive provides a closed list of potential exemptions with no such broad exemption for research. To come within the limit of the Directive, the use must be confined to non-commercial purposes.

This fact was recognised in the UK, where the law was changed in 2003 to limit the comparable exemption to use for non-commercial research only.

We submit:

An amendment to Sections 50(1) and (2) CRRA is required, to confine the fair dealing defence for "research" to "non-commercial research".

2. Parody

The Information Society Directive permits EU Member States to provide an exemption for "caricature, parody or pastiche". RNPAI would support the addition of a parody defence within the existing fair dealing defences. We believe that Irish and UK law is notable for the absence of such a defence, and that it would be a positive development for a range of media industries.

We submit:

The Review Committee should recommend the inclusion of a defence for parody within the framework of the existing fair dealing defences.

Regional Newspapers and Printers Association of Ireland
Summary of Submissions

- It is incumbent on the Review Committee to articulate a clear position on copyright infringement.

- The Review Committee should draw attention to the need for vocal and practical support by Government for all forms of legal licensing of content

- The Review Committee should recommend to Government that there should be collaboration with licensing entities to devise means of heightening public awareness of copyright and to promote the availability of legal offerings.

- The following is needed:

    - The provision of a small claims track in the courts system for claims of low monetary value;
    - Either a specialised court for the hearing of intellectual property matters or a programme of specialisation of judges, so that claims can be heard quickly and efficiently throughout the court system,
    - The establishment of a structured system of alternative dispute resolution, with options for arbitration or mediation, administered by the Patents Office, or some other suitable public body.

- The Review Committee should recommend that the consultation on the proposed Statutory Instrument should be broadened to encompass the question whether a more comprehensive piece of legislation is needed to implement the obligations in Article 8(3) of the Information Society Directive.

- The Review Committee should flag the importance of providing effective protection of technological protection measures to Government and should recommend the review of section 370-376 of the Act to ensure that the levels of protection are at par with the best international standards as well as being in keeping with our European obligations.

- An amendment to Sections 50(1) and (2) CRRA is required, to confine the fair dealing defence for “research” to “non-commercial research”.

- The Review Committee should recommend the inclusion of a defence for parody within the framework of the existing fair dealing defences.

[1] Copiepresse v Google, decision of May 5, 2011. Google may appeal the decision to the Cour de Cassation, Belgium's highest court.
[2] The Newspaper Licensing Agency and Ors v Meltwater Holdings BV and Ors 2010 EWCH 3099. The appeal against the decision has been heard and judgment is awaited.

[3] [2010] IEHC 377,