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BSA Response to Ireland's Copyright and Innovation Consultation Paper May 2012

Introduction

The Business Software Alliance (BSA)¹ welcomes the opportunity to submit views on Ireland's "Copyright and Innovation" consultation paper. We believe – as detailed below – that rather than hindering innovation, Ireland's copyright law has been a significant factor in the growth of the ICT sector in Ireland. We encourage the reviewing Committee to refrain from making any radical changes to the balance struck in the current copyright law, and encourage the Committee instead to consider what can be done to strengthen the law's enforcement and better position the Irish Government as a global leader in IP protection.

BSA brings together many of the world's most innovative companies, who develop and bring to market technologies and services that help define the digital age. They all rely directly on copyright and other forms of intellectual property in order to fund and protect their innovations. At the same time, these companies also provide many of the world's most popular online technologies and services, which are fuelled by third party content. As both producers and consumers of IP, BSA members have a unique perspective on copyright and the need for a balancing of interests.

Many BSA members also have a significant market presence in Ireland, and BSA has always worked closely with the Irish Government to ensure that Ireland's laws reflect the dynamism of the industry. The aim of the Committee's review – namely to identify any areas of the current copyright legislative framework that might create barriers to innovation and to make recommendations to resolve any problems identified – is therefore of significant, direct interest to BSA and its members.

BSA does not share the perception, which according to the review's terms of reference is apparently held in some quarters, that Ireland's copyright legislation does not cater well for the digital environment. On the contrary, BSA believes that the Copyright and Related Rights Act 2000 (the "CRRA") has helped to drive innovation in Ireland by enabling rightholders to effectively protect their valuable intellectual property while at the same time allowing for appropriate usage of copyrighted content. When President McAleese signed the Act into law on 10 July 2000, she and her Government created a "state of the art" copyright law that enabled Ireland to reach its current position as a leading hub for software

¹ The Business Software Alliance (www.bsa.org) is the world's foremost advocate for the software industry, working in 80 countries to expand software markets and create conditions for innovation and growth. Governments and industry partners look to BSA for thoughtful approaches to key policy and legal issues, recognising that software plays a critical role in driving economic and social progress in all nations. BSA's member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected and secure. BSA members include Acronis, Adobe, Apple, Asseco Poland S.A., Autodesk, Aveva, AVG, Bentley Systems, CA Technologies, Cadence, CNC/Mastercam, Compuware, Corel, Dassault Systèmes SolidWorks Corporation, DBA Lab S.p.A., Dell, Intel, Intuit, Kaspersky Lab, McAfee, Microsoft, Minitab, NedGraphics, Progress Software, PTC, Quark, Quest, Rosetta Stone, SAP, Siemens, Sybase, Symantec, Tekla, and The MathWorks.

development and the single largest exporter of software solutions in Europe.² This law has proven flexible and enduring and we see no need for major reforms. With that background, BSA asks the Committee to consider the following key points when determining its next steps and, in particular, in considering any reforms to the CRRA.

I. Overall balance (questions 23–25)

- **Copyright is essential, both as an incentive and as a mechanism for funding innovation**

There is a strong link between innovation, economic growth and IP protections. This conclusion is borne out by the direct experience of our companies. It is also buttressed by numerous studies that have shown that effective, balanced IP protections, such as those in Ireland, help create economic opportunities and drive competitiveness.³

- **Existing law fosters innovation and is a key factor in the establishment of Ireland as a software development hub.**

Ireland's existing copyright regime strikes an appropriate balance between facilitating innovative behaviour and protecting the resulting innovations. Many of our member companies have conducted R&D and commercialised their innovations in Ireland for several years. They view Ireland's IP regime as among the best in terms of promoting business growth and enabling innovators to bring their ideas to market. As a result of the regime's effectiveness, the Irish IT industry is a dynamic sector that currently is responsible for approximately 25% of Ireland's total turnover, representing one third of Ireland's exports by value, and supporting 75,000 high-skill, high-wage jobs.⁴

² Figures from Enterprise Ireland show total export sales in the software sector of EUR 852m in 2009, up 6% from 2008, see <http://www.enterprise-ireland.com/en/Publications/Reports-Published-Strategies/2009-Annual-Report-and-Accounts-Eng-.pdf>.

³ See, for example, World Economic Forum Global Competitiveness Report 2010-2011 at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf (confirming that the strength of a country's IPR regime is linked to economic competitiveness); see, also, Cavazos Cepeda, Lippoldt, Senft, "Policy Complements to the Strengthening of IPRs in Developing Countries", OECD Trade Policy Working Paper No. 104 (14 September 2010), available at http://www.oecd-ilibrary.org/trade/policy-complements-to-the-strengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en ("A strengthened IPR framework can create spillovers, incentivise innovation, increase trade and trade-related investment, and boost intellectual property intensive economic activity . . .").

⁴ See ICT Ireland, Sector profile, available at: http://www.ictireland.ie/Sectors/ICT/ICT.nsf/vPages/Papers_and_Sector_Data~sector-profile?OpenDocument..

II. Need for improvements to Ireland’s enforcement system (questions 86, 32)

- ***Ireland’s enforcement regime contains some model provisions that generally work well.***

When the CRRA was introduced in 2000, BSA applauded Ireland’s leadership. BSA and its members continue to hold out Irish law, including its enforcement provisions, as a model of a modern, balanced copyright regime. The CRRA’s provisions for presumptions of copyright, hearsay rules permitting confidential testimony, and robust damages for those found to be infringing are particularly useful measures.

- ***Some reforms on the margins of the regime may make sense.***

The CRRA introduced several improvements to assist right holders enforce copyright in Ireland and to dissuade infringers, such as new civil penalties and substantially increased criminal penalties in the form of higher maximum fines and prison sentences. Some modifications may be warranted to strengthen this regime, however. For example, improvements to civil procedures that allow for more rapid resolution of copyright infringement cases would be welcomed. Currently, bringing an infringer to justice can be an expensive and time consuming process, which may serve as a barrier to justice in particular for smaller and mid-sized enterprises and start-ups. A careful review of the dispute resolution procedures available in IP cases is warranted, including the possible introduction of summary judgment in IP cases, of recommended settlement conferences, mediation or ADR in order to encourage prompt resolution of cases by the parties involved, and/or of a small claims court procedure for copyright cases.

- ***Stronger enforcement has been demonstrated to drive innovation and economic growth.***

Robust IP enforcement and a resulting decline in software piracy can stimulate the IT sector and broader economy. A 2010 study by IDC documents the economic impact of reducing software piracy in markets worldwide.⁵ The report states that lowering piracy by 10 percentage points per country in four years would deliver a number of positive economic benefits, including: (i) the generation of nearly 500,000 new high-tech jobs, (ii) the creation of more than USD 142 billion in new economic activity, and (iii) the generation of roughly USD 32 billion in new tax revenues. The report also notes that the effects of piracy are far-reaching and “go beyond the multinational software publishing industry itself to affect distributors and service providers in local markets worldwide, starving them of spending that would create new jobs and generate much-needed tax revenues for governments”. The report goes on to conclude that widespread software piracy translates to lost

⁵ IDC, “The Economic Benefits of Reducing Software Piracy”, 2010, available at: <http://portal.bsa.org/piracyimpact2010/studies/piracyimpactstudy2010.pdf>.

opportunities for the businesses and related sectors that depend on the software industry, especially the distribution and services sectors.

- ***We also recommend that Ireland consider updating its Software Asset Management policy.***

Ireland has in the past served as a model of robust copyright protection, adopting Circular 3/2001 in February 2001. The Circular instructs government departments to adopt software compliance programs to ensure that “only lawfully acquired software is in use” and proposes a model software compliance program for departments to follow. Given that the Circular is now over a decade old, revisiting it and updating its terms may be warranted. Government-endorsed policies ensuring that the public sector does not purchase or use infringing software can help protect intellectual property by setting an example for industry and individual citizens. Ireland’s piracy rate is currently at 34%;⁶ adopting a government “software asset management program” could help to reduce the rate further, driving a concomitant increase in innovation, jobs and tax revenues.⁷

III. Importance of TPM protection (question 33)

- ***TPMs enable both existing and emerging business models (including a range of cloud-based services) and should benefit from robust protections.***

Software publishers have long used a variety of technological protection measures (TPMs) to protect against piracy and to enable secure dissemination of their products. More recently, TPMs have served as the foundation of many services and platforms designed to distribute content, enabling innovative companies to offer that content to users in a wide variety of ways. The use of TPMs will no doubt continue to expand as the technology takes on increased importance with the broader deployment of cloud computing, where these technologies are used to guard against unlicensed use and unauthorized access to software and data.

BSA recommends that protection of TPMs be made comprehensive in the CRRA. Specifically, TPM protection should cover both access control and copy control technologies, and should protect both against acts of circumvention and trafficking in (i.e., manufacture, marketing, distribution, etc.) circumvention tools and services. Prohibited acts should be subject to remedies without imposing requirements of knowledge, intent, or willfulness. In addition to civil remedies, criminal penalties should be available for violations that are carried out willfully and for a commercial purpose.

⁶ See BSA’s 2011 Global Software Piracy Study, May 2012, available at, <http://portal.bsa.org/globalpiracy2011/>.

⁷ See, for example, SAM (software asset management) Advantage, at, <http://samadvantage.bsa.org/>.

IV. Copyright levies (question 37)

- ***Ireland should resist calls for the adoption of private copy levies.***

We strongly support fair and full remuneration for rights owners for the use of their works. But we agree with the Committee that private copy levies are not an appropriate or necessary way to compensate authors. Levies have never been applied to software, and they should not be.

Levies were first introduced in the analogue world as a mechanism to compensate authors for losses due to “private” copying of music and movies. Because the levies system has little ability to reflect accurately the actual value and use of any particular work, levies are at best a rough form of justice. They reflect a compromise solution in a world where the technology did not exist to manage particular uses of works. Today, however, digital technologies better enable authors to manage uses of their works and to be paid for the use a consumer actually makes of those works. The better approach is to encourage use of these technologies, rather than to impose what is effectively a tax on digital devices and media that can discourage uptake of information society goods and services.

V. Proposals to expand exceptions and limitations

- ***As yet, we have seen no evidence to suggest that EU law should be re-opened to implement new exceptions.***

The consultation proposes to introduce a number of new exceptions, certain of which would require re-opening not only of the CRR, but also of EU laws. While some reforms on the margins of Ireland’s copyright regime may make sense (such as those described above relating to enforcement), we see no need for – and indeed would oppose – a re-opening of the EU Copyright Directive (2001/29/EC) or the EU Computer Programs Directive (2009/24/EC).

BSA members innovate in markets throughout Europe, operating as both licensors of their own technologies and licensees of third party content. In their experience, the existing system of exceptions set out in the Computer Programs and Copyright Directives strike the right balance between incentivising creativity and allowing third party uses. We see no need to ‘reinvent the wheel’, introducing new exceptions that could give particular companies or commercial sectors unwarranted free access to the material of others, or reopening EU legislation for major battles over exceptions. Indeed, the international success of Irish software and other copyright-based sectors in Ireland has demonstrated concretely that the Irish and EU copyright system is already largely fit for purpose.

Re-opening EU law threatens to unsettle long-held market expectations. To the extent additional exceptions may be needed in Irish law in particular – such as to

facilitate private copying – those should be dealt with at national level on a case-by-case basis, rather than through reform of the entire framework of exceptions.

- ***Any new exceptions should not apply to software.***

The EU Computer Programs Directive exclusively determines the copyright exceptions applicable to computer software. These exceptions are limited, and available for a narrow set of activities that include decompilation, the making of back-up copies, and observation, study and testing. The Computer Programs Directive's exceptions are implemented in the Irish European Communities (Legal Protection of Computer Programs) Regulations, 1993. As such, any new exceptions introduced in Irish law – including an exception for private copying – should *not* apply to computer software. This principle is reaffirmed by the express terms of the EU's 2001 Copyright Directive, which provides that "*Articles 5 and 6 of [the Computer Programs] Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.*"

- ***Any new exceptions must satisfy the Berne Convention's "three-step test".***

Under the Berne Convention's "three-step test", exceptions to the reproduction right are permissible only in (i) certain special cases that (ii) do not conflict with the normal commercial exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the author. The three-step test has since been incorporated into the WTO TRIPS Agreement (Article 13) and the EU's Copyright Directive (Article 5(5)).

WTO case law makes clear that the three-step test should be strictly interpreted. Following complaints by the Irish Music Rights Organisation and others, the EC filed a claim against the United States (*United States -- Section 110(5) of the US Copyright Act*, or "*the Irish Music Rights case*") alleging that certain exceptions in U.S. copyright law violated TRIPS. In ruling partially in favour of the EC, the WTO panel explained that "the three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied"; failure to comply with any one of the three steps renders an exception invalid. The panel also made clear that each step should be interpreted narrowly. For example, with regard to the requirement that any exceptions be "special", the panel explained that:

"The term 'special' connotes 'having an individual or limited application or purpose', 'containing details; precise, specific', 'exceptional in quality or degree; unusual; out of the ordinary' or 'distinctive in some way'. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective."

The Consultation suggests that the three-step test would be incorporated into the proposed innovation exception. It is less clear whether any of the other proposed

exceptions would be subject to the three-step test, however. Before recommending any new exceptions, we encourage the Committee to test the proposal against the three-step test.

- ***There is no evidence that the introduction of a fair use exception will create new innovation opportunities (questions 78–83).***

As the UK Hargreaves Review concluded, the answer to the question whether the UK would quickly become a rival to Silicon Valley if only it could amend its copyright law and adopt a “fair use” exception, is “certainly not”. The reality – as shown by several studies⁸ – is that numerous factors play a role to support innovation and competitiveness, including attitudes to business risk and investor culture, the tax and regulatory environment, R&D investment, and the local education system and workforce. As noted above, we believe that the structure of exceptions as set out in the Copyright Directive provides adequate flexibility to both accommodate the needs of follow-on innovators and to protect the interests of creators of original works, without the introduction of a sweeping and untested fair use exception. To the extent that reforms are needed, these should be addressed through the introduction of narrowly targeted reforms in the identified areas (such as amendments to facilitate private copying) within the scope allowed by the current EU legislation.

- ***We are similarly not persuaded of the need for an “innovation exception” (question 66).***

The Consultation suggests that an “innovation exception,” which would exempt users from liability for infringement where they derive a sufficiently “innovative work” from the original, might foster follow-on innovation in Ireland. The EU copyright acquis already provides for a number of exceptions intended to enable just this sort of secondary innovation, however. In the context of software, for example, the Computer Program Directive exception that allows lawful users to observe, study or test the functioning of a program in order to determine the ideas and principles which underlie that program ensures that copyright does not prevent the study of software in order to determine unprotected elements. Similarly, the Directive’s exception for reverse engineering enables innovators to develop software that can interoperate with existing computer programs in the event that information necessary to do so is not otherwise available.

Targeted exceptions such as these strike a careful balance between encouraging primary innovation and facilitating secondary innovation. A vague and overly broad

⁸ See, for example, study from the Economist Intelligence Unit (sponsored by BSA), that identifies several necessary factors to create a sound environment for IT sector growth, “Resilience amid turmoil: Benchmarking IT industry competitiveness 2009”, available at http://portal.bsa.org/2009eiu/study/2009_eiu_global.pdf. The Innovation Union Scoreboard 2010 and European-American Business Council’s Atlantic Century Report (2009) paint similarly complex pictures of the many elements needed to promote innovation in a given market and highlight potential areas of focus for Ireland. “Innovation Union Scoreboard 2010, The Innovation Union’s performance scoreboard for Research and Innovation”, February 1, 2010, available at: http://ec.europa.eu/research/innovation-union/pdf/iu-scoreboard-2010_en.pdf; and ITIF and EABC, “The Atlantic Century, Benchmarking EU & U.S. Innovation and Competitiveness”, February 2009, available at: <http://www.itif.org/files/2009-atlantic-century.pdf>.

innovation exception, in contrast, could make it more difficult for rightsholders to protect their innovative works – deterring rather than encouraging innovative activity.

Freedom of licensing facilitates new business models that benefit innovators and users alike (question 62).

The CRR (section 2(10)) provides that a contractual term which restricts an act permitted by the CRR is “irrelevant.” The Committee queries whether this language requires revisiting. We would recommend a more cautious approach, which reflects the fact that the market in the vast number of cases is working well through license agreements that have been freely entered into between copyright owners and users.

Indeed, contractual usage terms for copyright material – often implemented through technological usage rights – are the precise mechanism by which the options available to users can be made more varied, offered under different usage models, and made available at different price points. By contract, copyright owners can offer different numbers of particular types of copies at different prices, monthly usage rights at a flat price, or temporary usage rights for free, for example. Rather than overriding such useful competitive market offerings with mandatory rules for unlimited or a particular level or type of use, it would be more appropriate to respect and uphold agreed licensing terms, and leave exceptions to work as a reasonable default when the usage terms and conditions have not been defined by contract.

Conclusion

Irish policymakers have long understood the need for holistic measures to drive innovation in the country. When it committed itself to reform in the 1990’s, Ireland embraced its future as a knowledge-based economy not only by successfully reforming its copyright laws, but also by adopting new fiscal and strategic approaches that have attracted world-class innovators and allowed indigenous technology companies to flourish. Clearly this commitment has remained resolute, as evidenced by the Government’s plan to build a “Smart Economy” and to position Ireland as “The Innovation Island”. The Government’s “Innovation Taskforce” recognises that Ireland has many of the attributes needed in order to become an innovation hub for Europe, and has set out what further work needs to be done to make this happen. In BSA’s view, Ireland has the appropriate copyright framework in place. The Government should instead place renewed emphasis on priorities such as building on investment to date in research and development;⁹ attracting top tier venture financing to scale innovative companies; and strengthening linkages between education and industry. BSA members stand ready to work with the Irish Government on these issues.

⁹ Economy-wide R&D spend has trebled in the last decade, with two thirds coming from the enterprise sector, see http://www.taoiseach.gov.ie/eng/Building_Ireland's_Smart_Economy/Smart_Economy_Progress_Report.pdf.