

June 2011



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

Ericsson submission



Copyright Review Committee

Room 517,
Department of Enterprise, Jobs and Innovation,
Kildare Street,
Dublin 2
Ireland

Electronic submission via: copyrightreview@deti.ie

Re: **Consultation on the Review of the Copyright and Related Rights Act 2000**

Ericsson welcomes the opportunity to contribute to the Irish consultation on the review of the Copyright and Related Rights Act 2000 (“Copyright Act”) review and is pleased to be able to participate in the national discussion regarding the future Copyright framework in the context of the digital economy, competitiveness and growth.

Ericsson is the world’s leading provider of technology and services to telecom operators. Ericsson is the leader in 2G, 3G and 4G mobile technologies, and provides support for networks with over 2 billion subscribers and has the leading position in managed services.

The company’s portfolio comprises of mobile and fixed infrastructure, telecom services, software, broadband and multimedia solutions (including IPTV and Mobile TV) for operators, enterprises and the media and broadcasting industry. The Sony Ericsson and ST-Ericsson joint ventures provide consumers with feature-rich personal mobile devices.

As the world’s leading technology provider, Ericsson plays a key role in the development of standards in fixed and mobile voice, data (IP) and TV/video technologies, and hence is a key actor in the convergence process by enabling and empowering the convergence process with technological means and solutions.

Convergence is a fundamental game changer and it is a product created by the fifth technological revolution, i.e. IT and Telecom. Governments around the world play a significant role in maximizing the societal benefits of convergence and in creating incentives for industrial and societal transformation toward a digital networked society.

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1. Introduction

A report by the European Policy Centre in April 2010 concluded that a European Digital Single Market would bring 4% GDP growth over a 10 year period; this is equivalent to €500bn. A share of this growth would be attributable to the creative industries.¹ Ericsson considers the establishment of the Digital Single Market in the EU including, but not limited to audiovisual content, music, trade in service and goods (e-commerce) to be in the interest of all stakeholders: consumers, rights holders, innovators, service providers and SMEs. It will create a more dynamic and competitive market, benefiting the Irish economy and further the success of creative industries and digital industries alike.

Irish and other European consumers should have access to legal, timely available, competing and wide ranging choices of appropriately priced content offerings. In addition, consumers expect to be able to make a free choice of when (e.g. on-demand) and how (which device) and where (location) to consume content of their choice.

From a Copyright perspective, Ericsson believes that the challenge to stimulate the legal digital market lies in the out licensing process of legal digital content and the conventional business conduct of economic rights holders to exploit rights, although empowered by current copyright system in Ireland and elsewhere.

Ericsson would also like to share the following observations:

- Copyright legislation does not in itself prevent right holders from commercializing digital works on for example: a multi-platform, multi-territorial or any screen/format basis; or in competition with other release windows. Instead, the challenge lies in the commercial and contractual practice, i.e. the lack of adequate supply of legal digital content. This should fundamentally be about balancing all stakeholders' interests and not just economic rights holders and creators.

The historically persistent focus on upward revisions of copyright laws has resulted in:

- Insufficient growth in the legal digital market, e.g. legal, timely available, wide ranging, attractively prices and legal digital media offerings available on AWATAD terms: that is any where; any time; any device; by focusing on actual consumption rather than potential consumption that is distribution, technology and device specific.
- The protection of conventional distribution methods e.g. off-line and one-to-many distribution channels has limited competition and consumer choice.
- Excessive pricing of legal digital media products. Consumers are paying for: (a) potential consumption per screen/technology; (b) inefficient processes of clearing

¹ European Policy Centre 2010, see www.epc.eu/dsm .

all necessary rights and; (c) in some cases are subjected to double taxation. For example: direct licensing in combination with the use of excessive levies.

It is time that the market supply failure is resolved once and for all, not only in one EU member state but by equal measures across the entire EU. This can be achieved by revising copyright law on an EU and individual member state level, and also by giving consideration to equally important measures such as:

- Increasing the role of competition policy in the supply of digital content;
- Formulating new “digital” conditions regarding state funds for Film/Media production and Public Service Media; and
- Increasing the focus of media regulation to stimulate the availability of on-demand wholesale programming and aggregation of content (Film and TV).

2. Ericsson’s comments on Copyright

The failure of legal digital content supply has three main contributors:

2.1 Limited availability:

- Conventional media practice, such as windowing or other type of conventional media business conduct that is by design undertaken to limit competition in distribution markets, by restricting supply, needs to be addressed. The review conducted by the Irish Copyright Review Committee should, in Ericsson’s opinion, include but not be limited to, revisions of copyright but also increasing the role of competition law in legal digital content markets. The principal focus should be to re-balance the investment interest of rights holders’ with consumers’ interest and society’s interest in efficient and competitive markets.
- Traditional territorial licensing prevents the development and introduction of new technologies and services like networked based remote access services (more popularly known as cloud services) or follow-me media services. Amendments to the traditional territorial licencing approach could allow Irish consumers to seamlessly continue to consume legal content away from home across Ireland and Europe without losing access to a service they continue to pay for or without the necessity to acquire additional rights (freedom of location for the individual user). This is the next step in the territorial dimension; national or regional, where Irish and other European consumers can continue to enjoy their “home” media services across Ireland and/or the EU, without decreasing rights holders’ revenue potential.
- As a principal contract law and technical standards should not be allowed to override statutory exceptions such a new fair use regime in Ireland, thereby limiting the availability of legally acquired content to format or device shift within the scope of the private sphere.

2.2 Technology Specificity:

Joint Licensing of Co-existing Rights:

- The exclusive right to make copyright protected material available to the public is an area where technology has had an immense impact, in particular on the digital rights of mechanical reproduction and performance/communication to public. Digitalisation is making these rights increasingly harder to separate and maintain as distinct rights. Due to the vast and fundamental changes in technology and hence business conditions, it is absolutely essential for Irish copyright law to acknowledge the digital fact of a multiplatform distribution environment. These rights, as applicable in the digital sector, need to balance the demand side of the market (i.e. the consumption of copyright protected material) with the interests of rights holders. That is to consider end users' actual consumption of content, and avoid the situation, in force today, when the cumulative effect of rights slicing or splitting, can double or triple the cost of identical content for an identical user and for unaltered right to use. Accordingly, Ericsson recommends that to the extent the rights may co-exist in a particular digital usage (e.g. digital downloading/transferring), such rights must be licensed together and not separately, in order to avoid dysfunctional market outcomes in the digital market.

Format/Platform Shifting:

- In relation to format/platform-shifting, Ericsson advocates the expansion of the existing limited private copying exemption in section 101 of the Copyright Act, to permit copying of copyright works enabling format shifting, platform shifting and time shifting in order to reflect and regularise the reality of the situation in Ireland today, where it is commonplace for consumers to copy digital content (music and audiovisual works) for playback on different devices, such as from a CD to a MP3 player or from a PC to a portable player or CD. Ericsson believes this will help provide clarity and restore credibility and confidence in the copyright regime in Ireland, not only among consumers, but also among stakeholders including rights holders and technology providers.
- As a general principle the private copy exemption should, on the one hand, be drawn as broadly as possible to embrace all those acts of format shifting which everyone knows are happening as a matter of course, and that most reasonable people believe already are, or should be, permissible. On the other hand, it is imperative the exemption remains narrow and sufficiently limited so that it causes no significant harm to rights holders and as such does not give rise to a requirement for payment of compensation in accordance with the EU Copyright Directive 2001/29/EC. This is the critical balance that needs to be struck.
- The exemption should fundamentally apply only to individual consumers for personal private use, so that the owner would be able to make the work accessible in another format for playback on a device in their legal possession. Having said that, however, we do believe that extension to the family circle i.e.

the scope of private sphere, is an important consideration. Importantly, the exemption should not be place specific, to reflect the fact that devices may be portable or mobile (so taken out of the home) or located in a different place (e.g. in the car or even in a second home), in other words the exemptions should be technology (including, networks, clouds etc) neutral. Harmonisation of private copy exemptions across EU and, in the case of Ireland, the need to expand the existing private copy exemption as outlined above, should be based on a technology neutral approach.

Technology Neutral:

- To expand the technology neutral approach; the fair dealing/private copy exemption should also be constructed independently of any physical storage media format and any solution architecture e.g. if the storage function is embedded in a consumer device or in a network. Notably, PVR and nPVR (network PVR) have the same functions and should not be discriminated against by law or require special consent from right holders. As a result, competition between technologies is allowed and most suitable solutions will be accepted by consumers. In addition, the previously mentioned follow-me service functionality of nPVR should also be considered. The growing popularity of cloud based solutions² should be supported by adequate reforms to the Copyright Act.
- In the case of DRM, any legal provisions against circumvention technologies introduced into copyright legislation in Ireland and the EU must be based on technology neutral and interoperable principles to allow end-users to move legal content between devices and media service providers. Hence, legal provisions for use of DRM must only protect technologies that are:
 - Built on an interoperable set of proprietary standards or consist of DRM technologies that are based on open industry-wide standards.
 - Must not limit individuals' statutory right to make legal private copies of creative works.

2.3 Unreasonable transaction costs; - collective rights management³

Digital music licensing should be market-oriented and efficient allowing pan-European and multi-territory licensing, with the Irish and EU market characterised by willing right holder licensors and willing commercial licensees. Ericsson wishes to see the development of a pan-European licensing system. Ireland can take a leading role in such a pan-European licensing system and further leverage its position as the leading net exporter of digital content, by including the following criteria in the review of the Copyright Act:

² http://www.ericsson.com/news/110512_cloud_244188810_c

³ See also DE on CRM: http://www.digitaleurope.org/index.php?id=1071&id_article=549

- **Establishment of a manageable number of licensing entities** each representing a broad suite of rights and specific repertoires and ensuring healthy competition with each other, whilst operating on a pan-European, rather than a national, basis.
- **Transparency for rights clearance.** This is a prerequisite for a practical functioning market. Licensees need visibility as to the sources of different catalogues and content. A repertoire database (notably the Global Repertoire Database initiative as initiated by the European Commission⁴) would be an important tool for such transparency and related management of licences.
- **Ability to negotiate tariffs.** Licensees should have the choice to negotiate on a pan-European basis, and directly with publishers, national Collecting Societies, or Collecting Societies representing a particular repertoire. It is essential to establish a system whereby tariffs cannot simply be imposed by a licensing body; it is critical that commercial negotiations take place as the digital market is a fast-developing and continuously evolving one.
- **Competitive environment for all stakeholders, including Collecting Societies for the management of rights.** Strictly interpreted, a “one stop shop” would not be sufficiently agile, flexible or competitive. We would like to see enough participants to prevent monopoly leveraging within a Digital Single Market (e.g. 6-10 licensing entities offering different, competitive repertoires on a pan-EU basis).
- **Support the rise of new, innovative systems.** One of the highest policy priorities in the digital copyright eco-system should be the promotion of a vibrant and thriving pan-European market for the distribution of legal digital content, giving the consumer easy, flexible access to a rich source of digital content while fostering a climate conducive to new players, new business models, innovation, experimentation and evolution in the digital marketplace. The new copyright system should be technology and platform neutral (online, on-demand, broadcast), ensuring willing licensees have equal access to content.
- **Full scope licensing, meaning that private copy claims can be covered within the scope of the licence.** Right holders should be remunerated through licensing, not private copy levies. Levies should not be seen as a primary revenue stream for digital content. Direct licensing is more appropriate and fairer for all. Returns to right holders are correlated to the value of consumed content and users pay for what they consume, thus encouraging flexible licensing models: a virtuous circle.

Collecting Societies could still play a role; **provided that they adapt to a new commercial digital market, because the manner most of them manage licenses is too close to the traditional way of old national monopolies** and therefore cannot be maintained in its current form. It is also **necessary to improve the quality and efficiency of collective management** of intellectual property rights to have authors and composers receiving debt compensations and service providers receiving licences for digital services on reasonable commercially-negotiated terms.

⁴ [http://globalrepertoiredatabase.com/GRD-077-GRDRRecommendations\(Finalv1.0\).pdf](http://globalrepertoiredatabase.com/GRD-077-GRDRRecommendations(Finalv1.0).pdf)

Several cases of abuses and restrictions by collective right management societies have been investigated by the competition authorities; both at European and national level, and the European Commission will continue monitoring similar practices and behaviors. Commissioner Kroes also expressed her concerns on how current territorial copyright management implies a waste of resources that does not benefit right holders. In her speech in Avignon on November 5, 2010 Commissioner Kroes said:

“Today our fragmented copyright system is ill-adapted to the real essence of art, which has no frontiers. Instead, that system has ended up giving a more prominent role to intermediaries than to artists. It irritates the public who often cannot access what artists want to offer and leaves a vacuum which is served by illegal content, depriving the artists of their well deserved remuneration.”⁵

Member States are also increasingly realising that there is a genuine case for greater transparency in the way Collecting Societies operate⁶. The management of collecting societies could be improved and made more efficient in the right holders’ interest. Ericsson would like to make the following recommendations;

- **Collecting Societies** should be required to produce public yearly reports on the:
 - amounts collected, setting out different types of revenue
 - management fees and deductions of all types
 - methodology to redistribute collected money for each type of revenue
 - amounts redistributed
 - amounts non-distributed from current and previous years
- **Ireland should support the creation of mechanisms for dispute resolution at European level**
 - Lack of agreement on copyright tariffs often leads to significant litigation that delays payment and content dissemination. The establishment of a neutral and effective mechanism at European level could help solve these issues and should be considered.

3. Ireland should promote the abolishment of levy system in EU countries⁷

Ericsson considers it an important economic advantage for the digital economy that Ireland does not introduces private copy levies on digital equipment and media. Introduced in some European countries as a crude remuneration model in a bygone analogue era as a quid pro quo for consumers being able and permitted, to copy unlicensed content, notably from radio onto blank cassette tapes, private copy levies

⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619>

⁶ <http://www.rijksoverheid.nl/documenten-en-publicaties/wetsvoorstellen/2010/07/05/wetsvoorstel-versterking-en-verbreding-van-het-toezicht-op-collectieve-beheersorganisaties-auteursrecht-jus>

⁷ Economic impact of levy system: <http://www.oxera.com/main.aspx?id=9481>

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

Private copy levies should never be, or allowed to become, a primary or significant revenue source for digital content. This would serve only to discourage licensing at a time when service providers, SMEs and innovators are making substantial investments in developing and launching new digital offers and Irish rights holders seek to license new offers, often before rights holders in other territories do.

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

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

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

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

4. Enforcement⁸

Online illegal file sharing seems to be by far the biggest concern of economic rights holders; however their concern seems to be absent, so far, in regard to the inadequate growth of the legal digital market. Everybody agrees that adequate enforcement measures are certainly part of a solution to illegal file sharing and hence a functioning digital legal market.

Those who are convinced that an enforcement only focused approach is sufficient to develop the digital market ignore one key precondition for any market to function properly - that is in this case, the necessity of a well-functioning supply of legal digital content to consumers. This is also why “enforcement only” focused measures will continue to fail to solve the prevailing market supply failure of legal digital content, i.e. the lack of appropriate licensing of digital legal content which is the root cause of illegal file sharing. This supply failure as described earlier in this document is a result of; a) limited availability of **legal digital content**, b) **technology specificity of copyright** potentially hindering innovation and c) **unreasonable transaction costs** making legal digital content, in some cases, unnecessarily and relatively more expensive.

The market supply failure can never be solved by enforcement only focused measures, since they utterly fail to address barriers to a functioning legal digital market and at the same time continue to leave out a legitimate but un-served market demand, susceptible to illegal alternatives, and continue to fuel the symptoms of the market supply failure.

⁸ Ericsson's comments to EC's consultation on IPR Enforcement (IPRED):
http://www.ericsson.com/campaign/televisionary/#/regulation/positions/3b0a32ab_01ff_4ff3_9103_3a8625983d56



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Ericsson is advancing its vision of being the "prime driver in an all-communicating world" through innovation, technology, and sustainable business solutions. Working in 175 countries, more than 90,000 employees generated revenue of SEK 203.3 billion (USD 28.2 billion) in 2010. Founded in 1876 with the headquarters in Stockholm, Sweden, Ericsson is listed on NASDAQ OMX, Stockholm and NASDAQ New York.