



**Copyright and Innovation – Response to Consultation Paper**

**Copyright Review Committee**

**June 2012**

## Organisations party to this submission

**The Irish Music Rights Organisation (“IMRO”)** is the national organisation representing over 8,000 songwriters, authors, lyricists and their music publishers. In addition we represent within Ireland, via reciprocal arrangements with our overseas affiliates, the copyrights of over 2m songwriters, composers, and music publishers from around the world. We facilitate the easy licensing of the worldwide repertoire of over 14m musical works to allow organisations and individuals to play, perform and make available copyright music on behalf of our members and overseas affiliates.

**The Mechanical Copyright Protection Society (Ireland) Limited (“MCPSI”)** is an organisation which represents the works of composers and publishers of music. The right administered is the “mechanical” right. MCPSI is responsible for the collection of royalties for its members when their works are used on physical formats such as CD, DVD, vinyl, or made available for download via the internet, mobile phones and via other digital devices and services.

## Organisations endorsing this submission

**Irish Association of Songwriters, Composers and Authors, (IASCA)** is the representative organisation of songwriters, authors and composers. Its aim is to support the development of music creation in Ireland, to protect their interests and to develop an environment, in which new creativity can thrive. IASCA is a member of ECSA, the European Composers’ and Songwriters Alliance.

**The Music Publishers Association of Ireland, (MPAI)** is a trade body established to safeguard and promote the interests of music publishers and the writers signed to them, to represent these interests to government, the music industry, the media, the public, and to promote an understanding of the value of music and the importance of copyright. It is a member of the International Confederation of Music Publishers (ICMP).

## Acknowledgement

IMRO & MCPSI wish to acknowledge the contribution of Professor Robert Clarke BA, LL.M, PhD, Barrister at Law (King’s Inn) and Associate Professor in Law, University College Dublin, in the preparation of this submission.

## Preliminary Comments

We welcome the opportunity to provide input into the consultative process and also the extent of this detailed procedure. Our central objective in this review process is to ensure that Ireland possesses a modern up to date copyright system that delivers a balance between technology based industries and consumers on the one hand and fair incentives for the creative sector on the other.

Copyright – the statutory means to reward creativity - is the core principle underlying this value chain. The general tenor of the terms of reference of the Copyright Review and by extension the consultation paper suggests that copyright is a barrier to innovation. Innovation, it would appear, only occurs in the technology sector. This ignores the reality that innovation firstly takes place at the creative level and is indeed the very essence of the creative economy. Musical creativity of itself is derivative in nature and the current copyright legislation provides adequate room for creativity to flourish whilst at the same time protecting and rewarding those who innovate. The success of Ireland's creative sectors in areas such as music, film, literature and now computer gaming is testament to the flexibility inherent in the existing system.

We fundamentally disagree that weakening copyright law will somehow benefit an economy with such a dependence on creativity. However, even if we agreed with such a proposition, there is no logic whatsoever in joining with other EU territories to campaign for the same relaxations. Where is the competitive advantage that the Review Committee seeks if our other participant members in the EU seek similar benefits? In any case we should point out at the outset that the EU Member States are themselves parties to the Berne Convention and some of the exceptions mooted are contrary to the provisions of this Convention. The EU will therefore not be in a position to modify any existing EU directives that run contrary to the Berne Convention, and Ireland's efforts in this regard would be futile. The importance of the creative industries to the EU and Ireland in particular are best summarised from the Tera Consultants' Report "Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries"<sup>1</sup>

"The production and distribution of works by creative industries, including movies, music, television programmes and software, has been recognised as having a positive effect on economic growth and the creation of jobs. Unfortunately, over the last decade digital piracy (copyright infringement of digital media) has increasingly threatened the economic performance of the industries responsible for these creative works. For this reason, stemming the rising tide of digital piracy should be at the top of the agenda of policymakers in the European Union and elsewhere. But to make well-informed decisions in this area, policymakers would benefit from understanding the extent of the economic contributions of these industries and of the losses resulting from digital piracy."

Their analysis determined the following:

- In 2008 the European Union's creative industries, based on the more accurate and comprehensive definition, contributed 6.9%, or approximately €860 billion, to total European GDP, and represented 6.5% of the total workforce, or approximately 14 million workers.
- In 2008 the European Union's creative industries most impacted by piracy (film, TV series, recorded music and software) experienced retail revenue reduction of €10 billion and losses of more than 185,000 jobs due to piracy, largely digital piracy.
- Based on current projections and assuming no significant policy changes, the European Union's creative industries could expect to see cumulative retail revenue losses of as much as €240 billion by 2015, resulting in 1.2 million jobs lost by 2015.

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<sup>1</sup> <http://www.droit-technologie.org/upload/dossier/doc/219-1.pdf>

In Ireland, according to the latest DKM Economic Consultants research entitled “The Economic Contribution of the Copyright Based Industries” (June 2012);

### The copyright based industries make an important economic contribution

- Many surveys on the copyright-based industries carried out in various countries have raised public and political awareness of the issue and underlined the great potential of the creative sector. This study of the Irish copyright-based industries has similarly established the importance of the sector and the substantial “value-added” generated not just by the content itself plus also by the additional economic impacts that arise from the production, distribution and consumption of the various creative works.
- It is estimated that the core copyright industries in 2011 comprised 8,600 enterprises with 46,300 full-time equivalent persons employed (70,400 persons engaged), a turnover of €18.85 billion and gross value added (GVA) of **€4.6 billion**. The latter, which represents **the direct economic contribution, is equivalent to 2.93% of GDP**. This value is heavily dependent on copyright protection.
- The copyright industries, taking account of direct and indirect impacts across the economy, represent **7.35% of total GDP** which is equivalent to €11.50 billion. This figure includes the GVA (gross value added) of the range of industries whose primary function is to facilitate the creation, production, manufacture, distribution and sale of copyright content and other protected subject matter.
- **Total direct and indirect employment generated by the copyright based industries is estimated at 116,000, which represents 6.4% of total employment.**

Economic Contribution of Copyright Based Industries in Ireland			
	GNP	GDP	Employment
Direct Copyright Contribution (share)	3.71%	2.93%	2.56%
Indirect Copyright Contribution (share)	5.58%	4.42%	3.87%
<b>Total Direct and Indirect Copyright Contribution (share)</b>	<b>9.29%</b>	<b>7.35%</b>	<b>6.43%</b>
Induced Copyright Contribution (share)	5.01%	3.97%	3.47%

Source: DKM analysis based on CSO

This is not only an economic argument. Many of the attractions of Ireland as a centre for foreign direct investment, as a tourist destination and the worldwide standing of Ireland as a source of creativity lies in our reputation as a culturally rich nation that nurtures, respects and rewards the creation of artistic works.

There is a very real danger that uninformed, poorly targeted or ideologically driven changes to copyright law could instead undermine growth, both for Ireland’s creative sector and those digital businesses dependent upon the valuable content produced by Irish creators. We need to distinguish between interested parties arguing for genuine requirements for reform, and those who would simply seek lower royalty fees, which will not result in increased economic activity but simply effect a transfer of resource from the creative sector to others.

Whilst the economic and technological aspects of entrepreneurship and innovation are important, concentration on these aspects in isolation is of concern, given the vital importance that copyright plays in the social and cultural contribution to Irish society. This aspect seems to have been largely ignored in this Review. Any proposed amendments need to be considered in the light of objective impact assessments of such measures.

In support of our assertion that the real barrier to innovation in the ICT sector is lack of access to capital, we refer you to the following article written by John Dunne, co-founder of Intune Networks, the overall winner of The Irish Times Intertradelreland Innovation Awards 2011. In his article entitled “Too Reliant on the likes of Intel, Google and Microsoft”, Mr Dunne states:

“The real barrier to success for those who have intellectual property and have developed and created something that addresses a global need, is the lack of venture capital to fund their growth. There are inadequate levels of finance available in Ireland. While there is more than €400 million notionally up for grabs through Enterprise Ireland venture capital funds, the problem that many start-ups find is that there is no real understanding – or appetite for – the kind of long-term investment that is needed to grow and develop a company that has the potential to become a global leader”.

Whilst we acknowledge that easier access to venture capital is outside the scope of the CRC’s terms of reference, we nonetheless believe that the Committee should bring this to the attention of the Minister for Jobs, Enterprise and Innovation.

Finally IMRO would add that it cannot find any evidence suggesting that current copyright law is a barrier to innovation.

### Summary position on main issues

#### **The Copyright Council**

We welcome the suggested establishment of a Copyright Council. This Council should be established on a statutory basis. We also commend the emphasis placed on public education on copyright, recommendations on best practice, and the entire process of ongoing copyright reform which in a rapidly developing marketplace is vital to all participants. We believe the independence of such a Council could play a very important role in helping the IP Unit draw up a policy framework on notice and take down procedures and counter notice and put-back procedures. The composition of the Council needs further discussion and its function and objectives need to be clearly defined. Such functions and objectives must not conflict with those of Government through the IP Unit and the Office of the Controller of Patents, Designs & Trade Marks (‘the Controller’). Given this we believe that the Council’s role should not extend to any dispute resolution issues.

The recommendations aimed at providing expertise and specialist jurisdictions in the District and Circuit Courts are welcomed, though we acknowledge that such proposals will have significant resource implications.

#### **The Digital Copyright Exchange**

The real problem for industries depending on intellectual property is one of enforcement. How can Ireland expect to attract creative industries and to act as a centre for trading IP assets if we do not provide an environment that both respects and protects the commercialisation of such assets? Promoting Ireland as a location for the International Digital Copyright Exchange on the one hand, while simultaneously relaxing the laws of copyright is inconsistent and sends confused messages to investors.

We do need greater clarity on what is being envisaged by the Committee as regards a Digital Copyright Exchange before we would give further comment on what seems at face value to be an idea worthy of pursuit. We also are aware of a parallel process underway in the UK and note the recent first report of the Digital Copyright Exchange Feasibility Study (<http://www.ipa.gov.uk/dce-report-phase1.pdf>). IMRO will support any practical initiatives in this area.

## **Exceptions to copyright**

The 2001 Copyright Directive is quite explicit in terms of the list of exceptions contained therein and the list is exhaustive i.e. no other exceptions may be granted or applied by member states nor permitted under national law. This achieves legal certainty and the list itself is not mandatory, rather it was designed to accommodate various traditions pertaining throughout the EU at that time.

### (i) Format shifting

We could support an exception in respect of format shifting so that consumers can enjoy the benefit of technology, subject to fair remuneration being paid to copyright holders and thereby fully complying with EU Copyright Directive and European case law. Such an exception should be limited to any copies format shifted to other devices, legally purchased and should not extend to cloud locker services which are fully licensable.

### (ii) Educational exceptions

The licensing system currently in place in Ireland adequately takes account of the particular requirements of educational establishments, providing flexible solutions for copyright owners and users. Any further exception introduced in this area would result in a straight transfer of value (impeding innovation in the process) from the creative sector to the public sector. Such a proposal would not in any way aid innovation.

### (iii) Fair Use

As we have already said in our original submission, we believe that importing “fair use” provisions from the US will hamper innovation. The US has a better record of innovating, not because of a more lax copyright system but because of a deeply embedded culture of entrepreneurship, much deeper relationships between the business community and the University and educational sector, and wider availability of capital. Strengthening the links between academia, innovative enterprise, creativity, and encouraging wider access to capital are much better ways for Ireland to drive its knowledge economy forward in terms of both large and small enterprises. There is no evidence whatsoever that introducing fair use provisions will remove any barriers to innovation. We question how any policy recommendations can be made in this area without evidenced based impact assessment being undertaken in advance. More detailed comments are in the attached submission but in summary;

- Fair use is not compatible with the three step test in Berne;
- Fair use does not comply with the Berne Convention or TRIPS;
- Fair use contributes much more legal uncertainty than the fair dealing exceptions in CRRA;
- Due to this uncertainty, alongside the substantial penalties that attach to copyright infringement, the cost of establishing fair use is only feasible for very large, well resourced companies that seek to benefit from fair use provisions, hence it is of no benefit to small innovative start-ups.
- The fair dealing exception via Irish and EU law achieves a better balance between the uncertainties of a US style fair use doctrine, and a rigid application of a closed and inflexible list of exceptions and limitations;
- WIPO institutions have ruled on fair use and found it to be in breach of international law;
- The arguments made to support fair use are flawed, simplistic and fail to understand the position under US law;
- Fair use must be looked at in the context of demands for broader exceptions than those currently allowed under EU law;
- There are a lot more factors at play in how the US successfully innovates than fair use;
- There is no evidence to support the assertion that the absence of a fair use doctrine hinders Irish or EU innovation and much evidence that fair dealing provides no hindrance to innovation, but rather it has fostered it.

### **Registration of Licensing Bodies, licensing schemes and procedures regarding referrals to the Controller**

As stated and outlined in our initial submission on 14<sup>th</sup> July 2011, we believe that the practices and procedures under the CRRA and The Copyright and Related Rights (Proceedings Before the Controller) Rules 2009 relating to registration of licensing bodies and referrals to the Controller, which have been in operation for 12 years, require review in a number of areas particularly around the registration of licensing bodies, the publication of licensing schemes, and the procedures for the referral to the Controller in the event of a licensing dispute. For all service companies, from start ups and SMEs to large corporations, the ability to obtain copyright clearance through collective licensing bodies is beneficial. This mechanism allows companies to develop a variety of new business models and get them to market without undue delays. IMRO requests that the interaction it has with these companies is made easier with the introduction of more efficient procedures under the Act as set out above. We call on the Review Group to recommend to the Minister the adoption of legislation as appropriate to effect such changes. This will help bring about a more efficient and productive copyright clearance framework in Ireland, which will protect and reward creativity while at the same time promoting and facilitating innovation.

### **Online infringements**

We welcome the introduction of the recent Statutory Instrument. Clearly we have an issue in relation to enforcement of copyrights in the online environment. We cannot allow a situation to continue whereby copyright owners will have no option but to seek High Court injunctions in each separate instance of infringement in order to protect their copyrights from obvious piracy. This is unworkable even in the short term. We strongly support greater co-operation between the creative industries and the internet gate-keepers so that obvious abuses of copyright cannot continue with impunity.

Finally we believe our policy makers and the Minister should be given a real choice when the CRC issues its final report. The consultation paper provides draft legislation only in terms of one avenue being pursued. A more balanced approach is to provide the Minister with draft legislation for at least a choice of approaches. This will give the final report more objectivity and allow policy makers to make a more informed decision. In this regard we would refer the CRC to Recital 9 of the Information Society Directive which states that:

‘any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large’;

and recital 12 of the Information Society Directive:

‘Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.’

IMRO are available throughout the process and in particular in assisting any drafting of new legislation that may be required.

Victor Finn  
**Chief Executive Officer**  
Irish Music Rights Organisation

13th June 2012

**Chapter 2**  
**The Intersection of Innovation and Copyright in the Submission**  
**Preliminary Observations on Questions 1 to 6**

IMRO believes that the terms of reference given to the Copyright Review Committee seek to strike a reasonable balance between competing values, objectives and interests in what is a highly contentious area of law, economics and cultural policy. However, there appears to be a heavy emphasis in the Consultation Paper on seeking to encourage the “development of a knowledge based or smart economy” at the expense of the creative and cultural industries. We note this is not the expressed intention of the Review; it is nonetheless an inevitable consequence if Ireland advocates any weakening of existing IP protection.

The review states that (page 5)

“...whilst the growth of the internet has given rise to a whole host of new business models, the established film, music and news industries have struggled to find successful business models in the face of widespread infringement of the copyright of their content. This kind of infringement is clearly a very serious problem for those industries in their current form. However, as digital content delivery and online payment mechanisms become easier, safer and more robust, they are likely to become increasingly widespread. If so, successful digital content business models would burgeon, and there would be greater levels of copyright compliance. We are not yet at this point; and some of the submissions argued that, if it is attainable at all, it is a long way off. Even so, it is likely that many of the problems currently being posed by technology will in time be solved by technology”.

This seems to imply, in keeping with much ill informed public discourse, that the creative industries have not yet adapted. This may have been a valid criticism a number of years ago but any rational examination of the current status of the online availability of music would dispel such a hypothesis. There are now over 400 different online music services (Source: IFPI Digital Music Report 2011) licensed throughout the EU (including Ireland) offering consumers a huge variety of offerings at a time and place of their choosing, from legitimate service providers, with new products and delivery technologies evolving rapidly. Indeed, some services are free to the consumer, with innovative ISPs taking out relevant licenses (e.g. Eircom MusicHub). The success of these business models are being impeded by the widespread availability of free music through rogue web-sites. Legal sites would burgeon as the Review states but only if adequate enforcement measures are available to both the copyright holders and the innovative legal music service providers. We fully agree that technology itself will in time assist in solving this issue and this is precisely why we advocate the co-operation of the ISPs and content industries. If no action is taken, creativity will inevitably suffer and innovation will be hampered. Enforcement of copyright in the online environment has to be a key policy objective.

Performing rights have been in existence in Ireland for almost 100 years and in this period we have had to educate, inform and champion the interests of authors and publishers amongst the wider public, both at home and abroad. Litigation such as [PRS v Bray UDC](#), [PRS v Merlin](#) and the IMRO WTO Complaint about Fairness in Music Licensing Legislation in the USA shows that IMRO has found it necessary to challenge and confront policies (in some instances policies developed by Governments and even the European Commission) that threaten to undermine the economic interests of authors. IMRO believes that innovation and creativity is best nurtured by promoting the interests of creators by way of comprehensive and intellectually coherent laws that recognise long established rules of international treaty law in the copyright sphere. We recognise that digitisation, internal market considerations and user expectations present challenges as well as opportunities for the music industry, but specific legislation is needed to address the online piracy threat.

**Responses to Questions 1 to 6**

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



IMRO reserves its position in respect of what may be a perceived emphasis on ushering in new copyright exceptions which we believe are not needed or desirable. We particularly welcome the fact that Copyright Review Committee ('CRC') recognises that many creators are also users, and vice versa.

Whilst the economic and technological aspects of entrepreneurship and innovation are important, concentration on these aspects in isolation is of great concern, given the vital importance that copyright plays in the social and cultural contribution to Irish society. This aspect seems to have been largely ignored in this Review. Any proposed amendments need to be considered in the light of objective impact assessments of such measures.

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

Yes, but some improvements are needed and we have made suggestions in regard to same in both our initial submission and in this document.

IMRO would welcome a restatement of the collective licensing provisions with a view to making them simpler and better integrated into other parts of copyright legislation (e.g. the powers of the Controller etc).

**(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 believe that if amendments are substantive then it desirable to have one single piece of consolidated 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?**

Yes but IMRO feel that the impact of copyright and its value to society in general has been ignored. This is a significant omission for a country such as Ireland that has always placed so much store and value on in its wealth of artistic and creative endeavours.

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

IMRO does not believe that the existing law affords due recognition to the role of performers as innovators but this is a debate that must be conducted in Geneva via the forthcoming Diplomatic Conference on performers.

See also our response to Q4 above.

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

Current IP law, we believe, does provide a good balance and is certainly not a barrier to encouraging innovation. IMRO cannot find any evidence suggesting that current copyright law is a barrier to innovation.

**Chapter 3.  
Copyright Council of Ireland.  
Preliminary Observations on Questions 7 to 22**

The three proposals in this chapter of the consultation paper concern the creation of a Copyright Council of Ireland, an Irish Digital Copyright Exchange, and a Copyright Alternative Dispute Resolution Service. The CRC also deal with ancillary issues such as the relationship of these institutions, one with the other, as well as the impact

upon the existing statutory agency, the Controller of Patents, Designs and Trademarks (“The Controller”). Finally, the chapter considers the possibility of establishing specialist jurisdictions in the District Court and the Circuit Court.

On the issue of whether the establishment of a Copyright Council of Ireland would be desirable, IMRO takes the view that there would be significant benefits to be derived from creating a statutory body charged with some of the tasks identified on pages 15-16 of the Consultation Paper (i.e. best practice standards, co-ordination of the development of standards in notice-and-take-down and counter-notice-and-put-back provisions, advising the Minister, information and evidence collection). However, IMRO seriously doubts whether a system of self-regulation based on the Press Council of Ireland model, could work in the copyright arena. Self regulation systems rely heavily on the homogeneity of interests that are in play: no such consensus will be evident from the copyright landscape. The wide range of responses to-date received by the CRC are themselves irrefutable evidence of this. Furthermore, a Copyright Council would not address the central problem that copyright regulation in Ireland faces, which, in short, is the complete void that currently exists in terms of policy formulation at Government level. The lack of clarity on whom is in charge of policy formulation (Government departments, the Intellectual Property Unit, the Controller etc), as well as the lack of investment in expertise and personnel cannot be ignored. This vacuum will not be filled by the creation of a Copyright Council.

On the establishment of an Irish Digital Copyright Exchange, IMRO notes that much of this subject is being driven by the Hargreaves Review in the United Kingdom and two key recommendations in relation to copyright licensing and extended collective licensing for orphan works. Richard Hooper 2 March 2012 ‘[First Report of the Digital Copyright Exchange Feasibility Study](http://www.ipo.gov.uk/dce-report-phase1.pdf)’ (<http://www.ipo.gov.uk/dce-report-phase1.pdf>) suggests that progress can be made and IMRO will support practical initiatives in this area.

The Copyright ADR Service is rather less fully drawn out in the consultation paper. IMRO notes that there are already mediation models and structures in place and that the Law Reform Commission is examining ADR generally. The current system of dispute resolution before the Controller under CRRRA is not working entirely satisfactorily. Delays are protracted: CRRRA, S.367(2) sought to require the Controller to make a decision on referral to arbitration within a set period of time but this was deleted by S.48 of the Patents (Amendment) Act 2006. IMRO suggests that two legislative models exist in other common law countries that could be of assistance. Firstly, the Canadian Copyright Board has a statutory basis for assisting in dispute resolution and indeed policy formulation. The Board is staffed by legal, technical and economic experts. The Board has licensing functions, for example, in relation to orphan works. Secondly, we are impressed by the recent UK developments on ‘fast track’ low value dispute resolution mechanisms via the Patents County Court, and the Copyright Tribunal, under Judge Birss. A combination of such initiatives, properly staffed and funded, perhaps as an offshoot of the Commercial Court, would be welcome. Other ways of securing some clarity on net points of law include re-instating old IP provisions allowing Ministers to seek advice from the Attorney General (e.g. section 83 of Patents Act 1964).

IMRO would not be opposed to expanding the jurisdiction of the Circuit Court but this would necessitate the installation of a specialist judge and other expertise at Circuit Court level.

#### Responses to Questions 7 to 22

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

IMRO would support the establishment of a Copyright Council but its limitations, as well as its potential, should be recognised. As a result, IMRO would not support all of the proposals in this regard as made in the Consultation Paper – see our answers below.

**(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?**

Any Copyright Council should be a statutory body recognised by the State. However, efforts must be undertaken to ensure that its operations and decisions are not caught up in judicial review proceedings. This should be achieved by making it clear that the role of the Copyright Council does not involve the formulation of policy and that the Copyright Council has no role to play in resolving individual disputes.

**(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?**

IMRO would not support a subscribing membership model.

If a Council is to work it can only involve creators (innovators in and of themselves) and their representative organisations. Research by IMRO in regard to Copyright Councils and similar entities in other territories indicate that membership is made up of copyright owners and their representative organisations. We believe including intermediaries and users of copyright works together with copyright owners would inevitably lead to stalemate, given the diametric opposing views held and would stymie the necessary work a Copyright Council needs to do.

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

The Board should be broadly based, comprising individuals drawn from rights owners, collection societies, alongside some legal, economic, cultural, heritage and technology experts. The Board should have co-option powers on specific matters and it should have an independent government-appointed Chairman.

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

The Copyright Council should not have dispute resolution nor policy formulation functions. These matters should be for the Controller/the Courts/mediation bodies and Government respectively.

Its principal objects should be the promotion of copyright at all levels in Irish society up to and including:

- Education of the general public, rights owners and users and the provision of an information forum.
- Active promotion of respect for copyright.
- Setting out standards of best practice on relevant issues.
- Instituting and overseeing a voluntary code of conduct for collection societies and copyright owners.
- Provision of a support platform for copyright owners and performers in establishing their IP rights.
- Provision of guidance on commercial issues as between rightsholders and rights users.
- Provision of a voice for those whom the Copyright Council represents so that they may contribute to the formulation of Government IP policy and legislation. This could be done by providing information, research, academic expertise (legal, cultural and economic) and 'the copyright owner view' to the IP Unit and the Minister or any other Government Dept, when copyright issues are being considered at Government & EU level e.g. orphan works, cross border copyright licensing, proposed EU Directive on Collective Management, etc.
- Advising the IP Unit on suggested standards and codes of practice for offline and online use of copyright (e.g. notice and take down, proscribing websites).
- Being proactive in facilitating the development of practical solutions for detecting copyright infringements and appropriate methods to protect copyright in the online environment.
- Subject to our answer in Q13, support and encourage the setting up of and contribution of its members to a Digital Copyright Exchange.

From our research conducted via our sister collection societies in the UK, Australia, the Netherlands, Germany, Denmark, France, Canada, Sweden and Belgium, some do have an equivalent to the proposed Copyright Council of Ireland but where they do, we are advised that none 'play a role in negotiating collective licences' as indicated by the Review Committee at page 14. Negotiating licenses by exclusive rights holders, by definition, needs to be undertaken directly by copyright owners or their agents.

For the reasons outlined at Q.9 above IMRO would caution against the remit of an Irish Copyright Council going beyond that of Copyright Councils in other jurisdictions. In particular we believe that it should **not** have a role in;

- The existing jurisdiction of the Office of the Controller of Patents, Designs & Trade Marks (“the Controller”).
- Alternative Dispute Resolution - All dispute mechanisms should remain within the remit of the Controller as per the CRRA.
- Orphan works – once the EU Directive is passed we suggest that it should be implemented via the Office of the Controller.
- Brokering new settlements in industry bargains and contractual practices – such brokering must take place in commercial negotiations between the relevant parties.
- Regarding the EU Commission’s recently announced plans to adopt a horizontal initiative on notice & action procedures, all engagement on this issue with the Commission should come via the IP Unit, not the Copyright Council.
- We do not believe that the Council should have a role ‘as a central and honest broker’ to encourage more extensive voluntary collective licensing. This function must continue to reside with the rights owners and their representative collection societies.
- Some of the issues raised in the chapter such as Sec 124-126 re transfer of film rental rights are clearly a matter for the courts and should not be dealt with by the Council.
- Promoting Innovation (as suggested in the draft legal text). This is clearly under the direct remit of other state agencies and departments.

Finally we believe that the Press Council is not a good model for a Copyright Council of Ireland.

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

The Copyright Council should be funded from the Exchequer.

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

We note the comments of the Review Committee in relation to collection societies and in particular the proposal for the establishment of an Irish Digital Copyright Exchange (IDCE).

We believe it is appropriate in the first instance to address the views expressed by the Committee in relation to collection societies. Collective Management Societies (“CMS”) exist to provide access by way of licensing to a whole host of exclusive intellectual property rights. IMRO and MCPSI provide annual blanket licenses for the worldwide music repertoire to a wide variety of commercial users of music. Without CMS, licensees would need to seek permission and make appropriate payments to each individual copyright holder. This would be a clear impediment to innovation if such were the case. Many licensees and representative organisations such as the European Broadcasting Union actively support the very valuable service provided by CMS. The role of CMS in many territories is governed by Competition and Anti-Trust law, this being recognised in Recital 17 of the EU CD (European Union Copyright Directive 2001). CMS fully adhere to such legislation and in Ireland both IMRO and MCPSI and many other CMS have had their membership agreements and modes of operation fully cleared by the Irish Competition Authority. The Irish Competition Authority in 1995 recognised the essential role of collective administration and stated the following in its decision to grant IMRO a licence: -

“There are considerable practical difficulties involved in the administration and enforcement of performing rights, particularly in relation to the multiplicity of smaller users, and these difficulties do point to the need for a central collective licensing/enforcement system on behalf of creators and publishers. Substantial additional transaction costs would clearly be involved in any multiplicity of systems of administration of performing right based on licensing by individual creators. Compliant users would require a large number of licences while the cost of pursuit for non-compliance by individual creators/publishers would make this activity uneconomic except in the case of major users

or events. The pursuit of breaches by smaller users would become totally uneconomic. The Authority therefore accepts that a collective system of performing right administration involves efficiencies and these would be significant in the generality of cases. Assignment of the performing right to IMRO is accepted as improving the provision of services.”

While many changes have taken place in the industry since this decision in 1995, the essential role played by IMRO and other collection societies around the world, and the need for their continued existence, remains.

The Committee, from the submissions received, quote the patchwork quilt of societies and rights administered. Whilst from the outside this appears to be the case given the multitude of exclusive rights and owners involved, IMRO nonetheless has made significant strides over the past number of years to aggregate rights and offer where feasible, a one stop shop to licensees. We recognise the value to both rightsholders in terms of more cost efficient licensing solutions, and to licensees in terms of making available a one stop shop for all required rights with the obvious advantages. Some examples of our aggregation of rights administration to-date include:

- Cable rightsholders agreement – IMRO alongside BBC, ITV, Channel 4 and other collection societies (AGICOA, ALCS, DACS & PPI) offer a one stop licence to cable operators for the clearance of all cable retransmission rights in respect of 9 BBC TV channels, 7 BBC Radio channels, 4 ITV TV channels and Channel 4;
- IMRO and MCPSI Joint administration - Since early 2009, IMRO has administered the mechanical rights in musical works on behalf of MCPS. This offers a one stop shop for all public performance and mechanical rights in musical works in respect of the worldwide repertoire. We have joint licensing schemes for example in the online arena, where licensees can obtain a single license for the rights of making available, synchronisation and mechanical reproductions of musical works. This is to the direct benefit of innovative companies, enabling them make the best use of technology developments to get their services to market as quickly as possible whilst at the same time delivering real value to our rights holder members.
- IMRO rights throughout Europe - IMRO was the first collection society in the EEA to make its repertoire available for online and mobile uses on a multi-territorial basis through innovative partnerships with our overseas affiliates. In this instance, licensees, who wish to launch services throughout the EEA, can obtain the rights to IMRO member repertoire for all territories from a single source. This is an attractive option for multi platform pan-European music services, enabling them to obtain efficient licensing solutions and helping them expedite their route to market. This is also clearly in our members’ interests and the interests of Ireland Inc as it ensures that the best of Irish musical creativity is available on all such music services. The Committee states that many submissions advocated cross border pan-European licenses. This is already in existence in the case of IMRO’s repertoire and we would place our expertise in this area at the disposal of any new Copyright Council, the IP Unit and Government.
- We have recently installed the very latest in customer relationship management software and in the coming year plans are in place to introduce web-based self service licensing.

The Committee needs to recognise the difference between genuine criticisms of CMS, and industries and individual licensees simply seeking to reduce their copyright fees (this alone could be argued to be an impediment to innovation). There is a clear mechanism in place in Ireland whereby licensing schemes have to be published in advance, are available to all classes of licensees in a fair and transparent manner, are published with the Controller (subject to our comments in Q17 and we believe an impediment to innovation) and all licensees have a clear avenue of appeal through the reference procedure under the CRRRA and the Copyright & Related Rights (Proceedings before the Controller) Rules 2009. No other territory within the EU has in place such stringent controls and IMRO and MCPSI comply fully with all the requirements.

We cannot comment on other CMS but we would refer the Committee to our website for our annual report for the transparent manner in which we conduct our corporate governance, the Controller's website for all our licensing schemes, and our own publicly accessible web-site where many of our most commonly used licensing schemes and all our distribution policies are clearly laid out. The criticism of transparency does not stand up to any objective scrutiny in IMRO's case. See [www.imro.ie](http://www.imro.ie).

We fully agree with, and more pertinent, our actions to date fully support, the objective of more transparent licensing, more efficient administration and greater accountability of all CMS. In this regard, The Committee should be aware of the forthcoming Proposal for a Directive on Collective Licensing (copy not yet available but IMRO will forward same to the Committee as soon as it is published)] being proposed by the European Commission and expected in the coming months. IMRO fully supports the introduction of this Directive. We are at the Committee's disposal to assist in any way possible to ensure this Directive delivers what is required.

Regarding the establishment of an Irish Digital Copyright Exchange (IDCE) we are not fully clear on what the Committee believes the role of an IDCE should be. We reiterate our earlier comment that once further information on the IDCE is made available, we will support any practical initiatives in this area. We would add that IMRO is fully engaged, together with its international affiliates in CIS-Net, a network of musical rights databases made available to all participating societies to facilitate the international identification of musical repertoires. The Committee should also be aware of the Global Repertoire Database initiative, which, with the guidance of the EU, is being developed to facilitate licensing and identification of musical works especially in the online environment. If the Committee believes that the Copyright Council can further develop the one stop shop licensing of a multitude rights, IMRO's considerable experience to date will be placed at its disposal to ensure the most efficient licensing and distribution models can evolve.

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

On a practical level, adequate resourcing of the IP Unit of the Department of Enterprise & Jobs is crucial for the effective review, formulation and implementation of both Government and EU policy on copyright and its incorporation into Irish legislation. A similar view is held by IMRO as regards the resource deficit that IMRO feels is evidenced in the Controller's Office – see our response to Q17.

As regards the licensing body registration requirements under Chapter 17 of the CRRA and the Copyright and Related Rights (Register of Licensing Bodies) Regulations 2002, again please see our response to Q17.

From our experience in working within the CRRA, and the Copyright & Related Rights (Proceedings before the Controller) Rules 2009, IMRO submits that a number of small amendments to Chapter 16 and Sec 367 of CRRA and the Copyright and Related Rights (Proceedings before the Controller) Rules 2009 could be made to ensure clarity for all.

Section 152 of the Act

This section of the Act relates to the reference of a licensing scheme which is "*in operation*" to the Controller. The wording of section 152(1) provides that a person "may refer the scheme to the Controller". The use of the word "may" in this subsection provides uncertainty. IMRO submits that this could result in increased court litigation with a higher cost for those involved if a user seeks to take a court action instead of the referral procedure provided for in the Act. There should be no doubt in law that a licensing scheme in dispute must be referred to the Controller for determination.

The referral process under the Act needs to become more streamlined and cost effective, with a resultant benefit to both the user and rightsholders. As stated above it should be clarified that the referral process is a mandatory procedure as we believe that the court does not possess the same statutory powers as the Controller to review the licensing scheme in operation and set the level of royalties payable that are

“reasonable” based on the express legislative factors set out at Section 162 of the Act. The Controller also has the power under the Act to back date such reasonable royalties once determined. IMRO submits that the Courts are not best placed to determine such issues and arguably cannot, for want of jurisdiction, under the Act. IMRO therefore requests that the referral procedure to the Controller under the Act is made mandatory and this will allow users to put in place effective clearances in a speedy and cost effective manner, subject to the other proposals in this submission being implemented. This will remove barriers to the introduction of innovative business models.

In addition, IMRO would like to make a submission on Section 152(3), which provides that “*a scheme which has been referred to the Controller under sub section (1) shall remain in operation until proceedings in relation to the reference are concluded*”. From IMRO’s perspective we are always concerned to ensure that the user bringing the reference has paid royalties under the tariff up to the date on which the reference is made. While this would appear to be what sub-section (3) intends, the existing wording is not particularly clear, allowing users to argue that they do not have to pay any royalties before bringing the reference. In practice the Controller accepts the references with no investigation of whether a user has paid up to date at all. This impacts on payments to rights owners with a potential knock on effect for innovation and creativity in the sector. IMRO submits that this sub-section should be clarified and a new requirement should be introduced into the Act requiring the Controller, prior to his/her accepting the reference or continuing with it, to be satisfied that the referrer is in full compliance with its licence. This includes both making payment in full for any royalties due under the tariff up to the date of the reference and ensuring that such payment continues during the currency of the reference.

*Referral of disputes by the Controller to an arbitrator.*

Section 367 of the Act allows the Controller to refer a licensing dispute referred to him to an arbitrator agreed by the parties or in the absence of such agreement to an arbitrator appointed by the Controller. This can be done either with the consent of the parties or where the matter requires any prolonged examination of documents or other investigation requiring specialist knowledge which could not be made by the Controller.

Section 367(2) of the Act provides that the Controller shall make a decision whether or not to refer a dispute to arbitration no later than three months after the dispute has been referred to the Controller. Section 367(2) of the Act was repealed by Section 48 of the Patents (Amendment) Act 2006.

From IMRO’s experience, the removal of this three-month time period, the reasons for which IMRO is unaware, is a negative development and referrals to the Controller are unnecessarily delayed and drawn out as a result. In a referral by a licensee back in 2003, both IMRO and the licensee had a positive experience in that the referral process worked very well - once the quick decision was made by the Controller that he would refer the matter to an arbitrator. The removal of Sec 367(2) is having an impact on rights clearances being conducted in an efficient manner, which affects both users and rightsholders alike. IMRO submits that Section 367(2) of the Act be reinstated to provide for a more efficient process, which will in turn lower costs and provide companies with a speedier process to obtain clearances to develop and exploit new business models, particularly in the digital environment.

To this end, IMRO would also suggest that if reinstated, the wording of Section 367(2) of the Act, as repealed, be amended to provide that the Controller must appoint the arbitrator and notify the parties to the referral within the statutory three-month period. The wording of section 367(2) of the Act, as repealed, was unhelpful as while it suggests that the Controller must make a decision within a three-month period to appoint an arbitrator it does not require that that decision be notified to the parties nor does it require that the actual referral to an arbitrator take place within the three-month period.

The Copyright and Related Rights (Proceedings before the Controller) Rules 2009

IMRO would also welcome a simplification of the Rules of the procedures before the Controller, particularly those contained in the Copyright and Related Rights (Proceedings before the Controller) Rules 2009. On the issue of speed and efficiency of references of licensing disputes to the Controller, IMRO's experience based on references which are currently ongoing is that the progress of references to the Controller is extremely slow.

In summary the difficulties experienced with the referral process under the 2009 Rules are as follows:

**Rule 9** provides that where, having considered the statement and other information furnished by a Petitioner or Respondent, the Controller is of the opinion that it is necessary, he may request by notice in writing that further statements or counter statements be provided to him. Based on references currently before the Controller, it seems that the Controller does not engage in any meaningful review of the submissions made in deciding whether or not further statements are required. The practice of the Controller is to simply send on each party's submission to the other party and invite further submissions. **Rule 28** also grants the Controller with absolute discretion on time limits for the exchange of documents under such referrals. This can result in a lengthy exchange of submissions between the parties. For example in one recent case, following the statement of case and counter statement, there have been three further written submissions on behalf of the Petitioner and two further written submissions on the part of IMRO. In a further case there have been two further written submissions by the Petitioners following the statement of case and one further written submission from IMRO following the counter statement. This practice has the potential to go on *ad infinitum* and cannot be what the legislature intended.

In any event, IMRO submits that this has the potential to slow down licensing arrangements for new business models with a resultant impact on innovation and new start ups in Ireland. In a 2003 referral mentioned above, the arbitrator appointed requested, within strict timeframes, an initial submission from both parties, then provided one opportunity for counter submissions and then set an oral hearing date. As a result, the matter was decided with 11 months of the date of referral. The current experience of IMRO is that in a current referral to the Controller made back in August 2010 was only adjudged by the Controller under Sec 367 (1) i.e. referred to an Arbitrator, in July 2011, the arbitrator being appointed in Nov 2011 and the first hearing only starting in January 2012, A decision from the Arbitrator is not expected until July 2012 at the earliest. In making this submission, IMRO is not being critical of any particular party in the reference process - it is simply being critical of the inordinate delays in the referral process and asking that the process be reviewed so that a quick decision, for the sake of both the copyright owner and the copyright user, can come forth from the process.

On a related issue, under **Rule 11**, if the Controller is satisfied that it is necessary having considered the documents furnished or having received a request for an oral hearing from either party, he can fix a date for hearing. However, under Rule 11(2) if the Controller is not satisfied that it is necessary or does not receive a request from a Petitioner or Respondent for an oral hearing he can make his decision in respect of the application without an oral hearing. This wording would appear to suggest that the Controller may be in a position to decide that an oral hearing is not necessary, despite what the parties may think. This may not have been the intended effect of the section, however the wording is unclear. It would be preferable if the Controller was required to hold an oral hearing if either party requested it and the wording of the Rule should be clarified in this regard.

In summary, we consider that formal and prolonged processes for regulating licensing terms, or resolving disputes relating to such licensing terms, are not consistent with the needs of a dynamic market in the digital environment, where new start ups and business models require access to copyright clearances on a timely basis.



IMRO and MCPSI believes that Ireland can take this opportunity to adopt a more streamlined rights clearance framework that will allow rightsholders and licensing bodies to interact with licensees in the most efficient and seamless way possible, and to really innovate in the area of licensing by providing fast and effective processes in the case of a dispute.

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

Under the EU Copyright Directive and the Berne Convention copyright is an exclusive right and adequate dispute resolution remedies are already available under the CRRA. We refer to our response to Q11 above.

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

Only the Copyright Council should be a statutory body reporting to the relevant Minister. The current dispute resolution mechanism is already legislatively prescribed via the Controller in the CRRA.

**(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?**

A comprehensive review of the Controller's Office and its relationship with Government, Government Departments, and the office of the Attorney General should be undertaken to resolve issues.

IMRO does not have an opinion on renaming the Office of the Controller. In our view it is the statutorily defined remit and power of the Office that are important.

The Controller currently has a very extensive range of necessary powers which we believe to be adequate. However such powers do need to be backed up with adequate and appropriate staff resources with legal and economic qualifications/experience to carry out the duties of the Office. In the referral process this would enable the Office itself to arbitrate without the need for external intervention via the appointment of external arbitrators.

The Office plays a dual role in the areas of Patents, Designs and Trademarks, alongside Copyright. There is probably an argument for splitting the Office into two divisions – a Patents and Trademarks Division and a Copyright Division.

The remit of the Office should in our view remain as currently defined in legislation. All dispute resolution mechanisms should remain within the Office. Given the forthcoming directive on collective management, IMRO is of the view that implementation of this Directive, including the expected provisions on transparency, accountability and cross border online licensing, will provide much greater clarity throughout the EU on the operations of collection societies. We would suggest that the CRC await the publication of this Directive before making any premature recommendations to the Minister.

One area referred to at Paragraph 3.3 relates to the inefficiencies in the current licensing system. IMRO and MCPSI have been to the forefront in seeking to always licence in an efficient manner, issuing joint licenses to online music providers such as Apple, YouTube, Eircom Music Hub, etc. In addition IMRO has co-licensed (with other collection societies and UK broadcasters) the cable retransmission of BBC, ITV & Channel 4 channels in Ireland for well over 20 years. IMRO & MCPSI continue to seek out co-licensing opportunities with other rights owners and we would be happy to share our experiences and any expertise gained.

Regarding Para 3.7 and the publication of royalty rates (Chapter 17 Sec 175-181 of the CRRA), given that collection societies are subject to strict Irish & EU competition regulations around levying a fair and reasonable charge on all similar users, IMRO and MCPSI fully conform, IMRO's view is that publication of royalty rates in and of itself, does not 'ensure they are not too high'. However what it does mean is that commercially sensitive information is made public.

We submit that the Controller's practice of publishing tariffs, and in particular individually negotiated license terms, is causing difficulties in concluding licensing arrangements with companies, many of them large multinationals located in Ireland, and it may be a barrier to entry for some companies who do not want to countenance their commercial terms being made available to the public. These requirements are contained in Sections 175 and 177 of the Act and underpinned by the Copyright and Related Rights (Register of Copyright Licensing Bodies) Regulations 2002. IMRO is consistently coming up against a number of commercial confidentiality issues with prospective licensees who, for their own good commercial reasons, do not want the terms and conditions of those licenses to be made available to the general public. The Controller's more recent practice of publishing this information on the Patents Office website has exacerbated this problem.

IMRO publishes its general tariffs, which apply to shops, bars, hotels, offices, cinemas, concerts etc. on our website, [www.imro.ie](http://www.imro.ie). Such tariffs apply to the vast majority of similar users within well established business models. IMRO does not have an issue with publishing such tariffs and will continue to do so. The difficulty arises where IMRO and MCPSI are seeking to licence entities and we advise them that, uniquely, under Irish legislation we have to publish under Sec 175 (7) of the CRRRA, details of the scheme and details of the scales of charges or proposed charges to be levied by IMRO. Such licensees see this as a disclosure of commercially sensitive information. The issue has become particularly relevant to new business models in the digital environment which require one of a kind/ individual licences in order to obtain clearance and which, by definition, are of a "trial" nature whilst their commercial viability and true value to IP owners is established.

We are not aware of any other collection society or licensing body in Europe being required by law to disclose commercially negotiated licensing terms. There is no requirement in EU law that such publication must take place. IMRO therefore fails to understand why Ireland has sought to disadvantage itself in creating barriers and delays to licensing new business models, which do not apply in other commercial transactions in the State (even under Freedom of Information) or in other EU countries. This disclosure requirement is very difficult to justify in an environment that is seeking to foster innovation.

We submit that removing this publication requirement does not mean that there will be any distortion in the market for obtaining copyright clearances as music collecting societies are de facto monopolies, and are bound by competition law to ensure that similar licence terms for their repertoire are provided in similar circumstances unless there are objectively justifiable reasons for a deviation.

We believe that a more nuanced approach could be achieved by enabling the Controller to request details from licensing bodies of their licensing schemes on a strictly confidential basis so that he/she may then respond to and inform, in a general rather than on a specific licensee basis, requests for such data from the public.

In addition, IMRO would point out that the penalties for breaches of registration requirements under Chapter 17 of CRRRA are severe in that a licensing body, even for a small error or timeline missed is deregistered. This is not in the interest of copyright owners or licensees. In addition, there is currently no 'correction' mechanism in the Act, to address such errors or omissions.

IMRO therefore submits that Section 175 (7) (e) and (f) and Sec 177 be abolished and would request that the certificate of registration issued under Sec 175 (8) be a perpetual certificate rather than an annual certificate, unless of course the registration information required under Sec 175 (7) changes, whereupon an application for renewal of a registration of a licensing body would be made to the Controller. These proposals ensure that the registration requirement continues, that disclosures in regard to same are limited to information that is not commercially sensitive, and the proposals cut down on the annual renewal of registration requirement for both the licensing body and the Controller's Office.

As regards the renegotiation of contracts in the event of windfall income from a work that was not envisaged at the time the contract was made (Para 3.8) IMRO's view is that such a role should not fall to a Copyright Council. Such a role is better suited to the Office of the Controller. We point out that such powers to re-open or re-negotiate contracts are foreign to Irish contract law. In addition, IMRO submits that this is a non issue.

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

No, this is not possible under the Berne Convention.

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

IMRO believes that no inter-relationship to any such ADR process is desirable. The central method of resolving licensing disputes is outlined in the CRRA and while the Controller can set the means by which the dispute is resolved, we think that there is no need to develop any new statutory ADR mechanism to add to what is already available. Clearly any dispute between parties can be resolved in whatever way the parties see fit. Were any statutory ADR scheme to emerge, it would need to be regulated and such an ADR Service must remain vested in 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?**

The District Court already has significant powers under search and seizure provisions in CRRA. A small claims copyright/intellectual property jurisdiction in the District Court, presupposes judicial expertise, which is likely to be absent. However if such expertise were present, it would be welcomed as it would make for speedier less costly and more efficient IP case management.

**(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?**

Our comment in Q20 also applies, to a lesser extent, to question 21. IMRO would favour a specialist IP Court being established as an offshoot of the Commercial Court.

**(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?**

Good transfer of case rules from Circuit Court to High Court and vice versa are needed. See [Comic Enterprises & Twentieth Century Fox \(2012\) EWPC 8](#)

**Chapter 4 Rights-holders  
Preliminary Observations on Questions 23 to 37**

IMRO agrees that the situation of the individual author is "a dominant trope in copyright lore"<sup>2</sup>. As an author's society IMRO welcomes the Copyright Review Committee's appreciation of the role of individual creators and its awareness that "one important strand of innovation is likely to be provided by the creative capacity of artists to generate innovative content"<sup>3</sup>. IMRO would go further and argue that the intellectual effort that goes into creating innovative works is at the core of copyright protection. The Report is correct in stating

"there is undoubtedly an intersection between copyright and innovation; and if the legal protections of copyright are not sufficiently robust, there is little incentive for commercial innovation"<sup>4</sup>

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<sup>2</sup> Report, page 33

<sup>3</sup> Report, pages 33-34

<sup>4</sup> Report, page 34

It is however important to point out that the Copyright Review Committee may be stating the scope of copyright protection is broader than it actually is. We point out elsewhere in this submission that section 17(3) to (6) actually leaves open the scope of others to use and develop earlier works and materials – ideas, facts – without infringing copyright. Furthermore, the decisions of the ECJ in cases like *Infopaq 1*<sup>5</sup> and *Football Dataco*<sup>6</sup> (this later case being decided on the day after the Consultation Paper was launched) have accelerated the process of EU harmonisation as well as opening up downstream exploitation of fact based collections. *Infopaq 1* contains an apparent contradiction in holding that an 11 word long ‘string’ may be copyright protected – a newspaper headline might attract protection via literary copyright if it can be said to be an author’s ‘intellectual creation’. Most earlier cases incline towards denying copyright protection for words, sentences and slogans. However, the ECJ, by suggesting the test is intellectual creation by an author *everywhere in the EU and for all copyright works*, has displaced the low level of originality previously required by Anglo-Irish copyright law. The *Football Dataco* case takes this further by holding that Premier League Fixture lists do not constitute original intellectual creations. So, the creation of fixture lists, telephone directories, racing data such as runners and riders to be used at a meeting, television listings, etc are neither copyright works in themselves nor protected by the database right insofar as efforts are made to create the data. These recent ECJ developments, in providing a higher benchmark against which to measure creativity are of fundamental importance. At paragraph 4.5 the Copyright Review Committee observed that “it is not clear to us” how narrowing the originality test will incentivise creation. The answer is simple. If it is harder for creators and compilers of data to obtain IP rights then subsequent use (absent contract, technical protection of the data) will be free to all. IMRO believes that these decisions from the ECJ, once their full significance is understood, will make it more difficult to assert ownership over ‘low originality’ works and fact-based material. This means that the ECJ has clarified that the public domain is much wider than many ‘owners’ and users may understand it to be. Therefore, further changes are in IMRO’s view, unnecessary.

The basic message that IMRO seeks to communicate to the Copyright Review Committee is that the existing levels of protection in Europe are of a high standard and that the law affords to users significant ways of utilising works and data through exclusions from, and exceptions to, copyright. There are some issues that need to be addressed at EU level and IMRO believes that it is time to reconsider some aspects of the copyright acquis.

In summary, there are problems with databases and Technological Protection Measures (TPMs). But the answer lies in pressing the European Commission to review the Database Directive and for Irish stakeholders to re-examine Article 6 of EU CD.

Finally, we would like to contribute on a non-question. As the Review Group point out registration is not possible under the Berne Convention. Article 5.2 provides that the enjoyment and exercise of copyright “shall not be subject to any formality”. However, the marking of works themselves is useful in giving the benefits of presumptions (s.139 CRRA) and forestalling any innocent infringer defence (s.128(2)).

#### Responses to Questions 23 to 37

**(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?**

There is no evidence of any imbalance.

**(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?**

As regards encouraging innovation, IMRO submits that current Irish copyright law provides incentives and rewards for creativity, and this has been particularly helped by the recent SI in regard to intermediaries.

<sup>5</sup> Case C-5/08

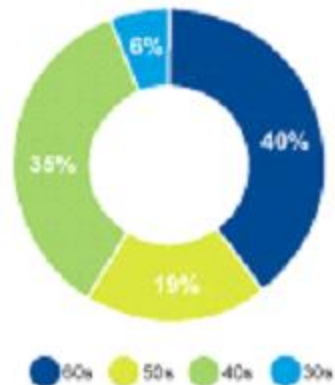
<sup>6</sup> Case C-604/10

However the lack of enforcement of existing copyright legislation discourages creativity and investment. This is particularly so in the music, film and print industries. Evidence of this is outlined below in Q37.

### Lack of investment

The absence of financial return for creative endeavours (in exchange for ‘free’) is discouraging media companies from investing in Artists and Repertoire (A&R). This is ultimately having an impact on consumers, culture and society. In France, industry data shows record companies investing 12 per cent of their turnover in marketing artists in 2009, a proportion that fell from 15 per cent in 2006 under pressure from reduced revenues, attributed, to a large extent, to illegal file-sharing (Source ([http://www.ifpi.org/content/library/investing\\_in\\_music.pdf](http://www.ifpi.org/content/library/investing_in_music.pdf)). In 2011 on behalf the music industry trade publication Pollstar, Deloitte plotted the top 20 grossing US tours of the decade by age of lead singer. The results signal a potential lack of investment into new and developing artists, with the majority of artists now in their 50’s and 60’s. If the return on investment in A&R in the music industry equals zero within a legal framework designed to offer a time-limited return on investment, the business of the creative industry will continue to be eroded, having an impact on the music industry’s ability to invest in new creative endeavours.

**Figure 1: share of revenues generated by the top 20 grossing music live acts in the US from 2000-2009, by age of artist / lead singer in 2011.**



*Source: Deloitte Deloitte Touche Tohamtsu Limited, 2010, based on live tour data from Pollstar; ages of lead singers from various websites*

Record industry estimate that A&R investment in Ireland has fallen by 80% in the last six years.

### Graduated Response

EU countries France, Sweden and the UK have been progressive in changing national law to tackle peer to peer activity and block illegal websites. In September 2009, the French Parliament adopted the ‘creation and the Internet’ law or HADOPI 2 which blocks access to Internet subscribers who are caught engaging in illegal file sharing on three separate occasions. This approach is commonly referred to as ‘three strikes’ or ‘graduated response’. In Sweden, the IPRED law, introduced in 2009, also requires ISPs to identify copyright-infringing subscribers (<http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=1268&method=afficherArticleInPortlet>).

In the UK, the Digital Economy Act (DEA) enacted into law in June 2010, places an onus on ISPs to reduce online copyright infringement by identifying subscribers engaged in copyright infringement and in so doing to take technical measures to limit or suspend broadband subscriber’s access

<http://www.legislation.gov.uk/ukpga/2010/24>). A full list of ISP obligations can be found in the DEA.

Eircom, under a settlement agreement with the Irish Recorded Music Association (IRMA) must implement or meet certain anti-piracy obligations. We understand that this voluntary code of graduated response practice has been successful in that of those Eircom ISP users that received a 1<sup>st</sup> letter, advising of the use of their internet connection to obtain or share music illegally, it was only necessary to send a 2<sup>nd</sup> letter to 11% of those users, with less than 1% requiring a 3<sup>rd</sup> letter and only 0.2% ever required a sanction i.e. internet access cut off. This compares to the situation in France under the HADOPI 2 law – at Dec 2010, of those ISP users that were put on notice as regards their illegal download/file sharing activity, it was necessary to send only 8.3% a second warning, while only 0.02% were placed under investigation.

In the US under the guise of the Centre for Copyright Information, content creators in the movie and music industries and selected ISPs have agreed measures to deter copyright infringement through the implementation of a Copyright Alert System.

*“The Center for Copyright Information (“CCI”), an organization formed in September 2011 by a coalition representing U.S. content creators and leading ISPs, is dedicated to implementing an unprecedented and cooperative effort, the Copyright Alert System (“CAS”), to deter online copyright infringement through a series of consumer notifications that are both educational and act as a deterrent”*

Details on how the Copyright Alert System works are available from

<http://www.copyrightinformation.org/alerts>

This is strong evidence both in Ireland and in other countries that the graduated response measures do work.

### **Infringement**

We note the comments of the CRC on page 38.

“Several submissions related to the question of whether a rights-holder can get an injunction against an ISP whose customers are infringing copyright. However, as we said in that chapter, we will not address this issue in the present review”.

We would respectfully submit that a copyright review taking place in 2012 is rather meaningless if it does not address infringements, enforcement and remedy provisions, in particular in the online environment. This is after all the precise area where copyright and innovation are intersecting and if all predictions come to be, may well be the exclusive area of intersection in the future.

**(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?**

See our response to Q 24 above. Rightsholders, through commercial negotiations obtain compensation for the use of their works by others. However the digital environment facilitates wholesale copyright infringement being carried out with impunity, with no remuneration paid to copyright owners in many cases. This can only stifle innovation.

**(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?**

In relation to literary and artistic copyright and original databases, the effect of *Infopaq 1* makes this question otiose.

We do not think any adjustments are needed *vis-à-vis* sound recordings, films, broadcasts, cable programs or typographical arrangements. The first four ‘works’ are not Berne/WCT works in the same

ways as are literary and artistic works. The Community acquis does not address typographical arrangements.

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

If there is any unintended perpetual copyright arising out of section 24(1) of CRRA (and no Court has ruled on this) then a “for the avoidance of doubt” provision should be inserted into CRRA. This provision should deny the existence of any perpetual copyright in unpublished works. Most of the confusion on this point is due to the failure of the drafters of CRRA to integrate Section 24 and 34 so as to reflect the original Term Directive (93/98/EEC). The controlling provision is now article 4 of the Consolidated Directive, Directive 2006/116/EC which provides; Article 4

Protection of previously unpublished works

“Any person, who after the expiry of copyright protection for the first time lawfully publishes or lawfully communicates to the public, a previously unpublished work shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.”

Article 4 should be added to the revised section 24 i.e. co-join sections 24 and 34.

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

From an IMRO/MCPSI perspective the current definition does not pose any difficulties. However, ensuring that ‘broadcast’ and ‘broadcasting’ are limited, like in the UK, to transmissions for simultaneous reception by the public, or made at a time solely determined by the person making the broadcast, would be beneficial and enable the exclusion of interactive services (i.e. services enabling access by members of the public to transmissions on request and at times selected or determined by them) from the definition of ‘broadcast’.

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

Yes. New delivery mechanisms, unimagined in the CRRA must be accommodated. See the recent ‘Singtel Opus’ decision in Australia. A general declaration that copyright protection and exceptions should be interpreted in a way that observes principles of technological neutrality and give effect to the purposes inherent in the provision, as enacted, would be helpful.

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

We believe that Sections 103 and 251 CRRA should be amended to ensure they are confined only to cable operators in the strict sense because of firstly, the clear distinction in the CRRA at Sec 40 (1) (a) and Sec 40 (1) (d) and secondly, to do otherwise makes a nonsense of the provisions of Sec 174 of the CRRA.

**(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?**

We believe that the current enforcement provisions in respect of breaches of copyright are largely ineffective in the on-line arena and therefore present a serious barrier to innovation. IMRO supports ACTA (Anti-Counterfeit Trading Agreement). Without ISP intermediary cooperation, copyright protection on the internet is meaningless and if commercial return is not possible for rights owners, innovation and creativity will be stifled. This is evidenced in the music industry by the lack of investment by the record industry in new artists and songwriters. Key evidential findings outlined in the IFPI Digital Music Report 2011 include:

- Despite the growth of digital music revenues, the music industry is still hemorrhaging revenue as a result of digital piracy
- A comprehensive study of the impact of piracy on employment published in March 2010 (Tera Consultants) projects that if piracy is not addressed, it has been projected that more than one million jobs will disappear from the creative industries by 2015.
- Polstar reported the top five tours of 2010 were by Bon Jovi, AC/DC, U2, Lady Gaga and Metallica – mostly artists with extensive catalogues established through record sales. Once an artist has established their name through their recordings, it is only then that they can generate substantial income from live performance and merchandise. No major artist has to date been able to build a career on live performance alone.
- In a study of the Spanish music market, which is struggling because of digital piracy, in 2003 there were 10 Spanish debut artists in the Top 50. In 2010 that had fallen to zero.
- The pressure on investment in new local artists as a result of piracy is reflected in the fact that between 2003 and 2010 (Jan-Nov 2010) the combined sales of debut albums featuring in the global top 50 fell by 77%. By contrast, non debut album sales fell by 28% over the same period. Debut titles accounted for 27% of all global top 50 sales in 2003. This has fallen to 10% in 2010.

**(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?**

See our comments in Q37.

**(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?**

**(i) Format shifting – private copying**

IMRO and MCPSI support the introduction of a format shifting exception subject to compensation. We believe consumers should be able to benefit from the advances in technology to allow copying of legally purchased content to electronic and mobile devices owned by individuals and retained strictly for their own private use, in line with European law and subject to rights holder compensation. We do not support the extension of the exceptions to online storage and so called “cloud locker” services. Such uses are already efficiently licensed by rightsholders to the benefit of consumers, rightsholders and innovative technology companies.

Enormous value is derived from the transferability of music i.e. transferring music from CD to an MP3 player. UK research shows that over 90% of music on the average MP3 player is music that’s copied. Irish creators and right holders are legally entitled to benefit from this value. At present, this value is enjoyed by both consumers and technology companies while creators and right holders are effectively excluded from any value. This demonstrates a clear market failure.

We are encouraged by the then EU Internal Market Commissioner, Charlie McCreevy who said in his statement on 14th February 2008:

“There can be no question of calling into doubt the entitlement of rights holders to compensation for private copying.”

This was echoed by the United Kingdom’s largest academic survey into the music consumption habits of young people, undertaken by the University of Hertfordshire and British Music Rights, where 90% of those who supported a licensing system agreed that creators should be compensated for a private copying exception see [http://www.ukmusic.org/assets/media/uk\\_music\\_uni\\_of\\_herts\\_09.pdf](http://www.ukmusic.org/assets/media/uk_music_uni_of_herts_09.pdf)



We need to redress the balance which underpins copyright - one that allows consumers to enjoy their music, drives technological innovation, yet recognises music creators' and right holders' place in this market. Our proposal creates an easily-implemented, flexible, future proofed and transparent solution: an exception subject to licence.

It does not seek to legitimise the wholesale copying and sharing of music; instead, it simply ensures that a fraction of the value gained by others should be compensated, and the injustice suffered by creators and right holders should be compensated. Licensing is an established and accepted mechanism for exercising the administration of copyright – enabling a range of businesses to benefit from music, while at the same time ensuring creators and right holders get paid. The apparatus and mechanisms for distributing such licensing income to creators and right holders are well-established in Ireland and have been in operation for many years through rights holders' collection societies.

### **The Licensing Solution**

An exception subject to licence is a pragmatic and market-responsive solution: the licensing scheme and fees will be subject to appeal to the Controller, just like any other copyright licensing scheme published by licensing bodies. The licence fee would be determined by commercial negotiations between creators and right holders and manufacturers and distributors of devices substantially used or marketed for copying music. Inherent in this process is the mechanism where any user can refer a licensing scheme to the Controller.

A licence would result in a non-disruptive and mutually-beneficial outcome: clarification for technology companies, remuneration for Ireland's creative music community and – most importantly – it would allow consumers to carry on enjoying their music. This principle is already established and accepted; for example, technology companies pay a commercial licence to use MPEG software for their services.

An exception for format shifting should be based on very clear principles:

- That the initial copy is legitimately owned and retained
- The copying is undertaken by the owner
- That it is done for the owner's private/ domestic use
- That it is done solely for the use of copying from a physical or legally purchased digital/MP3 format
- That there shall be no onward distribution, communication or exploitation in any way

The European Parliament and Council have clearly mandated in the Copyright Directive their objective that creators and right holders are entitled to fair compensation where such an exception forms part of national copyright law. Numerous systems already exist throughout Europe based on developing relationships between technology companies, creators and right holders. We propose that a balanced relationship is best achieved in Ireland through such a licensing scheme.

Compensation must accompany a private copying exception under Article 5(2)(b). The concept of compensation has been interpreted by the Court of Justice of the EU in *Padawan v SGAE* (Case c-467/08)

The ECJ held that:

- 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 (paragraph 44)
- There is a presumption that natural persons using reproduction equipment and media have caused harm to the author (paragraph 54-56)

- Whereas the harm caused by individual copies may be minimal, harm caused by private copying is to be assessed cumulatively (paragraph 46)

The CRC should also be aware of the ongoing stakeholder dialogue led by ex Commissioner Vitorino in Brussels. This is an EU Commission initiative to develop private copying policy for 2012 and beyond and is relevant to the CRC. Irish policy going forward should take account of up to date developments at EU level.

Additionally UK Music published research in May 2012 conclusively demonstrating the commercial market-based value of the ability to play music copied from CDs as a feature on MP3 players, phones and tablets. The research was published in response to the UK Government’s request for evidence on the impact of proposals to amend the UK’s copyright system<sup>7</sup>. Undertaken by Oliver & Ohlbaum, the research clearly demonstrates that being able to play music copied from CDs is the feature that consumers prize when they are in the market to buy a new device. Tellingly the research quantified the monetary value of these features:

**Headline Findings**

Device	Device RRP	Value of playing music copied from CD
MP3 Player (basic)	£47.55	£21.00 or 44% of price of device
MP3 Player (mid-range)	£122.95	£65.17 or 53% of price of device
MP3 player (top range)	£247.14	£80.00 or 32% of price of device
Smartphone (basic)	£257.46	£6.67 or 2.59% of price of device
Smartphone (top range)	£571.33	£23.60 or 4.13% of price of device
Tablets	£499.79	£33.50 or 6.7% of price of device

**(ii) Cloud Locker Services**

In relation to cloud locker services, we agree fully with the position adopted by PRS for Music in their response to the Consultation on Copyright in the United Kingdom:

“There is no case for an exception for copying to cloud lockers and online platforms providing online storage of a music collection so that it can be accessed from different locations, since these services are either licensed or licensable. Licensing solutions are inherently more flexible, quicker to introduce and more likely to result in fair and appropriate negotiated compensation paid directly and accurately to rights holders whose works are exploited, than any exception with compensation.”

Recital 44 of the Copyright Directive states that the provision on exceptions or limitations by member states should in particular reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment and that therefore the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject matter. This provision constrains the implementation of Article 5(2)(b) of the Directive generally, but should specifically rule out the application of an exception to cloud services and online platforms. Regulatory compensation schemes are an imperfect means of compensating rights holders for the loss of the right to authorise copying. Such schemes should not be introduced for new business models where licensing is taking place and where they could never substitute for the full value and certainty of the negotiated license. As an overriding principle, exceptions should only be introduced as a

<sup>7</sup> <http://www.ukmusic.org/news/post/270-uk-music-publishes-new-oliver--ohlbaum-research>

last resort, if rightsholders are not able to license. Clearly digital lockers can be licensed. There are already licensing solutions in place for digital locker and online platforms which are after all the future business model of the content and technology business. Examples include iTunes and its scan and match service.

Any exception in this area would remove licensing opportunities causing direct economic harm. PRS for Music in the United Kingdom estimate that online licensing revenues will continue to grow at 25% per annum. Cloud based services will be a significant area for future growth<sup>8</sup>. PRS estimates that if an exception was applied to such services, the reduction in online creative revenues would amount to at least £40m over the next five years. In an Irish context, this would equate to a significant loss for songwriters, composers and music publishers. An exception would also result in further legal uncertainty, giving rise to costs to both the licensor and licensees and is in itself a barrier to innovation.

The aforementioned research by Oliver & Ohlbaum<sup>9</sup> also identifies the commercial value ascribed to locker-based cloud storage of music. Personal documents and files, like irreplaceable family photos, rank highest for consumers. But music is the next most important thing to consumers to back-up to commercial cloud services. 72% of respondents consider their digital music collection as their most valuable commercial data of any type, ahead of film, eBooks, and video games.

This is irrefutable objective evidence, peer reviewed by a leading academic at Newcastle University clearly demonstrating the value derived by consumers by storing music on both devices and in cloud locker services.

We urge the CRC to incorporate this data, in an Irish context, and in particular in any impact assessment before making any recommendations to the Minister in relation to a private copying exception without the payment of fair compensation as is suggested in the consultation paper. This would align Ireland with its European partners, comply fully with EU Copyright Directives and is the fair and morally correct path to take.

We would draw the CRC's attention to assessments currently underway in other Member States concerning the interaction between private copying, exceptions and locker services. More detailed economic and legal studies will be emerging soon.<sup>10</sup>

## **Chapter 5 Collection Societies** **Preliminary Observations on Questions 38 and 39**

IMRO does not accept the characterisation of licensing schemes and the registration of collecting societies as a “bewilderingly byzantine area in practice, beset by opacity and fragmentation, and no little suspicion”. IMRO has worked hard over the years to ensure licensing practices are transparent. IMRO complies fully with competition law and the Controller registration requirements. The statutory provisions are complex and while many users may demonstrate a dislike of licensing arrangements, this is often the result of a failure to appreciate the benefits of blanket licensing and a desire to use music “for free”. IMRO points out that we have made our members rights available for cross border licensing through our agreements with sister organisations, SACEM in France and PRS for Music in the United Kingdom.

Collecting societies are the subject of regulation from both the European Commission and the ECJ; to mention collecting societies in the same sentence as “opacity” is to ignore the fact that IMRO trade practices and licensing schemes are among the most transparent in Europe.

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<sup>8</sup> Impact Assessment - Consultation on Copyright in the United Kingdom

<sup>9</sup> <http://www.ukmusic.org/news/post/270-uk-music-publishes-new-oliver--ohlbaum-research>

<sup>10</sup> France has set up a High Commission to review cloud and private copying levies

## Responses to Questions 38 and 39

- (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?**

IMRO is already regulated via the law of contract and competition law vis-à-vis its members and users of music, in addition to the CRRA.

Copyright collection societies in Ireland, as licensing bodies under CRRA are subject to far more disclosure and registration requirements when compared to sister collection societies in other EU countries. In addition, collection societies are subject to strict Irish & EU competition law. Finally IMRO would point out that the forthcoming EU directive on Collective Management (yet to be published) will further strengthen these provisions and IMRO welcomes these initiatives.

- (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?**

We have addressed all matters in Q14 & Q17 above.

## Chapter 6 Intermediaries Preliminary Observations on Questions 40 to 54

It is difficult to appreciate just how complex the law of copyright has become in the area of intermediary liability. This complexity is not helped by the fact that many of the Directives and policy positions that the European legislator has adopted are at times contradictory and unclear at best. For example the so called safe harbour provisions in the Electronic Commerce Directive are the subject of close judicial scrutiny before the ECJ (e.g. *L'Oreal v eBay* Case C-324/09)<sup>11</sup> and in national courts (e.g. *Newzbin* and the battery of English cases that have followed on from the original 29<sup>th</sup> March 2010 decision<sup>12</sup>). We also note that the Copyright Review Committee has been required to abstain from considering the filesharing issue insofar as the matter has been reserved for separate consideration.

IMRO would like to point out that on pages 45 and 46 of the Consultation Paper there is some ambiguity about the basis of intermediary liability.

Liability, where it has been made out against some intermediaries and others (e.g. software providers) will involve a finding that the intermediary has authorised infringement. (CRRA s.37 (1)). This form of liability sits between primary and secondary liability and is not to be confused with s.44 (4) CRRA liability. This is important as the debate in Ireland has not been clear on this point. We also suggest that changing the current statutory position on copyright will not be enough. Service providers, intermediaries and others can be liable in tort as well as under copyright statute law. Note that in *Newzbin* the High Court found *Newzbin* liable via authorisation, procuring infringement by way of a common design (tort) and by communicating the work to the public. In contrast, the High Court of Australia, in *iiNet* has found that an ISP is not liable for authorising infringement when the illegal nature of subscriber activity is not evident or clearly demonstrated by the complainant rightsholder. So any adjustments to the law will have to anticipate the hydra-headed nature of potential liability. Similarly, if liability is established, possible defences will not focus solely upon CRRA and SI No.68 of 2003. There is a common law defence of innocent dissemination that will need to be addressed. While most innocent dissemination cases are defamation cases, there is no reason to suggest the innocent dissemination defence is so limited. Because of the relationship between these concepts of primary and secondary liability, authorising infringement, as well as

<sup>11</sup> Decision of ECJ 20<sup>th</sup> July 2011

<sup>12</sup> [2010] EWHC 608 (Ch)

criminal liability under section 140, and related causes of action in tort or contract, IMRO does not think it is realistic to simply try to “fix” the law relating to intermediaries in the way outlined in Chapter 6.

#### Responses to Questions 40 to 54

**(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 immunities afforded by the Electronic Commerce Directive, as transposed into Irish law by SI No 68 of 2003 are matters of Community Law. IMRO does not believe that Ireland can operate unilaterally to further buttress the immunities afforded to intermediaries. Any legislation would have to take account of the complexities of ECJ case-law (e.g. *Telefonica*, *Scarlet Extended*, *Netlog*).

**(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?**

IMRO’s answer to Q 40 makes an answer to this question unnecessary.

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

Again, IMRO’s answer to Q40 refers.

**(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?**

The definition of intermediary has been clarified by case-law in decisions like *LVHM v eBAY* and *L’Oreal (ECJ)* and *Google Ad Words (Interflora)*. IMRO believes this is a matter to be left to case-law. However, a full statement on what the definition is should be built into an amended SI No 68 of 2003.

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

As stated above, the immunities in the Electronic Commerce Directive cannot be unilaterally adjusted in Ireland.

**(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?**

In this question the phrase, “of itself and without more” is critical. We note it does not appear in the narrative on pages 48 to 49 in the sense that its meaning is not expanded upon. Our position is that linking to illegal files should be an act of infringement. The question of intention is crucial.

We also challenge the Review Committee statement, “a link, by itself, is content neutral. It is the user who clicks on the link and publishes, reproduces or communicates the content who is the copyright infringer, and not the provider of the link”.

Linking, as an infringing activity can be a source of liability under US law (*Universal v Remeirdes aka Corley*) and in other common law jurisdictions. Perhaps the clearest decision on this is the Australian decision in *Cooper v Universal Music Australia Pty*. In *Newzbin* Kitchin J summarised *Cooper* thus:

“Cooper concerned a website run by Mr Cooper which did not itself contain any music files but was structured to allow internet users ready access to unauthorised music files of numerous popular sound recordings via hyperlinks. The trial judge found Mr Cooper had infringed the claimants’ copyrights by authorising the making of copies of their sound recordings. The finding was upheld on appeal. The court considered it material that the principal content of the website comprised links to other websites and files contained on other servers and that the overwhelming majority of the files listed on the website were protected by copyright. Further,

the website was structured so that when a user clicked on a link to a specific music file, a copy of that file was transmitted directly to the user's computer. The website was user friendly, highly structured and organised and allowed users readily to select from a variety of popular sound recordings, and Mr Cooper had a commercial interest in attracting such users. Mr Cooper did not take reasonable steps to prevent or avoid the use of his website for copying copyright sound recordings. Indeed he deliberately designed his website to facilitate such use, and the inclusion of various disclaimers was merely cosmetic."

English case-law tends to examine the mental element that is a part of the Electronic Commerce Directive defences very well. If a person copies a copyright work unintentionally an infringement will still occur. Innocence might limit the infringer's duty to pay damages but an injunction will still be awarded. But under the E Commerce Directive, an immunity is given when the defendant does not know or have awareness of facts from which the unlawful activity is apparent. The cases explain that where the cause of action is defamation it is understandable that a mental element is required, but in the post *Newzbin* environment this requirement is rather easier to satisfy in copyright infringement cases; see in particular *Newzbin 2*. Someone who creates a link knowing it is to infringing material, for gain, will be an infringer. We also point out that if legislation is amended to clarify the issue of linking then the opportunity might also be taken to examine liability of search engines.

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

IMRO believes that if the person creating the link is aware or has reasonable grounds to be aware, that the content being linked to is illegal or is aware of facts from which the illegality is evident, no immunity should be available.

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

See answer to question 45. Search engine immunity under article 12 of the Electronic Commerce Directive (refer to SI 68 2003) is based on the automated nature of the search engine (mere conduit). As a mental element is involved when a link is created (even if done via automation) it would involve factors absent from Articles 12-14 and no exemption is available. The status quo should remain.

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

No evidence has been presented to show that this is the case.

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

This appears to be a repetition of question 35 and we have no comment to make.

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

While article 7 of the Database Directive is a related right (as transposed by CRRA) that Directive is problematical and is generally agreed to be in need of revisiting by the European Commission.

**Chapter 7 Users  
Preliminary Observations on Questions 55 to 62**

Restrictions on the exercise of authors' rights are an integral part of the copyright system, as was recognised even before the Berne Convention was agreed: "limits to absolute protection are rightly set by the public interest"<sup>13</sup> Ricketson and Ginsberg, authors of International Copyright and Neighbouring Rights classify these exceptions as

<sup>13</sup> Ricketson and Ginsberg, p.756

- (i) subject matter limitations<sup>14</sup>
- (ii) use limitations<sup>15</sup>
- (iii) use limitations requiring compensation<sup>16</sup>

Ricketson and Ginsberg explain the exception thus:

“The judicial basis for each kind of provision is different. The first proceeds on the assumption that there are clear reasons of public policy why copyright protection in the works in question might not be required, for example, because it is necessary, in the interests of participatory democracy or the free flow of information, that these works should be readily and widely available. The second represents a more limited concession to the effect that certain kinds of uses of works that are otherwise protected should be allowed because there is a public interest present here that justifies overriding the private rights of authors in these particular circumstances. In the third category of cases, the author’s rights continue to be protected but are significantly abridged or even transmuted into something different: public interest may still justify the continuance of the use, regardless of the author’s consent, but this should be subject to the payment of appropriate remuneration (the transmission here being from an exclusive right to a right to remuneration).”

It is also well to remember that the International law context also requires national legislators to respect human rights as well as international treaty standards aimed at promoting commercial law. The European Court of Human Rights has held<sup>17</sup> that the unauthorised use of a copyright photograph for a purpose that was clearly of public interest without compensation or a contractual agreement regulating use, can be a breach of Article 1 of Protocol 1 to the European Convention on Human Rights, affording natural or legal persons entitlement to the peaceful enjoyment of his possessions. Absent some compelling public interest consideration, Moldovan legislation and the conduct of the Moldovan courts had failed to “strike a fair balance between the interests of the community and those of the [rightholder]”<sup>18</sup>. EU institutions are bound to observe decisions of the European Court of Human Rights as fundamental principles of Community Law, as well as taking effect within the EU under the European Convention on Human Rights.

The EUCD in particular has a provision on minor exceptions being possible under national law, but it clearly has no relevance here, not least because it cannot be used in a digital environment. The Consultation Paper recognises this. However, we go further in arguing that new defences, exceptions and limitations are simply not possible and the ECJ has been vigilant in overruling *ad hoc* legislated departures<sup>19</sup> from TRIPS, etc. A Fair Use exception is not possible as a matter of the Community Copyright *acquis* and any view to the contrary misunderstands both the Community *Acquis* and International Law. Reinbothe is quite clear on Article 5 of EUCD and the possibility of legislating for further exceptions and limitations:

“probably the most significant achievement in the context of Article 5 regarding exceptions and limitations to the rights relates to the very concept of this provision: As follows from the text of the Article and is explicitly confirmed in Recital 32, the list of permitted exceptions in Article 5 is ‘exhaustive’ – no other exceptions or limitations on top of those listed in Article 5 may be applied by member states, nor be permitted under national law. The achievement is legal certainty, the price to be paid was the length of this list of exceptions (from 8 permitted exceptions listed in the Commission’s proposal the list was increased to a total of 20). At the same time, these 20 categories of exceptions and limitations are not

<sup>14</sup> Berne, articles 2(4), 2(8) and 2 bis (1)

<sup>15</sup> Berne, articles 2(bis)(2), 9(2), 10 and 10 bis

<sup>16</sup> Berne, articles 11 (bis)(2) and 13. Some other compensatory or compulsory licence provisions may be applicable.

<sup>17</sup> *Balan v Moldova* [2009]ECDR 53

<sup>18</sup> *Ibid* p.64

<sup>19</sup> Case C -162/10, ruling on section 97 CRRA (2012)

mandatory; member states may, but are not obliged to apply these exceptions, and many if not most member states do not apply all of them. The legal certainty therefore extends to the exceptions that *may* be applied.<sup>20</sup>

For the sake of completeness we point out that any perceived abuses of power are amenable to review under national and EU competition rules, although there is no provision to this effect in the Berne Convention or the TRIPs.

Ricketson and Ginsberg point out that the issue of abuse of monopoly was raised at both the Rome and Brussels Conferences on Berne and the view that held sway was that “a convention concerned with the protection of private rights did not interfere with the power of sovereign states to regulate matters in the public interest. Thus, controls over collecting societies or other abuses of authors’ rights did not come into conflict with the provisions of the Convention.”<sup>21</sup>

The British and New Zealand Governments in 1948 sought to make it clear that the UK would treat copyright law as subject to national laws directed at counteracting the abuse of exclusive rights. Ireland associated itself with this UK/New Zealand declaration. It is necessary to point out that EU law has been used to counteract anti-competitive agreements and practices, and the abuse of a dominant position, in landmark cases before the ECJ (e.g. *Magill*, *Microsoft*)<sup>22</sup>.

To be sure, there is no doubt that within the Berne Convention a member state of the Berne Union is entitled to provide for non recognition of copyright in given situations as a matter of *ordre public*: the most obvious instance being content related, such as the distribution of pornographic materials or offensive materials (hate writings or religious incitement). Irish law is currently unclear on whether such a defence to an infringement action is possible. Unlike the UK 1988 legislation there is no specific public policy defence in CRRA based upon offensive content. Recent case-law from elsewhere in the common law world suggests that while copyright itself will not be denied to authors of offensive material, discretionary powers to give injunctive and other reliefs may take account of the nature of the copyright material.<sup>23</sup>

A question posed by the Committee at 7.2 is ‘whether reform of Irish Copyright law can accommodate and encourage user innovation, especially in the context of transformative uses’. IMRO believes that the existing legislative framework already does this without constraining innovation, and does so with the right and proper constraints laid down by Berne and the EUCD. The view expressed that ‘those who use copyright material run up against the interests of copyright interests’, firstly expresses same in a very negative way, and secondly seems to imply an “inconvenience” in rightsholders seeking to enforcing their rights as owners of their own intellectual property. IMRO has always sought to work with copyright users and has engaged with large international companies like Google and Apple to enable them launch their products using our members’ repertoire.

#### Responses to Questions 55 to 62

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

<sup>20</sup> Foreward to Landner and Shapiro, *Copyright in the Information Society*

<sup>21</sup> *Op Cit* p.845

<sup>22</sup> Extended licence agreements that are specifically mandated by law are also amenable to review under abuse of dominant position rules in TFEU: *Canal 5 v STIM*, Case C-52/07. An abuse may be found via the imposition of a price which is excessive in relation to the economic value of the service provided and calculations may take into account the turnover of the user: *Basset v SACEM*, Case C- 402/85 [1987] ECR 1747. IMRO is currently a party to Case T-420/08, the CISAC/EBU, Challenge to Commission Decision C (2008) 3435.

<sup>23</sup> *Aldrich v One Stop Video* (1987) 39 CPR (3d) 362; *Venus Adult Shops Pty v Fraserside Holdings Ltd* (2006) 70 IPR517. The Copyright Review Committee might like to consider whether this area needs legislative attention – see question 86.



IMRO believes that legal certainty is an important advantage in any legal system and it should not be lightly abandoned. We are not clear why this is being proposed and what benefits would accrue therefrom. Therefore, we do not believe that “includes” should replace “means” in S.50(4) (and no amendment should be made to Sec 221 (2)) as to do so would expand the meaning of ‘fair dealing’ well beyond what is intended and IMRO would go further than the Committee in stating that such an amendment will result in more litigation without any benefit to innovation, the users or rights owners.

**(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?

In general we believe that the exceptions in the CRRRA are adequate to allow fair dealing. There is no evidence to suggest that the current licensing system or exceptions create any impediment to innovation. For example parody, pastiche, uses are easily exercisable under the existing licensing solutions and we are not aware of any practical problems in this area. One has to ask where is the evidence that the absence of these EUCD exceptions in Irish law puts Ireland at a competitive disadvantage to other countries. IMRO in its experience since 2000 has never come across such evidence. User generated content has been licensed by IMRO and MCPSI on a blanket basis in cooperation with the web platforms that facilitate such activities. There is no impediment in Irish or EU law to user generated content fully owned by those same users, being made available by them online or offline. EU law via the EUCD permits Member states to introduce an exception for private copying, provided that fair compensation is paid – IMRO supports this position in its entirety and no less.

This question asks whether Ireland Inc should incorporate all of the exceptions permitted under the EUCD. The question sets out some of the exceptions at (a) to (i) and we deal with them in that sequence.

**(a) Reproduction on paper for private use.** The way in which this exception is put in the Consultation Paper is not free from difficulty. As this proposal is intended to give effect to Article 5(2) (a), at least in part, one has to be sure that it is in accordance with the article. The phrase ‘private use’ does not appear in the article. Nor does the phrase “fair compensation”, a *sine qua non* to Article 5(2) (a), appear in the proposed new section 106A. The Review Committee appears to be trying to tread around both difficulties. The ECJ, in *Padawan SL v SGAE* (Case C-467/08) basically held that “fair compensation” must be available, on a targeted basis, if use under this kind of exception is harmful to a rightsholder. If a compensation system is not introduced in Ireland the reproduction should be for personal use rather than private use, a change that will best reflect the proposed subsection (4) on a loan of the reproduction. We do however have a problem with the scope of the exception. The need for an acknowledgment suggests that the reproduction can be re-used or circulated. This acknowledgement is odd given that the reproduction is for private purposes. We also question whether the Database Directive is relevant here. Analogue reproduction is authorised but it should be made clear that there are problems about digital reproduction of the contents of a digital database under the *sui generis* right in Article 7 of the Database Directive. IMRO would also like to clarify the sheet music provision. Sheet music should be defined so as to include the lyrics of a song that has been lawfully published along with the musical notation of the musical work in question.

**(b) Reproduction for format shifting or backing-up for private use.** The *Padawan* criteria remain important here also. The reproduction in question must be non-commercial and avoiding Technical Protection Mechanisms (TPM) is not possible. We refer to our response to Q37 also.

On the other hand, the new back-up copy proposal in section 106C strikes us as very odd and rather dangerous. Someone who buys a copy of a hardback who loses it by leaving it on the bus one evening can hardly expect to ask the bookseller to give a free replacement. Why should the digital world be any different? We are particularly intrigued by the breadth of the proposed section 106C (1). Section 106C (1) (a), sets out an extremely broad “back up copy” provision which is not limited to unusable lawful copies. We also think it is dangerous to allow or encourage the making of back up copies on the basis of a contingency, that is, the chance that the original *may* be damaged. The policing of such an exemption would also prove to be impossible.

**(c) Reproduction or communication for the sole purchase of illustration for education, teaching or scientific research.** This proposal is not free from difficulty. The addition of a broad and undefined “education” purpose may fail all stages of the three step test, as well as being outside of the intended structure in article 5(2) (c) of EUCD – that article talks of establishments rather than persons engaged in educating and it refers to reproductions only. Nor does the proposal take account of the Database Directive which distinguishes between taking an original database and taking the contents of the database, as well as limiting permitted acts for digital content to reading the content. Perhaps this needs to be thought through rather more than it has been. In any event, IMRO would require that this proposal does not weaken the earlier sheet music provisions.

**(d) Reproduction for persons with disabilities.** IMRO would suggest that the recommendations be revisited to ensure that they are in accordance with broader international developments at WIPO as well as post 2001 Community policy. IMRO is of course supportive of constructive changes to the law in this area and is willing to offer its views on any proposed changes in this area. We note however that from an IMRO perspective the existing provisions in the CRRA have not caused any problems and are not a barrier to innovation in any case.

**(e) Reporting administrative parliamentary or judicial proceedings.** The key provision here is “reporting”. The Committee should note the recent *Waldman* litigation in Ontario (2012). IMRO does not support the suggested amendment at Para 7.3.12 in respect of Sec 71 (1) of the CRRA without more detail on what would be defined as ‘public security’ and how this amendment would support innovation.

**(f) Religious or official celebrations.** As we have noted earlier, the Berne Convention does anticipate some relaxation of the public performance right by way of minor exceptions. We point out that Article 5 (3) (g) requires that the exemption requires the event to be organised by a public authority rather than a religious group or a sporting association, for example. IMRO would argue that Berne appears to address performances, while Article 5 (3) (g) goes further in dealing with the reproduction right also. IMRO has been flexible over non-educational use of its repertoire in schools and we would seek discussions on the details to be agreed on how this would work and how it would contribute to innovation.

**(g) Advertising the exhibition or sale of artistic works.** IMRO has no comment on this exception.

**(h) Demonstration or repair of equipment.** This exemption is rather ill-defined in Article 5 (3)(l). The unregulated use of music contained in IMRO’s repertoire in a music or electrical shop would be of concern. Again how would this help innovation and what innovation barrier evidence is available to support the introduction of this exemption.

**(i) Fair dealing for the purposes of caricature, parody, pastiche or satire, or for similar purposes.** As the literature and the Copyright Review Committee observe, there is no Irish statutory exception (or case-law) but the fair dealing for criticism or review has been used previously in other jurisdictions (e.g. *Clark v*

*Associated Newspapers in England*). Many of the leading US cases concern musical works (*Loew's Inc v CBS* for example).

We fail to see how there is currently an issue in relation to the above and cannot understand how introducing an exception in respect of parody and pastiche uses could possibly aid innovation in any way. A review of the submissions already made available to the CRC provides no evidence that introducing such an exception would have any positive affect. It would simply serve to provide a loophole for those intent on using copyright works for commercial gain without paying a fair royalty to original copyright owners.

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

The possible extension of fair dealing for "research and private study" so as to include education has been discussed in relation to question 56(c). IMRO repeats that the scope of an educational use exception is problematical. Recitals 40 and 42 of the EUCD are relevant here. Recital 40 would appear to limit any exception to educational institutions. The recital also limits the exemption to the reproduction right. Recital 42 does not mention teaching at all, using the broader notion of "education". Recital 42 specifically addresses distance learning but draws a fine line between "the non-commercial nature of the activity" before stating that the organisational structure or means of funding the establishment are not the decisive factor. The focus is on the activity.

In summary, IMRO's position is that the CRRA "research and private study" references should not be extended to include "education". IMRO believes the quality and range of educational material will suffer if copyright owners do not receive a return and there is no moral justification for authors and writers to be disenfranchised when other 'suppliers' to the education sector are not.

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

On the question whether the education exceptions should extend (a) to distance learning, the answer is no. In relation to issue (b) utilisation of a work on the Internet, again the answer is no. Our reasoning being that IMRO sees no reason why rightsowners as 'suppliers of works' to education should be treated any differently to other suppliers. To do so would prejudice the commercial exploitation of such works. Finally there are the usual difficulties around defining a 'non commercial' activity.

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

The existing provisions in CRRA appear to be working satisfactorily. Nevertheless IMRO notes that recital 41 requires an adjustment to be made so as to allow the outsourcing of the reproduction of ephemeral recordings. Therefore the answer is yes but only if:

- the broadcaster and the third party has permission to do so from the relevant copyright owners, and
- the permitted party can fully report on all elements of IP storage and usage, and
- the archive is used only by the broadcaster or third party i.e. it is not for public consumption unless specifically authorized for such by the copyright owners.

IMRO is concerned about the possibility of such recordings finding their way into circulation, and, accordingly, we suggest the addition *vis-a-vis* subsection (4) of section 99 of CRRA (at pages 6-7) should be amended in two respects.

Firstly, the words "a person" should be replaced by "an agent". Secondly, the new subsection (4) should continue on: "The licensee must, in writing, inform the agent of the agent's obligations under subsection (3)"

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

As Article 5(2) (e) mandates reproductions of broadcasts in certain circumstances, such exceptions as are found in sections 97 and 98 can only be retained insofar as they comply with the article, or, possibly, Article 5 (3) (o). We believe that Article 5 (3) (o) is irrelevant insofar as an exception cannot be maintained under any of the specific exceptions or limitations; if the facts fall outside Article 5 (2) (e), Article 5 (3) (o) cannot be summoned in aid. IMRO accepts that the public good is supported by exemptions of this kind but we would oppose any expansion into commercial residential institutions, for example on the basis that such premises are neither social institutions nor pursuing non-commercial purposes. We believe that given the scale of hospital and prison accommodation that there is an issue about whether *Padawan v SGAE* is satisfied. As such, because Ireland does not provide “fair compensation” to rightsholders who are clearly prejudiced by the exemption, the exception must be in doubt vis-à-vis the legality of section 97. The Committee states at paragraph 7.3.7 that while submissions were made to it that section 97 CRRRA should be repealed, it does not consider that the section is a barrier to innovation or that an amendment or repeal would promote innovation.

IMRO's request for repeal of the section is not founded on evidence that repeal would remove a barrier to innovation or would promote it in any direct way. Instead, IMRO asks the Committee two questions:

(a) What innovation of any kind is fostered by the exception? IMRO certainly cannot identify any.

(b) Now that the record industry has obtained a decision from the Court of Justice of the EU that the inclusion of sound recordings in the exception is incompatible with Directive 2006/115/EC in respect of the provision of television and radio sets in hotels, what conceivable purpose is served by the retention of the exception if it applies only to broadcasts and cable programmes? IMRO knows of no broadcasting services which do not broadcast a host of copyright works. The continued existence of the exception (and the debate about it when the Act was in its legislative stages) suggests, misleadingly, that the exception applies not only to broadcasts as such but also to the copyright works included in them. It would of course be contrary to the requirements of Article 3 of the Copyright Directive for the section to be applied to authors' works included in the broadcasts, there being no permitted exception or limitation for this purpose under Article 5(3)

Since owners of premises must obtain licences from all rights owners save broadcasters (most of which in any case own the copyright in much of the content they broadcast), the time has come to remove the exception altogether and thereby to facilitate licensing by copyright owners of such public use of their works.

In relation to section 98, we note that it is not in force. We note that it is very narrow insofar as it applies only to sound recordings. English case-law (*PPL Ltd v South Tyneside* 2000) BC gives the section a very narrow interpretation. We believe that any proposal to extend section 98 so as to apply to broadcasts to clubs and societies would not be lawful as this would involve a communication to the public. As such, any exemption would, like section 97, be incompatible with the communication to the public right under EUCD (e.g. *Rafael Hotels*) or the Rental and Lending Right Directive (e.g. *PPL v Ireland, Italian Dentist Case*). We agree that these matters are not about innovation in any event.

IMRO suggests the repeal of sections 97 and 98 must be undertaken, with section 97 being replaced by a provision based on Article 5(2) (e) but only alongside fair compensation.

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

IMRO would oppose a specific exemption for “non-commercial user generated content”. We refer to Q56 as to our position on exceptions. The exemption proposed cannot be satisfactorily defined or drafted. What is non-commercial? While the user uploading the content may be non-commercial, is the platform on which is used non-commercial? In addition, why any non-commercial use should be given an

exemption without compensation, beyond those exemptions already granted in the CRRA. There are other ways to stimulate innovation/transformational use. IMRO suggests that the Irish State could do much by repealing Government and Oireachtas copyright as well as reviewing the SI that gives effect to the Re - Use of Public Sector Information Directive. The whole topic of database protection needs to be reviewed as it is clear that the 1996 Directive, as transposed, is a very different text to that which has emerged from the ECJ after cases like Football Dataco have been decided. Perhaps a statutory Restatement of the entire 2000 CRRA would be welcome insofar as the Public could be informed about just how flexible copyright actually is. Such a Restatement should take place in conjunction with a line by line assessment of CRRA to see just how the EUCD fits into Irish Copyright law. This may require further changes in CRRA. It is clear that this did not take place at the time the EUCD was being examined after 2001 and the making of SI No 16 of 2004. IMRO also suggests revisiting Article 6 of that Directive to see if there can be agreed solutions to the national exceptions difficulties as the drafters of the Directive had hoped for back in 2001.

**(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?**

Section 2 (10) does not need to be changed. IMRO does not see how such a provision could be expanded into an on-line environment given Article 6.4.4. of the EUCD. SI No. 16 of 2004 correctly gives effect to the restrictions in the EUCD in relation to on line, on demand services and absent movement at WIPO/EU level on TPMs we cannot see an Irish solution being effective or lawful.

**Chapter 8 Entrepreneurs  
Preliminary Observations on Questions 63 to 66**

IMRO regards it as of critical importance that the copyright balance be maintained if Ireland is to ensure that creators and users are to benefit from one of the most imaginative intellectual property regimes that exist anywhere in the world. There will always be those critics who complain that a legal regime is imperfect or dysfunctional, often because the regime does not reflect the views or aspirations of the critic in question. We believe that CRRA, while being far from perfect, or now state of the art, does show that the Irish Government has made sincere efforts to respond to the digital challenges that confront the State. One may not always find a consensus – witness the differing views on the recent injunction measure (SI No 59 of 2012) – but the Irish copyright regime is, in IMRO’s view, commendable. If we compare the 2000 Act to the current situation in the UK we should note that many of the shortcomings identified in the Gower’s Review were addressed by the Oireachtas in 2000. The situation in Canada over Canadian Copyright law reform is chaotic with the USA putting Canada on a WTO watch list. The legislative situation in the USA (contrary to the popular view) is that the Administration does not make copyright policy: reform in Congress is driven, not by informed debate, but by sponsored self interest and regulatory capture by lobby groups. The experience of IMRO during the WTO complaint over the US Fairness in Music Licensing Statute attests to the sclerotic nature of the US legislative process. The Copyright Review Committee cites the Hargreaves conclusion that intellectual property law currently over-regulates the market to the detriment of the UK. IMRO notes that the Copyright Review Committee does not afford examples of over-regulation but the tenor of the Report suggests that over-regulation will be healed by rolling back exclusive rights, by broadening or adding to existing exceptions, or clarifying existing legal grey areas<sup>24</sup>. If this interpretation is correct, IMRO would like to voice its disagreement with such a position.

The Copyright Review Committee identifies “three broad categories of limitations upon and exceptions to copyright protection”.<sup>25</sup>

- “First, a work might not be sufficiently original to achieve protection in the first place; or, exceptionally, it may be sufficiently original, but public policy indicates that it should nevertheless achieve copyright protection and be readily available to the public”.

<sup>24</sup> Report, page 89

<sup>25</sup> Ibid

- “Second, public policy recognises both sets of interests when it requires compulsory licences, by which rights-holders are remunerated when works are copied for public interest reasons.”
- “Third, public policy recognises both sets of interests when it requires compulsory licenses, by which rights-holders are remunerated when works are copied for public interest reasons”

IMRO believes that all of these are provided for in the CRRA.

Critics of Irish law can overlook section 17 of the CRRA. This formulation, taken from the TRIPs Agreement was not found in the 1963 Act. It reflects established case-law under the 1963 Act and precludes a copyright claim in many instances in which new technology is used to ‘add value’ to information or create software, solve technical problems or produce largely derivative works. Subsections (1) and (2) declare what copyright is and in whom copyright subsists, but the Section goes on:

- (3) Copyright protection shall not extend to the ideas and principles which underlie any element of a work, procedures, methods of operation or mathematical concepts and, in respect of original databases, shall not extend to their contents and is without prejudice to any rights subsisting in those contents.
- (4) Copyright shall not subsist in a work unless the requirements for copyright protection specified in this Part with respect to qualification are complied with.
- (5) Copyright shall not subsist in a work which infringes, or to the extent that it infringes, the copyright in another work.
- (6) Copyright shall not subsist in a work which is, or to the extent that it is, a copy taken from a work which has been previously made available to the public.

The European Union Institutions have played a significant role in updating Irish law and facilitating access to a huge Internal Market. There is no doubt that, but for the pressure that membership of the EU places on the Oireachtas to keep our laws up to date, the Irish statute book would not have the kinds of technology-neutral provisions in it that it has. IMRO views criticisms of the Community copyright Acquis as often ill judged in this respect. Critics who seek to lobby for wholesale changes to the Acquis often fail to acknowledge that copyright legislation always involved a balancing exercise.

IMRO believes that the Consolidated Software Directive 2009 has fostered innovation in a balanced way. So too has most of the EU CD.

This leads on to the role of the ECJ. The ECJ has produced a body of case-law that, in our view, is very pro investment and innovation. Two examples suffice. On the original database copyright, a landmark decision (*Football Dataco* Case C-604/10 March 1, 2012) has ruled that sporting fixture lists and other high fact/low intellectual effort materials are not copyright protected. This opens up a wide range of data for derivative exploitation as long as innovative development of the data, as an act of intellectual creation, is evident. The ECJ has done this by harmonising (through case-law) the criteria for copyright upwards. The test now is intellectual creation rather than the older Anglo-Irish test of the work being “not copied” and originating with the author. The ECJ has also rolled back some of the protective dimensions of the copyright *sui generis* right, in its earlier *William Hill* decision<sup>26</sup>. IMRO believes that the core issues that have to be addressed by a Court in infringement proceedings has not been bettered since it was laid down 227 years ago by Lord Mansfield:

We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time or the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Lord Mansfield, *Sayre v Moore* (1785) 1 East 316n.5

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<sup>26</sup> Case C-203/02

In that regard we consider the proposed drafts 106E to be unsatisfactory, as a hybrid directed at identifying derivative works (in the USA sense), and in providing a test of an innovative work which gives no guidance to either users or a court. The references to the three step test factors leaves s.106E open to the charge that it is an exception. We are not at all sure what subsections (4) and (6) are intended to achieve. Subsection (4), arguably, could be seen as an admission of infringement when the acknowledgement/notice is given while subsection (6) ignores the key fact that coincidental creation is a defence to an infringement of copyright.

In summary, the existing CRRA, EUCD, in conjunction with ECJ case law reflect the “three broad categories of limitations upon and exceptions to copyright protection”, and the proposed Sec 106E is not in compliance with EU law or the Berne Convention.

#### Responses to Questions 63 to 65

- (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 appears to present the possibility that a work that overcomes the obstacles presented by section 17(2) to (6) of CRRA (as informed by the author’s own intellectual creation test for literary and artistic works and original databases) should be denied copyright protection. This is a dangerous situation to countenance. Even the “news of the day” can be explained as an example of facts not being “copyrighted”, to use common parlance. Human rights case law rejects uncompensated appropriation by the State of intellectual property.

Any ‘innovation’ exception would be a breach of the Berne Convention and we repeat it is a fundamental human right for an author to be rewarded for the use of their IP work by others.

- (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?**

Never

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

Some case-law such as *Magill*, *IMS Health*, *Microsoft* (ECJ decisions) suggest that the innovative use of facts, data, works may, de facto, be the subject of compulsory licensing via competition law rules. The EUCD (recitals 4, 9) stresses the importance of a high level of protection for rightsowners if intellectual creation is to be stimulated. IMRO believes that strong copyrights stimulate innovation. Compulsory licenses are unlawful under the Berne Convention. Under Irish law, Section 38 contains the only licence of right provision, this being possible because a sound recording copyright is the only right involved, and as this “copyright” is not a Berne Convention “copyright”, the Berne prohibition on compulsory licensing is not an impediment to Sec 38.

IMRO believes that exclusive rights are always required to foster creativity and innovation. e.g. if compulsory licence provisions were similarly extended to all areas of IP law, then any exclusive rightsholder could be forced to compulsorily licence their IP to competitors. This makes no commercial sense and would clearly be a barrier to innovation and further investment.

- (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?**

IMRO does not support the introduction of a specialist innovation exception as to do so would mean there would no longer an incentive to innovate.

There is no evidence that copyright is a barrier to innovation. Blanket licensing of copyright musical works exists to simplify the use of musical works in new business models. Such a blanket licence facilitates innovation and whilst there may be debate as to price, there are adequate and clear mechanisms for resolving disputes within the existing CRRA.

**Chapter 9 Heritage Institutions  
Preliminary Observations on Questions 67-75**

IMRO has no specific interests involved in relation to Chapter 9 so our responses to the questions raised will be limited and given in the broad context of the issues raised rather than just in relation to heritage institutions

- (67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?**  
IMRO does not see why Heritage Institutions should be afforded special status as regards format shifting – our position as outlined at Q 37 and Q 56 applies.
- (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?**  
See our comments on Q 56
- (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?**  
IMRO does not have a view on except to say that it does not appear to reflect Article 5 (2) of the Info Soc Directive. Also see our comments on Q 56
- (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?**  
IMRO is not in a position to comment.
- (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?**  
As regards the involvement of the Copyright Council in the orphan works issue, please see our answers to Q 11.  
  
IMRO suggests that as the orphan works issue will be the subject of an EU Directive (<http://www.europarl.europa.eu/news/sv/pressroom/content/20120606IPR46383/html/Orphan-works-informal-deal-done-between-MEPs-and-Council>), any legislative move or discussion in regard to same should await this directive.
- (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?**  
IMRO do not licence physical works and so is not in a position to express an opinion.



**Chapter 10 Fair use**  
**Preliminary Observations on Questions 76 to 86**

IMRO would summarise its position on Fair use as follows:

- Fair use is not compatible with the three step test in Berne;
- Fair use is not in line with Berne Convention or TRIPS;
- Fair use contributes much more legal uncertainty than the fair dealing exceptions in CRRA;
- Due to this uncertainty, alongside the substantial penalties that attach to copyright infringement, the cost of establishing fair use is only feasible for very large, well resourced companies that seek to benefit from fair use provisions, hence it is of no benefit to small innovative start-ups.
- The fair dealing exception via Irish and EU law achieves a better balance between the uncertainties of a US style fair use doctrine, and a rigid application of a closed and inflexible list of exceptions and limitations;
- WIPO institutions have ruled on fair use and found it to be in breach of international law;
- The arguments made to support fair use are flawed, simplistic and fail to understand the position in US law;
- Fair use must be looked at in the context of demands for broader exceptions than those currently allowed under EU law;
- There are a lot more factors at play in how the US successfully innovates than fair use;
- There is no evidence to support the assertion that the absence of a fair use doctrine hinders Irish or EU innovation and much evidence that fair dealing provides no hindrance to innovation, but rather it has fostered it.

The historical traditions that underpin Anglo-Irish copyright law and US copyright law cannot be readily assimilated. Certainly, following on from the Act of Union, British and Irish legislation was concerned with the protection of the interests of authors and publishers. In contrast, US copyright protection responded not just to the Constitutional mandate of seeking to “promote the progress of science and the useful arts”, but also to further sought economic policy goals via protectionism and a reluctance to acknowledge international law standards in copyright. In Anglo-Irish copyright law we can truly say that the US copyright “past is a foreign country: they do things differently there”<sup>27</sup>. We make this observation at this stage because it is important to point out that while the US “fair use” doctrine has some links with the English “fair abridgement” doctrine<sup>28</sup>, fair use now serves a multiplicity of purposes. Samuelson praises contemporary “fair use” law as facilitating *inter alia*.

“promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth-telling or truth-seeking, competition, technological innovation, and privacy and autonomy interests of users”<sup>29</sup>

Leaving to one side the question whether such a claim can be made the point to be made is that supporters of the Anglo-Irish copyright tradition would argue that these objectives have also been pursued by UK and Irish legislators and judges too. The Copyright Statute of 1911, section 2(1) set out 5 fair dealing provisions and five other instances of non infringement. At that date (1911) a more structured approach to non infringement was set. The decision of Lord Mansfield in *Sayre v Moore*<sup>30</sup> reflects a profound understanding of the need to balance the protection of right owners with innovation incentives seeking to advance the public good, while Lord Ellenborough, in *Cary v Kearsley*<sup>31</sup> spoke of the need to secure for every man the enjoyment of his copyright while not putting manacles on science. However, while early cases do posit a test that asks whether the defendant’s work is of itself

<sup>27</sup> Opening line of LP Hartley, *The Go-Between*

<sup>28</sup> e.g. *Cary v Kearsley* (1803) 4 Esp.168

<sup>29</sup> Unbundling Fair Uses 77 *Fordham L. Rev* 2537 (2009) 2537 at p.2539

<sup>30</sup> (1785) 1 East 361n

<sup>31</sup> (1803) 4 Esp.168

a useful work, not being a mere copy of the plaintiff's work, *Copinger Skone James* suggest this is no longer good law<sup>32</sup>.

Not only is it too late to move towards a "fair use" standard along the lines of s.107 of the US Copyright Act 1976 as the touchstone for assessing the acceptable and unacceptable taking of, and from, a work, we believe that such a departure would be a retrograde step. Indeed, the Copyright Review Committee, by suggesting that fusion of the existing fair dealing and specific exceptions approach with an open ended fair dealing "bolt on", may open up new pathways to social and economic advancements and innovation, is of its nature an untestable proposition. We believe that such a fusion would create a hybrid that would not provide any solutions to the difficulties inherent in balancing the interests of right holders and users. Indeed, any suggestion that, an additional component to the existing exclusive right/permitted use (or right holder vs. user) mechanisms will solve complex problems that are an inherent part of social, cultural, economic and technological change, would be to promise more than can be delivered. Even worse, "fair use" would subvert the existing balance by encouraging users to challenge well established, legislatively endorsed institutions and practices in the hope and expectation that a judicial decision would provide not just for fair use, but a free use solution.

Within the US fair use system the uncertainty surrounding what is a fair use, combined with the substantial penalties that attach to copyright infringement by way of statutory damages and criminal liability can actually impede the development of new works and stifle innovation. In the view of Falzone and Urban, in *Demystifying Fair Use*<sup>33</sup>

Combining uncertainty with substantial downside risk, if a fair use defence is to fail, leaves the doctrine very murky for lawyers. For clients, it's something between a mystery and a nightmare. Useful as its flexibility may be, the complexity of fair use analysis and the uncertainty it creates has left its promises unkept, especially for independent and amateur creative communities. Many creators don't understand fair use. They can't find answers to their questions. They don't know the boundaries. They don't know what fair use lets them do and what it doesn't let them do. But they do understand the substantial penalties that may arise from getting the answer wrong, and they are subject to demands from risk-averse gate-keepers, such as publishing houses, distributors and insurance companies. So they steer around the problem by using second-best sources. They err on the side of caution, and seek permission whether it's legally required or not. Sometimes they receive it. But many times the answer is no, or the price is far too high. In these situations, risk aversion leads to self-censorship and other failures of the balancing system in copyright; it squelches the creativity copyright is intended to incentivise.

This risk aversion builds its own momentum. The more consistently artists seek licenses and permission for anything and everything whether they need to or not, the more people within the community assume everything requires permission. A feedback loop develops. Norms change. So do assumptions. A permission culture takes hold under which creativity is limited unnecessarily, inappropriately and inefficiently"<sup>34</sup>

The uncertainty that "fair use" creates for filmmakers was established by Aufderheide and Jaszi in a study examining the copyright clearance experiences that documentary filmmakers have in the USA. Stripping away primary sources and using earlier works that are either out of copyright, or resorting only *de minimis* use, often leads to poorer films being produced either because the licensing cost is too much or the fair use standard is too vague to provide assistance to the user on acceptable boundaries<sup>35</sup>. Efforts to address these uncertainties have been made through Best Practices Statements which actually seek to encourage users to develop their own standards in the USA. Rothman summarises the *Documentary Filmmakers Statement of Best Practices in Fair Use* (2005) thus:

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<sup>32</sup> 14<sup>th</sup> ed. Para 7.3.1.

<sup>33</sup> 57 J. Copyright Soc'y 337 (2010)

<sup>34</sup> Ibid at 340-1

<sup>35</sup> See generally , *Reclaiming Fair Use* (2011)

“The Filmmakers’ Statement presents four categories of uses of others’ copyrighted works that are likely fair in the context of documentary films. The privileged categories are critique or commentary, illustrative quoting, incidental uses. Each of these categories contains a number of “limitations”. Such limitations include, for example, in the context of the category approving the use of “copyrighted works of popular culture to illustrate an argument or point,” a suggestion that documentarians should:

Assume that the material is properly attributed.... [that] quotations are drawn from a range of different sources. [that] each quotation..... is no longer than is necessary to achieve the intended effect; [and that] the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.”<sup>36</sup>

To an Anglo-Irish copyright lawyer this Guidance looks like little more than the statutory exceptions, as finessed by the judiciary, notably Lord Denning in *Hubbard v Vosper*<sup>37</sup>. In other words, the absence of specifically approved uses in the 1976 legislation requires filmmakers to produce a Code of Practice which may not of itself represent the law. Rothman cautions that these Best Practices Statements are unilateral i.e. developed by users only:

“the best practices statements should not be viewed as particularly valuable customs for a variety of reasons, but especially because they are very one-sided, having been developed without input from the content owners whose work is likely to be used without permission and without compensation. This one-sided approach to custom is misguided as a normative matter and may also backfire because courts are more likely to incorporate restrictive practices that promote IP holders’ rights”<sup>38</sup>

One improvement that Rothman suggests is to broaden out the discourse so as to involve rightowners in the hope of garnering judicial acceptance:

“Although I do not support the wholesale adoption of any form of best practices statement as law, there are some ways to make the statements more worthy of some judicial consideration. First, why not bring in content providers and larger players and see if there actually are any areas of agreement? To the extent there are not, the best practices statements could transform into documents of organized dissent from the dominant clearance culture and other restrictive customs.

Second, the statements could shift from pretending to document actual practices to stating what communities deem fair and why – taking a more explicitly normative approach. Alternatively, the statements could be reconfigured to analyse current fair use precedents and give more specific legal guidance”<sup>39</sup>

The point to be emphasised here is that because UK and Irish law affords specific exceptions to copyright any negotiation under the UK and Irish system can proceed on the basis of greater clarity on what the user can do without the rightholder’s consent. This is not to say that Codes, whether unilateral or negotiated within an industry are of little or no use: quite the contrary. The process of negotiating a code within the fair use system has become worthwhile because of the lack of guidance given by s.107 and the vagaries of the USA judicial system.

It is evident from the literature that the roots of the fair use doctrine are shallow. Even the phrase “fair use” is itself uncertain in terms of its scope. As initially conceived in US case-law, if a justifiable use of earlier materials such as the unauthorised quotation of extracts from George Washington’s letters could be established, no

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<sup>36</sup> *Best Intentions* 57 J. Copyright Soc’y 371 at 373

<sup>37</sup> [1972] 2QB.84

<sup>38</sup> 57 J Copyright Soc’y at 372

<sup>39</sup> 386 (footnote omitted)

infringement of copyright would be made out. In that case<sup>40</sup> Justice Story laid out factors that are recognisable today, but in this context the factors were directed at acceptable/unacceptable use by author<sup>No.2</sup> of the earlier works of author<sup>No.1</sup>. For much of the twentieth century the Justice Story factors distinguished fair use<sup>41</sup> of illustrative and non-competitive use from impermissible reproduction that could supplant the market for the original. Most scholarly and judicial opinion favours the view that fair use was always about the use by a later author of an earlier author's work<sup>42</sup> and that it was not until very recent times that fair use was broadened to apply to the mere photocopying of an existing work because the purpose was non-commercial or educational.<sup>43</sup> It is noteworthy that the appellate courts in this landmark case were divided. Later decisions on fair dealing thus establish that the original parameters of the defence, extraction and abridgement by an author of earlier works, are no longer a *sine qua non* to the successful use of a fair use defence. Writing in a 2009 Article Samuelson states:

"Fair use has been invoked as a defence to claims of copyright infringement in a wide array of cases over the past thirty years, as when someone has drawn expression from an earlier work in order to parody it, quoted from an earlier work in preparing a new work on the same subject, published a photograph as part of a news story, made a time-shift copy of television programming, photocopied a document for submission as evidence in litigation, reverse engineered a computer program to get access to interface information, cached websites to facilitate faster access to them, or provided links to images available on the Internet, just to name a few"<sup>44</sup>

Again, one is struck by the extent to which Samuelson's examples are actually the subject of specific provisions in UK and Irish statute law. One is also surprised by the efforts of US commentators to inject some degree of certainty (at least in terms of the grouping or bundling of issues, if not of outcomes) vis-à-vis the kinds of copying or utilisation that will generate fair use disputes<sup>45</sup>. Surprised because even the first effort, made as a preliminary step to the production of section 107 argued for 8 headings even though the author, writing in 1958 could find no cases supporting 5 of the 8 headings he advanced<sup>46</sup>.

The practical importance of fair use in US law can be overstated. It is arguable that the US Copyright System does not depend upon fair use as the primary mechanism whereby the boundary between infringing and non-infringing use is drawn. Apart from the one section fair use provision in the 1976 Act, a number of detailed and specific exemptions have been included (and subsequently upgraded) to deal, for example with library and archiving of at risk materials and collections, educational access and use, sale or disposal/of works, secondary transmissions of cable broadcasts (on a royalty basis), ephemeral recordings, etc. Paradoxically, these exemptions are incredibly detailed and kept up to date so as to deal with phenomena such as compulsory licensing and webcasting (e.g. the Webcaster Settlement Act 2009, royalty distribution). Some sections engage with fair use under section 107 (e.g. section 118), while others represent international treaty provisions for architectural works, reproduction for the blind and other persons with disabilities.

It is also evident that a distinction can be drawn between fair use and personal use with the added complication that US Copyright law and the personal use of music and audiovisual works being the subject of levy mechanisms under the Audio Home Recording Act 1992 vis-à-vis home recording equipment. The Digital Millennium Copyright Act 1998 further strengthens the position of rightholders by making the circumvention of technological protection

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<sup>40</sup> *Folsom v Marsh* 9 F Cas 342 (1841)

<sup>41</sup> *Karll v Curtis Publishing* 39 F Supp 836 (1941); contrast *Hill v Whalen and Martell* 220 F.359 (1914)

<sup>42</sup> Seltzer, *Exemptions and Fair Use in Copyright* p24; Laval, *Fair Use Rescued* 44 UCLA L Rev. 1449 at 1450 (1997)

<sup>43</sup> *Williams & Wilkins v US* 203 Ct. C189 (1973) affirmed 420 US 376 (1975)

<sup>44</sup> The Levene Lecture at Fordham Law School (footnotes omitted) published as *Unbundling Fair Uses* 77 Fordham L Rev 2537 at 2439/Samuelson) (2009)

<sup>45</sup> *Ibid* footnote 1 of Samuelson

<sup>46</sup> Alan Latman, *Fair Use of Copyright Works* (1958) Copyright Studies (Congress) Patry, Madison, Goldstein and Samuelson have also proposed bundling exercises, probably noting the paradox: bundling tends towards showing convergence without there being any agreement on how many heads there are and what they are.

measures effectively unlawful. This refusal to equate fair use with personal use and private copying, and the very limited role of fair use within TPMs again underlines how this does not stop urban myths from building up. For example the Wikipedia entry for Copyright Act 1976 mentions that the exclusive rights in section 106 are subject to sections 107-122; only section 107 gets any treatment (March 23 2012), illustrating how simplistic it is to see fair use as a panacea for all the problems that the digitisation of works and data can throw up.

A further point to be made about a so called fair use model is that, apart from sections 107 to 122 of the Copyright Act 1976, the US Congress has prudently added other mechanisms to police the rightholder/user fault line in relation to digital works and digital use. The Digital Millennium Copyright Act 1998 recognises the weakness of fair use by adding an approval function for new technological uses by way of the Librarian of Congress. The role of the Copyright Office in setting applicable exemptions to the DMCA is considered by Jackson at 58 J. Copyright Soc’y 521 (2011). These questions are reconsidered every three years by the Librarian of Congress. In her conclusions Jackson notes the process is protracted and repetitive, urging a shift towards legislating permanent exemptions giving the Copyright Office the time and energy to play a more important role as first responder to threats posed by new technology. And because the DMCA rulemaking proceedings protect fair uses, the rulemaking proceedings must be protected too, she argues.

The decision making process under section 107 is a lottery, not a vending machine i.e. highly unpredictable. In a devastating critique of fair use,<sup>47</sup> the doyen of US copyright practitioner commentators, David Nimmer has characterised fair use as follows (footnotes omitted)

“Once upon a time, in a happy land, courts decided which usage constituted fair use in copyright cases, and justice prevailed throughout the realm. Then the Royal Council (“Congress”) imported something from beyond the sea called “codification”. Henceforward, the Council proclaimed, the law-books would spell out if usage were fair or unfair in four pellucid factors. The Wisest Men of the Kingdom (“Supreme Court”) declared that the result in any given case would depend on all four of the factors. The Copyright Specialists (“Second Circuit”) added, “because this is not a mechanical determination, a party need not ‘shut-out’ her opponent on the four factor tally to prevail,” to which Soothsayers embroidered that if nonetheless “she does so, victory on the fair use playing field is assured.” But these are only fairy tales.”<sup>48</sup>

In looking at sixty cases in which a fair use defence was at issue, David Nimmer found that the alignment of the four factors in section 107 produced a less than compelling story with just over 50 per cent of judges finding all four factors corresponded in the case at bar: “had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.....”<sup>49</sup> Nimmer points out that most judges finding for fair use, as well as judges finding against, almost always find that three or four of the factors justify their conclusions, showing in Nimmer’s eyes “the malleability of the fair use factors”<sup>50</sup>. Nimmer’s view is that it is the legislation that is flawed:<sup>51</sup>

“The courts are not to blame for that state of affairs. Rather, by injecting such a high degree of subjectivity and imprecision into each factor and into their cumulative application, as canvassed above, Congress essentially foreordained that result in the 1976 Act. Thus, it is not surprising to discover, in a given case, that the district judge found each of the four factors favouring fair use, whereas the Court of Appeals, in reversing, concluded the very opposite as to each factor....”<sup>52</sup>. To quash the facile explanation that the district judge in such a case simply failed to understand copyright law as well as did the appellate panel of three, it suffices to note that the same phenomenon has unfolded at the Supreme Court level. In

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<sup>47</sup> “*Fairest of them all” and other Fairy Tales of Fair Use*” (2003) 66 Law and Contemporary Problems 263

<sup>48</sup> *Ibid*

<sup>49</sup> 66 Law and Contemporary Problem 263 at 280

<sup>50</sup> *Ibid*

<sup>51</sup> 66 Law and Contemporary Problems 262 at 281-2 (footnotes omitted)

<sup>52</sup> citing *Financial Information Inc Moody’s Investors Services Inc* 751 F.2d 501 (2d Cir (1984))

*Harper & Row, Publishers, Inc v Nation Enterprises*, six justices analysed each of the four factors as disfavouring fair use; three justices, in dissent, reached the opposite conclusion as to each factor.”

David Nimmer’s conclusion is that the solution to problems relating to copyright use does not lie in the fair use section 107 factors because,

“they are malleable enough to be crafted to fit either point of view” i.e. that a given use is fair or unfair; in the end, reliance on the four statutory factors to reach fair use decisions often seems naught but a fairy tale”.<sup>53</sup>

In the digital world the US Congress has not endorsed fair use. International Treaty Law, in the form of the 1996 Geneva treaties, the WCT and the WPPT, required the US Congress to legislate for technological protection of copyright works, phonograms and performances that were protected by, or in, digital form; digital locks and other measures applied by rightholders can deny resort to any defences such as “fair dealing” or “fair use”. In the leading US decision Judge Kaplan gave an example of a US professor seeking to teach a class on film studies; running a copy of a film through a technological process to unscramble the film would not be lawful, even if for teaching purposes: there is no general fair use defence under the Digital Millennium Copyright Act: “If Congress had meant that fair use defence to apply to [anti-circumvention controls] it would have said so”.<sup>54</sup> There was no omission in this regard. It was recognised in Geneva, before the treaties were agreed, that the protection of content providers was necessary. As Parchomovsky and Weiser comment:

“In enacting the DMCA, Congress moved quickly to address the concerns of the Content industry and did not focus on the potential for cases like *Corley* to restrict the scope of the fair use doctrine in the digital age. Fearful that broad exceptions might allow increased circumvention to occur, Congress provided only limited exceptions to the DMCA”<sup>55</sup>.

As Jessica Litman points out in *Digital Copyright* the DMCA marked a significant shift in policy because prior to the DMCA, copyright infringement was directed at reproduction or adaptation of a protected work in some shape or form:

“at no time however, until the enactment of the access-control anti-circumvention provision of the DMCA, did Congress or the Courts cede to copyright owners’ control over looking at, listening to, learning from, or using copyrighted works”<sup>56</sup>

Within the US the impact of the DMCA on fair use is well known and scholarly discourse has sought to develop counter arguments in the form of reverse notice and take down mechanisms served by users, implied licence, characterisation of fair use as a wider collective or societal doctrine, etc. These approaches, while libertarian and in some senses well founded (e.g. educational uses are unduly narrowed by DMCA) debate appears to be going nowhere. If anything the Obama Administration through its sponsorship of the Anti Counterfeiting Treaty Agreement Initiative (ACTA) and SOPA is heading in the direction of more intensive protection measures.

Ironically, the transposition of the 1996 Geneva Treaties in Europe has produced, if anything a more “balanced”<sup>57</sup> view of the possible Geneva Treaty exceptions, especially in relation to technological protection measures.

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<sup>53</sup> 66 *Law and Contemporary Problems* 262 at 287

<sup>54</sup> Reimderes 111 F Supp 2d 294; 273 F Supp 429 (2d Circuit)

<sup>55</sup> *Beyond Fair Use* 96 Cornell L. Rev 91 at 104 (2010)

<sup>56</sup> *Digital Copyright* p.176. Lawrence Lessig has blogged: (“Under copyright law, a user has the right of fair use. Under the DMCA, the user has a right to fair use only if the code of the copyright protection scheme permits it. If the code does not permit fair use, then the user commits a crime if he makes and distributes tools that would enable others to crack the copyright protection system, even for purposes of fair use. The law thus gives industry coders more control over copyrighted material than the Constitution gives Congress.”)

<sup>57</sup> See Lindner, at p. 9-10 of Lindner and Shapiro (eds) *Copyright in the Information Society*

Reinbothe, the principal author of the EUCD draws attention to article 6 and the importance of recitals 47 to 53 in seeking to address the interface between protection and user's interests. Shapiro takes up this theme by pointing out that:

"The Directive does not establish an absolute supremacy of technological measures over exceptions. It includes provisions to reconcile technological measures and exceptions. Unlike the US DMCA, which provides for outright, albeit limited, exceptions to the anti-circumvention provisions, this Directive in a sense gives rightholders a chance to 'honour' certain exceptions failing which member states must intervene or, in the case of private copying, may intervene.

The Directive is clear that circumvention for 'lawful' purposes is not permitted. Indeed, it contains no express language that would permit circumvention of technological measures. However, many member states were uncomfortable about providing absolute precedence for technological measures over copyright exceptions and wanted to retain some room to manoeuvre. The EU legislator recognized that allowing circumvention of technological measures for so-called non-infringing uses (that is, in order to benefit from an exception) would effectively nullify the legal protection. As a result, Article 6(4) introduced a mechanism for member states to intervene in respect of technological measures<sup>58</sup>. The purpose of Article 6(4) is to regulate the interface between technological measures and copyright exceptions."<sup>59</sup>

As urban myths go, the Queen's conversation with Alice provides a context: "Why, sometimes I've believed as many as six impossible things before breakfast"<sup>60</sup> (Lewis Carroll).

The relationship between the exclusive reproduction right under article 9 of the Berne Convention and the provisions in the TRIPs Agreement has been summarised by Ricketson and Ginsberg: with one qualification based upon a linguistic difference<sup>61</sup> in each text, it is said that

"the three-step test in article 13 of the TRIPs Agreement simply replicates the three-step test in article 9(2) of Berne. To the extent that the differing objectives of the TRIPs might allow for a more generous interpretation of the various components of the three-step test, the non-derogation clause in article 2(2) of TRIPs and article 20 of Berne do not allow for this"<sup>62</sup>.

While the three step test is controversial in the sense that some academic commentators have called for a more "balanced interpretation" of the test: e.g. Annette Kur, Reto Hilty and others, it is clear that the test has taken on greater importance in recent years. Some American commentators see the three step test as the means whereby the International Community has been able to keep copyright purposeful and relevant.

It is clear that many US interests are opposed to the more structured approach to enumerating exceptions in a comprehensive manner. Professor Schwartz cites a Senior Director of the US Chamber of Commerce cautioning against the US engaging "in pursuing a copyright-exemption based paradigm"<sup>63</sup>. It is not clear whether US policymakers are opposed to the broadening of educational uses and other non-commercial exemptions. However, it is more than evident that in many areas internal debate within the United States is driven by domestic politics rather than international law considerations. In the context of the WTO and its role in relation to compliance with TRIPs, IMRO initiated a complaint which the European Union processed in relation to the non-

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<sup>58</sup> See forward to Lindner and Shapiro (eds) *Copyright in the Information Society* p. xxiii and xxiv

<sup>59</sup> In *Copyright in the Information Society* p.50 (footnotes omitted)

<sup>60</sup> The Queen's response to Alice's statement that one cannot "believe impossible things".

<sup>61</sup> The use of "author" in Berne and rightholder in TRIPs: see page 855

<sup>62</sup> *Ibid*

<sup>63</sup> An overview of International Treatment of Exemptions: *57 J Copyright Soc'y 473 at 497 (2010)*. This supports the IMRO view that the USA has a fundamentally different approach to the Berne/EU analysis of rights and exemptions.

remuneration of Irish Composers for the public performance of musical works. Professor Schwartz explains the genesis and outcome of the dispute thus (57 J Copyright Soc’y 473 at 491 (2010)).

“In 1998, Congress at the behest of restaurant and bar owners, expanded the scope of the public performance exception of section 110 (5) of the Copyright Act by passing the Fairness in Music Licensing Act of 1998 (“FMLA”), Pub. L. No. 105-298, 112 Stat. 2830. The FMLA broadened an exception in section 110(5)(b), which exempts certain establishments, such as bars, restaurants and retail businesses, from obtaining public performance licenses so long as the establishments do not charge a direct fee related to the performances, are smaller than a certain size, and utilise qualifying equipment. The passage of the FMLA resulted in a WTO dispute settlement case brought by the European Union, which the United States lost because the 110(5)(B) exception does not comply with the three-step test (concluding that the 110(5)(B) exception is not limited to “special cases” due to the large percentage of bars and restaurants that fit within the exception). After the opinion was issued, the case was submitted to a WTO arbitration panel. The United States indicated that it could not amend its law within the time-frame called for by the panel. Thus, the panel awarded the EU \$1,219,900 per year in royalties. Nearly two years later, the US still had not amended its law, and the parties negotiated a three-year settlement with payments of \$3,300,000. Today, ten years after the dispute settlement panel determined that the US law is not in compliance with WTO/TRIPs, the US still has not amended its law.”

We would argue that most informed commentators hold that the three step test, as the flexible element contained in the Closed List of Exceptions, takes precedence over “fair use”; indeed fair use is not compatible with the three step test. Supporters of a fair use exception suggest that an additional fair use provision would inject a much needed element of flexibility into the EU exceptions regime. Some European commentators, such as Senftleben<sup>64</sup> argue that some national regimes need a European fair use element to be injected into national law. That may be the case e.g. in the Netherlands, but we believe that the UK and Irish fair dealing and other exceptions provide a fluid response to future developments. We think that observations of this kind reflect a misunderstanding of the way in which International law, and the EUCD, function. The three step test as set out in Article 9(2) of the Berne Convention and both the Geneva Treaties, are directed at Berne member states so as to require any legislation to reflect the three step test *vis-à-vis* exceptions and limitations to copyright. As Shapiro observes

The crux of the three-step test is that, in order to be permissible at all, exceptions to exclusive rights must (1) occur in special circumstances (2) not conflict with the normal exploitation of the work, and (3) not unreasonably prejudice the legitimate interests of the rightholder. In order to pass the test, a limitation on an exclusive right must pass each step in turn.<sup>65</sup>

Because the Directive of 2001 reflects International law in this regard all exceptions contained in any recommendations made by the Copyright Review Committee cannot be free-standing. Assuming that a broad “educational use” exception, hinted at by the Copyright Review Committee (and that such an exception was *per se* within the EUCD) the exception would have to be shaped by the Irish legislator to meet the three step test. The three step test, as set out in article 5(5) was hailed by Reinbothe (op. cit.) as “a major step forward”:

“This provision subjects all exceptions and limitations listed in Article 5 to the three-step test, thus potentially linking the scope of all of them to what is absolutely needed and reflects an appropriate balance of users’ and rightholders’ interests. Article 5(5) is also remarkable from an institutional viewpoint: it has made all exceptions and limitations in Article 5, even though formulated in general terms, subject to EU law, and thus submits their correct and fair application in the last instance to the scrutiny of the European Court of Justice.”

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<sup>64</sup> Bridging the Offences between Copyrights Legal Traditions 57 J Copyright Soc’y 521

<sup>65</sup> *Copyright in the Information Society* p.36-7



The ECJ has already ruled on the implications of the three step test on several occasions, most recently finding that sections 97(1) of CRRR does not comply with that test<sup>66</sup>. The three step test is also a requirement under Article 13 of TRIPs. Lindner, in writing of the Berne and Geneva Treaties observes that the need to see exceptions to copyright as turning on the public interest was recognised during the process of agreeing the Convention over 100 years ago. It is evident that “balance” has become a feature of the International landscape.<sup>67</sup>

“These provisions set parameters for devising limitations and exceptions for the rights provided for under the Treaties in regional or national law. The careful balancing must thus be carried out at the regional and/or national level with the help of the legal tools provided for in the Treaties.

By setting parameters and providing tools to legislators for crafting their own limitations and exceptions rather than laying down specific exceptions, the treaties achieve a high degree of flexibility which is advantageous not only in view of the fast moving technological environment but also for accommodating different legal traditions..

While there may be therefore nothing radically new in the WIPO Treaties as regards the concept of balance, what has certainly changed over the years is the ‘rhetoric and language of balance’ which has led from the initial concept of striking a careful balance between the rights of creators and interests of users to the call for stronger limitations and exceptions to copyright and ultimately to requests for recognising users ‘rights’ in lieu of exceptions.”

IMRO believes that Article 5 is exhaustive. The Copyright Review Committee makes a most curious observation at paragraph 83.3 of the Consultation Paper in relation the possibilities of introducing an innovation right:

“since EUCD has not harmonised the adaptation right that Directive neither precludes such a development nor provides any guidance as to the contents of such an exception.”

The Copyright Review Committee goes on to discuss Article 9(2) of Berne as a starting point for an innovation exception. We find the comment to be a curious one; simply because the Berne Convention and the EUCD do not mention adaptations it does not follow that adaptations are unregulated (e.g. translations, rendering a work in one form into another form is an act of reproduction). In our view it is not possible to seek a separate innovation exception. Rather, innovation or transformative use of a work is best treated, not as an exception, but rather the conclusion that is reached when a court decides that there has not been a substantial taking from the earlier work. In other words, a court decides on such matters in the context of infringement litigation. This is a particularly important analysis in relation to artistic works and computer programs.

Conclusions on the UK and Irish model as dictated by EU Policy and the USA Fair Use doctrine are clear. We think that the Copyright Review Committee can be said to have gilded the fair use lily in paragraph 10.2 when commenting that “there is nothing intrinsically or exclusively American about the fair use doctrine. It has found homes in other common law countries.” In fact the only common law country where fair use is in place is Israel, added as recently as 2007. Debates in Canada are particularly heated, driven as they are by outdated legislation and a very controversial set of Supreme Court of Canada decisions that many commentators see as having a compromising effect on Canadian treaty obligations.

In Canada, a joint submission<sup>68</sup> of over 50 prominent organisations representing rightholders and creators combined to press that Canada should not adopt a fair use standard. Citing authors such as Cohen Jehoram, Ricketson and Gervais, the submission inclines towards the view that the fair use doctrine and the three step test are incompatible. The submission concludes

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<sup>66</sup> *PP Ltd v Ireland* March 15, 2012

<sup>67</sup> *Copyright in the Information Society* p.10

<sup>68</sup> (2009) 2 Osgoode Hall Rev L. Policy 139

If new exceptions and limitations are warranted, Canada should take the road chosen overwhelmingly throughout the world. It should make a careful, focussed study of the needs of Canadians for access to works that the market has not met or is unable to meet and decide on the best policy vehicles for meeting those needs. Where required, new exceptions should be based on the three-step test mandated by the treaties and conventions Canada has agreed to honour<sup>69</sup>.

**We have to see the call for fair use exceptions and demands for broader exceptions, the downgrading of the three step test and other changes to copyright, in their international context. Ireland is part of a trading bloc that supports international copyright standards. The stability that clear pro-protection standards give is a source of competitive advantage in itself.** One seasoned American commentator has written

“The call for new - broad - exceptions, understandings among nations (such as “best practices” for fair use or fair dealing), or even a treaty, has raised serious and legitimate concerns for developed countries and rightsholders, given the ease of copying and the dissemination across borders of works in the digital era has resulted in the movement – implicitly or explicitly – to recalibrate the long-standing, well-serving balance between creators and users as evidenced in the language of the Berne Convention, Article 9(2). The formulation albeit with minor revision during adoption of the “new” WTO/TRIPs and WIPO digital treaties – has resisted change and survived spectacular technological advancements because of, not in spite of, its flexibility. The call for new, specific, and broad-reaching exceptions threatens the existing formulation. In fact, it is this flexibility that has allowed the treaty exceptions to bridge differences across legal systems (civil and common law), and has enabled the Article 9(2) formulation to successfully ride the pendulum swings over time, between the interests of authors, producers, rightsholders and users, for close to a half century.”<sup>70</sup>

IMRO believes that the existing UK and Irish model and the EU copyright *acquis* provide a better balance as between the uncertainties of a US fair use doctrine and a rigid application of a closed and inflexible list of exceptions and limitations. There are signs that suggest that national legislators within EU member states, judges within those member states, and the ECJ are prepared to view the provisions of Article 5 of the EUCD as affording more “wriggle room” than was hitherto the case. We think that the ECJ is demonstrating a willingness to explore some of the key provisions in the EUCD, and other Community instruments. Let us work within what we have, rather than lose the benefits of internal market measures by adopting the proposed section 48A of CRR. A fair use “free for all” is to be vigorously opposed.

No evidence has been provided that Ireland’s IT Industry Competitiveness is being held back by the absence of a fair use doctrine. Instead two countries from outside the EU, Israel and India, are quoted as having such a doctrine, hence implying that this accounts for their respective “jumps” up the IT Competitiveness index. IMRO rejects the hypotheses that this jump in competitiveness can be attributed to the adoption of a so called “fair use” doctrine. The fact that the Indian Copyright Act 1957 is only now being amended (via the Indian Copyright (Amendment) Bill 2012) to bring it into conformity with international norms and World Intellectual Property Organisation guidelines would also account for such jumps in IT competitiveness. Copyright free zones or copyright “havens” are no longer possible in a globalised world that insists on high levels of copyright protection.

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<sup>69</sup> Ibid p.166. The Canadian situation is problematical for a number of reasons. The Supreme Court is extremely active while Parliament has struggled to pass legislation which is Geneva Treaty and even TRIPs compliant. Canadian blogs are extremely visceral as a result.

<sup>70</sup> Schwartz 57J Copyright Soc’y 473 at 496-7 (2010)

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

It will be evident that it is our understanding that a fair use standard does not work in the United States in any satisfactory way. Because Ireland, like all other common law countries, has opted for a fair dealing approach, being applicable to defined circumstances, with enumerated exceptions being added (e.g. recitation, judicial proceedings, etc) it is too late to switch to a system that does not work even within its own terms. We understand that in Israel, which adopted fair use in 2007 there have been no decisions on fair use. We believe that the introduction of a fair use doctrine is not in Ireland's interests and it would be contrary to EU and International treaty law.

**(77(a)) (a) What EU law considerations apply?**

It is our understanding that both the Berne Convention and the TRIPs go down the path of setting out rights and identifying exceptions, many of the exceptions being viewed in the light of the three step test. The EU system, particularly the EUCD follows this approach. There is no room for a fair use doctrine and adoption of such a doctrine would breach International treaty law and the Community acquis.

**(77(b)) (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?**

IMRO is aware of the pressure being generated to re-open the EUCD debate. Dutch scholars in particular are keen to stimulate such a review but we point out that Dutch law is much less flexible than UK and Irish law (e.g. levies are in place, there are no fair dealing flexibilities, etc). IMRO would not preclude a re-examination of the Copyright Acquis if it is for the narrow purpose of re-stating what flexibility and wriggle room the directives afford, particularly in the light of the ECJ and national case-law arising out of the acquis. But a fundamental re-negotiation is not in the interests of the EU. IMRO is also fearful that the language used by persons and organisations that support a review of the acquis – “transformative”, “non-consumptive uses”, etc is imprecise and suggestive of an agenda that can undermine the acquis. IMRO opposes any “fair use” doctrine.

The Committee considers that “the route to strategic advantage here (sic) is not only to match, but where possible and appropriate from an innovation perspective, to exceed, any copyright reforms undertaken by those other countries”. The logic of joining with competitors escapes us if all our competitors benefit equally - where is the advantage to be gained? The community acquis does not allow for unilateral departures by member states and to do so for the Community as a whole would only weaken the system of copyright that currently operates in the EU. EU member states as we have pointed out are in any case subject to all of the provisions of the Berne Convention.

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

We do not support the suggested draft section 48A. IMRO believes that the comments on pages 112-113 (and they are presented as being the views of both the Copyright Review Committee and Hargreaves) do not represent how fair use works. IMRO believes that the major global players have an idealised conception of fair use. So called “transformative” uses by such companies that use content in the United States and elsewhere, generally do so on the back of market power/dominance. The operation of a mechanism that allows “a flexible and sensitive calibration” of the four factors in section 107 of the US Copyright Act is a rather naïve explanation of how the USA successfully innovates. As stated in our initial submission we believe that importing “fair use” provisions from the US will hamper innovation. The US has a better record of innovating, not because of a more lax copyright system but because of a deeply

embedded culture of entrepreneurship, much deeper relationships between the business community and the University and educational sector and wider availability of capital. Strengthening the links between academia and innovative enterprise and creativity and encouraging wider access to capital are much better ways for Ireland to drive its knowledge economy forward in terms of both large and small enterprises.

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

IMRO believes the draft section 48A subvert the interests of rights holders in many ways. IMRO rejects this text as being philosophically unsound. Even within its own terms draft section 48A raises more questions and concerns. For example;

- Under section 48A (2), why should the other exceptions be regarded as examples of fair use? This proposal is not to add a fair use exception; rather it is to subordinate Irish copyright exceptions and limitations to a fair use doctrine.
- In subsections (2) and (3) the link is unclear. Subsection (2) appears to insulate the existing exceptions from the subsection (3) analysis but the danger is that if a user cannot come within the existing exceptions and limitations that user will invoke section 48A “as a backstop”. This will invite speculative use of section 48A. .
- The remaining factors are problematic. US case-law has shifted on commercial/non commercial use (the “Pretty Woman” case). Given that commercial use is constrained within the EU directives, would it be possible for a “minor” commercial use to fail under the *acquis* but be accommodated by section 48A (3)? What does factor (c) mean? Is a sound recording a valuable copyright work more, or less, vulnerable to fair use? Is this factor not, more or less, the same as factor (e)? Factor (d) is relevant in cases of non infringement. Does its use here legitimise a taking that has already been held to infringe? Factor (f) is redolent with uncertainty. What is “a reasonable time” and “an ordinary commercial price”? Even under existing copyright litigation these value judgments are difficult to make or articulate.
- The fact that section 48A(3) is only to apply “in any particular case” suggests individual decision making and a species of “palm tree” justice. Clearer, better rules are to be preferred. We note that, ironically, section 48A(5) anticipates that a Minister will decide on these kinds of issue and for certain educational uses there is some area of success (e.g. educational use under SI No.514 of 2002). Targeted and detailed solutions to specific legal and commercial issues, balanced by public interest concerns represent the most appropriate solution

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

Please examine the literature on fair use drawn from the US. Even supporters of fair use often start from the position that fair use needs to be “fixed”, that the DMCA needs to be “fixed” to allow in “fair use” and that user codes of practice need to be “fixed” to represent right holders, as well as users. The legislative and consequential uncertainty of outcome, are a price not worth paying.

**(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?**

We believe that the existing CRRA/EU *acquis vis-à-vis* rights and exceptions in EUCD represent a far superior model than any full, or adapted, transposition of s.107 of the USA Copyright Act 1976.

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

We have set these out in the General Introduction and in our initial observations on Questions 76-83

**(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?**

In our preliminary observations and our initial observations on Q76-83, we have rejected fair use and the draft section 48A as inappropriate for adoption into Irish law and contrary to EU law. As a doctrine that depends for court adjudication for application we cannot see how it can afford a speedy, cheap, timely and predictable means of resolving complex issues of the kind that right holder/user conflicts can throw up and we fail to see how it helps innovation.

## Chapter 11 Conclusion

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

Yes they should be consolidated.

**(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)?**

We note the Regulations refer to the liability of intermediary service providers – “mere conduit”, caching and hosting, but we also note that there is no discussion in respect of the EU Regulation in this Chapter so until we know the context of the question IMRO is not in a position to provide a comment.

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

IMRO has addressed any further points in our Preliminary Comments.