



INTERACTIVE SOFTWARE  
FEDERATION OF EUROPE

## **Comments by the Interactive Software Federation of Europe on the Review of the Copyright and Related Rights Act 2000**

### **Introduction**

The Interactive Software Federation of Europe, ('ISFE'), representing the European videogame industry<sup>1</sup>, welcomes this opportunity to comment on the Review of the Copyright and Related Rights Act 2000. ISFE's membership comprises major international game publishers, together with national trade associations that in turn represent both national and international game publishers. The three main manufacturers of today's videogame consoles are also members of ISFE. The videogame industry is the fastest growing of Europe's creative sectors and is a major employer across the EU, including Ireland. The industry regards Ireland's young and highly educated population and its government's focus on encouraging technological development as potent engines for future investment, innovation and growth.

Intellectual property rights remain one of the most important drivers for innovation and investment in information society services, technologies and content. As the European Commission has repeatedly recognised, "a strong and balanced IPR system is a driving force for promoting innovation and improving competitiveness"<sup>2</sup>. Intellectual property provides the market-based rewards which ensure that such innovation and creation continues and grows.

The videogame industry's successful ongoing innovations and unparalleled growth have been founded on the certainty provided by copyright law. ISFE favours the adaptation of copyright law to keep pace with technological development, but believes that this should never be at the cost of undermining the certainty provided by existing legal structures that we regard as vital to the legal underpinnings of the innovation, development and distribution models that are the essential features of today's videogame industry.

We propose to comment on the Copyright Review Committee's Terms of Reference in turn:

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<sup>1</sup> ISFE Membership consists of the following: Associations - IGAI (Ireland), AESVI (Italy), ADESE (Spain), BIU (Germany), BEA (Belgium), UKIE (UK), FIGMA (Finland), MDTS (Sweden), MUF (Denmark), NVPI (The Netherlands), NSM (Norway), OVUS (Austria), SELL (France), SIEA (Switzerland), SPIDOR (Poland). Companies - Activision Blizzard, Eidos, Electronic Arts, Konami, Microsoft, Nintendo, SCEE (Sony Computer Entertainment Europe), SEGA, Take 2, THQ, UbiSoft, The Walt Disney Company.

<sup>2</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/509&format=HTML&aged=1&language=EN&guiLanguage=en>

**1. Examine the present national Copyright legislation and identify any areas that are perceived to create barriers to innovation.**

ISFE does not believe that there are specific areas of Irish copyright law that create barriers to innovation. We do, however, believe that piracy constitutes the single greatest barrier to the innovation, artistic commitment and technological advancements enjoyed by millions of consumers worldwide.

The videogame industry epitomises technological innovation and thrives on the development of original intellectual property. A robust and workable IP framework, together with strong enforcement, is integral to our industry's success. We believe that the current IP framework in Ireland supports growth and innovation, and that it allows new business models, particularly in the online space, to develop in our industry. We believe that the current framework supports the development of original IP in Ireland, and provides the right framework for its development across a range of formats, including traditional boxed products, online games, and those that can be played on mobile phones. One area where the videogame industry has shown particular innovation is in offering its consumers a variety of channels and new business models through which to play games online and to access game content. Ireland's IP framework supports these diverse business models, and does not present any barrier to their successful operation in the Irish market.

However, the IP framework does not, we believe, provide adequate tools to enforce against online piracy and consequently does not provide sufficient protection for copyright creators. While many tools exist in Irish law to protect the videogame and other creative industries from piracy, effective and deterrent mechanisms for protecting them against growing online piracy are still lacking, and this remains a weakness in Ireland's otherwise strong copyright framework. Ensuring that IP rights are protected and properly and effectively enforced provides industry with the certainty it requires to invest in the research and development that leads to growth and employment. Content creators need to feel secure that they will reap the benefits of their creations. The Government's focus should be on ensuring that those who create IP are rewarded for their endeavours and retain the incentive to continue to innovate. There are good examples of countries with strong IP regimes and elevated commitments to enforcing these regimes attracting higher levels of investment in new and innovative technologies that represent engines of growth and economic development, including the United States and Korea.

In recent years the Internet has played a vital role for the videogame industry as it has been the main driver in the rapid growth and development of online games, leading to increased European game development, production and, of course, jobs. All the popularly available game console systems connect to and interact with the Internet and most games today include an Internet-related aspect. The videogame industry now offers more new, innovative ways for consumers to experience its products online than any other industry. The online games sector is arguably an example of electronic commerce at its best. It should therefore be abundantly clear why this industry favours policies at national, European and international levels that allow our member companies to continue to supply high quality games to their customers online and across borders. For all of the above reasons, it is vital that the Internet remains largely a benign force. The unwelcome development and growth of online piracy is a major hindrance and discouragement to the provision or take-up of online videogame services, as well as being highly damaging to traditional physical goods business models.

Like the other content industries, the videogame industry suffers serious economic damage from widespread illicit file-sharing on P2P networks. In addition, and increasingly these days, the threat comes via other channels, such as the rapid growth of “linking sites” used to distribute links to pirate files hosted on “one-click hosting sites” or “cyberlockers”.

The videogame industry also incurs particular damage due to the widespread availability of devices (including software) designed to circumvent the technological protection measures (TPMs) used by the industry to protect its products. Console games are protected by TPMs that involve a “handshake” between the game and the console. There is a global market for “modification chips” (or “mod chips”) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer), will bypass the handshake and allow the play of pirated games. “Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms. Soft mods (i.e., “software modification” techniques which exploit vulnerabilities to install software modifying game console firmware in order to bypass or disable TPMs) are becoming increasingly common, and may soon completely replace physical circumvention devices such as mod chips and game copiers. Day-by-day, all of these circumvention devices further fuel growing levels of online piracy as each device functions as a gateway to multiple future infringements and inflicts untold damage on legitimate game sales. As a result the industry regards the enforcement of effective provisions against the manufacture, distribution and use of such piracy tools as an essential factor in preventing or limiting the download and sale of pirate games. Ensuring that countries have effective legislation and enforcement regimes that make such circumvention, as well as the manufacture and distribution of circumvention devices, illegal and subject to both criminal and civil remedies is a very high priority for our industry.

The scale of unlawful game downloads worldwide is now so great, that without an effective and cost efficient solution, the potential damage to the industry is substantial. It can often take a team of hundreds of professionals two to three years to bring a top videogame to market. On top of spending several millions of euros in Research and Development costs, game publishers invest millions more in marketing and distributing each and every game. Only a small percentage of these games actually achieve profitability and the commercial life of a game is quite short compared to that of other entertainment content. This is why piracy can have a particularly destructive effect on the sales performance of many games. With the digital revolution, videogames that have resulted from groundbreaking technological development, years of effort and investments of tens of millions of euros can be illegally duplicated and distributed worldwide online almost instantaneously. It is now a regular occurrence for new videogame software to be distributed for illegal download on the Internet within minutes of official release and, with increasing regularity, even prior to release. Casual infringements, consisting of otherwise law-abiding people downloading tens of millions of pirate copies of games every month, are now exacting a far greater toll on the industry than in the past. This toll is a notorious example of what is sometimes called the tyranny of small decisions that have ruinous economic consequences.

In 2010, vendors for the Entertainment Software Association<sup>3</sup> in the U.S. detected over 144 million connections by peers participating in unauthorized file-sharing of approximately 230 leading game titles on popular P2P networks through ISPs across more than 200 countries and territories worldwide.

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<sup>3</sup> The US game industry trade association which has common member companies with ISFE.

This figure does not account for downloads of these titles that occurred directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites (which account each year for progressively greater volumes of infringing downloads).

As demonstrated by the above description of the online piracy problems afflicting the videogame industry today, it should be abundantly clear that the Internet and digital technologies have added an extra, challenging dimension to enforcing intellectual property rights, and that the Internet has opened the door to new forms of infringements, some of which have proved very difficult to combat.

**2. Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation.**

**The Role of Intermediaries**

Integral to any solution to the growing problem of online piracy is the cooperation of ISPs across whose infrastructures copyrighted content is transmitted, and without whose cooperation any effort to address the problem is futile. Efforts to encourage such cooperation should be maintained and strengthened. Internet intermediaries should be required to maintain and enforce “repeat infringer” policies as well as their own terms of service with their customers.

Traditional hosting providers frequently fail to verify the identity of their customers and as a result often host anonymous websites that have registered with false or insufficient identity details and that pay through anonymising payment providers. We believe that hosting providers should be required to verify their customers’ identities, which would enable rights holders to hold the responsible persons liable. Such providers should also be required to suspend services to customers who have registered with false or insufficient identity details as soon as they become aware of such false registration.

Experience has, unfortunately, demonstrated that if ISPs are not legally obliged to prevent their networks from being used for illegal purposes they will generally not do so, and that those that do will be at a competitive disadvantage. This is why injunctions are important and why the Government’s recent proposal to amend the Copyright and Related Rights Act 2000 by way of Statutory Instrument to allow rights holders to apply for injunctions against intermediaries is so necessary. While ISFE plans to elaborate on this proposal in a separate submission, we would just like to note here that we believe that the Government needs to take due account of the Opinion of the Advocate General in the SABAM v Scarlet case currently before the European Court of Justice and to ensure that the future scope of injunctions under the proposed amendment will not be unduly restrictive.

We believe that the Courts should have the power, for example, to order ISPs to implement a “graduated response” solution to address illegal P2P activities by their customers or to block their customers’ access to sites whose primary purpose is to engage in, enable or facilitate the infringement of the IP rights of others. Graduated response systems allow for user education about copyright and piracy, for warnings about the possible consequences of repeated infringement, and hopefully for a decrease in copyright infringement without unnecessary burden, expense or invasion of privacy for Internet users.

Whilst graduated response measures may reduce illegal peer-to-peer activity, consumers will still have access to illegal content through other methods of pirate distribution, including one-click hosts. Unlawful sharing of copyright works is therefore likely to remain, if the availability of, and access to, major suppliers or facilitators of such infringement are not stemmed. Any court-ordered blocking of access to pirate sites should, of course, be subject to adequate safeguards, in particular to ensure that the blocking is limited to what is necessary, that users are informed of the reason for the blocking and that content providers, as far as possible, are informed of the possibility of challenging it. Sites hosting or linking to pirated content can and do generate significant amounts of revenue from online advertising and sales, and blocking them will cause their operators very considerable inconvenience and loss of business.

More resources should be dedicated to shutting down websites that are specifically dedicated to the sale of pirated games and circumvention devices, killing piracy at its source. These and other further steps should be explored, in conjunction with ISPs, search engines and other online service providers, to help reduce access to pirated games and circumvention devices.

### **Strengthened Anti-Circumvention Provisions**

As previously stated, our industry regards the enactment and enforcement of effective provisions against the manufacture, distribution and use of circumvention devices as an essential factor in preventing or limiting the download and sale of pirate games. We believe that the existing anti-circumvention provisions contained in the Copyright and Related Rights Act 2000 should be considerably enhanced and strengthened, in order to bring Ireland fully into compliance with its obligations under European and international law.

### **Education and Self-Regulatory Solutions**

Greater education is needed to raise awareness of the value of copyright and of the damaging impact that piracy has on all creative, intellectual property based industries in terms of jobs, future prosperity, growth and innovation. The education of consumers regarding the harms caused by piracy and the risks associated with the acquisition and use of illegal copies of digital works can serve to restrict demand for pirated products and thereby alleviate the burdens on any IP enforcement framework. Given the growth in opportunities to access and acquire illegal digital products resulting from the growth in broadband access to the Internet, such educational efforts can be as important as enforcement actions to controlling the growth in piracy levels. A wide variety of educational efforts are being undertaken by governments in a number of countries, including Singapore, Hong Kong and Mexico, as well as most recently by the French government in connection with the launch of its online enforcement regime under the HADOPI law.

The videogame industry is already playing a role in this regard. The website [www.jointheteam.com](http://www.jointheteam.com) represents an effort by game publishers to create a curriculum for teachers and school librarians to use in introducing IP concepts to children. Although the site is geared towards American educators, its curriculum and IP education lessons are universal.

ISFE would also like to see collaborative, self-regulatory solutions applied to the online environment, for example working with ISPs, search engines and others to combat the threat of online piracy.

This collaborative approach to tackling online piracy would alleviate the negative impact that piracy has on economic growth and innovation; illegal websites in particular impact the ability of legal services to get off the ground and make a return on their investment, and to keep reinvesting and innovating to find new ways to reach consumers – to the benefit of the consumer and business alike. Many websites are establishing API takedown tools to facilitate rights holder efforts to address and remove infringing content and links to infringing content on their sites. Such measures should become the norm, and not remain the exception for sites accessible to Irish Internet users.

### **3. Examine the US style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.**

We do not believe that a US style ‘fair use’ doctrine would be appropriate in an Irish or EU context. On the contrary, given the ease and speed of digital transmissions, there is reason to consider whether existing exceptions should be narrowed or removed in order to meet international obligations in this area.

Existing European Union legislation provides strict parameters for exceptions to copyright which are underpinned by the time-tested ‘three step’ test contained in the Berne Convention which Ireland first acceded to in 1927, and as also recognised in the TRIPS Agreement and the 1996 WIPO Internet Treaties, to which Ireland is also a party. Indeed, it should also be remembered that US copyright law, including the fair doctrine use, is also subject to the three-step test, as the US is also party to those agreements and treaties. This means that US copyright exceptions should operate within the same parameters as the defences and exceptions that exist in Ireland.

#### **Fair Use/Fair Dealing**

Any changes to the existing Irish regime would, we believe, necessitate revision of the EU Software and Copyright Directives. In any event, apart from the legal uncertainty (examples<sup>4</sup>) that a US style fair use doctrine would introduce, it is clear that advances in technology in general and in digital rights management in particular dictate that, if anything, the twenty five current exceptions<sup>5</sup> that exist in the Copyright Directive should be reduced and not increased by an open-ended fair use doctrine which will only create more uncertainty and litigation than is now the case.

The Copyright and Related Rights Act 2000 contains specific exemptions for ‘fair dealing’ under Sections 50 and 51. In order to enjoy the benefits of a fair dealing exemption, the use must be for: research or private study; criticism or review; or reporting current events. The use must also be “for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”. If a use is not a fair dealing or specifically covered by an exemption set out in Chapter 6 of the Act, then the creator is entitled to remuneration. The clear and unambiguous language used in the law has provided certainty and has resulted in negligible litigation in this area. The opposite is true in the case of the U.S.

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<sup>4</sup> All leading US fair use cases contain conflicting conclusions by the participating judges: see *Sony v. Universal City Studios, Inc.*, 464 US 417 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 US 539 (1985), *Campbell v. Acuff-Rose Music, Inc.* 510 US 569 (1994); in none of the cases was a unanimous result delivered from the bench.

<sup>5</sup> These exceptions were the subject of unprecedented, protracted and exhaustive debate amongst the EU member states, the Commission, parliamentarians and rights holders in the three years up to finalisation of the Directive in June 2000.

Another country, Australia, recently underwent a similar and wide ranging copyright review<sup>6</sup> centred on the U.S. fair use doctrine and decided instead to follow the existing EU style approach of specifically defined exceptions. There are clear parallels with the process under way in Ireland.

The history of the U.S. fair use doctrine to date has been one of an increase in copyright-based litigation resulting in a series of ever more numerous judicial decisions, which cannot be reconciled using any 'doctrine' or principles.

Nor does the U.S. experience lend itself to any suggestion that its fair use doctrine is fit to respond to technological development. What is needed in today's highly adversarial legal environment is certainty, which will of course not occur if an equity-based jurisdiction is given to judges acting in copyright cases through the introduction of a fair use regime. More copyright litigation would be the only true certainty of such a regime.

A U.S. style fair use doctrine should not therefore be introduced in Ireland.

**4. If it transpires that national copyright legislation requires to be amended but cannot be amended, (bearing in mind that Irish copyright legislation is bound by the European Communities Directives on Copyright and Related Rights and other international obligations) make recommendations for changes to the EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.**

We do not consider that amendments to Irish copyright legislation to remove the barriers to innovation identified above or to optimise the balance between protecting creativity and promoting and facilitating innovation (even though we do not regard these aims as being at all in conflict or mutually exclusive) would require any changes to EU Directives or to Ireland's other international obligations.

Should you require any clarifications on the above comments or any further information, please do not hesitate to contact us.

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<sup>6</sup> In Australia, the government made its decision after much debate in parliament and considerable public input.