



Copyright and Innovation

A Consultation Paper

**Response of the Irish Professional Photographers' Association
("IPPA")**

June 28, 2012



The Irish Professional Photographers' Association

The Irish Professional Photographers' Association ("IPPA") was founded in 1949 to serve the interests of professional photographers in Ireland and to ensure the provision to the public of a high standard of expertise and professional practice. The IPPA has just under 400 full time practising members, all full-time professional photographers, who are qualified and insured and who are dedicated to the production of high quality photography.

The IPPA is a member of both the Federation of European Publishers and the World Council of Professional Photographers.

Copyright and Innovation – A Consultation Paper

The IPPA welcomes the opportunity to respond to the questions of the Consultation Paper of the Review Committee. We respond below to the numbered questions of the Paper.

We preface our responses with the following preliminary remarks:

This is a very challenging time for professional photographers. The images our members produce can be seen everywhere. They are relied upon to enhance the value of every type of product. They record Irish life, from daily news to historical events. They enhance the memory of the special events in our domestic lives. They contribute to art and cultural. And yet, despite the value and enjoyment our images provide, professional photographers find it increasingly difficult to utilise their copyright to ensure a reasonable return for their work.

IPPA members recently participated in a survey conducted by DKM Economic Consultants on the value of the creative industries in Ireland. The survey demonstrates the impressive size of these established industries, all of which depend, as we do, on copyright protection.

Where photographers are concerned, the survey estimates 811 enterprises in the sector in 2011, with a turnover of €109 million and a GVA of €42 million.. The total number employed is 1,758, of which full-time equivalents are 797.

At the same time, our internal survey conducted for the purpose of the DKM report showed that in real terms the average income of our members has dropped by 35% over the period 2003-2011. In the same period our members have invested significant capital sums in digital equipment (an average of €63,000 by those responding to the survey). However, notwithstanding the decline in income and conditions, our members remain as committed as ever to the quality of the service they provide and to sustaining present levels of employment in the sector.

The reasons for the decline in income are clear. While our members find that public and corporate sector clients increasingly demand “all rights” contracts with waivers of moral rights (and our survey demonstrated that these sectors account for well over 50% of income of respondents), the most overwhelming challenge faced by our members is that of copyright infringement. All of the respondents to our survey cite instances. These are typical responses:

“every year as technology develops, it is more important for professional photographers to protect their images and work, as it is becoming more and more of a problem to control the copyright”....”

If we can stop the public TAKING the rights to our work they will have to pay for what we do. If we can get paid for what we do the our businesses will grow”

The loss of copyright control is not a simple issue of infringement for photographers. The problem is often compounded by loss of reputation due to the creation and circulation of poor quality unauthorised images.

We have had several infringements of clients using low resolution web quality images (licensed and charged out for that use only) in publications and media. Not only are we at the loss of revenue difference – our reputation is at stake due to poor quality reproductions.

The most important points for photographers to communicate to the Review Committee are these

- **We need an improvement in the legal provisions to strengthen the prohibition on removal of technological measures and rights management information, such as watermarking and metadata applied to our works; and**
- **We need better dispute resolution, so that that when our rights are infringed, we have more effective means of redress.**
- **Above all else, it is of critical importance that our rights are not diminished and our business models undermined in any amendments to the CRRRA, and that, where appropriate, photographs are excluded from the proposed expansion of certain exceptions.**

Responses to the Questions of the Consultation Paper

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

The focus is not sufficiently broad in our opinion. A great deal of the Consultation Paper is narrowly focused on a dramatic expansion of the exceptions to copyright in an apparent effort to facilitate digital and internet enterprises. This would occur at the expense of established creative industries which have built successful business models in reliance on a stable copyright balance. *No economic evidence has been adduced to justify the benefit to the economy of making such changes.* Our belief is that the net result would be a weakening of copyright and further losses in existing industries at a time when pressure from online infringement makes it imperative that the system needs to be *strengthened* by clear and enforceable rules for enforcement. Photographers are one of the most vulnerable groups of right holders. We struggle to uphold our existing rights. We would be the first to suffer from changes which send the wrong message to those who believe that all content ought to be free.

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

No. Copyright law is complex and opaque. This gives rise to the need to raise awareness about copyright amongst the public and the need to provide accurate information about copyright to business, especially small business.

(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?

Yes.

(4) Is the classification of the submissions into six categories –

- (i) Rightsholders;**
- (ii) collection societies;**
- (iii) intermediaries;**
- (iv) users;**
- (v) entrepreneurs; and**
- (vi) heritage institutions appropriate?**

We are struck by the fact that *the only category not represented in the classification is that of authors.* It is an extraordinary omission in a paper devoted to copyright. Of course authors are the first right holders, but to conflate them with all right owners does them an injustice. In so far as they licence or assign their rights, their interests differ from other right holders. There are many issues in the space between them. As mentioned in our earlier submission, photographers suffer from poor bargaining power and many are forced into “all rights” contracts and waivers of moral rights. By failing to accord authors a separate classification, issues such as these are given insufficient attention.

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

See reply to 4.

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

This question is too broad to address in this context. We would however warn against upsetting the existing balance without compelling evidence - firstly, that the net effect would be beneficial to emerging enterprises and secondly, would not be detrimental to established businesses. In the current economic climate particular value ought to be placed on businesses that have already contributed to the economy and are working very hard to continue to do so, despite the adverse conditions of online infringement.

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

We believe that a Copyright Council could make a very valuable contribution to the Irish copyright framework, but as a *right holder* Council (similar to those in the UK, Australia, New Zealand). A mixed-interest group would find it impossible to balance internal conflicts, particularly if it was being funded, even in part, by some of those interest-groups. There is a striking need to raise public awareness of copyright. A right holder Council could play an important role in this regard. A Council could also act as a resource to advise Government on right holder issues. It should be a non-profit organization, open to right holder representative bodies. Arising out of this review, there may be an impetus on the part of right holders to form such a Council.

(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?

See reply to (7).

(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?

See reply to (7)

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

It should be a non-profit entity.

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

It would serve the same functions as similar right holder Councils in other countries: the dissemination of information about copyright; promoting copyright amongst the public; conducting research; helping to inform policy.

(12) How should it be funded?

By its members.

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

This is a very ambitious proposal. We do not believe it is a realistic one, in a national context. We would however like to see the Irish collecting societies collaborating to coordinate and improve their offerings. Beyond that, we feel that we should await developments in the UK, where a serious effort is being made to establish a DCE. If it can be successfully established there, it may be possible for Irish right holders to establish a framework for linking to that exchange or mirroring it in some other way. Further developments in Europe designed to facilitate multi-territory licensing in Europe may also give rise to new possibilities. We strongly believe that better legal services will help to contain online infringement.

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

We would urge the Review Group to look at ways in which legal offerings can be identified more easily online. One of the factors which contribute to infringement is that users cannot easily distinguish legal from infringing services. We note that the HADOPI system in France provides for the use of a special symbol to identify legal services. We believe a similar system would be beneficial. Below we suggest the establishment of a Copyright Licensing Board. Such a body might be empowered to oversee and authorise the use of a symbol designating legal services.

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

An ADR service ought certainly to be provided, but not by the Copyright Council as a right holder body. It would need to be provided by a trusted external entity. We suggest that a mediation framework could be overseen by the Patent Office, by providing a list of qualified mediators, a scale of daily charges and a mediation agreement. The IPO in the UK provides such a service. A more sophisticated framework could also be envisaged providing a range of ADR services which would apply to all IP disputes, and would include not only mediation but arbitration and conciliation. Photographers would be particularly interested in a conciliation service. It might help us to address the contractual imbalances described in our original submission.

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

See our replies above.

(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?

Yes, the Office of the Controller should be given a more extensive remit in relation to copyright, and should be re-named as the Intellectual Property Office, or something similar.

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

No comment.

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

The ADR service would be provided under the auspices of the Office of 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?

We are certainly in favour of a small claims jurisdiction in the court system. We believe a range of measures is needed to facilitate the bringing of copyright claims. There are many claims which are not pursued because the existing system makes it too costly in terms both of legal costs and the time involved to pursue a claim. In its submission of March 2012 to the Patent County Court Consultation in the UK, the Association of Photographers said that a small claims jurisdiction would be "invaluable in helping individuals and SMEs to pursue infringements." The submission said that in 2011, photographers reported pursuing 113 copyright disputes, of which 85 cases were under £2,500 and 78 were between £2,500 and £5,000. Some 106 cases were not pursued, of which 85 were under £2,500 and 61 were between £2,500 and £5,000. 70% stated that it was too expensive to pursue these.

(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?

No comment.

(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?

No comment.

(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?

We are not aware of any such evidence.

(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?

We are firmly convinced, in particular having attended the two public meetings conducted by the Review Group, that there are many small digital and internet enterprises that simply do not understand the law. They do not understand the existing exceptions to copyright that they might avail of. Rather than familiarise themselves with the rules (or pay a licence fee), they seek to change the system. It is arguable that the Irish system fails these entities by not providing ready access to information. We note the extensive programme of educational events and other supports for small digital businesses provided in the UK by the IPO. We would urge the Review Committee to take seriously the need for public education and for information services for small business. The Officer of the Controller could also play a significant role in this regard. We are well aware of the financial constraints of the public service, but it is imperative that some priority be given to serving the needs of small business in this growth area.

(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?

Right holders are under-compensated in any internet-related business, due to uncontained infringement and the fact that many internet businesses have no proper business model, preventing them from monetizing their efforts.

(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?

It would be ill-advised to attempt to define originality, especially as the Court of Justice of the EU is developing the meaning of the term in a variety of cases. We refer in particular to the *Eva-Maria Painer* case (C-145/10), which determined the meaning of originality for the purpose of photographs.

(27) Should the sound track accompanying a film be treated as part of that film?

No comment.

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

No comment.

(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?

No. This could have unintended consequence.

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

We would not be in favour of a general provision for this purpose. It is not necessarily the case that uses of works online and offline should be treated in the same way.

(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?

No comment

(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?

Yes. In an environment where digital services are growing exponentially, it is increasingly important that the technical means to protect works are given strong and secure legal protection. Protection for metadata applied to photographs is currently woefully inadequate. While the technology to prevent its removal is still imperfect, the legal remedies are also in need of strengthening. Many social media sites routinely strip metadata from photographs. This is not generally understood. We would urge the Review Committee to draw attention to this fact in its report. In addition, more and more photographers are using watermarking to protect their works. The legal protection of technological measures also needs strengthening. As to amendments to the CRRA, see below.

(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?

There have been no cases to highlight the shortcomings in the existing provisions. This is, at least in part, because the legal provisions do not provide accessible and effective remedies. See our further comments below.

(34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?

There are certain things that can be done to address the problem of infringement.

The most significant step that could be taken would be to improve the position relating to stripping of metadata and removal of rights protection measures, such as watermarks (which can also act as RMI). We make the following suggestions:

(a) Metadata – Rights Management Information

There needs to be a greater awareness of the value of metadata in identifying authorship and other valuable information, including the licence terms on which a work is made available. Attention needs to be drawn to the fact that the removal of it is in fact an offence under section 376 CRRA. It needs also to be remembered that every time metadata identifying an author is removed from a photograph, a new orphan work is created.

The remedies in relation to rights management information need to be augmented for this purpose.

Currently there are two remedies in the CRRA relating to rights management information. Section 376 makes it an offence to remove or alter RMI or make available works from which it has been removed “knowing or having reason to believe” that the purpose or effect of this will be to “induce, enable, facilitate or conceal an infringement of any right conferred by this Act”.

The principal problem with this provision is that it is useless to right owners. It is simply not possible to sufficiently interest the Gardaí in an issue such as this, so as to bring a prosecution.

The second remedy is the civil remedy provided by section 375. This is not a right for the right holder, but for the “person who provides rights management information”, who may or may not be the right holder. It provides the same rights and remedies to that person as are enjoyed by a right holder in respect of infringement. The difficulties with this remedy are: it is not a right for the right holder; it does not protect the RMI in its own right; it is not independent of there being an underlying infringement.

We suggest that the standard does not equate to that required by the EUCD, which obliges EU Member States to provide “adequate legal protection” in the terms set out in Article 7.

We suggest that it is essential to provide a remedy in respect of the removal of the RMI. This right should be provided for the author of the work. It should be unequivocal. For example:

(a) It shall be deemed to be an infringement of the copyright in a work to remove or alter rights management information without the authorisation of the rightsowner.

(b) It shall be deemed to be an infringement of the copyright in a work to make available to the public the work knowing that rights management information has been removed from the work.

Section 375 has an additional problem. The definition of “rights management information” is stated to apply only for the purposes of section 375. It should also be relevant for the purposes of section 376.

(b) Rights Protection Measures

The provisions, at sections 370-374 CRRA, suffer from the same shortcomings as those relating to rights management information, namely that the removal or interference with such measures is not actionable per se by the author or right holder, requires proof of infringement, and is subject to a strict knowledge requirement. A knowledge requirement may be necessary for a criminal conviction, but it ought not to be such a strict and detailed requirement for a civil suit. We suggest a provision along the following lines that:

(a) It shall be deemed to be an infringement of the copyright in a work to circumvent rights protection measures applied to the work for the purpose of controlling the authorisation of the use of the work, without the consent of the rightsholder.

(b) It shall be deemed to be an infringement of the copyright in a work to knowingly make available to the public a work, knowing that an act described in sub-section (a) has occurred.

(c) Notice and take-down procedures

There is one more improvement that can be made. Internet intermediaries vary greatly in their levels of response to a “notice and take down” application when a request is made to remove an infringing copy of a work. We are aware that the European Commission is exploring this issue, but meanwhile there is no reason why the domestic situation cannot be improved at a national level. Section 40(4) CRRA allows for Ministerial regulations concerning the form of the notice. We suggest that the Review Committee might propose an amendment to section 40(4) giving the Minister a more expansive role in relation to the making of Regulations and might in addition propose the making of a comprehensive set of Regulations to govern the procedure.

(35) Should the special position for photographs in section 51 (2) CRRA be retained?

It is imperative that this exclusion be retained. Many photographers derive licence income based upon it. If it were to be removed in combination with a broadening of the exception for reporting current events (“news marshalling”), it would be disastrous for photographers who work with the press. Their works would become free-for-all on the internet in a news context, without any way of addressing the problem.

(36) If so, should a similar exemption for photographs be provided for in any new copyright exceptions which might be introduced into Irish law on foot of the present Review?

Yes. See below.

(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?

We are aware that the current system of levies is under review by the European Commission and suggest that it is academic to debate the question until the Commission review is complete.

(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?

We believe there is a need for the equivalent of a Copyright Licensing authority of some kind for the resolution of the increasing range of disputes and potential disputes involving copyright licensing. The present jurisdiction of the Controller in this regard is inadequate. Ireland stands out as an exception in common law countries in lacking a copyright tribunal. An authority could be serviced by the Office of the Controller. It could take over the existing limited dispute resolution remit of the Controller and deal with the range of additional issues which either already exist or will shortly exist in response to developments in Europe, including oversight of codes of practice for CMOs; issues concerning multi-territory licensing; hearing claims regarding rights management information and technological protection measures (and the intervention mechanism to permit exercise of exceptions); possible licensing of orphan works (as for example occurs in Canada, by the Copyright Board). This might be an effective way of providing specialist expertise to the copyright community and keeping a range of disputes out of the court system.

(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?

See our replies above

(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?

We submit that this is something which can only be dealt with as a matter of European law.

(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?

Ditto.

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

Ditto.

(43) Does the definition of an 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?

Ditto.

(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?

Ditto.

(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?

We are emphatically opposed to the proposed provision described at paragraph 6.3. of the Consultation Paper. The question of linking is a complex one. It has been demonstrated in a number of cases in different European countries that whether or not linking constitutes copyright infringement depends on the particular circumstances of the case. For example in a case involving deep linking, the German Federal Supreme Court determined that a deep link constitutes an infringement of copyright for the reason that a technological measure had been employed. It was held to be irrelevant whether the technological measure was effective. It was sufficient that the fact of employing the measure demonstrated the will of the copyright owner to restrict the availability of the work¹.

As all searching activities are based on links, it is not a matter than can be treated as simplistically as the proposed provision suggests.

Photographs are particularly vulnerable to infringement by linking. It is therefore imperative that right holders are in a position to prohibit linking without express permission. There have been cases in European courts which demonstrate the necessity for this. For example, in French decision of the Cour d'Appel, Paris, ² it was determined that Google was not liable for communication to the public of images available through a Google image search as long as the right holder had not taken technical precautions to exclude his work from Google's indexing measures. Photographers must not be precluded from blocking links, when they choose to do so.

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

No. See reply to 45.

(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the

¹ Session-ID, GRUR, 2011,56

² RG No 08/13423, 26 January 2011

existing conduit, caching and hosting exceptions?

See reply above.

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

This is a question that is so broad as to be incapable of an answer in this context.

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

Yes. See below.

(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?

Of course the “news of the day” ought to be freely-available information. But this is not the same as saying that the investment made by newspapers in producing news content ought to be placed at the disposal of online news aggregators. The photographs of IPPA members are regularly “lifted” from bona fide news sites and re-used without remuneration on infringing sites.

The existing fair dealing exception allows a degree of leeway for users, and this can be supplemented by licences available from NLI. If the licences available fell short of what is required, there would be a case for a compulsory licence.

We are not sure what is meant by “and other content” but clearly all proposed exceptions to copyright would have to be examined on their individual merits.

(51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?

See our reply to (50)

(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions

We think not.

(53) If so, what exactly should it provide?

No comment.

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

We believe that shortcomings in the licensing framework pose problems. With better availability

of legal services, infringement would be curtailed and intermediaries' businesses models would be better served.

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

We are not in favour of this. It may promote uncertainty.

(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?**

(a) An exception for reproductions on paper would destroy the business model of our portrait photographers, who depend on licence income for the making of high quality reproductions on paper. We submit that any proposed exception should exclude artistic works.

(b) In so far as format shifting is concerned, we believe that any such exception should be closely defined and limited to the works for which it is generally appropriate, i.e., music and audiovisual works. Artistic works should be excluded.

(f) Any exception relating to use of a work during religious or official celebrations should exclude photographs. Clearly such events provide important earning opportunities for photographers.

(i) We are not opposed to a narrowly-drawn fair dealing exception for parody, but we are opposed to the addition of "caricature", "pastiche" and "satire" and adamantly opposed to "similar purposes".

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

The blunt addition of "education" in the manner proposed would do serious damage to the educational publishing industry, which derives secondary income from licensing to schools. Photographers benefit from this through their membership of IVARO, which receives a proportion of ICLA income for the inclusion of visual works in ICLA's licences.

Undoubtedly educational institutions would seek to avail of this to authorise all of their educational uses. It is moreover an inconsistent addition. “Research and private study” are intended to facilitate reasonable small-scale uses by individuals. Adding “education” brings into the frame all sorts of institutional uses and users, including commercial concerns. It is simply not a reasonable proposal.

We re-iterate a point made in our previous submission – that the exception for research and private study at section 50 must be confined to “non-commercial” research. It is manifest that the EUCD requires this. The UK has legislated to provide accordingly. We suggest that the Review Committee should draw attention to this point.

(58) Should the education exceptions extend to the:

- (a) provision of distance learning, and the**
- (b) utilisation of work available through the internet?**

(b) We would be adamantly opposed to such a broad exception legitimizing the use of anything found on the internet. It is an infringer’s charter and sends a very bad message to students.

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

No comment.

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

Concerning the proposal for a new exception for “user-generated content”, we submit this proposal encompasses **all** non-competing non-commercial derivatives, of **all** works in **all** media, irrespective of the type of use (other than that it must be non-commercial). We suggest that there is no provision in the EUCD by reference to which it can be justified.

(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?

No. We would point out this proposal becomes very problematic if the exceptions to copyright are also broadened as proposed in the Consultation Paper. A private copy exception, for example, when combined with the proposed provision, would undermine a number of existing business models based on licensing for private uses. Right holders must be able to define the terms on which their works are made available.

(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?

As a public policy, innovation is served rather than hampered by copyright law. Copyright stimulates the production of innovative material, by providing an incentive and a reward to the creator of innovative works. The withdrawal of this incentive would greatly harm the potential for innovation.

(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?

See our reply to Q.63. We submit that “innovation” is far too broad a concept to justify either exceptions to copyright or the provision of compulsory licences. The latter might be justified in a narrow range of circumstances where a certain use is demonstrably necessary in the public interest but voluntary licences are not available.

(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?

This is a broad question relating the circumstances in which compulsory licences are appropriate or permissible and outside the scope of this response.

(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?

No. The proposed exception would not meet the requirement of the “three-step test”. “Innovation” is far too broad a concept to qualify as “a special case”. It is also outside the parameters of the EUCD.

(67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?

We agree with this proposal, but not with the expansion of the definition of “heritage institutions” in the Consultation Paper. The exception should be available to designated libraries and archives only. It is not appropriate to regard all educational establishments as heritage institutions. They are plainly not established as keepers of our national heritage in the same way as, for example, our national cultural institutions. It is not appropriate that they be treated in the same way.

(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?

No. This activity is licensed. Exhibition catalogues are typically glossy publications for which a charge is made. The charge is largely justified by high quality images produced by photographers.

(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?

Subject to our comment above about the definition of heritage institutions, we do not object to this provision.

(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?

We have no objection to this, subject to our comment above relating to the definition of heritage institutions.

(71) How, if at all, should legal deposit obligations extend to digital publications?

No 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?

See our comments above concerning the Copyright Council. The orphan works issue is be a matter of government policy. The formulation of this policy will have to await the final form of the proposed Orphan Works 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?

We suggest that this proposal is well-meant but flawed. In the first place the definition of “fixation” at section 2 CRRA needs to be considered. To the extent that it includes a photograph as an embodiment of an image, it cannot be the case that the transfer of the physical object should be construed as including the copyright in the work.

(74) Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?

We are opposed to this proposal. It’s potential is uncertain.

(75) Should there be related exceptions to permit computer security assessments?

No comment.

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

As already explained in our initial submission, we are not in favour of a fair use exception. It is in any event a matter which cannot be settled at national level, but would require an alteration to the EUCD. We do not believe the Irish Government should advocate the adoption of US law in Europe. It is a matter for the European institutions to consider what exceptions are appropriate in a European context, and to devise these in a manner suited to European legal systems.

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

(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?

See reply to Q.77.

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

This question is academic. See our reply to Q 77

(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?

Ditto.

(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?

Ditto.

(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?

Ditto.

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

Ditto.

(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?

Ditto.

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

Yes.

(85) Should sections 15 to 18 of the European Communities (Directive 2000131/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?

No.

(86) What have we missed?

We would be delighted to receive any responses to any of these questions. It is not necessary for any submission to seek to answer all of them.

We commend the comprehensive work carried out by the Review Committee and look forward to receipt of its final report. We hope our submissions will help to inform the outcome.