Submission to
Department of Jobs, Enterprise & Innovation

Copyright Review 2011

1 This is a submission on behalf of the Irish Hotels Federation ("IHF") in response to the Department's consultation on the review of Ireland's copyright legislation.

2 We note that the main focus of the review is to identify any aspects of the Copyright & Related Rights Act 2000, as amended, (the "CRRA") that may be perceived to create barriers to innovation, to examine potential solutions to those barriers and to examine the potential applicability for Irish/EU copyright law of a US-style "fair use" doctrine.

3 We also note that the Department is interested in making recommendations for changes at EU level if this is considered appropriate or necessary.

4 This submission addresses issues of concern to the IHF in relation to any amendments to the CRRA which may be proposed by the DJEI following this review. The IHF recognises that the Department may take the opportunity (as part of any package of amendments proposed) to propose amendments to other provisions of the CRRA and/or may make recommendations for changes at EU level to other (non-review specific) copyright provisions.

5 Specifically, as the Department is aware, the IHF is concerned about the Irish Government's ability to maintain the clarification/exception currently contained in Section 97 of the CRRA, to the effect that it is not an infringement of the copyright in a sound recording, broadcast or cable programme to cause any of those works to be heard or viewed in hotel/guesthouse bedrooms.

6 The IHF maintains its consistently-held position that the exception/clarification contained in Section 97 is permissible under Directive 2006/115 and under Ireland's and the EU's obligations under international treaties (specifically, the Rome Convention, the TRIPS Agreement and the WIPO Treaty on Performances & Phonograms ("WPPT")).

7 We are aware that Ireland's ability to maintain the Section 97 exception/clarification has recently been thrown into doubt by the opinion of Advocate General Trstenjak in the case of *Phonographic Performance (Ireland) Limited –v- Ireland & Others*[1]. However, as the Department will be aware, it would be premature to consider deleting Section 97 from the CRRA in response to this opinion, not least because the Advocate General's opinion may not be followed by the ECJ, and of course to do so would be to concede Ireland's position in defence of the national proceedings at issue and would prejudice its defence of those proceedings.

8 The IHF supports Ireland's arguments in the PPI proceedings, i.e. (in summary):-

(a) the provisions of Directive 2006/115 are not required to be interpreted the same manner as the provisions of Directive 2001/29 (per the *SGAE* case[2]) insofar as the meaning and extent of the concept of "communication to the public" is concerned, and in fact can be interpreted more narrowly such that

[1] Case C-162/10, Opinion delivered on 29 June 2011.
[2] Case C-306/05, *SGAE –v- Rafael Hoteles SL*, ECJ Decision dated 7 December 2006.

the provision of equipment (e.g. television sets, record players) in the (ECJ acknowledged) private setting of the hotel bedroom by the hotel owner to enable programmes containing sound recordings to be viewed or to enable sound recordings to be played/heard, or the improvement of the emitted broadcast signal by the hotel owner by, e.g. use of an internal cable system in the hotel, does not constitute an act of communication to the public;

(b) the hotel owner is not a "user" of the sound recording for the purposes of attracting any royalty liability under Directive 2006/115;

(c) the concept of "single equitable remuneration" under Directive 2006/115 means that, in the case of television programmes, the performer and phonogram producer have already received this remuneration in the form of the payment to them by the broadcaster who emitted the broadcast containing the performance/sound recording in the first place, and the hotel/guesthouse owner should not be liable to make any further payment to the performer/phonogram producer; and

(d) Member States including Ireland are entitled to a wide discretion to determine the limits of the permissible exception of "private use" under Directive 2006/115, and this includes the ability to designate the hotel/guest bedroom as a private space and to determine that the provision of equipment in that private space to enable programmes containing sound recordings to be viewed or to enable sound recordings to be played/heard, or the improvement of the emitted broadcast signal by the hotel owner by, e.g. use of an internal cable system in the hotel, falls within the ambit of "private use".

9 The IHF would also add to the above arguments, as follows:-

(a) It is clear that the use of the equipment (TV set or equipment for playing/hearing sound recordings) by the hotel guest is not an infringement of copyright, because the hotel bedroom is so very evidently a private space, and this is acknowledged by the ECJ in the *SGAE* case.

(b) Insofar as the alleged provision of facilities by the hotel/guesthouse owner is concerned, and this being a "communication to the public" of the sound recording, the IHF submits (contrary to the Advocate General in the PPI case) these acts are not such as to open up a new audience for the works, thus somehow justifying the hotel's/guesthouse's activity as being an "indirect communication" to a new and previously "uncontemplated" public.

(c) This is clear from previous caselaw of the ECJ which examined the cable diffusion of broadcast signals resulting in the underlying television programmes being received in an area beyond that of the original broadcast: in *Procureur de Roi v Debauve*[3], the ECJ considered cable diffusion within

[3] C-52-79, (1982) 2CMLR 362.

Belgium in the context of free movement of services. At paragraph 19 of its judgment, it pointed out that *"the transmission of television signals by cable enables them to be diffused over a wider area and improves their penetration…"* It also ruled in its judgement in *Coditel v Ciné Vog*[4] that a copyright owner is entitled to enforce his copyright against the cable diffusion of a broadcast originating in another Member State. Were a copyright owner not able to prevent such an activity, it would result in the utilisation of the copyright work without remuneration outside the natural territory of the original broadcast.

(d) However, the same economic logic does not apply to the use of small-scale communal aerials (for example, those used in a hotel in order to improve a signal which is already receivable by the hotel (including in individual bedrooms of a hotel) or a communal aerial provided by the landlord on the roof of a block of leased flats). It would be possible, although inconvenient and expensive, for each hotel bedroom or flat to have its own aerial. It is extremely difficult to understand why the copyright owner should be regarded as having been adequately compensated for the reception of his works, in broadcasts received by one section of the population, namely persons living in detached houses or flats with individual aerials, but should be entitled to extra compensation because his work is listened to or viewed by people occupying hotel bedrooms or by those living in blocks of flats with communal aerials.

(e) The Rome Convention Intergovernmental Committee at its 12th Session (Geneva, 5 to 7 July 1989) adopted a report by committees of governmental experts setting out a number of principles (see Report at Appendix 1). Under "Cable distribution" it adopted:

> **"Principle AW26.** It does not amount to distribution by cable of the broadcast of the work concerned where the broadcast, received by an aerial larger than generally used for individual reception, is transmitted by cable to individual receiving sets within a limited area consisting of one and the same building of a group of neighbouring buildings, provided that the cable transmission originates in that area and is made without gainful intent."

(f) The case is obviously a fortiori when the communal system uses a normal size aerial. The notes indicate that the above principle (in common with other principles relating to cable distribution) were essentially unchanged from those adopted in 1983 by Committees of the Berne Union, the Universal Copyright Convention and the Rome Convention.

(g) The reference to "gainful intent" does not affect the ability of hotels to rely on the clarification expressed by Principle AW26. Any such aerial system would cost money to install and the contractor would need to be paid, and any recovery by the hotel or landlord of this charge in their charges to

[4] C-62/79, reported together with the *Debauve* case.

guests/lessees should not affect the availability of the clarification. Rather, we submit that the phrase is intended to exclude the case where cable diffusion is provided by an independent company as a service in its own right.

(h) We do not believe that this internationally agreed principle was drawn to the attention of the ECJ in the *SGAE* case, although the Court did implicitly recognise (in paragraph 42 of its judgment) that the provision of mere "technical means to ensure or improve reception in the catchment area" might not amount to a communication to the public. Likewise, it is not referred to in the Advocate General's recent opinion in the PPI case.

(i) The underlying logic of this argument is that it is necessary to identify a communication to the public which is distinct from the communication to the public effected by the original broadcaster: If what is being done is merely to provide technical assistance to the reception of the original broadcast by already-intended end-recipients of that broadcast, then we submit that there is no new intervening communication by a different organisation, merely an act of technical assistance to the communication made by the original broadcasting organisation.

(j) Having implicitly accepted that the provision of such "technical means" would not be, or at least might not be, sufficient to amount to infringement, it is not clear why the *SGAE* or *PPI* cases imply/find that the hotel's central antenna and cable system did not amount simply to such "technical means". Paragraph 42 of the *SGAE* judgment (which is relied upon by the Advocate General in the *PPI* case) states that the hotel *"intervenes in full knowledge of the consequences of its actions"*, and the last sentence of that paragraph states that *"in the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work*".

(k) However, it is not clear why it is said that the hotel guests could not "in principle" be able to enjoy the broadcast works. We submit that television sets could have been provided, at least in principle, with individual indoor aerials in which case no question would arise of any communication of the work by wire or wireless means other than that effected by the original broadcast. It is not clear whether the fact that the television sets themselves were provided by the hotel was itself the reason, or part of the reason, why the hotel was not merely providing "technical means".

(l) In addition, some confusion arises from both the *SGAE* case judgment and the Advocate General's opinion in the *PPI* case as to whether the relevant distribution of the signal is effected by the <u>television sets</u> installed in rooms or by the <u>cable system</u> which feeds the signal out from the central antenna. The formulation (i.e. the provision of televisions and/or radios in bedrooms to which broadcast signals are distributed) conflate the act of installation with the act of sending a signal by cable. Thus, the distribution is said to be "by means of television sets". Whilst this answer separates out the act of installing the sets from the act of communication, it unfortunately does not address the

fact that the signal is distributed by the hotel's cable system rather than by the television sets themselves, which are merely the devices converting the signal into intelligible form at the point of reception. It raises the question of whether or not the provision of the television sets by the hotel is determinative. We submit that it is not. By way of analogy, for example, we do not believe that a landlord of a rented apartment with a communal aerial would or should be liable for copyright infringement if it is a furnished flat and a television set is provided. (It is clear that he/she would not be so liable if the tenant provides his own television set.) Equally, in the case of the hotel bedroom, the hotel would not be liable if the guest uses their own portable television/other device in order to receive and watch/listen to a broadcast in the confines of their hotel room.

(m) The *SGAE* judgment and *PPI* Advocate General opinion both state or suggest that the communication to the private rooms of the hotel is to be considered in conjunction with the communication to the public areas, i.e. it is when one considers as a whole the communication to both public and private areas together that one reaches the overall conclusion that the communication is to "the public." But what of a hotel which has no television set in its public areas, as appears to be the position in the present case? We submit that the reasoning does not support extending the answer to a case where there is no parallel distribution to the public areas of the hotel. We believe that it is also relevant to note in this regard that the hotel has separately paid a royalty in respect of its use of television sets in the public areas of the hotel, on the basis that the works included in the broadcasts viewed/listened to via those television sets are accessible to all the public who enter the hotel, and not just to the hotel's private guests.

(n) In relation to the argument advance by *SGAE* and by the Advocate General in *PPI* that the communication to the hotel guests is *"made to a different public from the public at the original act of communication of the work is directed, that is, to a new public"*. However, this is difficult to appreciate. It is not an instance (as in the *Debauve* case) where a broadcast is made accessible in an area outside its natural footprint. It is not clear why a member of the public who watches his television set at home is part of the public contemplated by the broadcaster, but ceases to be part of that public because he stays overnight at a hotel and yet still watches television within the normal catchment area of the broadcaster. It is difficult to understand why someone watching a television programme at home in private should be part of the normal public for the broadcast but cease to be so when he watches the programme in private in a hotel room. This difficulty is compounded by the fact that if an indoor aerial were provided for the television set in each hotel room, then the occupants of the rooms could watch the broadcast without infringement. This would suggest that hotel room occupants are indeed part of the normal public to whom the broadcast is directed.

(o) There is no economic justification in terms of legitimate rewards for copyright owners if the Irish and European hotel industry is burdened with royalties on copyright works because they are played in hotel bedrooms, when no royalty would be due if they were played in a bedroom in house next door to the hotel. It is fair to say that copyright collecting societies will always ask for an extra slice of pie, but in this instance they are essentially seeking an extra reward for an exploitation of their members' works for which they have already been paid (by the original broadcaster, and by the hotel if television sets are made available in the public areas of the hotel.)

(p) In relation to the Advocate General's opinion in the *PPI* case that the provision of players for phonograms and the related phonograms in physical or digital form is also to be regarded as communicating those works to the public, this is inconsistent with long-held principles under Irish and European law that the mere provision of facilities for the use of copyright works does not, of itself, amount to an act within the control of the copyright owner.

10 If, however, the ECJ is minded to follow the Advocate General's opinion in the *PPI* case, and if as a result Ireland is required to delete or amend Section 97 of the CRRA, the IHF submits that the above issues merit consideration at a European level, and would ask that the Department consider making recommendations for changes to Directive 2006/115 so that the acts in question do not give rise to a copyright liability on the part of hotels/guesthouses. It is important to note that the European Commission supported a number of Ireland's arguments in the case, and it can be assumed that it would be open to considering such amendments.

11 In addition, it is interesting to note that the Commission argued in the *PPI* case, and the Advocate General accepted, that Member States have discretion as to the amount of equitable remuneration payable to performers and phonogram producers in these circumstances. As such, the IHF submits that it would be open to Ireland to prescribe the amount of equitable remuneration payable in these circumstances, rather than leaving it to the market to decide. Effectively the market will not necessarily achieve the best outcome, because one side (PPI) will have a much stronger bargaining position given that it will have been determined to have a right which must be satisfied (i.e. the right to equitable remuneration). In addition, if Ireland prescribes the payment, this may have the effect of limiting any damages which may be payable in the national proceedings.