



IRISH MUSIC RIGHTS ORGANISATION
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Re: Consultation on the Review of the Copyright and Related Rights Act 2000

Dear Members of the Copyright Review Committee

We refer to the Copyright Review Committee set up by the Minister for Enterprise, Jobs and Innovation, Richard Bruton TD, to examine the current copyright legislative framework in Ireland. The Irish Music Rights Organisation Limited ("IMRO"), The Mechanical Copyright Protection Society (Ireland) Limited ("MCPSI"), and the Irish Association of Songwriters, Authors and Composers ("IASCA") are jointly responding to the call for submissions by the Copyright Review Committee.

IMRO is a national organisation that administers the performing right in copyright music in Ireland on behalf of its members - who are songwriters, composers and music publishers - and on behalf of the songwriters, composers and music publishers of the international overseas societies that are affiliated to it. IMRO has over 7,000 members, represents in excess of 2.2m worldwide songwriters, composers and music publishers in Ireland, these in turn owing the copyright in more than 14 million musical works. IMRO's function is to collect and distribute royalties arising from the public performance of these copyright works. IMRO is a not-for-profit organisation and is a registered licensing body with the Controller under Section 175 of the Copyright and Related Rights Act 2000 (the "Act"). It is also a member of CISAC and GESAC, the respective worldwide and European collective society umbrella representative organisations.

MCPSI is an organisation which represents thousands 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, etc or made available for download via the internet, mobile phones and via other digital devices and services. MCPSI also license the use of its members' works in film, TV, radio, advertising, computer games and many other situations where music is used in conjunction with other media. MCPSI is also a registered licensing body with the Controller under Section 175 of the Copyright

Irish Music Rights Organisation Limited. Registered in Ireland Number 133321

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and Related Rights Act 2000 (the "Act").

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

Music copyright underpins the earning capacity of Irish songwriters authors and composers. It provides a means by which creativity can be sustained and rewarded and innovation is encouraged. Strong effective copyright protection is afforded to all those participating in the creative sector. Eurostat figures estimates there are up to 55,000 employed in the creative industries in Ireland. This amounts to 2.5% of the workforce. This employment depends directly on the economic returns delivered by strong copyright and intellectual property foundations. Other research quote higher employment numbers. Diluting copyright law places such jobs at risk and the ongoing lack of legislation and enforcement in the online environment is already causing job losses.

We note from the recent open forum that the Review Group would welcome evidence based submissions. The music industry is currently engaged in calculating the industry's contribution to Irish GDP. This will allow both the music industry and government to better understand the sector and to assess the likely impacts of any policy intervention. Such a process of impact assessment of proposed policy is widely used at EU level and should be adopted at national level also. The methodology of GDP measurement can be incorporated across the entire creative sector so that the economic benefits of all creators are clearly understood.

IMRO and MCPSI issues licences to those wishing to use copyright music in public including in the online or digital environment. As a result, we would like to make submissions for the purposes of the current review of the copyright legislative framework in Ireland, which are relevant to barriers to innovation, the "fair use" doctrine and other issues outlined in the terms of reference of the review. In particular, we would like to address the following issues:

- (i) The "fair use" doctrine; and
- (ii) The registration of licensing bodies under the Act and the procedure for referrals to the Controller in the case of licensing disputes.

As a member of the Collecting Societies Forum, IMRO and MCPSI have also contributed to its submission.

In addition, we note that IRMA, (the Irish Recorded Music Association), has made a submission to the Copyright Review Committee as part of the review on the issue of enforcement of copyright in the digital environment and particularly ISP liability for the copyright infringing acts of subscribers. We, acting on behalf of rightsholders and the creative industry in Ireland, welcome the Governments proposed amendment to the Copyright and Related Rights Act 2000, by means of a Statutory Instrument. Any review of copyright law must ensure that protections exist for the creators and innovators in the digital world and that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. This is a fundamental cornerstone of E.U. policy on Copyright and related rights in the information society and should be or must be central to any new strategy in Ireland to encourage and stimulate growth and innovation in the digital world.

(i) Fair Use Doctrine

The terms of reference for the review includes a specific reference to the Copyright Review Committee examining the US style "fair use" doctrine to see if it would be appropriate in the Irish and/or wider EU context. The "fair use" doctrine is considered to be a much more flexible approach to copyright exceptions. For the reasons outlined below, we do not consider it feasible to introduce it into Irish law nor do we consider it legally permissible to do so without amendment to Ireland's legal obligations at an International/EU level.

The very clear unambiguous language used in the Act and also in the UK equivalent, the Copyright Designs and Patents Act 1988, has meant that there are few, if any, cases in the area of fair dealing in Ireland and very little case law in the UK. This has the advantage of providing certainty for companies including start ups and SMEs and compares with the huge costs of litigating such cases in the US where the "fair use" doctrine originates. Because of this high cost of litigation, only large companies in the US have the resources necessary to bring such actions and clearly the "fair use" provisions can therefore not be relied upon by small enterprises or individuals, including the very start ups that this review is seeking to support, by removing barriers to innovation where possible. This is inherently unfair. Innovation, enterprise and creativity can mutually flourish if clear unambiguous fair dealing provisions remain in Ireland. This provides certainty for all concerned.

The "fair use" exception creates a lot of uncertainty. It is generally considered that the "fair use" doctrine's flexibility is grounded on its generality or vagueness and this means that the outcome of "fair use" cases in the US are unpredictable. This is the major drawback of implementing a "fair use" exception into Irish or EU law. It is inevitable that cases will have to come before the courts in Ireland for the foreseeable future in order for the confines of any new "fair use" exception to be worked out and, given the US experience, it is arguable whether or not a clear definition of what constitutes "fair use" will ever emerge. The exception would allow users a possibility of exploiting a copyright work without having to seek permission based on an untested perception that the "fair use" defence may apply to a particular case. This will lead to expensive and unnecessary litigation. We do not believe that this would benefit the music sector or contribute to innovation.

Introducing the "fair use" doctrine at an EU level would have very negative consequences, since courts all over the EU, with different legal traditions, would be ruling on all kinds of possible exceptions to copyright and quite possibly with different conclusions, the result being a completely disharmonized Single Market. We fail to see how this could possibly remove any barriers to innovation in the EU and would in fact create such a barrier. Additionally, the benefits of a quicker response to changes that may merit the application of a "fair use" exception would be offset by the fact that rulings would be subject to numerous appeals and that ultimately it would be up to the Court of Justice of the European Union to decide.

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.

It is also debateable if the US "fair use" exception is in compliance with international law under the Berne Convention and Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. Therefore, Ireland is not in

a position to effect such a change in the law.

To summarise, we believe that the adoption of a "fair use" exception into Irish law, or indeed EU law, is not desirable as it would create unnecessary uncertainty to both rightsholders and users of copyright material, particularly because of its roots in US case law developed over many years and the resultant high cost of litigation that would be necessary to elaborate on the true scope of the exception at a national or EU level. We also believe that there is a serious risk that the scope of the defence will deviate and potentially be interpreted differently across the various Member States of the EU. As a result, we consider that there will be no removal of barriers to innovation but potentially the opposite, with copyright law in the Single Market becoming fragmented. The considerable disadvantages that would occur in providing for a "fair use" exception in Irish law are too high a price to pay.

Finally, we note the result of the recent Hargreaves Review in the UK¹, which examined whether the introduction of a "fair use" exception would be of any benefit to the UK in helping foster innovation. That report concluded, inter alia, that the adoption of a US style "fair use" exception into UK law was not appropriate.

IMRO, MCPSI and IASCA are not in favour of the introduction of the "fair use" exception into Irish and/or EU law and believes that more than adequate provision for "fair dealing" is already contained with the Act.

(ii) The registration of licensing bodies under the Act and the procedure for referrals to the Controller in the case of licensing disputes.

IMRO and MCPSI submit in the interest of the review's rationale of promoting innovation, that the role, responsibilities and methodologies of the Controller are a relevant issue for examination. In order for IMRO and other licensing bodies to interact most effectively with prospective licensees, including potential start ups in the digital environment, amendments to some practical licensing, enforcement and administration challenges contained in the Act must be adopted. IMRO has a number of submissions in this regard, which are detailed below.

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 in the most efficient and seamless way possible with licensees, and to really innovate in the area of licensing by providing fast and effective processes in the case of dispute.

IMRO and MCPSI's submission is that the following pieces of copyright legislation are reviewed and amended:

Chapters 16 and 17 and Section 367 of the Act;
The Copyright and Related Rights (Register of Copyright Licensing Bodies) Regulations 2002; and

1. An Independent Report by Professor Ian Hargreaves May 2011 – Digital Opportunity A Review of Intellectual Property and Growth.

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

Our rationale in this regard is set out in detail below.

Publication requirements of licensing bodies under the Act.

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 may be a barrier to entry for some companies who will not countenance their commercial terms being made available to the public. These requirements are contained in Sections 175 and 177 of the Act and 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. Indeed, the Controller's more recent practice of publishing this information on the Patents Office website has exacerbated this problem.

We publish our general tariffs, which apply to shops, bars, cinemas etc. on our website, www.imro.ie. Such tariffs apply to the vast majority of similar users within well established business models. We do not have an issue with publishing such tariffs and will continue to do so. The difficulty arises where IMRO and MCPSI are dealing with large entities such as broadcasters, cable operators and online content providers and the serious concern that arises as commercially sensitive information has to be made public. This issue is also 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 of 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 exist in other EU countries. This cannot be useful 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 collecting societies are de facto monopolies, and are bound by competition law to ensure that similar licence terms for its repertoire are provided in similar circumstances unless there are objectively justifiable reasons for a deviation. IMRO therefore requests that this publication requirement be abolished as soon as possible.

In addition, the penalties for breaches of registration requirements 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.

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.

We also submit that the Department should ensure that the Office of the Controller is adequately resourced, in line with equivalent copyright tribunals in other jurisdictions. This would also improve the efficiency and speed of referrals under the Act going forward.

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 invites further submissions. **Rule 28** also grants the Controller with absolute discretion on time limits for the exchange of documents under such referrals. This has resulted 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 the 2003 referral mentioned above, the arbitrator appointed requested, within strict timeframes, an initial submission from both parties, than 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.

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 for IMRO 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.

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.

It is hoped that the legislative amendments proposed in this submission would be adopted and that the referral process under the Act would become more streamlined and cost effective with the resultant benefit to both the user and rightsholders. This, in IMRO's submission to the Copyright Review Committee, should be a mandatory procedure. In addition, 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, and foster 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 to be satisfied that the referrer is in full compliance with its licence. This includes

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 - prior to the Controller accepting the reference or continuing with it.

Conclusion

We believe that the practices and procedures under the Act relating to registration of licensing bodies and referrals to the Controller, which have been in operation for 11 years, require review on the above basis. For all service companies, from start ups and SMEs to large corporations, the ability to obtain copyright clearance through collective licensing bodies is beneficial. It allows companies to develop a variety of new business models. 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 Minister to adopt legislation as appropriate to effect such changes. This will bring about a more efficient and productive copyright clearance framework in Ireland, which will no doubt protect creativity and also promote and facilitate innovation.

IMRO, MCPSI and IASCA, would welcome the opportunity to meet with the Copyright Review Committee to discuss any of the above issues as necessary and intends in due course to submit a more considered response to the consultation paper issued by the Committee later this year.

Yours faithfully

for IRISH MUSIC RIGHTS ORGANISATION LIMITED



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Chief Executive

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