
Irish Review of Copyright Law

Copyright and Innovation *A Consultation Paper*

RESPONSE OF THE MOTION PICTURE ASSOCIATION



Motion Picture Association, Brussels
28 June 2012

Comments of the Motion Picture Association

The Motion Picture Association (MPA) is a trade association representing six major international producers and distributors of films, home entertainment and television programmes.¹ The MPA welcomes this opportunity to respond to the *Consultation Paper* of the Copyright Review Committee established by the Department of Jobs, Innovation and Enterprise, published on 29 February 2012.

Introduction

The structure of the film industry is and always has been based on two inextricably linked elements: technology and intellectual property. The industry deploys diverse technologies to produce valuable copyright works, which are exploited by licensing these works to a diverse supply chain that is itself constantly pushing the limits of new technology. The business of the audio-visual sector is the creation of intellectual property and the licensing of the rights residing therein.

The film industry is constantly seeking new ways to improve the consumer experience through novel offers using – and sometimes creating – the latest technology to enable it to do so in a sustainable way. A recent example is UltraViolet®, a Cloud-based licensing system that allows consumers to enjoy purchased content on multiple devices.²

The work of innovation is complex and expensive; the nature of new opportunities is difficult to predict. What is certain is that innovation in the copyright sector is ultimately sustained by the possibility of licensing content. As technology advances, the possibility of individual licensing transactions grows while the justification for third party intervention in market transactions and blanket licensing via levies or compulsory collective licensing diminishes. Growth and innovation will be compromised if the value of copyright is depreciated through the weakening or outright expropriation of exclusive rights protected by copyright. Such action would make it harder for rightholders to license content in new ways.

We respond to the questions raised in the *Consultation Paper*, on a chapter-by-chapter basis. Throughout, the Copyright and Related Rights Act 2000 is referred to as “CRRA.” Directive 2001/29/EC (the “Copyright Directive” or “the Information Society Directive”) is referred to as EUCD.

¹ MPA is a trade association representing the six major international producers and distributors of films, home entertainment and television programmes: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth century Fox Film Corporation, Universal City Studios LLC, Walt Disney Motion Pictures and Warner Bros Entertainment Inc.

² See <http://www.uvuu.com/>

Chapter 1 – Background

We note the statement in Chapter 1 of the *Consultation Paper* that the analysis of the Review Committee is directed towards outcomes that can confer a competitive advantage on the Irish economy. Conscious that many competitor nations are undertaking similar review processes, the Review Committee considers that the route to strategic advantage is “not only to match but where possible and appropriate from an innovation perspective, to exceed, any copyright reforms undertaken by those other countries.”

We understand the desire to seek strategic advantage to secure a benefit to the Irish economy. We disagree, however, with the manner in which it is sought to realise it, consisting primarily in a dramatic expansion of the exceptions to copyright. This may draw attention to Irish copyright law, but at what cost? In a 2012 Survey conducted by DKM Economic Consultants, it is estimated that:

- In 2011, the “core” copyright industries in Ireland comprised 8,600 enterprises.
- These enterprises engage 70,400 persons, of which 46,300 are full-time equivalents.
- These enterprises have a turnover of €18.85 billion and gross value added (GVA) of €4.6 billion.
- The direct economic contribution of these enterprises is equivalent to 2.93% of GDP.
- When indirect impacts across the economy are taken into account, the copyright industries represent a turnover of €11.50 billion, or 7.35% of total GDP, and the number of employed is estimated at 116,000, or 6.4% of total employment.

These established and proven industries are built on successful business models, in reliance on a stable copyright balance. As repeatedly mentioned in the *Consultation Paper*, there is little or no hard evidence to suggest that copyright law either over – or under – protects various interests. Yet the Committee, in the approach signalled by the *Consultation Paper*, considers placing this sector of the economy at risk by weakening the copyright framework on which it relies. We emphasise that *no economic evidence has been adduced to justify the benefit to the economy of making the changes proposed.*

The single biggest barrier to growth in this sector is infringement, especially online infringement. Little attention was given to enforcement issues in the *Consultation Paper*, possibly because of the parallel consultation on the then proposed Statutory Instrument to give effect to Article 8(3) EUCD. We express our strong support and appreciation for the Government’s action in enacting

the Statutory Instrument to bring its legislation into line with the EU norms. As that issue is now settled, we ask the Review Committee to pay particular attention to issues of enforcement raised in this round of consultation.

While Ireland can usefully compare this review process to that currently underway in the UK, it should be remembered that the debate occurs in the UK against a somewhat different background. Specific measures to address online copyright infringement were enacted in the Digital Economy Act 2010. This has survived a number of challenges, and is expected to be fully implemented by 2014. In the meantime, the UK Copyright and Related Rights Regulations 2003³ specifically implement Article 8(3) EUCD in section 97A of the UK Copyright, Designs and Patents Act 1988 (CDPA). This provision has been successfully used to ground injunctions to address two structurally infringing sites: the PirateBay and Newzbin2. A second point of difference is that Ireland already has a wider range of exceptions and limitations than exists under UK legislation. The current UK consultation is examining, inter alia, the application of fair dealing to sound recordings, films and broadcasts; the recording of broadcasts by social institutions, and a new exception for quotations – all of which are already exempt uses under the CRRA.

³ S.I. No.2498 of 2003

Chapter 2 – The Intersection of Innovation and Copyright

We suggest that the approach adopted by the *Consultation Paper* rests on a misconceived assumption about the relationship between innovation and copyright. Rather than acting as a barrier to innovation, copyright drives innovation. It enables the creator to control and thus to monetise his or her work. This provides both the incentive and the reward for innovation, and serves the public interest in ensuring the availability of innovative products and services.

| Question | Answer |
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| 1. Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review? | We agree with the focus, but we contest the evident assumption that changes to copyright law to serve business models reliant on free access to protected material will in fact result in a net benefit to entrepreneurship and innovation. |
| 2. Is there sufficient clarity about the basic principles of Irish copyright law in CRRRA and EUCD? | No. Copyright law in every jurisdiction is complex, as in many fields of regulation. This gives rise to the need for readily available information on copyright – especially for business users. Rightholders are committed to assisting in processes to support education on the value and operation of copyright. |
| 3. Should any amendments to CRRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRRA? | Yes. |
| 4. Is the classification of the submissions into six categories - (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions - appropriate? | The classification is not perfect. While the term “rights-holders” generally includes authors and related right holders (producers, performers and broadcasters), many rightholders from individual authors to independent film producers and performing artists to broadcasters are also entrepreneurs. Moreover, the term “users” is broad enough to include “heritage institutions.” Collecting societies tend to exercise rights on behalf of individual |

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| | rightholders either by operation of law and/or assignment of rights. In this sense they are rightholders or at least agents of rightholders. |
| 5. In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect? | See our comments above. |
| 6. What is the proper balance to be struck between the categories from the perspective of encouraging innovation? | The balance to be struck is not between categories of interest-groups which can overlap significantly, but instead between exclusive rights and exceptions to those rights. This balance is subject to EU and international norms. |

Chapter 3 – Copyright Council of Ireland

The Copyright Council

We are familiar with the work of Copyright Councils in the UK, Australia and New Zealand. As rightholder bodies, these perform useful functions in promoting copyright; conducting research; holding seminars and other educational events; producing publications and proposing policy to Government.

We are dubious, however, that the governance model proposed in the *Consultation Paper* could succeed in delivering the range of functions described. A number of the roles attributed to the Council in the Paper involve balancing different vested interests. There is no precedent body of which we are aware that attempts to reconcile the diverse and competing interests of copyright stakeholders in this way.

The roles attributed to the proposed Council include the establishment of policy on certain matters and lobbying the EU in relation to specific issues.⁴ We suggest that copyright policy is the strict preserve of Government. Intellectual property is a property right, enshrined in the European Convention on Human Rights and the European Charter on Fundamental Rights and Freedoms. It is not appropriate for Government to abdicate any aspect of policy-making relating to such a right.

A Licensing Authority

This chapter mentions a number of issues concerning collective management of rights. Collective management has a very limited role in relation to audio-visual works. Our members license their works by individual, direct licensing, and do not (except in the case of cable retransmission) collect royalties through collecting societies. There is therefore little scope for disputes coming within the remit of the Controller of Patents, Designs and Trade Marks, as described at section 362 CRRA.

We are, however, aware that Ireland is unusual in not having an independent Copyright Tribunal to adjudicate licensing disputes. The Controller fulfils a dual role as head of the Intellectual Property Unit of the Department of Jobs Enterprise and Innovation, responsible for policy, and this appears inappropriate. The determinations of the Controller are not published. We note the comment in *Intellectual Property Law in Ireland*⁵ to the effect that [the dispute resolution jurisdiction of the Controller] is “not working transparently at the present time”, and that “it is submitted that the current situation is entirely unsatisfactory and raises grave doubts about whether Irish law meets the requirements of Article 49 of TRIPS and the need for administrative procedures to meet certain standards in respect of the costs and speediness of remedies.”

⁴ For example, in relation to issues concerning the liability privileges in Articles 12-15 of the E-Commerce Directive, and lobbying the European Commission for change – see para. 6.2.

⁵ Clark, Smith & Hall, *Intellectual Property Law in Ireland*, (Bloomsbury, Dublin, 2010), paras 15.53 and 15.55.

Licensing claims are becoming increasingly complex, as licensing moves into digital uses and online dissemination. See, for example, the recent determination by the UK Copyright Tribunal in the case of *Meltwater Holding BV v. NLA*⁶, involving the need for Web Database Licenses and Web End-Users Licenses.

The European Commission is shortly to publish the text of a Proposal for a Directive on Collective Management. This is expected to impose duties on CMOs relating to transparency, accountability and governance. We are hopeful that this directive will help to reduce any complexity in mass licensing undertaken by collecting societies.

We believe that it would be timely to establish an independent Copyright Licensing Tribunal or Authority with a remit which will enable it to play an effective and transparent role in the resolution of licensing disputes as well as assisting in the delivery of the aims of the forthcoming Directive on CMOs. However, the Irish Government may be well advised to wait until the Directive is adopted before taking other steps in this area.

Digital Copyright Exchange

The MPA has responded to the proposal to establish a Digital Copyright Exchange in the UK by confirming its support for a voluntary digital exchange, as long as it takes account of the limits of its applicability to audio-visual content. It seems premature to consider establishing an Irish exchange. We suggest it is preferable to await the outcome of the research being done by Richard Hooper, who is due to the report to the UK Government at the end of July, as well as the publication of the awaited Proposal for a Directive on CMOs, which is expected to contain provisions designed to facilitate cross-border licensing in the music sector. We understand that the Irish collecting societies are in the meantime exploring enhanced forms of cooperation on a communal national licensing portal, and we strongly support this development.

Alternative Dispute Resolution

We welcome the proposal to introduce an ADR system for the resolution of copyright disputes. This would need to be provided within an independent trusted framework. One option is for the Patents Office to provide the type of basic service made available through the IPO in the UK. There is no reason why this cannot be available for all types of intellectual property dispute amenable to mediation.

Small Claims Track in the Irish Courts' System

Many small businesses are deterred from bringing copyright claims, or defending them, because of legal costs and delays in the court system. Lack of access to an efficient low-cost remedy affects the perception of risk and thus impacts on innovation. We welcome the proposals in the

⁶ Decision dated 15 May 2012 available at <http://www.ipo.gov.uk/ct11409-final-150212.pdf>

Consultation relating to the provision of a small claims jurisdiction in the lower courts.

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| 7. Should a Copyright Council of Ireland (Council) be established? | We see the benefit of a Council established along similar lines to existing Councils in the UK, Australia and New Zealand. |
| 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? | It should be a non-profit entity. |
| 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? | While generally such bodies are comprised of rightholders, there should be an opportunity for other interest groups to participate. |
| 10. What should the composition of its Board be? | No comment. |
| 11. What should its principal objects and its primary functions be? | No comment. |
| 12. Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)? | Our response to the UK Consultation on a Digital Copyright Exchange was to confirm our support for a voluntary digital exchange which takes account of the limitations to its applicability for audio-visual content. |
| 13. What other practical and legislative changes are necessary to Irish copyright licensing under CRRA? | A more open and effective system of dealing with licensing disputes. |
| 14. Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)? | This would likely be a more appropriate role for a separate body. We suggest above that it might be established under the auspices of the Office of the Controller of Patents. |

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| 15. How much of this Council/Exchange/ ADR Service architecture should be legislatively prescribed? | Not applicable. |
| 16. 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? | It seems appropriate that the role of the Controller and the name of his Office be reviewed to ensure that the Office delivers a service which is at least equivalent to that delivered by IPOs in other countries, and that the name of the Office is an appropriate reflection of its role. |
| 17. Should the statutory licence in section 38 CRR be amended to cover categories of work other than "sound recordings"? | It is only justifiable to introduce compulsory licences in circumstances where they are not circumscribed by European and international law. This is typically in areas where individual exercise of rights is impossible or highly impracticable. There is no case made out in the <i>Consultation Paper</i> that such circumstances exist in relation to categories of work other than sound recordings. |
| 18. Furthermore, what should the inter-relationship between the Controller and the ADR Service be? | No comment. |
| 19. 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? | There is undoubtedly a case for such a jurisdiction. Evidence in the UK demonstrates that many claims are not pursued for the reason that litigation is disproportionately costly in cases of low monetary value. |
| 20. 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? | We are generally supportive of specialised IP tribunals but make no comment on the extent to which legislative change is required. |
| 21. Whatever the answer to | No comment |

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| <p>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?</p> | |
| <p>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?</p> | <p>No comment</p> |
| <p>Note: While they do not form part of the numbered questions, submissions are invited in this chapter in relation to certain additional matters. In relation to these:</p> <p>22A. Registration of foreign collecting societies in Ireland to collect cross-border royalties</p> <p>22B. Publication of royalty charges.</p> <p>22C. Windfall income.</p> | <p>While this a matter may be partially addressed by the EU framework for cross-border licensing for music, to be incorporated in the forthcoming Proposal for a Directive on collective management, we note that EU rules on freedom of establishment must be fully respected.</p> <p>The same applies, in that it is expected that standards of transparency for CMOs will be prescribed.</p> <p>A provision which allows for the <i>post hoc</i> renegotiation of a contract would be extremely problematic for the audio-visual industry. Film production depends on the concentration in the hands of the producer of all rights necessary for the exploitation of the work in all appropriate media. The producer bears all of the financial risk. Contract</p> |

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| | <p>practices are well established, having evolved over time, often as a result of negotiation with trade unions or guilds, which include subsequent payments (aka residuals) for secondary exploitations. Their terms must be precise and conclusive.</p> <p>In fact, the “bestseller” clause in German law has not been successful. It was necessary for the claiming author to prove that the remuneration he received was less than 50% of the average remuneration paid for comparable uses. When that proved impossible, the provision was altered so that it is now linked to the concept of “fair remuneration.” However, there is still an intractable problem in that there is no binding point of reference for the meaning of “fair” remuneration. In our experience, legislative intervention to regulate arms-length negotiations in the marketplace are rarely successful.</p> |
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Chapter 4 – Rightholders

Shifting the Copyright Balance

Several important issues are raised in this chapter. The first concerns the “delicate and proportionate balance between the monopoly afforded to the rights-holder and the potential to undercut diversity by preventing further developments based on the original work.”⁷ Irish copyright law since 2000 has been well-regarded, as being stable and appropriately balanced. The only fundamental deficiency to have been exposed in litigation was that relating to the implementation of Article 8(3) EUCD, which has been addressed by Government.⁸

We accept that it is timely to review the legislation, and that the review is uncovering shortcomings in the copyright infrastructure as well as the need for some minor alterations to the CRRA. While we do not oppose the introduction of balanced exceptions, we note that neither of these things signals anything inherently wrong with the existing copyright balance. There is no evident need for action to prevent rightholders from “undercutting diversity” – indeed copyright is the engine of diversity.

While powerful Internet and IT giants have lobbied, in Ireland and elsewhere, for the introduction of a US-style “fair use” defence and other sweeping changes to European copyright laws, it is relevant that a wide range of major international Internet and IT companies have not been deterred by restrictive copyright law from locating their European headquarters in Ireland. The notion that Irish or EU copyright law is somehow hostile to growth on the Internet is simply wrong – some of these companies are even more successful in Europe than they are in the US.

The proposals of the *Consultation Paper*, taken as a whole, *would* represent a significant shift in the balance of copyright. Leaving aside the point that a number of the proposals exceed what is permitted under both international and European law, we suggest that this would be a risky strategy for the Irish Government. Copyright is currently highly vulnerable to online infringement. To adopt a policy of adopting the maximum possible expansion of free uses of protected material will send entirely the wrong message at this time. It is likely to be interpreted as a victory for those who, rather than take a licence, seek to have the law altered to legitimise their existing infringements. The Government will be perceived as being willing to bend its legislation for this purpose. This will not be favourable to Ireland’s international reputation and its ability to attract investment and to create jobs in the creative sector.

⁷ Para.4.3, page 35 of the *Consultation Paper*

⁸ Another shortcoming was exposed by the decision of the CJEU on 15 March 2012 in the case of *Phonographic Performance (Ireland) Ltd v. Ireland and the Attorney General*, determining that a hotel operator is not exempt from the need to pay equitable remuneration for broadcasts of music in hotel bedrooms. This clearly gives rise to the need to revoke or amend s. 97 CRRA.

Remedies

The *Consultation Paper*⁹ agrees that if remedies are inadequate, this can be a deterrent to innovation, but it maintains there was insufficient evidence in the submissions that this is the case.

We made the point in our earlier submission, but reiterate here, that the remedies in the CRRA relating to technological measures and rights management information are not adequate.

(a) Technological measures

Article 6(1) EUCD obliges EU Member States to provide “adequate legal protection” against the circumvention of any effective technological measures, such as access or copy controls, applied to protected works to restrict unauthorised use of the works.

In making film available online through various services, the film industry depends heavily on the security of technological measures. Unlike music, filmed content has always been made available subject to content protection. The video-cassette was typically protected by Macrovision anti-copying technology, and the DVD by the Content Scrambling System. Blu-ray and Pay TV are protected by more advanced systems. Content protection measures are becoming ever more important to the construction of viable online markets in content.

The EUCD recognises the need for effective protection measures in the online environment. Recital 53 states that:

“The protection of technological measures should ensure a secure environment for the provision of inter-active on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) [the “intervention mechanism”] should not apply. Non-interactive forms of online use should remain subject to those provisions”

The Motion Picture Association submits that the CRRA provisions relating to rights protection measures, contained at sections 370 – 374 CRRA, do not constitute “adequate legal protection” against the circumvention of technological measures, and do not therefore meet the standard required by the EUCD. Specifically:

- There is no prohibition of the act of circumvention. The act of circumvention should be an offence. It is not.

⁹ Para. 4.9.

- There is no remedy for the right owner. The act of circumvention should be actionable at the suit of the right holder. It is not.¹⁰
- The remedies should be capable of being invoked when the technological measures have been circumvented independently of any underlying infringement of copyright.
- It should be clear that Article 6(4)(4) operates regardless of the treatment of any contractual override in the CRRA.

(b) Rights management information

Recital 55 states that:

“Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, inter alia, their authorisation when putting works or other subject-matter on networks.”

In pursuit of this objective, Article 7 EUCD obliges Member States to provide for “adequate legal protection” against any person knowingly performing without authority acts consisting of the removal or alteration of any electronic rights management information, or the distribution, importation, broadcasting, communication or making available to the public of works or other subject matter from which electronic rights management information has been removed or altered without authorisation.

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.”

This remedy is useless to right owners. It has a daunting knowledge requirement. Even if the knowledge hurdle could be overcome, it is simply not possible to sufficiently interest An Garda Síochána in an issue such as this, so as to bring a prosecution.

The second remedy is the indirect remedy provided by section 375. This is a remedy 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

¹⁰ Walter and von Lewinski (European Copyright Law – A Commentary, OUP 2010) state “given the purpose of protection under Article 6, the owners of rights protected by the technological measures....should be considered as beneficiaries of this protection” – para. 11.6.7.

respect of infringement. The difficulties here are the same as those which afflict the remedy for technological protection measures – the RMI is not protected in its own right; there is no remedy for the right holder, and the remedy depends on there being an infringement.

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.

The provisions relating to RMI are infringed on a huge scale. Metadata identifying the authorship of works and in some cases the licensing terms on which they are made available are routinely removed from works placed online, including by social media sites.

The MPA urges the Copyright Review Committee to recommend enhancement of the provisions, so as to discharge Ireland’s obligation under Article 7 of the Directive and so as to provide right owners with an effective level of protection.

Solutions Adopted in Other EU Countries

Articles 6 and 7 EUCD have been transposed in a variety of EU Member States in a manner which makes circumvention of technological measures and removal of rights management information actionable *per se*, with a remedy for the right holder.

In Austria, for example, by virtue of section 90 of the Copyright Act, any person who claims exclusive rights under the copyright law and who uses effective technological measures to prevent or restrict the infringement of his rights may apply for a cease and desist order, inter alia if these measures are circumvented by a person knowing, or with reasonable grounds to know that he or she is pursuing that objective.¹¹ The same remedy is accorded to the copyright owner for removal of rights management information.¹²

In Denmark, section 75c of the Copyright Act provides that: “It is not permitted to circumvent effective technological measures without the consent of the right holder.” Section 75e provides that “It is not permitted without the consent of the rightholder to (i) remove or alter any electronic rights management information....” In both instances, remedies include damages in civil cases, and fines.¹³

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| 23. Is there any economic evidence that the basic structures of current Irish | We are not aware of any. The contrary appears to be the case. Under the current regime, the creative industries, internet intermediaries and users co-exist |
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¹¹ See Ed Lindner and Shapiro, *Copyright in the Information Society*, (2011, Edward Elgar), chapter by Florian Philipitsch, p.74.

¹² *Ibid.*, p.77.

¹³ *Op. cit.*, p.172, chapter by Peter Schonning.

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| <p>copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?</p> | <p>under a piece of legislation which may have some minor problems but no significant flaws. Such problems as are evident from the review process appear to consist of poor understanding of copyright, under-developed licensing and inadequate dispute-resolution systems. These are issues that can be addressed without shifting the copyright balance.</p> |
| <p>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?</p> | <p>See reply to 23.</p> |
| <p>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?</p> | <p>For audio-visual producers, copyright is the indispensable tool on which the financing, production and distribution of AV works is based. Rightholders generally have seen their incomes put under considerable pressure from online infringement. They are investing to adapt their business models to the online environment. In some cases this investment is not readily recoverable. The result – in many cases – is “under-compensation” for the cost of generation of content.</p> |
| <p>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?</p> | <p>No. The meaning of “originality” is being developed, and effectively harmonised by decisions of the Court of Justice of the EU. Ireland must remain open to these developments.¹⁴</p> |
| <p>27. Should the sound track accompanying a film be treated as part of that film?</p> | <p>Yes. There is no value in according a separate copyright to the soundtrack. It would also marginally facilitate co-productions, as the rule in the US and the UK is that the sounds accompanying a film enjoy a unitary copyright along with the images comprised by the film.</p> |

¹⁴ See, for example, the *Painer* and *Football Dataco* judgments of the CJEU, respectively cases C-145/10 and C-604/10

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| <p>28. Should section 24(1) CRRRA be amended to remove an unintended perpetual copyright in certain unpublished works?</p> | <p>Yes. The term of protection should be co-terminous with that which applies to published works.</p> |
| <p>29. Should the definition of "broadcast" in section 2 CRRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?</p> | <p>We are opposed to this idea. In Section 183(a) of the Broadcasting Act 2009, the legislature carefully distinguished the definition of broadcast for copyright purposes from that for the other purposes of the 2009 Act. The result of the proposal to alter this recent provision would be to bring within the broadcasting right everything disseminated by way of an "electronic communications network", including satellite, cable, fixed terrestrial networks, Internet, mobile networks and so forth. We are reassured to note that the <i>Consultation Paper</i> acknowledges, at par. 4.12, that this "would have significant consequences for many of the balances struck for CRRRA" and that "there do not seem to be any strong innovation arguments for making the definition of "broadcast" platform neutral in this way.</p> |
| <p>30. Are any other changes necessary to make CRRRA platform-neutral, medium-neutral or technology-neutral?</p> | <p>Every proposal to make an alteration to the provisions of the CRRRA for reasons of platform, medium or technology neutrality must be considered on its own individual merits.</p> |
| <p>31. Should sections 103 and 251 CRRRA 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?</p> | <p>These sections ought to be removed. They were based on s.52 of the Copyright Act 1963. The purpose was to permit cable retransmission of broadcasts to remote areas which could not at the time receive broadcasts. They are no longer required. We are adamantly opposed to extending them to web-based streaming.</p> |
| <p>32. Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions</p> | <p>Yes. See below.</p> |

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| or graduating civil sanctions) to support innovation? | |
| 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 | Anything which will promote growth in the availability of legal services will lead to greater levels of compliance in the online market. In particular, standards for sophisticated content management cannot be implemented without robust protection for DRM. Best possible protection for TPMs and RMI – and effective means of addressing breaches of that protection - results in greater security for creators and legal choices for consumers and for this reason promotes innovation. Existing protection for TPMs and RMI under the CRRA is not adequate. See our further comments, above. |
| 34. How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur? | No comment. |
| 35. Should the special position for photographs in section 51 (2) CRRA be retained? | No comment. |
| 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? | No comment. |
| 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? | Ireland has two limited private copying allowances – for fair dealing for private study, and for time-shifting of broadcasts and cable programmes. If, as is proposed in chapter 7 of the <i>Consultation Paper</i> , additional exceptions are to be introduced for private use, the question of compensation must |

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| | <p>arise. Following the decision of the CJEU in the case of <i>Padawan SL v. SGAE</i>,¹⁵ the European Commission has embarked on a process of review of private copying levies. It appears logical for Ireland to await the outcome of this process and meanwhile to refrain from extending the existing exceptions for private copying in a manner which would cause harm to rightholders and give rise to the need for compensation.</p> |
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¹⁵ *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*, Case C-467/08.

Chapter 5 – Collecting Societies

Audio-visual producers license cinemas, DVD distributors, online platforms and broadcasters directly. This facilitates greater efficiency and lower costs. It promotes collaboration on the development of new technology to support further advances in licensing.

Our members are, however, concerned with the deficiencies in the wider licensing framework and we support the work of the European Commission in attempting to address both issues of governance of CMOs and possible solutions to the problems associated with multi-territory licensing of music.

Both users and members of the societies would benefit from improvements in the functioning of collecting societies. It is not clear that there is a significant problem in Ireland (save that licensing is in general less developed than, for example, in the UK), but based on experience in other EU Member States, we submit that there should be minimum audit standards required of CMOs, as well as requirements for publishing (to members) transparent information about amounts collected, costs and fees deducted from collections, how distribution keys/procedures are set. These standards would benefit rightholders, so long as CMOs were regulated to make sure they were accountable to both users and right holder members.

We urge the Review Committee to recommend prioritising developments which will promote the development of licensing. We support the proposals of the Collecting Societies' Forum to collaborate on a communal national portal for licensing. As suggested in Chapter 3, we believe that the establishment of a statutory licensing tribunal or authority would also represent a positive contribution to the licensing framework in Ireland.

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| 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? | Our response to this question is given at Chapter 3. |
| 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? | Our response to this question is given at Chapter 3. |

Chapter 6 – Intermediaries

The EUCD grants to authors rights of reproduction and communication to the public, which may be subject to certain limitations, such as that for temporary copies. Directive 2000/31/EC on electronic commerce provides liability privileges for three categories of online activities: hosting, caching and mere conduit provision. As a result, it limits the potential for civil, including in particular damages, and criminal liability of internet intermediaries. The liability provisions were transposed into Irish law by Statutory Instrument 68/2003.¹⁶ In addition, a “notice and take-down” provision was inserted at section 40(4) CRRA. Article 8(3) EUCD provides for the grant of injunctions against intermediaries to terminate or prevent an infringement. It operates independently from the intermediaries’ potential liability for underlying copyright infringement on their sites or networks.

Central questions involving intermediaries concern hyperlinks, information location tools and content aggregation. The Review Committee grapples with these questions in the *Consultation Paper*, and specifically with the question whether amendments should be made to the CRRA to clarify legal liability for infringement.

Hyperlinking and Information Location Tools

In so far as the EUCD is concerned, there is a broad view that simple hyperlinks provided by search results leading to information on other websites do not infringe the *reproduction right*. The link is seen as simply enabling a reproduction by the person activating the link. In so far as the *making available right* is concerned, the situation is different. The question depends on the circumstances, and the specific activities of the service provider. A service provider such as Google, for example, is not merely a search engine in the most basic sense. It provides a news service, an image bank, translation services, streaming of videos on Google Video, and it has scanned many millions of books to provide an online library. Clearly all of these activities cannot be evaluated equally for copyright purposes.

European courts have come to different conclusions in different cases. Relevant factors have included whether the right owner had made the work freely available on his website; whether the use of the hyperlink involved circumventing a technological protection measure; whether search results linked to content which had been uploaded lawfully or unlawfully. In a judgment of April 2010, the German Federal Supreme Court found that Google was not liable for the reproduction of images and the making available of them as “thumbnails” notwithstanding that the images had been reproduced and made available by Google, because the right holder had recourse to search engine optimisation and had published the images without technological protection. The court took the view that there was implicit consent¹⁷.

¹⁶S.I. No.68 of 2003 - The European Communities (Directive 2000/31/EC) Regulations 2003.

¹⁷ *BCH*, Judgment of 29 April 2010 – 1 ZR 69/08 – Vorschaubilder.

In a case involving deep linking, the German Federal Supreme Court has also ruled that a deep link constituted an infringement of the making available right if the respective content was protected by any kind of technological measure. Under such circumstances, it was irrelevant whether the technological measure was effective, as the fact of employing the technological measure expressed the will of the rightholder to make the work publicly accessible only when the technological measure was applied.¹⁸

The variety of the decisions demonstrates that there is not a single answer to the question whether the linking incurs liability for breach of copyright.

The same situation pertains in relation to the application of the liability privileges for mere conduit, caching and hosting activities in the E-Commerce Directive. For example, in a judgment of 23 March 2010, the CJEU considered an internet referencing service as an information society service which could benefit from the liability privilege for hosting providers as long as the service had not played an active role with regard to data entered in its system by advertisers and stored in the memory of its server.¹⁹ In a Paris Court of Appeal case concerning Google “thumbnails”, the Court arrived at a similar conclusion to that in the German thumbnails case. It held that Google was not liable as long as the right owner had not taken technical measures to exclude his work from Google indexing measures. It examined the question whether Google had played an active or a neutral role and concluded that the role was neutral and therefore benefited from the liability privilege for caching.²⁰ The cases clearly demonstrate that whether linking does or does not give rise to infringement, and the extent to which search engines can benefit from the liability privileges of the E-Commerce Directive depend on the circumstances of the case, the nature of the service in question and the role played by the intermediary in question.

A small number of EU Member States, including Austria, Hungary, Portugal and Spain, have introduced specific provisions concerning liability for hyperlinks and information location tools. The UK Government conducted a consultation in 2006 to establish whether there was a need to extend the liability privilege regime to providers of these specific services.

The consultation established that there was no substantial evidence to support the case for change. It made a number of relevant points:

- It would be undesirable from a policy perspective to create exceptions from liability that would shelter businesses that seek to profit from mass copyright infringements;
- The technology supporting information society services has moved on considerably with the effect of it becoming increasingly difficult to draw distinctions between the

¹⁸ Session-ID, GRUR 2011, 56.

¹⁹ Cour d’Appel, Paris, Judgment of 26 January 2011, RG No 08/13423

²⁰ Consultation document on the Electronic Commerce Directive: the liability of hyperlinkers, location tool services and content aggregators: DTI Government response and summary of responses, December 2006

various categories of service provider;

- There are disadvantages in Member States individually extending the imitations of liability as this hinders the development of any uniform approach, and that “It would be much better for the European Commission....to propose such additional liability imitations that would, after negotiations, be uniformly transposed into the national laws of all Member States.”

We urge the Review Committee to take note of these arguments. It can be seen that the points made in the UK Government Report reflect accurately the picture which emerges from the caselaw. It should be recalled as well that the E-Commerce Directive liability privileges are of course horizontal measures relating to all kinds of illegal conduct.

The comments made at paragraph 6.3 of the *Consultation Paper* and the proposal for a simple new provision stating that “it will not be an infringement of the copyright to provide a link on a page on the internet which connects to a work elsewhere on the internet” do not take account of the complexity and diversity of the cases on the issue. The acts of reproduction and making available are conflated. The provision sets up a conflict with the liability privileges in the E-Commerce Regulations. It obscures the fact that the act of linking cannot be evaluated in isolation from the services it facilitates and the role of an intermediary in providing those services. The provision would be a convenient refuge for structurally infringing services.²¹

It is our understanding that the European Commission does not intend to reopen the E-Commerce Directive but instead is looking at notice and action procedures. The nuances of secondary liability are still being worked out by – and are best left to – the courts.

News Marshalling

The *Consultation Paper* makes the point that websites which marshal news from various sources represent an important emerging online business model. The services they offer vary widely – the range includes indexing, syndication, aggregation and curation. Clearly the copyright implications differ, depending on the nature of the service provided. Equally, the question whether the service will benefit from the E-Commerce Directive liability privileges will depend on the facts of the case. Caselaw across the EU already provides significant guidance in this respect.

Although there is no question concerning it at the end of the chapter, the *Consultation Paper* proposes to extend section 51(2) CRRRA – fair dealing for reporting current events – to combine the existing section with the provisions of Article 5(3)(c) EUCD. We have an issue with the draft proposal. It selectively omits the limiting phrase used in both Article 10*bis* of the Berne Convention and Article 5(3)(c) EUCD “to the extent justified by the informatory purpose”. This phrase is of key importance. It cannot be omitted.

²¹ This occurred in Spain, where hyperlinking and content tool locators were included in the liability regime for hosting. The manner in which this was done enabled operators linking to illegal content on P2P networks to be exempt from liability, seriously hampering the ability of right holders to address internet piracy.

The *Consultation Paper* also raises the possibility of making a broader allowance for content aggregation services.

This question was also investigated by the Department of Trade and Industry in the UK, as part of the 2006 consultation referred to above. Having looked at both sides of the argument for and against an extension of liability limitation to providers of content aggregation services, the UK Government's view was that there was no substantial evidence to support the case for such an extension, and that the question of amendment of Articles 12-14 of the Electronic Commerce Directive was a matter for the European Commission.

The *Consultation Paper* refers to the concepts of "substantial" and "incidental" taking, but concludes that there is probably insufficient leeway in these concepts to protect many (even most) content aggregation websites. We agree. These concepts now have to be viewed in the light of the *Infopaq*²² decision.

The Paper debates other possibilities, which range from licensing to the addition of a specific marshalling exception to the existing conduit, caching and hosting exceptions and the adoption of a fair use doctrine or something akin to it.

We submit that the key question here is the availability of licences. If there was a compelling case that the dissemination of news was being inhibited by the lack of available licences for reasons of impossibility or impracticability, there might be some justification for government intervention subject of course to applicable EU and international norms. However, we do not believe that there is a compelling case, but rather that emerging news aggregators are unwilling to take the licences available from NLI and other sources.

The European Commission published the Communication "A coherent framework for building trust in the Digital Single Market for e-commerce and online services" in January 2012. As noted above, it states definitively that a revision of the Directive is not required at this stage, but that it is, however, necessary to improve its implementation, and proposes to set up a horizontal European framework for notice and action procedures.

We suggest that the most appropriate course for the Review Committee is to refrain from recommending unilateral amendment of Irish law relating to hyperlinking, information location tools and content aggregation and to await such development as may emerge from the process in Europe.

Finally, we note that, at paragraph 6.2 of the *Consultation Paper*, submissions are invited on a proposed alteration to section 87, relating to "transient and incidental uses," although again no question is asked in relation to the point at the end of the chapter.

²² *Infopaq International A/S v. Danske Dagblades Forening* (Case C-5/08).

We oppose the proposed amendment. The exception at Article 5(1) EUCD is specifically confined by its terms to the reproduction right. The broad extension of the exception to any “communication which is permitted by this Act” is neither permissible within the framework of the EUCD, nor required, as suggested, to bring the exception into line with the *FA Premier League* ruling by the Court of Justice of the EU.

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| <p>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?</p> | <p>The validity and usefulness of in particular the hosting privilege has been weakened by the growth of editorial services, such as YouTube, and indeed other types of services that engage in a wide ranges of activities that are not neutral to content. Such services claim to rely on the hosting immunity, but they are very different from the simple provision of server space which was contemplated when the privilege was created. A more nuanced approach is desirable which places a greater preventive responsibility on those who make money from hosted material, rather than by the mere provision of hosting services to other publishers.</p> |
| <p>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?</p> | <p>It is not the technological process which enjoys immunity, but the manner in which content is handled by intermediaries. As is clear from the CJEU caselaw, the technology provides for a number of diverse applications which must be individually evaluated.</p> |
| <p>42. If there is a case for such immunities, to which remedies should the immunities provide defences?</p> | <p>The current approach under the applicable Directives distinguishes between injunctive and pecuniary relief. Subject to the details of the privileges themselves, the general balance seems appropriate.</p> |
| <p>43. Does the definition of intermediary (a provider of a "relevant service", as defined in section 2 of the E-Commerce Regulations, and referring to a definition in</p> | <p>The concept is embedded in the <i>acquis communautaire</i> and could only be reviewed at EU level. Moreover, the CJEU has provided some guidance as noted</p> |

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| <p>an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?</p> | <p>above.</p> |
| <p>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?</p> | <p>While the E-Commerce Directive leaves room for national provision concerning hyperlinks and location tool services, there is no possibility to extend the privileges in respect of copyright. This follows from the fact that EUCD sets out an exhaustive list of exceptions to copyright which does not include exceptions for hyperlinking or search. (The privileges could of course be extended in relation to other sorts of liability, such as defamation.) In any case, it would be ill-advised to pursue these questions in national legislation at this time, for the reasons set out in our general response to this chapter, above.</p> |
| <p>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?</p> | <p>No one contends that a link in any and all circumstances constitutes infringement. However, as stated in our general response to this chapter, a generalised exemption for a “link” would be extremely ill-advised. It would lead to confusion and would be wide open to abuse. The most that can sensibly be said is already clearly stated in Section 40(3) CRRA: “The provision of facilities for enabling the making available to the public of copies of a work shall not of itself constitute an act of making available to the public of copies of the work.” However, this proposition does not assist in identifying the subtle conditions which determine when the provision of a link does, or does not, amount to primary or accessory infringement. These are being teased out by European and national courts. As a general matter, caselaw looks at the nature of the intermediary –</p> |

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| | structurally infringing sites usually do not escape liability. |
| 46. If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright? | No. A simplistic provision, such as that proposed at paragraph 6.3 of the <i>Consultation Paper</i> , is capable of causing immeasurable difficulty and could in certain cases conflict with EU and international norms given the broad scope of the communication to the public right. |
| 47. If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions? | Neither. We would oppose such a provision in either formulation. |
| 48. Does copyright law inhibit the work of innovation intermediaries? | This is a very general question. Our perception is that <i>in general</i> Ireland provides a facilitating legal and regulatory environment for both creative and digital/internet industries. |
| 49. Should there be an exception for photographs in any revised and expanded section 51(2) CRRA? | No comment. |
| 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? | No. In so far as news is concerned, there is an existing fair dealing exemption for “reporting current events”, at section 51(2) CRRA. Non-exempt uses can be licensed. While copyright law has always recognised the need for an exception for “the news of the day”, this is quite different to sanctioning the taking of content the subject of considerable investment by newspaper proprietors and other bona fide news providers. The proper limits which must be observed by news aggregators continue to be examined in courts in the UK and in Europe. The limits will not harm innovation. All emerging business must |

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| | factor-in legitimate costs. |
| 51. If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law? | As to aggregation of content generally, see our general response to this chapter. The working out of commercial relationships between generators and distributors of content can only occur if the former are given rights to license to the latter. The starting point therefore has to be that what would otherwise be infringements of exclusive rights should not be exempted from the usual requirement of licensing in the free market at arm's length. |
| 52. In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions? | No, see our general comments on this chapter. This would in any event contravene Article 5 EU CD. |
| 53. If so, what exactly should it provide? | Not applicable |
| 54. Does copyright law pose other problems for intermediaries' emerging business models? | No. Internet intermediaries have received differentiated and tolerant treatment by the courts in Europe, depending on the nature of the service and the role played by the intermediary. The law establishes broad privileges for them already and they have experienced unprecedented growth at time of economic crisis across the EU. To introduce further privileges at the expense of another sector that relies on copyright protection to continue to deliver growth, jobs and investment is short-sighted. |

Chapter 7 – Users

The central proposal of the *Consultation Paper* is the expansion of the exceptions and limitations to copyright in an undifferentiated way to the maximum possible limit permitted by the EUCD. There appears to be an assumption, entirely unjustified by economic evidence, that this will have a beneficial impact on “innovation.”

We emphasise that the creative industries are far more significant innovators at national level than any of the international technology companies that are lobbying for change. In order to avoid serious damage to a sector in which Ireland is extremely strong, each of the proposed changes must be examined on its own merits, after an assessment of the economic consequences of making the change; the effect on existing and new business models; and the overall impact on the copyright balance. The cumulative effect of making the whole range of proposed changes must also be evaluated.

Legal Limits to Exceptions

Any proposal to amend the exceptions and limitations in the CRRA must take into account the following provisions of the EUCD and principles established by the CJEU.

A closed list

The exceptions enumerated in the EUCD represent a closed list: recital 32 states “This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.”

The “Three-Step Test”

Recital 44 states: “When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.” These include the international “Three-Step Test”, set out in full in Article 5(5):

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

This test has been applied by not only by the CJEU but also by national courts across the EU.

A broad interpretation of the exclusive rights

It is well settled that the relevant provisions in the EUCD necessitate a broad interpretation of the rights of reproduction and communication to the public in order to establish a high level of protection for authors.²³

A restrictive interpretation of the exceptions

It is equally established caselaw that the allowance for exceptions must be interpreted strictly. As pointed out in *Infopaq*,²⁴ “the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly”.

New uses

In interpreting the meaning of “the public” for the purposes of the right of communication to the public, the CJEU has also elaborated the concept of a “new public”, holding that when a work is disseminated to a public in a manner not envisaged by the author and hence a greater public, that use must be authorised.²⁵

With reference to certain of the specific proposals of the *Consultation Paper*:

Format-shifting for private purposes

The MPA opposes introduction of a broader private copy exception for audio-visual works than is available under current law. Given the nature of the audio-visual sector and the terms of the Copyright Directive, a broader exception would bring limited benefits to consumers while undermining new business models. In the audio-visual sector, private copying has traditionally been limited to making of reproductions of linear broadcasts (time-shifting) – something that is already permitted under Irish law.²⁶

Home entertainment has always been made available subject to some form of technological protection measure, so there are limited consumer expectations in being able to copy audio-visual works. At the same time, new business models are enabling new ways for consumers to format shift content and access content from the “cloud” securely through direct licensing. The effect of a format-shifting exception would therefore be to remove certain licensing models from the market, or significantly devalue such models, whilst undermining emerging business models. The possibility of experimentation with release strategies and consumer offerings would be made more difficult.

It is important to realise that the modern format-shifting exception (with compensation) exists to address a market failure – the difficulty of monetising domestic copying arising

²³ See, for example, Recital 9 EUCD.

²⁴ Para. 56.

²⁵ See, for example, *Airfield NV C-431/09 & 432/09*.

²⁶ S. 101 CRRA.

from the development of domestic analogue recording equipment. Now that technology allows content to be commercialised in countless different ways, the rationale for such an exception has fallen away even for works which traditionally were not distributed with any form of content protection.

No economic argument is advanced to justify the difficulties that such an exception would produce for enforcement and the potential undermining of technological measures which are vital to these new business models. The issue of the relationship between exceptions, technological measures and on-demand services²⁷ is discussed below. We note here that pursuant to Article 6(4)(4) EUCD, Member States are not permitted to intervene to require the private copying of works provided to the public on-demand on the basis of agreed contractual terms – regardless of whether exceptions have a binding character under national law. To provide otherwise is turn to rental models into sell-through transactions, thereby disincentivising the early-window provision of content.

In any event, the application of a format-shifting exception would have to pass the Three-Step Test. In the case of audio-visual content, it is difficult to conceive of any format shifting exception that would not ultimately conflict with the normal exploitation of the work. This has been recognised, for example by the French Courts,²⁸ one of which provided the following standard of review:

“whereas the conflict with the normal exploitation of the work, which should lead to the setting aside of the private copying exception, must be assessed in light of the risks inherent in the new digital environment as regards the safeguarding of copyright and of the economic importance that the exploitation of the work, in the form of DVD, represents for the recovery of the costs of cinematographic production”.

The draft measure contained at paragraph 7.3.4 of the *Consultation Paper* recognises the need to limit the proposed private copy exception to a device owned by the copier, but does not refer to the need to respect technological measures. It is evident from Recital 39 that this is obligatory:

“When applying the exception of limitation on private copying, Member States should take account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological measures are available. Such exceptions or limitations should not

²⁷ See Article 6(4)(4) EUCD, and the CJEU decisions in *Padawan* and *Stichting de ThuisKopie* regarding the application of the private copy exception to licensed copying.

²⁸ See, for example, *Perquin/UFC Que Choisir v. Films Alain Sarde et al* (Cour de Cassation (CIV.)), 28 February 2006 (the *Mulholland Drive* case); *Henry et al v. WB et al* (Tribunal de Commerce de Paris, 19 September 2007)(the *Class Action* case); and cases from Italy and Belgium: Tribunal of Milan, 10 July 2008 – *Duranti*; Court of Appeal of Brussels, 9 September 2005, *A&M*, 2005 – *Test Achats v. EMI et al*.

inhibit the use of technological measures or their enforcement against circumvention.”

It should be a condition of the applicability of any private copy exception that the copy is made from a legal source and that there is lawful access²⁹ to the work, not for example merely lawful ownership of the physical carrier. Moreover, it must be clear that reproductions of works obtained via remote “private copy” services or in the “cloud” particularly those rendered for a fee or supported by advertising do not fall within the scope of the exception. Cloud providers are not copying for their own use and are not free to make available without a licence.

The need for compensation

The issue of compensation is of importance for the whole question whether any private copy exception should be introduced in Ireland.

Article 5(2)(b) of the Copyright Directive permits Member States to introduce an exception:

“in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned”.

While it may be possible to justify the current lack of levies on the basis of limited scope of the current “time-shifting” exception in section 101 CRR, the lack of compensation for rightholders will become indefensible if the scope of the exception is broadened. It is obvious that the market for home entertainment is price-elastic.³⁰ Opponents of copyright protection perennially argue that the industry should lower prices in order to counter online piracy. It is plain that the increase of prices to reflect private copying would reduce demand. It is also argued that rightholders can, and do, set their prices by reference to the anticipated use. This assertion is in direct contradiction of the Copyright Directive and practices in other Member States. The CJEU stated in the *Padawan* case:

“The fact that the equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy provided that the equipment or

²⁹ This principle is recognised in majority of Member States either specifically in the Copyright Act (see e.g., the Copyright Acts of Denmark (Article 11(3)), Finland (Article 11(5)), Germany (Article 53), France (Article L 122-5(2)), Italy (Article 71-sexies(4)), Spain (Article 31(2)), Sweden (Article 12) and others) or via caselaw (see e.g., *Procureur Général v. Aurélien Delicourt* – Cour de Cassation (Chambre Criminelle), 30 May 2006. The court must examine the circumstances under which a party has obtained access (i.e., legal or not) to the content concerned where that party seeks to invoke the private copy exception as a defence to an alleged infringement of the exclusive reproduction right. This ruling was subsequently applied by the Aix-en-Pce Court of Appeal - Cour d’appel d’Aix en Provence (5ème chambre), Arrêt du 5 septembre 2007 Ministère public / Aurélien D. See also, the Decision No. 298779 of July 11, 2008 from the *Conseil d’Etat* holding that “private copy remuneration must only take into account legal copies” since the private copy exception does not apply to copying from illegal sources.

³⁰ According to the British Video Association, average DVD prices have fallen sharply since 2007.

devices have been made available to natural persons as private users.”

The *Padawan* decision would clearly expose a private copy exception without compensation to judicial review. Moreover, as the European Commission has, in the wake of the *Padawan* decision, undertaken a review of the question of levies, we suggest that it would be imprudent to consider introducing a broader private copying exception at this time.³¹

Back-up copy

It is proposed to introduce a new exception for back-up copies, applicable to all works. While there are limitations to the proposal, it encompasses works which are protected by technological measures, thereby implying an authorisation to circumvent the TPM. This is not permissible. As already cited, Recital 39 EUCD makes the position clear: “When applying the exception or limitation on private copying... such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention”. The EUCD does not countenance circumvention for non-infringing use.

Education

The MPA has long supported the study of film in schools. We are open to constructive and balanced changes to existing exceptions.

Five changes to the CRRA are proposed in the *Consultation Paper*: the broad inclusion of “education” in the fair dealing exception for research and private study at section 50(1); the replacement of the reprographic exception at section 57 with an exception for “illustration for education, teaching or scientific research”; a new section 57A permitting communication of a work for distance learning; a broad new clause permitting “use of works available through the internet” by educational establishments; and the extension of the existing (but expanded) range of library and archive exceptions to educational establishments.

We make the following points:

Limitations in the EUCD

There are just three articles of the EUCD that can be used to justify educational exceptions:

- Article 5(2)(c) permits an exception to the reproduction right in favour of publicly accessible libraries, educational establishments, museums and archives for specific acts which are not for direct or indirect economic advantage;
- Article 5(3)(a) permits use for the sole purpose of illustration for teaching, subject to an acknowledgement where possible, and to the extent justified by the non-commercial purpose to be achieved.
- Article 5(3)(n) permits communication for research or private study to individual

³¹ A Single Market for Intellectual Property Rights, COM (2011) 287 final.

members of the public by dedicated terminals on the premises of the establishments referred to in Article 5(2)(c) of works not subject to purchase or licensing terms, which are contained in their collection.

Technological measures

Whatever amendments are made, technological measures must be respected, particularly those protecting on-demand content, in accordance with Article 6 EUCD, including in particular subparagraph (4)(4). In certain cases, for example in respect of distance learning, technological measures may be useful and provide some comfort for rightholders that the exception will not prejudice their interests.

Existing licensing schemes should be preserved

The proposals would entail a significant reduction in the role of collecting societies. This arises in particular from the broad inclusion of “education” in the fair dealing exception at section 50(1) and the inclusion of “educational establishments” in the new definition of “heritage institutions”. The removal of licensing schemes would be most unfortunate, given the role such schemes play in facilitating the use of copyright works. The proposal may also conflict with the Three-Step Test”, especially in relation to works conceived for educational use. The normal exploitation of such works would clearly be affected and where this is not the case there may in any event be a requirement of remuneration for authors due to the third step of the test.

Licensing schemes provide an important method of enabling the use of copyright works and provide valuable legal certainty. Collecting societies can often help educational institutions to navigate copyright waters. The existing self-regulatory licensing schemes provide considerable added-value and should not be abolished.

Making whole works available for distance learning is not permissible

The limitation in Article 5(3)(a) of the use of materials to “illustration” is an obstacle to the generalised making available of copyright materials to distance learners. Film clips could be used to illustrate teaching materials, but it would not be permissible to make complete feature films available to remote students in a course, for example, on film history. Apart from the limitative effect of the reference to “illustration”, the Three-Step Test would not be satisfied. Such use would not amount to a “special case” and would conflict with the normal exploitation of the film through commercial VOD or other home entertainment channels.

Any extension to existing exceptions must be confined to non-commercial purposes

Both enabling provisions of the EUCD are quite clear that educational exceptions must be confined to non-commercial uses. As drafted, the proposed new and altered exceptions are not so confined. It is clearly important that educational exceptions are not extended to all

commercial education providers, and to a range of other commercial users who might designate certain of their activities “educational” for the purpose of availing of the exceptions.

The proposal to exempt “works available through the internet” is not permissible

This proposal, for a new section 57B CRRA, would permit both the reproduction and the communication to the public by educational establishments of any “work that is available through the internet.” There are some constraints – the work must not be protected by a technological protection measure; there must be a sufficient acknowledgement; the establishment must not know that the work is an infringing one and there must be no clearly visible notice prohibiting the use of the work. The Minister may by order prescribe what is a “clearly visible notice.”

The proposal is entirely indiscriminate in the works it proposes to exempt from use. It fundamentally undermines both the reproduction right and the right of communication to the public. The provisions relating to knowledge and the clearly visible notice would be unworkable, in that it would be impossible for either the educational establishment or an aggrieved party to establish after the event that the conditions had been complied with. The most significant problem, however, with this clause is that it sends the message to students that anything found on the internet is free for use.

There is no question but that this exception falls well outside the Three-Step Test. Even though the benefit of the exception is confined to educational establishments, the extension of it to all works available through the internet must remove it from the category of “special cases”. Where the EUCD is concerned, there is no basis on which it can be justified.

Parody

The CRRA already has a number of exceptions which could provide a defence to copyright infringement in the case of a genuine parody – fair dealing for criticism or review [section 51(1)]; incidental inclusion [section 52(3)] and the use of quotations or extracts (section 52(4)).

In considering an exception for parody, there are three problematic issues that need to be addressed.

First, where a work comprises more than one creative contribution (such as words and music), how can a parody expressed in one of the media (e.g., the words of a song) justify the wholesale taking of another (e.g., the music)? “Newport State of Mind” is enjoyable partly because it is in fact a better performance of the song *qua* song than the original. It is, however, a pure, unadulterated taking of the musical element. If only the style of the original had been taken (one definition of a parody), there would be no question of infringement and no need for an exception. Similar examples can be imagined in the audio-visual sector where one author’s work is lifted wholesale in the course of refashioning another’s for purposes of parody.

Second, where a parody is a commercial success, why should the original author be excluded from sharing in the profits? The U K *Gowers Review* pointed out that: “Weird Al Yankovic has received 25 gold and platinum albums, four gold-certified home videos and two GRAMMYS® by parodying other songs, **“but he had to ask permission from right holders”** (emphasis added). Commercial parody and licensing are not incompatible.

Third, the problems for enforcement are far from imaginary, given the need for fact-based assessment of fair dealing or fair use factors. J.K. Rowling had to meet this defence in her 2003 action in the Netherlands to prevent the distribution of the “Tanya Grotter” books, as did the Salinger Estate in its 2009 attempt to halt publication of a Swedish author’s sequel to “Catcher in the Rye”.³⁶ These problems would be aggravated if the exception extended to “caricature” and “pastiche.”

While the MPA is sceptical about the economic case for or desirability of a parody exception, we would have no objection to a narrowly tailored and carefully crafted exception, situated within the fair dealing provisions. We oppose the draft provision contained at paragraph 7.3.18 of the *Consultation Paper*, on the grounds that it is far too broad; it covers caricature and pastiche and “similar purposes” as well as parody; it does not take account of the enforcement problems highlighted above, and finally, that it is not proposed to situate it within the fair dealing provisions.

Non-Commercial User-Generated Content

It is proposed, at paragraph 7.3.19 of the *Consultation Paper*, to add a new provision 106D to the CRRA, to permit the non-commercial non-competing use of a work in order to create and communicate to the public a new work. In its drafting, the proposed provision is very similar to that proposed at section 22 of Canadian Bill C-11 – the Copyright Modernisation Act, currently before the Canadian Parliament.

There are some differences between the draft and the Canadian proposal:

- The Canadian provision applies only to published material.
- In the Canadian proposal the new work must be a work in which copyright subsists.
- The Canadian provision is a “fair dealing” exception.

Accordingly, the proposal at paragraph 7.3.19 of the *Consultation Paper* is a good deal broader in scope than the comparable Canadian proposal. The provision would cover *all* non-commercial non-competing derivatives, of *all* works, in *all* media, irrespective of the type of use. It would cover the *whole* work.

Under existing Irish law, a new work made in accordance with the proposal might be exempt as a

fair dealing for criticism or review, or reporting current events under section 51(1) or (2) CRRA. It might be a quotation or extract made in accordance with section 52(1) CRRA. The use might constitute incidental use, in accordance with section 52(1) CRRA.

If the use of the existing work does not fall within the ambit of any of these exceptions, it will be a derivative, possibly an adaptation, for which the permission of the rightholder will be required.

Measured against Article 5 EUCD, it is possible that an exception for the new work might fall within Article 5(3)(c), if it involved reporting current events, or Article 5(3)(d), as a quotation of published material for purposes such as criticism or review, in each case subject to the conditions specified in the provisions. These possibilities aside, dissemination of the works envisaged by the provision would be precluded by the Directive.

Given the constraints of the EUCD, it is understandable that the Review Committee has had to look outside the EU for a model clause. To attempt to bring a novel provision for user-generated content within the ambit of the EUCD, it would be necessary to limit it so as to fall within the exceptions referred to above – which already exist under Irish law.

Protecting Exceptions from Contract Over-Ride

In general, the MPA strongly opposes the giving of overriding effect to exceptions.

Legal background

The EUCD provides little explicit guidance on the possibility of giving mandatory status to exceptions. However, it clearly contemplates that parties will be able to enter into contracts regarding online uses. Recital 40 provides, for example that:

“Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. **Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter.** This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.” (emphasis added)

In addition Article 6(4)(4) EUCD provides an important carve out from government intervention to enforce exceptions:

“The protection of technological protection measures should ensure a secure environment for the provision of inter-active on-demand services, in such a way that members of the public may access works or other subject matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) [the intervention mechanism] should not apply. Non-interactive forms of online use should remain subject to those provisions.”

This exclusion of on-demand services from the intervention mechanism was an important compromise made at the time of the adoption of the Directive in order to encourage new business models based on the making available right. Indeed, mandatory exceptions that in practice negate use of the making available right, as they would if given this mandatory force, fail the Three-Step Test.

It is true that under the Computer Software Directive 2009/24/EC and the Database Directive 96/9/EC, the rightholder may not prohibit a limited number of acts (such as the backing up of software or the extraction of insubstantial parts of a database) by means of contractual terms. However, these provisions reflect the unique nature of software and databases, the protection of which raises special issues.

There are two legal arguments which indicate that the Government may not legislate freely to give exceptions a mandatory character.

Mandatory exceptions violate the EUCD

Read with the recitals,³² it is plain that the Three-Step Test does not permit mandatory exceptions that effectively negate technological measures, thereby rendering the making available right useless. It is clear from the recitals and indeed Article 6(4)(4) that in the contemplation of the Directive the *normal* exploitation of on-demand content will be on the basis of the making available right by means of contracts coupled with technological measures. An exception which has the effect of nullifying such arrangements must interfere with the normal exploitation of the work.

For certain sectors, including in particular the audio-visual industry, distribution using technological measures is the normal form of exploitation. Content, such as that delivered using conditional access, may become easily copiable or distributable at some stage following delivery, at which point the only legal control is the contract between the

³² See Recitals 44, and 47-53. Dr Jorg Reinbothe, one of the principal architects of the EUCD says: “In a very subtle and effective manner, Article 6, in conjunction with the entire set of seven sophisticated Recitals 47 to 53 addresses the interface between the protections and application of technological measures on the one hand and the functioning of exceptions and imitations to the rights on the other – in particular, but not only, regarding private copying” – Ed Lindner & Shapiro, Foreword to *Copyright in the Information Society*, (2011 Edward Elgar).

rightholder and the user. In the event of the introduction of broad private copy exception, any potential early window VOD models would be jeopardised as such content is made available for viewing only. If rightholders could be required to permit private copying of view-only content, then new models like Premium VOD (which offer content very soon after theatrical release) are unlikely to be explored.

Mandatory exceptions violate fundamental rights

The effect of creating new, wide exceptions to copyright, coupled with a prohibition on contracting out, would be to deprive authors of rights in existing works. These rights are property protected by Article 1 of Protocol 1 to the European Convention of Human Rights. It would be disproportionate to any identifiable public purpose to interfere so drastically with authors' ability to dispose of their works. Such measures would hence violate the Convention.³³

The Existing CRRA Provision

The CRRA provides at section 2(10) that:

“Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.”

Arguably, this provision means no more than that it is irrelevant to the question whether an act is an infringement whether there is a contract prohibiting the use. This is plainly correct. It is a matter of copyright law whether an act falls within the scope of protection or not. The provision has been said by some, however, to mean that a contract cannot be relied upon to counteract the effect of an exception. If the section has that meaning, it is a barrier to the operation of the licensing market which could hamper innovative forms of distribution. It also raises particular problems with respect to on-demand services underpinned by operation of Article 6(4)(4) of the EUCD.

Comparable provisions in other European countries

Two other EU Member States have addressed the question – Belgium, and Portugal.

The Belgian Copyright Law appears to give mandatory affect to exceptions, but fully exempts from this rule works made available to the public for access at a time and place of their choosing (Article 23bis, *Loi relative au droit d'auteur et aux droits voisins*) in accordance with Article 6(4) EUCD.

Article 75(5) of the Portuguese Copyright Code (*Código do Direito de Autor e dos Direitos*

³³ See *Balan v. Moldova* (2008), application no. 19247/03.

Conexos) renders:

“null and void any contractual provision that aims to eliminate or prevent the normal exercise by beneficiaries of the uses set out in paragraphs 1, 2 and 3 of this Article, **without prejudice to the right of parties to agree freely on the respective forms of exercise, in particular concerning the amounts equitable remuneration.**” (emphasis added)

It can be seen that in the case of the Belgian provision, the delivery of works online is exempted from the rule. The Portuguese provision allows for works delivered subject to licence terms.

Conclusion: Section 2(10) CRRA should not be amended

As already mentioned, MPA member studios are investing in new business models, including such early-window VOD services, cloud-based services (e.g., Ultraviolet®) and providing format-shiftable digital copies in a secure manner that offer consumers different means to enjoy films at different price points and on different devices. Any new exception that overrides contractual agreements would undermine such business investments and indeed restrict consumer choice.

The proposal constitutes a wholly unjustified interference in contract law. It is a blunt approach which fails to take account of the complexity of the market solutions on which the creative industries rely. It fails to take account of the nuanced provisions of the EUCD. In its drafting, it fails to take account of the variety of conditions attached to the exercise of number of the permitted acts.

We are emphatically opposed to the proposed change and urge the Review Committee not to pursue it.

Lawful User

We note that the *Consultation Paper*³⁴ proposes a new definition of “lawful user” for all purposes of the CRRA, although no question concerning the definition is included in the list of questions at the end of the chapter. The definition proposed is:

“lawful user” means a person who, whether under a license to undertake any act restricted by the copyright in the work or otherwise, has a right to use the work, and “lawful use” shall be construed accordingly.

We would question the usefulness of such a definition. The wording amounts to this: “A lawful user is a person who has a right to use the work”. This does not seem calculated to assist.

³⁴ Para 7.3.3.

Further, many lawful uses do not result from a “right” to use the work: uses pursuant to exceptions are not such, as exceptions merely provide a defence to what would otherwise be an infringement.

We have moreover some concerns about a proposal to apply a definition for all purposes of the CRRRA. We note that the term “lawful user” is used in just two EU Directives: the Computer Program Directive and the Database Directive, while the term “lawful use” is used in the EUCD. While the definition in each case is very similar to that proposed in the *Consultation Paper*,³⁵ in each case, it is placed in a particular context and subject to certain qualifications.

In the case of the Computer Program Directive, for example, certain acts do not require the authorisation of the rightholder where they are necessary for the use of the program by the “lawful acquirer” in accordance with its intended purpose, including for error correction³⁶. In the case of the Database Directive, a “lawful user” is permitted to use only “insubstantial parts” of the content of the database, and is precluded from performing acts which conflict with the normal exploitation of the work, or cause prejudice to the rightholder³⁷. And in the case of the EUCD, a “lawful use” is exempt provided it is transient and incidental and has no independent economic significance.³⁸

We suggest that it is ill-advised to attempt to apply the definition in a generalised way, independent of the circumstances and particular conditions attaching to individual exceptions in the CRRRA. We note that the CJEU has been called upon to determine whether a person authorised to use only part of database was a “lawful user” for the purposes of the entire database.³⁹ We suggest that this is the type of problem that a generalised definition would cause.

Exceptions to the Database Right

The *Consultation Paper* proposes to apply certain of its proposed new exceptions to the database right. We respectfully remind the Review Committee that under the terms of the Database Directive, there are only four types of permitted exception – see Article 6(2) of that Directive.

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| 55. Should the definition of "fair dealing" | No. This would render the definition open- |
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³⁵ And carried forward into the provisions of the CRRRA implementing the respective Directives.

³⁶ Article 5(1) Computer Program Directive.

³⁷ Article 8(1)-(3) Database Directive.

³⁸ Article 5(1) EUCD.

³⁹ Case 203/02.

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| <p>in section 50(4) and section 221 (2) CRRA be amended by replacing "means" with "includes"?</p> | <p>ended and uncertain for rightholders and users alike. It may in addition encourage expansive interpretations of fair-dealing exceptions, contrary to the injunction of the CJEU in <i>Infopaq</i> that exceptions should be construed narrowly.</p> |
| <p>56. Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:</p> <p>(a) Reproduction on paper for private use,</p> <p>(b) reproduction for format-shifting or backing-up for private use,</p> <p>(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research,</p> <p>(d) reproduction for persons with disabilities ,</p> <p>(e) reporting administrative, parliamentary or judicial proceedings,</p> <p>(f) religious or official celebrations,</p> <p>(g) advertising the exhibition or sale of artistic works,</p> <p>(h) demonstration or repair of equipment, and</p> <p>(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?</p> | <p>No. Every new exception should be evaluated on its own merits, having studied the potential economic effect. See our detailed comments above.</p> <p>(a) No comment</p> <p>(b) The MPA opposes introduction of a broader private copy exception for audio-visual works than is available under current law. See our detailed explanation above.</p> <p>(c) See our comments above.</p> <p>(d) No comment.</p> <p>(e) No comment.</p> <p>(f) No comment.</p> <p>(g) No comment.</p> <p>(h) No comment.</p> <p>(i) We are not opposed to a narrowly drawn exception for parody, but object to the provision proposed at paragraph 7.3.18 of the <i>Consultation Paper</i>, as drafted. See our</p> |

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| | explanation above. |
| 57. Should CRRRA references to "research and private study" be extended to include "education"? | No. See our comments above. |
| 58. Should the education exceptions extend to the: (a) Provision of distance learning, and the (b) utilisation of work available through the internet? | See our comments above. Emphatically not. See our reasoning above. |
| 59. Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters' behalf? | Yes. This issue has been decided recently by the CJEU. ⁴⁰ |
| 60. Should the exceptions for social institutions be repealed, retained or extended? | Article 5(2)(e) EUCD is confined to broadcasts made by social institutions pursuing non-commercial purposes. Contrary to what is stated at paragraph 7.3.7 of the <i>Consultation Paper</i> , the CRRRA does have an analogous provision. A Ministerial Order made pursuant to section 101 CRRRA extended the application of the time-shifting provision for broadcasts to student residences, hospitals, hospices, nursing homes and prisons. As pointed out in the <i>Consultation Paper</i> , further allowances are provided by section 97 and section 98 CRRRA. The former has been recently overturned by a decision of the CJEU. ⁴¹ We question whether the latter also over-reaches what is permitted by the EUCD. We are opposed to further expansion of these exceptions. |
| 61. Should there be a specific exception for non-commercial user generated | See our comments above. The provision proposed in the <i>Consultation Paper</i> , in order to |

⁴⁰ *DR & TV2 v. Danmark*, judgment 26 April, 2012.

⁴¹ *Case C-162/10 Phonographic Performance Ireland Ltd v. Ireland and the Attorney General*, judgment of 15 March 2012.

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| content? | comply with the EUCD, would effectively have to be limited to circumstances in which an exception already exists in the CRRA. |
| 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. See our reasoning above. |

Chapter 8 – Entrepreneurs

The centre point of this chapter is the novel proposed exception for “innovation”, to be a new section 106E CRRA. It is essentially an exception for a commercial derivative which is substantially different to the original work, does not conflict with the normal exploitation of the original work and does not unreasonably prejudice the legitimate interests of the right holder in the original work.

The *Consultation Paper* states “Since EUCD has not harmonised the adaptation right, that Directive neither precludes such a development nor provides any guidance as to the contents of such as exception.”

The CRRA of course contains an adaptation right at section 37(1)(c). The owner of the copyright has the exclusive right to undertake or authorise others to, inter alia, make an adaptation of the work. The right of adaptation is infringed, by virtue of section 37(2) “by a person who without the license of the copyright owner undertakes, or authorises another to undertake, any of the acts restricted by copyright. Reference to the undertaking of an act restricted by copyright, according to section 37(3) “shall relate to the work as a whole or to any substantial part of the work and whether the act is undertaken directly or indirectly”.

Clearly the proposed exception for innovation would represent a significant curtailment of the adaptation right.

We contest the assertion that the adaptation right is not harmonised.

It is true that only the Computer Programs and Database Directives provide specifically for exclusive rights of “translation and adaptation, abridgement and any other alteration”. However, Articles 8 and 12 of the Berne Convention respectively provide authors of literary and artistic works with a translation right (Article 8) and a right of “authorising adaptations, arrangements and other alterations” (Article 12). The TRIPS Agreement and the WCT oblige contracting states to comply with Article 1-21 of the Berne Convention.

Accordingly, even without specific mention of the Article 8 and 12 rights in the Directives, Member States are under an international obligation to provide for them.⁴²

Leaving aside the adaptation right, the proposed exception will also represent a permitted act for the purpose of exercise of both the reproduction right and the right of communication to the public. There is nothing in Article 5 EUCD which could justify the provision.

A final problem with the proposed exception is that it cannot be regarded as being in compliance

⁴² See Walter & von Lewinski, *ibid.*, paras 16.0.35 and 16.0.36.

with the Three-Step Test, notwithstanding the incorporation of two of the three “steps” in the drafting. It is inconceivable that “innovation” could be regarded as a “special case”.

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| <p>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?</p> | <p>While this is an academic question, given that Ireland must comply with international and European obligations which prevent the introduction of an exception for “innovation”, it is worth noting that the question is rather misleading. Copyright works are generally created at least in part due to the combination of incentive and reward provided by the resulting protection which permits the copyright owner to exploit the work. The ensuing benefit to society is the basis on which the granting of intellectual property rights to creators is justified – as a matter of public policy.</p> |
| <p>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?</p> | <p>Ditto.</p> |
| <p>65. When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licenses?</p> | <p>This question is too broad. Compulsory licenses could be justified on the basis of public policy and EU/international law, but the question would have to be evaluated by reference to a specific range of uses of specific works and the requirement for a compulsory license demonstrated.</p> |
| <p>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?</p> | <p>No. This is not legally workable, even if it were desirable.</p> |

Chapter 9 – Heritage Institutions

Reproduction for Archival and Preservation Purposes

The MPA has long supported the view that the preservation of a nation's film heritage is vitally important. We support the proposals of the *Consultation Paper* which rely on Article 5(2)(c) EUCD, subject as follows:

- Any new exception should be limited to copying for preservation or archiving and exclude any direct or indirect commercial use of the excepted copies.
- Any new exception must preclude communication to the public. As it clarified by Recital 40 EUCD, Article 5(2)(c) extends only to “certain special cases covered by the reproduction right”. Such an exception of limitation “should not cover uses made in the context of online delivery of protected works.”
- We are not in agreement with the proposal of the *Consultation Paper* to apply all of the existing exceptions and limitations at sections 59-70 CRRA (as extended) to “educational establishments”. As already argued, existing licence schemes should be preserved. This is one of the ways in which the proposals would undermine such schemes, and possibly render them unviable.

Text and Data Mining for Research

Non-commercial data-mining would appear a useful tool. It is already permitted to an extent under section 50(1) – fair dealing for research and private study.

However, an exception for commercial data-mining would not be permitted under the EUCD. Such an exception at EU level would have to be carefully evaluated, and should in any event not encompass search engine and indexing activities in general. More specifically, such an exception must not become a refuge for rogue sites.

We believe that the lobby by search providers for an exception for data mining is a strategic effort to extend the privileges provided by the E-Commerce Directive, so as to insulate their businesses from liability in general. Care must be taken to ensure that in addressing the narrow issue of non-commercial data-mining it does not upset the balance created by the E-Commerce and EUCD. There is also a potential to undermine enforcement efforts against structurally infringing sites, which will seek to invoke any new liability privileges.

If there were to be a refinement of the existing section 50(1) to make it clear that non-commercial data-mining is permitted, the exception should expressly adopt (with suitable adaptation) the wording of the Three-Step Test, so as to confine the excepted use to “cases where securing the necessary licence would be impracticable, and provided that the use does

not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder”.

Since the publishing industry already offers licensing solutions to the perceived problem, the availability of the exception should also be subject to the condition that no licensing scheme exists for such use. This would encourage publishers and database owners to devise comprehensive schemes to facilitate both commercial and non-commercial data-mining.

Non-commercial research and private study

We note that the *Consultation Paper* does not advert to our earlier submission concerning the fact that section 50(1) CRRA in its existing form over-reaches what is permitted by EUCD. The provision must be confined by its terms to non-commercial purposes. We suggest it is incumbent on the Review Committee to draw the attention of Government to this point. It may become the subject of a contest to the provision.

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| 67. Should there be an exception permitting format-shifting for archival purposes for heritage institutions? | Yes, provided the limits of Article 5(3)(c) EUCD are observed. |
| 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 comment. |
| 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? | Yes, but provided the terms of Article 5(3)(n) EUCD are observed. We note that the proposed provision does not exclude, as required, works subject to purchase or licensing terms. |
| 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. |
| 71. How, if at all, should legal deposit obligations extend to digital publications? | We note that the proposed provisions do not apply to film. For film, we support voluntary deposit systems around the world and our members |

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| | have entered into numerous agreements. Where mandatory schemes are in place, they tend to be limited to national works to make them less onerous on all concerned. |
| 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? | Our view is that Ireland should base any orphan works legislation on the results of the Proposed Orphan Works Directive currently being discussed at European level. Political agreement on this instrument was reached in early June. |
| 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? | The new provision, at paragraph 9.7 of the <i>Consultation Paper</i> is far too broad, and unworkable. It cannot have been intended to apply to “any transfer” of the object incorporating a fixation of a work. |
| 74. Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques? | We are cautious about any such proposal. See our comments above. |
| 75. Should there be related exceptions to permit computer security assessments? | We do not see the need for such a proposal. |

Chapter 10 – Fair Use

In our previous submission to the Review Committee we made clear the view of the MPA in relation to the prospect of introduction of a “fair use” provision in Europe. We note that, at paragraph 10.5 of the *Consultation Paper*, the Committee states that it is “as yet, unconvinced by the arguments on both sides of the fair use debate.”

We reiterate that the MPA fully supports the US fair use defence. However, while fair use works in the US within a regulatory culture founded on litigation and many accumulated precedents, it is an expensive system which could not easily be transferred to a European context. It is clear that no individual EU Member State could introduce fair use at this time, given that it is not one of the exceptions permitted under the Directive.

We append hereto, for the benefit of the Committee, a paper by Stephen J Metalitz⁴³ in which he deals specifically with translating fair use to legal systems outside the US.

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| 76. What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland? | See the Metalitz paper, herewith. |
| 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? | The Irish Government should engage in constructive debate at European level, without preconceptions, concerning the changes to copyright that may be necessary to keep pace with technological change. |
| 78. How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation? | 78-83. We submit that these questions are academic, given the constraints of the EUCD. We refer also to our comments in previous submissions and above. |
| 79. How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, either subvert the interests of rightholders or accommodate the interests of other parties | See previous submission and above. |
| 80. How, in fact, does fair use, either in the abstract or in the draft section 48A | See previous submission and above. |

⁴³ Stephen J Metalitz, of Mitchell Silberberg & Knupp, LLP, Washington DC, USA, dated 4 March 2011.

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| <p>CRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?</p> | |
| <p>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?</p> | <p>See previous submission and above.</p> |
| <p>82. What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?</p> | <p>See previous submission and above.</p> |
| <p>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?</p> | <p>See previous submission and above.</p> |
| <p>84. Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?</p> | <p>A consolidated piece of legislation would be welcome.</p> |
| <p>85. Should sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations, 2003 be consolidated into our proposed Bill (at least insofar as they cover copyright matters)?</p> | <p>We think not.</p> |
| <p>86. What have we missed?</p> | <p>Where we believe an issue has been missed, we have drawn attention to it in this response.</p> |
| <p>87. 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.</p> | <p>We commend the Review Committee on the very detailed proposals contained in the <i>Consultation Paper</i>. We hope that this response will help to inform its final</p> |

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