Copyright Review Committee Submission

Catherine Murphy TD
Stephen Donnelly TD
Digital Rights Ireland
McGarr Solicitors

Submission

Ireland's copyright laws are currently being examined by the Copyright Review Committee. The aim of the review is to identify barriers to innovation caused by the current legislative framework and to recommend solutions.

The Committee has called for submissions, and this document is a response to this call.

We hope that our submission represents the needs and interests of ordinary consumers. We believe that ordinary consumers' needs are greatly underrepresented in the consultative process (through no fault of the Committee). Our intent is that this submission will help redress the balance.

We hope that it will add to the reform of copyright legislation so as to stimulate artistic endeavour and technological innovation and investment, as well as the welfare and freedom of choice of consumers. The legislation should balance the right to private property with the right to freedom of expression. It should be easy to understand, transparent and accessible.

The public was given an opportunity to consider a draft of this submission, and many of the comments received have been incorporated into this draft.

The submission was prepared by Catherine Murphy TD, Stephen Donnelly TD, Digital Rights Ireland and McGarr Solicitors.

Contents

Executive Summary

Copyright law should have the consumer and citizen at its heart. Its objective must be to ensure that consumers fairly compensate the producers of copyright works. It must do this in an environment of rapid, relentless technological change. It must balance the rights of the holders of copyright with the civic and human rights acknowledged by the Charter of Fundamental Rights.

The following are some key issues and anomalies that we believe need to be rapidly addressed as part of a reform of copyright law.

1 There is ambiguity around the legality of core aspects of what is considered everyday behaviour online, such as linking to third-party content. This needs to be resolved. Ireland's existing copyright laws provide for a strong presumption in favour of the holders of copyright.

2 End-users are not well represented in lobbying efforts aimed at shaping Ireland's copyright regime, perpetuating the allocation of disproportionate power to copyright owners.

3 Ireland's existing copyright laws are not sufficiently adaptable to the rapid evolution of technology, in particular the creation and distribution of digital content.

4 Copyright law in Ireland can impact directly and adversely on free speech. Parody and satire do not have the same protection as in other countries, such as Australia and the US.

5 Creating a transparent, easy-to-use, fair and cost-effective copyright regime will stimulate internet based economic activity and investment and job creation.

We make the following recommendations:

1. Provide for Free Speech
Free speech is at the heart of our democratic system. As a central element of the new regime, copyright should not be allowed to fetter the spread of ideas. In particular, the restrictions on parody and satire as a result of current copyright legislation should be relaxed.

2. Move from Fair Dealing to Fair Use
Ireland should introduce 'fair use', to allow copyright material to be used in innovative and useful ways, but without undermining the rights holder's fundamental right.

3. Get Ownership Rules Right
Copyright exists in order to protect financial returns to artistic endeavour and investment.
There needs to be a balance between the rightsholder's need to produce a return on his investment, and the public good which includes the right to build on what has gone before.

4. Provide Legal Clarity
The law of copyright need to be as clear as possible.

5. Appropriate Penalties and Enforcement
There needs to be appropriate sanctions for infringement and these need to be enforced appropriately and effectively.

6. Protect innocent parties
Innocent parties should not be punished for copyright infringements just because it is easier than finding and prosecuting those who do the infringing.

7. Put the consumer at the heart of any resolution or mediation system
Any 'copyright council' should ensure equal representation of all stake-holders. Consumers must be well represented, something which to date has not happened.

8. Recognise the limits of copyright
Copyright and the law cannot provide all the answers to the problems of incentivising and funding the creative industries. Copyright law that attempts to do so may be so proscriptive as to inhibit innovation.

9. Make it easy to pay and to license
Rights owners need to put the technical and business infrastructure in place to allow rapid, efficient licensing for all sorts of purposes, from consumer use, to reuse as part of a different work.

Finally, we would emphasise that copyright law is not a panacea. It is only a small part of the relationship between the consumer and the producer. We cannot expect to solve the problems which the various content industries report through making new, more restrictive laws

PRINCIPLES

Principles

We believe that the following principles should be at the heart of copyright reform:

- In any review of copyright law, the needs of consumers and citizens should be a key consideration. Consumers are the ultimate purchaser for the producers of copyright works.

- The system of copyright must, at its heart, facilitate the fair payment of creators by consumers of their work.

- Reform must allow for the accelerating pace of technological change.

- Reform of Irish copyright law is an opportunity to positively differentiate Ireland from other jurisdictions. Short-term interests should not deter us from pursuing the economic and cultural benefits that reform will provide.

- Any Irish reform of copyright law must take into account the decisions of the European Court of Justice balancing the right to copyright enforcement with the civic and human rights acknowledged by the Charter of Fundamental Rights.

Issues

1. Copying and Innovation

- In the digital age, copying is now an ordinary activity. Every computer is a copying machine, and every Internet connection is a distribution mechanism for copies. Anytime something is downloaded, it is by definition copied. Copying may be as simple in practice as forwarding a link.

- Our laws were designed for the old analogue world, when making exact copies was a difficult business, involving physical printing machines, and complicated duplication setups.

- Copying is now an essential aspect of many Internet services. For example, Google makes a copy of the content it is indexing as part of the process of indexing the pages to allow searching.

- Increasingly, in both art and commerce, innovation comes from copying.

2. The copyright 'stick'

- Unauthorized, literal copying of intellectual property is not desirable or acceptable. If copying is permitted on a widespread basis and becomes a legitimate, accepted way of obtaining material, there is clearly a much narrower scope for attracting people to invest in production of high quality material.

- However, the Copyright and Related Rights Act 2000 and the secondary legislation arising from it create what is now a punitive and impractical regime. This regime was designed for a situation where copying, legitimate and illegitimate, was not as much a part of the production and distribution of media, where the cost of unit production was much higher and where the division between those who produced and those who consumed media was much more clear-cut. It was designed to provide protection for large-scale rights holders. At that time, these were the main funders of creative productions and the sale of copies was the main income that derived from creative work.

- The range of measures available to the purported rights-holder involve a presumption that copyright subsists in a work in favour of the plaintiff and provides for exemplary, aggravated damages and criminal sanctions including summary conviction for each constituent offence.

- In theory these same benefits accrued and accrue to small rights-holders, for example an individual photographer or writer. In practice, however, those rights are difficult to meaningfully vindicate.

- There have been instances where the laws enforcing copyright have been abused or applied over-zealously. In the United States, websites have been shut down for long periods as a result of an apparent misunderstanding by enforcement agencies and by the owners themselves of how the intellectual property had been distributed. One website was shut down for a full year. Whilst the website is still in operation, this clearly caused enormous reputational damage and loss of profits for the owner of the website, who was operating what turned out to be a perfectly legitimate business. A shutdown by policemen, without a trial, is not the appropriate intervention in such circumstances.

- Equally, in Ireland, charities have been put under pressure to pay penalties for linking to news stories from their websites. (See Case Studies: Irish Newspaper publishers and linking)

- Rights holders have been given all the stick they could ask for without providing the carrot of providing consumers with services they want at a price they will pay.

3. Copyright and Technology: Creation, Nature + Distribution

Creation

- The creation of content (be it films, music, computer programmes or any of the many other types of popular content) has changed utterly in nature since 2000 as a result of technological progress.
  - Formerly, there was a clear distinction between producers of content and consumers and their roles were clear. Equally, there was little or no uncertainty about the originality of a work.
  - The economics of content production have changed. Whereas previously, it took a team of technicians, musicians and business people to assemble a music album, technology means that much the same end can be achieved by smaller teams with much less resources.

Nature

- The nature of content has changed. Rather than being clearly free-standing works, works often incorporate, directly or by reference, other works. The reason they incorporate these works is often because of their cultural significance. It is not an attempt to simply capitalize on the value of the authors' of those works.
  - The Internet has driven this change. The most frequented sites, like Google, Facebook and Twitter aggregate content and put it into new contexts, and by doing so, make it more useful. Google builds indices of Internet contents and makes it easy to find what you are looking for. Facebook and Twitter tell you about what your friends are talking about and interested in. Similarly, user-generated content sites (for example, Youtube) host the work of a multitude of users, which are then responded to by other users.
  - The Copyright Review Committee correctly identifies this type of downstream and follow-on innovation as a developmental tool in a modern economy and, indeed, notes that:

    "Such innovation can lead to the evolution of the original goods or services, or to the development of new ones, and it is a very important source of innovation in the modern economy".

Distribution

- The Internet moves faster than the speed of the law by a considerable margin. Since the adoption of the last Copyright statute in Ireland, not only the media we consume but the way we consume them has utterly changed.

- Intellectual property is increasingly being disassociated from its traditional physical forms as creative industries move to digital distribution. Blocks of paper become e-books. DVDs become Netflicks streams. Music becomes iTunes downloads. Newspapers and magazines become iPad apps.

- This move to digital distribution is one of the greatest opportunities for culture and for commerce in the modern age. But it also has become an example of how current copyright law has damaged innovation. For distribution to work, there must be distribution channels - platforms and innocent intermediaries.

- The law makes these intermediaries (the likes of boards.ie or politics.ie, online discussion boards in Ireland, but also the likes of Youtube, a video sharing site) liable for the actions of their users. Whilst this may have been appropriate in a bygone era of printing presses and physical distribution networks serving a centralised editorial model, it does not suit the needs of decentralised, user-generated content. Rights holders still need to be protected, but in an appropriate, proportionate way. Systems for distributing information should not be made illegal for fear that some of that information may turn out to be under copyright.

- The law's interaction with the Internet is at a critical junction. It needs to be flexible so as to allow rapid change in response to the enormous opportunities created by new technology.

4. Representation of consumers' interests

In spite of the fact that consumers are the paymasters for copyrighted content, consumers are underrepresented in the debate about copyright. Large-scale rights holders, on the other hand are overrepresented. Arguably, artists and producers are also underrepresented. There is an immediate incentive for large-scale rights holders to organise and lobby to maximise the short-term return on their back-catalogue of assets. (See "Amen!" in Case Studies below.)

The only practical representation that consumers have in the legislative process is through their public representatives. Any steps to move the making of copyright law away from public representatives needs to be treated with great caution.

5. Parody and satire

One way in which copyright becomes an issue and can impinge on free speech is around the area of parody and satire. It is not surprising that the subject of a parody often holds a copyright in material which is reproduced for comedy purposes, and it is not surprising that the subject sometimes takes offence, to the point of instituting legal proceedings. In Australia*, a 'comedy right' has been introduced to provide protection for artists in these circumstances.

* *http://www.consumerfocus.org.uk/files/2011/07/Consumer-Focus-Parody-briefing.pdf*

Recommendations

Recommendations

Ireland can now realign the intellectual property regime into one which is innovative, adaptable and fit for the future. In doing so, Ireland can gain a competitive advantage as a place to live and do business in the digital age. Ireland can also take a leadership role for other jurisdictions to follow.

1. Provide for Free Speech

Free speech is at the heart of our democratic system. Copyright cannot be allowed to fetter the spread of ideas. The biggest issue is around the area of parody and satire. We endorse Recommendation 12 of the Gowers Report* in the UK: create an exception to copyright for the purpose of caricature, parody or pastiche.

2. Move from Fair Dealing to Fair Use

The changes in how media have been produced and consumed have been largely unrecognised in Irish copyright law. We believe it would benefit ordinary consumers if many (but by no means all) copying activities were legitimised in law.

The most conventional approach to making this feasible would be an extension of 'fair dealing' to be closer to 'fair use' in other jurisdictions. As it stands, this has facilitated the innovative development of Internet services in the United States.

This would:

- Allow news gatherers and various types of aggregation services to operate more freely and without being the risk of arbitrary prosecution. This would make a wider variety of content readily available to the public, both directly and indirectly through aggregators.
- Prevent a monopoly of views.
- Prevent or limit the abuse of the monopoly that copyright bestows.

* *Gowers Review of Intellectual Property: http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf*

We think serious consideration should be given to going further than current US fair use laws. We should allow the legal system to adopt positive innovations whose effect will be to maximise the economic benefit of intellectual property overall.

It is important for Ireland to openly set out its intention to seek any changes required at EU level to allow that to happen.

3. Get Ownership Rules Right

Copyright exists in order to protect financial returns to artistic endeavour and investment. This makes it possible for artists to dedicate themselves to their craft, and for investors to support this (e.g., through investment in movie or album production).

However, the extent of copyright must be limited in the public good. This is analogous to pharmaceutical patents expiring, allowing generic drugs be produced which are affordable to a wider population.

We think special account should be taken of the work of Dr. Rufus Pollock* in relation to optimising the extent of the copyright monopoly. Pollock's work concentrates on the issue of the length of the term for the copyright to last. However, the same arguments can be applied to other aspects of the copyright monopoly. The strongest protections will probably not provide the greatest incentives for the production of new, high quality works.

The ownership rules need to reflect the new economic landscape where opening up content allows for lower-cost innovation and improvement, or at the very least, allows a rights holder to cheaply bring the existence of the created work to the attention of a mass audience.

** Dr. Pollock's analysis indicates an optimal copyright term of 15 years. http://rufuspollock.org/economics/papers/optimal_copyright_term.pdf*

4. Provide Legal Clarity

The limits of copyright need to be as clear as possible. There will always be grey areas, but every effort should be made to make it as clear as possible to all parties what the law means and what the implications for them are. Equally, it is often unclear if a work is covered by copyright or where ownership of the rights actually lie. The industry should provide mechanisms, such as registries, to improve this.

5. Appropriate penalties and enforcement

There needs to be appropriate sanctions for infringement. They need to be appropriate for the particular situation. For example, a child making illegal copies and distributing them on the Internet needs to be deterred, but this should not include cutting the child's entire family off the Internet. Similarly, if there is a question over the legitimacy of content on a website which has a commercial purpose, there needs to be certainty that the use is not authorized or otherwise legally permitted before the website is shut down.

There needs to be appropriate and accessible mechanisms for enforcement. A rights holder (who might be a sole trader like a photographer or freelance writer) should not need to embark on a long and complex journey to enforce rights. At the same time, the enforcement needs to provide for a fair trial. The enforcement procedures cannot be used as a tool for 'shaking down' ordinary users who have infringed in a relatively minor way. Use of non-court mechanisms, such as having Internet service providers applying penalties to customers who are alleged to have infringed copyright is not a fair or proportionate way to proceed.

6. Protect innocent parties

Innocent parties should not be punished for copyright infringements just because it is easier than finding and prosecuting those who do the infringing. However, this is the current situation in Ireland.

Examples of this include bulletin boards and sharing websites, which may inadvertently display content which is under copyright. It also includes Internet Service Providers, who route traffic from third parties. In both these cases, the appropriate action is to take proceedings against the actual infringers.

Not only is this approach contrary to the principles of natural justice, it is ineffective. Ofcom, the UK regulator said: "For all blocking methods, circumvention by site operators and internet users is technically possible and would be relatively straightforward by determined users." Other countries who implement these regulations see a temporary dip in piracy, followed by a return to normal levels once users find alternative methods.

7. Put the consumer at the heart of any resolution or mediation system

The Internet is in a state of rapid change. The law needs to take account of that pace. There are a number of means proposed by which that can be done. There has to be a balance between the need for flexibility and the need for laws to be democratically approved. What cannot be allowed is a body of law to develop which is outside the normal legislative procedures and the ordinary courts.

There needs to be an appropriate way to resolve disputes, if not to the satisfaction of all parties, in a definitive, fair way.

Our primary concern is that consumers, who ultimately pay for all content, have their needs appropriately taken into account and that the above objectives be achieved. To this end, we recommend:

- That the law be based in principles, rather than in specific rules that are applicable to today's technologies;
- That whatever body makes binding decisions about copyright matters, that their findings should form a corpus of precedents which can give greater certainty about the law;
- That any 'copyright council' (other than a council which deals solely with internal industry matters) be heavily weighted in favour of representing the end-users, rather than representing
- The various facets of the industry. This follows the best practice in other professional regulatory bodies such as the Medical Council and the proposed Legal Services Regulatory Authority.

RECOMMENDATIONS

8. Recognise the limits of copyright

Copyright and the law cannot provide all the answers to the problems of incentivising and funding the creative industries, any more than the Road Traffic Acts could provide all the answers to the problem of road safety.

We cannot continuously extend the law in order to benefit rights holders, particularly if this will be damaging in other ways to the personal rights of consumers and innocent parties, or if it undermines the value of intellectual property to the economy as a whole.

9. Make it easy to pay and to license

Consumers sometimes complain that they infringe copyright because they cannot access a legitimate copy. This can never be an excuse for breaking the law. Nevertheless, it seems to be factually accurate*.

From an economic point of view, the failure of the content 'market-makers', the large media companies, to make the content consumers want available to them legitimately and for the right price is an example of market failure. Whatever about the rights and wrongs, and whether or not the consumer goes on to infringe, the artist is being left short in this situation. Money that was available and which would rightly have gone to the artists involved either directly or indirectly, was lost because the market failed to function correctly.

The practical reasons for these problems are manifold. It is not simply a lack of will that results in certain copyright works not being available on the Internet or only being available in certain territories. The problem is that there is often uncertainty about who actually holds the rights for part of the work, or all the copyright clearances needed may not be in place. This makes it impossible in practice to market and sell the work.

* *http://www.forbes.com/sites/erikkain/2012/05/09/hbo-has-only-itself-to-blame-for-record-game-of-thrones-piracy/*

RECOMMENDATIONS

This is a problem that the rightsholders urgently need to address. It is up to rights holders to make their property available for profit.

To facilitate this, rights owners need to put the technical and business infrastructure in place to allow rapid, efficient licensing for all sorts of purposes, from consumer use to reuse as part of a different work. An important part of this would be rights databases, recording every copyright work, and providing information about how it can be licensed.

Regulation has a role to play. One useful way to encourage the development of such databases might be to provide for a 'default' licensing arrangement for works for which the owner has failed to specify a licence. The 'Creative Commons' licenses might provide the starting point for the default licence.

Case Studies

Case Studies

Video Saved the Movie Star

In 1976, Universal Studios and the Disney Corporation sought to curtail the use of the Betamax VCR (a videocassette recorder) by way of litigation proceedings against Sony. Universal and Disney argued that the major use of a video recorder was to make illegal copies of their works, and therefore should be banned. Sony, according to the complainants, were contributing directly to this breach, and they were thus liable to pay compensation, and would need to stop selling video recorders. The US Supreme Court disagreed and held that time-shifting TV programs amounted to allowed "fair use". The fact that the device could also be used in ways that would clearly infringe copyright law did not mean that the machines should be banned or that Sony should have to pay damages. This allowed innovative uses of the new technology. Within a few years, it provided a new channel to give the movie industry direct access to people's homes, DVDs superceded analog videotape and eventually came to contribute "as much as 70 percent of revenue for a new film.*"

Amen!

A collaborative copyright regime allowing for fair use can bestow social, economic and artistic impact. The most famous example of this is the afterlife of the "Amen Break", and the development of a musical phenomenon via the use of unimpeded creativity and innovation. In 1969, the drummer from a popular soul-group known as the Winstons, played a six-second drum solo in the middle of their song "Amen Brother". This was incorporated onto the b-side of their most-famous single "Color him Father", which in turn, reached number 7 in the US Billboard Charts.

The emergence of sampling technology in the 1980's allowed for a new generation of would-be music artists to splice and cut drumming solos, and in turn, develop and innovate a new musical genre. The use of the Winstons' drumming solo provided the basis for developing musical movements such as hip-hop, backbeat, and drum and bass. This development was unimpeded by threats of litigation; disproportionate licensing fees, and gave rise to immensely successful musical innovation.

* *http://www.nytimes.com/2008/11/21/business/21dvd.html?pagewanted=all*

Without the development of a culture of musical sharing and reuse allowing the Amen Break to become the basis for an entire genre of music- rap and hip-hop would have never been able to contribute so dramatically to mainstream culture in the way which they have.

In addition, the reuse of breaks and beats allowed the development of an industry which is estimated to generate more than $10 billion in revenue every year.

Irish Newspaper publishers and linking

In 2002, Newspaper Licencing Ireland Limited (NLI) was established by the Irish Newspaper publishers as a body intended to licence companies or individuals to copy and share clippings from Irish Newspapers.

In 2012 there were a number of highly critical statements by newspaper publishers on the reuse of what they termed 'their' content. Information, as opposed to particular pieces of writing or words was described as property of the newspapers.

*"The fact is that, to generate good information carries a cost. It requires money. Unless you steal it like most new media companies do."**

This was a reference to new, online publications which had proved successful in attracting readers by mixing the aggregation of news from available traditional news sources with original reporting driven by stories emerging from social media.

NLI Limited, in an apparent change in the policies it had up to then pursued, subsequently sent out a demand letter to Women's Aid, a non-profit organisation dedicated to the assistance of women who had suffered domestic violence. In that correspondence they asserted; "a licence is required to link directly to an online article even without uploading any of the content directly onto your own website.*"

This claim has yet to be tested and we do not know whether it represents the start of a more widespread aggressive stance taken by newspaper publishers towards reuse of information.

* *http://www.scribd.com/doc/80644220/Alan-Crosbie-s-Speech-Media-Diversity-and-Why-It-Matters*

It certainly represents an extreme of copyright holders seeking to assert greater control over their content, to the unqualified detriment of the common good.

If the claim by NLI that a person had to pay money to link to another site had been made and enforced at the start of the world wide web it would never have got off the ground.

Google Books and Google Search

Google have decided to begin digitally scanning the collections of several prominent libraries in order to create a vast searchable database of literary works**. Copyright holders who have not authorized and object to the digitization have filed suit against the company. This project clearly had implications for authors of these books. Google alleged that the commercial implications were positive, as it would provide a new revenue stream for the authors. The authors were uncertain whether this would be the case, and were concerned about the level of royalties they would in fact receive from sales. The case will come to trial in the second half of 2012, although it is possible that there will be a court-authorised settlement of the whole matter before that date. There are many good arguments on both sides. Google's defence arises from 'fair use'. Google believes that it is just as entitled to index these publicly available books as it is to index the Internet.

The broader issue of whether Google is entitled to index and cache pages was considered in Google v Fields. The Court found in favour of Google, finding that Google's activities in indexing and caching Internet pages amounted to fair use. It also found that there was an 'implied licence' to Google to index and cache the pages. This last finding would obviously not apply to books predating modern indexing technologies.

Were the same cases to be brought in Ireland, the outcome would be much different. Google would not be entitled to rely upon 'fair use' at all. On the face of it, the Google Books project would be completely and unquestionably illegal. There would be no possibility of a settlement with authors.

* *http://www.mcgarrsolicitors.ie/2012/05/10/newspaper-licencing-ireland-ltd-asks-womens-aid-for-money-to-link-to-newspaper-websites/*

** *http://www.au.af.mil/au/awc/awcgate/crs/rs22356.pdf*

Market failure in music licencing

A Fortune 500 customer of an events and video production company (based in Ireland) wanted to license the use of a particular music track for use at a corporate function. The function was private and the usage was straightforward, not involving any compromise of the artist's moral or other rights. A budget of €1000 euros was allowed for. The proposed use was manifestly commercial, and not in any way required for the sake or free expression or for explanation, and therefore it could not possibly be considered as fair dealing.

The video production company took steps to clear its planned use of the music track. After unsuccessful approaches to the record company in question, the company engaged its lawyers to pursue the matter. After over a week of pursuit, it became clear that the music industry was organizationally incapable of providing the licence the customer and the production company required at anything like a reasonable price. The rate sought for the required licence was arbitrarily increased when the licensing agencies found out who the client was. One of the four licensing agencies involved suggested that it would be better to use library music. Another agency recommended that the production company get a solicitor to represent them (which the agency in fact did). The rights to the track were divided between two owners. The various licensing agencies did not work together and even contradicted one another, and this made the whole process much more difficult than it needed to be. The result of this was that the client did not get their music track, and the artist did not get any royalty payment, a failure for all the parties involved.

In our engagement with consumers on the Internet to review and consider this document, we have had recounted numerous other examples of products not being available for purchase, and resulting loss of revenue for artists and investors. In these cases, the particular product was not available for download in a particular market because of an issue relating to rights. It is up to the industry to resolve these issues in orderto discourage consumers from making illegal copies of

their valuable work. This instances related to us occurred in the film/video and book publishing areas, as well as in in the music area. Another aspect of how the music industry has failed to realistically serve its market is in relation to how music is licensed to consumers. At the moment, a consumer in Ireland is forbidden by law from copying their CD music to an MP3 format. An MP3 copy, used by the owner of a CD that it was ripped from, is as illegal as a copy downloaded without any licence at all and without any payment at all from the filesharing. This seems a manifestly ridiculous way to treat paying customers in the digital age, and the industry accepts that it is unenforceable.

On the positive side, there are innovative ways to fund music and its promotion which do not depend on copyright enforcement, but which are not being embraced by the traditional music industry. It is almost as though a new music industry is emerging, separate from the old players, not represented by the majors. For example, Amanda Palmer's record company told her that it would cost her €200,000 to fund her next album. Palmer used Kickstarter to raise €800k in less than a month. One result of this was that the end consumer being able to buy and download the entire album for $1* Unfortunately for the record company, it was not itself able to see the potential for new funding and revenue streams, and lost out as a result.

* *http://www.kickstarter.com/projects/amandapalmer/amanda-palmer-the-new-record-art-book-and-tour*

SPECIFIC RESPONSES

Specific Responses

The Committee's review asked for responses in relation to very specific issues in order to advance its consultation. The foregoing comments are intended to frame these specific remarks.

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

The needs of consumers must be brought into sharper focus. Innovation needs to be focused on providing the best results for the consumer in terms of quality and value-for-money. Sustainability should also be a watchword. The needs of the innovator or artist (as opposed to the rights holder) are also critical

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

In general yes, there is; although there are some areas of ambiguity, for example around links to websites, forms of secondary liability for infringement, and the scope of the sui generis database right.

(3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

Yes.

(4) Is the classification of the submissions into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions – appropriate?

It is generally appropriate, though in reality, 'users' are more and more likely to also be rights-holders to some degree. Also, the term user undermines the distinction between the user as consumer, citizen and creator in their own right (for example, in relation to mash-ups).
It is rather odd that artists and producers are not mentioned. A rights holder is quite different from an artist or producer of copyright work and their interests are quite different. A rights holder is interested in exploiting existing work. An artist or producer is interested in producing new work and if necessary attracting the capital he or she needs to do so. An artist or producer may not be interested in holding rights at all.

Whilst these terms might be appropriate for dealing with the consultation, it would not be appropriate to institutionalize these terms as they are ill-defined.

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

Software developers and researchers occasionally fall foul of the law in relation to circumvention devices and this is another case that may need to be considered. These could be considered under the heading of intermediaries.

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

The long-term needs of consumers and by extension the society should be to the fore. The benefit of intellectual effort needs to be maximised, whilst at the same time, there needs to be very adequate incentive for investing in intellectual effort.

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

Yes. However, we would actively support this only if, in the design of the Council, consumers are served to the maximum extent.

(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 depends upon its role. If its role is to make recommendations on behalf of the industry and these are to be somehow binding on other industry members, it might be one of the former categories. If it is to make recommendations which are binding or have an effect on consumers it should be a public body. If it is a public body, and its role is to make rules in relation to copyright which are binding on consumers, its governance should be in the hands of consumers and it should in any case be subject to the Oireachtas.

As discussed in this document, there is serious market failure in this industry in relation to the licensing of rights for particular purpose. The industry appears to be extremely badly organized in relation to serving the needs of consumers. This is an example of a problem that an industry-only body might resolve.

(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?

This depends upon its role as described above. It is worth noting that collecting societies do not represent the interests of artists. Their role is strictly to collect revenue.

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

It depends on the role of the Board. If the Board is a talking shop to solve the serious problems within the content/creative industries and between its constituent parts, it should probably be composed mainly of industry representatives. If it is to make rules in relation to the operation of intellectual property overall and how it effects consumers, then it should be composed largely of consumers' representatives.

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

There are a number of different functions that might need to be fulfilled.

(12) How should it be funded?

This depends upon its functions. An industry council for rights holders would obviously be funded as the rights holders see fit.

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

A private council might want to operate such a system. It would need to consider whether this would be beneficial to consumers and how it could be structured so as to be profitable. Issues of scale would have to be considered.

On the face of it, it would make sense for such a copyright exchange to be privately operated, with its own accounts.

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

This question falls outside the remit of this submission.

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

If the council is private in nature and the members wish to establish an ADR, they would be free to do so. The council might or might not want to make it compulsory for use to resolve disputes between members. However, the use of such an ADR in relation to disputes with non-members would be very questionable. On the face of it, such a tribunal would be inherently partial to the member over the non-member. This would make it nearly useless in practice.

If the council is public in nature, establishing such an ADR would needlessly and perhaps harmfully duplicate the workings of the constitutionally mandated courts system. It would be a better plan to provide a fast, efficient, user-friendly district court and circuit court track for intellectual property disputes. This scheme could be the starting point for further reform of the district and circuit courts. It should also be considered how valuable a body of published case law is in establishing commercial certainty in relation to the law on complex areas such as intellectual property. ADR processes generally do not provide for development of such a body of case law.

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

It should be allowed for, to expressly give the parties the maximum freedom to resolve disputes, but it should not be mandated.

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

No comment in relation to the name. The powers of the Controller should largely be limited to those required to fulfil her legislative functions. The controller should take the needs of consumers into account in decision making.

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

Yes, but it may be important to give creators a mechanism to formally object, or distance themselves, from particular uses or exploitation of their work.

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

It might be analogous to the relationship between the press ombudsman and the press council.

(20) Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

We think there should, if this will allow rights to be vindicated faster and with less expense. There could be significant cost to this.

(21) Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

We think there should, if this will allow rights to be vindicated faster and with less expense. There could be significant cost to this.

(22) Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?

No response.

(23) Is there any economic evidence that the basic structures of current Irish copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?

Yes. The quantitative work of Dr. Rufus Pollock indicates that copyright law is overreaching. See References Section.

(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?

Fair use would dramatically increase the opportunities for innovation. The success of the United States in relation to Internet industries and the relative failure of the European economies are explained in some part by the more liberal fair use law there*. One well known example in Ireland relates to the removal of a widely used smartphone app designed to locate Dublin Bikes around Dublin city based on a claim by the owners and operators of the bikes, JC Decaux.

* *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use, CCIA, 2011 http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000526/CCIA-FairUseintheUSEconomy-2011.pdf*

(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?

Dr. Rufus Pollock's quantitative work clearly indicates that the copyright term is too long.

(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?

This question falls outside the remit of this submission.

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

Insofar as this arrangement would facilitate easier dealing in intellectual property, this should be considered.

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

Yes.

(29) Should the definition of "broadcast" in section 2 CRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?

Yes in principle, although in practice, there is a significant difference between what is normally considered as Internet video and broadcast in the traditional sense, and it may not make sense to purposely join the two.

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

This question falls outside the remit of this submission.

(31) Should sections 103 and 251 CRRA be retained in their current form, confined only to cable operators in the strict sense, extended to web-based streaming services, or amended in some other way?

This question falls outside the remit of this submission.

(32) Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?

We do not think there is any evidence. Evidence from faraway markets such as Korea and Japan is given without presenting the full context of the development of the markets in those places. In Korea, a music market with its own dynamics, the effect of cutthroat pricing appears to have been a major driver. This pricing has led in turn to a reduction in income for artists. It is important to understand these legislative changes in their true context.

Any benefits of modifying remedies as described need to be weighed against the cost to society. Enforcement resources, including public resources become tied up with this work. The rights of data subjects also need to be considered.

(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?

Not that we know of.

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

This question falls outside the remit of this submission.

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

No response. However, in case of photography in public places, recognition should be given to the fact that a photographic work is derivative to some degree, and that members of the public have no choice but to allow their image to be incorporated in these works.

(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?

This question falls outside the remit of this submission. However, any exceptions should be extremely narrow and photography is a very wide area of endeavour.

(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?

Yes. It is worth noting that if such a levy were collected, its proceeds would mostly be sent overseas. Such levies can also a highly regressive.
(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?

This question falls outside the remit of this submission.

(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?

This question falls outside the remit of this submission.

(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?

It has been strengthened in our view. Caching, hosting and conduits are increasingly a part of legitimate Internet use. The development of cloud computing technologies has multiplied this effect.

(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?

This question falls outside the remit of this submission.

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

This question falls outside the remit of this submission.

(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 an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?

The range of intermediaries protected by the E-Commerce Directive are not sufficiently wide in that, for example, the Directive itself may not protect the activities of search engines or content aggregators.

(44) If the answers to these questions should lead to possible amendments to the CRRA, are they required or precluded by the E-Commerce Directive, EUCD, or some other applicable principle of EU law?

EU law certainly permits extension of the E-Commerce immunities to other online intermediaries - the Directive in this regard establishes a floor rather than a ceiling.

(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?

No. However the view of the newspaper industry is that such a link is infringing and requires a licence and this is already creating difficulties for Irish websites. Clarification on this point (accompanied if necessary by an explicit fair use principle to deal with e.g. quoted headlines) would ensure that this and similar views would not occur again.

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

Yes. But the principle is wider than than just our current concept of linking. If linking is illegal, then indexing is certainly illegal too.

(47) If so, should it be a stand-alone provision, or should it bean immunity alongside the existing conduit, caching and hosting exceptions?

As per answer 45, a linking immunity should ideally be accompanied by a wider fair use principle which covers this sort of use. For example, the use of a reduced size thumbnail to link to a site would require both a fair use justification along with a linking immunity.

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

If as is alleged, copyright law forbids even linking to articles, then it most certainly does. It is legally impossible to operate as innovative intermediary in Ireland, and those that do operate only do so under forbearance.

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

Yes.

(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?

Arguably the greatest innovations, and most economically beneficial ones, have been made by companies rearranging the presentation of pre existing information in new ways. Google and Facebook are the most prominent examples.

It is important that Ireland's laws do not make the country unwelcoming to the creation of as-yet-unimagined equivalent services.

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

The overarching solution to this form of content reuse is for Ireland to provide for a wide ranging "fair use" exemption from copyright.

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

Adding piecemeal immunities for particular actions is suboptimal as a solution to a broader problem. By providing for fair use in Irish law, the principles which would allow for the above mentioned immunities, as well as those as yet to be invented, would be explicitly set out.

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

See answer to 52 above.

Principles based legislation is required. Otherwise it risks being tied by technology changes and permenantly lagging years if not decades behind the capabilty of creators and content sharers.

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

Yes, by definition. As such, it will always favour legacy rights holders over new business. A good copyright regime is one which recognises this and explicitly seeks to minimise negative impact on innovation.

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

Yes.

(56) Should all of the exceptions permitted by EUCD be incoporated into Irish law, including:
(a) reproduction on paper for private use
(b) reproduction for format-shifting or backing-up for priv
private use
(c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research
(d) reproduction for persons with disabilities
(e) reporting administrative, parliamentary or judicial proceedings
(f) religious or official celebrations
(g) advertising the exhibition or sale of artistic works,
(h) demonstration or repair of equipment, and
(i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?

Yes

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

Yes. This is particularly important to allow Ireland's high technology, information driven sectors to successfully compete when recruiting qualified Irish workers. There is also a huge potential for a 'public good' element, aside from economic considerations.

(58) Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?

Yes

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

Yes, with appropriate commercial caveats regarding the passing of rights.

(60) Should the exceptions for social institutions be repealed, retained or extended?

No response.

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

If this means that user-generated content should not have the same protections as other copyright works, no.

The nature and intent of a work, and the extent to which it is commercial should be an aspect of whether a particular use within that work is 'fair use'.

(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 response.

(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?

Innovation is not, in and of itself a public good. The fact that a use is 'innovative' is not in itself a reason to allow the principles of copyright to be cast aside.

(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?

Innovation is not, in and of itself a public good. The fact that a use is 'innovative' is not in itself a reason to allow the principles of copyright to be cast aside.

(65) When, if ever, is innovation a sufficient public policy to require that copyright-protected works should be made available by means of compulsory licences?

Innovation is not in and of itself a sufficient reason to bring in a compulsory licence regime. The reason to bring in such a regime would be to ensure free flow of information. An easily accessible and usable compulsory licensing regime might form a part of certain forms of fair use.
Such a compulsory licensing regime would not necessarily effect the moral rights of creators.

Such licensing could be introduced and tapered in a variety of ways. For example, compulsory licensing might only come into play a number of years after publication.

(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?

On the face of it, such a specialist exception would not make sense without a very narrow definition in relation to innovation.

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

Yes. This exception should be more general, in particular if the rights holder is not in a position to immediately provide a fully satisfactory version in the desired new format. 'Heritage institutions' should be construed in its widest meaning, to include private collections.

(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?

Probably not, if the catalogue is to be used for a commercial purpose, i.e., to be sold. The availability of a licensed copy on reasonable terms should also be considered as a factor.

(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 a use like this should come under a more general principle of fair use.

(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?

Yes, but a use like this should come under a more general principle of fair use.

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

The extension should be designed with ensuring ongoing availability of the publication to the public on reasonable terms. Although digital publications do not go out-of-print, they do become unavailable for various reasons, and the role of the legal deposit might be to ensure that a publication always remains available once it has been published.

(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?

It is hard to see how a Copyright Council could grant rights to a third party in a work that it does not own and does not have any right to deal in relation to.

A better way forward would be for legislation to provide for a 'default' licence for works for which the rights owner has not come forward to specify licensing arrangements. This would not usurp a creator's moral rights- should they come forward to assert them. In most cases the work is 'orphaned' (no one knows who owns it) but it would also cover situations where the rights owners have not been able to agree amongst themselves as to the licensing process.

(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 iself, unless the contrary is expressly stated?

Yes, though obviously any change in the law should be qualified to ensure it applies as expected to works like paintings and sculptures and does not apply in an unexpected way in other instances.

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

Yes. But really, such a specific exemption should not be needed. This should be covered by fair use principles. The Irish government should commit itself to making common cause with the UK and Dutch governments to seek any necessary changes in EU required to have fair use exemptions implemented.

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

Yes. But again, such a specific exemption should not be needed. Computer security assessments relate to public safety and welfare. They may well need to be regulated (in the way other parts of the security industry are regulated) but copyright is not a suitable.

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

The fair use doctrine has operated successfully for years in the United States. It has a thriving, innovation based economy. Another strongly innovation-based economy, Israel, has adopted similar rules as a result.

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

No detailed response. Whilst there are issues to consider, the rights that do exist in EU law should be maximised.

(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?

It should lobby more broadly for a fair use doctrine.

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

See Appendix 6: Fair Use in the US Economy.

(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, either subvert the interests of rights holders or accommodate the interests of other parties?

In the simplest case, it allows consumers to link to or forward material with comment, without fear of penalties or prosecution. To that extent it is an extended amenity for the consumer. This may have further benefits for the rights holder.

It allows a wider range of views on current events to be presented, by allowing diversity in media.

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?

No response.

(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?

No response.

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

No response.

(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?*

No response.

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

Yes, if this is beneficial to understanding of the law.

(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)?

No response.

(86) What have we missed?

No response.

* *http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf*

References

References

Dr Rufus Pollock: Value of the EU Public Domain
http://rufuspollock.org/economics/papers/value_of_the_public_domain_eu.pdf

The RSA: Adelphi Charter
http://en.wikipedia.org/wiki/Adelphi_Charter

Copyright4Creativity.eu
http://www.copyright4creativity.eu/bin/view/Public/SignersList

Declaration for Europe
http://www.copyright4creativity.eu/bin/view/Public/Declaration

Centre for Intellectual Property and Information Law, University of Cambridge: Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings
http://www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf

The Gowers Review of Intellectual Property
http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf

Computer & Communications Industry Association: Fair Use in the US Economy 2011
http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000526/CCIA-FairUseintheUSEconomy-2011.pdf

Richard Hooper: Is copyright licensing fit for purpose for the digital age?
The first report of the Digital Copyright Exchange Feasibility Study
http://www.ipo.gov.uk/dce-report-phase1.pdf