

# **Response of Raidió Teilifís Éireann (RTÉ) to Copyright and Innovation; A Consultation Paper issued by the Copyright Review Committee**

**29<sup>th</sup> June 2012**

RTÉ notes the fundamental aim of the Consultation Paper which is to begin the process of “sketching out” reforms to Irish Copyright legislation to “further innovation” without denying protection to those who “need copyright law to innovate”. RTÉ as a public service broadcaster is (by necessity) an innovative content provider in that it is required (through its digital strategy) to innovate in order to maintain its relevance to an increasingly changing and technologically enhanced audience who can now access its content through a myriad of devices. The growth of digital media requires RTÉ to be innovative in how it delivers new digital services, and in how RTÉ can collaborate and engage with its audiences into the future. While RTÉ’s traditional linear services must remain strong and vibrant, new, innovative complementary products will be developed by RTÉ to ensure it meets all audience needs. As an organisation, RTÉ will be ambitious in fulfilling its core public service objectives and aim to play its part in the digital economy of Ireland.

Intellectual property rights and copyright law generally are a key support to economic growth and any effort to reform or review them must ensure that the benefits of the Irish copyright and intellectual property system are maximised and shared widely, thereby supporting economic growth and enriching society.

As will be evident from the submissions made in this response to the Consultation Paper, RTÉ is in broad agreement with many of the Committee’s proposals. However as a content provider, RTÉ would also wish to see a balance maintained in any proposed review or reform; that is a balance between ensuring that the copyright system gives adequate protection to rights owners to ensure that innovation is not confused with unfair and unauthorised exploitation or casual and localised use whereby the property rights of content owners or providers are effectively eroded. There is no question but that the digital age has rendered some copyright law provisions inadequate and the practices and the processes surrounding digital media raise questions about narrow understandings of intellectual property law, however as a content owner and an entity that is innovative in this area, RTÉ is of the view that a strong copyright and intellectual property system is equally important to encouraging innovation and economic growth.

## **Chapter 2 - The Intersection of Innovation and Copyright**

The scope of the Committee's work has been constrained by its terms of reference, focussed as those are on areas in the present national legislation that are perceived to create barriers to innovation, to identify solutions for removing those barriers, and to make recommendations as to how these solutions might be implemented through changes to national legislation. In RTÉ's view there are important changes to copyright law that are needed not because they may stimulate innovation and growth but instead because they will foster the public good socially, culturally and politically. When the Minister comes to consider implementing the Committee's final proposals, it is to be hoped that he will take these other considerations into account, so that the opportunity is not lost to create a comprehensively revised and updated copyright law for Ireland.

Given the degree of harmonisation of copyright in EU member states, the actual scope to create a significantly more innovation-friendly regime in Ireland must be assessed realistically. It is not the case that the drive for innovation and growth means reducing the rights of copyright owners to control the use of their works by third parties. As previously noted above, innovation and growth are just as much the product of a copyright regime. A strong intellectual property and copyright law system makes it worthwhile to create new works and services in the knowledge that they will have the benefit of strong protection. RTÉ is pleased to see that this point is recognised and given due weight throughout the Consultation Paper.

Against this background, RTÉ's responses to the questions posed at the end of Chapter 2 of the Consultation Paper are as follows:

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

RTE accepts this broad focus of the Review. However, we make specific comments as set out below on issues which much also be addressed.

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

RTÉ does not think that the reform process needs to include a formal restatement of the basic principles of Irish copyright law.

- (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?**

It would certainly be helpful to have at the end of the process a new Act consolidating all the amendments made to the CRRA.

- (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?**

and

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

RTÉ has no argument with this classification for the purpose of analysis; it is a useful tool for this purpose and they are useful markers around which to sketch out possible changes in copyright law.

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

In RTÉ's view there is no single answer to this question. The proper balance is struck in an issue-by-issue analysis of the current provisions of the CRRA of the kind the Committee has conducted. Some of the Committee's proposals would strengthen the position of right-holders, others would enhance the ability of heritage institutions to perform their functions, some would facilitate the functioning of intermediaries, etc. This is as it should be, because the CRRA is not an unbalanced piece of legislation. It reflects compromises negotiated over the years at international and national level. It also reflects the policy of harmonisation of our copyright legislation with other Member States.

### **Chapter 3 - Copyright Council of Ireland**

RTÉ supports any initiative that ensures the protection of copyright and the general public interest as well as encouraging innovation. Careful thought needs to be given to any

proposed model that seeks to effect such an initiative. The concern that RTÉ would have is a simple one. The tasks that the Copyright Council of Ireland proposes to take on in effecting such an initiative are manifold. They encompass a range of responsibilities from effecting a wide-ranging rights clearance system, to brokering licences to educating members of the public to prescribing standards of best practice as well as to providing an ADR service. All of these services (and more) are to be provided by the Council whose Board is to be made up of a broad mixture of representing the public interest, the industry and copyright users.

It is notable that in the jurisdictions mentioned in this Chapter – Australia, New Zealand, UK – the existing Copyright Councils represent rights-holders alone. In RTÉ's view it is unrealistic to expect that in Ireland the disparate groups of interested parties (who cannot be described as an Irish copyright community, given that some of the most powerful players are (or represent) multinational companies) could be relied upon to reach agreements across the range of activities referred to above which the Paper suggests might be devolved to a Council. The reality may be that conditions of deadlock would result, with a consequent need for Ministerial intervention to take the decisions required.

Notwithstanding the above, RTÉ acknowledges the merits of a co-operative and collaborative approach to copyright licensing regulation and reform proposed by the Paper. The Press Council is used by way of analogy, however its terms of reference and that of the Press Ombudsperson are quite defined. Its remit is to provide a forum for complaints and to adjudicate on them. Those complaints concern the print media. It is quite confined (although the complaints are varying and wide-ranging in nature), and that may be why it is effective.

While RTÉ believes that there is significant merit in the initiative behind the Council the range and scope of the tasks to be devolved to the Council is of concern to RTÉ,. Therefore RTÉ recommends that the range of tasks be re-considered and re-cast so that the role of the Council is a more realistic and defined one. RTÉ proposes that the role of the Copyright Council in Ireland should be limited to that role which exists and is performed effectively by the Copyright Council in the UK and in other jurisdictions. RTÉ suggests that separate to this many of the other tasks of the proposed Council should be effected and carried out by a specific intellectual property office – the Intellectual Property Bureau as proposed by the Committee. RTÉ suggests that the intellectual property office in the UK would be a useful model to look at in terms of how it operates.

We have set out more specific comments below in response to the questions in the Paper:-

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

Yes there is a need for such a Council to be established but RTÉ recommends that its role is more narrowly defined than outlined in the Paper. It is effective in other jurisdictions as a forum for rights holders and rights licensing. (For an organisation like RTÉ, copyright licensing is in some ways a means to an end; that of facilitating RTÉ's principal function of providing broadcasting services) RTÉ understands that the Copyright Council in the UK plays a very useful role in formulating consensus views among those organisations of rights-holders that participate in it. These organisations represent authors, publishers, performers and the record industry, including collecting societies for those rights-holders. Broadcasters and film producers are not members, despite being major rights-holders, nor are other users of copyright works. The Committee should recognise that copyright licensing and protection is the principal function of these organisations, and they regard participation in such Councils as a central part of their modus operandi. Moreover, the music publishing and record industries, and their collecting societies in particular, are able to mobilise the resources of their international lobbying bodies to promote their interests at national and European level.

**(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?**

Against the background outlined above, any Council should be an entirely private 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?**

The membership should be major rights-holders, organisational, institutional or representative bodies and collecting societies.

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

RTÉ has no comment, given the points made above.

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

This would be for rights-holders to decide, but the self-description of the British Copyright Council, provides a model: “As a liaison committee and pressure group for change in Copyright Law at UK, European and international level, the BCC provides its members with a forum for the discussion of copyright matters.”

**(12) How should it be funded?**

Privately by subscriptions of members.

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

The establishment of an Irish Digital Copyright Exchange should not be a function of the Council, although the Council could play a helpful role in the process of determining the need for such an Exchange and, if the need exists, in its subsequent establishment.

RTÉ has been following with interest the work being undertaken for the UK government by Richard Hooper CBE on the feasibility of such an exchange.

RTÉ notes that Mr Hooper has completed and reported on the outcome of the ‘Diagnostic Phase’ of his study, which was *“focussed on examining available evidence to identify the issues preventing copyright licensing from being fully effective for the digital age”* (p8 of “Rights and Wrongs”, the first report of the study). He is now moving on to the second phase of his work, but at this stage it is by no means certain that he will recommend the creation of a Digital Copyright Exchange on the model proposed in the Hargreaves Report. He has, however, identified in this phase of his work that copyright licensing in the UK can be made more streamlined, easier and cheaper to use, especially for small and medium-sized enterprises, without eroding the rights of rights owners. He had identified significant problems in a range of market segments and industry sectors:

- Libraries, archives and museums
- Educational institutions

- The audiovisual industry (feature films and television)
- The publishing industry (newspapers, magazines, books and journals)
- The music industry
- The images industry (still pictures, photo libraries, artworks)

He summarised the problems as follows:

- Complexity of licensing processes
- Complexity of licensing organisations
- Repertoire imbalance between the digital and physical worlds
- The difficulty in finding out who owns what rights to what content in what country
- The difficulty in accurately paying to creators the fair share of revenues from uses and reuses of their copyright content
- The labour-intensiveness, expense and difficulty of licensing copyright for the high volume low value transactions that characterise the digital world
- The lack of common standards and of a common language for expressing, identifying and communicating rights information across the different creative sectors and across national borders.

It remains to be seen whether Mr Hooper will conclude that a cross-sectoral Digital Copyright Exchange, as envisaged by the Hargreaves Report, is the best solution to the identified problems.

RTÉ submits that, in addition to the above Richard Hooper criteria, validation of rights ownership, statutory right of opt out, as well as the creation of an effective digital rights register for any works envisaged as coming within the remit of a Digital Copyright Exchange, should also be considered before any decision can be taken on whether an Irish Digital Copyright Exchange could be established, and to this end a similar feasibility study should be undertaken in Ireland.

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

Here we comment on the licensing issues identified in paragraphs 3.6 to 3.8 of the Consultation Paper.

- (a) We do not see a need for an expansion of compulsory licensing as a means of increasing access to content. Clearly this question engages the same issues as would be the subject of the study which RTÉ considers should be made of the need for, and feasibility of a Digital Copyright Exchange. In addition it raises the question of the protection of intellectual property for rights-holders where they have a commercial interest in retaining their rights. RTÉ does think that there is a need for the introduction of enabling legislation for Extended Collective Licensing schemes (“ECL”) under limited, defined circumstances that recognises the special position of the primary body responsible for the creation protection, preservation and management of the works involved. There would need to be a detailed consideration of what particular categories of rights and rights-holders would be suitable to being made subject to such schemes. For example, RTÉ is already obliged under section 111 of the Broadcasting Act to have a scheme for access and use by third parties of archive material in which RTÉ hold copyright. As Extended Collective Licences are not defined in the Consultation Paper, RTÉ understands it to mean that the collective organisation could licence rights even where the rights holder has not granted them and the rights holder is entitled to payment, but cannot sue for infringement even where the rights holder has not given permission for its rights to be licensed. However the rights holder is entitled to withdraw its rights from the ECL, after which the collective organisation may not license those rights. Such legislation should include proper statutory regulation of the schemes (including sanctions for non compliance by collecting societies) and a code of conduct based on minimum standards as a pre-condition for allowing collecting societies to apply to use Extended Collective Licensing. RTÉ is of the view that any collecting society that applies for ECL must be able to demonstrate that it represents the interests of affected rights holders. RTÉ is supportive of the



development of a rights' register where rights information could be centrally referenced.

- (b) We note that the Committee considers that a Copyright Council could develop codes of practice and agreed minimum standards for collecting societies, to address concerns about their activities. RTÉ acknowledges the merits of such an initiative. However RTÉ considers that this is a task that should not be devolved to a Council. It is RTÉ's view that this should be a statutory requirement to be managed by the specialist Intellectual Property Bureau.
- (c) RTÉ agrees that the Irish government should support moves by the European Commission to establish a framework for cross-border copyright licensing, and that interested parties in Ireland should work together to ensure that any framework is as favourable as possible to Irish interests.
- (d) RTÉ is opposed to the introduction of a right to share in windfall income. It may have been possible for such a right to be introduced in Germany without adverse consequences for innovation but RTÉ is certain that there would be adverse consequences in Ireland. In particular, high-end film and television production in Ireland relies on funding from many sources. Irish producers have to compete for such funding with those from the UK and other countries. The introduction of a windfall right would introduce uncertainty into the calculations which investors make and disadvantage Irish producers seeking production funding against their competitors in the UK and in other countries which do not have such windfall rights.

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

Given that RTÉ does not consider that a Copyright Council as envisaged by the Committee should be introduced, but instead considers that the functions suggested for it by the Committee should be fulfilled by a specialist intellectual property office, RTÉ considers that if an ADR service is to be offered, it should be provided under the auspices of that office – the Intellectual Property Bureau (being the suitable title suggested by the Committee).

The Committee suggests in this context that collecting societies' licensing schemes would contain ADR clauses, with the parties to them only being able to refer disputes to the Controller if the parties do not reach agreement before the ADR Service. RTÉ generally negotiates individual licences with the collecting societies, and would not wish to be obliged to include prescribed ADR provisions in these, nor would it wish to see ADR being required in circumstances where it needs to apply to the Controller for an existing licence to be extended (under sections 159 and 275 CRRA).

There is a suggestion on page 20 of the Consultation Paper that the Council could help broker the terms of a licence scheme. If, as RTÉ proposes, these functions envisaged by the Committee for the Council are given to the Intellectual Property Bureau instead, RTÉ would not wish to see the Bureau becoming involved in the brokering of the terms of licences and licensing schemes. We consider that this would call into question the ability of the Controller to take an impartial view of a dispute referred to the Controller's own office.

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

It follows from the comments made in respect of the preceding questions that RTÉ does not think that the architecture of the Council should be legislatively prescribed, that it is premature to be considering this question in respect of an Exchange and that it is not necessary to prescribe by legislation an ADR service under the auspices of the Bureau.

**(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?**

RTÉ proposes that the office of the Controller be renamed as the Intellectual Property Bureau, and that it should have responsibility for operating the present dispute resolution procedures and other functions specified for it under the CRRA, through a sub-division. The principal role would be to foster the development of Irish copyright, designs, trade mark and patent law and to represent Ireland's interests in this field at the international level.

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

RTÉ sees no case for the expansion of section 38 to cover categories of works other than sound recordings.

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

See our response to question 15 above.

- (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?**

RTÉ considers that copyright law issues should not be dealt with in the District Court.

- (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?**

It follows from RTÉ’s response to question (20) above that RTÉ is not averse to the development of a specialist IP jurisdiction at Circuit Court level, although it might be doubted that the volume of cases will be enough to enable the specialisation to develop rapidly.

- (22) Whatever the answer to the previous question, 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?**

It is not clear that there are legal or procedural reasons discouraging claims for breach of copyright being brought in the Circuit Court.

#### **Chapter 4 – Rights-holders**

RTÉ has considered the issues raised in this Chapter of the Consultation Paper from the perspective of being a rights-holder in programmes and in broadcasts, as well as in many of

the underlying works included in these (such as programme scripts). At the same time RTÉ is a large scale user of the works of other rights-holders. The comments below reflect RTÉ's wish to see appropriate balances maintained between competing interests, so that it can continue to fulfil its public mission and in particular to introduce innovative services and techniques that new technologies make possible.

**(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?**

RTÉ does not consider that the basic legal structures fail to get the balance right. However, in its initial submission of the 6<sup>th</sup> July, 2011 and in this response, RTÉ has submitted proposals for changes that will adapt Irish copyright law for the digital era.

**(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?**

RTÉ has made submissions for the creation of a scheme to allow the use of orphan works and for the introduction of Extended Collective Licensing. As to whether there is any evidence that current Irish copyright law discourages innovation, RTÉ draws attention to the evidence given by the BBC to the Hargreaves Review in the UK as to the BBC's estimate of the prohibitive administrative cost that would be involved in attempting to clear rights in its archive programme to enable them to be used in information society services. The scale of the task may be different for RTÉ, but the costs would be no less prohibitive.

**(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?**

RTÉ submits that Irish copyright law under-compensates rights-holders in that it has yet to provide them with adequate solutions to internet piracy.

- (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?**

Like the Committee, RTÉ is not clear how narrowing the ambit of copyright to protect only works which are the author’s own intellectual creation would incentivise innovation. EU law is developing in this direction through decisions of the Court of Justice of the EU (‘CJEU’); it may be that a re-consideration of the issue will be needed at EU level if the CJEU jurisprudence results in protection being lost for innovative works which do not meet the “own intellectual creation” standard.

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

RTÉ strongly supports the proposal that the sound track of a film should be treated as part of the film and should not have separate copyright protection as a sound recording. The current existence of the separate copyright is a trap for the unwary and a potential source of complication in the licensing of distribution of films. The film producer obtains no additional benefit from having this additional copyright to exploit.

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

Yes, this unintended perpetual copyright in unpublished works that may have been created by the CRRA should be removed. RTÉ sees no public policy reason for its continued existence.

- (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?**

RTÉ believes that the definition of “broadcast” should now be made platform-neutral, as has been done in the Copyright Directive. The complex definition of “inclusion in a cable programme service” is obsolete and a cause of confusion.

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

The CRRA probably cannot be made entirely platform, medium or technology-neutral while public policy requires otherwise: see for example the response to the next question.

**(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?**

It is time for a re-consideration of the public policy considerations underlying sections 103 and 251 CRRA. The Committee, in accordance with its brief, has considered whether there is an impact on innovation if these sections are amended or not and has concluded that it is unable to determine this. In RTÉ's view the policy considerations go beyond innovation and concern such issues as the importance of public service broadcasts being available to citizens on the technological systems they commonly use to obtain audio and audiovisual services, the maintenance of the integrity of those broadcasts as so received, audience measurement, the allocation of economic value attributable to the carriage of the broadcasts. We note the approach and comments in the consultation document and developments in the UK and as an owner of content RTÉ believes that any extension beyond cable operators in the strict sense needs to be looked at carefully and on a case-by-case basis.

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

In paragraph 4.9, the Committee refers to arguments that minor or unintentional infringements should not necessarily be treated in exactly the same way as serious, intentional or wholesale infringements, and that accordingly the former might attract injunctions but not necessarily damages. RTÉ would, on balance, prefer to leave the law unchanged in this regard. If damages were not an available remedy in such cases, courts might be more minded to grant injunctions. An injunction against a programme can be a drastic remedy if the work is an integral part of the programme and not capable of being edited-out without severe harm to the programme's

integrity. RTÉ, on balance, prefers the Court to have the option of weighing up whether damages provide the rights-owner with a sufficient remedy.

**(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?**

As the Committee recognises, any strengthening of the protection afforded to technologies used to restrict access to copyright works must be balanced by provisions that ensure that use of such works within the scope of the statutory exceptions is not blocked. Until the Committee is satisfied that this balance can be achieved, it should not, in RTÉ's view, make proposals for further strengthening of the protective provisions in the CRRA.

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

RTÉ does not consider that photographs deserve any special form of protection under the CRRA. They are no more likely than other types of works to be infringed in innovative, information society services.

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

and

**(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?**

RTÉ has already proposed to the Committee that the exclusion of photographs from the fair dealing exception for reporting current events is not justified. The exclusion covers all photographs regardless of their age. But RTÉ considers that it would not be realistic to draw a distinction between old and new photographs. The protection that photographs are given by the need for any use to be 'fair' is sufficient. RTÉ notes that the US fair use exception does not exclude photographs from its scope; again, photographs are protected by the requirement that the use be fair.

**(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?**

RTÉ (which would be a beneficiary as a rights-holder if a private copying levy were to be introduced) does not support calls for an introduction of a levy. It does, though, support a clarification of the scope of permitted private copying, especially in relation to format shifting.

## **Chapter 5 – Collecting Societies**

In its initial submission to the Committee, RTÉ made the following proposals concerning collecting societies:

- RTÉ’s ability to fulfil its public service remit (for example, by making its programme archives more accessible to the public) would be significantly enhanced if powers were vested in the Minister to allow the introduction of Extended Collective Licensing schemes in limited and defined circumstances that recognise the special position of the primary body responsible for the creation protection, preservation and management of the works involved. Such schemes empower collecting societies to grant rights for certain uses (defined on a case-by-case basis by the Minister) not only in respect of works already within their repertoire but also in respect of other works of the same type.
- RTÉ also proposed that the Minister should have power to approve arrangements under which a collecting society or societies would be able to grant licences in respect of orphan works.
- Because these proposals imply an increase in the number of collecting societies operating in Ireland and an expansion of their current roles, they should be placed under a greater degree of regulation than applies to them at present. They should be required, for example, to develop and publish codes of practice setting out the principles upon which they will operate, both in relation to licensees and potential licensees, and in relation to their own members.

Against that background, RTÉ’s responses to the two questions raised in this Chapter are as follows:



- (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?**

RTÉ does not think that any of the three issues described above are ones that are capable of being agreed and dealt with on a voluntary basis by a Copyright Council; they need primary enabling legislation which will vest powers in the Minister or possibly the Controller to approve, by order on a case by case basis, extended collective licensing schemes, a scheme for licensing of orphan works, and collecting societies' codes of practice.

- (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?**

RTÉ has no issues to raise other than those referred to in relation to Chapter 2.

## **Chapter 6 - Intermediaries**

While RTÉ's perspective on copyright issues relating to intermediaries is primarily that of a rights-holder, RTÉ may also provide intermediary services of various kinds.

RTÉ's submissions in relation to the Committee's questions under this section are as follows:

- (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?**

The caching, hosting and mere conduit immunities continue to play an essential role in enabling information society services to operate and develop.

- (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?**

It is not clear that a case has been made for immunities to be introduced for other technological processes as yet.

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

RTÉ does not see a case for altering the current scope of remedies to which the immunities provide defences.

- (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 – 1988 – Directive) capture the full range of modern intermediaries, and is it sufficient technology-neutral to be reasonably future-proof?**

RTÉ has no comment on this point.

- (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?**

Not applicable in view of responses given above.

- (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, we do not believe there is a good reason for this provided the material is legitimately on the original site. RTÉ would like it to be clear, under Irish copyright law, that the mere provision of a link to copyright material, of itself and without more, does not constitute an infringement of that copyright.

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

Yes it should, provided the material is legitimately on the original site. RTÉ would like it to be clear, under Irish copyright law, that the mere provision of a link to copyright material, of itself and without more, does not constitute an infringement of that copyright.

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

RTÉ suggests that this clarification should be a stand-alone provision.

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

RTÉ does not consider that the work of innovation intermediaries is inhibited unjustifiably by copyright law. Some rights-holders no doubt consider that some innovation intermediaries have tended to innovate first and deal with rights-holders' interests later, sometimes only when faced with legal proceedings for infringement.

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

As stated above in response to question 35, RTÉ does not think that the exclusion of photographs from the scope of the exception in section 51(2) CRRA is justified.

- (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. RTÉ believes that services offering the marshalling of news should only be operated with permission of the holders of rights in the news coverage which is to be marshalled. If the holders of rights do not wish to allow their content to be made available by a third party news marshaller, they should be entitled to withhold consent. The amended section 51(2)(a) proposed by the Committee would require RTÉ (if it wished to preserve its rights to grant or withhold licences for the use of its radio and television coverage of current events) to expressly reserve its rights. RTÉ does not think that there is a case for such an exception. In the circumstances where RTÉ would wish to reserve its rights (were such an exception to be introduced), issues would arise over the means by which RTÉ would do that. It would certainly not wish to clutter television screens or radio broadcasts with express reservations whenever such programme material is broadcast.

**(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 best blend of responses to the questions raised about the compatibility of the marshalling of content with copyright law is that the person proposing to marshal must strike a commercial arrangement with the owners of the content it wishes to marshal. The analogy that comes to mind is the marshalling which a cable operator makes of broadcasters' channels that the operator thinks will attract customers to his cable platform. The cable operator will make a variety of deals, expecting to pay more for some channels than for others, and in some cases even being paid by the broadcaster for access to the cable platform. RTÉ does not see why a "news marshaller" should not be expected to make commercial arrangements with the holders of rights in news content. News marshalling may indeed represent innovation, but there is no cause for the public interest in innovation to override the public interest which is the basic respect and regard for intellectual property rights.

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

and

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

No marshalling immunity should be provided, for the reasons given in 51 above.

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

RTÉ is not aware of any such problems.

## **Chapter 7 – Users**

The exceptions to copyright protection, which are the principal focus of the Committee in this Chapter, are of great importance to RTÉ. The range and quality of RTÉ's programmes would be difficult to sustain if the fair dealing exceptions were more restricted than they are at present. However, RTÉ does not advocate any radical replacement of the current specific exceptions with a general fair use exception based on the US model, as it sees that as being

unlikely to deliver very much by way of additional freedom to make use of third parties' works, but highly likely to create uncertainty and difficulty in an area where at present it is possible to advise programme producers and other creatives with a reasonable degree of confidence. RTÉ does, though, see scope for and would support an expansion of the present list of exceptions in the CRRA to match the list of permitted exceptions in the EUCD.

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

RTÉ is not in favour of replacing ‘means’ with ‘includes’ in the definitions of fair dealing in the CRRA. RTÉ considers that this would introduce into Irish copyright law a new uncertainty which would not be of benefit to users. Users generally need to have as much certainty as possible when making decisions on whether or not to make use of a third party’s work without prior rights clearance, decisions that may involve considerable monetary investment. It is only in rare cases that a user will be prepared to proceed with a significant investment knowing that there is a real risk of a project being stopped in its tracks by an aggrieved rights owner.

**(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:**

- (a) reproduction on paper for private use**
- (b) reproduction for format-shifting or backing-up for private use**
- (c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research**
- (d) reproduction for persons with disabilities**
- (e) reporting administrative, parliamentary or judicial proceedings**
- (f) religious or official celebrations**
- (g) advertising the exhibition or sale of artistic works**
- (h) demonstration or repair of equipment, and**

- (i) **fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?**

RTÉ considers that all the exceptions permitted by the EUCD should be incorporated into Irish law. In respect of certain exceptions, RTÉ would wish to see some refinements to the Committee's proposals, as follows:-

*Reproductions for private use: format-shifting and back-up copies*

Sections 101 and 250 CRRA provide an exception for the making of a recording of a broadcast and its contents for the purposes of time-shifting. RTÉ does not consider that copies made for this purpose should be freely transferable into another format, nor should it be permissible to make a back-up copy of a recording made for this purpose. To permit this would be equivalent to allowing the emergence of a free download-to-own facility.

*Copying for purpose of broadcast or cable programme*

RTÉ agrees that section 99 CRRA should be amended so that it will be applicable not only where, as at present, a copy is made by the broadcaster by means of its own facilities but also where the facilities used are those of a person acting on behalf of and under the responsibility of the broadcaster. This will bring the CRRA exception into better alignment with modern programme-making, where certain RTÉ programmes are made without the use of RTÉ's own technical facilities.

*Reporting administrative, parliamentary or judicial proceedings*

RTÉ endorses the Committee's suggestions that the wording of sections 71 and 237 CRRA should be expanded so that copyright is not infringed by anything done for the purposes of public security or for the purposes of administrative proceedings (or for the purpose of reporting such proceedings).

*Caricature, parody, pastiche and satire*

Similarly, RTÉ endorses the Committee's proposal for introducing a fair dealing exception for caricature, parody, pastiche and satire – or for similar purposes. We agree that no attempt should be made to define the boundaries of these concepts; this should be left to the Courts.

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

Considering there is already a detailed section of the CRRA regarding exemptions for educational use – ss 53, 54, 55, 56, 57 and 58 – RTÉ's view is that educational use is already sufficiently dealt with in the CRRA.

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

Considering there is already a detailed section of the CRRA regarding exemptions for educational use – ss 53, 54, 55, 56, 57 and 58 – RTÉ's view is that educational use is already sufficiently dealt with in the CRRA.

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

RTÉ is in favour of allowing this.

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

RTÉ sees no need for section 97 to be repealed and has no objection to the extension of section 98 as proposed.

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

The recent history of UGC websites and apps for mobile phones shows how what may start as a non-commercial item of UGC may go viral and generate substantial commercial value, not necessarily for the creator of the content, as it may be that the value flows to the website operator. Where the existing work used in the UGC is an essential element in its commercial success, there should be no argument but that the

rights-holder of that work should share in the reward. The potential problem that RTÉ sees with the proposed exception is that it encourages the use of copyright works without permission outside the private and domestic circle which is the traditional zone of immunity.

**(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?**

RTÉ would prefer to see section 2(10) retained in its present form. It is very uncommon for a licence which grants the licensee the right to do certain acts and restricts the licensee from doing anything else with the licensed work to include an express carve-out allowing acts that fall within all the permitted exceptions. It is usually taken as read that the licensee is free to make use of the work to the extent that the exceptions permit. There is a danger that clauses containing legitimate restrictions on use will be void if they do not expressly include such an express carve-out. The only clauses which should rightly be void are those which require the licensee to agree not to make use of the work notwithstanding the statutory exceptions which would otherwise allow the licensee to do so.

## **Chapter 8 – Entrepreneurs**

The Committee's discussion in this Chapter of a specialist copyright exception for innovation is perhaps the most challenging in the Consultation Paper.

RTÉ notes that the Committee considers that such an exception is not precluded by the EUCD because it involves an exception to the adaptation right, which has not been harmonised by the EUCD, rather than to the reproduction or communication to the public rights, which have been. RTÉ does not think that this gives the complete picture. An act of adaptation may also be an act of reproduction, so that the same act may infringe both rights. Where this is the case, Ireland does not have the right to introduce an express exception for innovation, as this is not an exception included in the exhaustive list of exceptions to the reproduction right permitted by Article 5 EUCD. It follows that the scope for creating an exception for innovation is limited to those acts of adaptation which are not also acts of



reproduction. This is too small and too uncertain a category to be significant for encouraging innovation.

RTÉ notes that the Committee does not see how giving express statutory recognition for a general “public interest” defence would promote innovation further than an innovation exception. Since an innovation exception does not appear to offer what the Committee seeks, RTÉ hopes that the Committee will reconsider recommending recognition of the public interest defence.

**(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?**

RTÉ does not consider that innovation can be a sufficient public policy reason to deny copyright protection to works that would otherwise qualify for it. To attempt to do this would likely place Ireland in breach of its obligations under the Berne Convention and other international copyright conventions and treaties.

**(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?**

RTÉ does not think that it is feasible to add innovation as a criterion for determining whether an exception can be introduced for certain uses that do not fall within the scope of those justified by their recognition in the list of permitted exceptions in the EUCD.

**(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?**

The scope given by EU Directives and the Berne Convention for compulsory licensing is very restricted. Within that scope, however, innovation could certainly be a sufficient public policy to justify the creation of a compulsory licence for a specific purpose that might otherwise not be capable of being pursued because of the impracticability of voluntary licensing. Innovation is also a sufficient public policy for the introduction of Extended Collective Licensing, which differs from

compulsory licensing in that it involves voluntary licensing by collecting societies and a right for an individual rights-holder to opt-out.

- (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?**

As explained in the initial comments on this subject set out above, RTÉ does not consider that such an exception can be introduced save in respect of a limited range of acts of adaptation. In view of this, RTÉ requests the Committee to reconsider recommending statutory recognition for a general “public interest” defence.

## **Chapter 9**

RTÉ has only three points to make on the issues raised in this Chapter.

The first is the general one that RTÉ itself should be capable of being classed as a “heritage institution”.

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

RTÉ agrees with the principle of format shifting for preservation and legitimate use purposes by heritage institutions. However, in respect of the proposed rewording of clause 69(1)(c) where reproduction is made for “archival and preservation purposes” the exemption should be qualified by adherence to an exercise in due diligence to establish whether the preservation work is necessary, where for example a work is the only surviving copy and is at risk or where there is a reason to believe that the holder of original material is not enabling its preservation.

- (68) Should the occasions in section 66(1) CRRRA 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. Any copying for these purposes should be part of an Extended Collective Licensing scheme and should not unduly disadvantage IP owners.

**(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

**(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, provided it is not for commercial purposes or where there is no associated commercial benefit.

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

Yes, RTÉ is of the view that legal deposit obligations should extend to digital publications.

**(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 than can and should be done from a legislative perspective?**

RTÉ's view is that this should be dealt with by the Intellectual Property Bureau and the relevant collecting societies could advise it on drawing up guidelines on orphan works. RTÉ notes the progress made on the matter of Orphan works at European level and awaits the outcome of the recommendations currently before the EU Committee on Legal Affairs.

[http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120606IPR46383/20120606IPR46383\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120606IPR46383/20120606IPR46383_en.pdf)

The second and third points relate to questions 73 and 74.

- (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?**

In the case of donated physical works, RTÉ is opposed to the introduction of a presumption that the copyright in the work passes with the physical work. This would be a recipe for untold numbers of inadvertent transfers of copyright, thereby creating uncertainty for prospective users as to whether they were obtaining licences from the right person. Samuel Beckett was notorious for giving his manuscripts to friends; Picasso and L.S. Lowry famously dashed off sketches as gifts. The act of making a gift is often spontaneous action and very different from the making of a testamentary bequest, and should not have the same consequence for copyright ownership.

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

RTÉ notes that in the UK the recommendation in the Hargreaves Report is that an exception for text and data mining should be confined initially to research for non-commercial purposes (Hargreaves Report, paragraph 5.26), as to allow this for commercial purposes would not be compatible with the EUCD.

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

RTÉ has no view on this.

## **Chapter 10 – Fair Use**

The Committee's account of the submissions it has received, the conflicting issues raised, the approaches taken in other countries and of the constraints created by the EUCD is subtle and nuanced, as too is its draft of what a fair use section in the CRRA might look like. Having considered the Committee's account, RTÉ remains of the view that from its perspective as both a user and owner of copyright works, the balance remains tilted in favour of not introducing such an exception into Irish law. RTÉ would prefer to see the CRRA exceptions expanded to reflect the full extent of those permitted specifically by the EUCD, as discussed in relation to Chapters 7 and 8 above.

RTÉ is not, accordingly, providing specific responses to questions 76 to 83.

## **Chapter 11 – Conclusion**

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

Yes.

**(77) 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)?**

It is, on balance, preferable not to consolidate these sections.

**(78) What have we missed?**

RTÉ does not think that there is a significant omission from the Committee's report other than in respect of the damaging effects of piracy. The report notes on page 25 that Irish law does not yet provide a means by which a rights-holder can get an injunction against an ISP whose customers are infringing copyright. However, as the Committee notes, there is a parallel consultation about that issue, which is why the Committee does not address it further in the present Review. The Committee also does not discuss the creation of other anti-infringement measures such as those set out in the UK's Digital Economy Act, under which the regulator is able to require ISPs to impose technical measures against subscribers who are known infringers. The damage which piracy can do to innovative services, and hence the disincentive piracy creates to their introduction, makes it imperative that piracy issues be kept firmly in mind by the Department when it concludes what reforming legislation it will bring forward in due course.