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Copyright Review Committee

Copyright and Innovation

A Consultation Paper

prepared by the

Copyright Review Committee

for the

**Department of Jobs, Enterprise
and Innovation**

Dublin, 2012

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1. Background

1.1 *The Copyright Review Committee*

The **Copyright Review Committee (the Committee)** was established on 9th May 2011 by the Minister for Jobs, Enterprise and Innovation, Mr. Richard Bruton T.D., with the following Terms of Reference:

1. Examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation.
2. Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation.
3. Examine the US style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.
4. If it transpires that national copyright legislation requires to be amended but cannot be amended (bearing in mind that Irish copyright legislation is bound by the European Communities Directives on copyright and related rights and other international obligations), make recommendations for changes to the EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.

The membership of the Committee is **Dr Eoin O’Dell** (Trinity College Dublin) (Chair), **Patricia McGovern** (DFMG Solicitors, Dublin), and **Prof Steve Hedley** (University College Cork). It is supported in its work by officials of the Department of Jobs, Enterprise and Innovation. The Committee established a website for the process at http://www.djei.ie/science/ipr/crc_index.htm

The Committee held a public meeting on 4th July 2011 in Dublin and received over 100 written submissions, which have been published online at http://www.djei.ie/science/ipr/crc_submissions.htm

This **Consultation Paper** (the Paper) has been prepared on foot of the above Terms of Reference, and our thinking has been informed both by the debate at the public meeting, and by the wide range of submissions which we received. This Paper sets out the issues which have arisen; it explores possible outcomes; and it poses specific questions on which further responses are sought. Submissions on all of these matters are actively encouraged; and should be received by close of business on **Friday 13 April 2012**. There will also be a public meeting from **10:00am until 12:00 noon**, on **Saturday 24 March 2012**, in Trinity College Dublin.

Submissions, or expressions of interest in attending the public meeting, should be emailed to copyrightreview@djei.ie or posted to Copyright Review, Room 517, Department of Jobs, Enterprise, and Innovation, Kildare Street, Dublin 2.

At present, we have formed no conclusions. In this Paper, we simply discuss the concerns which have been expressed to us, and explore various options to meet those concerns in the light of our Terms of Reference. We will come to our conclusions based on the responses to this Paper, and we will make our recommendations in our final **Report**.

1.2 Paper

The fundamental aim of this Paper is to begin the process of sketching reforms to Irish copyright law to further innovation without denying protection to those who need copyright law to innovate. The submissions which we received covered a great deal of ground, and we have divided the material into nine further chapters and four appendices.

Chapter 2 considers the intersection of innovation and copyright in the submissions. In particular, it defines innovation, sketches copyright principles, and provides a classification of the submissions which we received (into (i) rights-holders; (ii) collecting societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions). This Paper is submission-led, and later chapters (especially chapters 4 to 9) apply this classification.

Chapter 3 explores the possible establishment of a Copyright Council of Ireland (Council) by the Irish copyright community, which could in turn establish a digital copyright exchange and an alternative dispute resolution service. The Chapter also explores how this would dovetail with the jurisdiction of the Controller of Patents, Trade Marks and Designs (the Controller) and with specialist copyright (or intellectual property) tracks in the District and Circuit courts.

In conjunction with many of the specific issues discussed in the subsequent chapters, a Council has the potential to ensure a great deal of progress under all four of our Terms of Reference. Thereafter, chapters 4 to 9 are concerned largely with the submissions made to us about our first and second Terms of Reference, and chapter 10 is concerned largely with the submissions made to us about our third and fourth Terms of Reference. As our essential concern under our Terms of Reference is with the intersection of innovation and copyright, in assessing the submissions we always referred our thinking back to the question whether the relevant copyright issue raised an actual or potential barrier to economic and technological entrepreneurship and innovation. Hence, our analysis is directed towards outcomes that can confer a competitive advantage upon the Irish economy. We are conscious that this Review is not being conducted in a vacuum: many competitor nations are undertaking similar processes. We therefore consider that the route to strategic advantage here is not only to match, but where possible and appropriate from an innovation perspective, to exceed, any copyright reforms undertaken by those other countries.

Rights-holders are central both to copyright and to innovation, and we consider their position in chapter 4; whilst chapter 5 considers the position

of collecting societies which have been formed to give practical effect to the rights of rights-holders. However, copyright law has to strike a delicate and proportionate balance between the monopoly afforded to rights-holders and the potential to undercut diversity and innovation by preventing further developments. It does so by accommodating other interests and perspectives, such as those of the other categories considered in chapters 6 to 9 - intermediaries, users, entrepreneurs, and heritage institutions. In those chapters, we explore how those interests might be accommodated by crafting appropriate copyright exceptions. Many of these exceptions reflect EU law, and - having regard to our Terms of Reference - we also explore whether it might be possible to develop a specific exception for innovation. Furthermore, the most controversial issue in the submissions concerned the fourth of our Terms of Reference, relating to the doctrine of fair use, and that is considered in detail in chapter 10. Finally, Chapter 11 brings the Paper to a conclusion.

There were many assertions in the submissions that, in seeking to achieve an appropriate balance, copyright law either over- or under- protects various interests. However, little hard evidence was provided to support these assertions. Therefore, a great many of the questions which we pose at various stages in this Paper seek such evidence.

In our Report, we hope to be able to provide draft heads of a **Copyright and Related Rights (Innovation) (Amendment) Bill, 2012**, (the Bill) to implement our recommendations. As a consequence, we have attempted in this Paper to provide early drafts of possible sections of that Bill. We cannot stress enough that these drafts do not in any way represent settled conclusions on our part. Rather they are provided here for the purposes of discussion in the submissions.

Finally, there are four appendices to this paper, containing the following lists: (i) the names of those who made submissions to us; (ii) the amendments to CRRA, to date; (iii) the questions on which we seek further submissions; and (iv) some of the proposed draft statutory provisions which might form the basis of discussions in some submissions.

Dr Eoin O'Dell
Prof Steve Hedly
Patricia McGovern

22 February 2012

2. The Intersection of Innovation and Copyright in the Submissions

2.1 Introduction

The main focus of our Terms of Reference is upon the barriers to innovation, if any, created by Irish copyright law; and this was reflected in the submissions which we received. In this chapter, we set out what we understand by innovation (section 2.2), we briefly outline some salient features of Irish copyright law (section 2.3), and we apply these to a classification of the submissions which we received (section 2.4).

2.2 Innovation

In this Paper, we construe “innovation” and its connections with copyright fairly broadly. The definitions of “innovation” in the *Oxford English Dictionary* (OED) include:

the introduction of novelties; the alteration of what is established by the introduction of new elements or forms;

a change made in the nature or fashion of anything; something newly introduced; a novel practice, method, etc.;

the action of introducing a new product into the market; a product newly brought on to the market.

Whilst we have had regard to innovation, creativity, ingenuity, renewal and transformation in all of their forms - artistic, cultural, educational and social, as well as economic - we were mindful that it is innovation in the first two senses in the OED definition above that leads to innovation in the third sense of the development of new businesses, products and technologies. Much public policy is now being driven by this sense of the word “innovation”. For example, the 2008 Report *Innovation in Ireland* said that “innovation is the creative process of exploiting new ideas”,¹ and continued

A more complex definition describes innovation as the exploitation of new ideas in pursuit of a competitive advantage, including the development of new or enhanced products and services and the introduction of new business models, new organisational structures or new work practices.

Similarly, the Organisation of Economic Co-Operation and Development (OECD) understands the process of innovation “as the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organisational method in business practices,

¹ *Innovation in Ireland* (Department of Enterprise, Trade and Innovation, 2008) p2 (see <http://www.djei.ie/publications/science/innovationpolicystatement.pdf>).

work-place organisation or external relations”, and must therefore, “by definition, contain a degree of novelty”.²

Innovation Ireland, the Report of the Innovation Taskforce, building upon a similar OECD definition, presented innovation as a key driver of productivity and central to economic development, and sought to develop a strategy to place innovation at the heart of enterprise policy.³ Encouraging innovation is all about encouraging new technologies, new business methods and new companies; and public policy is all about fostering an innovation ecosystem that will drive the development of a knowledge-based or smart economy in Ireland.⁴

Moreover, the Innovation Taskforce recognised that the digital environment provides fertile fields for innovation:⁵

In the internet age characterised by open systems, innovation is often facilitated by new forms of collaboration and interaction, for example where businesses engage with their customers and suppliers in an open-ended dialogue, which can sometimes lead to new business ideas and models.

We are in the midst of a process of rapid technological innovation affecting every aspect of our society and economy. Many new industries are emerging to take advantage of these developments; and many industries in transition are investing in innovation and technology to meet these challenges. To take just one contrast that came up repeatedly in the submissions, whilst the growth of the internet has given rise to a whole host of new business models, the established film, music and news industries have struggled to find successful business models in the face of widespread infringement of the copyright in their content. This kind of infringement is clearly a very serious problem for these industries in their current form. However, as digital content delivery and online payment mechanisms become easier, safer and more robust, they are likely to become increasingly widespread. If so, successful digital content business models would burgeon, and there would be greater levels of copyright compliance. We are not yet at that point; and some of the submissions argued that, if it is attainable at all, it is a long way off. Even so, it is likely that many of the problems currently being posed by technology will in time be solved by technology.

² *Ministerial report on the OECD Innovation Strategy. Innovation to strengthen growth and address global and social challenges. Key Findings* (OECD, 2010) p1 (see <http://www.oecd.org/dataoecd/51/28/45326349.pdf>).

³ *Innovation Ireland. Report of the Innovation Taskforce [Innovation Ireland]* (Stationery Office, Dublin, 2010) p2; citing *Interim Report on the OECD Innovation Strategy* (OECD, Paris, 2009) p4 (see http://www.taoiseach.gov.ie/eng/Innovation_Taskforce/Report_of_the_Innovation_Taskforce.pdf).

⁴ *Building Ireland's Smart Economy. A Framework for Sustainable Economic Renewal* (Stationery Office, Dublin, 2008) (see http://www.taoiseach.gov.ie/attached_files/BuildingIrelandsSmartEconomy.pdf).

⁵ *Innovation Ireland*, p20.

Nevertheless, it is important that the Irish economy swims with this tide rather than against it. Technological development brings opportunity. There are great competitive advantages to be gained if the basic conditions of the Irish innovation ecosystem are well-adapted and conducive to sustaining a thriving knowledge economy.

Copyright law is one of the pressures that will shape some of the outcomes of the process of technological innovation. As the Innovation Taskforce observed, the “regulation of intellectual property rights in Ireland is a vital part of the overall legislative framework that promotes, protects and encourages innovation”.⁶ Copyright law provides an excellent example: since a great deal of internet use is based upon content, copyright is a significant factor in determining when content will be remunerated. On the one hand, copyright law can support innovation by rewarding the introduction of a novelty with a long monopoly. On the other hand, copyright law can deter innovation by preventing the alteration of what is already established. As a consequence, whilst the market may have the benefit of the initial novelty, it can lose out on potential enhancements. A well-balanced copyright regime attuned to the processes and benefits of innovation would reward novelty without deterring further enhancement.

The aim of the present Review is to determine whether current Irish copyright law strikes that balance appropriately. Of course, the legal framework is only one of the many conditions which nurture creativity, entrepreneurship and innovation. Equally, innovation is only one of many competing policies underpinning copyright law. Nevertheless, there is a clear intersection between copyright and innovation, and, as Government undertakes a wide range of initiatives to develop and enhance the Irish innovation ecosystem, this Review will seek to ensure that Irish copyright law can play its part.

We invite submissions on whether our broad focus upon the economic and technological aspects of entrepreneurship and innovation is the right one for this Review.

2.3 Copyright

As a matter of principle, it is crucial that there be clarity in the basic legislative provisions. We therefore set out here some of the very basic principles of Irish copyright law, in part to provide for our readers a common framework to which we will refer at various points later in this Paper.

If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation. Moreover, as has often been observed, predictions are difficult, especially about the future. Hence, as many of the submissions emphasised, it is important that copyright law be as **technology-neutral** as possible. It is equally as important that it be capable either of adapting or of being easily

⁶ *Innovation Ireland*, p22.

adapted to unforeseen technological innovations. These are standards by which to judge both existing copyright law and any possible amendments.

As to the existing law, in Ireland, copyright is governed by the Copyright and Related Rights Act, 2000 [CRRRA] (as amended);⁷ and EU Directives, including the EU Copyright Directive [EUCD],⁸ are an important source of the principles set out in CRRRA. Although these legal instruments are long and complex, the basic principles are relatively clear. We set out some of the basic principles here, and will address some of the complexities in their specific contexts in later chapters.

According to section 17(2) CRRRA, copyright subsists in

- (a) **original** literary, dramatic, musical or artistic works,
- (b) sound recordings, films, broadcasts or cable programmes,
- (c) the typographical arrangement of published editions, and
- (d) original databases.

The owner of the copyright in a work has the **exclusive** right to make the work available to the public, to copy the work, or to adapt it (s37 CRRRA; see also Arts 2-4 EUCD). The copyright owner may grant a **licence** to others to publish, copy or adapt the work; and the CRRRA contains extensive provisions relating to licensing schemes and licensing bodies. Copyright generally subsists until the first of January of the year after the **70th anniversary** of the death of the author of an original literary, dramatic, musical or artistic work (see ss24 and 35 CRRRA; this 70 year period is a baseline for the duration of other copyrights, though many have shorter durations).

Copyright is infringed by anyone who, without the licence of the copyright owner, publishes, copies or adapts “the work as a whole or ... any **substantial** part of the work” (s37(3) CRRRA). However, **fair dealing** (for various purposes, including research or private study, news and criticism or review), does not infringe copyright; and the incidental inclusion of copyright material in another work, such as for the purposes of quotation, does not infringe copyright either (ss50-52 CRRRA; similar exceptions are set out in Art 5 EUCD). There are also exceptions for educational institutions and libraries.

Infringement of copyright is usually a civil matter, actionable by the copyright owner against the infringer, and remedies for infringement

⁷ The full text of CRRRA, and other associated primary and secondary legislation, is available at <http://www.djei.ie/science/ipr/copyright.htm> A full list of all relevant primary and secondary legislation is available in Appendix II below.

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>). Harmonisation of copyright law is important aspect of the establishment of the EU single market (see http://ec.europa.eu/internal_market/copyright/index_en.htm), and the provisions of CRRRA relating to databases and to the duration of copyright are governed by other EU Directives available at that link.

include damages, injunctions and the delivery up or seizure of infringing copies (ss127, 128, 131 CRRA; see also Art 8 EUCD). Some copyright infringements are also criminal offences (ss140-141 CRRA).

CRRA also provides for rights related to copyright, such as performers' rights (s203 CRRA), and a special database right (s321 CRRA). It also contains provisions prohibiting the circumvention of technological measures designed to protect copyright (ss370-376 CRRA; see also Arts 6-7 EUCD).

Where a work is not covered by copyright - because it is not sufficiently original, or because the duration of copyright has expired, or because the owner has disclaimed copyright - then it is said that work is in the **public domain**, though the phrase does not appear in either CRRA or EUCD. So, for example, in the case of authors who died in 1941, their copyright in what they published during their lifetimes expired on 1 January of 2012, and those publications may now be said to be in the public domain.

Many of the submissions which we received referred to basic principles, but then presented different visions of such principles. On the one hand, some submissions presented absolute visions of copyright. As the summary presented here makes clear, the protections offered by copyright are indeed very strong. But they are not absolute. In the case of literary, dramatic, musical or artistic works, copyright protection subsists only where the work is **original**. Moreover, copyright protects against copying a work in whole or in **substantial** part, but does not prevent insubstantial or **incidental** takings. The first two Terms of Reference posed to us in effect ask whether the balance thereby struck is compatible with the encouragement of innovation. On the other hand, some submissions sought to make a great deal more of the exceptions than the CRRA or EUCD text warranted. In particular, it is because the CRRA conception of **fair dealing** is more limited than the US doctrine of fair use that our third Term of Reference has been posed to us.

It is understandable that the submissions should have advanced different perspectives on copyright. Such submissions were concerned to articulate and defend the differing perspectives of their various authors. However, partisan advocacy is prone to overstatement, and sometimes even to wishful thinking. For this reason, just as with innovation, we thought it important to provide this very short statement of basic principles of copyright upon which we will build in this Review. Nevertheless, we invite submissions as to whether there is sufficient clarity about the basic principles of Irish copyright law.

Finally, we are working towards proposing text for a possible Bill, a full draft of which we hope to include in our Report. In this Paper, we discuss possible draft statutory provisions on some of these issues below, and we particularly encourage responses with draft legislative text, as this serves to make clear both what an issue is and what its legislative solution might be.

Moreover, in addition to CRRA and EUCD, there is already a great deal of further primary and secondary legislation⁹. This is a rather fragmented situation, and any legislation enacted following the present Review would only add to that. In our view, therefore, all of the post-CRRA developments still in force (including both statutory amendments and significant statutory instruments) ought to be consolidated into any legislation that emerges from the present Review. This would minimise the number of sources through which Irish copyright law is scattered, and thereby make it more accessible. Moreover, although we are confined by our Terms of Reference to look at amendments to CRRA which encourage innovation, no matter how broadly this can be interpreted, matters were submitted to us which were beyond our remit but which we felt could nevertheless be taken on board by the Department of Jobs, Enterprise and Innovation (the Department) during its consideration of this Paper and our subsequent Report. We are therefore open to submissions as to the additional scope of any amending legislation emerging from this process, though in the end it will be matter for the Department rather than for us what amendments unrelated to innovation might be taken on board.

2.4 Submissions

We were delighted at the wide range of submissions that we received, from those who said that copyright should be abolished, through those who said that no change at all was needed, to those who said it should be strengthened. A full list is available in **Appendix 1** and the submissions themselves are available on our website at http://www.djei.ie/science/ipr/crc_submissions.htm. However, we have not listed or published the inevitable spam; and requests for confidentiality have been respected. This Paper is submission-led, in that much of the discussion reflects and engages with the submissions we have received. We do not refer directly to individual submissions; rather, we have taken up the issues they have raised. Moreover, we have not engaged in a head-count on any given issue: we were not concerned with the frequency with which points are made in the submissions, but rather with the quality of those points and especially of the evidence on which they are based.

We formed the impression that the submissions came broadly from six main categories:

- (i) **rights-holders**; this category includes the people who create the copyright work, and as well as their publishers, music labels, movie studios, broadcasters and so on;
- (ii) **collecting societies**; this category includes societies which grant licences of copyrighted works and collect copyright royalties for distribution back to the rights-holders;
- (iii) **intermediaries**; this category includes internet service providers, online search engines, social networks, and trading sites;

⁹ See Appendix 2 below.

- (iv) **users**; this category includes the consumers, purchasers and users of copyright works;
- (v) **entrepreneurs**; this category includes online start-ups; and
- (vi) **heritage institutions**; this category includes libraries, archives, galleries, museums, schools, universities and other educational establishments, and the like.

These categories are simply our impressions of those who made submissions to us. They are not formal or legal definitions. Instead, they seem to us to constitute a useful classification with which to organise the submissions and this Paper. Moreover, even for our purposes, they are neither hermetically sealed nor mutually exclusive. For example, collecting societies could be seen as a subset of rights-holders, but they deserve separate treatment here because of the range of submissions relating specifically to them. Again, given the centrality of entrepreneurship to innovation, they too plainly deserve separate treatment, though entrepreneurs are to be found in all of the other categories.

Moreover, there is a fluid over-lap between the categories; for example, broadcasters produce content as well as re-broadcast other content, so they are both rights-holders and intermediaries. Indeed, in many cases, it is in these overlaps that the opportunities for entrepreneurship, innovation and new business-models reside, as in the case of platforms that marshal user-generated and other online content. Hence, this six-fold division is driven by the submissions, rather than based on abstract principles of innovation and copyright law; but we consider that this is a reasonably good categorisation for our purposes; and it will inform the structure of the later chapters in this Paper.

All of these categories have their own perspectives on the intersection of innovation and copyright. Unsurprisingly, submissions in each category argued that the law does not adequately protect the interests of those within it, often whilst viewing the interests of those in other categories with suspicion. Some submissions argued that their interests were paramount, even exclusive; some argued that any change at all to the balances struck by and under CRRRA would be very harmful to their interests; and some sought to co-opt members of other categories or classes to their interests or to have the law force them to do so.

Although these points were often well-made, our concern is two-fold. First, it is with the intersection of copyright and innovation in every category. Second, it is with the appropriate balance of copyright protection both within and between the various categories, the better to encourage innovation. Whilst we are conscious that any changes will indeed have an impact on the existing balances struck by Irish copyright law, it is our function to consider whether such changes are necessary or desirable to foster and encourage innovation. For example, our fourth Term of Reference directs us to make recommendations to “eliminate the barriers to innovation and optimise the **balance** between protecting creativity and

promoting and facilitating innovation” (emphasis added). This requires us to strike the balance between all of these various categories, in a fair, balanced and equal fashion, in so far as this is likely to encourage innovation; and this is broadly the approach we adopt in this Review.

We welcome submissions on the suitability of this six-fold classification, and on the proper balance to be struck between the categories from the perspective of encouraging innovation.

We are, however, conscious that there are two possible drawbacks with our six-fold classification. First, the categories may be over-simplified or over-inclusive. For example, the interests of every member of any given category may not align with those of every other member; within the categories, different members may have different concerns, some subtle, some very clear, depending on the issue. This is particular so in the category of intermediaries, where the interests of ISPs may not necessarily align with those of user-generated content platforms. We have tried to be conscious of this in the later chapters, but we would be grateful to learn if we have not always been successful in perceiving these different perspectives.

The second potential drawback with the classification into the six categories of rights-holders, collecting societies, intermediaries, users, entrepreneurs and heritage institutions, is that there may still be gaps, either within or between the categories. We are particularly concerned to ensure that there are no significant gaps in this classification, and we would be grateful to learn if we have missed an important interest or category in the intersection of copyright and innovation.

We welcome submissions as to whether our six-fold classification is unnecessarily over-inclusive, or whether we have missed a category or interest where copyright and innovation intersect.

2.5 Conclusion

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (1) Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?
- (2) Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?
- (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?
- (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?

- (5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?
- (6) What is the proper balance to be struck between the categories from the perspective of encouraging innovation?

3. Copyright Council of Ireland

3.1 Introduction

One of the main issues on which we invite submissions is whether there ought to be a **Copyright Council of Ireland** (the Council) (section 3.2). The model which we propose for discussion would be an independent self-funding organisation, created by the Irish copyright community, recognised by the Minister, and based on principal objects that ensure the protection of copyright and the general public interest as well as encouraging innovation. Such a body has the potential to be an important resource for the Irish copyright community and the general public, especially if it undertakes processes of public education on copyright, recommends standards of best practice, and gathers evidence to support the process of ongoing copyright reform. At the end of the chapter, we provide an early draft of the kind of legislative provisions which would be necessary to establish such a Council.

We also explore whether that Council ought to include an **Irish Digital Copyright Exchange** (the Exchange) (section 3.3), to facilitate speedy, effective and comprehensive copyright licensing, and a **Copyright Alternative Dispute Resolution Service** (the ADR Service) (section 3.4), to provide an independent and speedy alternative dispute resolution mechanism. We consider the inter-relationship between a Council and its alternative dispute resolution service, on the one hand, and the **Controller of Patents**,¹⁰ (the Controller) on the other (section 3.5). The Controller has a wide range of functions under CRRA, and we consider in particular the Controller's functions relating to copyright licensing and collecting societies (section 3.6). In this regard, we discuss whether a Council might have a role to play in resolving the issues surrounding the compulsory publication of royalty rates (section 3.7) and the renegotiation of contracts in the event of windfall income from a work that was not envisaged at the time the contract was made (section 3.8).

Finally, it was a recurring theme in the submissions that there is a significant need for simpler, speedier, and more cost-effective determination of copyright disputes. Establishing a Council with an alternative dispute resolution service, and expanding the jurisdiction of the Controller, would be important steps in the development of a comprehensive dispute-resolution architecture. We also explore the possibility of establishing specialist jurisdictions in the District Court and the Circuit Court relating to copyright (and - potentially - other intellectual property law disputes) (section 3.9).

3.2 Copyright Council of Ireland

The copyright communities in many other countries have established copyright councils, and we invite submissions on whether the Irish copyright community is ready, willing and able to establish a **Copyright Council of Ireland** (the Council). For example, the Australian Copyright Council¹¹

¹⁰ See http://www.patentsoffice.ie/en/copyright_what_is.aspx

¹¹ See <http://www.copyright.org.au/>

supports “a creative Australia through information and advice on copyright”; its members include representative organisations for writers, musicians, photographers, visual artists, journalists, film-makers and architects. The aim of the Copyright Council of New Zealand¹² is “to protect, preserve, develop and promote the rights of copyright creators and owners to New Zealand's best, long-term advantage”; and its members represent a wide spectrum of copyright creators and owners. The British Copyright Council¹³ “is a national consultative and advisory body” which represents various copyright holders and acts as a pressure group for change in copyright law at national, European and international levels. These councils are by and large privately funded through membership fees, publication sales, seminars and so on.

The functions of these copyright councils are very similar. Since their members are principally rights-holders, their functions relate principally to promoting and protecting the interests of rights-holders and to raising public awareness of the importance of copyright. They all have very helpful websites with lots of helpful data (information packs, FAQs, position papers, reports and so on); they organise seminars and other events for their members and for the general public; and they regularly respond to copyright consultations on behalf of their members. Some provide individual preliminary advice to their members on copyright issues (though they step back where a matter is or becomes contentious). Others play a role in negotiating collective licences. In sum, they constitute important resources for their copyright communities and the general public.

Our provisional suggestion is that the Council could go not only at least this far, but also considerably further. The Innovation Taskforce recommended the introduction of national initiatives to increase public awareness of intellectual property issues,¹⁴ and many of the submissions argued that public education about the role and importance of copyright would be very valuable. This promotion of the public awareness of copyright is a role that the Council could easily play (by means of a comprehensive website and publications, providing information services to the members and to the public at large, hosting seminars and other events, undertaking studies and preparing position papers on important issues, and so on).

The subscribing membership of the copyright councils in other jurisdictions is largely confined to rights-holders and collecting societies; but - having regard to the range of functions which the Council could discharge - we see no reason why the subscribing membership of the Council should not be more broadly-based and collaborative, such that every interested member of the Irish copyright community (such as all of the various categories of person and organisation which made submissions to this Review) could also be subscribing members of the Council if they wish to be.

¹² See <http://www.copyright.org.nz/>

¹³ See <http://www.britishcopyright.org/>

¹⁴ *Innovation Ireland*, p77.

The members of the Board of the Council should be a broad mixture representing the public interest, the industry, and copyright users; and an independent chair should be drawn from the ranks of the public interest directors..

In our view, it would be appropriate for a Council with a wide subscribing membership, a Board with a broad mixture of directors, and an independent chair, to take quite a pro-active role across the full range of copyright issues, including drafting codes of best practice on various issues, proposing model agreements and clauses for collective and individual copyright licences, and seeking to provide guidance and leadership on the copyright issues of the day as they arise. Several possible examples came up in the submissions.

First, the Council could describe standards of best practice on important issues as they arise. For example, some submissions supported the development of voluntary standards to improve long-term archiving and access for the visually impaired, and we would consider this as exactly the kind of issue on which a Council could take the initiative and develop appropriate standards. Another example is the vexed issue of orphan works, which are works that are still protected by copyright but whose authors are not known or cannot be located or contacted after a diligent search to obtain copyright permissions.¹⁵ The Council could develop appropriate standards to address some of the problems posed by orphan works¹⁶ (the Council might perhaps to define what constitutes diligent search, and to allow good-faith use of orphan works subject to a licence fee which would be paid to the owners of the works if they ever emerge).

Second, many submissions raised issues with industry bargains and contractual practices reached in the shadow of the CRRRA. In our view, a Council would be ideally suited to broker new settlements in these kinds of situations.

Third, we received submissions about the notice-and-take-down provisions in Article 14 of the E-Commerce Directive and section 18 of the E-Commerce Regulations,¹⁷ and in particular about the standards applicable to a possible counter-notice procedure which could result in the impugned content being put back online where it does not amount to an infringement. In our view, the Council would be ideally suited to co-ordinate the development of standards both for notice-and-take-down procedures and for counter-notice-and-put-back procedures, at least in the context of copyright. Moreover, the EU Commission has recently announced that it plans to adopt a horizontal initiative on notice and action procedures, and a Council could engage with the Commission on such a development.¹⁸

¹⁵ See, for example, http://ec.europa.eu/internal_market/copyright/orphan_works_en.htm

¹⁶ See also section 9.6 below.

¹⁷ See section 6.2 below.

¹⁸ See section 3.2 of the Communication on e-commerce and other online services (2012) concerning "A coherent framework to build trust in the Digital single market for e-commerce and online services" (COM(2011) 942); available at

Fourth, CRRRA provides many occasions on which the Minister can make orders and regulations, and it seems to us that it would be appropriate for a wide ranging Council to be consulted by the Minister before such orders and regulations are made. Conversely, it seems equally appropriate to us that the Council should be able make submissions to the Minister on copyright and related issues. There may even be room for a system where the Minister would consider making regulations in certain areas pursuant to submissions from the Council.

Fifth, there are many places in the subsequent chapters in which we seek further evidence to support some of the propositions which were submitted to us. One of the key roles of the Council could be to assemble such evidence, the better to inform debates about future amendments to Irish copyright law.

These are just examples based on issues that came up in the first round of submissions, and we would welcome further submissions on what the ambit of the role of a Council ought to be.

One possible model for a statutory basis for an independent Council is the Press Council of Ireland¹⁹ set up by the print media industry in advance of the enactment of the Defamation Act, 2009.²⁰ Section 44 and Schedule 2 of that Act allowed for the formal recognition of the Press Council, which duly followed in April 2010.²¹ It is effectively a system of recognised self-regulation, privately funded by membership fees. By contrast, the broadcast media are regulated by a statutory body, the Broadcasting Authority of Ireland [BAI],²² established pursuant to Part 2 of the Broadcasting Act, 2009,²³ and publicly funded by the State. We are not suggesting the establishment of a statutory regulator by analogy with the BAI (though that is broadly the US model, where the US Copyright Office²⁴ regulates, oversees and supports the US copyright system). Rather, taking up submissions which suggested various collaborative, self-regulatory models, our provisional suggestion is that the Irish copyright community might give consideration to the establishment of a Council and that the Government might give consideration to providing statutory recognition to the Council, in both cases by analogy with the Press Council. Moreover, to continue that analogy, the legislative provisions should be relatively non-directive, setting out basic provisions, but letting the detail emerge in practice. To that end, some of the draft proposed statutory provisions at the end of this chapter took as their starting point the relevant provisions of the Defamation Act, 2009.

http://ec.europa.eu/internal_market/e-commerce/communication_2012_en.htm

¹⁹ See <http://www.presscouncil.ie/>

²⁰ Available at <http://www.irishstatutebook.ie/2009/en/act/pub/0031/index.html>

²¹ See the Defamation Act 2009 (Press Council) Order, 2009 (SI No 163 of 2010); available at <http://www.irishstatutebook.ie/2010/en/si/0163.html>

²² See <http://www.bai.ie/>

²³ Available at <http://www.irishstatutebook.ie/2009/en/act/pub/0018/index.html>

²⁴ See <http://www.copyright.gov/>

We therefore invite submissions on whether we should recommend that the Irish copyright community should establish a Council, perhaps by analogy with the Press Council. In this respect, we are particularly interested in the views of those engaged in this process who also have experience of the Press Council.

3.3 Irish Digital Copyright Exchange

Many submissions raised various issues with collection societies, collective licences and rights clearance; and one route to resolving them might be provided by a Council. On the one hand, some submissions preached the benefits of collective management. In particular, where collective licences are appropriate solutions, many such submissions said that they represent a simple and relatively cheap method of obtaining permissions. This is plainly a matter which can encourage innovation.

On the other hand, some submissions bemoaned the fact that there is a patchwork quilt of collection societies administering a great many different rights; some described their experiences of collective licensing in practice as frustrating; some referred to difficulties in negotiating collective licensing arrangements for their own industries; some perceived a lack of transparency in the process of setting licence rates; some argued that collecting society rates are too high, and that there is a need for some relatively simple means of redress in such circumstances; and some took issue with the compulsory publication of the rates themselves, objecting to the disclosure of commercially sensitive information.

It is clear that inefficiencies in the licensing system can stifle innovation, that significant transaction costs are occasioned by the current, fragmented nature of collective rights management in Ireland, and that if matters were less complex, less costly and more transparent, there would be greater scope for licensing of rights and for innovation accordingly. In our view, it is simple efficiency and plain common sense that, where possible, rights should be able to be licensed together and not separately. To this end, the Council could engage with collection societies to oversee the development of a simple yet wide-ranging rights-clearance mechanism, a one-stop shop with a central and comprehensive database of licensable rights, and perhaps even work towards online automated digital permission and payment systems. Indeed, such a single repository would be an important foundation in allowing the Council to engage in efforts to develop the kind of extensive cross-border pan-European licensing solutions advocated in many of the submissions. The Council could also liaise with its members and other stakeholders at national, European and international level to find practical solutions for detecting copyright infringements and appropriate methods to protect copyright online. The Council needs to be proactive in seeking appropriate solutions.

One of the key recommendations of a recent review in the United Kingdom was that the UK Government should encourage all of the relevant players to come together, within an agreed framework of rules, to establish a UK

Digital Copyright Exchange [UK DCE] to facilitate speedy, effective and comprehensive copyright licensing.²⁵ A range of incentives and disincentives would be needed to encourage rights holders and others to overcome divergences of interest to participate first in the formation of the UK DCE and then in its licensing schemes. The UK government announced that it accepted and would implement all of the recommendations in that review,²⁶ and has recently announced a consultation on specific proposals in that regard.²⁷ When it initially accepted the recommendations, the UK government specifically noted that it wants to see a “DCE, or something like it”²⁸ established; it announced that Richard Hooper would lead a feasibility study on developing a DCE;²⁹ and that process has recently commenced.³⁰

We are of the view that it would be an excellent idea if all of the relevant UK players could come together to establish a UK DCE. We are also of the view that it would be an even better idea if the Council could play a similar role in Ireland, and establish an Irish Digital Copyright Exchange. Once that is done, the Exchange could co-ordinate with the UK DCE if and when it is established. Matters are proceeding in the UK, but rather slowly. There is, therefore, a small window of opportunity for the Irish copyright community to come forward with an agreement in principle to form a Council, one of the functions of which would be to operate a digital Exchange. In turn, government could encourage and facilitate such a development. And this could all be supported and underpinned by clear legislative structures. Such leadership and timeliness would be a strong signal to foreign direct investors that Ireland is committed to promoting both copyright and innovation.

3.4 Copyright Alternative Dispute Resolution Service

A great many submissions argued that there is a pressing need for quicker, less expensive forms of redress than High Court actions; several suggested various forms of non-curial alternative dispute resolution. Recital 51 and Article 17 of the E-Commerce Directive strongly encourage out-of-court settlement of copyright disputes, especially minor matters and those involving consumers and users. Indeed, some submissions pointed to the wide scope for online dispute resolution mechanisms in the copyright context. We consider that a Council could establish a **Copyright Alternative Dispute Resolution Service** [ADR Service] to provide a quick, fair and free method of resolving copyright disputes seems to us to be a more than desirable means of achieving clarity and redress in a cost-effective fashion.

²⁵ *Digital Opportunity. A Review of Intellectual Property and Growth* (2011) [Hargreaves] (available at: <http://www.ipso.gov.uk/ipreview.htm>) pp3-4, 8, 28-35.

²⁶ *Government Response to the Hargreaves Review of Intellectual Property and Growth* (2011) (available at: <http://www.ipso.gov.uk/ipresponse>) [Response to Hargreaves].

²⁷ See <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=422484&NewsAreaID=2>

²⁸ *Response to Hargreaves*, p5.

²⁹ See <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=422173&NewsAreaID=2>

³⁰ See <http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-dce.htm>

The Press Council has established the Office of the Press Ombudsman, to deal with complaints from members of the public against publications which are members of the Press Council, and to seek to resolve such complaints by conciliation. If that is unsuccessful, the Ombudsman will take a decision, which can be appealed by either party to the Press Council. There is no charge to the complainant for this service. Moreover, unlike other similar Ombudsman services established under statute,³¹ the Press Ombudsman is established by the print media as part of the recognised self-regulating Press Council system.

We consider that an ADR Service established by the Council could provide a voluntary dispute resolution process similar to that provided by the Press Ombudsman; but, unlike that process, we do not see a role for the ADR Service in taking decisions, or for the Council as an appeal body from the ADR Service. To that end, some of the draft proposed statutory provisions at the end of this chapter are modelled on some of the suggestions in the Law Reform Commission's Draft Mediation and Conciliation Bill, 2010.³²

The ADR Service could publish standard form Alternative Dispute Resolution clauses [ADR clauses] by which copyright disputes could be referred to the ADR Service, and these ADR clauses could be included in various standard form copyright contracts. Indeed, to encourage the spread and efficacy of such clauses, it may be appropriate to provide (by analogy with the position that used to apply in respect of arbitration agreements under section 12 of the Arbitration Act, 1954) that, in the case of a dispute involving a contract including an ADR clause, the court should have a discretion to stay proceedings to allow the matter to be heard by the ADR Service.

The ADR Service could also publish standard form Alternative Dispute Resolution contracts, by which parties to copyright disputes where there is no ADR clause could still agree to refer the matter to the ADR Service.

3.5 The Council, the ADR Service and the Controller

An important issue to be resolved is the nature of the interrelationship between the ADR Service and the Controller of Patents, Trade Marks and Designs (the Controller), who has very important functions under CRR. Indeed, given the wide range of IP functions not limited to patents exercised by the Patents Office and the Controller, these titles are misleading, and thought should be given to renaming them as, respectively, something like the **Intellectual Property Bureau [IPB]** and the **Director of**

³¹ For example, the Financial Services Ombudsman was set up pursuant to section 16 and Schedules 6 and 7 of the Central Bank and Financial Services Authority of Ireland Act 2004, and the Pensions Ombudsman was set up pursuant to Part XI of the Pensions Act 1990 (inserted by the Pensions (Amendment) Act 2002); see <http://www.financialombudsman.ie/> and <http://www.pensionsombudsman.ie/cms/index.php> respectively.

³² See Law Reform Commission *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) (Law Reform Commission, Dublin, 2010), available at <http://www.lawreform.ie/news/report-on-alternative-dispute-resolution-mediation-and-conciliation.318.html>

the IPB (but it is beyond our remit to make a formal recommendation in this regard).

CRRA gives the Controller important functions relating to copyright licensing bodies, to licensing schemes and to royalty payments. It will be crucial to ensure that the line between the Council (as well as the Exchange and the ADR Service) on the one hand, and the Controller (or IPB) on the other is clear.

Copyright licensing bodies must be registered with the Controller pursuant to Chapter 17 CRRA;³³ and the Controller maintains a Register of Copyright Licensing Bodies. The terms of such bodies' licensing schemes must be referred to the Controller, and disputes about such schemes also go to the Controller (Chapter 16 CRRA). The Controller also has jurisdiction relating to sound recording in broadcasts (section 38 CRRA). However, the Controller's powers in dealing with these issues are relatively limited. By contrast, such disputes are now dealt with by specialist copyright boards and tribunals in Australia,³⁴ Canada,³⁵ New Zealand,³⁶ Singapore,³⁷ and the UK;³⁸ and their powers are considerably greater than those afforded to the Controller under CRRA.

We consider that the Council and the ADR Service could have a role to play before an issue reaches the Controller. For example, the Council could help broker the terms of a licensing scheme that would meet the needs not only of the relevant rights-holders and collecting societies but also take into account the position of licensees. Such schemes could contain ADR clauses, by which disputes in the first instance could be referred to the ADR Service. If the parties do not reach agreement before the ADR Service, the matter would then go to the Controller.

When an issue does reach that office, the question arises as to whether the Controller ought to have an increased range of powers and responses similar to those exercised by specialist copyright boards and tribunals in other jurisdictions. Moreover, if the Controller is to have such an increased range of powers, a statutory appeal (as distinct from the existing judicial review procedure) from the Controller to the High Court might then be appropriate.

We invite submissions in this regard, especially as to the amendments that would be necessary to CRRA.

³³ And the Copyright and Related Rights (Register of Copyright Licensing Bodies) Regulations, 2002 (SI No 463 of 2002); available at <http://www.irishstatutebook.ie/2002/en/si/0463.html>

³⁴ See the Copyright Tribunal of Australia: <http://www.copyrighttribunal.gov.au/index.html>

³⁵ See the Copyright Board of Canada: <http://www.cb-cda.gc.ca/home-accueil-e.html>

³⁶ See the Copyright Tribunal of New Zealand: <http://www.copyright.org.nz/tribunal.php>

³⁷ See the Copyright Tribunals: <http://www.ipos.gov.sg/leftNav/cop/Copyright+Tribunal.htm>

³⁸ See the Copyright Tribunal: <http://www.ipo.gov.uk/ctribunal.htm> (which is planned to be merged into the over-arching Tribunal Service).

3.6 *Licensing issues*

We received many submissions relating to three issues under this heading.

First, some submissions urged us to recommend widespread compulsory licensing as a means of increasing access to content. In the absence of draft statutory provisions to this effect in the submissions, the statutory provisions concerning the playing of sound recordings in public in sections 38, 130 and 305 CRRA could form the basis of a more extensive statutory model, by which CRRA would provide for general provisions relating to compulsory licences and equitable remuneration, but this could prove very complex. On the other hand, we are of the view that a Council as a central and honest broker could encourage more extensive voluntary collective licensing than exists at present. We invite submissions in this regard.

Second, notwithstanding the possibilities suggested by voluntary collecting licensing, and having regard to section 38 mentioned in the previous paragraph, the question arises as to whether the statutory licence in section 38 should be amended to cover categories of work other than “sound recordings”, and we invite submissions in this regard.

Third, one of the aims of the CRRA, as stated in its Preamble, is to give effect to the EU Rental and Lending Directive [EURLD].³⁹ Hence, sections 124-126 CRRA deal with the transfer of rental rights in the case of film production agreements, in return for equitable remuneration, which may be either a single payment or a series of royalties. Many submissions raised various issues with these (and similar) sections; in particular: as to who qualifies for them and whether a single payment is fair. Although we do not consider that these issues are within our remit, the resolution of this kind of practical matter is precisely the sort of issues that could be dealt with by a Council. We were also asked to determine whether ss124-126 were compatible with EURLD, but this is clearly a matter for the courts and not for us.

Fourth, some submissions were unhappy with the activities of copyright collecting societies, but we consider that a Council could develop codes of practice and agreed minimum standards to address these concerns. We invite submissions in this regard.

Finally, many submissions argued that Irish law should allow registration of licensing bodies/collecting societies from outside the State, and that, in an increasingly integrated European market, licensing systems need to be cross-border.

³⁹ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0115:EN:HTML>), replacing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0100:EN:HTML>).

We note that some foreign collecting societies are already registered with the Controller, but their registration is only for the purpose of collecting royalties in respect of those copyrights which their members have in Ireland under CRRRA. The more complex question relates to the second issue, by which foreign collecting societies might register in Ireland to collect cross-border royalties in Ireland in respect of foreign copyrights or equivalent or related rights. This effectively requires a comprehensive EU framework for cross-border copyright licensing.⁴⁰ The recent UK review suggested that the UK government should support moves by the EU Commission to establish such a framework;⁴¹ and we invite submissions on whether the Irish government - and the Irish copyright community generally - should do so too.

In particular, we are of the view that this is a matter on which a Council and IDCE should be able to work, to advocate on behalf of Irish copyright interests, to ensure not only that such a cross-border framework could come about, but also that it was as favourable as possible to such interests. We invite submissions in this regard.

3.7 Publication of royalty charges

Some of the submissions took issue with the compulsory publication of royalty rates, required by sections 175 and 177 CRRRA.

On the one hand, rights-holders, collecting societies and some licensees regarded this as commercially sensitive information. We understand that most if not all other collecting societies operating in Europe are not required to do this, and we note that section 27 of the Freedom of Information Act, 1997 (as amended) exempts commercially sensitive information from disclosure. It is clear, then, that there are indeed circumstances in which the publication of financial or commercial information could prejudice the business whose information is published.

On the other hand, the idea behind publication of royalty rates is that such transparency could ensure that they are not too high.

We consider that sections 175 and 177 CRRRA take a very blunt approach to achieve a laudable goal, and that the Council could develop a far more nuanced approach to this issue, and we invite submissions in this regard.

3.8 Windfall

It was submitted to us that we ought to recommend the renegotiation of contracts in the event of windfall income from a work that was not envisaged at the time the contract was made, modelled on a German⁴² law

⁴⁰ See, eg, Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005H0737:EN:NOT>

⁴¹ See http://ec.europa.eu/internal_market/copyright/management/management_en.htm

⁴² See section 32a of the Law to Strengthen the Contractual Position of Authors and Performing Artists of 22 March 2002; available at http://www.wipo.int/wipolex/en/text.jsp?file_id=189744.

of 2002, which provides that where the contractually agreed remuneration is

conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement that grants the author further equitable participation appropriate to the circumstances.

On the one hand, although the context of this provision is a very different copyright landscape to CRRRA, there is a germ of an interesting point here. On the other hand, questions of finality and certainty are very important in commercial agreements, and any significant uncertainty about whether transactions are ever really closed has the potential to discourage innovation, especially if such a clause were not to have a built-in long-stop limitation period beyond which it could not be invoked. Moreover, parties would seek to contract out of such a clause, if that were possible. Given the nature of the issues, in our view, it is the kind of issue on which the Council might take the lead, developing codes of practice and encouraging any disputes to be referred to the ADR Service, and we invite submissions in this regard.

3.9 Remedies

The issue of remedies for infringement is obviously of great concern to rights-holders; but a proportionate set of remedies, and an appropriate set of procedures, are just as important to all parties to a dispute. This is reinforced both by international⁴³ and EU⁴⁴ obligations. However, it was a recurring theme in the submissions that it is very costly both to seek and to defend court applications for remedies for infringement of copyright. We agree with the submissions that there is a significant need for a comprehensive dispute-resolution architecture, and for simpler, speedier, and more cost-effective, determination of copyright disputes. The submissions were not short of suggestions in this regard, including: extending the copyright jurisdiction of the Controller of Patents, establishing a dedicated Copyright Tribunal, creating a specialist small-claims copyright jurisdiction in the District Court, and fashioning a fast-track procedure in the Circuit Court.

We consider that establishing an ADR Service and extending the jurisdiction of the Controller (or IPB), as discussed above, could prove important

⁴³ The Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPs] (1994) is an element of the agreement establishing the World Trade Organization (WTO), which administers TRIPs; see http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm TRIPs, *inter alia*, emphasises the importance of appropriate enforcement procedures, remedies, and dispute resolution procedures.

⁴⁴ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [the Enforcement Directive]; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R%2801%29:EN:HTML>

elements of the solution to this problem, but other elements are necessary as well.

For example, we see attractions in the idea of a specialist expedited small-claims copyright jurisdiction in the District Court.⁴⁵ Indeed, the US Congress has asked the US Copyright Office to consult on remedies for copyright infringement suits in small claims courts.⁴⁶ However, although there were many suggestions to this effect in the submissions, they were not fleshed out in any great detail. Several questions arise, including the nature of the jurisdiction and of the disputes that might be covered, and how it might dovetail with the existing small claims procedure for consumers in the District Court.⁴⁷ But we do not consider that these issues are insurmountable. Moreover, we see substantial merit in encouraging disputes too complex for the District Court to be litigated, where possible, in the Circuit Court rather than in the much more costly and cumbersome High Court. In particular, we see great merit in the creation of specialist copyright jurisdiction in the Circuit Court, with streamlined procedures appropriate to copyright disputes. Of course, there will still be many cases for which the High Court is the appropriate venue.⁴⁸

Since our Terms of Reference are limited to copyright, it is beyond our remit to recommend that these specialist jurisdictions in the District Court and the Circuit Court be extended to other intellectual property law disputes. However, we consider this extension to be very desirable, both in its own terms, and because it would probably ensure sufficient business for a specialist jurisdiction overseen by a judge expert in intellectual property matters. It is important that the judges in these specialist jurisdictions have sufficient expertise and ongoing training to make it attractive for litigants to opt for these courts.

Finally, in principle, it should not be difficult to opt for a specialist jurisdiction. Many commercial disputes often contain a great many issues, not just copyright. For example, copyright issues often go hand in hand with other intellectual property issues. However, even then, intellectual property disputes are not hermetically sealed away from other commercial disputes. In such circumstances, we consider that, where there is a copyright (or intellectual property) issue as part of the dispute between the parties, then either of the parties should be entitled to run the entire dispute in the specialist jurisdiction.

⁴⁵ This would be far more extensive than the District Court (Intellectual Property) Rules 2004 (SI No 411 of 2004); available at <http://www.irishstatutebook.ie/2004/en/si/0411.html> and the District Court (Intellectual Property) Rules 2010 (SI No 421 of 2010); available at <http://www.irishstatutebook.ie/2010/en/si/0421.html>

⁴⁶ See <http://www.copyright.gov/docs/smallclaims/>

⁴⁷ See <http://www.courts.ie/courts.ie/Library3.nsf/PageCurrentWebLookUpTopNav/Small%20Claims%20Procedure>.

⁴⁸ This will, of course, require amendment to Order 63A Rule 1(e)(ii) RSC, inserted by the Rules of the Superior Courts (Commercial Proceedings), 2004 (SI No 2 of 2004); available at <http://www.irishstatutebook.ie/2004/en/si/0002.html>

We understand that the rules of court are currently being reviewed, to the extent that they apply to intellectual property, to see how they could be streamlined to make litigation more efficient and cost effective, but the present Review affords the opportunity to go much further. For example, the County Court in the UK is broadly speaking equivalent to the Circuit Court in Ireland; there is a specialist Patents division in the County Court;⁴⁹ and it could provide a helpful precedent for a specialist copyright division in the Circuit Court. Moreover, the Defamation Act, 2009 introduced a range of rapid procedures, including a slimline Circuit Court procedure for a declaratory order (section 28), and it seems to us that a similar fast-track procedure in the copyright context would encourage routine copyright disputes to be taken in the Circuit Court.⁵⁰

Finally, we note 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, there is a parallel consultation about this issue,⁵¹ and we will not address it further in the present Review.

3.10 Conclusion: Towards a Copyright Council of Ireland?

Several of the topics discussed in this chapter will come up again in the discussion in subsequent chapters. For now, the key questions are whether there ought to be a **Copyright Council of Ireland**, an **Irish Digital Copyright Exchange**, and a **Copyright Alternative Dispute Resolution Service**? In our view, many of the issues raised in the submissions could be better dealt with by the Council, over time and in a much more context-sensitive way, than by one-off legislative reform. The intersection of innovation and copyright is a complex one; and, given the pace of technological development, it is a swiftly moving target. Moreover, policy-making is an ongoing process, and the present consultation can only respond to a snapshot in time. A pro-active Council would be in an excellent position to respond to challenges and changes as they occur, to ensure that the practice of Irish copyright is best-adapted on an ongoing basis to sustain innovation and to find the most appropriate balance of all of the interests involved.

3.11 Submissions invited

We invite submissions on foot of the discussions above, and in particular on the following issues:

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

⁴⁹ See <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/patents-county-court/index.htm>

⁵⁰ It is beyond our Terms of Reference to suggest that this jurisdiction be extended to other intellectual property law disputes.

⁵¹ See <http://www.djei.ie/press/2012/20120126a.htm> (text of a draft Statutory Instrument to provide for injunctions for rights-holders against intermediaries whose services are used to infringe rights-holders' copyright).

- (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?
- (10) What should the composition of its Board be?
- (11) What should its principal objects and its primary functions be?
- (12) How should it be funded?
- (13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?
- (14) What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?
- (15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?
- (16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?
- (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?
- (18) Should the statutory licence in section 38 CRRA be amended to cover categories of work other than “sound recordings”?
- (19) Furthermore, what should the inter-relationship between the Controller and the ADR Service be?
- (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?
- (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?
- (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?

3.12 Possible draft statutory provisions

Possible statutory drafts to establish the Council, the Exchange and the ADR Service might provide as follows:

PART VII

COPYRIGHT COUNCIL OF IRELAND

377. Copyright Council of Ireland.

- (1) The Minister may by order declare that such body as is specified in the order shall be recognised for the purposes of

this Act, and a body standing so recognised, for the time being, shall be known, and in this Act is referred to, as the “Copyright Council of Ireland” (the Council).

- (2) Not more than one body shall stand recognised under this section for the time being.
- (3) No body (other than a body that stands recognised under this section for the time being) shall be known as, or describe itself as, the “Copyright Council of Ireland”.
- (4) The Minister or the Council may apply to the High Court for an injunction to restrain any body other than the Council from using the description “Copyright Council of Ireland” in contravention of subsection (3).
- (5) The Minister shall not make an order under subsection (1) unless he or she is satisfied that the body in respect of which he or she proposes to make the order complies with the minimum requirements specified in Schedule 4.
- (6) If the Minister is of the opinion that a body for the time being standing recognised by order under this section no longer complies with the provisions of Schedule 4, he or she may revoke that order.
- (7) The Minister shall, before making an order under subsection (5), allow the body for the time being standing recognised under this section to make representations to him or her.
- (8) Whenever an order is proposed to be made under this section a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made unless a resolution approving of the draft has been passed by each such House.

338. *Regulations and submissions.*

- (1) When making regulations or orders pursuant to any provision of this Act other than the provisions of this Part, the Minister shall first consult with the Council.
- (2) The Council shall, from time to time, make such representations to the Minister on copyright and related issues as to it seem appropriate.

FOURTH SCHEDULE

Minimum Requirements in relation to the Copyright Council of Ireland and the Copyright Alternative Dispute Resolution Service

- 1 The Copyright Council of Ireland (the Council) shall be a company limited by guarantee.
- 2 The principal objects of the Council shall be to—
 - (a) ensure the integrity of copyright whilst protecting the public interest,
 - (b) raise public awareness of the importance of copyright, and
 - (c) promote innovation.
- 3 The Council shall be independent in the performance of its functions.
- 4 Any person shall be entitled to be a subscribing member of the Council.
- 5(1) The number of directors of the Board of the Council shall be 13, of whom—
 - (a) six shall be directors who represent the public interest,
 - (b) one shall be a director who represents the interests of those who regularly make lawful use of copyright material,
 - (c) three shall be directors who represent the interests of those who hold rights pursuant to this Act, and
 - (d) three shall be directors who represent the interests of collecting societies.
- (2) The directors referred to in section 5(1)(a) shall be persons who are of standing in the community, and are independent of the interests referred to in section 5(1)(b)-(d).
- (3) The directors referred to in section 5(1)(b) shall be persons who are of standing in the community, and are independent of the interests referred to in section 5(1)(c)-(d).
- (4) The directors referred to in section 5(1)(a)-(b) shall be selected for appointment—
 - (a) by a panel of persons who are, in the opinion of the Minister, independent of the interests referred to in section 5(1)(b)-(d), and

- (b) in accordance with a selection process that is advertised to members of the public in a manner that the Minister considers to be sufficient.
- (5) The criteria for selecting persons for appointment as directors pursuant to section 5(1)(a)-(b) shall be published in such manner as will enable them to be inspected by members of the public.
- (6)
 - (a) A director shall hold office for a period of 5 years from the date of his or her appointment.
 - (b) A director whose term of office expires by the effluxion of time shall be eligible for reappointment as a director, but only once.
- (7)
 - (a) One of directors appointed pursuant to paragraph 5(1)(a) shall be appointed as Chairperson of the Board.
 - (b) A Chairperson whose term of office as a director expires by the effluxion of time shall be eligible for reappointment as a director and as the Chairperson, but only once.
- 6(1) The Council shall be funded from subscriptions paid by members of the Council calculated in accordance with such rules as the Council shall make for that purpose.
- (2) The Council may accept gifts, donations or funding (other than subscriptions referred to in subsection (1)) from any person, but only where
 - (a) the donor does not attach any conditions to the gift, donation or funding,
 - (b) the Council does not give any undertaking in return for the gift, donation or funding, and
 - (c) the making and receipt of any such gifts, donations or funding is published in such manner as will enable this to be known to and commented upon by members of the public.
- 7(1) The Council shall establish an Irish Digital Copyright Exchange (the Exchange).
- 8(1) The Council shall establish a Copyright Alternative Dispute Resolution Service (the Service).

- (2) The Service shall be an independent, facilitative, confidential, expeditious and informal service, to assist parties to a copyright dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute.
 - (3) The following principles shall apply to the dispute-resolution process—
 - (a) participation in a process to resolve a copyright dispute is voluntary, and any party involved the process, including the Service, may withdraw from the process at any time and without explanation,
 - (b) the Service shall at all times be independent, neutral and impartial,
 - (c) during the currency of the process, and thereafter unless otherwise agreed by the parties, the parties and the Service shall keep the process confidential,
 - (d) the parties and the Service shall seek to complete the process in the shortest time practicable, relative to the nature of the dispute,
 - (e) where all parties agree, a non-party participant, such as a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party, shall be allowed to participate in the process,
 - (f) the Service may, at any stage in the process, make a proposal to the parties to resolve the dispute, but the Service is not empowered to impose such a proposal on the parties,
 - (g) the parties alone shall determine, either at the beginning of the process or when agreement (if any) is reached, the enforceability, or otherwise, of any agreement that arises from the process, and any agreement thereby reached shall be enforceable as a contract at law if it is made in writing and signed by all the parties and by the Service, and
 - (h) if the process does not result in an agreement, the Service shall issue a certificate to this effect.
- 9(1) If any party to a dispute resolution agreement or any person claiming through or under him commences any proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter

agreed to be referred, any party to such proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if it is satisfied that there is not sufficient reason why the matter should not be referred in accordance with the agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the process, may make an order staying the proceedings.

- (2) (a) The court shall not make an order staying the proceedings if—
 - (i) the parties had already undertaken a process with the Service to seek to resolve their dispute, and
 - (ii) that process had not resulted in an agreement resolving the dispute.
- (b) A certificate from the Service that the process had not resulted in an agreement resolving the dispute shall be evidence, unless the contrary is proven, that the process had not so resulted.

10(1) In this Schedule—

- (a) “copyright dispute” means any civil or commercial dispute arising under this Act that could give rise to civil liability, but does not include any mediation, conciliation or other dispute resolution process which is provided for in accordance with any other enactment;
- (b) “dispute resolution agreement” means an agreement to refer present or future disputes to the Service;
- (c) “process” means the process undertaken by the parties to a copyright dispute with the Service to seek to resolve that dispute.

We invite submissions relating to these provisions. We also invite submissions relating to what other statutory amendments might be necessary not only to CRRA but also to legislation relating to the courts to establish and encourage the use of specialist copyright (or intellectual property) jurisdictions in the District and Circuit courts.

4. Rights-holders

4.1 Introduction

Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and, in this Chapter, we consider them in the context of rights-holders, the first of the six categories into which we have divided the submissions.

In this chapter, we consider the position of rights-holders in copyright law (section 4.2) and of how such rights-holders contribute to the process of innovation (section 4.3), as the background to examine some of the specific submissions which touched upon the position of rights-holders. For example, we address the suggestion that copyrights ought to be formally registered (section 4.4), and we consider various submissions relating to the test of “originality” (section 4.5), the definition of “authors” (section 4.6), and the copyright status of unpublished works (section 4.7).

It is not enough that copyright-owners hold rights; they must also be able to protect them where appropriate; as a consequence, we discuss submissions relating to technological measures for the protection of copyright or for the management of copyright information (section 4.8). Similarly, not only must copyright-owners be able to protect their rights, they must also be able to seek remedies when they are infringed. We discussed many issues relating to remedies in the previous chapter, but other issues arise which we address here (section 4.9). We assess rights-holders’ submissions on the question of whether there ought to be a system of levies upon devices or storage media that facilitate copying (section 4.10), and we also consider the particular concerns raised by photographers (section 4.11).

Various submissions argued that copyright law ought to be as technology-neutral as possible, so we explore issues relating to the definition of broadcasting (section 4.12) and web-streaming (section 4.13). And we conclude this chapter by examining submissions which we received relating to rental rights, lending rights, and artists’ resale rights (section 4.14) as well as other issues beyond the scope of our Terms of Reference (section 4.15).

4.2 *Rights-holders in copyright law*

Of the six categories in our classification, this is the most obvious one. Its first main constituent are the people who create the copyright work, from writers to artists to photographers to songwriters to software programmers. The first Copyright Act - the Statute of Anne, 1710 - was adopted, in the words of its long title, for “the **Encouragement of Learning**, by Vesting the Copies of Printed Books in the Authors ...” (emphasis added).⁵² In 1787, the copyright clause of the US Constitution sought to “promote the **progress of useful arts**, by securing for limited times to authors the exclusive right to

⁵² A facsimile and transcription of the Act is available at <http://www.copyrighthistory.com/anne.html>

their writings”⁵³ (emphasis added). Irish courts see copyrights as constitutionally protected property rights, which allow copyright owners to benefit from their original works (s17(1) CRRA). Moreover, EUCD recognises that if authors “are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work” (Recital 10).

The situation of the individual author or artist is therefore a dominant trope in copyright lore; and it is particularly resonant in Ireland, given our strong cultural heritage and traditions in art, music and literature. Sometimes such creators seek to exploit their work directly. Sometimes, however, they are employees, such as when programmers in a software company write a piece of software, like a game or a search engine. In those cases, copyright vests in their employers unless otherwise agreed in their contracts of employment (s23(1)(c) CRRA). And sometimes, creators assign or licence some or all of their rights, such as when an author signs with a publisher, or an artist or group signs with a music label. Indeed, it was the protection of publishers’ - rather than authors’ - interests which drove the enactment of the Statute of Anne: the long title referred to the vesting of copyrights in “the Authors *or Purchasers* of such Copies” (emphasis added), and the text of the Act makes clear that these purchasers are those who purchase from the authors the rights to print or publish the books. Moreover, such publishers, labels, broadcasters, and similar corporations, have their own copyrights as well: for example, a studio has many copyrights in a movie, and a broadcaster has many copyrights in a television or radio show. Content industries (such as the publishing, movie, music and software-games industries) therefore seek talent to nurture and market; hence, many submissions from such companies argued that copyright law is at the heart of their business-model. It is an example of a classic pattern of innovation, where companies innovate new products, services or talent and market them to end-users. Hence, Irish copyright law protects not just individual creators but also investors, broadcasters, and music and movie companies.

4.3 Rights-holders, copyright and innovation

In all of these cases, the intersection between copyright and innovation is clear in the case of rights-holders. The category of rights-holders is diverse, but, in general they benefit from the rights conferred by copyright law in two main ways: they can commercially exploit their works, and they protect the artistic integrity of their works. The two broad justifications for copyright track these reasons; and, in both cases, the connection between copyright and innovation is reasonably clear.

First, the central premise from which copyright law has developed is that it is the potential reward provided by copyright that encourages the art, movie, music, programming and writing. In that sense, copyright law fosters and protects innovation. Indeed, as was argued in a number of submissions, given Ireland’s strong cultural heritage and traditions, one important strand of innovation is likely to be provided by the creative capacity of artists to

⁵³ See Article I, Section 8, Clause 8, of the US Constitution; see http://www.law.cornell.edu/anncon/html/art1frag71_user.html#art1_sec8cl8

generate innovative content. Of course, creativity is fostered and encouraged by a wide range of individual, social and cultural factors beyond copyright law; and some creators of works are more concerned to make use of copyright law to protect the integrity of their work rather than to exploit it commercially. Nevertheless, there is undoubtedly an intersection between copyright and innovation; and if the legal protections of copyright are not sufficiently robust, there is little incentive for commercial innovation.

Technological innovation has led to new forms of content (photographs were once cutting edge; nowadays artwork can be created purely digitally), to new ways of generating and distributing older forms (books are giving rise to e-books, sound recordings have gone from analogue to digital formats), and to new markets and downstream revenues. Moreover, such technological innovation has in turn affected copyright, as its protections have been extended in successive copyright enactments from its original role in the protection of copyright in books, so that CRRA now covers many other areas, such as paintings, photographs, sound recordings, performances, broadcasts, movies, software and databases.

There is much labour involved in all of these endeavours, and copyright law provides rights-holders legal protection for the fruits of their labours, thereby incentivising them to produce their copyrightable works, especially works that others might value. This is particularly the case where the costs to the rights-holders of producing the works are high, but the costs of reproduction by others are quite low: copyright law incentivises this production by the rights-holders and prevents reproduction by others, for sufficient time to allow the rights-holders to recoup the costs of production and gain an adequate return. The potential reward provided by copyright therefore encourages innovation: if “authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work” (Recital 17 EUCD); hence, the “creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work” (Recital 5, EURLD). Moreover, consumers also benefit from the availability of the work produced by the rights-holder.

The second main justification for copyright law also proceeds from the position of the rights-holder: copyright provides rights-holders legal protection for the artistic integrity of their works. It allows rights-holders to innovate artistically, in the knowledge that the law protects such intellectual expressions of their personalities. This is the basis of the moral rights in Chapter 7 CRRA. Moreover, society also benefits by the creation of work of potential economic value or cultural significance.

Against the background of these justifications, it is easy to form the impression that incentivising and protecting rights-holders is the limit of the intersection between copyright and innovation. Certainly, some of the submissions argued that this must be so. However, both justifications look not only to the rights-holder, but also to the public benefit of the work: the

State affords copyright protection to the rights-holders because it is for the public benefit or the common good; in particular, from the perspective of this Review, one of the reasons the State allows exceptions to copyright is to promote innovation by promoting competition. Hence, copyright law is justified by the overall benefit of a diverse range of work; and the appropriate reward afforded to the rights-holder is not an end in itself, but rather the means to this diversity, competition and innovation.

Hence, copyright law has to strike a delicate and proportionate balance between the monopoly afforded to the rights-holder and the potential to undercut diversity by preventing further developments based on the original work. This tension can be seen in CRRA, which not only protects copyright but also limits it in various ways - by protecting only “original” works, by preventing only “substantial” infringements, by providing a range of exceptions, and so on. In this way, copyright law accommodates interests other than those of rights-holders and thereby provides other contexts for innovation.

From the perspective of this Review, the relevant public benefit is the encouragement of extensive innovation. However, the tension between monopoly reward and diversity is exacerbated by the fact that innovation is not only encouraged by reward, it is also enabled by diversity. Hence, innovation is to be found on both sides of the copyright balance. The main issue for us, therefore, is whether the current copyright monopoly strikes the most appropriate innovation-friendly balance between protection of rights-holders’ legitimate interests and the competing public interest in diversity, having regard especially to the challenges posed by the dizzying pace of technological change.

Some of the submissions suggested that the current law of copyright over-compensates and over-protects rights-holders beyond the needs of appropriate remuneration, thereby stifling further innovation; others suggested that it does not go far enough to incentivise innovation in the first place. We are open to both possibilities, but we saw little reliable and compelling evidence either way, and we therefore see no reason at this point to recommend any change to the basic structures of Irish copyright law. We are grateful for the economic evidence we have already received, not least because we recognise that such evidence is difficult to obtain. Nevertheless, we would welcome more evidence, specifically on how current copyright law in fact encourages or discourages innovation, and how changes could encourage innovation.

It is against that background that we examine some of the specific submissions which touched on the position of rights-holders.

4.4 Registration

There were some faint suggestions in the submissions that copyrights ought to be formally registered. However, this would contradict Ireland’s international obligations. The Berne Convention for the Protection of Literary and Artistic Works was initially adopted in Berne, Switzerland in

1886;⁵⁴ it was most recently amended in 1971 and 1979; and Ireland has been a member since 1927. Article 5(2) of the Berne Convention provides that the enjoyment and the exercise of the copyrights it protects “shall not be subject to any formality”, and this plainly excludes formalities such as registration. Hence, under Berne, copyright subsists in a work if it fulfils the basic test of originality; CRRA is compatible with the Berne Convention; and for so long as we adhere to it, we cannot add any formal registration requirements.

4.5 Originality

The basic test for copyrightability under section 17 CRRA is that the relevant work be “original”. This test is very broad, since the courts have held that work will be original if independent effort, skill and labour have been sufficiently expended in its creation. This potentially captures a great deal of “ephemera”, which is much of the web’s content; and some submissions took the view that such ephemera should not be protected by copyright. US law takes a slightly narrower approach to originality, excluding works created through simple diligence (such as by assembling facts or data), no matter how much work was done or investment was expended. Recent decisions indicate that EU law may be heading in a similar direction. It was submitted to us that the Irish definition of “originality” could and should therefore be amended to protect only works which are the author’s own intellectual creation. However, it is not clear to us how narrowing the ambit of copyright in this way would incentivise innovation, and we would welcome further submissions in this regard.

4.6 Authors

Many key CRRA rights are conferred upon authors, widely defined in section 21 CRRA. Several submissions raised issues with this section. First, some of the submissions concerned contractual practices in which some of those who come within that definition have not been able to exercise - or have been excluded from exercising - rights afforded by CRRA. However, if CRRA is being ignored, an amendment is likely to be ignored too. Instead, this seems to be an issue of enforcement, and in particular, an issue where the contractual imbalances complained of continue to make enforcement difficult. This is just the kind of contractual situation which we think a Council along the lines sketched in chapter 3 could be able to take in hand.

Second, section 21(1)(a) provides that if the relevant copyrightable work “is made by an employee in the course of employment”, then the employer and not the employee owns the copyright, “subject to any agreement to the contrary”. It was submitted to us that, in many creative industries, this was unfair to the creative employees, and that this should be amended or repealed. We do not consider that this provision is a barrier to innovation or that an amendment or repeal would promote innovation. However, if a Council were to be established, then it might be able to examine this issue and perhaps recommend a code of practice or even a model agreement.

⁵⁴ See http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

Third, it was submitted to us that there is some ambiguity as to the authorship of the sounds on the sound track of a film. In the UK, the Copyright, Designs and Patents Act 1988⁵⁵ [CDPA] was amended in 1995, and section 5B was inserted to deal with films. In particular, section 5B(2) provides that the sound track accompanying a film should be treated as part of the film. If a similar provision were to be added to CRRA, it would be more appropriate to incorporate it into section 17 CRRA (defining copyright and copyright works, rather than section 21), perhaps by adding a new sub-section (7) to section 17, as follows:

17. Copyright and copyright works.

- ...
- (7) The sound track accompanying a film shall be treated as part of the film.

We invite submissions in this regard.

4.7 Unpublished works

Several submissions pointed out that the combination of the definition of the term of copyright in section 24 CRRA, the expiry of copyright in section 33, and a transitional provision in respect of duration in section 9 of the First Schedule to CRRA, has the potential to provide for a perpetual copyright in certain unpublished works. If this is correct, it was an unintended consequence of the enactment of CRRA, and we agree that it must be addressed, perhaps by the addition of the words in bold at the end of the subsection:

- 24. Duration of copyright in a literary, dramatic, musical or artistic work or an original database.**
- (1) The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective **either** of the date on which the work is first lawfully made available to the public **or of whether the work is ever made available to the public.**

We invite submissions in this regard.

4.8 Technological Protection Measures and Rights Management Information

Various rights-holders submitted that sections 370-376 CRRA⁵⁶ are inadequate in fact to protect technologies used to control access to copyright content, or to prevent users from copying protected content, and are insufficient in law to comply with Articles 6 and 7 EUCD. Whatever about such incompatibility, which is a matter for the courts and not for us,

⁵⁵ Available at <http://www.legislation.gov.uk/ukpga/1988/48>

⁵⁶ Including the associated European Communities (Copyright and Related Rights) Regulations, 2004 (SI No 16 of 2004) available at: <http://www.irishstatutebook.ie/2004/en/si/0016.html>

it is certainly the case that the World Intellectual Property Organisation⁵⁷ and other jurisdictions have strengthened⁵⁸ or are in the process of strengthening⁵⁹ their rules in this regard. However, this development is not uncontroversial, not least because such measures are capable of preventing not only unauthorised infringements of copyright but also authorised uses of copyright works, such as those that come within the statutory exceptions to copyright. There was insufficient evidence in the submissions that any change to the current position would have a net beneficial effect on innovation, and we therefore invite further submissions in this regard.

4.9 Remedies

The issue of remedies for infringement is obviously of great concern to rights-holders; but a proportionate set of remedies, and an appropriate set of procedures, are just as important to all parties to a dispute. This is reinforced both by our international obligations⁶⁰ and by our EU commitments.⁶¹

In Chapter 3, we discussed a comprehensive remedial architecture. In this section, we discuss substantive remedies. Several submissions related to the question of whether a rights-holder can get an injunction against an ISP whose customers are infringing copyright. However, as we said in that chapter,⁶² we will not address this issue in the present Review.

Many submissions recommended strengthening the criminal offences or adding new ones. We agree that, if remedies are insufficient, this can be a deterrent to innovation, but there was insufficient evidence in the submissions on this matter, and we therefore invite further submissions in this regard.

There is the converse question of whether some remedies go too far, in particular as the reach of copyright increases and a greater range of activities is brought within its scope. There are arguments, for example, that remedies should be graduated, so that minor or unintentional

⁵⁷ See, for example, Articles 11 and 12 of the WIPO Copyright Treaty (1996) [WCT] (available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html) and articles 18 and 19 of the WIPO Performances and Phonograms Treaty (1996) [WPPT] (available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html); Ireland has recently ratified both of these treaties.

⁵⁸ For example, Australia; see Schedule 12 of the Copyright Amendment Act, 2006 (Cth); available at http://www.austlii.edu.au/au/legis/cth/num_act/caa2006213/

⁵⁹ For example, Canada; see Bill C-32, proposing a Copyright Modernization Act; available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=4580265>

⁶⁰ The Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPs] (1994) is an element of the agreement establishing the World Trade Organization (WTO), which administers TRIPs; see http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm TRIPs, *inter alia*, emphasises the importance of appropriate enforcement procedures, remedies, and dispute resolution procedures.

⁶¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [the Enforcement Directive]; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R%2801%29:EN:HTML>

⁶² See section 3.9 above. See also <http://www.djei.ie/press/2012/20120126a.htm>

infringements would not necessarily be treated in exactly the same way as serious, intentional or wholesale infringements. For example, the former might attract injunctions but not necessarily damages. We therefore invite submissions in this regard.

Section 139 CRRA states a number of presumptions to apply in copyright proceedings. It was submitted to us that a presumption should be added to this section to the effect that there was no consent on the part of the copyright owner to the acts complained of. However, from the perspective of our Terms of Reference, we see no reason to do so.

4.10 Levies

Many rights-holders strongly argued in favour of levies upon devices or storage media that facilitate copying as compensation for any copying carried out by means of those devices or media. However, the idea was just as vigorously opposed in other submissions as an outmoded and counterproductive response. It seems to us that such levies are a blunt instrument: they cannot take account of the number of times a copy might or might not be made; and they do not distinguish between those who use devices or storage media for copying and those who don't. Moreover, we think that they would amount to a tax on innovation, and in particular upon the technology that is essential to creating and sustaining a knowledge economy. It seems to us that it is to Ireland's economic advantage that it does not have a system of private copying levies, and we are not minded to recommend their introduction. We invite submissions in this regard.

4.11 Photographers

The position of photographers was a particular concern both in the submissions and at the public meeting. Section 2 CRRA confirms that photographs can constitute a "artistic work", so that, if a photograph is sufficiently "original" (section 17(2)(a) CRRA), it will attract copyright protection, which may be exercised by the photographer as author and rights-holder (section 21 CRRA). Photographs are also specifically mentioned in many other sections of the Act (see, eg, sections 39(1)(c), 93(2)(b), 102, 114, 115, 117(4), 119, and 199).

Digital photographs are now particularly easy to reproduce, and many photographers submitted to us that this has led to widespread piracy, especially online, and they trenchantly argued against the introduction of additional exceptions which would dilute photographers' rights even further. There are two questions of principle here. The first relates to infringement of copyright. This will occur whether there any exceptions at all, let alone whether they are narrow or generous; so the real issues are how such infringements might be prevented in the first place and properly remedied if they occur; and we invite submissions in this regard.

If such issues of infringement, prevention and remedy can be sorted out, the second question of principle relates to the appropriate exceptions to photographers' copyrights. In principle, since photographs are artistic works, they attract both the same levels of protection and the same levels

of exception as other copyright works. This is true for the most part, but, in some cases, photographs are afforded greater protections than other works. So, for example, photographs are exempted from the news fair dealing exception in section 51(2) CRRA; in the UK, section 30(2) CDPA is to similar effect; but there is no requirement in EU law for photographs to be exempted from the equivalent exception in Article 5(3)(c) EUCD.⁶³ This raises two questions on which we invite submissions. First, should the special position for photographs in section 51(2) CRRA be retained? Second, if so, should a similar exemption for photographs be provided for any new copyright exceptions which might be introduced into Irish law on foot of the present Review?

4.12 Broadcasting

The original definition of “broadcast” in section 2 CRRA was amended by section 183(a) of the Broadcasting Act, 2009. However, although the 2009 Act provided a new definition of broadcast for the purposes of copyright law, it also provided in section 2 a different definition of “broadcast” for the purposes of broadcasting law. It was submitted to us that the CRRA definition of “broadcast” ought to be made platform-neutral, and one way of doing this might be to provide that, in CRRA, “broadcast” has the same meaning as in section 2 of the Broadcasting Act, 2009 (modified to exclude transmission by means of MMDS or digital terrestrial retransmission).

Such a development could, for example, bring internet broadcasts within the remit of the CRRA in general (and, in particular, within the terms of the statutory licence provided by section 38 CRRA). It is worth noting in this context that, in the UK, section 6 CDPA was amended in 2003 to allow for some internet transmissions to be treated as broadcasts for copyright purposes.

On the other hand, this change would have significant consequences for many of the balances struck by CRRA. Moreover, although technological innovation can be enabled by technology-neutral drafting, there do not seem to be any strong innovation arguments for making the definition of “broadcast” platform-neutral. We invite submissions in this regard. We also invite submissions as to whether there are other respects in which innovation might be encouraged by amending CRRA to make it technology-neutral.

4.13 Cable retransmission and web-based streaming

Sections 103 and 251 CRRA allow for cable programme services to receive and simultaneously retransmit broadcasts without infringing copyright or performers’ rights. It was submitted to us that this exception should not be available to web-based streaming services over third parties’ telecommunications networks, and that the sections should be recast so as to apply only to cable operators in the strict sense. Since section 2 CRRA defines a “cable programme service” to mean a service which sends sounds, images or data “by means of a telecommunications system”, a literal

⁶³ See section 6.6 below.

reading of that definition would seem to bear out the contention that it covers web-based streaming; and this is reinforced by the canon of construction that an Act of the Oireachtas is always speaking and is therefore to be given a construction that continuously updates its wording to allow for changes since the Act was initially framed.⁶⁴ On the other hand, a purposive approach to the definition, which takes account of the object, purpose and policy objectives of CRRA, might point in the other direction. There is plainly an issue here, but we are not in a position to determine whether there is impact on innovation whether the sections are amended or not. We therefore invite submissions in this regard.

4.14 Rental rights, lending rights, and artists' resale rights

EURLD provides for a Public Lending Remuneration scheme, by which authors receive payment for the loans of their books by public libraries. The Court of Justice of the European Union [CJEU] held that, by exempting all categories of public lending establishments from this obligation, Ireland had failed to fulfill its obligations under EURLD.⁶⁵ The gap was filled by the Copyright and Related Rights (Amendment) Act, 2007.⁶⁶ The Act has prospective effect from 4 December 2007, but it was submitted to us that it should be extended to apply to the estates of authors who were alive on 1 July 1994 (see EURLD (1992) Article 13). While we see the merit in exploring this argument, the issue does not constitute a barrier to innovation, and we do not consider that it is within our Terms of Reference.

A similar point can be made with respect to the European Communities (Artist's Resale Right) Regulations, 2006 (SI No 312 of 2006),⁶⁷ which allow artists to be paid a royalty of 4% of the value of their works sold for more than €3,000 through the professional art market. It was submitted to us that these Regulations improperly transposed the relevant EU Directive⁶⁸ into Irish law, that they were a temporary measure which should now be replaced by a full legislative response, and that the value threshold should be lowered, the royalty increased, and the rights extended to artists' estates. Again, while we see the merit in exploring this argument, some of the problems may already have been solved by the passage of time,⁶⁹ and the issue does not constitute a barrier to innovation, so we do not consider that it is within our Terms of Reference.

⁶⁴ See section 6 of the Interpretation Act, 2005, available at <http://www.irishstatutebook.ie/2005/en/act/pub/0023/sec0006.html#sec6>

⁶⁵ Case C 175/05 *Commission v Ireland* [2007] ECR I-00003; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0175:EN:HTML>

⁶⁶ See <http://www.irishstatutebook.ie/2007/en/act/pub/0039/>

⁶⁷ Available at: <http://www.irishstatutebook.ie/2006/en/si/0312.html>

⁶⁸ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0084:EN:HTML>

⁶⁹ See the EU Commission's *Report on the implementation and effects of the Resale Right Directive (2001/84/EC)*; available at http://ec.europa.eu/internal_market/copyright/resale-right/resale-right_en.htm#report

4.15 Other issues

Several submissions asked us to recommend amendments to CRRA which are beyond our Terms of Reference because they do not raise copyright issues. For example, some submissions asked us to extend CRRA to cover racing colours. To the extent that they are original works, they may already be covered by CRRA (they may perhaps also be covered by the Industrial Designs Act, 2001⁷⁰). However, to the extent that they are not, we consider that the question whether protection ought to be afforded to racing colours ought to be dealt with on its own terms, rather than as a matter of copyright law. Again, one submission argued that all substantial artworks should have a “passport or title deed”. This may be a good idea in itself, but it is plainly not a copyright issue.

4.16 Submissions invited

We invite submissions on foot of the discussions above, and in particular on the following issues:

- (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?
- (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?
- (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?
- (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?
- (27) Should the sound track accompanying a film be treated as part of that film?
- (28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?
- (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?
- (30) Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?
- (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?

⁷⁰ Available at <http://www.irishstatutebook.ie/2001/en/act/pub/0039/>

- (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?
- (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?
- (34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?
- (35) Should the special position for photographs in section 51(2) CRRA be retained?
- (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?
- (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?

5. Collecting Societies

Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and, in this Chapter, we consider them in the context of collecting societies, the second of the six categories into which we have divided the submissions.

Collecting societies give effect to rights-holders rights in a very important practical way, where copyright-holders have established such societies to grant licences in copyrighted works and collect copyright royalties for distribution back to the rights-holders. Hence, Chapter 16 CRRA provides for licensing schemes and licensing bodies; and EUCD observes that it is “necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency” (Recital 17 EUCD). Collecting societies are an important means by which rights-holders manage their copyrights and are rewarded for their investments and innovation.

One means by which rights-holders can benefit from their works is by licensing their use in return for fees or royalties. Sometimes, this will be achieved by means of a direct agreement between the rights-holder and the licensee. However, in the vast majority of cases, these licences will be administered by licensing and collecting societies, which issue licences and collect royalties on behalf of their members. Such societies have an even more important role to play when legislation grants compulsory licences over rights-holders’ works. It is therefore convenient to treat the issues raised by and about licensing and collecting societies and collective licences together.

CCRA provides for licensing schemes and the registration of collecting societies, and, as we outlined in chapter 3, this is an bewilderingly byzantine area in practice, beset by opacity and fragmentation, and no little suspicion. In that chapter, we therefore raised the question of whether many of the practical issues raised in the submissions could be resolved by means of a body like the Council sketched in that chapter.

Against that background, two further questions arise:

- (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?
- (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?

6. Intermediaries

6.1 Introduction

Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and, in this Chapter, we consider them in the context of intermediaries, the third of the six categories into which we have divided the submissions.

The challenges posed for copyright law by technological developments lie at the heart of the present Review. The internet is a key driver of such developments, and its distributed architecture has created new industries which in turn are raising new issues in the intersection of copyright and innovation. For example, internet service providers (ISPs) provide access, communications and hosting services for users; search engines provide a means by which users can find material; social networks provide a means by which users can interact with each other; and trading sites have provided users with entirely new channels to buy and sell new and second-hand goods. Many of these innovative developments are encouraged and protected by the intermediaries' copyrights in their own software.

In this chapter, we therefore analyse the position of intermediaries in copyright law (section 6.2), we consider whether linking infringes copyright (section 6.3), we discuss the extent to which copyright law has an impact on innovation by intermediaries (section 6.4), and we conclude by looking at the specific case of websites which marshal (index, syndicate, aggregate, curate, *etc*) news and other content (section 6.5).

6.2 Intermediaries in copyright law

Chapter 4 set out the centrality of rights-holders in copyright law; but, for all that they are significant, the law recognises other interests as well. Hence, since copyright provides rights to rights-holders not merely for their own sake but as a means towards public benefit, the law strikes a balance between rights-holders and those other interests, and seeks to promote innovation by promoting competition. Indeed, our fourth Term of Reference directs us to optimise the balance between protecting creativity and promoting and facilitating innovation (admittedly, this is in the context of seeking possible changes to EU Directives, but these changes are directed to enabling this balance in Irish law, and this balance suffuses the other Terms of Reference). Essentially, therefore, the issue for us is to consider whether reforms of copyright law are necessary to ensure that it is serving its public purpose.

Intermediaries run up against the copyright interests of rights-holders in several ways; and, as intermediaries' business models have developed, copyright law has been modified to accommodate their legitimate interests. One of the main questions for the present Review is whether the copyright balance between rights-holders and intermediaries now requires further amendment, in particular to incentivise innovation.

Intermediaries may be primarily liable for breach of copyright where their own activities infringe copyright; and they may be secondarily liable for breach of copyright where the activities of their users infringe copyright.

First, the most likely way that intermediaries may be primarily liable for breach of copyright is where the technological processes of transmitting data results in transient and incidental copies of the data. Article 5(1) EUCD provides:

Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
 - (b) a lawful use
- of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

This was introduced into Irish law in 2004,⁷¹ by amending sections 87(1) and 244(1) CRRA. Similarly, in the UK, Article 5(1) was transposed by section 28A CPDA 2003.⁷² The Irish and UK language has the merit of tracking the EUCD text. However, the CJEU has recently explained⁷³ the operation of the section, so that sections 87(1) and 244(1) might with profit be amended to come into line with the CJEU approach. Moreover, the position regarding temporary and incidental reproductions made while exercising an exception provided by CRRA might similarly be copper-fastened by a new subsection in those sections; perhaps as follows:

87. *Transient and incidental copies.*

- (1) It is not an infringement of the rights conferred by this Part to undertake or conduct an act of reproduction which—
 - (a) is temporary,
 - (b) is transient or incidental,
 - (c) has no independent economic significance,
 - (d) is an integral and essential part of a technological process, and
 - (e) has as its sole purpose the enabling of
 - (i) a transmission in a network between third parties by an intermediary, or

⁷¹ See the European Communities (Copyright and Related Rights) Regulations 2004 (SI No 16 of 2004); available at <http://www.irishstatutebook.ie/2004/en/si/0016.html>

⁷² Australian and Canadian provisions relating to temporary reproductions for technological processes are more straightforward (for Australia, see sections 43A and 111A of the Copyright Act, 1968 as inserted by the Copyright Amendment (Digital Agenda) Act, 2000 [CADAA]; for Canada, see section 32 of Bill C-32 (which, if enacted, will be styled the Copyright Modernization Act [CMA])).

⁷³ See Joined Cases C-403/08 *FA Premier League v QC Leisure* and C-429/08 *Murphy v Media Protection Services Ltd* [2011] ECR-I nyr, [2011] EUECJ C-403/08 (04 October 2011) [161].

- (ii) a lawful use.
- (2) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to make or cause to be made a temporary reproduction of a work where that temporary reproduction is incidentally made as a necessary part of the technical process of making a reproduction or communication which is permitted by this Act.
- [(3) Existing subsection (2)].

And

244. *Transient and incidental copies.*

- (1) It is not an infringement of the rights conferred by this Part to undertake or conduct an act of reproduction of a performance which—
 - (a) is temporary,
 - (b) is transient or incidental,
 - (c) has no independent economic significance,
 - (d) is an integral and essential part of a technological process, and
 - (e) has as its sole purpose the enabling of
 - (i) the viewing of or listening to the recording by a member of the public to whom the recording is lawfully made available, or
 - (ii) a lawful use.
- (2) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to make or cause to be made a temporary reproduction of a performance where that temporary reproduction is incidentally made as a necessary part of the technical process of making a reproduction or communication which is permitted by this Act.
- [(3) Existing subsection (2)].

These provisions are of general application to all situations in which a transient and incidental copy is technically necessary, but they are obviously of particular practical benefit to intermediaries.

Second, the most likely way in which intermediaries may be secondarily liable for breach of copyright is where the activities of their users infringe copyright; and Irish law, implementing a European Directive, now provides for some immunities in certain circumstances from such secondary liability.⁷⁴ For example, much of the architecture of the internet requires

⁷⁴ For the three immunities sketched in this paragraph, see Articles 12-14 of the E-Commerce Directive (see Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

that copies be incidentally created and transiently stored as content is more efficiently transmitted across the internet; and the law now provides circumstances in which intermediaries do not infringe copyright by automatic, intermediate and temporary caching. Again, ISPs often simply provide the means by which users go online and transmit and receive data; and the law now provides circumstances in which intermediaries who act as mere conduits do not infringe copyright. Moreover, ISPs often simply provide the means by which users post data online; and the law now provides circumstances in which such hosting does not infringe copyright. Of course, all of these caching, conduit and hosting immunities come with conditions, but if the conditions are satisfied, intermediaries will not be secondarily liable for copyright infringement (though, of course, the copyright infringing users will continue to be primarily liable).

At our public meeting, these immunities proved very controversial, with rights-holders objecting that they allow infringement, and intermediaries objecting that they do not go far enough. In chapter 3, we addressed one of the issues in our discussion of whether a Council could develop a clear code of practice relating to procedures to be followed where rights-holders object to cached or hosted infringing material. However, there are wider issues here, given the rapid and extensive nature of technological development since the E-Commerce Directive was adopted in 2000 and the implementing Irish Regulations were adopted in 2003. There are issues relating to the case for these immunities, to the possibility of similar immunities, and to the definition of intermediary, and we invite submissions in this regard. Moreover, even though we will be limited in what we can do in this Review by the Directive, a Council could lobby the Commission for further desirable changes.

6.3 Linking

On a webpage, a link is an image or text coded to refer to and connect with either another place in the same webpage or another webpage. Linking is therefore essential to the architecture of the web, for all users, not just for intermediaries. Courts are divided on the question of whether a link on one webpage to copyright material on another webpage is a primary or secondary infringement of copyright in that material, though they are increasingly concluding that a link, by itself, should never be seen as publication, reproduction or communication of the content to which it refers, even where that content is an infringement of copyright. These cases take the view that links simply convey that something exists; but they do not, by themselves, publish, reproduce or communicate its content. A further act on the part of the user - such as clicking on the link - is necessary before that user can gain access to the content. The fact that links make access to that content straightforward does not change the

commerce, in the Internal Market [the E-Commerce Directive]; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>), implemented in Ireland by sections 16-18 of the E-Commerce Regulations see European Communities (Directive 2000/31/EC) Regulations 2003 (SI No 68 of 2003) [the E-Commerce Regulations]; available at <http://www.irishstatutebook.ie/2003/en/si/0068.html>).

reality that a link, by itself, is content neutral. It is the user who clicks on the link and publishes, reproduces or communicates the content who is the copyright infringer, and not the provider of the link.

Against this background, we invite submissions as to whether CRRA ought to be amended to provide that a link to copyright material, of itself and without more, should not constitute either a primary or a secondary infringement of that copyright, perhaps by inserting a new sub-section (3) in section 87, as follows:

- (3) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to provide a link on a page on the internet which connects with a work elsewhere on the internet.

[(4) Existing subsection (2)].

If so, a similar amendment would then be necessary to section 244, as follows:

- (3) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to provide a link on a page on the internet which connects with a performance elsewhere on the internet.

[(4) Existing subsection (2)].

Of course, this is simply a copyright question. We make no comment on whether such linking can give rise to other legal issues, such as passing off.

6.4 Intermediaries, copyright and innovation

As section 6.2 above makes clear, as intermediaries' business models have developed, copyright law has been modified to accommodate their legitimate interests, seeking to find the right balance between rights-holders' remedies for online infringement and intermediaries' immunities. Many intermediaries are developing business models with rights-holders within the contours of these immunities. As the internet flourishes, its architecture develops accordingly (for example, the recent rise of the mobile internet), and further business models emerge (for example, with sites which marshal - index, syndicate, aggregate, or curate -content). Of course, there are many other issues between rights-holders and intermediaries (many are governed by contract rather than copyright law); other parties are involved (collecting societies, users, law enforcement); and there are other general legal issues here too (due process, freedom of speech, privacy). The present Review is concerned with the intersection between copyright and innovation. In particular in this context, since internet intermediaries constitute an important locus of innovation, the present Review is concerned with the question whether the existing copyright balance between rights-holders and ISPs is in need of further reform to encourage innovation. For example, are the specific immunities

for specific functions (caching, conduit, hosting) inadequate for the emerging architecture of the mobile internet? Again, does copyright law pose particular problems for emerging business models? If so in either case, the issue then is how best to shape the new contours of copyright law to encourage emerging innovative online business-models without a disproportionate impact on existing rights-holders.

In this respect, as many of the submissions made clear, it is very easy to make copies of digital content, there is a great deal of infringing content online, and it is very easy for users to find and use such infringing material. Rights-holders seek to enroll intermediaries in various mechanisms against this infringement, such as blocking, filtering, deep packet inspection, or notice-and-disconnection regimes; but this is a contentious strategy, and these mechanisms are controversial. Moreover, 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 we said in chapter 3, there is a parallel consultation about this issue,⁷⁵ and we will not address it further in this Review. Nevertheless, other questions about the intersection of copyright and innovation arise in the context of intermediaries.

Innovation Intermediaries facilitate innovation by bringing together a range of different players to facilitate and co-ordinate innovation. They can connect inventors with industry and users and bring new products and services to market. They therefore provide a wide and varied, even holistic, role for their clients in the innovation process. Technology can facilitate the potentially vast area of collaborative innovation, by bringing the various players together online. We invite submissions as to whether copyright law inhibits this important process, especially the technological aspects of this process.

6.6 News and marshalling

Websites which marshal news from other news sources, providing readers with convenient personalised headlines, news and information, are an important emerging online business model. They include indexers (such as specialised search engines), syndicators (such as web feeds), aggregators (which organise the material, often in quite sophisticated ways), or curators (which routinely edit and add content and value). Aggregation has been used as an overarching noun for all of these practices, but it is increasingly underinclusive. This is why we prefer to describe this process in a neutral and generic fashion as **marshalling**. Its central case is the marshalling of news, though, in principle, the process can apply to the marshalling of any and all kinds of content and not just news.

In this section, we will look first at general copyright exceptions for the reporting of news, and we will then go on to look at the specific case of marshalling.

⁷⁵ See section 3.9 above. See also <http://www.djei.ie/press/2012/20120126a.htm>

There are many exceptions in the Berne Convention for the benefit of reporting news. In particular, Article 2(8) provides:

The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

And Article 10 *bis* goes on to provide

- (1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.
- (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

There is a similar provision in Article 5(3)(c) EUCD, which provides for an exception to or limitation upon the reproduction right and the communication right to allow for

reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

This raises issues covered by section 51(2) CRRA:

Fair dealing with a work (other than a photograph) for the purpose of reporting current events shall not infringe copyright in that work, where the report is accompanied by a sufficient acknowledgement.

At least four points arise when comparing section 51(2) CRRA and Article 5(3)(c) EUCD. First, there is no requirement in Article 5(3)(c) EUCD for photographs to be exempted from this exception.⁷⁶ Second, the UK equivalent of section 51(2) (section 30(3) CDPA) was amended in 2003 to provide

No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.

Third, section 51(2) CRRA essentially only permits the second part of what is envisaged by Article 5(3)(c) EUCD, and the entire first part of the Article has not been transposed at all.

Fourth, the definition of news in CRRA as “current affairs” is far more confined than the definition of news in EUCD, which covers “current economic, political or religious topics or other subject-matter of the same character are reproduced by the press and communicated by them to the public”.

Perhaps the existing section 51(2) CRRA and Article 5(3)(c) EUCD could be combined in a revised and expanded section 51(2) (which retains the exception for photographers for the time being, subject to what might be concluded on foot of the questions which we pose pursuant to section 4.11 above):

51. *Fair dealing: criticism or review.*

- ...
- (2) (a) It is not an infringement of the rights conferred by this Part if works (other than photographs) on current economic, political or religious topics or other subject-matter of the same character are reproduced by the press and communicated by them to the public; provided that
- (i) such use is not expressly reserved, and
 - (ii) the reproduction and communication is accompanied by a sufficient acknowledgement unless to so do would be impossible for reasons of practicality or otherwise.
- (b) In particular, fair dealing with a work (other than a photograph) for the purpose of reporting current events shall not infringe copyright in that work, where the report is accompanied by a sufficient acknowledgement unless to so do would be impossible for reasons of practicality or otherwise.

⁷⁶ See section 4.11 above.

- (c) Where a reproduction which would otherwise be an infringing copy is made under paragraphs (a) or (b), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

There may be a role for the Copyright Council in resolving disputes under this subsection. Again, if section 51(2) is to be amended along these lines, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). We invite submissions in this regard.

A similar issue arises in the context of Article 5(3)(f) EUCD which provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible.

This raises issues covered by section 89 CRRA:

89. *Use of notes or recordings of spoken words in certain cases.*

- (1) Subject to compliance with the conditions specified in subsection (2), where a record of spoken words is made, in writing or otherwise, for the purpose of—
 - (a) reporting current events, or
 - (b) broadcasting or including in a cable programme service the work or part of the work,it is not an infringement of any copyright in the words as a literary or dramatic work, or in any literary or dramatic work or recording arising from the recording of the words, to use the record or material taken from it or to copy the record, or any such material, and to use the copy for the purposes referred to in paragraph (a) or (b).
- (2) The conditions referred to in subsection (1) are—
 - (a) that the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast or cable programme,
 - (b) that the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe the copyright in the work,

- (c) that the use made of the record or material taken from it is not prohibited by or on behalf of the speaker or copyright owner before the record was made, and
- (d) that the use made of the record or material taken from it is by or with the authority of a person who is lawfully in possession of the record.

In the equivalent UK section (section 58 CDPA), reference to “broadcasting or including in a cable programme” was amended in 2003 to “communicating to the public”, but it is otherwise very similar. A small series of amendments to section 89 would align it more closely with Article 5(3)(f), perhaps as follows:

89. *Use of notes or recordings of spoken words in certain cases.*

- (1) Subject to compliance with the conditions specified in subsection (2), where a record is made, in writing or otherwise, for the purpose of—
 - (a) reporting current events, or
 - (b) broadcasting, or including in a cable programme service, or otherwise communicating to the public, the record or part of the record,it is not an infringement of the rights conferred by this Part to use the record or material taken from it or to copy the record, or any such material, and to use the copy for the purposes referred to in paragraph (a) or (b).
- (2) The conditions referred to in subsection (1) are—
 - (a) that the record relates to spoken words, including political speeches and extracts of public lectures or similar works or subject-matter,
 - (b) that the record is a direct record of the spoken words,
 - (c) that the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe the copyright in the work,
 - (d) that the use made of the record or material taken from it is not prohibited by or on behalf of the speaker or copyright owner before the record was made,
 - (e) that the use made of the record or material taken from it is by or with the authority of a person who is lawfully in possession of the record, and
 - (f) that the use made of the record or material taken from it is accompanied by a sufficient acknowledgement unless to do so would be impossible for reasons of practicality or otherwise.
- (3) Where a record which would otherwise be an infringing copy is made under subsection (1), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as

an infringing copy for those purposes and for all subsequent purposes.

We invite submissions in this regard.

As we said at the outset of this section, an important example of the issues raised in the context of news is provided by the business of websites which marshal news from other news sources. **Marshalling** is an example of a new generation of digital and online business, but it faces criticism from traditional news rights-holders as infringing copyright in the content which they marshal. However, the issue is considerably more nuanced than this binary division suggests.

First, the Berne and EUCD provisions discussed above would plainly provide some protection to marshalling of news, but they have not yet been incorporated into Irish law. Nevertheless, they demonstrate that copyright law is capable of being flexible in its application when it comes to news and information. This is why we invite comments above on the amendment of the definition of news by incorporating Article 5(3)(c) EUCD into a revised section 51(2) CRRA and by incorporating Article 5(3)(f) EUCD into a revised section 89 CRRA. Of course, these provisions are confined to news and speeches, and would not cover marshalling of other content.

Second, CRRA protects against copying a work in whole or in **substantial** part, but does not prevent insubstantial or **incidental** takings. Although whether a taking is substantial is a matter of quality (think of a distinctive guitar riff, drum solo or turn of phrase), it is often simply a matter of quantity. Whilst this would provide some protection to marshalling of news and other content, there is probably insufficient leeway in the notion of an insubstantial or incidental taking to protect many (perhaps even most) marshalling websites.

Third, there may be room for individual arrangements. For example, video-sharing websites are increasingly striking deals with music companies and movie studios; and there is scope for licensing agreements at the curating end of the spectrum.

Fourth, and related, there may be room for a compulsory licensing regime, by which marshalling sites could gain access to copyright news items and the rights-holders are compensated for this re-use.

Fifth, if there is a net gain in innovation by providing for the marshalling of news and other content, then options to accommodate it will have to be explored. The possibilities include the addition of a specific marshalling exception to the existing conduit, caching and hosting exceptions (see section 6.3 above), the adoption of a fair use doctrine or something akin to it (see Chapter 10 below), and compulsory licensing and/or arrangements which might be brokered by a Council of the kind explored in Chapter 3 above. Consequently, there is likely to be a blend of responses to the

questions raised about the compatibility of marshalling of content with copyright law, and we invite submissions in this regard.

6.7 Submissions invited

We invite submissions on foot of the discussions above, and in particular on the following issues:

- (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?
- (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?
- (42) If there is a case for such immunities, to which remedies should 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 - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?
- (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?
- (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?
- (46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of 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?
- (48) Does copyright law inhibit the work of innovation intermediaries?
- (49) Should there be an exception for photographs in any revised and expanded section 51(2) CRRA?
- (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?
- (51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?
- (52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?

- (53) If so, what exactly should it provide?
- (54) Does copyright law pose other problems for intermediaries' emerging business models?

7. Users

7.1 Introduction

Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and, in this Chapter, we consider them in the context of users, the fourth of the six categories into which we have divided the submissions. We note the contribution which users can make to innovation (section 7.2), and we then discuss the copyright exceptions which benefit users (section 7.3). In particular, we discuss the possibility of incorporating into CRRA the exceptions permitted by EUCD which are not yet part of Irish law, including: reproduction on paper, format-shifting, and back-ups for private use; various exceptions for education, teaching and research; exceptions for persons with a disability; and exceptions for parody and for non-commercial user-generated content.

7.2 Users and innovation

Innovation occurs in many places and comes in many forms. The classic example is of corporate research and development leading to new goods and services marketed to users. Even here, there is great scope for downstream innovation, as intermediate sellers seek to add value or as users customise products to meet their specific needs more precisely. Such innovation can lead to the evolution of the original goods or services or to the development of new ones, and is a very important source of innovation in the modern economy. Often, it is simply a tweak which makes using a product or service more efficient. Sometimes, it is a more significant remodelling. Occasionally, it amounts to the development of a new good, service, technology or business-model. The key point is that innovation is not only a linear top-down process, it is also an iterative and interactive one in which users play increasingly important roles.

The internet particularly encourages such interactive user innovation. Without users, there would be no internet, from consumers of movies, music, ebooks and games, to producers of user-generated content. A great deal of internet innovation has gone into business models constructed around not only the delivery of content to users but also the formation and transformation of content by users. Clarity around the rights of consumers is therefore crucial, not least because such clarity can encourage transformative uses. To take just one example, there is a long tradition of transformation in music (from genres like Irish traditional music and jazz, through parodies and tribute songs, to remixing and sampling). Similar examples can be found right across the arts and in respect of all kinds of copyright works.

Technology is making it increasingly easier for users to innovate, and for that innovation to be based upon the transformation of existing content. On the one hand, in the submissions, rights-holders presented innovation as a linear top-down process and were generally wary of such transformative uses. On the other hand, users and others argued strongly that innovation is also an iterative and interactive process and that such transformative uses

encouraged both cultural diversity and commercial innovation. The question for the present Review is whether reform of Irish copyright law can accommodate and encourage user innovation, especially in the context of transformative uses.

7.3 Users and copyright

Chapter 4 set out the centrality of rights-holders in copyright law, but the law recognises other interests as well, and our fourth Term of Reference directs us to optimise the balance between these competing interests. Those who use copyright material run up against the copyright interests of rights-holders, and EUCD and CRRA therefore provide exceptions in favour of users. One of the main questions for the present Review is whether the copyright balance between rights-holders and users now requires further amendment, in particular to incentivise innovation.

7.3.1 Users and copyright exceptions

Copyright law seeks to balance the interests of rights-holders in protecting their monopoly against other legitimate interests in diversity. In particular, by protecting only “original” works, by preventing only “substantial” infringements, and by providing a range of exceptions, copyright law accommodates interests other than those of rights-holders, such as those of users. Together with many other common law jurisdictions, one of the main exceptions provided by CRRA is “fair dealing” (see in particular, sections 50-51, 221 and 329 CRRA). In many jurisdictions, case law is increasingly providing expansive interpretations of these exceptions, but it was submitted to us that the definition of fair dealing provided by section 50(4) CRRA cuts Irish law off from these developments. Section 50(4) provides:

50. Fair dealing: research or private study.

...

- (4) In this Part, “fair dealing” means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.

A very small amendment to this provision, replacing “means” with “includes”, would allow Irish law to reconnect with mainstream common law developments relating to fair dealing, though this could result in more litigation:

50. Fair dealing: research or private study.

...

- (4) In this Part, “fair dealing” ~~means~~ **includes** the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition

which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.

If this is done, then a similar change will have to be made to section 221(2) CRRA. This suggestion will be reinforced if “fair dealing” is extended in any of the various ways discussed below; in which case, the more inclusive the definition is, the better. We invite submissions in this regard.

Notwithstanding these exceptions, the law is increasingly out of step with users’ expectations, relating to matters such as format-shifting, parody, satire, pastiche, caricature, fan-fiction, and so on, and with the realities of user innovation. Format-shifting is now a basic user expectation and a widespread consumer practice. There are countless mash-ups, parodies, fan tributes and other similar transformative works, on user-generated sites. And the web is replete with user-generated applications, extensions and services.

Hence, many of the submissions argued that the exceptions in CRRA are more grudging than they might be; they are certainly less extensive than those envisaged in EUCD. As a consequence, those submissions argued that, as a first step, all of the exceptions available in EUCD should be made available as a matter of Irish law.

The scheme of EUCD is straightforward. Article 2 provides a “reproduction” right, by which rights-holders may “authorise or prohibit direct or indirect, temporary or permanent reproduction” of their works. Article 3 provides a “communication” right, by which rights-holders may “authorise or prohibit any communication to the public of their works”. Article 4 provides a “distribution” right, by which rights-holders may “authorise or prohibit any form of distribution” of their works. To these three basic rights, Article 5 goes on to provide a range of exceptions and limitations, covering: temporary acts of reproduction (Article 5(1)), reproductions on paper, reproductions for private use, libraries, broadcasters, social institutions (all Article 5(2)), teaching and research, the needs of persons with a disability, the press, quotations, proceedings, speeches, religious or official celebrations, architecture or sculpture, incidental inclusion, advertising art sales and exhibitions, parody, repair, building plans and terminals (all Article 5(3)).

In principle, these exceptions and limitations must allow and ensure the development and operation of new technologies, and they must safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other. We agree that, as a matter of Irish law, these exceptions ought to be made available to users, for the benefit of users; and, if properly defined, they should have little or no economic or practical impact on rights-holders. Furthermore, they also benefit the internet intermediary to which a user might upload any generated content. And they can also benefit established music companies, which can discover

and promote talent online. In our view, the overall net gain to innovation, and especially to technological and digital innovation, is clear. In particular, where there is no exact Irish equivalent, we see great merit in the direct incorporation into Irish law of an exception allowed by EUCD, whether by amending an existing section, or introducing a new one. Moreover, if this is to be undertaken, then it ought to be in line with what is said elsewhere, so that the outcome of this Review is consistent.

There is a further reason to incorporate the full range of EUCD exceptions and limitations. The recent UK review recommended that copying should be lawful where it is for private purposes or does not damage the underlying aims of copyright. It observed that taking advantage of these EU exceptions would bring important cultural as well as economic benefits to the UK. In its view, this would make copyright law better understood and more acceptable to the public.⁷⁷ The UK government recently announced that it would therefore transpose all of the EU exceptions and limitations into UK law.⁷⁸ Australia has already done something similar: the Copyright Act, 1968⁷⁹ has recently been amended both by the Copyright Amendment (Digital Agenda) Act, 2000 (Cth)⁸⁰ [CADAA] and the Copyright Amendment Act, 2006 (Cth)⁸¹ [CAA]. Canada is in the process of doing something similar too: Bill C-32⁸² proposes to amend the Copyright Act, 1985⁸³ by means of a Copyright Modernization Act [CMA]. If Ireland is not to be at a competitive disadvantage to these countries, then we need to do the same.

7.3.2 *Temporary Acts of Reproduction*

Article 5(1) EUCD provides that copyright is not infringed by temporary acts of reproduction to enable a transmission in a network by an intermediary; and we deal with this issue in section 6.2 above.

7.3.3 *Reproductions on paper for private use*

Article 5(2)(a) EUCD provides for an exception to or limitation upon the reproduction right

in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation.

This effectively allows the owner of a work to make a photocopy for private and domestic use. Although there is no exact CRRA equivalent, the fair dealing provisions in section 50 CRRA encompass (and extend well beyond)

⁷⁷ Hargreaves, pp4, 41-51.

⁷⁸ *Response to Hargreaves*, pp7-8.

⁷⁹ See http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/

⁸⁰ See http://www.austlii.edu.au/au/legis/cth/consol_act/caaa2000294/

⁸¹ See http://www.austlii.edu.au/au/legis/cth/num_act/caa2006213/

⁸² See

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5144516>

⁸³ See <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-42/latest/rsc-1985-c-c-42.html>

the ground covered by Article 5(2)(a), and, as a consequence, the sheet music exclusion is provided for in section 50(6) CRRRA.⁸⁴ In Australia, Schedule 6 CAA inserted a new section 43C into the 1968 Act, to provide for an exception relating to the reproduction of print works in different form for private use. It is a useful starting point for a possible CRRRA provision to be inserted in Chapter VI of Part II CRRRA (relating to acts permitted in relation to works protected by copyright), perhaps as follows:

106A. *Reproduction on paper for private use.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) the owner or lawful user of a work makes or causes to be made from it a reproduction on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects,
 - (b) the reproduction is made for his or her private and domestic use,
 - (c) the reproduction embodies the work in a form different from the form in which the work is embodied,
 - (d) at the time the owner makes the reproduction or causes it to be made, he or she has not made, and is not making, another copy that embodies the work in a form substantially identical to the form of reproduction, and
 - (e) the reproduction is accompanied by a sufficient acknowledgement.
- (2) Subsection (1) shall not apply if the work being reproduced is—
 - (a) sheet music, or
 - (b) an infringing copy, and the person making the reproduction had no reasonable grounds to believe that the work was a lawful copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (4) For the avoidance of doubt, subsection (3) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (5) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives

⁸⁴ As inserted by the European Communities (Copyright and Related Rights) Regulations 2004, SI No 16 of 2004) [the 2004 Regulations]; see <http://www.irishstatutebook.ie/2004/en/si/0016.html>

away, rents, or sells that work to another person without first destroying the reproduction.

“Lawful user” will then have to be defined in section 2, as follows:

2. Interpretation.

(1) In this Act, unless the context otherwise requires—

...

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

...

A more extensive section would probably require a system of private copying levies to allow for “fair compensation”. As we explained in section 4.14 above, we are not minded to recommend the introduction of such a system, and we therefore consider that this draft is about as far as a CRRA implementation of Article 5(2)(a) EUCD could go. We invite submissions in this regard.

7.3.4 Reproductions for private use: format-shifting and back-ups

Article 5(2)(b) EUCD provides for an exception to or limitation upon the reproduction right

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

Again, there is no exact CRRA equivalent. Although the fair dealing provisions in section 50 CRRA do allow for some reproductions for private use, and time-shifting of broadcast or cable programmes is already provided for in sections 101 and 250 CRRA, the scope of Article 5(2)(b) is far greater, and we received many submissions urging the full implementation of the Article.

In Australia, Part 2 of Schedule 6 CAA provides for a series of exceptions relating to the reproduction of copyright material in different formats for private and domestic use, including the reproduction in a different format (format-shifting) of photographs, sound recordings, and cinematograph films (effectively: video tapes, DVDs and so on); and such format-shifting is plainly permitted by Article 5(2)(b). In Canada, section 22 CMA would introduce a series of exceptions, including a very crisp one relating to reproduction for private purposes, which provides a useful starting point for a possible CRRA provision to be inserted in Chapter VI of Part II CRRA, perhaps as follows:

106B. *Format-shifting for private use.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) the owner or lawful user of a work makes or causes to be made a reproduction of that work in a different format,
 - (b) he or she owns or is a lawful user of the medium or device on which the reproduction is reproduced,
 - (c) the reproduction is made for his or her private and domestic use, and
 - (d) the reproduction is made for purposes that are neither directly nor indirectly commercial.
- (2) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the person making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (4) For the avoidance of doubt, subsection (3) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (5) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives away, rents, or sells that work to another person without first destroying all reproductions of that work which he or she has made under that subsection.

If this is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). A similar question may arise in respect of Chapter VIII of Part V (concerning acts permitted in relation to databases). However, more extensive format-shifting provisions would probably require a system of private copying levies to allow for "fair compensation". Since we are not minded to recommend the introduction of such a system, we feel that this draft is about as far as a CRRRA implementation of Article 5(2)(b) EUCD could go. We invite submissions in this regard.

Although section 80 CRRRA provides for back-up copies of computer programs, it does not provide for back-up copies of other digital data. In Canada, section 22 CMA would introduce a crisp exception relating to the

making of back-up copies, which provides a useful starting point for a possible CRRA provision to be inserted in Chapter VI of Part II CRRA, perhaps as follows:

106C. Back-up copy.

- (1)
 - (a) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a work makes or causes to be made a reproduction of that work as a back-up copy of it which it is necessary for him or her to have for the purposes of his or her lawful use.
 - (b) In particular, it is not an infringement if the reproduction is made as a back-up copy in case the work is lost, damaged or otherwise rendered unusable.
- (2) Subsection (1) shall apply only if the owner or lawful user of the work being reproduced owns or is authorised to use the medium or device on which the reproduction is reproduced.
- (3) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the person making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.
- (4) If the work is lost, damaged or otherwise rendered unusable, then a reproduction made under subsection (1) shall be treated as the work.
- (5) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (6) For the avoidance of doubt, subsection (5) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (7) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives away, rents, or sells that work to another person without first destroying all reproductions of that work which he or she has made under that subsection.

Again, if this is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to

performances). And a similar question may arise in respect of Chapter VIII of Part V (concerning acts permitted in relation to databases).

We invite submissions in this regard.

7.3.5 Libraries

Article 5(2)(c) EUCD provides for exceptions or limitations in favour of libraries, educational establishments, museums, and archives; and we deal with this issue in chapter 9 below.

7.3.6 Broadcasters

Article 5(2)(d) EUCD provides for an exception to or limitation upon the reproduction right

in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted.

The issues raised by this Article are covered in two ways at Irish law. First, there are some general provisions. Section 26 of the Broadcasting Act, 2009 provides that nothing in CRRA prevents or restricts the recording of programme material by those who hold contracts under the 2009 Act to do so; sections 40 and 69 of the 2009 Act require that broadcasters record their broadcasts, and provide that making and retaining such recordings is not a breach of copyright; and section 111 of the 2009 Act provides for a scheme allowing third parties licensees to use such recordings. Moreover, section 105 CRRA also allows for recording for archival purposes, and section 100 CRRA allows for recordings to be used for the purposes of supervision, control and regulation of broadcasts.

Second, and more particularly, section 99 CRRA covers the exception provided by Article 5(2)(d) EUCD; and section 99(2) provides that any such recording must be destroyed within 3 months of first being broadcast. There is, however, one difference between CRRA and EUCD: section 99 CRRA provides that the copying must be by means of the broadcaster's "own facilities", whereas Recital 41 EUCD clarifies that that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation. In these circumstances, section 99 could be amended by the addition of a new subsection (4):

99. *Copying for purpose of broadcast or cable programme.*

...

- (4) Where, by virtue of subsection (1), a person (the licensee) is deemed to be to be licensed by the owner of the copyright in a work to copy or authorise the copying of that work by means of his or her own facilities, such facilities shall include those of a

person acting on behalf of and under the responsibility of the licensee.

We invite submissions in this regard.

7.3.7 Social institutions

Article 5(2)(e) EUCD provides for an exception to or limitation upon the reproduction right

in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

This ground is fully covered by section 97 CRRA.⁸⁵ It was submitted to us that this provision should be repealed. However, this exception is permitted by EUCD, and we do not consider either that it is a barrier to innovation or that an amendment or repeal would promote innovation.

Second, section 98 CRRA contains an exception regarding the playing of sound recordings as part of the private activities of a not-for-profit club or society. In the UK, section 72 CDPA provides for a more comprehensive exception relating to broadcasts, and we invite submissions as to whether a similar provision ought to be incorporated into CRRA.

7.3.8 Education, teaching and research

Article 5(3)(a) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.

This raises issues covered by section 50 CRRA (fair dealing for research or private study), sections 53-58 CRRA (educational purposes), and sections 223-225 CRRA (equivalent exceptions in respect of performances). Section 50 CRRA probably covers the “scientific research” issues raised by Article 5(3)(a) EUCD, and would be more likely to do so if subsection (4) were amended as suggested above; but sections 53-57 and 223-225 CRRA are considerably more confined than the “teaching” issues raised by that Article. By contrast, in Canada, sections 23-35 CMA would further expand an already comprehensive set of education exceptions.

The phrase “for the purposes of research or private study” appears at several points throughout CRRA, and one simple change which section 21 CMA would make to the equivalent Canadian provisions is the addition of

⁸⁵ As implemented by Copyright and Related Rights (Recording For Purposes of Time-Shifting) Order, 2000 (SI No 407 of 2000) available at <http://www.irishstatutebook.ie/2000/en/si/0407.html>

“education” before “research or private study”. We consider that a similar amendment to the relevant provisions of CRRA would be within Article 5(3)(a); perhaps as follows:

50. ~~**Fair dealing: research or private study.**~~

Fair dealing: education, research or private study.

- (1) Fair dealing with a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, or non-electronic original database, for the purposes of **education**, research or private study, shall not infringe any copyright in the work.
- (2) Fair dealing with a typographical arrangement of a published edition for the purposes of **education**, research or private study shall not infringe any copyright in the arrangement.

[For the text of sections 61, 62 and 67 CRRA, incorporating this suggested amendment, see section 9.2 of this Paper below].

92. **Fixations of performances of works of folklore.**

...

- (3) The conditions referred to in subsection (2) are—
 - (a) that a copy may not be supplied other than to a person who satisfies the archivist that he or she requires the copy for the purposes of **education**, research or private study and he or she will not use it for any other purpose,...

229. **Copying by librarians or archivists: parts of recordings lawfully made available to public.**

...

- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian or archivist that he or she requires that copy for the purposes of **education**, research or private study ...

234. **Copying by librarians or archivists: certain recordings not lawfully made available to public.**

...

- (3) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian or archivist that he or she requires that copy for purposes of **education**, research or private study and he or she shall not use it for any other

purpose and that person shall not be furnished with more than one copy of that recording or part of that recording.

245. *Recordings of works of folklore.*

- ...
- (3) The conditions referred to in subsection (2) relating to the actions of archivists are—
- (a) that a copy may not be supplied other than to a person who satisfies the archivist that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose, ...

**329. ~~Fair dealing: research or private study.~~
*Fair dealing: education, research or private study.***

- (1) The database right in a non-electronic database which has been re-utilised is not infringed by fair dealing with a substantial part of its contents by a lawful user of the database where that part is extracted for the purposes of **education**, research or private study.

Given that a great deal of education policy is directed to innovation,⁸⁶ there are good innovation reasons to include “education” in the “research or private study” exceptions.

Beyond that, however, to avoid wholesale surgery to sections 50, 53-58, and 223-225 CRRRA, which would introduce an unnecessary degree of uncertainty into settled statutory language, the simplest way to incorporate Article 5(3)(a) EUCD would be to replace section 57 CRRRA with new provisions, modelled on that Article, on the existing section, and on the extensive CMA provisions, perhaps as follows:

**57. ~~Reprographic copying by educational establishments of certain works.~~
*Illustration for education, teaching and research.***

- (1) (a) It is not an infringement of the rights conferred by this Part to make or to cause to be made a reproduction or communication for the sole purpose of illustration for education, teaching or scientific research.
- (b) In particular, it is not an infringement of the rights conferred by this Part for an educational establishment, for the educational purposes of that establishment, to

⁸⁶ To take only one example, the Strategic Innovation Fund administered by the HEA, is directed towards support for innovation in higher education institutions; see <http://heatest-drupal6.heanet.ie/en/sif>

reproduce a work, or do any other necessary act, in order to display it.

- (2) Subsection (1) shall apply only if the reproduction or communication is—
 - (a) made for purposes that are neither directly nor indirectly commercial,
 - (b) made only to the extent justified by the non-commercial purposes to be achieved, and
 - (c) accompanied by a sufficient acknowledgement.
- (3) Subsection (1) shall not apply if—
 - (a) there is a licensing scheme certified under section 173 and the person making the reproductions knew or ought to have been aware of the existence of the licensing scheme, or
 - (b)
 - (i) the work being reproduced or communicated is an infringing copy, and
 - (ii) the person making the reproduction or communication did not have reasonable grounds to believe that the work was not an infringing copy.
- (4) Not more than 5 per cent of any work may be copied by or on behalf of an educational establishment under subsection (1) in any calendar year.
- (5) Where a reproduction which would otherwise be an infringing copy is made under subsection (1), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (7) Except in the case of manual reproduction, subsection (1) does not apply if the work is commercially available in a medium that is appropriate for the purposes referred to in that subsection.
- (8) The terms of a licence granted to an educational establishment authorising the reproduction, for the educational purposes of that establishment, of works which have been lawfully made available to the public, shall be void in so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

57A. *Distance learning provided by an educational establishment.*

- (1) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part if—
 - (a) an educational establishment, for the educational purposes of that establishment, communicates a lesson or examination to a registered student by telecommunication, and
 - (b) a student who has received such a lesson or examination reproduces it in order to be able to listen to or view it at a more convenient time.
- (2) Subsection (1) shall not apply if—
 - (a) the work being reproduced or communicated is an infringing copy, and
 - (b) the person making the reproduction or communication did not have reasonable grounds to believe that the work was not an infringing copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under subsection (1)(b), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

57B. *Use by educational establishment of work available through the internet.*

- (1) It is not an infringement of the rights conferred by this Part if an educational establishment, for the educational purposes of that establishment, reproduces or communicates a work that is available through the internet; provided that the reproduction or communication is accompanied by a sufficient acknowledgement.
- (2)
 - (a) Subsection (1) does not apply if—
 - (i) the work is protected by a technological protection measure,
 - (ii) the educational establishment knows or ought to have known that the work was made available through the internet without the consent of the copyright owner, or
 - (iii) a clearly visible notice – and not merely the copyright symbol – prohibiting that act is posted at the Internet site where the work is posted or on the work itself.

- (b) The Minister may, by order, make regulations for the purposes of this subsection prescribing what constitutes a clearly visible notice.

Again, if sections like these are added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). A similar question may arise in respect of Chapter VIII of Part V (concerning acts permitted in relation to databases).

We invite submissions in this regard.

Finally, here, we discuss other related issues in chapter 9 below.

7.3.9 Persons with a disability

Article 5(3)(a) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.

This raises issues covered by section 104 CRRA:

104. *Provision of modified works.*

- (1) A designated body may—
 - (a) make a copy of a work for the purpose of modifying that copy to meet the special needs of a person who has a physical or mental disability, and
 - (b) supply that modified copy to that person, without infringing the copyright in that work.

It was submitted to us that this section, and the related section 252 CRRA, neither take full advantage of Article 5(3)(a) EUCD, nor work particularly well in practice. In particular, the restriction of the making of modified copies to designated bodies is not provided for in Article 5(3)(b) EUCD, and there is nothing in that Article which would preclude people with a disability from making their own modified copies.

Moreover, in the UK, sections 31A-31F CDPA were introduced in 2002, providing a far more extensive regime for visually impaired persons. In particular: section 31A permits the making of a single accessible copy for personal use; section 31B provides for the making of multiple copies for visually impaired persons by approved bodies, and this is more comprehensive than section 104 CRRA; and section 31C allows an approved body to make and hold intermediate copies and records. Similarly, in Australia, both recent amendment Acts (CADAA and CAA) provide exceptions relating to the reproduction and communication of works by institutions assisting persons with a print disability or an intellectual disability.

However, the Australian provisions do not go as far as CDPA in allowing for the making of a single accessible copy for personal use by a person with a disability.

However, whereas the CDPA provisions apply specifically in respect of “visually impaired person[s]”, the CADAA provisions apply to “persons with a print disability” or “persons with an intellectual disability”, section 104 CRRA applies to “person[s] with a physical or mental disability”, and Article 5(3)(b) EUCD applies to persons “with a disability”. If sections 31A-31F CDPA were modified to apply to all persons with a disability, and if some of the Australian provisions were incorporated, then they could serve as a model for the introduction of new CRRA sections to incorporate Article 5(3)(b) and replace the existing section 104 CRRA, perhaps as follows:

104. *Personal copies for persons with a disability.*

- (1) It is not an infringement of the rights conferred by this Part if a person with a disability who is the owner or lawful user of a work (“the master copy”) which is not accessible to him or her because of the disability makes or causes to be made an accessible copy of the master copy for his or her personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it, or
 - (b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.
- (3) Subsection (1) does not apply in relation to the making of an accessible copy for a person with a disability if, or to the extent that, copies of the copyright work are commercially available—
 - (a) by or with the authority of the copyright owner,
 - (b) within a reasonable time after first publication of the work,
 - (c) in a form that is accessible to that person, and
 - (d) at an ordinary commercial price.
- (4) An accessible copy made under this section must be accompanied by—
 - (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement.
- (5) If a person makes an accessible copy on behalf of a visually impaired person under this section and charges for it, the sum charged must not exceed the cost of making and supplying the copy.

- (6) If a person holds an accessible copy made under subsection (1) when he or she is not entitled to have it made under that subsection, the copy is to be treated as an infringing copy, unless he or she is a person falling within subsection (7)(b).
- (7) A person who holds an accessible copy made under subsection (1) may transfer it to—
 - (a) a visually impaired person entitled to have the accessible copy made under subsection (1), or
 - (b) a person who has lawful possession of the master copy and intends to transfer the accessible copy to a person falling within paragraph (a).
- (8) The transfer by a person (the transferring person) of an accessible copy made under subsection (1) to another person (the recipient) is an infringement of copyright by the transferring person unless he or she has reasonable grounds for believing that the recipient is a person falling within subsection (7)(a) or (b).
- (9) Where a copy which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

104A. *Multiple copies for persons with a disability.*

- (1) It is not an infringement of the rights conferred by this Part if a designated body which is the owner or lawful user of a work (“the master copy”)—
 - (a) makes or causes to be made an accessible copy of the master copy for the personal use of persons with a disability to whom the master copy is not accessible because of their disability, or
 - (b) supplies or causes to be supplied an accessible copy to such persons for their personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it, or
 - (b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

- (3) Subsection (1) does not apply in relation to the making of an accessible copy if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.
- (4) Subsection (1) does not apply in relation to the supply of an accessible copy to a particular person with a disability if, or to the extent that, copies of the copyright work are commercially available—
 - (a) by or with the authority of the copyright owner,
 - (b) within a reasonable time after first publication of the work,
 - (c) in a form that is accessible to that person, and
 - (d) at an ordinary commercial price.
- (5) An accessible copy made under this section must be accompanied by—
 - (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement.
- (6) If a designated body charges for supplying a copy made under this section, the sum charged must not exceed the cost of making and supplying the copy.
- (7) A designated body making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.
- (8) If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection (unless the copyright owner agrees otherwise).
- (9) If a designated body continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.
- (10) Where a copy which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (11) In this section, “designated body” means
 - (a) an educational establishment, or

- (b) a body designated for the purposes of this section by order of the Minister who shall not designate a body unless he or she is satisfied that the body is not conducted for profit.

104B. *Intermediate copies and records.*

- (1) A designated body entitled to make accessible copies under section 104A may hold an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but only—
 - (a) if and so long as the approved body continues to be entitled to make accessible copies of that master copy, and
 - (b) for the purposes of the production of further accessible copies.
- (2) An intermediate copy which is held in breach of subsection (1) shall be treated as an infringing copy.
- (3) A designated body may lend or transfer the intermediate copy to another designated body which is entitled to make accessible copies of the work or published edition under section 104A.
- (4) The loan or transfer by a designated body of an intermediate copy to another person (the recipient) is an infringement of copyright by the designated body unless it has reasonable grounds for believing that the recipient —
 - (a) is another designated body which is entitled to make accessible copies of the work or published edition under section 104A; and
 - (b) will use the intermediate copy only for the purposes of the production of further accessible copies.
- (5) If a designated body charges for lending or transferring the intermediate copy, the sum charged must not exceed the cost of the loan or transfer.
- (6) A designated body must—
 - (a) keep records of accessible copies made under section 104A and of the persons to whom they are supplied,
 - (b) keep records of any intermediate copy lent or transferred under this section and of the persons to whom it is lent or transferred, and
 - (c) allow the copyright owner or a person acting for him or her, on giving reasonable notice, to inspect the records at any reasonable time.

- (7) Within a reasonable time of making an accessible copy under section 2, or lending or transferring an intermediate copy under this section, the designated body must notify—
 - (a) the Copyright Council of Ireland, and
 - (b) each relevant licensing body, or, if there is no such body, the copyright owner.
- (8) The requirement to notify the copyright owner under subsection (7)(b) does not apply if it is not reasonably possible for the designated body to ascertain the name and address of the copyright owner.

104C. *Licensing schemes.*

- (1) Section 104A does not apply to the making of an accessible copy in a particular form if—
 - (a) a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form,
 - (b) the scheme is not unreasonably restrictive, and
 - (c) the scheme and any modification made to it have been notified to the Controller by the licensing body.
- (2) A scheme is unreasonably restrictive if it includes a term or condition which—
 - (a) purports to prevent or limit the steps that may be taken under sections 104B or 104C, or
 - (b) has that effect.
- (3) But subsection (2) does not apply if—
 - (a) the copyright work is no longer published by or with the authority of the copyright owner; and
 - (b) there are reasonable grounds for preventing or restricting the making of accessible copies of the work.
- (4) If section 104B or 104C is displaced by a licensing scheme, sections 152 to 155 apply in relation to the scheme as if it were one to which those sections applied as a result of section 150.

104D. *Limitations following infringement of copyright.*

- (1) The Minister may make an order under this section if it appears to him or her that the making of copies—
 - (a) under section 104A, or
 - (b) under a licence granted under a licensing scheme that has been notified under section 104C,

has led to infringement of copyright on a scale which, in the Minister's opinion, would not have occurred if section 104A had not been in force, or the licence had not been granted.

- (2) The order may prohibit one or more named designated bodies, or one or more specified categories of designated body, from—
 - (a) acting under section 104A, or
 - (b) acting under a licence of a description specified in the order.
- (3) The order may disapply—
 - (a) the provisions of section 104A, or
 - (b) the provisions of a licence, or a licensing scheme, of a description specified in the order,in respect of the making of copies of a description so specified.
- (4) If the Minister proposes to make an order he or she must, before making it, consult—
 - (a) such bodies representing copyright owners as he thinks fit; and
 - (b) such bodies representing persons with a disability as he thinks fit.
- (5) If the Minister proposes to make an order which includes a prohibition he or she must, before making it, consult—
 - (a) if the proposed order is to apply to one or more named designated bodies, that body or those bodies; and
 - (b) if it is to apply to one or more specified categories of designated body, to such bodies representing designated bodies of that category or those categories as he or she thinks fit.
- (6) A designated body which is prohibited by an order from acting under a licence may not apply to the Controller under section 154(1) in respect of a refusal or failure by a licensing body to grant such a licence.

104E. Definitions.

- (1) For the purposes of sections 104 to 104D:—
 - (a) a copy of a copyright work (other than an accessible copy made under section 104A or 104B) is to be taken to be accessible to a person with a disability only if it is as accessible to that person as it would be if he or she did not suffer from a disability.

- (b) “accessible copy”, in relation to a copyright work, means a version which provides for a person with a disability to have improved access to the work.
- (c) an accessible copy may include facilities for navigating around the version of the copyright work but may not include—
 - (i) changes that are not necessary to overcome problems caused by disability; or
 - (ii) changes which infringe the integrity right provided by section 109.
- (d) “disability” means physical or mental disability, and includes the meanings ascribed to it in section 2 of the Equal Status Act, 2000 and section 2 of the Disability Act, 2004.

If section 104 CRRA is amended in this way, then section 252 CRRA will have to be similarly amended, other aspects of CRRA may also need to be amended to be consistent with this.

Finally, CRRA has a possible inconsistency in the definition of “disability”. Section 2 provides that “ ‘disability’ has the same meaning as in section 48 of the Statute of Limitations, 1957”, and this meaning of “disability” applies to sections 144 and 263. To clear up any possible confusion with the meaning of “disability” in sections 104 to 104E, it would be better to delete the meaning in section 2, and transfer it to sections 144 and 263, perhaps as follows:

2. Interpretation.

- (1) In this Act, unless the context otherwise requires—

...

~~“disability” has the same meaning as in section 48 of the Statute of Limitations, 1957;~~

...

144. Period after which remedy for delivery up is not available.

...

- (5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.

263. Period after which remedy for delivery up is not available.

...

- (5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.

We invite submissions in this regard.

7.3.10 Press

Article 5(3)(c) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for press reproduction of works on current economic, political or religious topics; and we deal with this issue in section 6.6 above.

7.3.11 Quotations

Article 5(3)(d) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

This ground is fully covered by sections 51(1) and 221(1) CRRA (relating to fair dealing with a work for the purposes of criticism or review) and 52(4) CRRA (relating to quotations).

7.3.12 Proceedings

Article 5(3)(e) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

This has been partly transposed by section 71(1) CRRA, which provides:

The copyright in a work is not infringed by anything done for the purposes of parliamentary or judicial proceedings or for the purpose of reporting those proceedings.

EUCD does not provide a definition of “public security”, which may explain why the phrase does not appear in section 71(1). However, if that section is to be expanded to cover all of Article 5(3)(e), it might perhaps provide as follows:

**71. ~~Parliamentary and judicial proceedings.~~
Proceedings.**

- (1) The copyright in a work is not infringed by anything done for the purposes of public security, for the purposes of administrative, parliamentary or judicial proceedings, or for the purpose of reporting those proceedings.

If this is done, then a similar amendment would have to be made to section 237 (which provides for a similar exception in relation to performances).

We invite submissions in this regard.

7.3.13 Speeches

Article 5(3)(f) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for reporting of political speeches; and we deal with this issue in section 6.6 above.

7.3.14 Religious or official celebrations

Article 5(3)(g) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use during religious celebrations or official celebrations organised by a public authority.

There is no CRRA equivalent, and we received no submissions in respect of this Article, but it could easily be incorporated into CRRA using established “fair dealing” language, perhaps as a new section 52(5):

**52. ~~Incidental inclusion of copyright material~~
Fair dealing: other examples.**

...

- (5) Fair dealing with a work for the purposes of use during religious celebrations or official celebrations organised by a public authority shall not infringe copyright in that work, where the use is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.

The shoulder-note to section 52 CRRA currently refers to “Incidental inclusion of copyright material”, but while ss52(1)-(3) deal with incidental inclusions, the existing section 52(4) deals with quotations. If the shoulder note is changed to refer to “Fair dealing: other examples”, as above, then it could provide an appropriate home for any further examples of fair dealing suggested in this Review.

If this is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). In particular, similar amendments might be made to the shoulder-note to, and to text of, section 222.

We invite submissions in this regard.

7.3.15 Architecture or sculpture

Article 5(3)(h) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use of works, such as works of architecture or sculpture, made to be located permanently in public places.

This ground is fully covered by section 93 CRRA.

7.3.16 Incidental inclusion

Article 5(3)(i) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

incidental inclusion of a work or other subject-matter in other material.

This ground is fully covered by sections 52(1)-(3) and 221(1)-(3) CRRA.

7.3.17 Advertising the exhibition or sale of artistic works

Article 5(3)(j) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use.

This raises issues covered by section 94(1) CRRA:

94. Advertising sale of artistic work.

- (1) It is not an infringement of the copyright in an artistic work to copy it, or to make available to the public copies of it, for the purpose of advertising the sale of the work.

This covers advertising sales but not exhibitions, but it could easily be amended to come into line with Article 5(3)(j), perhaps as follows:

94. Advertising sale of artistic work.

- (1) It is not an infringement of the copyright in an artistic work to copy it, or to make available to the public copies of it, for the purpose of advertising the **public exhibition or sale** of the work.

We discuss a related issue in section 9.3 below.

We invite submissions in this regard.

7.3.18 Caricature, parody, pastiche, and satire

Article 5(3)(k) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use for the purpose of caricature, parody or pastiche.

There is no CRRA equivalent, and we received a great many submissions that there ought to be. In Australia in 2006, CAA added fair dealing exceptions for the purposes of “parody or satire” to sections 41A and 103AA of the 1968 Act; and in Canada, section 21 CMA would do the same. We are concerned that an overly literal process of statutory interpretation could draw overly-careful distinctions between caricature, parody, pastiche, satire, and the many other synonyms which were used in the submissions to us. This would be inconsistent with the teleological and purposive approach to interpretation adopted by the CJEU, we think that any transposition of Article 5(3)(k) should be drafted to encourage rather than discourage such an approach. Against this background, this Article could easily be incorporated into CRRA using established “fair dealing” language, perhaps as a new section 52(6):

**52. ~~Incidental inclusion of copyright material~~
Fair dealing: other examples.**

...

- (6) Fair dealing with a work for the purposes of caricature, parody, pastiche, or satire, or for similar purposes, shall not infringe copyright in that work.

If this is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). In particular, a similar amendment might be made to section 222.

We invite submissions in this regard.

7.3.19 Non-commercial user-generated content

In many of the submissions which discussed parody, it was submitted to us that transformative new works that make a distinct departure from source material should be permitted. In Canada, section 22 CMA would provide just such an exception especially for non-commercial user-generated content; and this a useful starting point for a possible CRRA provision to be inserted in Chapter VI of Part II CRRA, perhaps as follows:

106D. Non-commercial user-generated content.

- (1) It is not an infringement of the rights conferred by this Part for a person to use an existing work in the creation or communication of a new work; provided that—
- (a) any such use, creation or communication is done solely and exclusively for non-commercial purposes,
 - (b) any such creation and communication is accompanied by a sufficient acknowledgement, unless this is unreasonable or inappropriate or turns out to be impossible for reasons of practicality or otherwise, and
 - (c) the creation and communication of the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation

of the existing work or on an existing or potential market for it, including that the new work is not a substitute for the existing one.

- (2) Subsection (1) shall not apply if
 - (a) the existing work is an infringing copy, and
 - (b) the person using the existing work did not have reasonable grounds to believe that it was not an infringing copy.

If this is added to Part II, then a similar exception may have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). And a similar question may arise in respect of Chapter VIII of Part V (concerning acts permitted in relation to databases).

We invite submissions in this regard.

7.3.20 Demonstration or repair

Article 5(3)(l) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use in connection with the demonstration or repair of equipment.

There is no CRRA equivalent, and we received no submissions in respect of this Article, but it could easily be incorporated into CRRA using established “fair dealing” language, perhaps as a new section 52(7):

52. ~~Incidental inclusion of copyright material~~ Fair dealing: other examples.

...

- (7) Fair dealing with a work for the purposes of use in connection with the demonstration or repair of equipment shall not infringe copyright in that work.

If this is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). In particular, a similar amendment might be made to section 222.

We invite submissions in this regard.

7.3.21 Building plans

Article 5(3)(m) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building.

This ground is fully covered by section 96 CRRA.

7.3.22 *Terminals*

Article 5(3)(n) EUCD provides for exceptions or limitations for terminals on the premises of libraries, educational establishments, museums, and archives; and we deal with this issue in chapter 9 below.

7.3.23 *Minor exceptions*

For the sake of completeness, we mention Article 5(3)(o) EUCD, which provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

This is a provision to save minor exceptions which might be provided by national law, but there do not seem to be any minor exceptions in Irish law which this Article might enable.

7.3.24 *Consumer protection*

The rights provided to consumers or users by the exceptions to copyright could be very easily set at naught by means of terms and conditions in contracts between rights-holders and users. Hence, section 2(10) CRRA very sensibly provides:

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

There was a great deal of support in the submissions for a provision of this sort, and there was no argument against it. However, whilst sensible, in our view, section 2(10) does not go far enough, in that it does not make clear exactly what the effect of the section is upon the impugned term or condition. For example, other consumer protection provisions make it clear that impugned terms “shall not be binding on the consumer”,⁸⁷ or even shall be “void”,⁸⁸ and a similar clarity would be beneficial in this context. As a consequence, section 2(10) could be strengthened to provide that a term of contract which purports to prohibit the exercise of a copyright exception provided by the Act should be void, perhaps as follows:

⁸⁷ See section 6(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (SI No 27 of 1995) [Unfair Terms Regulations]; available at: <http://www.irishstatutebook.ie/1995/en/si/0027.html>

⁸⁸ See, eg, sections 12(3), 13(9) and 55 of the Sale of Goods Act, 1893, as inserted by sections 10 and 22 of the Sale of Goods and Supply of Services Act, 1980, sections 18 and 31 of the 1980 Act; and sections 33, 62 and 79 of the Consumer Credit Act, 1995. The 1980 Act is available at <http://www.irishstatutebook.ie/1980/en/act/pub/0016/index.html> The 1995 Act is available at <http://www.irishstatutebook.ie/1995/en/act/pub/0024/index.html>

2. *Interpretation.*

- ...
- (10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, ~~it is irrelevant whether or not there exists~~ any term or condition in an agreement which purports to prohibit or restrict that act **shall be void.**

We invite submissions in this regard.

That, in turn, raises a further question as to whether there are other consumer protection concerns in the copyright context that are insufficiently covered by existing consumer protection provisions or by recent consumer reform proposals⁸⁹ and that therefore ought to be similarly addressed. We also invite submissions in this regard.

7.4 *Submissions invited*

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (55) Should the definition of “fair dealing” in section 50(4) and section 221(2) CRRA be amended by replacing “means” with “includes”?
- (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?
- (57) Should CRRA references to “research and private study” be extended to include “education”?
- (58) Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?

⁸⁹ See, eg, <http://www.djei.ie/commerce/consumer/slrg.htm>

- (59) Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters' behalf?
- (60) Should the exceptions for social institutions be repealed, retained or extended?
- (61) Should there be a specific exception for non-commercial user-generated content?
- (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?

8. Entrepreneurs

8.1 Introduction

Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and our fourth Term of Reference directs us to optimise the balance between protecting creativity and promoting and facilitating innovation. In this chapter, we consider our Terms of Reference in the context of entrepreneurs, the fifth of the six categories into which we have divided the submissions. In particular, although the interests of rights-holders are central to copyright law, the law recognises other interests as well, and entrepreneurs feature on both sides of this balance: sometimes as rights-holders, but increasingly as internet start-ups seeking to develop novel methods of engagement with content. A properly balanced copyright system should seek not only to reward initial creativity but also to encourage follow-on innovation. Hence, as with the balance between rights-holders and users in the previous chapter, one of the main questions for the present Review is whether the copyright balance between rights-holders and entrepreneurs now requires further amendment, in particular to incentivise innovation. We therefore consider the contribution which entrepreneurs make to innovation (section 8.2); we then assess the extent to which they can, for this purpose, take advantage of copyright exceptions (section 8.3); and we conclude by considering whether it is possible or desirable to craft a specialist copyright exception for innovation (section 8.4).

8.2 Entrepreneurs and innovation

Entrepreneurs are a key source of the innovation identified in chapter 2. The Innovation Taskforce was of the view that entrepreneurs and enterprises are at the heart of the innovation ecosystem because the success of the Irish economy depends on our capacity to translate ideas into exportable goods, services and sustainable jobs.⁹⁰ The Taskforce therefore placed the entrepreneur and innovative enterprises at the centre of their efforts to create the circumstances which would increase the number of indigenous start-ups,⁹¹ and they pointed to the important role of intellectual property law in this context.⁹² Against this background, the present Review is concerned with the copyright aspects of intellectual property law as they have an impact on entrepreneurship and innovation.

8.3 Entrepreneurs, innovation and copyright

8.3.1 Getting the balance right

Online start-up companies have many engagements with copyright law: some wish to generate their own original content; others seek to develop or transform existing content; still others want to provide platforms to allow others to generate or transform content. On the one hand, some submissions argued that inflexibility in Irish and EU copyright regimes hinder

⁹⁰ *Innovation Ireland*, p21.

⁹¹ *Innovation Ireland*, p22; those circumstances (eg funding, tax, support for entrepreneurship, and so on) are discussed in chapters 9 and 10 of the Report.

⁹² *Innovation Ireland*, p77.

innovation, and that access to and use of legal digital content ought to be made easier and more attractive in Ireland and Europe. On the other hand, other submissions argued the problems faced by entrepreneurs are not principally related to copyright legislation and therefore advocated caution if flexibility for innovators resulted in the dilution of the rights of rights-holders.

The recent UK review was commissioned to address the risk that the UK's intellectual property law was insufficiently well designed to promote innovation;⁹³ and, in that context, the UK government's response recognised that copyright law currently over-regulates to the detriment of the UK.⁹⁴ We are addressing a similar risk, albeit in respect of copyright rather than intellectual property generally; and if the UK's copyright law over-regulates to the detriment of the UK, then Ireland's similar copyright law must similarly over-regulate to the detriment of Ireland.

It is unsurprising, then, that many of the submissions made the point that inflexibility in the Irish and EU copyright regimes is hindering innovation; we were given a few examples of startups that ran into problems with copyright and related rights; and other submissions felt that they were in a legal grey area. It follows that we must look closely at the balance between rights-holders' copyrights and the scope for innovation provided by the exceptions, so as to enable copyright law to keep up with rapid technological changes, support existing content industries, nurture new ones and find ways to encourage legitimate new developments whilst preventing infringements.

8.3.2 Entrepreneurs, innovation and copyright exceptions

There are three broad categories of limitations upon and exceptions to copyright protection. First, a work might not be sufficiently original to achieve protection in the first place; or, exceptionally, it may be sufficiently original, but public policy indicates that it should nevertheless not achieve copyright protection and be readily available to the public as a consequence. Effectively, public policy here takes the view that such information ought to be in the public domain. The news exceptions in the Berne Convention, discussed in chapter 6, are a good example of this; so is the general exemption in Article 2 EUCD and section 87(1) CRRA; and the courts are moving in the direction that the right to freedom of expression in the Constitution and the European Convention on Human Rights will operate in the same way in certain limited circumstances. Second, public policy favours certain kinds of (often public, social, or cultural) uses of otherwise copyright protected works; this is the insight underpinning the exceptions in favour of fair dealing for the purposes of research or private study, or criticism or review, or in favour of educational institutions and libraries. The news exception in EUCD, discussed above, is a good example of this. And third, public policy recognises both sets of interests when it requires compulsory licences, by which rights-holders are remunerated when works

⁹³ *Hargreaves*, p15.

⁹⁴ *Response to Hargreaves*, p7.

are copied for public interest reasons. The idea of a compulsory licence in favour of news marshalling sites raised above is a possible example of this.

From the perspective of the present Review, this raises an important question of principle: when is innovation a sufficient public policy to require a copyright limitation or exception in one of these three categories. In particular, when, if ever, does innovation require that

- works that might otherwise be protected by copyright nevertheless should not achieve copyright protection at all so as to be readily available to the public, and/or
- there should nevertheless be exceptions for certain uses, even where works are protected by copyright, and/or
- copyright-protected works should be made available by means of compulsory licences?

We particularly welcome further submissions in response to these questions. In the meantime, we offer some preliminary observations here. At one end of the spectrum, it is not easy to conceive of circumstances in which innovation could require otherwise copyrightable works to be in the public domain. At the other end of the spectrum, it is not at all difficult to conceive of circumstances in which innovation could require that copyright works be made available under compulsory licence (and we think that a Copyright Council might be able to moderate borderline cases). Our main focus here will therefore be on the middle question of whether the range of copyright exceptions ought to be increased for the purposes of encouraging innovation. In earlier chapters, we have discussed whether all of the exceptions available in EUCD should be made available as a matter of Irish law. The question here is whether that is enough, or whether something more can be done to encourage innovation.

8.3.3 A specialist copyright exception for innovation?

One possibility for the encouragement of innovation is the introduction of a specialist innovation exception to copyright. Exceptions operate by permitting the user to make use of some of a copyright work. An exception in favour of innovation would therefore work by permitting the innovator to make use of some of a copyright work. As the discussion in section 2.2 made clear, innovation results in a significant or substantial improvement, or enhancement, or transformation, or in something different, or even entirely new; and these new insights, new goods or new services will have the capacity to generate economic growth and deliver benefits to society as a whole.

Since EUCD has not harmonised the adaptation right, that Directive neither precludes such a development nor provides any guidance as to the contents of such an exception. However, some of the submissions suggested that Article 9(2) of the Berne Convention might provide a starting point; it provides

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases,

provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The text of Article 9(2) was distilled from typical features of copyright limitations in the Berne Member States in 1971, when it was added to the Convention. Article 13 of TRIPs and Article 10 of the WCT repeat this test, and it is incorporated in Article 5(5) EUCD. It falls into three obvious steps, relating to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work, and which (iii) do not unreasonably prejudice the legitimate interests of the author.

Legal certainty in this context requires that the standards of the exceptions be clearly articulated; while special cases will be relatively limited and narrow in scope. These clear and narrow exceptions must not conflict with the rights-holders' normal exploitation of their copyrights. That is to say, they must not conflict with the ways that rights-holders typically extract economic value (or might reasonably, potentially do so) from their copyrights. This focus on normal or typical uses of the right is reinforced by the reference to the rights-holders' legitimate interests, suggesting both that there is a proper or appropriate realm for the rights-holders' interests and that there is a boundary on that realm. Finally, the exception must not unreasonably prejudice those interests. That is to say, the exception must not disproportionately trench upon rights-holders' legitimate interests. It also seems to follow that certain circumstances - such as attribution or payment - could make prejudice reasonable.

It seems, then, that Article 9(2) sets a standard for copyright exceptions, and thereby provides the principles for a first attempt at drafting a possible specialist exception in favour of innovation. The essence of innovation is a substantial development or transformation that creates new value. In language that is at the core of copyright law,⁹⁵ this can be expressed as a **substantial** development that results in a new **original** work. This language could therefore be the basis of an innovation exception, perhaps as follows:

106E. Innovation.

- (1) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a work (the initial work) derives from it an innovative work.
- (2) An innovative work is an original work which is substantially different from the initial work, or which is a substantial transformation of the initial work.
- (3) The innovative work must not—
 - (a) conflict with the normal exploitation of the initial work,
 - or

⁹⁵ See, for example, section 2.3 above.

- (b) unreasonably prejudice the legitimate interests of the owner of the rights in the initial work.
- (4) Unless it is unreasonable or impractical to do so—
 - (a) the innovative work must be accompanied by a sufficient acknowledgement, and
 - (b) within a reasonable time of the date on which the innovative work is first made available to the public in the State, the author of the innovative work must inform the owner of the rights in the initial work about the availability of the innovative work.
- (5) Subsection (1) shall not apply if—
 - (a) the initial work is an infringing copy, and
 - (b) the person making the innovative work did not have reasonable grounds to believe that the initial work was not an infringing copy.
- (6) Subsection (1) shall not apply if, or to the extent that, the owner of the rights in the initial work can establish by clear and convincing evidence that, within a reasonable time after first publication of the work, he or she had embarked upon a process to derive from it a work to which the innovative work is substantially similar.
- (7) This section shall come into operation on such day as may be fixed by order made by the Minister.

Again, if provisions like these are added to Part II, then a similar exception may have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances). And a similar question may arise in respect of Chapter VIII of Part V (concerning acts permitted in relation to databases).

The key aspects of the definition in subsection (2) are that the innovation has to be an **original** work that is **substantially** different from the initial work. As we pointed out in section 2.3 above, these notions of “originality” and “substantiality” are already integral to copyright law; and something that merely repackages or even draws upon the initial work would not pass that test. Moreover, as subsection (3) makes clear, it has to be something new, beyond the normal exploitation of the initial work; and a substitute, alternative or competitor would not pass that test. The essence of innovation is that it creates *new* value; and these new insights, new goods or new services will have the capacity to generate economic growth and deliver benefits to society as a whole.

Moreover, there is some statutory precedent for this kind of development. Section 7(b) of the Industrial Development Act, 1993⁹⁶ defines one of the

⁹⁶ See <http://www.irishstatutebook.ie/1993/en/act/pub/0019/>

functions of Forbairt as being “to strengthen the technological base and the capacity of industry to innovate”; and section 7(1)(e) of the Industrial Development (Enterprise Ireland) Act, 1998⁹⁷ defines one of the functions of Enterprise Ireland as being “to develop the technological base and the capacity of enterprises to innovate and undertake research, development and design” (though, in neither case is any further definition of “innovation” provided). However, in Australia, the Patents Amendment (Innovation Patents) Act, 2000 (Cth)⁹⁸ has gone so far as to allow an “innovative step” as an alternative to the traditional “inventive step”⁹⁹ for the purposes of patentability, and Schedule 1 provides the following definition:

an invention is to be taken to involve an innovative step when compared with the prior art base unless the invention would, to a person skilled in the relevant art, in the light of the common general knowledge as it existed in the patent area before the priority date of the relevant claim, only vary from the kinds of information set out in subsection (5) in ways that make no substantial contribution to the working of the invention.

Hence, to obtain an innovation patent, the innovative development must be a **substantial** one (it must be a “*substantial* contribution”), just as in the proposed copyright exception for innovation above.

One key example of the kind of innovation which this exception would allow is provided by the business of online search. Assume a website containing copyright material; if a search website were to quote a substantial part of the copyright materials on the first website, then the search website would, in principle, be in breach of copyright. Now, assume many websites containing copyright material; if a search website were to quote a substantial part of the copyright material on each of these websites, then the search website would, in principle, be in breach of copyright for all of them. The key question, of course, is whether the quoted material (short text extracts, thumbnails of images, stills of video clips and so on) were “substantial”. However, case law indicates that, in many circumstances, quoting even a small few words can be a “substantial” taking and thus an infringement of copyright. That being so, there are doubtless many circumstances in which online search results breach copyright.

However, this conclusion fundamentally conflicts with the reality of internet usage. What internet search does is to produce an original work in the page of results which is substantially different from the underlying websites being quoted and linked to. Not only does this search not conflict with the normal

⁹⁷ See <http://www.irishstatutebook.ie/1998/en/act/pub/0034/>

⁹⁸ See http://www.austlii.edu.au/au/legis/cth/consol_act/papa2000400/index.html

⁹⁹ For Ireland, see section 9(1) of the Patents Act, 1992; available at <http://www.irishstatutebook.ie/1992/en/act/pub/0001/index.html> (the amendment in section 3 of the Patents (Amendment) Act 2006 does not affect this issue). In many ways, the Australian innovation patent is similar to the Irish short-term patent available under section 63 of the 1992 Act.

exploitation of the websites being quoted and linked to, or unreasonably prejudice the legitimate interests of the owners of those sites, the potential of driving internet traffic to those sites is a benefit to them.

Internet search is simply the most intuitively easily grasped example of the widespread phenomenon of the analysis of internet data for various purposes. One example is provided by indexing data (we have already discussed aspects of this in the news context, above, in section 6.6).

Another example is provided by targeted online advertising, such as Google ads and Amazon purchase suggestions (if you liked this, then you'll love ...; or people who bought this also bought ...). A third example is provided by the reporting of twitter trends and klout. A fourth example is provided by review sites which provide ratings based on analysis of online reviews and/or internet traffic. Each of these activities provides original outputs that differ substantially from the initial inputs; and yet their copyright status is unclear as a matter of Irish law.

If copyright law is not to stifle these kinds of innovative business models, a copyright exception to promote innovation such as that tentatively proposed above is likely to be necessary. We have addressed artistic transformation by means of the proposed parody fair dealing exception (in section 7.3.18 above); this innovation exception addresses entrepreneurial transformation; and, in many ways, these two proposed exceptions logically complement one another.

We invite submissions in this regard. We particularly welcome further submissions as to whether—

- there ought to be a specialist copyright exception for innovation,
- the proposed draft is sufficient in this respect, and
- there are examples of business models which could take advantage of this proposed exception.

Finally, here, it was submitted to us that we should go further and recommend express statutory recognition for a general “public interest” defence, but we do not see how doing so would promote innovation further than an innovation exception would; hence, having regard to our Terms of Reference, we do not propose this.

8.4 Submissions invited

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (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?
- (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?

- (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?
- (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?

9. Heritage Institutions

9.1 Introduction

As keepers of our cultural heritage from which much innovation can flow, copyright law raises particular issues for heritage institutions such as libraries, archives, galleries, museums, schools, universities and other educational establishments. Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and our fourth Term of Reference directs us to optimise the balance between protecting creativity and promoting and facilitating innovation. In this chapter, we consider our Terms of Reference in the context of heritage institutions, the last of the six categories into which we have divided the submissions.

Many of the exceptions to copyright in both CRRA and EUCD relate to educational purposes in general (which we discussed in chapter 6 above) and to heritage institutions in particular (which we discuss in this chapter). These are important interests in Ireland, given our strong cultural heritage and traditions in art, music and literature. Indeed, one important strand of innovation is likely to be provided by the creative capacity of artists to generate innovative content. In particular, many of the submissions pointed to the important role of libraries and other heritage institutions as repositories of all forms of intellectual heritage - whether print or digital - from which such innovation can flow.

We have already discussed some related issues in chapter 7 above (especially sections 7.3.8 and 7.3.17). In this chapter, we consider exceptions for format-shifting for archival purposes (section 9.2). We discuss a possible exception allowing heritage institutions to publish, in catalogues for public exhibitions, images of artworks in those institutions' permanent collections, where those artworks are still covered by copyright (section 9.3); and we explore the possibility of extending fair dealing exceptions to cover displays of images of works in permanent collections on dedicated terminals, and to cover the brief and limited displays of images of artworks during public lectures at such institutions (section 9.4). We examine the issues surrounding extending copyright deposit to digital publications (section 9.5); we note concerns relating to clearing rights in orphan works (section 9.6); and we assess the potential for 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 (section 9.7). Finally, we conclude this chapter by analysing possible exceptions for text and data mining for research purposes (section 9.8).

9.2 *Format-shifting for archival purposes*

It was submitted to us that sections 59-70 CRRA relating to libraries and archives are not well adapted to the digital age. In particular, it was argued that heritage institutions should be able to make digital reproductions of protected works for archival and preservation purposes and to format-shift archival copies to guard against future obsolescence. It may well be, of

course, that the existing CRRA language is sufficiently technology-neutral in this respect to permit such digital reproductions. However, in the absence of a clear statutory permission, heritage institutions are reluctant to undertake such format-shifting. Article 5(2)(c) EUCD could fill that gap. It provides for an exception to or limitation upon the reproduction right

in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

The effective CRRA equivalent of this list of heritage institutions is “the librarian or archivist of a prescribed library or prescribed archive”. Incorporation of this Article could be achieved by adapting the format-shifting provision suggested in section 7.3.4 above, to provide a starting point for a possible new CRRA section incorporating Article 5(2)(c) EUCD. Since the original section 69 CRRA has been repealed by section 9 of the Copyright and Related Rights (Amendment) Act, 2007, the possible new section could be a new section 69 CRRA, perhaps as follows:

69. *Format-shifting by heritage institutions.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) a heritage institution
 - (i) being the owner or lawful user of a work, makes a reproduction of that work in a different format, or
 - (ii) makes or causes to be made a digital reproduction of a work,
 - (b) the heritage institution owns or is a lawful user of the medium or device on which the reproduction is reproduced,
 - (c) the reproduction is made for archival and preservation purposes, and
 - (d) the reproduction is made for purposes that are neither directly nor indirectly commercial.
- (2) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the heritage institution making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.

Adding such a section would then require three further amendments.

First, section 70 CRRA would have to be amended to list this new section 69 (see section 9.4 below).

Second, “prescribed archives and ... libraries” are defined pursuant to sections 59 and 60 CRRA; but these references will need to be replaced by a

reference to the more encompassing description of “heritage institutions”, perhaps as follows:

59. ***Regulations relating to copying by ~~libraries and archives~~ heritage institutions.***
- (1) The heritage institutions to which this section applies include—
- (a) prescribed libraries and prescribed archives,
 - (b) educational establishments, and
 - (c) the Boards and authorities referred to in section 198(1).
- (1) The Minister may make regulations for the purposes of this section and those regulations may make different provisions for different descriptions of ~~libraries or archives~~ **heritage institutions** and for different purposes.
- (2) Without prejudice to the generality of subsection (1), the Minister may prescribe the ~~libraries or archives~~ **heritage institutions** to which sections 60 to ~~67~~ **70** apply and may prescribe all or any of the following:
- (a) the conditions that are to be complied with when a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes and supplies, or causes to be made and supplied, a copy of any part of a work which has been lawfully made available to the public to a person requiring a copy;
 - (b) the conditions that are to be complied with when a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes and supplies, or causes to be made and supplied, to another prescribed ~~library or prescribed archive~~ **heritage institution** a copy of a work or part of a work which has been lawfully made available to the public and is required by that other prescribed ~~library or prescribed archive~~ **heritage institution**;
 - (c) the conditions that are to be complied with before a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes or causes to be made a copy of a work in the permanent collection of the prescribed ~~library or prescribed archive~~ **heritage institution** in order to preserve or replace that work in the permanent collection of that ~~library or archive~~ **heritage institution**, or in the permanent collection of another prescribed ~~library or prescribed archive~~ **heritage institution**;

- (d) the conditions that are to be complied with by a ~~librarian or archivist of a prescribed library or prescribed archive~~ prescribed heritage institution when making or supplying or causing to be made or supplied a copy of the whole or part of certain works which have not been lawfully made available to the public from a work in the prescribed ~~library or prescribed archive~~ heritage institution to a person requiring the copy; and
- (e) in the case of section 69—
 - (a) what works may be reproduced pursuant to subsection (1)(a)(ii) of that section,
 - (b) what constitutes a digital reproduction for the purposes of subsection (1)(a)(ii) of that section,
 - (c) what constitute archival and preservation purposes for the purposes of subsection 1(c) of that section, and
 - (d) such other conditions, if any, which must be complied with.

60. *Heritage institutions: ~~Libraries and archives:~~ declarations.*

- (1) Where regulations made by the Minister under section 59 require a librarian, ~~or~~ archivist, or Director of a heritage institution to be satisfied as to any matter before making or supplying a copy of a work—
 - (a) the librarian, ~~or~~ archivist, or Director concerned may rely on a declaration as to that matter by the person requesting the copy, unless the librarian, ~~or~~ archivist, or Director is aware that it is false in a material particular, and
 - (b) in such cases as may be prescribed, the librarian, ~~or~~ archivist, or Director shall not make or supply the copy in the absence of a declaration in such form as may be prescribed.
- (2) [unchanged].

Third, sections 61-68 CRRA would have to be amended to enlarge reference to libraries, librarians, archives and archivists to reach heritage institutions more generally, perhaps as follows:

61. *Copying by ~~librarians or archivists~~ heritage institutions: articles in periodicals.*

- (1) A prescribed heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the

prescribed conditions are complied with, make and supply, or **cause to be made and supplied**, a copy of an article or the contents page in a periodical without infringing any copyright in the article, the contents page or in any illustrations accompanying the article or the contents page or in the typographical arrangement.

- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ **archivist, or Director of a heritage institution concerned**, that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose and that person shall not be furnished with more than one copy of the same article unless the person satisfies the librarian, ~~or~~ **archivist, or Director** that the previous copy has been lost, stolen, discarded or destroyed or a reasonable period of time has elapsed, and that person shall not be furnished with more articles from a volume of a periodical than the number of issues that comprise that volume or 10 per cent of the volume, whichever is the greater.

62. *Copying by ~~librarians or archivists~~ heritage institutions: parts of works lawfully made available to public.*

- (1) ~~A heritage institution~~ **The librarian or archivist of a prescribed library or prescribed archive** may, where the prescribed conditions are complied with, make and supply, or **cause to be made and supplied**, a copy of part of a work (other than an article or the contents page in a periodical) which has been lawfully made available to the public without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.
- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ **archivist, or Director of a heritage institution concerned**, that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose and that person shall not be furnished with more than one copy of the same material unless the person satisfies the librarian, ~~or~~ **archivist, or Director** that the previous copy has been lost, stolen, discarded or destroyed or a reasonable period of time has elapsed, and that person shall not be furnished with a copy of more than a reasonable proportion of any work.

63. *Multiple copying.*

[unchanged]

64. *Copying by heritage institutions ~~librarians or archivists~~: supply of copies to other ~~libraries and archives~~ heritage institutions.*

- (1) **A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, or cause to be made and supplied, to another heritage institution ~~prescribed library or prescribed archive~~ a copy of—**

- (a) a periodical or articles or the contents page contained therein, or
- (b) the whole or part of a work,

which has been lawfully made available to the public, without infringing any copyright in the periodical, in the article, in the contents page or in the work, in any illustrations accompanying the periodical, the article, the contents page or the work or in the typographical arrangement.

- (2) Subsection (1) shall not apply where, at the time the copy is made, the **heritage institution ~~librarian or archivist~~** making it could, by reasonable enquiry, obtain the consent of a person entitled to authorise the making of the copy.

65. *Copying by heritage institutions ~~librarians or archivists~~: replacement copies of works.*

- (1) **A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make or cause to be made a copy of a work in the permanent collection of the institution ~~library or archive~~ in order—**

- (a) to preserve or replace that work by placing the copy in the permanent collection of that library or archive in addition to or in place of that work, or
- (b) to replace in the permanent collection of another **heritage institution ~~prescribed library or prescribed archive~~** a work which has been lost, destroyed or damaged,

without infringing the copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

- (2) [unchanged].

66. *Copying by librarians or archivists for certain purposes.*

[see section 9.3 of this Paper, below].

67. *Copying by heritage institutions ~~librarians or archivists~~: certain works not lawfully made available to public.*

- (1) A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, ~~or cause to be made and supplied~~, a copy of a work or part of a work which has not been lawfully made available to the public from any work in the permanent collection of the ~~institution library or archive~~ without infringing the copyright in the work or in any illustrations accompanying the work or in the typographical arrangement.
- (2) This section shall not apply where the copyright owner has prohibited copying of the work and at the time the copy is made librarian, ~~or~~ archivist, ~~or~~ Director making the copy knew, or ought to have been aware of, that fact.
- (3) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ archivist, ~~or~~ Director that he or she requires that copy for the purposes of **education**, research or private study and he or she will not use it for any other purpose and that person shall not be furnished with more than one copy of that work or part of that work.

68. *Copy of work required to be made as condition of export.*

Where a work of cultural or historical importance or interest may not lawfully be exported from the State unless a copy of it is made and deposited in a ~~heritage institution library, archive~~ or other institution designated by the Minister for Arts, Heritage, Gaeltacht and the Islands under section 50 of the National Cultural Institutions Act, 1997, it shall not be an infringement of copyright to make that copy.

Finally, if provisions like these are added to Part II, then similar amendments will have to be made to Chapter IV of Part III (concerning acts permitted in relation to performances).

We invite submissions in this regard.

9.3 Catalogues

Section 66(1) CRRRA sets out five occasions [paragraphs (a) to (e)] on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in the work. Many submissions argued that

section 66 CRRA is ambiguously narrow, and that there was unnecessary uncertainty whether this section permits heritage institutions to publish a catalogue for a public exhibition, where that catalogue contains images of works of art from the collection which are to be featured in the exhibition but which are still covered by copyright. If section 94 is amended as suggested above (in section 7.3.17 in the context of Article 5(3)(j) EUCD relating to advertising the exhibition or sale of artistic works), then this would go a long way towards removing that unnecessary uncertainty; and it would be copper-fastened by an amendment to section 66(1) adding a new paragraph (f), and amending subsection (2) to require sufficient acknowledgement, perhaps as follows:

66. *Copying by heritage institutions ~~librarians or archivists~~ for certain purposes.*

- (1) **A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make or cause to be made a copy of a work in the permanent collection of the library or archive—**
- (a) for the purposes of obtaining insurance cover for the works concerned;
 - (b) for purposes of security;
 - (c) for the purposes of compiling or preparing a catalogue;
 - (d) for exhibition in the library or archive; ~~or~~
 - (e) for the purposes of informing the public of an exhibition, **or**
 - (f) **for the purposes of publishing such a copy in a catalogue relating to an exhibition,**
- without infringing any copyright in the work, in any illustrations accompanying the work, or in the typographical arrangement.
- (2) This section shall apply to copying conducted for the curatorial purposes specified in subsection (1), and to an extent reasonably justified by the non-commercial purpose to be achieved, **provided that any reproduction is accompanied by a sufficient acknowledgement.**

If a provision to this effect is added to Part II, then a similar exception would have to be added to Chapter IV of Part III (concerning acts permitted in relation to performances).

We invite submissions in this regard.

9.4 *Fair dealing by heritage institutions*

Article 5(3)(n) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for

use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

There is no real analogue or equivalent in CRRA, and we received many submissions in favour of an exception of this kind. The establishments referred to in paragraph 2(c) are “publicly accessible libraries, educational establishments or museums, or ... archives”; the effective CRRA equivalent of this list of institutions is “the librarian or archivist of a prescribed library or prescribed archive”; and we have considered a slightly expanded list in section 9.2 above exploring a possible new section 69 concerning format-shifting for archival and preservation purposes by heritage institutions. Article 5(3)(n) EUCD could easily be incorporated as a new section 69A, which relates this exception to section 50 CRRA (concerning fair dealing for research or private study).

Similarly, section 55 CRRA provides that a performance in an educational establishment does not infringe copyright; and it was submitted to us that a similar exception should apply to the copying and display of a protected image to make a presentation to students or others attending an educational event at a public gallery or other heritage institution. Some of this might be permitted by section 52(4) CRRA (concerning quotations), but a more tightly crafted exception could be incorporated into a new section 69A, perhaps as follows:

69A. *Fair dealing by heritage institutions.*

- (1) The communication by a heritage institution to individual members of the public of reproductions of works in the permanent collection of the institution, by dedicated terminals on the premises of the institution, shall constitute “fair dealing” for the purposes of section 50(1).
- (2) The brief and limited display of a reproduction of an artistic work, during a public lecture in a heritage institution shall constitute “fair dealing” for the purposes of section 50(1).
- (3) Subsections (1) and (2) shall apply only if the communication or display is
 - (a) undertaken for the sole purpose of education, teaching, research or private study, and
 - (b) accompanied by a sufficient acknowledgement.
- (4) Subsection (2) shall apply only if the display is undertaken for purposes that are neither directly nor indirectly commercial.

As noted above, section 70 CRRA would have to be amended to list section 69, and it would also have to be amended to list this new section 69A, perhaps as follows:

70. *Copying by heritage institutions ~~librarians or archivists~~: infringing copy.*

Where a copy which would otherwise be an infringing copy is made under section 61, 62, 64, 65, 67, ~~or 68, 69 or 69A~~ but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

We invite submissions in this regard.¹⁰⁰

9.5 *Legal deposit*

Legal deposit provided by section 198 CRRA is an important instrument of national cultural policy. Many of the submissions argued that CRRA does not adequately provide for legal deposit of Irish digital heritage. In particular, they argued that legal deposit of digital-only publications needs to be brought into line with hard-copy publications, so as to be able to create a truly comprehensive copyright deposit collection. In the UK, CDPA has been amended¹⁰¹ to cover this issue, and we agree that CRRA needs similar amendment, perhaps by a new section 198A (modelled on the existing s198 CRRA, revised to apply to digital works, with some CDPA provisions included) as follows:

198A. *Digital copyright deposit.*

- (1) The publisher of any digital publication first made available in the State after the commencement of this section or, in the case of the authority specified in section 198(1)(a), the publisher of any digital publication made available in the State, shall, within one month of the date on which the digital publication is first made available, deliver, at his or her own expense, copies of the digital publication in the format in which it is published to the Boards and authorities referred to in section 198(1).
- (2) Boards and authorities taking delivery of a digital publication under subsection (1) shall give an electronic receipt for every digital publication delivered to them under that subsection.
- (3) The Minister may, on an application of a Board or authority referred to in section 198(1), make regulations exempting from

¹⁰⁰ If such amendments are enacted, then the Copyright and Related Rights (Librarians and Archivists) (Copying of Protected Material) Regulations, 2000 (SI No 427 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0427.html> would also need to be amended accordingly.

¹⁰¹ By the Legal Deposit Libraries Act 2003; available at <http://www.legislation.gov.uk/ukpga/2003/28/contents>

subsection (1) in respect of the Board or authority making the application, any class of work as may be specified in those regulations, and it shall not be necessary for the publisher of any publication so excepted to deliver the digital publication to that Board or authority or for such Board or authority to give a receipt unless as respects any particular digital publication a written demand for the delivery of that digital publication is made by the Board or authority concerned.

- (4) The Boards or authorities referred to in section 198(1) may before delivery of a digital publication is made under subsection (1), require that a digital publication be delivered in a particular format, being one of the formats in which the digital publication is made available and the publisher shall deliver it in the format required.
- (5) The publisher of any digital publication first made available in the State after the commencement of this section shall, where a demand is made in writing by the authority having control of each of the libraries referred to in section 198(5), before the expiration of 12 months after the digital publication is made available, deliver within one month after receipt of that written demand or, where the demand was so made before the digital publication was made available, within one month after publication, to an address in Dublin named in the demand a copy of that digital publication for, or in accordance with the directions of, that authority.
- (6) In the case of a digital publication made available in a series of numbers or parts, the written demand referred to in subsection (5) may include all numbers or parts of the digital publication which may subsequently be made available.
- (7) A copy of a digital publication delivered to the authority having control of the National Library of Ireland or the Board of the British Library pursuant to this section shall be a copy of the whole digital publication.
- (8) A copy of a digital publication delivered pursuant to this section to any of the authorities referred to in section 198(1) and section 198(5), other than those referred to in subsection (7), shall be in the format specified by the Board or authority; and the Board or authority may require the person delivering the digital publication to deliver, with the copy of the digital publication, a copy of any computer program and any information necessary in order to access the digital publication, and a copy of any manual and other material that accompanies the digital publication and is made available to the public.

- (9) Where a publisher fails to comply with this section he or she shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €750 and in addition the person shall be liable to be ordered to comply with this section.
- (10) Where substantially the same work is published both in a form to which section 198 applies and in a format to which this section applies, then—
 - (a) delivery of a book pursuant to section 198 shall discharge the obligation to deliver a digital publication pursuant to this section,
 - (b) delivery of a digital publication pursuant to this section shall discharge the obligation to deliver a book pursuant to section 198, and
 - (c) it shall be for the Board or authority which is entitled to take delivery of the book or digital publication, as the case may be, to decide which form or format of delivery to require.
- (11) It is not an infringement of the rights conferred by this Act if a Board or authority referred to in section 198(1) reproduces a work that is made available in the State through the internet.
- (12) For the purposes of this section, “digital publication” includes any publication in any digital or electronic format readable by means of any electronic retrieval system, but does not include
 - (a) a copy of a book in an electronic form delivered by a publisher to a Board or authority pursuant to section 198, or
 - (b) a sound recording or film or both.
- (13) The Minister may make regulations to implement and administer this section.

Finally, if a new section 198A CRRA is introduced, the question arises as to whether the reference to section 198 CRRA in section 2(1) of the Heritage Fund Act, 2001 ought to be amended to include a reference to any new section 198A CRRA?

We invite submissions in this regard.

9.6 Rights clearance and orphan works

At present, heritage institutions share the same problems as discussed in chapter 3 relating to rights clearance; and they would benefit in the same way if a Council were to be established. However, as we noted in section 3.2, where the rights-holder in a given work cannot be identified or traced, it is impossible to clear the rights to such orphan works. There are obvious benefits to a scheme that would return orphan works to circulation, and to allow their owners to be discovered and, where appropriate, remunerated

for their use. Hence, at present, the EU is working towards a Directive establishing common rules on the digitisation and online display of orphan works.¹⁰² However, this relates only to a sub-set of the range of copyright works, and so the problem will remain in respect of the rest.

This problem is especially acute for libraries and other heritage institutions, as they have custody of huge numbers of orphan works (many of which works are in a fragile state, but which cannot be preserved digitally at present). We particularly invite submissions from heritage institutions as to whether the good offices of the Council sketched in chapter 3 would be sufficient to move towards a resolution of this difficult issue, or whether there is something more that can and should be done from a legislative perspective.

9.7 Donations

It was submitted to us that there ought to 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. Section 123 CRRA already provides a limited example of this suggestion, allowing copyright in certain unpublished works to pass under a will:

123. *Copyright to pass under will with certain original fixations.*

Where, under a bequest (whether specific or general), a person is entitled, beneficially or otherwise, to any material thing containing an original fixation of a work which has not been made available to the public before the death of the testator, the bequest shall be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his or her death, unless a contrary intention is indicated in the will of the testator or in a codicil to that will.

To go further so as to accommodate the submissions to us, section 123 might be repealed and replaced by a broader provision, perhaps as follows:

123. ~~Copyright to pass under will with certain original fixations.~~ *Copyright to pass in transfers.*

Where a person is entitled, beneficially or otherwise, to any material thing containing an original fixation of a work, any transfer by that person of that thing shall be construed as including the copyright in the work in so far as the transferor is the owner of the copyright at the time of the transfer, unless a contrary intention is indicated in a document effecting that transfer.

We invite submissions in this regard.

¹⁰² See http://ec.europa.eu/internal_market/copyright/orphan_works_en.htm and see also the related *Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf

9.8 Text and data mining

The recent UK report recommended that there should be a change in rules to enable scientific and other researchers to use modern text and data mining techniques,¹⁰³ and the government's response accepted this recommendation.¹⁰⁴ Furthermore, in Canada, section 31 CMA would provide for additional exceptions relating to encryption research and security. These could be added to CRRRA, perhaps as follows:

106F. Digital analysis and research.

- (1) It is not an infringement of the rights conferred by this Act for a person to reproduce a work for a purpose to which this section applies if—
 - (a) it would not be practical to carry out the research without making the copy,
 - (b) the person is the owner or lawful user of the work, and
 - (c) the person has informed the owner of the rights in the work, unless this is unreasonable or inappropriate or turns out to be impossible for reasons of practicality or otherwise.
- (2) This section applies to—
 - (a) text-mining, data-mining, and similar analysis or research,
 - (b) encryption research and similar analysis or research, and
 - (c) such other analysis or research as the Minister may by order provide.
- (3) Nothing in Part VII shall be construed as operating to prevent any person from undertaking the acts permitted by this section or from undertaking any act of circumvention required to effect such permitted acts.

106G. Computer security.

- (1) It is not an infringement of the rights conferred by this Act for a person to reproduce a work for the sole purpose, with the consent of the owner or administrator of a computer, computer system or computer network, of assessing the vulnerability of the computer, system or network or of correcting any security flaws.
- (2) Nothing in Part VII shall be construed as operating to prevent any person from undertaking the acts permitted by subsection (1) or from undertaking any act of circumvention required to effect such permitted acts.

¹⁰³ *Hargreaves*, p48.

¹⁰⁴ *Response to Hargreaves*, pp11-12.

We invite submissions in this regard.

9.9 *Records open to public inspection*

It was also submitted that section 73 CRRA (concerning “records which are open to public inspection”) is ambiguously wide, but we do not see how amending the section would promote innovation.

9.10 *Submissions invited*

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?
- (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?
- (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?
- (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?
- (71) How, if at all, should legal deposit obligations 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 that can and should be done from a legislative perspective?
- (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?
- (74) Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?
- (75) Should there be related exceptions to permit computer security assessments?

10. Fair Use

10.1 *Fair Use and our Terms of Reference*

The third of our Terms of Reference requires us to

examine the US style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.

This term provides us with no standard against which to judge whether the doctrine would be “appropriate”, but it seems clear from the context of the other Terms of Reference that the relevant standard is meant to be whether the absence of a fair use doctrine from Irish copyright law amounts to a barrier to innovation, and we will consider it in that light in this chapter.

We begin with a consideration of fair use in jurisdictions which have adopted it (including the US, Israel, Singapore, and the Philippines) and jurisdictions which are considering it (including Australia, Israel, Holland and the UK) (section 10.2). Against that background, we discuss both the general issues and concerns which were raised in the submissions (section 10.3) and the particular question of whether EU law precludes the adoption of a fair use doctrine at national law (section 10.4). And we conclude this chapter with an attempt to sketch what a fair use clause for Ireland might look like if it were possible to introduce it into Irish law and if it were to be introduced as a consequence of the present Review (section 10.5).

10.2 *Fair Use in US law and in other jurisdictions*

The recent UK review introduced the topic of fair use in US law in this way:

... the US approach enables judges to take a view as to whether emerging activities in relation to copyright works should legitimately fall within the scope of copyright protection or not. Fair Use provides a legal mechanism that can rule a new technology or application of technology (like shifting music from a CD to a personal computer) as legitimate and not needing to be regulated, so opening the way to a market for products and services which use it. It has been suggested that this is one of the factors creating a positive environment in the US for innovation and investment in innovation.^{vi} Fair Use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to adjudicate objections from rights holders if innovators have trespassed too far upon their rights.¹⁰⁵

The rights afforded by copyright to rights-holders are not absolute, but are confined by a subtle structure of limitations and exceptions, and, as many of the submissions pointed out, the fair use exception was developed by the US courts as a safety valve upon the exclusive rights granted by

¹⁰⁵ *Hargreaves*, p44; on that page, footnote vi provides: “By Google and other (mainly American) technology companies”, and we received submissions to the same effect.

copyright, permitting limited and reasonable uses without permission or payment. It was codified in the Copyright Act in 1976 (17 U.S.C. § 107):¹⁰⁶

... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Although the US courts have taken the view that the fourth factor, which specifically focuses on the impact on potential market exploitation of the work, is the most important, nevertheless, each proposed use must still be examined in light of all four factors, allowing a flexible and sensitive calibration of the impact of the particular use in any given set of circumstances. Hence, in applying the fair use doctrine, the courts have consistently refused to accommodate with the fair use doctrine any of those uses that go too far and interfere with the copyright owner's normal markets for the work.

In 1996, as part of a WTO review of copyright legislation, the EU asked the US how fair use under 17 U.S.C. § 107 is consistent with Article 13 of TRIPs, which embodies the test set out in Article 9(2) of the Berne Convention (discussed in the previous chapter), and the US replied that the “fair use doctrine of US copyright law embodies essentially the same goals as Article 13 of TRIPs, and is applied and interpreted in a way entirely congruent with the standards set forth in that Article”.¹⁰⁷ In those terms, the balancing of the four fair use factors in 17 U.S.C. § 107 provides a sufficiently certain means of evaluating whether or not the proposed use in question conflicts with the normal exploitation of the work and unreasonably prejudices the interests of the rights-holder.

¹⁰⁶ For the full US Copyright Code, see <http://copyright.gov/title17/>

¹⁰⁷ See http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDF DOCUMENTS%2FT%2FIP%2FQ%2FUSA1%2EWP%2EHTM

The recently UK review pointed out that in the US, fair use has allowed “sufficient flexibility to realise the benefits of new technologies, without losing the core benefits to creators and to the economy that copyright provides” especially “in a small number of cases which have been extremely important for the development of consumer technologies, notably those relating to reverse engineering, home video recording, and internet search caching and thumbnail images”.¹⁰⁸ We received submissions to similar effect, and others pointed to user-generated content (especially parody and remix) and private copying (particularly space-shifting in the cloud).

The US is not the only country with a fair use doctrine. For example, Ireland is often bracketed together with Israel and India as global digital competitors. Like Ireland, the copyright laws of Israel and India are ultimately derived from the UK’s Copyright Act, 1911. While Israel has already amended its copyright law to include fair use, India is heading in that direction.

An important recent example of grouping Ireland with Israel and India is provided by the **IT Industry Competitiveness Index 2011** prepared by the Economist Intelligence Unit for the Business Software Alliance,¹⁰⁹ which mentioned the three countries in the first example in its key findings:¹¹⁰

... despite its obvious economic problems, or perhaps because of them, Ireland appears to have redoubled efforts to cultivate one of the world’s most competitive environments for IT producers. Private-sector R&D spending was up in the early part of the downturn (as was enrolment in science programs). With IT patent generation also increasing, the effect is to boost Ireland’s score for the R&D environment and advance the country to joint 8th position this year from 11th in 2009. A similar improvement in the R&D environment, with higher private-sector spending along with increased patent activity, lifts Israel from 13th to joint 10th. And significant improvement across all R&D environment indicators, as well as in higher education enrolment, has boosted India ten places to joint 34th this year.

As to the rankings themselves,¹¹¹ the US is ranked at number 1 (no 1 in 2010), Singapore is ranked at number 3 (up from no 9 in 2010), the UK is ranked at number 5 (up from no 6 in 2010), **Ireland is ranked at number 8** (up from no 11 in 2010; Ireland’s ranking at number 8 is joint with Australia, which is down from number 7 in 2010), Israel and Holland are jointly ranked at number 10 (Israel is up from no 13 in 2010; Holland is down from number 5 in 2010) and India is at number 34 (up from no 44 in 2010, one the biggest improvements of the year).

¹⁰⁸ *Hargreaves*, p47.

¹⁰⁹ See <http://globalindex11.bsa.org/>

¹¹⁰ See <http://globalindex11.bsa.org/key-findings/>

¹¹¹ See <http://globalindex11.bsa.org/country-table/>

The suitability of the legal environment to IT competitiveness is one of the ranking criteria, and both Israel and India are progressively improving their law in this respect. In particular, in Israel, the Copyright Act, 1914, was modelled on the UK's 1911 Act, which remained in force until the enactment of the recent Copyright Act, 2007,¹¹² which took effect on 25 May 2008. It is still a recognisable cousin of CRR; its list of exceptions to and limitations upon copyright draws both from English law and from EU Directive; and section 19 of contains a fair use clause:

- (a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
- (b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following:
 - (1) The purpose and character of the use;
 - (2) The character of the work used;
 - (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
 - (4) The impact of the use on the value of the work and its potential market.
- (c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

Likewise, in India, their Copyright Act, 1914, was also modelled on the UK's 1911 Act; and it was replaced in 1957 by an Act modelled on the UK's Copyright Act, 1956. Indeed, in Ireland, the Copyright Act, 1963¹¹³ was also modelled on the UK's 1956 Act. Now, in India, the still-pending Copyright (Amendment) Bill, 2010¹¹⁴ would introduce an expanded fair dealing exception that goes a very long way down the road to a fair use doctrine. Indeed, in Singapore, section 35 of the Copyright Act, 1987 (as amended)¹¹⁵ has gone even further, setting out - under the heading of fair dealing - what is effectively a fair use defence: for example, section 35(2) is in similar terms to 17 U.S.C. § 107, with the addition of a fifth criterion:

- (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

The legal system of the Philippines is a mixed one, with elements of its civilian (Spanish) and common law (US) heritage, and its intellectual property regime largely reflects US influences. It is unsurprising, then, that

¹¹² See <http://www.wipo.int/wipolex/en/details.jsp?id=5016> and <http://www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf>

¹¹³ See <http://www.irishstatutebook.ie/1963/en/act/pub/0010/index.html>

¹¹⁴ See <http://164.100.24.219/BillsTexts/RSBillTexts/asintroduced/copyright.pdf>

¹¹⁵ <http://www.ipos.gov.sg/NR/rdonlyres/138E6C9D-983E-4D81-8BC6-7F0848DC9CE1/14479/CopyrightAct.pdf>

section 185 of the Intellectual Property Code of the Philippines (Republic Act No. 8293) (1997)¹¹⁶ contains a fair use clause:

185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (b) The nature of the copyrighted work;
- (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) The effect of the use upon the potential market for or value of the copyrighted work.

185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Other countries are moving in a similar direction. In Australia, although a previous government had resiled from introducing the doctrine,¹¹⁷ the current government is revisiting copyright and digital technology issues, including fair use.¹¹⁸ The recent UK review referred to many of these developments, but it felt unable to recommend that the UK adopt a fair use doctrine due to EU law concerns,¹¹⁹ and it recommended instead that the UK implement all of the exceptions permitted by EU law whilst, exploring at EU level “a new mechanism in copyright law to create a built-in adaptability to future technologies”.¹²⁰ This exception for non-consumptive uses would allow “uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work” and “do not compete with the normal exploitation of the work itself”.¹²¹ The UK government’s response agreed to seek to “secure further flexibilities at EU

¹¹⁶ See http://www.congress.gov.ph/download/ra_10/RA08293.pdf

¹¹⁷ See http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_IssuesandReviews_Fairuse

¹¹⁸ See http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_25February2011-AddresstotheBlueSkyConferenceonfuturedirectionsinCopyrightlaw (the Attorney-General intends to provide the Australian Law Reform Commission with a reference on copyright).

¹¹⁹ *Hargreaves*, pp9, 46.

¹²⁰ *Ibid*, p47.

¹²¹ *Ibid*.

level that enable greater adaptability to new technologies”.¹²² The Dutch government is prepared to go further: it is interested in introducing a fair use doctrine into Dutch law, and has confirmed its commitment to initiating a discussion on this matter at European level.¹²³

We are particularly interested in submissions on the question of whether the Irish government should 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 is clear from this survey that there is nothing intrinsically or exclusively American about the fair use doctrine. It has found homes in other common law countries, and the UK would be among their number if EU law permitted. It has also found homes in mixed and civilian jurisdictions, and Holland would be among them if EU law permitted. In principle, given both Ireland’s shared common law heritage with the common law countries which either have or wish to adopt the doctrine, and Ireland’s shared EU membership with member states which also wish to adopt the doctrine, there is no reason why a transplant of the doctrine should necessarily fail. The real problem is not the suitability of the Irish soil, but the suitability of the plant (the doctrine itself) and of the wider environment (in particular, EU law).

10.3 Fair Use and the submissions

The submissions were deeply divided on whether the fair use doctrine has had a positive impact on innovation in the United States and on whether it could do so in Ireland. As with the UK review,¹²⁴ most of the submissions we received were opposed to the doctrine. However, it is not so much a question of head count on either side of an issue as one of the strength of the arguments being made; for example where one US digital technology pioneer regularly claims that fair use has been crucial to its business model and that it could not have survived, let alone thrived, under current Irish or EU law, another claims that it can operate equally well in Ireland and Europe as in the US. In our view, the arguments on both sides are easily overstated, and the rhetoric is often overblown as a consequence. The arguments in the submissions fell broadly into four categories.

First, some trenchant critics described fair use as a synonym for widespread infringement and an excuse for unfettered exploitation; whilst its apologetic enthusiasts argued that this is to misconceive a doctrine that presupposes the protection of copyright and simply permits an exception that does not interfere with the copyright owner’s normal markets for a copyright work. Similarly, its more sober critics argued that, for creators, there is nothing fair about fair use; whilst its enthusiasts argued that the creative industries are thriving in the US in part because of the doctrine. Again, critics say that fair use undermines the incentive for rights holders to innovate, whilst

¹²² *Response to Hargreaves*, pp8,16.

¹²³ See Kamerstuk (Parliamentary Record) 21501-34, no. 155.

¹²⁴ *Hargreaves*, p44.

enthusiasts say that it fosters the creativity the copyright system is designed to encourage. In essence, the critics' point here is that fair use subverts the interests of rights holders, whilst the enthusiasts' point here is that it brings balance to the copyright system and accommodates the interests of other parties.

Second, for its critics, a significant objection to the fair use doctrine is that it is unclear, and can thus undermine existing business models. On the other hand, for its enthusiasts, the main benefit of the fair use doctrine is that it is flexible, and can thus accommodate new technologies and emerging business models. The critics point to lengthy and costly legal proceedings (it took a lengthy and costly case all the way to the US Supreme Court to confirm that parody can amount to fair use); the enthusiasts point to decided cases on which others can thereafter rely (now, large numbers of users generate their own parodies, and similar content, sometimes commercially, sometimes not). In truth, these points amount to one and the same thing, which is that the doctrine needs interpretation in the courts. The critics' fears can be overstated: all law, whether judge-made or statutory, is certain or uncertain to some degree. By the same token, however, the enthusiasts' dismissals of these fears can also be overdone: an open standard will, by definition, give rise to open questions.

Many submissions made the related point that the (uncertain/flexible) common law heritage of a fair use doctrine would make it inappropriate in (codified) civil law countries and the EU. However, this is a red herring: code provisions in civilian jurisdictions are often very general indeed; doctrines from all legal traditions influence EU law; and civilian (such as the Netherlands) and mixed jurisdictions (such as Israel and the Phillipines) see no such objections to the doctrines. In essence, whatever about this red herring, the critics' point here is that fair use is founded upon unwelcome vagueness, whilst the enthusiasts' point here is that it brings desirable versatility.

A third category of submission argued that the fair use doctrine is not, in fact, necessary as Irish law currently stands. Many critics argued that the long-established and well-understood CRRA exceptions - in particular, the fair dealing provisions - were ample, whilst some said that the addition of the EUCD exceptions (discussed in section 7.2 above) would be more than sufficient, and a few could envisage further specific exceptions being enacted in the future. On the other hand, enthusiasts for fair use argue that fair dealing is insufficient to support many aspects of emerging digital business models, and that an approach based on iterated exceptions (even as extensive a list as that contained in EUCD) rather than upon an overarching principle is too inflexible to accommodate technological innovation of the kind that has stimulated the growth of high-tech business in the US.

A number of submissions made the related point that at least some of the issues might be met by greater use of licences, voluntary and compulsory, to provide access to commercially available content. However, other

submissions pointed out that there would be limits to such schemes, that they would not provide access to content where licensing is inapt, and that an overly complex licensing system would itself create barriers to innovation.

In the end, all three points amount to the same conflict between certainty and flexibility, and the resolution of that conflict is not so much a legal one as a political one based upon empirical evidence and general policy considerations. This leads to the fourth category of submissions, which concerned such empirical evidence and policy considerations.

Some submissions argued that there is no evidence that the current copyright system in Ireland is inhibiting innovation, and in particular, that there is no evidence that a fair use doctrine is necessary to encourage innovation. On the other hand, there were many submissions to the effect that innovators in the US benefit greatly from the doctrine, especially in the digital environment. In particular, it was submitted to us that many business models both offline (reverse engineering, private copying and time shifting) and online (search, indexing and retrieval, remixing and sharing remixed videos, and space shifting via the cloud) are possible only because of the fair use doctrine. On this view, although many other factors have also influenced technology growth in US, the fair use doctrine has been at least one important factor in digital innovation in the US. However, the submissions often had more in the nature of the assertions rather than evidence, and certainly did not provide sufficient evidence to compel a decision one way or the other.

As to general policy considerations, many submissions counselled caution on the basis that relatively few countries have adopted the doctrine. Other submissions argued that this very fact could provide an early mover advantage. In this respect, it is noteworthy that all of the countries with a fair use doctrine, or considering its introduction, are Ireland's direct competitors in the IT Industry Competitiveness Index 2011 considered above. However, the submissions did not provide sufficient discussion of general policy considerations to compel a decision one way or the other.

In the end, these various arguments are finely balanced; we are therefore particularly interested in submissions which provide empirical evidence and general policy considerations one way or the other.

10.4 Fair Use and EU law

Our third Term of Reference requires us to examine whether the fair use doctrine would be appropriate both in an Irish and in an EU context. The fourth of our Terms of Reference also directs us to look to EU law:

If it transpires that national copyright legislation requires to be amended but cannot be amended, (bearing in mind that Irish copyright legislation is bound by the European Communities Directives on Copyright and Related Rights and other international obligations) [then the Committee should] make recommendations for

changes to the EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.

EU law was invoked both by critics of the doctrine (as a reason why it should not be adopted at Irish law) and by its enthusiasts (as a reason to press for its adoption at an EU level). In section 10.2 above, we sought submissions on the question whether the Irish government should join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine. The main question in this section is whether EU law precludes the adoption of a fair use doctrine at national law.

On the one hand, EUCD is a complete code, and critics therefore take the absence of a reference in it to fair use as absolutely precluding its adoption at national law. On the other hand, enthusiasts point out that whilst EUCD has harmonised a great deal of copyright law, there is still wide scope for national rules. For example, the fair use doctrine can be seen on many levels, only some of which might raise EUCD concerns. The doctrine is often presented as an exception to copyright or as a defence to an infringement action which are indeed subject to EUCD. However, while these matters are harmonised by EUCD insofar as they relate to “reproduction”, “communication” and “distribution”, they are not harmonised in relation to other matters such as adaptation and translations. Furthermore, fair use can be envisaged as a doctrine that defines the ambit of copyrightability and thus not an infringement at all, and EUCD does not harmonise the definition of copyright at national law.

Moreover, whilst the EU does indeed accord high protection to intellectual property, there is nothing whatsoever in EU directives or the case-law of the CJEU to suggest that that right is inviolable and must for that reason be absolutely protected. Rather, case law is increasingly stressing that protection of intellectual property must be balanced against the protection of other fundamental rights. In this respect, if fair use is a means of protecting other fundamental rights (such as freedom of information, users’ freedom of expression or intermediaries’ freedom to provide services), then EUCD would have to be interpreted consistently with it.

Nor do internal market considerations hinder a Member State which wishes to adopt a fair use doctrine as a matter of national law. EUCD already tolerates different levels of copyright exceptions, thereby permitting different Member States to adopt some different copyright rules without leading to a disproportionate distortion of the EU’s internal market.

The basic point here is that there is a great deal of scope under EU law for member states to adopt a fair use doctrine as a matter of national law. However, even if the EU does not necessarily preclude fair use at national law, it certainly does not mandate it. So, the matter once again becomes an issue of politics and policy at the level of Irish law; and, as we said in section 10.3 above, we are therefore particularly interested in submissions

which provide empirical evidence and policy arguments one way or the other on this point.

10.5 A Fair Use Clause for Ireland?

It will by now be clear that we are, as yet, unconvinced by the arguments on both sides of the fair use debate.

On the one hand, we have set out in previous chapters what the EUCD exceptions might look like in CRRA terms. Critics of fair use have argued that the CCRA and EUCD exceptions are sufficient, whilst enthusiasts for the doctrine have argued that they do not go far enough. In inviting submissions on those drafts, we particularly invite submissions as to whether the possible draft exceptions already suggested are sufficient or not to encourage innovation without going so far as to adopt a fair use doctrine.

On the other hand, since we have to attempt to draft EUCD exceptions in CRRA terms, we think we should also attempt to set out here what a fair use doctrine might look like in CRRA terms. **Again, this is simply for the purposes of debate, and we very tentatively offer it here, not because we are recommending the the doctrine or this draft, but rather simply as an indication of what such a clause might look like.** It is not a perfect definition; indeed, it cannot be; but that does not mean that we cannot at least attempt to craft a workable one, based on three paramount considerations.

First, it should take full account of the legitimate concerns raised by the doctrine's critics.

Second, it should be tied as closely as possible to the existing exceptions: the exceptions should be regarded as examples of fair use so as to allow workable analogies to be developed; and the exceptions should be exhausted before any claim of fair use can be considered. Part II CRRA deals with copyright, and the acts permitted in relation to works protected by copyright in Chapter 6 start at section 49, so putting it in as a new section 48A immediately before section 49 allows it both to be tied to and to be informed by the existing exceptions.

Third, it should be based not just on the four US criteria, but also on Article 9(2) of the Berne Convention and on the experience of other countries which have adopted a similar doctrine. In this way, there will be a wide range of international authorities - in particular, extensive US caselaw - on which to draw for the purposes of interpretation.

A new first section of Part II, Chapter 6 might therefore look like this:

48A. Fair Use.

- (1) The fair use of a work is not an infringement of the rights conferred by this Part.

- (2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any given case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.
- (3) For the purposes of this section, the court shall, in determining whether the use made of a work in any particular case is a fair use, take into account such matters as the court considers relevant including any or all of the following—
 - (a) the extent to which the use is of a nature and extent that is analogically similar to the acts permitted by this Part,
 - (b) the purpose and character of the use, including whether such use is of a commercial or non-commercial nature,
 - (c) the nature of the copyrighted work,
 - (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the copyrighted work as a whole,
 - (e) the impact of the use upon the normal exploitation of the copyrighted work, such as its age, value and potential market,
 - (f) the possibility of obtaining the copyrighted work within a reasonable time at an ordinary commercial price,
 - (g) whether the legitimate interests of the owner of the rights in the copyrighted work are unreasonably prejudiced by the use, and
 - (h) whether the use is accompanied by a sufficient acknowledgement.
- (4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section.
- (5) The Minister may, by order, make regulations for the purposes of this section—
 - (a) prescribing what constitutes a fair use in particular cases, and
 - (b) fixing the day on which this section shall come into operation.

Subsection (1) introduces the fair use doctrine, and subsection (2) ties it very closely to the existing exceptions.

Subsection (3) sets out the criteria for the court to take into account in determining whether a matter amounts to a fair use. The introductory clause to that subsection is modelled on section 26(2) of the Defamation Act, 2009, which similarly sets out a list of factors for the court to take into account (in that case, for the defence of fair and reasonable publication), and the fair use criteria are drawn from many sources, not just the US:

- paragraph (a) reinforces the connection to the CRRRA exceptions;
- paragraph (b) is a common US-derived criterion; the Israeli version does not include a second clause at all, but an edited version of the US language of the second clause is included here;
- paragraph (c) is a common US-derived criterion;
- paragraph (d) is a common US-derived criterion, with the addition of "quantitatively and qualitatively" by analogy with the Israeli version;
- paragraph (e) is a common US-derived criterion, heavily modified by reference to Berne, and with more than half an eye to the Israeli version. The reference to the age of the copyright work is added so that fair use can expand gradually as the copyright in question ages and is less likely to be commercially exploited. Of course, as the longevity of the Mickey Mouse and 'Happy Birthday' copyrights demonstrate, there are cases where long-established copyrights continue to be extremely valuable and commercially exploited; but the proliferation of orphan works shows the other side of the coin. The reference to "age" allows this issue at least to be considered by the court;
- paragraph (f) is an element of the Singaporean version of the doctrine;
- paragraph (g) is a Berne criterion; and
- paragraph (h) is a Berne criterion in CRRRA language.

Subsection (4) is a common US-derived criterion; subsection (5) is a standard boilerplate clause in most of the suggested exceptions in this Paper; and subsection (6) means that the ground can be thoroughly prepared before the clause comes into effect:

- paragraph (a) is suggested by the Israeli provision. It means that the Minister can provide additional detail on the issue of fair use; and if a Copyright Council is established along the lines suggested in Chapter 3, with the power to consult widely among the copyright community and the entitlement to be consulted by the Minister before making orders under the Act, then the detail provided by the Minister could be informed by the Council and its wide consultation;
- paragraph (b) allows the Minister to bring the section into effect only when the time is right, and thus the Minister may delay bringing it into effect at least until after the process envisaged in the previous paragraph has concluded.

10.6 Conclusion

Fair use is the issue which aroused the greatest passions both in the submissions and at the public meeting. On the one hand, its critics often characterised it as little better than parasitic larceny, allowing a user to take unfair commercial advantage of a rights-holder's work. On the other hand, its enthusiasts argued that, in the context of innovation, it is better to be bold than to be timid, and that, to support innovation, Irish copyright law must itself be innovative and introduce an exception permitting reasonable uses of copyrighted works. It is impossible to reconcile these extreme positions, but a more balanced outcome may yet be achieved.

10.7 Submissions invited

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (76) What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?
- (77) (a) What EU law considerations apply?
 - (b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?
- (78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?
- (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?
- (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?
- (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?
- (82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?
- (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?

11. Conclusion

No Irish copyright survey would be complete without the obligatory reference to the timeworn story of the sixth-century judgment of Diarmaid, High King of Ireland, who held against St Columba in a copyright dispute with St Finian of Clonard. Columba had illicitly copied a psalter in Finian's scriptorium; and Diarmaid ordered Columba to deliver the copy to Finian:

To every cow its calf and to every book its copy.¹²⁵

This legend suggests that Ireland was the first country in the world to protect copyright. We now have the opportunity to be world leaders once again. The aim of the present Review is to search for ways to seize that opportunity.

This Paper is simply a discussion document which sets out issues and poses questions. We have formed no fixed conclusions, we have come to no final decisions, and we have made no firm recommendations - such matters are for our final **Report**. In this Paper, we simply discuss the concerns which have been expressed to us, and explore various options to meet those concerns in the light of our Terms of Reference. Furthermore, we have attempted to provide tentative and provisional drafts of possible sections of that Bill. **However, we cannot stress enough that these drafts do not in any way represent settled conclusions on our part. Rather they are provided here for the purposes of discussion in the submissions.** We will come to our conclusions based on the responses to this Paper, and we will make our recommendations in our final Report.

The development of a Council, incorporating a digital copyright exchange and an alternative dispute resolution service, is one of the possibilities which we explored above. If this idea is adopted by the Irish copyright community, it has the potential to take great strides under all four of our Terms of Reference.

The first and second of our Terms of Reference required us to

1. Examine the present national Copyright legislation and identify any areas that are perceived to create barriers to innovation.
2. Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation.

¹²⁵ See J Phillips "St Columba the Copyright Infringer" [1985] 12 *EIPR* 350-353; available at <<https://sites.google.com/site/ipkatreaders/history/stcolumba.pdf>>

We understood innovation very broadly as a process which results in a significant or substantial improvement, or enhancement, or transformation, or in something different, or even entirely new, to generate economic growth and deliver benefits to society as a whole. At various points in the Paper, we discuss specific possible amendments to CRRA to encourage such innovation, including:

- the improvement of remedies and court procedures;
- the clarification of the position of intermediaries and of temporary and incidental reproductions;
- the introduction of exceptions permitted by EU law (including those relating to format-shifting, user-generated content and parody);
- the modernisation of exceptions for education, teaching and research, and for libraries, archives and galleries; and
- the desirability of a specialist exception for innovation.

The third and fourth of our Terms of Reference required us to

3. Examine the US style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.
4. If it transpires that national copyright legislation requires to be amended but cannot be amended (bearing in mind that Irish copyright legislation is bound by the European Communities Directives on Copyright and Related Rights and other international obligations), make recommendations for changes to the EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.

We referred to EU law - and in particular EUCD - at various points in the Paper, but the main issue on which possible changes to EU law arose was in regard to the fair use doctrine, and, for the purposes of discussion, we attempted to sketch what a fair use clause for Ireland might look like, having regard to developments elsewhere.

In that context, as in many others, we kept running into the problem that the submissions contained a great deal of assertion but very little hard evidence. For this reason, many of the specific questions which we posed at various stages above invite further submissions with supporting evidence. Many of the issues which arose in the first round of submissions are as much matters of policy as they are of law, and we need proper evidence if we are to make sound recommendations on such policy issues.

For convenience, all of the questions which we posed at the end of the various chapters are gathered together in Appendix 3 below. Similarly, we have gathered together in Appendix 4 all of the tentative amendments to CRRA which we attempted to draft at various points in the Paper. We invite

submissions on all of these issues. We should say that we don't expect any respondents to attempt to answer all of the questions which we have posed, or to discuss all of the tentative amendments which we have drafted. Of course, the more comprehensive the submissions are, the better the final Report will be. Moreover, we particularly encourage responses with draft legislative text, as this serves to make clear both what an issue is and what its legislative solution might be.

We look forward to the next round of submissions, and to a final Report and draft Copyright and Related Rights (Innovation) (Amendment) Bill which, we hope, will establish Irish copyright law on a firm footing to encourage innovation, foster creativity, and meet the challenges of the future with confidence. It will, we hope, be an appropriate legacy for Diarmaid's judgment in the dispute between Columba and Finian.

To conclude: a final question on which we invite submissions:

(86)¹²⁶ What have we missed?

¹²⁶ Please note that this question number is slightly out of sequence. The last question in the previous chapter was number (83). There are two questions in Appendix 2, which are numbered (84) and (85), so that the question above can be the last question in the list in Appendix 3.

Appendix 1

List of submissions

Listed below are those who made submissions to us; they are available on our website at http://www.djei.ie/science/ipr/crc_submissions.htm

- 1 Ad Hoc Group of Concerned Librarians
- 2 AGICOA
- 3 ALTO
- 4 Arts Council
- 5 Association of Independent Radio Producers of Ireland (AIRPI)
- 6 Association of Irish Racehorse Owners
- 7 Authors' Licensing and Collecting Society Limited (ALCS)
- 8 Bently, Professor Lionel
- 9 Bonnar, Gavin
- 10 Bord Scannan na hÉireann/The Irish Film Board
- 11 British & Irish Association of Law Librarians (BIALL) Irish Group
- 12 Brophy, David
- 13 BskyB
- 14 Business Software Alliance
- 15 Carroll, Peter
- 16 Channel Four Television Corporation (Channel 4)
- 17 Clark, Prof Robert
- 18 Collecting Societies Forum
- 19 Commission for Communications Regulation (ComReg)
- 20 Computer & Communications Industry Association (CCIA)
- 21 Consortium of National and University Libraries (CONUL)
- 22 Copyright Agency Limited
- 23 Cunningham, Gerard
- 24 De La Harpe Golden, David
- 25 Department of Arts, Heritage and the Gaeltacht
- 26 Digital Rights Ireland Ltd.
- 27 Directors Guild of America (DGA)
- 28 Distilled Media Limited
- 29 Dnes, Professor Antony W.
- 30 eircom Limited
- 31 Electronic Frontier Foundation
- 32 Ericsson
- 33 European Newspaper Publishers' Association (ENPA)

- 34 Federation of European Publishers (FEP)
- 35 Frost, Dermot

- 36 Garvey, Daire
- 37 Google
- 38 Gough, James

- 39 Independent Broadcasters of Ireland (IBI)
- 40 ICT Ireland
- 41 IDA Ireland
- 42 Interactive Software Federation of Europe (ISFE)
- 43 International Association of Scientific, Technical & Medical Publishers (STM)
- 44 International Digital Services Centre (IDSC)
- 45 International Publishers Association (IPA)
- 46 Internet Service Providers Association of Ireland (ISPAI)
- 47 Irish Copyright Licensing Agency (ICLA)
- 48 Irish Free Software Organisation (IFSO)
- 49 Irish Hotels Federation (IHF)
- 50 Irish Music Rights Organisation Limited (IMRO)
- 51 Irish National Federation Against Copyright Theft Limited (INFACT)
- 52 Irish Playwrights' and Screenwriters' Guild
- 53 Irish Professional Photographers' Association (IPPA)
- 54 Irish Recorded Music Association (IRMA)
- 55 Irish Writers' Union
- 56 IVARO (Irish Visual Artist' Rights Organisation)

- 57 Kelly, Nick

- 58 Law Society of Ireland Business Law Committee
- 59 Library Association of Ireland (LAI)
- 60 Licensed Vintners Association (LVA)
- 61 Lindberg, Barbara

- 62 Mac Síthigh, Dr. Daithí
- 63 Malone, David
- 64 Mc Hugh, Mark
- 65 Microsoft
- 66 Motion Picture Association (MPA)
- 67 Mulcahy, Ross
- 68 Murray, Christine
- 69 Music Managers Forum Ireland (MMF)

- 70 National Council for the Blind of Ireland (NCBI)
- 71 National Gallery of Ireland (NGI)
- 72 National Library of Ireland
- 73 National Newspapers of Ireland (NNI) & NNI Local & Regional Newspapers

- 74 National Union of Journalists (NUJ)
- 75 Newspaper Licensing Agency
- 76 Newspaper Licensing Ireland Ltd (NLI)
- 77 Nokia Corporation

- 78 Ó Lachtnáin, Antoin
- 79 O'Brien Press
- 80 O'Dowd, Micheál
- 81 O'Dwyer, Adele
- 82 O'Regan, Damian

- 83 Pearson Group
- 84 The Publishers Association
- 85 Publishing Ireland

- 86 Recorded Artists Actors Performers (RAAP)
- 87 Regional Newspapers and Printers Association of Ireland (RNPAI)
- 88 Raidió Teilifís Éireann (RTÉ)
- 89 Ryan, Eamon

- 90 Saor Cultur Eire
- 91 Science Foundation Ireland (SFI)
- 92 Screen Directors Guild of Ireland (SDGI)
- 93 Society of Film Exhibitors
- 94 Sports and Media Rights International Ltd (SMRI)

- 95 Trinity College Dublin Library
- 96 TV3

- 97 Weld, John M.
- 98 Weld, John M. (2)

Appendix 2

List of amendments to CRRA, to date

1. *Primary Legislation*

Copyright and Related Rights (Amendment) Act, 2004; available at <http://www.irishstatutebook.ie/2004/en/act/pub/0018/>

Copyright and Related Rights (Amendment) Act, 2007; available at <http://www.irishstatutebook.ie/2007/en/act/pub/0039/>

2. *Sections in primary legislation which amend CRRA*

There are references to CRRA in many other pieces of legislation (especially the Industrial Designs Act, 2001); and some of them amend CRRA, including:

Schedule 6 of the Arbitration Act, 2000 amends section 367(8) CRRA.

Section 47 of the Patents (Amendment) Act 2006 enacts a new section 364A CRRA, while section 48 of the 2006 Act repeals section 367 CRRA.

Section 183(a) of the Broadcasting Act, 2009 amends the definition of “broadcast” in section 2 CRRA.

3. *Secondary Legislation*

Copyright and Related Rights (Recording of Broadcasts and Cable Programmes For Archival Purposes) (Designated Bodies and Classes) Order, 2000 (SI No 405 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0405.html>

Copyright and Related Rights (Provision of Modified Works) (Designated Bodies) Order, 2000 (SI No 406 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0406.html>

Copyright and Related Rights (Recording For Purposes of Time-Shifting) Order, 2000 (SI No 407 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0407.html>

Copyright and Related Rights (Works of Folklore) (Designated Bodies) Order, 2000 (SI No 408 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0408.html>

Copyright and Related Rights (Educational Establishments and Establishments To Which Members of the Public Have Access) Order, 2000 (SI No 409 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0409.html>

Copyright and Related Rights (Educational Establishments) Order, 2000 (SI No 410 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0410.html>

Copyright and Related Rights (Material Open To Public Inspection) (International Organisations) Order, 2000 (SI No 411 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0411.html>

Copyright and Related Rights (Librarians and Archivists) (Copying of Protected Material) Regulations, 2000 (SI No 427 of 2000); available at <http://www.irishstatutebook.ie/2000/en/si/0427.html>

Copyright and Related Rights (Register of Copyright Licensing Bodies) Regulations, 2002 (SI No 463 of 2002); available at <http://www.irishstatutebook.ie/2002/en/si/0463.html>

Copyright and Related Rights (Certification of Licensing Scheme For Reprographic Copying by Educational Establishments) (The Irish Copyright Licensing Agency Limited) Order, 2002 (SI No 514 of 2002); available at <http://www.irishstatutebook.ie/2002/en/si/0514.html>

European Communities (Copyright and Related Rights) Regulations, 2004 (SI No 16 of 2004); available at <http://www.irishstatutebook.ie/2004/en/si/0016.html>

European Communities (Enforcement of Intellectual Property Rights) Regulations, 2006 (SI No 360 of 2006); available at <http://www.irishstatutebook.ie/2006/en/si/0360.html>

Copyright and Related Rights (Register of Licensing Bodies for Performers Property Rights) Regulations, 2008 (SI No 306 of 2008); available at <http://www.irishstatutebook.ie/2008/en/si/0306.html>

Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008 (SI No 597 of 2008); available at <http://www.irishstatutebook.ie/2008/en/si/0597.html>

Copyright and Related Rights (Proceedings Before the Controller) Rules, 2009 (SI No 20 of 2009); available at <http://www.irishstatutebook.ie/2009/en/si/0020.html>

Copyright and Related Rights Act, 2000 (Notice of Seizure) Regulations 2009 (SI No 440 of 2009); available at <http://www.irishstatutebook.ie/2009/en/si/0440.html>

4. Sections in secondary legislation which amend CRRA

Sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations, 2003 (SI No 68 of 2003); available at <http://www.irishstatutebook.ie/2003/en/si/0068.html>

have an impact not just on copyright but more generally to all activities by online intermediaries. It is a fine balance whether to include these provisions in a Bill which consolidates all of the amendments to CRRA in one place, and we invite submissions in this regard.

5. Consolidation

If the recommendations which we make in our Report are enacted, then a single consolidation of the CRRRA as amended should be prepared and maintained by the Copyright Council.

6. Submissions invited

We invite submissions on the following issues:

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

Appendix 3

List of questions

We therefore invite submissions on foot of the discussions above, and in particular on the following issues:

- (1) Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?
- (2) Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?
- (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?
- (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?
- (5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?
- (6) What is the proper balance to be struck between the categories from the perspective of encouraging innovation?
- (7) Should a Copyright Council of Ireland (Council) be established?
- (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?
- (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?
- (10) What should the composition of its Board be?
- (11) What should its principal objects and its primary functions be?
- (12) How should it be funded?
- (13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?
- (14) What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?
- (15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?
- (16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?
- (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?

- (18) Should the statutory licence in section 38 CRRA be amended to cover categories of work other than “sound recordings”?
- (19) Furthermore, what should the inter-relationship between the Controller and the ADR Service be?
- (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?
- (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?
- (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?
- (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?
- (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?
- (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?
- (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?
- (27) Should the sound track accompanying a film be treated as part of that film?
- (28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?
- (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?
- (30) Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?
- (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?
- (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?

- (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?
- (34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?
- (35) Should the special position for photographs in section 51(2) CRRA be retained?
- (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?
- (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?
- (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?
- (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?
- (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?
- (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?
- (42) If there is a case for such immunities, to which remedies should 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 - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?
- (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?
- (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?
- (46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of 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?
- (48) Does copyright law inhibit the work of innovation intermediaries?
- (49) Should there be an exception for photographs in any revised and expanded section 51(2) CRRA?
- (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?
- (51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?
- (52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?
- (53) If so, what exactly should it provide?
- (54) Does copyright law pose other problems for intermediaries' emerging business models?
- (55) Should the definition of "fair dealing" in section 50(4) and section 221(2) CRRA be amended by replacing "means" with "includes"?
- (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?
- (57) Should CRRA references to "research and private study" be extended to include "education"?
- (58) Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?
- (59) Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters' behalf?

- (60) Should the exceptions for social institutions be repealed, retained or extended?
- (61) Should there be a specific exception for non-commercial user-generated content?
- (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?
- (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?
- (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?
- (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?
- (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?
- (67) Should there be an exception permitting format-shifting for archival purposes for heritage institutions?
- (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?
- (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?
- (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?
- (71) How, if at all, should legal deposit obligations 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 that can and should be done from a legislative perspective?
- (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?
- (74) Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?

- (75) Should there be related exceptions to permit computer security assessments?
- (76) What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?
- (77) (a) What EU law considerations apply?
(b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?
- (78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?
- (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?
- (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?
- (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?
- (82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?
- (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?
- (84) Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?
- (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)?
- (86) What have we missed?

We would be delighted to receive any responses to any of these questions. It is not necessary for any submission to seek to answer all of them.

Appendix 4

List of proposed draft statutory provisions

In our Report, we hope to be able to provide draft heads of a **Copyright and Related Rights (Innovation) (Amendment) Bill, 2012** to implement our recommendations. As a consequence, we have attempted at various stages in this Paper to provide early drafts of possible sections of that Bill, and we bring all of these drafts together in this Appendix. They do not represent settled conclusions on our part. Rather they are provided here for the purposes of discussion in the submissions. Moreover, we particularly encourage responses with draft legislative text, as this serves to make clear both what an issue is and what its legislative solution might be.

Our Copyright and Related Rights (Innovation) (Amendment) Bill, 2012 might amend the Copyright and Related Rights Act, 2000 in the following ways:¹²⁷

2. *Interpretation.*

(1) In this Act, unless the context otherwise requires—

...

~~“disability” has the same meaning as in section 48 of the Statute of Limitations, 1957;~~

...

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

...

(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, ~~it is irrelevant whether or not there exists~~ any term or condition in an agreement which purports to prohibit or restrict that act shall be void.

17. *Copyright and copyright works.*

...

(7) The sound track accompanying a film shall be treated as part of the film.

¹²⁷ The section numbers correspond with those in CRRA. For the most part, these are new provisions, to be inserted into CRRA either at or in place of the sections indicated. However, some are amendments to existing text, and those amendments are shown here thus: ~~this is deleted text~~; **this is added text**.

24. *Duration of copyright in a literary, dramatic, musical or artistic work or an original database.*

- (1) The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective **either** of the date on which the work is first lawfully made available to the public **or of whether the work is ever made available to the public.**

50. ~~*Fair dealing: research or private study.*~~

Fair dealing: education, research or private study.

- (1) Fair dealing with a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, or non-electronic original database, for the purposes of **education**, research or private study, shall not infringe any copyright in the work.
- (2) Fair dealing with a typographical arrangement of a published edition for the purposes of **education**, research or private study shall not infringe any copyright in the arrangement.
- [(3) Unchanged.]
- (4) In this Part, “fair dealing” ~~means~~ **includes** the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.

51. *Fair dealing: criticism or review.*

...

- (2) (a) It is not an infringement of the rights conferred by this Part if works (other than photographs) on current economic, political or religious topics or other subject-matter of the same character are reproduced by the press and communicated by them to the public; provided that
- (i) such use is not expressly reserved, and
 - (ii) the reproduction and communication is accompanied by a sufficient acknowledgement unless to so do would be impossible for reasons of practicality or otherwise.

- (b) In particular, fair dealing with a work (other than a photograph) for the purpose of reporting current events shall not infringe copyright in that work, where the report is accompanied by a sufficient acknowledgement unless to do so would be impossible for reasons of practicality or otherwise.
- (c) Where a reproduction which would otherwise be an infringing copy is made under paragraphs (a) or (b), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

52. ~~**Incidental inclusion of copyright material**~~
Fair dealing: other examples.

- ...
- (5) Fair dealing with a work for the purposes of use during religious celebrations or official celebrations organised by a public authority shall not infringe copyright in that work, where the use is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.
 - (6) Fair dealing with a work for the purposes of caricature, parody, pastiche, or satire, or for similar purposes, shall not infringe copyright in that work.
 - (7) Fair dealing with a work for the purposes of use in connection with the demonstration or repair of equipment shall not infringe copyright in that work.

57. ~~**Reprographic copying by educational establishments of certain works.**~~
Illustration for education, teaching and research.

- (1) (a) It is not an infringement of the rights conferred by this Part to make or to cause to be made a reproduction or communication for the sole purpose of illustration for education, teaching or scientific research.
- (b) In particular, it is not an infringement of the rights conferred by this Part for an educational establishment, for the educational purposes of that establishment, to reproduce a work, or do any other necessary act, in order to display it.

- (2) Subsection (1) shall apply only if the reproduction or communication is—
 - (a) made for purposes that are neither directly nor indirectly commercial,
 - (b) made only to the extent justified by the non-commercial purposes to be achieved, and
 - (c) accompanied by a sufficient acknowledgement.
- (3) Subsection (1) shall not apply if—
 - (a) there is a licensing scheme certified under section 173 and the person making the reproductions knew or ought to have been aware of the existence of the licensing scheme, or
 - (b)
 - (i) the work being reproduced or communicated is an infringing copy, and
 - (ii) the person making the reproduction or communication did not have reasonable grounds to believe that the work was not an infringing copy.
- (4) Not more than 5 per cent of any work may be copied by or on behalf of an educational establishment under subsection (1) in any calendar year.
- (5) Where a reproduction which would otherwise be an infringing copy is made under subsection (1), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (7) Except in the case of manual reproduction, subsection (1) does not apply if the work is commercially available in a medium that is appropriate for the purposes referred to in that subsection.
- (8) The terms of a licence granted to an educational establishment authorising the reproduction, for the educational purposes of that establishment, of works which have been lawfully made available to the public, shall be void in so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

57A. *Distance learning provided by an educational establishment.*

- (1) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part if—

- (a) an educational establishment, for the educational purposes of that establishment, communicates a lesson or examination to a registered student by telecommunication, and
 - (b) a student who has received such a lesson or examination reproduces it in order to be able to listen to or view it at a more convenient time.
- (2) Subsection (1) shall not apply if—
 - (a) the work being reproduced or communicated is an infringing copy, and
 - (b) the person making the reproduction or communication did not have reasonable grounds to believe that the work was not an infringing copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under subsection (1)(b), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

57B. *Use by educational establishment of work available through the internet.*

- (1) It is not an infringement of the rights conferred by this Part if an educational establishment, for the educational purposes of that establishment, reproduces or communicates a work that is available through the internet; provided that the reproduction or communication is accompanied by a sufficient acknowledgement.
- (2)
 - (a) Subsection (1) does not apply if—
 - (i) the work is protected by a technological protection measure,
 - (ii) the educational establishment knows or ought to have known that the work was made available through the internet without the consent of the copyright owner, or
 - (iii) a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work is posted or on the work itself.
 - (b) The Minister may, by order, make regulations for the purposes of this subsection prescribing what constitutes a clearly visible notice.

59. *Regulations relating to copying by ~~libraries and archives~~ heritage institutions.*

- (1) The heritage institutions to which this section applies include—
 - (a) prescribed libraries and prescribed archives,
 - (b) educational establishments, and
 - (c) the Boards and authorities referred to in section 198(1).
- (1) The Minister may make regulations for the purposes of this section and those regulations may make different provisions for different descriptions of ~~libraries or archives~~ **heritage institutions** and for different purposes.
- (2) Without prejudice to the generality of subsection (1), the Minister may prescribe the ~~libraries or archives~~ **heritage institutions** to which sections 60 to ~~67~~ **70** apply and may prescribe all or any of the following:
 - (a) the conditions that are to be complied with when a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes and supplies, or causes to be made and supplied, a copy of any part of a work which has been lawfully made available to the public to a person requiring a copy;
 - (b) the conditions that are to be complied with when a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes and supplies, or causes to be made and supplied, to another prescribed ~~library or prescribed archive~~ **heritage institution** a copy of a work or part of a work which has been lawfully made available to the public and is required by that other prescribed ~~library or prescribed archive~~ **heritage institution**;
 - (c) the conditions that are to be complied with before a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution** makes or causes to be made a copy of a work in the permanent collection of the prescribed ~~library or prescribed archive~~ **heritage institution** in order to preserve or replace that work in the permanent collection of that ~~library or archive~~ **heritage institution**, or in the permanent collection of another prescribed ~~library or prescribed archive~~ **heritage institution**;
 - (d) the conditions that are to be complied with by a ~~librarian or archivist of a prescribed library or prescribed archive~~ **prescribed heritage institution**

when making or supplying or causing to be made or supplied a copy of the whole or part of certain works which have not been lawfully made available to the public from a work in the prescribed ~~library or prescribed archive~~ heritage institution to a person requiring the copy; and

- (e) in the case of section 69—
 - (a) what works may be reproduced pursuant to subsection (1)(a)(ii) of that section,
 - (b) what constitutes a digital reproduction for the purposes of subsection (1)(a)(ii) of that section,
 - (c) what constitute archival and preservation purposes for the purposes of subsection 1(c) of that section, and
 - (d) such other conditions, if any, which must be complied with.

60. *Heritage institutions: ~~Libraries and archives:~~ declarations.*

- (1) Where regulations made by the Minister under section 59 require a librarian, ~~or~~ **archivist, or Director of a heritage institution** to be satisfied as to any matter before making or supplying a copy of a work—
 - (a) the librarian, ~~or~~ **archivist, or Director** concerned may rely on a declaration as to that matter by the person requesting the copy, unless the librarian, ~~or~~ **archivist, or Director** is aware that it is false in a material particular, and
 - (b) in such cases as may be prescribed, the librarian, ~~or~~ **archivist, or Director** shall not make or supply the copy in the absence of a declaration in such form as may be prescribed.
- (2) [unchanged].

61. *Copying by ~~librarians or archivists~~ heritage institutions: articles in periodicals.*

- (1) A prescribed heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, or cause to be made and supplied, a copy of an article or the contents page in a periodical without infringing any copyright in the article, the contents page or in any illustrations accompanying the article or the contents page or in the typographical arrangement.

- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ **archivist, or Director of a heritage institution concerned**, that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose and that person shall not be furnished with more than one copy of the same article unless the person satisfies the librarian, ~~or~~ **archivist, or Director** that the previous copy has been lost, stolen, discarded or destroyed or a reasonable period of time has elapsed, and that person shall not be furnished with more articles from a volume of a periodical than the number of issues that comprise that volume or 10 per cent of the volume, whichever is the greater.

- (3) [unchanged].

62. Copying by ~~librarians or archivists~~ heritage institutions: parts of works lawfully made available to public.

- (1) A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, ~~or cause to be made and supplied~~, a copy of part of a work (other than an article or the contents page in a periodical) which has been lawfully made available to the public without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.
- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ **archivist, or Director of a heritage institution concerned**, that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose and that person shall not be furnished with more than one copy of the same material unless the person satisfies the librarian, ~~or~~ **archivist, or Director** that the previous copy has been lost, stolen, discarded or destroyed or a reasonable period of time has elapsed, and that person shall not be furnished with a copy of more than a reasonable proportion of any work.

64. Copying by heritage institutions ~~librarians or archivists~~: supply of copies to other ~~libraries and archives~~ heritage institutions.

- (1) A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, or

cause to be made and supplied, to another heritage institution ~~prescribed library or prescribed archive~~ a copy of—

- (a) a periodical or articles or the contents page contained therein, or
- (b) the whole or part of a work,

which has been lawfully made available to the public, without infringing any copyright in the periodical, in the article, in the contents page or in the work, in any illustrations accompanying the periodical, the article, the contents page or the work or in the typographical arrangement.

- (2) Subsection (1) shall not apply where, at the time the copy is made, the heritage institution ~~librarian or archivist~~ making it could, by reasonable enquiry, obtain the consent of a person entitled to authorise the making of the copy.

65. *Copying by heritage institutions ~~librarians or archivists~~: replacement copies of works.*

- (1) A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make or cause to be made a copy of a work in the permanent collection of the institution ~~library or archive~~ in order—

- (a) to preserve or replace that work by placing the copy in the permanent collection of that library or archive in addition to or in place of that work, or
- (b) to replace in the permanent collection of another heritage institution ~~prescribed library or prescribed archive~~ a work which has been lost, destroyed or damaged,

without infringing the copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

- (2) [unchanged].

66. *Copying by heritage institutions ~~librarians or archivists~~ for certain purposes.*

- (1) A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make or cause to be made a copy of a work in the permanent collection of the library or archive—

- (a) for the purposes of obtaining insurance cover for the works concerned;

- (b) for purposes of security;
- (c) for the purposes of compiling or preparing a catalogue;
- (d) for exhibition in the library or archive; ~~or~~
- (e) for the purposes of informing the public of an exhibition,
or
- (f) for the purposes of publishing such a copy in a
catalogue relating to an exhibition,

without infringing any copyright in the work, in any illustrations accompanying the work, or in the typographical arrangement.

- (2) This section shall apply to copying conducted for the curatorial purposes specified in subsection (1), and to an extent reasonably justified by the non-commercial purpose to be achieved, **provided that any reproduction is accompanied by a sufficient acknowledgement.**

**67. *Copying by heritage institutions ~~librarians or archivists:~~
certain works not lawfully made available to public.***

- (1) **A heritage institution ~~The librarian or archivist of a prescribed library or prescribed archive~~ may, where the prescribed conditions are complied with, make and supply, or cause to be made and supplied, a copy of a work or part of a work which has not been lawfully made available to the public from any work in the permanent collection of the institution ~~library or archive~~ without infringing the copyright in the work or in any illustrations accompanying the work or in the typographical arrangement.**
- (2) This section shall not apply where the copyright owner has prohibited copying of the work and at the time the copy is made librarian, ~~or~~ archivist, **or Director** making the copy knew, or ought to have been aware of, that fact.
- (3) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian, ~~or~~ archivist, **or Director** that he or she requires that copy for the purposes of **education**, research or private study and he or she will not use it for any other purpose and that person shall not be furnished with more than one copy of that work or part of that work.

68. *Copy of work required to be made as condition of export.*

Where a work of cultural or historical importance or interest may not lawfully be exported from the State unless a copy of it is made and deposited in a **heritage institution ~~library, archive~~** or other institution designated by the Minister for Arts, Heritage, Gaeltacht

and the Islands under section 50 of the National Cultural Institutions Act, 1997, it shall not be an infringement of copyright to make that copy.

69. *Format-shifting by heritage institutions.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) a heritage institution
 - (i) being the owner or lawful user of a work, makes a reproduction of that work in a different format, or
 - (ii) makes or causes to be made a digital reproduction of a work,
 - (b) the heritage institution owns or is a lawful user of the medium or device on which the reproduction is reproduced,
 - (c) the reproduction is made for archival and preservation purposes, and
 - (d) the reproduction is made for purposes that are neither directly nor indirectly commercial.
- (2) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the heritage institution making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.

69A. *Fair dealing by heritage institutions.*

- (1) The communication by a heritage institution to individual members of the public of reproductions of works in the permanent collection of the institution, by dedicated terminals on the premises of the institution, shall constitute “fair dealing” for the purposes of section 50(1).
- (2) The brief and limited display of a reproduction of an artistic work, during a public lecture in a heritage institution shall constitute “fair dealing” for the purposes of section 50(1).
- (3) Subsections (1) and (2) shall apply only if the communication or display is
 - (a) undertaken for the sole purpose of education, teaching, research or private study, and
 - (b) accompanied by a sufficient acknowledgement.
- (4) Subsection (2) shall apply only if the display is undertaken for purposes that are neither directly nor indirectly commercial.

**70. *Copying by heritage institutions ~~librarians or archivists~~:
infringing copy.***

Where a copy which would otherwise be an infringing copy is made under section 61, 62, 64, 65, 67, ~~or 68, 69 or 69A~~ but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

**71. ~~*Parliamentary and judicial proceedings.*~~
*Proceedings.***

- (1) The copyright in a work is not infringed by anything done for the purposes of **public security, for the purposes of administrative, parliamentary or judicial proceedings, or for the purpose of reporting those proceedings.**

87. *Transient and incidental copies.*

- (1) It is not an infringement of the rights conferred by this Part to undertake or conduct an act of reproduction which—
- (a) is temporary,
 - (b) is transient or incidental,
 - (c) has no independent economic significance,
 - (d) is an integral and essential part of a technological process, and
 - (e) has as its sole purpose the enabling of
 - (i) a transmission in a network between third parties by an intermediary, or
 - (ii) a lawful use.
- (2) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to make or cause to be made a temporary reproduction of a work where that temporary reproduction is incidentally made as a necessary part of the technical process of making a reproduction or communication which is permitted by this Act.
- (3) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to provide a link on a page on the internet which connects with a work elsewhere on the internet.

- [(4) Existing subsection (2)].

89. *Use of notes or recordings of spoken words in certain cases.*

- (1) Subject to compliance with the conditions specified in subsection (2), where a record is made, in writing or otherwise, for the purpose of—
- (a) reporting current events, or
 - (b) broadcasting, or including in a cable programme service, or otherwise communicating to the public, the record or part of the record,
- it is not an infringement of the rights conferred by this Part to use the record or material taken from it or to copy the record, or any such material, and to use the copy for the purposes referred to in paragraph (a) or (b).
- (2) The conditions referred to in subsection (1) are—
- (a) that the record relates to spoken words, including political speeches and extracts of public lectures or similar works or subject-matter,
 - (b) that the record is a direct record of the spoken words,
 - (c) that the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe the copyright in the work,
 - (d) that the use made of the record or material taken from it is not prohibited by or on behalf of the speaker or copyright owner before the record was made,
 - (e) that the use made of the record or material taken from it is by or with the authority of a person who is lawfully in possession of the record, and
 - (f) that the use made of the record or material taken from it is accompanied by a sufficient acknowledgement unless to do so would be impossible for reasons of practicality or otherwise.
- (3) Where a record which would otherwise be an infringing copy is made under subsection (1), but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

92. *Fixations of performances of works of folklore.*

- ...
- (3) The conditions referred to in subsection (2) are—
- (a) that a copy may not be supplied other than to a person who satisfies the archivist that he or she requires the copy for the purposes of **education**, research or private study and he or she will not use it for any other purpose,
- ...

94. *Advertising sale of artistic work.*

- (1) It is not an infringement of the copyright in an artistic work to copy it, or to make available to the public copies of it, for the purpose of advertising the public exhibition or sale of the work.

99. *Copying for purpose of broadcast or cable programme.*

...

- (4) Where, by virtue of subsection (1), a person (the licensee) is deemed to be to be licensed by the owner of the copyright in a work to copy or authorise the copying of that work by means of his or her own facilities, such facilities shall include those of a person acting on behalf of and under the responsibility of the licensee.

104. *Personal copies for persons with a disability.*

- (1) It is not an infringement of the rights conferred by this Part if a person with a disability who is the owner or lawful user of a work ("the master copy") which is not accessible to him or her because of the disability makes or causes to be made an accessible copy of the master copy for his or her personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it, or
 - (b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.
- (3) Subsection (1) does not apply in relation to the making of an accessible copy for a person with a disability if, or to the extent that, copies of the copyright work are commercially available—
 - (a) by or with the authority of the copyright owner,
 - (b) within a reasonable time after first publication of the work,
 - (c) in a form that is accessible to that person, and
 - (d) at an ordinary commercial price.
- (4) An accessible copy made under this section must be accompanied by—
 - (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement.

- (5) If a person makes an accessible copy on behalf of a visually impaired person under this section and charges for it, the sum charged must not exceed the cost of making and supplying the copy.
- (6) If a person holds an accessible copy made under subsection (1) when he or she is not entitled to have it made under that subsection, the copy is to be treated as an infringing copy, unless he or she is a person falling within subsection (7)(b).
- (7) A person who holds an accessible copy made under subsection (1) may transfer it to—
 - (a) a visually impaired person entitled to have the accessible copy made under subsection (1), or
 - (b) a person who has lawful possession of the master copy and intends to transfer the accessible copy to a person falling within paragraph (a).
- (8) The transfer by a person (the transferring person) of an accessible copy made under subsection (1) to another person (the recipient) is an infringement of copyright by the transferring person unless he or she has reasonable grounds for believing that the recipient is a person falling within subsection (7)(a) or (b).
- (9) Where a copy which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

104A. *Multiple copies for persons with a disability.*

- (1) It is not an infringement of the rights conferred by this Part if a designated body which is the owner or lawful user of a work (“the master copy”)—
 - (a) makes or causes to be made an accessible copy of the master copy for the personal use of persons with a disability to whom the master copy is not accessible because of their disability, or
 - (b) supplies or causes to be supplied an accessible copy to such persons for their personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy

- would involve recording a performance of the work or part of it, or
- (b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.
- (3) Subsection (1) does not apply in relation to the making of an accessible copy if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.
- (4) Subsection (1) does not apply in relation to the supply of an accessible copy to a particular person with a disability if, or to the extent that, copies of the copyright work are commercially available—
- (a) by or with the authority of the copyright owner,
- (b) within a reasonable time after first publication of the work,
- (c) in a form that is accessible to that person, and
- (d) at an ordinary commercial price.
- (5) An accessible copy made under this section must be accompanied by—
- (a) a statement that it is made under this section, and
- (b) a sufficient acknowledgement.
- (6) If a designated body charges for supplying a copy made under this section, the sum charged must not exceed the cost of making and supplying the copy.
- (7) A designated body making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.
- (8) If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection (unless the copyright owner agrees otherwise).
- (9) If a designated body continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.
- (10) Where a copy which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as

an infringing copy for those purposes and for all subsequent purposes.

- (11) In this section, “designated body” means
- (a) an educational establishment, or
 - (b) a body designated for the purposes of this section by order of the Minister who shall not designate a body unless he or she is satisfied that the body is not conducted for profit.

104B. *Intermediate copies and records.*

- (1) A designated body entitled to make accessible copies under section 104A may hold an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but only—
 - (a) if and so long as the approved body continues to be entitled to make accessible copies of that master copy, and
 - (b) for the purposes of the production of further accessible copies.
- (2) An intermediate copy which is held in breach of subsection (1) shall be treated as an infringing copy.
- (3) A designated body may lend or transfer the intermediate copy to another designated body which is entitled to make accessible copies of the work or published edition under section 104A.
- (4) The loan or transfer by a designated body of an intermediate copy to another person (the recipient) is an infringement of copyright by the designated body unless it has reasonable grounds for believing that the recipient —
 - (a) is another designated body which is entitled to make accessible copies of the work or published edition under section 104A; and
 - (b) will use the intermediate copy only for the purposes of the production of further accessible copies.
- (5) If a designated body charges for lending or transferring the intermediate copy, the sum charged must not exceed the cost of the loan or transfer.
- (6) A designated body must—
 - (a) keep records of accessible copies made under section 104A and of the persons to whom they are supplied,

- (b) keep records of any intermediate copy lent or transferred under this section and of the persons to whom it is lent or transferred, and
 - (c) allow the copyright owner or a person acting for him or her, on giving reasonable notice, to inspect the records at any reasonable time.
- (7) Within a reasonable time of making an accessible copy under section 2, or lending or transferring an intermediate copy under this section, the designated body must notify—
 - (a) the Copyright Council of Ireland, and
 - (b) each relevant licensing body, or, if there is no such body, the copyright owner.
- (8) The requirement to notify the copyright owner under subsection (7)(b) does not apply if it is not reasonably possible for the designated body to ascertain the name and address of the copyright owner.

104C. *Licensing schemes.*

- (1) Section 104A does not apply to the making of an accessible copy in a particular form if—
 - (a) a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form,
 - (b) the scheme is not unreasonably restrictive, and
 - (c) the scheme and any modification made to it have been notified to the Controller by the licensing body.
- (2) A scheme is unreasonably restrictive if it includes a term or condition which—
 - (a) purports to prevent or limit the steps that may be taken under sections 104B or 104C, or
 - (b) has that effect.
- (3) But subsection (2) does not apply if—
 - (a) the copyright work is no longer published by or with the authority of the copyright owner; and
 - (b) there are reasonable grounds for preventing or restricting the making of accessible copies of the work.
- (4) If section 104B or 104C is displaced by a licensing scheme, sections 152 to 155 apply in relation to the scheme as if it were one to which those sections applied as a result of section 150.

104D. Limitations following infringement of copyright.

- (1) The Minister may make an order under this section if it appears to him or her that the making of copies—
 - (a) under section 104A, or
 - (b) under a licence granted under a licensing scheme that has been notified under section 104C,has led to infringement of copyright on a scale which, in the Minister's opinion, would not have occurred if section 104A had not been in force, or the licence had not been granted.
- (2) The order may prohibit one or more named designated bodies, or one or more specified categories of designated body, from—
 - (a) acting under section 104A, or
 - (b) acting under a licence of a description specified in the order.
- (3) The order may disapply—
 - (a) the provisions of section 104A, or
 - (b) the provisions of a licence, or a licensing scheme, of a description specified in the order,in respect of the making of copies of a description so specified.
- (4) If the Minister proposes to make an order he or she must, before making it, consult—
 - (a) such bodies representing copyright owners as he thinks fit; and
 - (b) such bodies representing persons with a disability as he thinks fit.
- (5) If the Minister proposes to make an order which includes a prohibition he or she must, before making it, consult—
 - (a) if the proposed order is to apply to one or more named designated bodies, that body or those bodies; and
 - (b) if it is to apply to one or more specified categories of designated body, to such bodies representing designated bodies of that category or those categories as he or she thinks fit.
- (6) A designated body which is prohibited by an order from acting under a licence may not apply to the Controller under section 154(1) in respect of a refusal or failure by a licensing body to grant such a licence.

104E. Definitions.

- (1) For the purposes of sections 104 to 104D:—
 - (a) a copy of a copyright work (other than an accessible copy made under section 104A or 104B) is to be taken to

be accessible to a person with a disability only if it is as accessible to that person as it would be if he or she did not suffer from a disability.

- (b) “accessible copy”, in relation to a copyright work, means a version which provides for a person with a disability to have improved access to the work.
- (c) an accessible copy may include facilities for navigating around the version of the copyright work but may not include—
 - (i) changes that are not necessary to overcome problems caused by disability; or
 - (ii) changes which infringe the integrity right provided by section 109.
- (d) “disability” means physical or mental disability, and includes the meanings ascribed to it in section 2 of the Equal Status Act, 2000 and section 2 of the Disability Act, 2004.

106A. *Reproduction on paper for private use.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) the owner or lawful user of a work makes or causes to be made from it a reproduction on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects,
 - (b) the reproduction is made for his or her private and domestic use,
 - (c) the reproduction embodies the work in a form different from the form in which the work is embodied,
 - (d) at the time the owner makes the reproduction or causes it to be made, he or she has not made, and is not making, another copy that embodies the work in a form substantially identical to the form of reproduction, and
 - (e) the reproduction is accompanied by a sufficient acknowledgement.
- (2) Subsection (1) shall not apply if the work being reproduced is—
 - (a) sheet music, or
 - (b) an infringing copy, and the person making the reproduction had no reasonable grounds to believe that the work was a lawful copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan,

or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.

- (4) For the avoidance of doubt, subsection (3) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (5) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives away, rents, or sells that work to another person without first destroying the reproduction.

106B. *Format-shifting for private use.*

- (1) It is not an infringement of the rights conferred by this Part if—
 - (a) the owner or lawful user of a work makes or causes to be made a reproduction of that work in a different format,
 - (b) he or she owns or is a lawful user of the medium or device on which the reproduction is reproduced,
 - (c) the reproduction is made for his or her private and domestic use, and
 - (d) the reproduction is made for purposes that are neither directly nor indirectly commercial.
- (2) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the person making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.
- (3) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (4) For the avoidance of doubt, subsection (3) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (5) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives away, rents, or sells that work to another person without first

destroying all reproductions of that work which he or she has made under that subsection.

106C. *Back-up copy.*

- (1) (a) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a work makes or causes to be made a reproduction of that work as a back-up copy of it which it is necessary for him or her to have for the purposes of his or her lawful use.
 - (b) In particular, it is not an infringement if the reproduction is made as a back-up copy in case the work is lost, damaged or otherwise rendered unusable.
- (2) Subsection (1) shall apply only if the owner or lawful user of the work being reproduced owns or is authorised to use the medium or device on which the reproduction is reproduced.
- (3) Subsection (1) shall not apply if
 - (a) the work being reproduced is an infringing copy, and
 - (b) the person making the reproduction did not have reasonable grounds to believe that the work was not an infringing copy.
- (4) If the work is lost, damaged or otherwise rendered unusable, then a reproduction made under subsection (1) shall be treated as the work.
- (5) Where a reproduction which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
- (6) For the avoidance of doubt, subsection (5) does not apply to a loan of the reproduction by the lender to a member of the lender's family or household for the member's private and domestic use.
- (7) Subsection (1) does not apply if the owner or lawful user of the work from which the reproduction was made disposes of, gives away, rents, or sells that work to another person without first destroying all reproductions of that work which he or she has made under that subsection.

106D. *Non-commercial user-generated content.*

- (1) It is not an infringement of the rights conferred by this Part for a person to use an existing work in the creation or communication of a new work; provided that—
 - (a) any such use, creation or communication is done solely and exclusively for non-commercial purposes,
 - (b) any such creation and communication is accompanied by a sufficient acknowledgement, unless this is unreasonable or inappropriate or turns out to be impossible for reasons of practicality or otherwise, and
 - (c) the creation and communication of the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or on an existing or potential market for it, including that the new work is not a substitute for the existing one.
- (2) Subsection (1) shall not apply if
 - (a) the existing work is an infringing copy, and
 - (b) the person using the existing work did not have reasonable grounds to believe that it was not an infringing copy.

106E. *Innovation.*

- (1) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a work (the initial work) derives from it an innovative work.
- (2) An innovative work is an original work which is substantially different from the initial work, or which is a substantial transformation of the initial work.
- (3) The innovative work must not—
 - (a) conflict with the normal exploitation of the initial work, or
 - (b) unreasonably prejudice the legitimate interests of the owner of the rights in the initial work.
- (4) Unless it is unreasonable or impractical to do so—
 - (a) the innovative work must be accompanied by a sufficient acknowledgement, and
 - (b) within a reasonable time of the date on which the innovative work is first made available to the public in the State, the author of the innovative work must inform the owner of the rights in the initial work about the availability of the innovative work.
- (5) Subsection (1) shall not apply if—

- (a) the initial work is an infringing copy, and
 - (b) the person making the innovative work did not have reasonable grounds to believe that the initial work was not an infringing copy.
- (6) Subsection (1) shall not apply if, or to the extent that, the owner of the rights in the initial work can establish by clear and convincing evidence that, within a reasonable time after first publication of the work, he or she had embarked upon a process to derive from it a work to which the innovative work is substantially similar.
- (7) This section shall come into operation on such day as may be fixed by order made by the Minister.

106F. *Digital analysis and research.*

- (1) It is not an infringement of the rights conferred by this Act for a person to reproduce a work for a purpose to which this section applies if—
- (a) it would not be practical to carry out the research without making the copy,
 - (b) the person is the owner or lawful user of the work, and
 - (c) the person has informed the owner of the rights in the work, unless this is unreasonable or inappropriate or turns out to be impossible for reasons of practicality or otherwise.
- (2) This section applies to—
- (a) text-mining, data-mining, and similar analysis or research,
 - (b) encryption research and similar analysis or research, and
 - (c) such other analysis or research as the Minister may by order provide.
- (3) Nothing in Part VII shall be construed as operating to prevent any person from undertaking the acts permitted by this section or from undertaking any act of circumvention required to effect such permitted acts.

106G. *Computer security.*

- (1) It is not an infringement of the rights conferred by this Act for a person to reproduce a work for the sole purpose, with the consent of the owner or administrator of a computer, computer system or computer network, of assessing the vulnerability of the computer, system or network or of correcting any security flaws.

- (2) Nothing in Part VII shall be construed as operating to prevent any person from undertaking the acts permitted by subsection (1) or from undertaking any act of circumvention required to effect such permitted acts.

**123. ~~Copyright to pass under will with certain original fixations.~~
*Copyright to pass in transfers.***

Where a person is entitled, beneficially or otherwise, to any material thing containing an original fixation of a work, any transfer by that person of that thing shall be construed as including the copyright in the work in so far as the transferor is the owner of the copyright at the time of the transfer, unless a contrary intention is indicated in a document effecting that transfer.

144. *Period after which remedy for delivery up is not available.*

- ...
- (5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.

198A. *Digital copyright deposit.*

- (1) The publisher of any digital publication first made available in the State after the commencement of this section or, in the case of the authority specified in section 198(1)(a), the publisher of any digital publication made available in the State, shall, within one month of the date on which the digital publication is first made available, deliver, at his or her own expense, copies of the digital publication in the format in which it is published to the Boards and authorities referred to in section 198(1).
- (2) Boards and authorities taking delivery of a digital publication under subsection (1) shall give an electronic receipt for every digital publication delivered to them under that subsection.
- (3) The Minister may, on an application of a Board or authority referred to in section 198(1), make regulations exempting from subsection (1) in respect of the Board or authority making the application, any class of work as may be specified in those regulations, and it shall not be necessary for the publisher of any publication so excepted to deliver the digital publication to that Board or authority or for such Board or authority to give a receipt unless as respects any particular digital publication a written demand for the delivery of that digital publication is made by the Board or authority concerned.

- (4) The Boards or authorities referred to in section 198(1) may before delivery of a digital publication is made under subsection (1), require that a digital publication be delivered in a particular format, being one of the formats in which the digital publication is made available and the publisher shall deliver it in the format required.
- (5) The publisher of any digital publication first made available in the State after the commencement of this section shall, where a demand is made in writing by the authority having control of each of the libraries referred to in section 198(5), before the expiration of 12 months after the digital publication is made available, deliver within one month after receipt of that written demand or, where the demand was so made before the digital publication was made available, within one month after publication, to an address in Dublin named in the demand a copy of that digital publication for, or in accordance with the directions of, that authority.
- (6) In the case of a digital publication made available in a series of numbers or parts, the written demand referred to in subsection (5) may include all numbers or parts of the digital publication which may subsequently be made available.
- (7) A copy of a digital publication delivered to the authority having control of the National Library of Ireland or the Board of the British Library pursuant to this section shall be a copy of the whole digital publication.
- (8) A copy of a digital publication delivered pursuant to this section to any of the authorities referred to in section 198(1) and section 198(5), other than those referred to in subsection (7), shall be in the format specified by the Board or authority; and the Board or authority may require the person delivering the digital publication to deliver, with the copy of the digital publication, a copy of any computer program and any information necessary in order to access the digital publication, and a copy of any manual and other material that accompanies the digital publication and is made available to the public.
- (9) Where a publisher fails to comply with this section he or she shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €750 and in addition the person shall be liable to be ordered to comply with this section.
- (10) Where substantially the same work is published both in a form to which section 198 applies and in a format to which this section applies, then—

- (a) delivery of a book pursuant to section 198 shall discharge the obligation to deliver a digital publication pursuant to this section,
 - (b) delivery of a digital publication pursuant to this section shall discharge the obligation to deliver a book pursuant to section 198, and
 - (c) it shall be for the Board or authority which is entitled to take delivery of the book or digital publication, as the case may be, to decide which form or format of delivery to require.
- (11) It is not an infringement of the rights conferred by this Act if a Board or authority referred to in section 198(1) reproduces a work that is made available in the State through the internet.
- (12) For the purposes of this section, “digital publication” includes any publication in any digital or electronic format readable by means of any electronic retrieval system, but does not include
- (a) a copy of a book in an electronic form delivered by a publisher to a Board or authority pursuant to section 198, or
 - (b) a sound recording or film or both.
- (13) The Minister may make regulations to implement and administer this section.

229. *Copying by librarians or archivists: parts of recordings lawfully made available to public.*

- ...
- (2) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian or archivist that he or she requires that copy for the purposes of **education**, research or private study ...

234. *Copying by librarians or archivists: certain recordings not lawfully made available to public.*

- ...
- (3) A copy made under subsection (1) shall not be supplied other than to a person who satisfies the librarian or archivist that he or she requires that copy for purposes of **education**, research or private study and he or she shall not use it for any other purpose and that person shall not be furnished with more than one copy of that recording or part of that recording.

244. *Transient and incidental copies.*

- (1) It is not an infringement of the rights conferred by this Part to undertake or conduct an act of reproduction of a performance which—
- (a) is temporary,
 - (b) is transient or incidental,
 - (c) has no independent economic significance,
 - (d) is an integral and essential part of a technological process, and
 - (e) has as its sole purpose the enabling of
 - (i) the viewing of or listening to the recording by a member of the public to whom the recording is lawfully made available, or
 - (ii) a lawful use.
- (2) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to make or cause to be made a temporary reproduction of a performance where that temporary reproduction is incidentally made as a necessary part of the technical process of making a reproduction or communication which is permitted by this Act.
- (3) For the avoidance of doubt, it is not an infringement of the rights conferred by this Part to provide a link on a page on the internet which connects with a performance elsewhere on the internet.
- [(4) Existing subsection (2)].

245. *Recordings of works of folklore.*

- ...
- (3) The conditions referred to in subsection (2) relating to the actions of archivists are—
- (a) that a copy may not be supplied other than to a person who satisfies the archivist that he or she requires that copy for the purposes of **education**, research or private study and he or she shall not use it for any other purpose, ...

263. *Period after which remedy for delivery up is not available.*

- ...
- (5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.

329. ~~Fair dealing: research or private study.~~

Fair dealing: education, research or private study.

- (1) The database right in a non-electronic database which has been re-utilised is not infringed by fair dealing with a substantial part of its contents by a lawful user of the database where that part is extracted for the purposes of **education**, research or private study.

PART VII

COPYRIGHT COUNCIL OF IRELAND

377. *Copyright Council of Ireland.*

- (1) The Minister may by order declare that such body as is specified in the order shall be recognised for the purposes of this Act, and a body standing so recognised, for the time being, shall be known, and in this Act is referred to, as the “Copyright Council of Ireland” (the Council).
- (2) Not more than one body shall stand recognised under this section for the time being.
- (3) No body (other than a body that stands recognised under this section for the time being) shall be known as, or describe itself as, the “Copyright Council of Ireland”.
- (4) The Minister or the Council may apply to the High Court for an injunction to restrain any body other than the Council from using the description “Copyright Council of Ireland” in contravention of subsection (3).
- (5) The Minister shall not make an order under subsection (1) unless he or she is satisfied that the body in respect of which he or she proposes to make the order complies with the minimum requirements specified in Schedule 4.
- (6) If the Minister is of the opinion that a body for the time being standing recognised by order under this section no longer complies with the provisions of Schedule 4, he or she may revoke that order.
- (7) The Minister shall, before making an order under subsection (5), allow the body for the time being standing recognised under this section to make representations to him or her.
- (8) Whenever an order is proposed to be made under this section a draft of the order shall be laid before each House of the

Oireachtas and the order shall not be made unless a resolution approving of the draft has been passed by each such House.

338. *Regulations and submissions.*

- (1) When making regulations or orders pursuant to any provision of this Act other than the provisions of this Part, the Minister shall first consult with the Council.
- (2) The Council shall, from time to time, make such representations to the Minister on copyright and related issues as to it seem appropriate.

FOURTH SCHEDULE

Minimum Requirements in relation to the Copyright Council of Ireland and the Copyright Alternative Dispute Resolution Service

- 1 The Copyright Council of Ireland (the Council) shall be a company limited by guarantee.
- 2 The principal objects of the Council shall be to—
 - (a) ensure the integrity of copyright whilst protecting the public interest,
 - (b) raise public awareness of the importance of copyright, and
 - (c) promote innovation.
- 3 The Council shall be independent in the performance of its functions.
- 4 Any person shall be entitled to be a subscribing member of the Council.
- 5(1) The number of directors of the Board of the Council shall be 13, of whom—
 - (a) six shall be directors who represent the public interest,
 - (b) one shall be a director who represents the interests of those who regularly make lawful use of copyright material,
 - (c) three shall be directors who represent the interests of those who hold rights pursuant to this Act, and

- (d) three shall be directors who represent the interests of collecting societies.
- (2) The directors referred to in section 5(1)(a) shall be persons who are of standing in the community, and are independent of the interests referred to in section 5(1)(b)-(d).
- (3) The directors referred to in section 5(1)(b) shall be persons who are of standing in the community, and are independent of the interests referred to in section 5(1)(c)-(d).
- (4) The directors referred to in section 5(1)(a)-(b) shall be selected for appointment—
 - (a) by a panel of persons who are, in the opinion of the Minister, independent of the interests referred to in section 5(1)(b)-(d), and
 - (b) in accordance with a selection process that is advertised to members of the public in a manner that the Minister considers to be sufficient.
- (5) The criteria for selecting persons for appointment as directors pursuant to section 5(1)(a)-(b) shall be published in such manner as will enable them to be inspected by members of the public.
- (6)
 - (a) A director shall hold office for a period of 5 years from the date of his or her appointment.
 - (b) A director whose term of office expires by the effluxion of time shall be eligible for reappointment as a director, but only once.
- (7)
 - (a) One of directors appointed pursuant to paragraph 5(1)(a) shall be appointed as Chairperson of the Board.
 - (b) A Chairperson whose term of office as a director expires by the effluxion of time shall be eligible for reappointment as a director and as the Chairperson, but only once.
- 6(1) The Council shall be funded from subscriptions paid by members of the Council calculated in accordance with such rules as the Council shall make for that purpose.
- (2) The Council may accept gifts, donations or funding (other than subscriptions referred to in subsection (1)) from any person, but only where
 - (a) the donor does not attach any conditions to the gift, donation or funding,

- (b) the Council does not give any undertaking in return for the gift, donation or funding, and
- (c) the making and receipt of any such gifts, donations or funding is published in such manner as will enable this to be known to and commented upon by members of the public.

7(1) The Council shall establish an Irish Digital Copyright Exchange (the Exchange).

8(1) The Council shall establish a Copyright Alternative Dispute Resolution Service (the Service).

(2) The Service shall be an independent, facilitative, confidential, expeditious and informal service, to assist parties to a copyright dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute.

(3) The following principles shall apply to the dispute-resolution process—

- (a) participation in a process to resolve a copyright dispute is voluntary, and any party involved the process, including the Service, may withdraw from the process at any time and without explanation,
- (b) the Service shall at all times be independent, neutral and impartial,
- (c) during the currency of the process, and thereafter unless otherwise agreed by the parties, the parties and the Service shall keep the process confidential,
- (d) the parties and the Service shall seek to complete the process in the shortest time practicable, relative to the nature of the dispute,
- (e) where all parties agree, a non-party participant, such as a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party, shall be allowed to participate in the process,
- (f) the Service may, at any stage in the process, make a proposal to the parties to resolve the dispute, but the Service is not empowered to impose such a proposal on the parties,

- (g) the parties alone shall determine, either at the beginning of the process or when agreement (if any) is reached, the enforceability, or otherwise, of any agreement that arises from the process, and any agreement thereby reached shall be enforceable as a contract at law if it is made in writing and signed by all the parties and by the Service, and
 - (h) if the process does not result in an agreement, the Service shall issue a certificate to this effect.
- 9(1) If any party to a dispute resolution agreement or any person claiming through or under him commences any proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred, any party to such proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if it is satisfied that there is not sufficient reason why the matter should not be referred in accordance with the agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the process, may make an order staying the proceedings.
- (2) (a) The court shall not make an order staying the proceedings if—
- (i) the parties had already undertaken a process with the Service to seek to resolve their dispute, and
 - (ii) that process had not resulted in an agreement resolving the dispute.
- (b) A certificate from the Service that the process had not resulted in an agreement resolving the dispute shall be evidence, unless the contrary is proven, that the process had not so resulted.
- 10(1) In this Schedule—
- (a) “copyright dispute” means any civil or commercial dispute arising under this Act that could give rise to civil liability, but does not include any mediation, conciliation or other dispute resolution process which is provided for in accordance with any other enactment;
 - (b) “dispute resolution agreement” means an agreement to refer present or future disputes to the Service;

- (c) “process” means the process undertaken by the parties to a copyright dispute with the Service to seek to resolve that dispute.

