



NNI,
Clyde Lodge,
15 Clyde Road,
Dublin 4.
Tel: +353 1 668 9099
Fax: +353 1 668 9872
Email: info@nni.ie
www.nni.ie

National Titles:

Irish Independent
Irish Examiner
The Irish Times
Irish Daily Star
Evening Herald
Sunday Independent
Sunday World
The Sunday Business Post
Irish Mail on Sunday
Irish Farmers Journal
Irish Daily Mail
Irish Daily Mirror
Irish Sun
Irish Sunday Mirror
The Irish Sun Sunday
The Sunday Times

Chairman:

Matt Dempsey

Regional Titles:

Evening Echo
Western People
Kildare Nationalist
Laois Nationalist
Carlow Nationalist
Waterford News & Star
Enniscorthy Echo
Roscommon Herald
Wexford Echo
Gorey Echo
New Ross Echo
Enniscorthy Guardian
Gorey Guardian
New Ross Standard
Drogheda Independent
Fingal Independent
Carlow People
Wicklow People
The Argus
Bray People
The Corkman
Wexford People
The Kerryman
Sligo Champion

Chairman:

Ger Walsh

Co-Ordinating Director:

Frank Cullen

Further Submission of National Newspapers of Ireland (NNI) to the Copyright Review Committee on its Consultation Paper on copyright and innovation

29 June 2012



Introduction

National Newspapers of Ireland (“NNI”) welcomes the publication of “Copyright and Innovation, A Consultation Paper” by the Copyright Review Committee. The document is a comprehensive one and will serve to progress and promote this important review of existing copyright law.

The NNI appreciates the opportunity from the Copyright Review Committee to make a further submission on the Consultation Paper, and for the extension of the deadline within which submissions must be made. That extension of the deadline has assisted in ensuring that our submission can best address the issues raised and queries posed in the Consultation Paper.

In this submission, we intend making a number of general comments on the Consultation Paper. We will then deal with those specific queries posed in the Consultation Paper by the Committee, and in doing so shall respond to those which are of relevance to the NNI.

This further submission must be read in light of the content of our previous submission to the Committee, the content of which continues to represent the NNI’s position on the Committee’s terms of reference and on the copyright law review.

General Comments

1. Terms of Reference

In our previous submission, we submitted that the basis upon which this review is being conducted, and the terms of reference, are a concern. That remains the case and, as you know, we believe that the terms of reference are misconceived in a number of respects.

- Perhaps the key point is that the terms of reference are predicated on the concept that copyright might create a barrier to innovation. That is a misconception. Copyright is in fact about valuing and protecting innovation. That is the very function of recognising intellectual property rights by way of legislation.
- We believe, with respect, that this key flaw in the terms of reference has led to the Committee adopting a position throughout the Consultation Paper which is itself flawed. We are referring to the thread which runs through the Consultation Paper which seems to regard copyright holders as a different, distinct group from innovators and entrepreneurs. Creators of copyright are, by definition, creators and innovators. This is discussed further below.
- We welcome the focus in the Consultation Paper on the wish for the Committee to be presented with evidence in various areas, rather than relying on assertions which may or may not be founded in evidence. That focus, the wish to be presented with evidence, in fact identifies another key flaw in the terms of reference. The first paragraph of the terms of reference require the Committee to:

“Examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation.” (Our emphasis added).

It is illustrative, and clearly a matter of concern, that the Committee has been requested to proceed by identifying areas “that are perceived” to create barriers to innovation. It is quite wrong that a review of copyright legislation would proceed on the basis of a perception. This is important, given that the second paragraph of the terms of reference requires the Committee to then:

“Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation.”

The “perceived barriers” of paragraph 1 have now in paragraph 2 become “these barriers”. They have been afforded legitimacy. It is clear that in fact what the Committee is being asked is to recommend changes to national legislation based on “perceived” barriers.

Any perception that copyright law is a barrier to innovation is ill-founded. The Committee received a large number of submissions prior to the production of the Consultation Paper. Those submissions emanated from a wide range of contributors including rights holders, content creators, copyright users, collecting societies, academics and others. We could find no credible concrete evidence in those submissions which supported the perception that national copyright legislation creates barriers to innovation or that a US style “fair use” doctrine would be appropriate to encourage innovation.

2. Press freedom, pluralism and a democratic society

It is beyond dispute that a diverse and free press is the lifeblood of a democratic society. The right of the press to investigate, examine, report and criticise the private and public sectors is closely guarded by both national and European laws. Diversity of the press is one of the key ingredients for a functioning healthy democracy. Ireland is unique in the range of original newspaper content available on a daily basis to consumers of such content. Ireland boasts 16 national newspapers in circulation and approximately 150 local and regional newspapers. Every week more than 5.2 million newspapers are sold in over 4000 retail outlets throughout the Republic of Ireland. Over 1.5 million free distribution newspapers are circulated every week in the Republic of Ireland. Independent research shows that 4 out of 5 adults are regular readers of newspapers.

The newspaper industry in Ireland has invested heavily in the content which it creates. This has resulted in high quality, original content for the consumer. This is reflected in the healthy numbers of people reading affordable, reasonably priced newspapers on a weekly basis. However, the investment which the newspaper industry has made to produce the high quality content consumed by the Irish public is not sustainable when the content placed on-line is consistently and systematically under threat from those who wish to reproduce, use and abuse the original content for their own commercial benefit without reasonably compensating those who have put time, effort and significant financial investment into creating the content.



The importance of copyright protection for content creators was noted recently by Androulla VASSILIOU, European Commissioner responsible for Education, Culture, Multilingualism and Youth.

In her keynote speech at the General Assembly of ENPA (The European Newspapers Publishers' Association), on 25 May 2012, she said:

“We all know that copyright underpins investment in quality editorial content.

The fact is, digitisation, far from reducing it, has actually increased the need for copyright protection. Nowadays new business models allow bringing copyright-protected works to much larger audiences. But all too often news content developed and financed by newspaper publishers ends up being used by third parties as an added value for their commercial services.

On this, I am firmly of the opinion that news aggregators and technology platforms need to respect newspaper copyright on the Internet.

Respect of copyright is essential. That is why the European Commission adopted a strategy for intellectual property rights, in May last year. I am working closely with my colleague Commissioner Barnier to prepare the next initiatives on copyright, such as the future instrument on collecting societies and the review of the directive on the enforcement of intellectual property rights.

I will be vigilant, to ensure that there is no weakening of the level of protection for content and that the EU legislation on copyright remains a key tool that sustains newspapers in Europe.”

Commissioner Vassiliou’s views, expressed just last month, confirm the European Commission’s support for content creators and recognises that adequate copyright protection for original content is absolutely essential.

If content continues to be routinely reproduced by others without fair and reasonable remuneration for the creator, the press diversity and choice of news which the Irish public enjoys cannot and will not continue.

Ironically, if newspapers are forced out of business as a result of the parasitic behaviour of others, content upon which those parasites rely to sustain their own businesses will be gone. The diversity of the Irish press must be protected in order to sustain the constitutionally safeguarded freedom of expression and the democratic values upon which our society is built.

3. The Committee’s examination of the appropriateness of the US style “fair use” doctrine in an Irish/EU context

It is noteworthy that a common theme to a large number of the submissions, spanning a wide range of the different interest groups, was the desire for certainty in copyright law. That in fact appears to be one of the main themes which arises from the majority of the submissions. We would suggest that it was also a key, recurring theme which arose at the public meeting held by the

Copyright Review Committee at Trinity College Dublin on the 24 March 2012. Numerous contributions, from persons representing varied interests, were made from the floor about the need for certainty. It was clear, following the meeting, that certainty in the legal position is of paramount importance to those whose businesses are affected by copyright law. Uncertainty in national copyright legislation is unwanted and unhelpful.

Against that background, clearly it is not appropriate to introduce the US style “fair use” doctrine in an Irish/EU context. Firstly, there appears to be no evidence whatsoever to suggest that the introduction of such a doctrine would be in any way appropriate or would be necessary to achieve the “optimum copyright position for Ireland” referred to in the announcement by the Department of Enterprise, Trade and Employment of this review. Secondly, it is undoubtedly the case that a fair use doctrine is considerably less certain in its application than existing legislation. Whatever different parties might suggest are the merits or demerits of the doctrine, it does not lend certainty to copyright law.

In fact, it is inherent from the manner in which the doctrine must be applied in any specific situation that it brings with it uncertainty. The principles loosely governing fair use are widely open to subjective interpretation, a situation which is to be avoided. This lack of certainty not only runs directly contrary to the interests of NNI members and other copyright holders, it also runs against the interests of those parties who wish to have certainty in copyright legislation and who do not wish to have to deal with the prospect of being sued as a result of actions they might take in a situation of uncertainty.

We reiterate here what we said in our previous submission. It is those with the deeper pockets, and who wish to commercially exploit copyright owned by others, who benefit from the uncertainty which comes with the fair use doctrine.

We are also advised that any introduction of a “Fair Use” doctrine in this jurisdiction will be impermissible as contrary to European law. The Copyright Directive (2001/29/EC) at Article 5, sets out a complete and exhaustive list of exceptions to the reproduction right. The language of Article 5 in this regard is clear and unambiguous.

“...5(2) Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases -...”

There is a simple logic to this that of achieving uniformity in copyright law throughout the Union.

Article 5, itself of course, follows the three step test under the Berne Convention and TRIPS. The three steps being that any limitation or exception to the reproduction right must fulfil three criteria-

- a) The limitation or exception can only apply in certain special cases.
- b) The limitation or exception must not conflict with the normal exploitation of the work;
- c) The limitation or exception must not unreasonably prejudice the legitimate interests of the author.

It follows from the foregoing that if there is to be any consideration of a “*fair use*” test it must be considered at European level in the first instance as any departure from the strict criteria of Article 5 would be impermissible in this jurisdiction.

It is instructive to note developments which are occurring in other European countries with regard to copyright law and the internet. Recently the German government announced plans for legislation which would require search engines and aggregators to pay for small snippets of text displayed on their search result pages. The German plan would require commercial users of news to pay reasonable remuneration for the content by way of the short extract delivered by them to the consumer. This follows on from a decision of the Belgian Courts last year in *Google Inc v Copiepresse*. The Belgian Court found in favour of Belgian publishers in ruling that Google was in breach of copyright laws in the manner in which it reproduced copyright material created by the Belgian publishers. It is instructive that Google sought to rely on US copyright law (in other words “*fair use*” copyright law) in order to determine whether it was in breach of copyright law. In the UK, the Newspaper Licensing Agency sought a ruling from the English High Court concerning the aggregation service provided by Meltwater as to whether users of the service could receive content and distribute same without a licence. The English Court of Appeal confirmed the High Court’s ruling that on-line newspapers are copyright protected and that most businesses subscribing to a media monitoring service that contains content from on-line newspapers require a licence from such newspapers.

Germany, Belgium and the United Kingdom have all recently recognised the copyright protection afforded to newspapers’ on-line content. Furthermore, each of these countries is subject to the EUCD. To even consider a US style “*fair use*” doctrine in light of these instructive and persuasive authorities is foolhardy.

We also reiterate here our previous submission to the effect that the existing “*fair dealing*” defence in the Copyright and Related Rights Act 2000 should be amended and clarified so as to reflect the position set out in Section 29.1 of the Copyright, Designs and Patents Act 1998 (United Kingdom) – that commercial use cannot benefit from the defence. That approach would be both certain and fair.

4. Various parts of the Consultation Paper refer to the need for Ireland and the Irish economy to embrace technological change

NNI and its members do indeed embrace technological change. Since the year 2000 NNI members have spent over €250 million on capital investment in technological change. In our previous submission, we discussed the progression of the newspaper industry through a period of innovation and change. To the extent that there might be an implicit suggestion that a copyright holder is not one that embraces technological change, that is a misplaced suggestion.

Newspapers have evolved from print only, black and white, printed on an old-fashioned printing press to today’s multi-platform delivery of news created in an integrated newsroom from where the print and digital editions are created.



It's almost hard to imagine but, in 1994, The Irish Times launched a web edition and was one of the first half a dozen newspapers in the world to do so. In fact, it was the first in Europe to do so.

Who could have imagined back then that the reader in 2012 would have so many choices available to them to access high quality editorial content, created by highly-trained, top class journalists and writers.

The choices for the reader are now manifold: printed newspaper, e-paper, website, mobile apps. From a digital perspective, a reader can access the headlines and a quick synopsis of a "breaking news" story or read the full story, complete with detailed analysis, opinion as well as video content. The reader can also enjoy an interactive experience with the option to share views with other readers through the "leave a comment" facility. Irish newspapers continue to invest in content management systems to enable their digital products to evolve and respond to reader demands.

Separately, to the extent which some mention of the country's economic position is made in the Consultation Paper in the context of the importance of embracing innovation, we would reiterate here that some 4500 people are employed by the newspaper industry in the Republic of Ireland, with several thousand more part-time and spin-off jobs in related sectors. Newspapers generate €830 million annually for the Irish economy. Irish newspapers pay €300 million in wages to employees and contributors. A similar amount is spent on the purchase of goods and services by those newspapers. It is quite clear, and undeniable, that a dilution of the rights of copyright holders will jeopardise those figures.

Separate from this economic consideration, weakening of copyright laws poses a threat to the availability of independent, credible news sources. The significant financial investment which is required from news publishers will be harder to justify if the rights in those publishers' content are such that the content can be copied and distributed in a digital context without the possibility for the publishers to make a commercial return.

5. The need for the Committee to recognise the importance of licensing

With respect, insufficient emphasis is placed in the Consultation Paper on the role which licensing systems, and other forms of permissions from rights holders relating to the use of copyright content, plays. NNI members are happy to allow companies to use and benefit commercially from their content, as long as the users are licensed and the publishers receive reasonable remuneration in return. This is evidenced by the fact that a straightforward, "one stop shop" for companies that wish to use newspaper content has been mandated by publishers in Ireland, specifically for that purpose. Competitive, value-for-money licence fees are published on a transparent basis by Newspaper Licensing Ireland Limited.



In light of that, to the extent that there are portions of the Consultation Paper which identify copyright as a monopoly and express concern about a potential barrier to technology in that context (which concern we submit is misplaced in any event), that does not reflect the reality of the situation. The reality of the situation is that the NNI members, and indeed most other members of the creative sector, welcome use of their content, provided it is on a reasonable commercial basis, and actively take steps and set-up systems to facilitate licensing and syndication. In other words, the creative sector generally does not wish to exercise a monopoly. It is in the sector's own interests, and speaking more specifically it is in the interests of NNI members, that they would not exercise a monopoly but instead would make their content available on a commercial basis. This is a reality which the Committee must not ignore.

We would submit that the Committee must have considerable regard to this in continuing its review of copyright legislation. NNI noted that there were submissions made by other parties to the Committee to the effect that licensing on the part of the creative sector is difficult to access. In the case of NNI, the NNI and its members actively publish and promote the existence of the licensing system, as it is in their own interest to do so. This is done through the various NNI member websites and publications, but also through a separate website and through awareness campaigns and mail shots launched by the mandated body (Newspaper Licensing Ireland Limited). Indeed, Newspaper Licensing Ireland Limited is in the process of developing an on-line database of newspaper clippings to facilitate easier and more efficient access to newspaper content for those who wish to reproduce it in return for reasonable remuneration. This investment in improving the existing licensing service shows the need to support and promote a well organised and fair licensing service. The newspaper industry has invested significant sums of money in making its content widely available. Licensing has played a vital role in ensuring that newspaper content is available in an accessible, efficient and fair manner.

6. The need for the Committee to have regard to the distinction between commercial use of copyright material and non-commercial use

NNI submits, respectfully, that the Committee has not had sufficient regard or consideration in its Consultation Paper to an important distinction in terms of whether a person using copyright material is doing so for their own commercial purposes or not. That is the distinction upon which the Committee should place more emphasis than its attempt to consider its review on the basis of a distinction between copyright holders and those who wish to innovate (for the reasons already discussed, that distinction is a false one).

Put simply, if someone chooses to use copyright material for a commercial purpose of their own, what possible reason is there why they would not have to do so with the permission of the copyright holder and, if required, payment of reasonable remuneration? That should be the case regardless of whether the commercial use is something which can be said to be innovative or not. Indeed there is evidence that copyright users prefer to respect and reward copyright and innovative, lawful methods of delivering copyright material (e.g. iTunes, Netflix) where the means of access is understandable and user friendly such as is the case in relation to Newspaper Licensing Ireland Limited.

It is understood by the NNI that different considerations can arise if copyright material is being used for non-commercial use. That is reflected in existing copyright legislation by virtue of the fact that there are exceptions within the legislation dealing with areas such as research, private study, criticism and/or review.

Throughout the Consultation Paper, the Committee has raised for discussion the prospect of certain amendments to the existing copyright legislation. Many of those possible amendments, and the rationale for them, are undermined by the fact that regard has not been paid as to whether the use relevant to the amendments is for commercial use or non-commercial use.

For example, the Committee has suggested various amendments so as to allow for use of copyright material in the context of education. The NNI can understand many contexts in which there are educational purposes in respect of which the use of copyright material should not require the permission of the copyright holder. However, for example, why should a private, third level education run as a profit-making business be able to use copyright material, such as books and newspapers, without a reasonable payment to the copyright holder. Clearly, there is no case there for an exception for that type of institution.

7. Linking

The Consultation Paper, at page 48, briefly discusses the issue of linking and goes on to provide for a proposed amendment to existing copyright legislation to provide that the offering of a link on a page on the internet is not an infringement of copyright law. The underlying rationale set out by the Consultation Paper in this section is misconceived and we do not accept as being based on fact.

Section 6.3 of the Consultation Paper provides that Courts, (although it does not specify which Courts) are increasingly concluding that a link, by itself, should never be seen as a publication, reproduction or communication of the content to which it refers, even where that content is an infringement of copyright. The NNI takes serious exception to the statement included in the Consultation Paper that “the fact that links make access to that content straightforward does not change the reality that a link, by itself, is content neutral.” The NNI strongly believes that this position simply by-passes the creator’s copyright and gives aggregators and other forms of on-line copiers carte blanche to disregard the legitimate interests of content creators.

The publisher’s permission for commercial exploitation of copyright material is something which should not be ignored, whether it be by means of a valid licence or adherence to the publisher’s online terms and conditions of use or a combination of both.

It is the view of NNI that a link to copyright material does constitute infringement of copyright, and would be so found by the Courts. In particular the Committee should have regard to the recent decision of the UK Court of Appeal (Civil Division) in the case of the Newspaper Licensing Agency Limited and

Others v Meltwater Holding BV and Others wherein it upheld the findings of the High Court which findings included:

- that headlines are capable of being independent literary works and so copying just a headline can infringe copyright;
- that text extracts (headline plus opening sentence plus “hit” sentence) can be substantial enough to benefit from copyright protection;
- that an end user client who receives a paid for monitoring report of search results (incorporating a headline, text extract and/or link, is very likely to infringe copyright unless they have a licence from the NLA or directly from a publisher.

NNI proposes that, in fact, any amendment to the existing copyright legislation with regard to deep-linking should specifically provide that deep-linking to content protected by copyright without respect for the linked website’s terms and conditions of use and without regard for the publisher’s legitimate commercial interest in protecting its own copyright is unlawful.

NNI, and its member publications, fully recognise that there is a distinction between the sending and receipt of links for personal use on the one hand and the sending and receipt of links for commercial purposes on the other (despite the fact that the same legal principles apply to both). This is evidenced by the approach taken in the terms and conditions of most newspapers’ websites, where the use of links for personal use is expressly permitted, whereas that is not the case for commercial or non-personal use. NNI accepts that linking for personal use is a part of how individuals communicate online and have no issue with that. However, linking, where it is done for commercial purposes without fair remuneration to the rights-holder, is unfair. Doing so is not permitted in most newspaper websites’ terms and conditions and also, in the view of the NNI, is an infringement of copyright.

Response to the Specific Queries

In this section of our further submission, we will outline the NNI’s position on the various numbered issues and queries raised throughout the Consultation Paper. We do so using the same numbering as in the Consultation Paper itself.

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

NNI would submit that the Committee’s six-fold classification is misconceived to the extent that it is not in fact possible or accurate to deal with each of those six classes as if they are separate from the others. For example, a person or entity can be, and in many cases is, not just a rights holder, but also a user and entrepreneur.

The point we are making here is not just a technical one relating to the labels used for different interests. We believe that this is the key underlying difficulty with the approach being taken by the Committee. To try and deal with “rights holders” as a separate class from “entrepreneur” misses the point that copyright

is about protecting innovation, creation and entrepreneurship. This goes back to the misconception in the terms of reference of the Committee to the effect that copyright can constitute a barrier to innovation. Copyright is about protecting innovation by allowing content creators to benefit from their work.

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

The basic principles of copyright law in Ireland are sufficiently clear and well known however, clarification would be welcomed by the NNI in relation to the protection of copyright holders' interests and the enforcement of those interests. At present, the protective and enforcement measures available to copyright holders are expensive and protracted. A low cost, effective way to enforce copyright holders' interests is in all stakeholders' interests.

(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?*

Whilst NNI accepts that the answer to this query is perhaps more pertinently one for drafters of legislation, we do see attraction in the consolidation envisaged in the query.

(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?*

No, for the reasons identified above. Our issue is not just a technical one in relation to the classification, we believe it arises from the misconception in the terms of reference that this Committee must consider changes to legislation based on the fact that it may be *perceived* that copyright can create a barrier to innovation.

Furthermore, we would suggest that greater clarity is required in terms of what is meant by the category of "intermediaries". It appears that the Committee believes that phrase applies to a wide range of different categories of bodies, which carry out a wide range of different activities. For example, the activities and practices of the likes of Google (with its services such as its search engine, its "Google ads" service, "Google books" and "Google news") are entirely different to the activities of pure, narrow internet service providers. Furthermore, newspapers might be considered as "intermediaries" given that they are the medium conveying the news to consumers of the news. To try and deal with such a wide range of commercial activities and interests under one category is not realistic.

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

Please see our comments above.

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

The NNI believes, with respect, that it is not an issue of a balance to be struck between the categories, but instead that the manner of categorisation might lead one to believe that the categories are mutually exclusive. Furthermore, it is unhelpful to become bogged down in a classification of the submissions. Rather, it is important to remember that the generation of creative content is innovation. It is wrong to take the view that creative industries are in any way in conflict with innovation. In fact, the opposite is the case. Without the protections properly afforded to the creative industries by the current copyright laws, innovation would be discouraged.

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

NNI welcomes consideration of the establishment of a Copyright Council of Ireland, but believes that considerably greater clarification and detail is required in terms of what would be the composition, objectives and powers of such a Council. NNI believes that it is important that there should be no lack of clarity in relation to the role and functions of a Council. A Council, if there is to be one, should have its functions clearly provided for by law. Furthermore, NNI believes that a Council should not purport to be any form of quasi-judicial forum. Rather, the Council should be concerned solely with the implementation of best international standards with regard to the licensing and usage of copyright material.

The NNI believes that the question of the function and role of any potential copyright Council should be the subject of a separate and standalone in-depth review and consultation. The NNI would welcome a focused process of consultation and engagement in relation to the role and function of a Copyright Council in Ireland. Regard should be had for the establishment of the Press Council. The Press Council was set up following the work and deliberations of the Press Council steering group. After over 2 years of careful consideration and analysis a model was developed for a Press Council which works effectively and efficiently. This process of consultation and engagement with the relevant stakeholders should also be applied through any proposal for the establishment of a Copyright Council.

(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?*

NNI believes that this query cannot be answered until greater clarity has been achieved in terms of the composition, powers and objectives of the Council.

However, NNI believes that it would appear appropriate that the Council would be a private body, having regard to the views of the NNI in relation to the subscribing membership of the Council (below).

- (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?***

NNI believes that for a Council to be able to meaningfully operate, its subscribing membership should be rights holders and collecting societies. The function of the Copyright Council in the UK is as a national consultative and advisory body representing those who create, hold interests in or manage rights in copyright works.

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

Greater clarity is required in terms of the composition, powers and objectives of the proposed Council before consideration can be given to composition of its Board.

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

We would suggest that any Council proposed by the Committee should have similar aims, and therefore broadly similar objects and functions, as bodies such as the Copyright Councils in the UK and New Zealand (which are referenced in the Consultation Paper).

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

NNI believes that consideration in terms of funding can only arise in circumstances where the proposed composition of the Council has been identified and detailed.

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

NNI is not averse to the establishment of an Irish digital copyright exchange, though further detail is required in terms of its scope and function.

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

NNI believes that there is clearly a system of good, functioning licensing amongst copyright holders generally. A simplifying of the means of enforcement of copyright by way of practical and legislative change would be welcome and beneficial.

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

In principle, NNI would welcome the establishment of an alternative dispute resolution service. In terms of whether one should be included as part of any Council, it would seem to be desirable, though with the manner in which the service operates, and the composition of those who operate it, can only be considered and clarified when the composition, powers and objectives of the proposed Council have been identified.

NNI believes that (as with the role and function of a potential Copyright Council) the establishment of an ADR service requires independent review, consultation and analysis in conjunction with the relevant stakeholders in the copyright industry. It would be a mistake to implement a system of ADR, in a hurried fashion, which fails to address the current shortcomings in relation to protection and enforcement of copyright interests. NNI believes that the English system of a Copyright Tribunal whose principal function is to decide, where the parties cannot agree between themselves, the terms and conditions of licences offered by or licensing schemes operated by collective licensing bodies in the copyright and related areas deserves closer scrutiny to establish whether it may be useful in this jurisdiction also.

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

See our answers above.

(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?*

NNI believes that the role of the Controller could also form part of a separate review concerning the proposed role and function of a Copyright Council and a system of alternative dispute resolution for copyright matters. NNI is of the view that the different branches of intellectual property namely patents, industrial designs, copyright and trademarks are all unique, distinctive and separate areas, the administration and management of which require specific knowledge and expertise. There is specific merit to separating out the functions in relation to copyright currently undertaken by the Controller and giving those functions to an office solely dedicated to the issue of copyright.

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

NNI does not propose to comment on this.

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

Further detail in respect of any proposed Council and alternative dispute resolution service would be required in order to answer this. NNI believes that this should form part of the proposed independent review and consultation referred to above.

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

In principle, the introduction of such a jurisdiction would be welcome, but the need for one may depend on whether an ADR service is implemented. NNI has reservations about the ability of the existing District Court system to deal with

copyright matters. If there was to be a specialist jurisdiction either for the District Court or the Circuit Court, it cannot simply be part of the everyday workload of the existing judiciary. Specialist knowledge and experience is required. As stated above further consideration and engagement is required in order for a cost effective, workable dispute resolution system to be achieved.

- (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?***

See answer to number 20 above.

- (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?***

See answer to number 20 above.

- (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?***

NNI believes that the public interest in diversity within the media is very well served by the creative sector in Ireland. This is borne out by the wide variety of daily and weekly newspapers in circulation in the country with regard to the total population of the country. Unfortunately the public interest in diversity within the media is threatened by the proposed relaxation of the protections afforded to creators. Without adequate protection, the creative sector's incentive to serve the public interest in diversity is removed by the lack of reward for commercial exploitation of copyright material.

- (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?***

Currently there are 16 national newspapers in circulation as well as approximately 150 local and regional newspapers in Ireland. Ireland enjoys an unprecedented level of newspaper readership, above 80% of the adult population. Every week over 5.2 million newspapers are purchased in one of 4000 newspaper outlets throughout the Republic of Ireland. A further 1.5 million free distribution newspapers are circulated every week in the Republic of Ireland. This important sector of the economy has achieved this status under the current copyright regime. In recent times newspapers made their content available on the internet and have invested heavily in innovative and ground breaking ways of making the news available to the public. If the law is changed to sanction the commercial exploitation of newspaper content without remuneration for the publishers and/or creators then it is simply logical that this will have a detrimental effect on the creative sector.

(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?*

NNI believes that the Committee needs to have regard to the high quality of content offered by the Irish newspapers as well as the significant investment put into their businesses by the newspaper industry in Ireland over the last number of years. Content in those newspapers is created from a process of research, writing and editing and is subject to standards in relation to publication and ethics. Newspaper publishers are now making that content available through a variety of different digital and analogue platforms. However, whilst huge investment has been made in making available newspaper content by digital means, there is also a wide scale unremunerated exploitation of that content to afford no proper return on investment which threatens the very existence of the businesses who have made those significant investments.

NNI estimates that, in 2010, a single search engine operating in Ireland offered free access to approximately 150,000 Irish newspaper articles at a cost equivalent of approximately €46.5 million. This is based on NNI's research which concluded that a single national newspaper article in this country costs the newspaper approximately €300 to produce. In 2011, the same search engine offered free access to more than 350,000 Irish newspaper articles at a cost equivalent of over €110 million. This is clear evidence of non-remuneration of the rights holders where significant expenditure has been incurred by the rights-holders in generating the content. It is highly relevant that the search engine generates revenue from the advertising it can attract by offering free access to these articles. The advertising on the rights-holders' homepages is by-passed, a trend which is not sustainable for the rights-holders as they try to attract purchasers for their own advertising space.

Furthermore, the manner in which those who choose to unfairly exploit this content means that the pursuit and punishment for their unlawful activity is extremely difficult. In many instances these entities operate off-shore and behind a web of digital disguises. Protection for the innovation and investment already undertaken by the newspaper industry should be a paramount concern for the Committee. Enforcement of existing copyright laws and acceptance of legitimate enforcement of copyright is a problem which should be addressed. The NNI is concerned that the newspaper industry in Ireland be fairly remunerated for implementing the highest standards of professionalism and cutting edge technology in bringing the news to the public via digital means.

(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?*

NNI believes that the current definition of originality should be retained. Restricting the works to which the term “originality” can be attached is potentially dangerous. Originality by its very nature cannot and should not be narrowly defined. Indeed, the essence of innovation is originality.

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

NNI does not have a view on this.

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

NNI does not have a view on this.

(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?*

NNI does not have a view on this.

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

CRRA deals well with the principles governing ownership of copyright content. Alterations don't need to be made, and should not be made, to CRRA to alter the fundamental principles of copyright law.

(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?*

NNI does not have a view on this.

(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?*

NNI believes that what is required is easier enforcement of copyright. What is required is proper enforcement of the copyright protection afforded to creators and rights holders as it currently exists.

(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?*

There is clear evidence to show that rights-holders have worked innovatively to devise solutions to issues with access to copyright material online. A number of years ago the worldwide publishing community developed the Automated Content Access Protocol “ACAP”, a sophisticated mechanism to allow computers recognise the terms and conditions of access to copyright material, thereby simplifying the process. However the barrier to the innovation that is ACAP has been the distinct lack of “buy-in” to the process of implementation of ACAP by “innovators” who wish to get access to the material without due regard to the terms and conditions of access.

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

NNI is not advocating a change in the law in relation to photographs at this time.

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

NNI is not advocating a change in the law in relation to photographs at this time.

(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?*

NNI is not advocating a change in the law in relation to photographs at this time.

(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?*

Private levies are not an issue of concern in Irish copyright law. The real concern is the issue of copyright users failing to comply with their legal responsibilities in relation to commercial exploitation of copyright material. The solution to this problem is not to legalise activity which is currently illegal. Rather, greater support and recognition should be given to reasonable, affordable and accessible licensing of copyright material for those who wish to use it.

(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?*

The Committee is referred to earlier answers in relation to the Copyright Council and alternative dispute resolution.

(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 CRRRA?*

The issue of enforcement of copyright in relation to unlawful reproduction of analogue content is insufficiently addressed in the context of copyright licensing and collecting societies. Whilst there is discussion on the prospect of introducing new dispute resolution procedures, the issue of unlawful reproduction activities is not properly discussed. This is of concern to the NNI. Furthermore, following on from significant investment by the newspaper industry in providing digital content the issue of web crawlers, aggregators and other on-line entities copying and commercially exploiting newspapers' on-line content without any remuneration to the newspapers is a significant issue for the newspaper industry and is insufficiently addressed in the Consultation Paper. The issue of unlawful, unlicensed reproduction without a licence needs to be properly understood and to be dealt with by law.

- (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?***

NNI believes that the case for caching, hosting and conduit immunities has been weakened by technological advances. News aggregators are using cache copies of original content and are, without obtaining the required licence, using those cache copies to bypass the legitimate archive of the publishers. The publishers are entitled to maintain their archives for commercial gain. Aggregators are not, and should not be, entitled to immunity in relation to unlawful copying of newspapers' content.

- (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?***

There should be no immunity. See answer to number 40.

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

There should be no immunity. See answer to number 40.

- (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 reasonable future-proof?***

The definition of intermediary is far too broad. It is simply far too simplistic to gather the activities of entities as diverse as internet service providers, search engines, discussion/posting websites and even potentially newspaper websites under the single classification of "intermediary". The internet is complex and highly sophisticated so are those who choose to exploit it by means of copyright theft. The problem of copyright enforcement requires an accurate understanding of the diverse activities undertaken in order to be adequately addressed.

- (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?***

Yes. As stated at page four of this submission EUCD prevents introduction of a Fair Use doctrine in Ireland. It is simply not legally permissible.

- (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?***

That is a matter for the Courts to decide. It is the view of NNI that a link to copyright material does constitute infringement of copyright, and would be so found by the Courts. In particular the Committee should have regard to the recent decision of the UK Court of Appeal (Civil Division) in the case of the

Newspaper Licensing Agency Limited and Others v Meltwater Holding BV and Others wherein it upheld the findings of the High Court which findings included:

- that headlines are capable of being independent literary works and so copying just a headline can infringe copyright;
- that text extracts (headline plus opening sentence plus “hit” sentence) can be substantial enough to benefit from copyright protection;
- that an end user client who receives a paid for monitoring report of search results (incorporating a headline, text extract and/or link, is very likely to infringe copyright unless they have a licence from the NLA or directly from a publisher.

Any argument that linking in fact drives traffic to the publisher’s website, and therefore is in the publisher’s interests, ignores the fact that linking directly to the article/report/content by-passes much of the publisher’s revenue generating advertising available from the publisher’s homepage. If advertisers no longer see the benefit of advertising on a newspaper’s homepage because of the prevalence of linking directly to the newspaper’s content then a vital revenue stream for newspapers justifying the availability of that content on-line will be removed.

NNI’s members have, for many years, invested heavily in quality journalism and content. This has resulted in a relationship of trust between the newspaper and its loyal readers. The newspaper is heavily reliant on awareness, amongst the public, of its brand and its product. Linking threatens that relationship. Linking directly to articles anonymises the article. The relationship between newspaper/brand and reader is severed. The reader should know where an article comes from and how it has been produced. It is unhealthy, in a democratic society, for diversity of newspaper content to be threatened in this way.

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

There should be no legislative provision stating that linking does not constitute an infringement of copyright. It is clearly defined in the legislation on a general basis as to what constitutes copyright material and it is ultimately a matter for the Courts to decide as to whether linking constitutes an infringement of copyright. It is not understood as to why there should be any specific exception made in the case of linking within the legislation.

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

This should not arise.

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

NNI is concerned with the use of the term “innovation intermediaries” by the Committee. The Committee’s proposed definition of the term “intermediaries” is misconceived. This has been discussed in previous answers to the questions raised by the Committee. NNI reiterates its firm view that copyright law in its current form encourages innovation, as copyright law is supposed to do. Furthermore, NNI believes that its member newspapers are innovation intermediaries as the term is properly understood. Newspapers research the news, find the news, describe the news and presented the news in both traditional and innovative ways. Newspapers constantly invest and innovate in order to produce high quality content for the consumer.

It is not understood why the Committee, in raising this point, did not request evidence from those who would answer this question in the positive.

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

Please see our reply to question number 35.

(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?

No, that is not the case. News publishers are innovators too. If their copyright is diluted in the digital context, it will stifle that innovation.

The coining of the phrase “marshalling” in this context by the Committee is unfortunate and regrettable. It appears that the type of activities which the Committee regards as covered by this phrase “marshalling” include clear examples of blatant copyright infringement. The use of the phrase “marshalling”, with the positive connotations it brings with it, is extremely pejorative. It is a concern if the Committee believes it is acceptable to use such a phrase for activities of that type, and indeed to attempt to bring so many differing types of activity under that one phrase.

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

See above.

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

No. As stated above, the coining of the phrase “marshalling” in this context by the Committee is unfortunate and regrettable. It appears that the type of activities which the Committee regards as covered by this phrase “marshalling” include clear examples of blatant copyright infringement. The use of the phrase “marshalling”, with the positive connotations it brings with it, is extremely pejorative. It is a concern if the Committee believes it is acceptable to use such a phrase for activities of that type, and indeed to attempt to bring so many differing types of activity under that one phrase.

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

Not applicable.

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

NNI is of the view that the failure on the part of those who unlawfully reproduce newspapers' on-line content without reasonable remuneration is in fact a barrier to innovation. NNI's members are presenting the news to the public in increasingly innovative ways. However, it cannot continue to do so when faced with unfair competition from those unwilling to pay fair remuneration to reproduce content created by the newspapers. This is a barrier to further development by newspapers. The reality is that entities such as Google News will replace the news industry in the not too distant future if copyright continues to be disrespected. Ironically, NNI's members and the content they create is the lifeblood for these organisations. Without this content, not only will the Irish press industry be decimated but the aggregators will be left without diverse, quality and properly edited news content. This is a clear threat to the need for a diverse press in a functioning democracy.

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

No. The word "includes" creates uncertainty. Uncertainty is to be avoided especially where a goal for the Committee must be clarity and certainty of law. It should be the Committee's goal to promote clear legislation rather than laws which are further open to interpretation. It was universally acknowledged at the recent public meeting that certainty in relation to copyright is very important.

(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?***

Each of those would have to be considered on its own merits, rather than being included in Irish law simply on the basis that they are exceptions permitted by EUCD. The existing legal position achieves a balance between the rights of owners and users which has served both the copyright community and users well for the last twelve years. The Committee's focus should be on proper

protection and enforcement of rights holders' interests to promote creativity and innovation in the context of legitimate content creation. Any perception that copyright law is unbalanced, in favour of rights holders, in its current form is misguided. The imbalance lies in the disparity between the level of commercial exploitation of copyright content and the level of fair remuneration for commercial use of copyright content.

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

No. The proposed extension has no regard as to whether, for example, the education is for commercial purposes. The exemptions should be specifically and explicitly limited to non-commercial use. Furthermore, any extension to include "education" could potentially jeopardise the future of the book publishing industry in Ireland. It is worth highlighting that NNI's members have invested heavily in education and literacy. Newspaper content is already used widely in Irish classrooms. The amended that should be made is that the exception for research and private study should be explicitly limited to private, non-commercial, research.

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

NNI's answer to question number 57 applies equally here.

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

NNI does not have a view on this.

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

Whilst the exception relates to playing or showing sound recordings, broadcasts and cable programmes in certain premises NNI submits that no exception can or should be made that would extend to other types of copyright work e.g. literary works.

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

No. The phrase user-generated content is capable of encapsulating a huge variety of different content. However, as it is traditionally understood, user-generated content on the internet is replete with examples of breach of copyright whether directly by simple copying of copyright content into "user-generated content" or indirectly by the offering of links directly to copyright 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?***

No. The law of copyright should not seek to trespass upon the law of contract in this fashion. Terms and conditions of use should be respected by the user. These terms and conditions of use are one of the few ways that content creators and rights holders can seek to protect the time, effort and investment made in creating content.

- (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?***

Never. This question is a prime example of the misconception inherent in the Committee's approach. Copyright protects innovation. In so far as the question assumes that there may be a public policy interest in protecting innovation, that is the very purpose of copyright law and the way in which that public policy interest is served.

In answering this question, NNI must take exception with the paragraph which commences at the foot of page 93, in the section on "Entrepreneurs". With respect, it is not for the Committee to make bald, apparently factual statements such as that an internet search function does not "unreasonably prejudice the legitimate interests of the owners of those sites". The Committee has no basis, or evidence, to state that as fact and it is vigorously disputed. It is a matter of concern if the Committee is conducting this review on the basis of such a prejudiced view of whether copyright holder's legitimate interests are unreasonably prejudiced by search engines.

- (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?***

Same as above.

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

The issue of compulsory licences is worth further consideration and may be a way to make news aggregators copyright-compliant in circumstances where such entities have not availed of the existing licensing system. Any such compulsory licences would have to provide for equitable remuneration for content providers. In this regard the Committee should give consideration to the new set of laws proposed by the German Government. The German plan would require commercial users of news (including aggregators that electronically circulate selected news items) to pay a fee for doing so.

- (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?***

No. It is misguided, and ironic, to suggest that there might be a copyright exception for innovation. Copyright is about protection of innovation.

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

NNI is of the view that where, potential for commercial exploitation of copyright works exists in relation to format shifting by heritage institutions for archival purposes, then such institutions should fairly remunerate the rights-holder in return.

- (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?***

NNI is of the view that the investment and curation of a newspaper archive should be respected by libraries and fair remuneration for use of archived content should be paid. A newspaper archive is a commercial asset of a newspaper in which significant investment has been made.

- (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?***

No. NNI's rationale in answering question 68 applies equally here.

- (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?***

No. NNI's rationale in answering question 68 applies equally here.

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

NNI's rationale in answering question 68 applies equally here. Further clarity is required on what is meant by the term "digital publications" in this context before NNI is in a position to provide an answer.

- (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?***

This question is difficult to answer until detail in relation to the composition and functions of Council are available.

- (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?***

NNI does not have a view on this.

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

No. Exceptions provided for by CRRA achieve a reasonable balance between the rights and interests of rights holders and creators and users of content save that the exceptions should be confined to non-commercial use only. A broad exception covering scientific and other researchers to use modern text and data mining techniques is open to abuse and exploitation by commercial users. Exceptions to copyright protection ought to be limited, clearly set out and limited to non-commercial use.

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

NNI is not opposed to a clear and limited exception for the purposes of funding computer security assessments provided that the legislation prescribes the precise circumstances in which an exception of this nature may be available of with the rights holders' permission and strictly for the purposes of computer security.

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

Our previous submission discusses to some extent the experience of other countries in relation to the fair use doctrine. The key points are: that it dilutes certainty; that it results in expensive litigation and that it creates a barrier to smaller players in the market who cannot get fair remuneration for those commercially exploiting their content.

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

As stated at page four of this submission EUCD prevents introduction of a Fair Use doctrine in Ireland. It is simply not legally permissible.

- (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?***

No. NNI is concerned about the nature of this question. A question of a political nature such as this has no place in what is a review of the legal position in relation to copyright law.

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

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

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

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

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

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

- (81) *Is the ground covered by the fair use doctrine, either in the abstract or in the draft section 48A CRRRA above, sufficiently covered by the CRRRA and EUCD exceptions?***

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

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

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

- (83) (a) *If a fair use doctrine is to be introduced into Irish law, what drafting considerations should underpin it?***

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".



(b) In particular, how appropriate is the draft section 48A tentatively outlined above?

The Committee is referred to the section at the start of this submission dealing with the Committee's examination of the appropriateness of the US style "fair use" doctrine in an Irish/EU context for the NNI's views in relation to "fair use".

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

NNI is in favour of a single consolidated piece of legislation in the interests of clarity.

(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)?

NNI has already expressed its views in relation to the legal position concerning liability of internet service providers, caching and hosting at answer to question number 47.

(86) What have we missed?

We have identified throughout this further submission a number of what we believe to be misconceptions in the manner in which the Committee is approaching this. We do so respectfully. This includes the fact that the Committee has not had sufficient regard to the role that licensing plays. It includes the fact that the Committee is not having sufficient regard to the fact that copyright is about protecting innovation. It includes the fact that the Committee is not having sufficient regard in considering these issues as to whether any particular use of copyright law is for commercial use or non-commercial use.

Having made those points, and others throughout this submission and our previous submission, we would commend the Committee on the generally comprehensive nature of its Consultation Paper and the time and detail which clearly went into it.

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