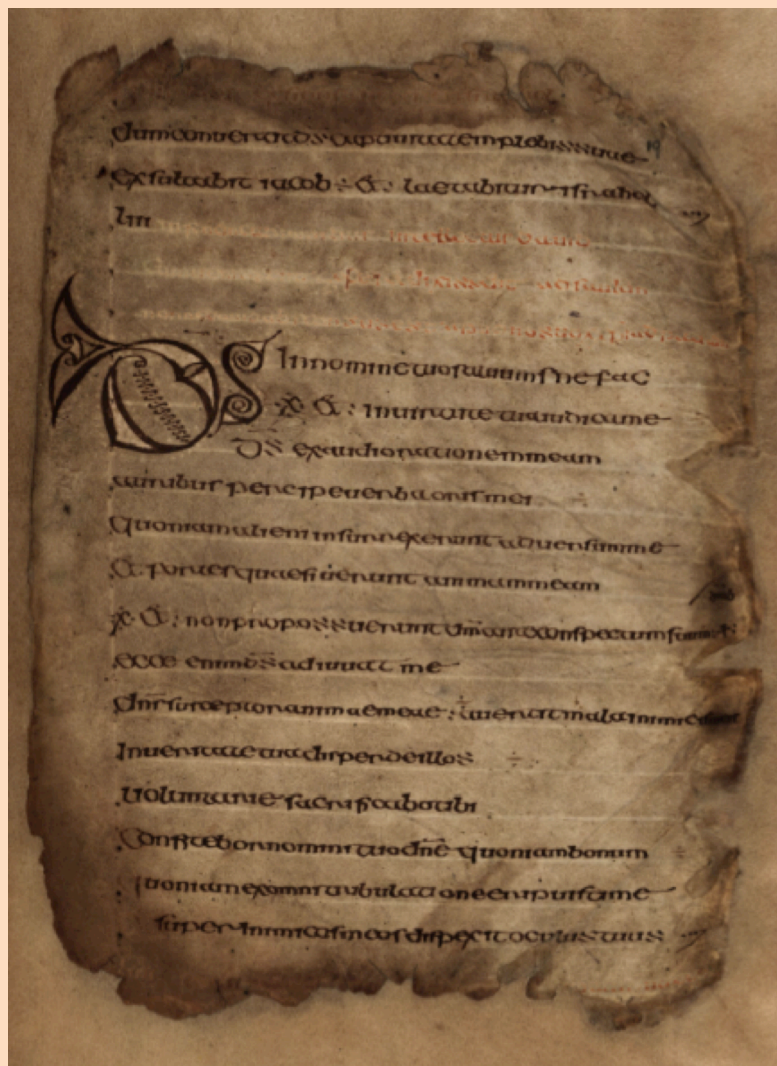


Modernising Copyright



The Report of the
Copyright Review Committee

Dublin, 2013

We are grateful to the Royal Irish Academy for permission to use the images on the front and back covers. They are photographs of the *Cathach* of St Columba, from the Academy's collection. The *Cathach* is the oldest extant Irish illuminated manuscript and the earliest example of Irish writing, and it is traditionally accepted as the psalter which St Columba copied from St Finian. This led to King Diarmaid's famous judgment in favour of St Finian - "To every cow, its calf; to every book, its copy", to the Battle of Cúl Dreimhne in 561, and to St Columba's exile in Scotland.

See <http://www.ria.ie/Library/Special-Collections/Manuscripts/Cathach.aspx>

Modernising Copyright

A Report

prepared by the

Copyright Review Committee

for the

**Department of
Jobs, Enterprise and Innovation**

Dublin, 2013

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Introduction

Background

Copyright reform is in the air. In the recent past, Canada has introduced comprehensive amending legislation;¹ Germany² and India³ have made small but significant changes; the United Kingdom (UK) is in the course of implementing extensive reform proposals;⁴ Australia is on the cusp of a truly radical transformation;⁵ the European Union (EU) has important ongoing processes relating to licences,⁶ orphan works,⁷ and infringement procedures;⁸ and, in the United States (US), both Congress⁹ and the Copyright Office¹⁰ are getting in on the act.

As part of this process, the Copyright Review Committee (the Committee) was established on 9 May 2011 by the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton (TD). It consisted of Dr Eoin O'Dell (Trinity College Dublin), Patricia McGovern (DFMG Solicitors, Dublin), and Professor Steve Hedley (University College Cork); and it was tasked with the following Terms of Reference:

¹ See Copyright Modernization Act, 2012; available at http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/FullText.html

² See *Achtes Gesetz zur Änderung des Urheberrechtsgesetzes* Vom 7 Mai 2013 available at http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl113s1161.pdf#_Bundesanzeiger_BGBI__%2F%2F%5B%40attr_id%3D'bgbl113s1161.pdf%5D__1376837120165

³ See the Copyright (Amendment) Act, 2012; available at http://www.copyright.gov.in/Documents/CRACKT_AMNDMNT_2012.pdf

⁴ See the Intellectual Property Office Implementation of the Hargreaves Review (*Digital Opportunity. A Review of Intellectual Property and Growth*) [Hargreaves]; Hargreaves is available at: <http://www.ipo.gov.uk/ipreview.htm>; and the implementation is available at <http://www.ipo.gov.uk/types/hargreaves.htm>

⁵ See Australian Law Reform Commission Inquiry on *Copyright and the digital economy*, available at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>

⁶ See *Licences for Europe* (2013); available at <http://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>

⁷ See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works; available at http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm

⁸ Commission Communication To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions *A coherent framework for building trust in the Digital Single Market for e-commerce and online services* (SEC(2011) 1640 final) (11 January 2012); available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF> and see generally http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm

⁹ See Subcommittee on Courts, Intellectual Property, and the Internet of the US House of Representatives Committee on the Judiciary hearings on “Innovation in America: The Role of Copyrights” (25 July 2013) http://judiciary.house.gov/hearings/113th/hear_07252013.html

¹⁰ See *Copyright Small Claims. A Report of the Register of Copyrights* (US Copyright Office, 2013); available at <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>

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 Committee established a website for the process,¹¹ held a public meeting on 4 July 2011, received over 100 written submissions,¹² and published a *Consultation Paper* [the *Paper*] on 29 February 2012.¹³ The Committee held a further public meeting on 24 March 2012, received in the region of 180 further submissions¹⁴ (including via an online questionnaire) and is now pleased to publish this *Report*.

This *Report* builds upon the *Paper* as well as the two public meetings and the two rounds of submissions; and the main fruits of the work are the draft Copyright and Related Rights (Innovation) (Amendment) Bill 2013 which forms the second part of this *Report*. The “present national copyright legislation” referred to in our Terms of Reference, above, is the Copyright and Related Rights Act, 2000 [CRRA] (as amended);¹⁵ the “European Communities Directives on copyright and related rights” referred to in our Terms of Reference, above, include the EU Copyright Directive [EUCD];¹⁶ and, having regard to the EUCD, our draft Bill is drafted as a series of CRRA amendments.

¹¹ See http://www.djei.ie/science/ipr/crc_index.htm

¹² See http://www.djei.ie/science/ipr/crc_submissions.htm

¹³ See *Copyright and Innovation. A Consultation Paper* (2012); available at http://www.djei.ie/science/ipr/crc_consultation_paper.pdf

¹⁴ See http://www.djei.ie/science/ipr/crc_submissions2.htm

¹⁵ The full text of CRRA, and other associated primary and secondary legislation, is available at <http://www.djei.ie/science/ipr/copyright.htm> and in Appendix II to the *Paper*.

¹⁶ 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; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> For the full range of applicable EU Directives, see http://ec.europa.eu/internal_market/copyright/index_en.htm

Summary of Recommendations

The centerpiece recommendations relate to the establishment of a Copyright Council of Ireland and specialist intellectual property tracks in the District and Circuit Courts, and to the introduction of tightly-drawn exceptions for innovation, fair use, and very small snippets of text in the context of online links.

The position of rightsowners will be improved, by recommendations to extend remedies, technological protection measures, and rights management information. Furthermore, photographers in particular will benefit from the recommendation that copyright protection for metadata be strengthened.

The position of copyright users will also be improved, by recommendations to introduce the full range of exceptions permitted by EU law, including format-shifting, parody, education, disability, and heritage, as well as related exceptions for non-commercial user-generated content and content mining. Furthermore, copyright deposit libraries, in particular, will benefit from the recommendation that the existing legal copyright deposit provisions be extended to digital publications. Finally, all users will benefit from a comprehensive recommendation that any contract term which unfairly purports to restrict an exception permitted by the Act should be void.

Copyright Council of Ireland

A central recommendation is the formation of a Copyright Council of Ireland, as an independent self-funding organisation, created by the Irish copyright community, recognised by the Minister, and supported and underpinned by clear legislative structures provided (section 3 of Bill; and the Schedule). This should be based on principal objects that ensure the protection of copyright and the general public interest as well as encouraging innovation; and it should have a broad subscribing membership and a Board drawn widely from the Irish copyright community. It should provide education and advice on copyright issues, advocate both nationally and internationally for developments in copyright policies or procedures, and work towards solutions on difficult copyright issues. It should be able to establish a Digital Copyright Exchange (to expand and simplify the collective administration of

copyrights and licences), a voluntary alternative dispute resolution service (to meet the need for an expeditious dispute resolution service outside the court system), and an Irish Orphan Works Licensing Agency (to provide a solution to the problem of orphan works).

The Courts and the Controller

In parallel, we recommend that the Small Claims procedure in the District Court be extended to include intellectual property claims up to the value of the standard limit of the District Court's jurisdiction, and that a specialist intellectual property court also be established in the Circuit Court (section 4 of the Bill). We also recommend that the Controller of Patents, Designs and Trade Marks be renamed the Controller of Intellectual Property (section 5 of the Bill). Moreover, we strongly recommend that these new Courts and the Controller's Office be properly resourced. If they are not, all of this new architecture will be for naught.

In these new structures, it will still be for the Minister to make policy, for the Controller to implement that policy and to regulate and administer the State's formal intellectual property infrastructure, for the Council to provide education and advice and to run its various services, and for the Courts to provide ultimate resolution of disputes.

Innovation and Fair Use

We recommend the introduction of tightly-drafted and balanced exceptions for innovation and fair use. Given the significant nature of these changes, we specifically recommend that the Minister's power to determine the date on which they come into operation should be expressly reiterated in these sections, so that they may come into effect on a graduated basis at appropriate times.

As to the innovation exception, we recommend that it should not be an infringement of copyright to derive an original work which either substantially differs from, or substantially transforms, the initial work (section 21 of the Bill).

As to the recommended fair use exception, it is very circumspect, and differs substantially from the US doctrine. We recommend that the existing exceptions be regarded as examples of fair use, that they must be exhausted before analysis reaches the question of fair use, and that the question of whether a use is fair on any given set of facts turns on the application of up to eight separate factors (section 29 of the Bill).

Linking

Interconnectedness by linking is at the very heart of the internet, so we recommend that linking should not infringe copyright, except where the provider of the link knew or ought to have been aware that it connects with an infringing copy. We further recommend that it should not be an infringement of copyright to reproduce a very small snippet of the linked work reasonably adjacent to the link, and that a very small snippet should consist of no more than either 160 characters or 2.5% of the work, subject to a cap of 40 words (section 14 of the Bill).

Remedies

A key means by which copyright drives innovation is by incentivising rightsowners and content-creators to produce copyright works. We therefore recommend a full range of graduated and proportionate civil remedies, for infringement of copyright, of performers' rights, and of recording rights. Hence, at one end of the scale, unintentional breaches are not met with significant awards of damages, and that, at the other end of the scale, the most serious breaches can be appropriately dealt with by the award of restitutionary, exemplary or punitive damages (section 8 of the Bill).

Photographers

The position of photographers was a particular concern at both public meetings and in both rounds of submissions. We therefore recommend explicit protection for digital watermarks and other metadata applied to photographs. To this end, we provide a definition of metadata (section 2(2) of the Bill); and we recommend not only that copyright protection be extended to metadata, but also that its removal should amount to an infringement of copyright (section 9 of the Bill).

Technological Protection Measures

We also recommend various ways by which the legal rules underpinning technological measures for the protection of copyright or for the management of copyright information can be strengthened. In particular, we recommend that rightsowners can seek remedies for infringements of rights protection measures even where the work has been licensed, and that a circumvention of a technological protection measure should be actionable at the behest of the rightsowner as though it were an infringement of copyright (section 10 of the Bill).

On the other hand, we also recommend that users should have an effective remedy where the technological protection measures prevent a user from performing an exception permitted by the legislation (section 10 of the Bill).

Intermediaries

We recommend that the statutory provisions relating to transient and incidental copies be amended to come more closely into line with the approach being taken by the Court of Justice of the European Union (CJEU) (section 13 of the Bill). However, in advance of the outcome of a current EU Commission process,¹⁷ we do not recommend amending the existing conduit, caching and hosting immunities or introducing new immunities relating to search, framing, and cloud computing.

Users and Consumers

Innovation is increasingly an iterative and interactive process in which users play increasingly important roles, especially online, where technology is making it increasingly easier for users to innovate. To facilitate this, we recommend amending the definition of fair dealing to allow Irish law to reconnect with developments on fair dealing elsewhere in the common law world (section 16 of the Bill). We also recommend the introduction of the full range of exceptions permitted by EU law. Five of these relate to private use: reproductions on paper for private use; format-shifting; back-ups; parody; and non-commercial user-generated content (all in section 16 of the Bill). Other recommended exceptions

¹⁷ See note 8 above.

relate to news (section 15 of the Bill), religious or official celebrations (section 16(3)(b) of the Bill), and public administration (section 20 of the Bill).

Finally, all users and consumers will benefit from a comprehensive recommendation that any contract term which *unfairly* purports to restrict an exception permitted by the Act should be void (section 19 of the Bill).

Education and Research

To incorporate the range of exceptions in respect of education permitted by EU law, we recommend that the existing education exceptions relating to “research or private study” should be amended to cover “education, research or private study”, that those relating to “instruction and examination” should be amended to cover “education and examination”, and that such exceptions should extend to distance learning and the use of material available online (section 17 of the Bill). We also recommend that these developments should be subject to a licence override, and that they should be balanced by a definition of “education” which explicitly confines these exceptions to formal education in the non-commercial sector (section 2(2) of the Bill).

Similarly, given the potential for new discoveries from existing data, very significant social benefits stand to be gained from text-mining and data-mining (hereafter called “content-mining”), and we therefore recommend exceptions relating to content-mining (section 27 of the Bill) and to digital research and computer security (section 28 of the Bill).

Disability

To incorporate the full width of the exception in respect of disability permitted by EU law, we recommend that the existing exception for accessible personal copies for persons with a disability should (subject to a licence over-ride) be extended to permit multiple accessible copies for persons with a disability to be made by designated bodies. We also recommend that the Minister may provide that publishers should be given an anticipatory duty to retain intermediate electronic versions of works for the purpose of creating accessible copies (section 18).

Heritage

We recommend that references in the current legislation to “libraries and archives” be replaced with a more generic reference to “heritage institutions” (as defined in section 22(2) of the Bill), that such institutions should be able to format-shift works in their collections for archival or preservation purposes, to display such works on terminals in the institutions, and to use them in public lectures and in catalogues relating to exhibitions (sections 22 and 23 of the Bill).

We also recommend that there should be a rebuttable presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself (section 24).

In keeping with the digital focus of much of the Bill, we recommend that the existing provisions relating to legal copyright deposit should be extended to digital publications, so that copyright deposit institutions should be able to decide which digital publications they wish to claim and how they wish to claim them, in a process that is as similar as possible as the existing provisions. We also recommend that such institutions should be able to make copies of our online digital heritage by reproducing any work that is made available in the State through the internet (section 26 of the Bill provides for digital deposit; section 25 of the Bill provides for parallel changes to the existing provisions).

Other Recommendations

We recommend that there should be a new, technology-neutral, definition of “broadcast” for copyright purposes, and (for the avoidance of doubt) that the existing cable programme exceptions should not capture internet transmissions (section 11 of the Bill). We recommend that the sound track accompanying a film should be treated as part of the film (section 6 of the Bill). We recommend that there should be a provision which clarifies that copyright exceptions do not apply to computer programs, as they are subject to their own regime (section 12 of the Bill). We also recommend that an anomaly in the current legislation, by which certain unpublished works might gain a perpetual copyright, should be removed (section 7 of the Bill).

Penultimately, to ensure that there is a single authoritative statement of all Irish copyright legislation, we recommend that the Copyright Council should be able to propose such restatements to the Attorney General (section 12 of the Schedule).

Finally, we recommend¹⁸ that there should be a review of the operation of the changes made by the Bill five years or so after it comes into force (section 20 of the Bill).

1 October 2013

¹⁸ Modelled on section 25 of the Public Transport Regulation Act 2009 (available at <http://www.irishstatutebook.ie/2009/en/act/pub/0037/sec0025.html>); section 5 of the Defamation Act 2009 (available at <http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0005.html>); and section 141 of the Personal Insolvency Act 2012 (available at <http://www.irishstatutebook.ie/2012/en/act/pub/0044/sec0141.html>).

Copyright Council of Ireland

Introduction

In Chapter 3 of the *Paper*, we sought views on whether there ought to be a Copyright Council of Ireland (the Council). The model proposed in the *Paper* is for an independent self-funding organisation, created by the Irish copyright community, recognised by the Minister, based on principal objects that ensure the protection of copyright and the general public interest as well as encouraging innovation, and supported and underpinned by clear legislative structures.

It was central to the proposal in the *Paper* that the Council should have a broadly-based subscribing membership (so that any interested member of the Irish copyright community who wished to be a subscribing member of the Council could do so) and that its Board would be constituted by members of the various categories of persons and organisations connected with copyright. Moreover, key functions envisaged for the Council included undertaking processes of public education on copyright, recommending standards of best practice, and gathering evidence to support the process of ongoing copyright reform.

The *Paper* explored whether the Council ought to include an Irish Digital Copyright Exchange (the Exchange), to facilitate speedy, effective and comprehensive copyright licensing, and whether the Council ought to include a Copyright Alternative Dispute Resolution Service (the ADR service), to provide a voluntary, independent, speedy and free alternative dispute resolution mechanism.

The Copyright Council of Ireland

There was a strong positive response to proposals to encourage transparency and dialogue amongst all stakeholders in the copyright debate, the better to address collectively issues such as providing statements of standards and best practice, gathering evidence for the purposes of making policy recommendations to the Minister, and working towards solutions on difficult copyright issues. In particular, many of the respondents, though engaged on the details, said that they would be delighted to support such an initiative.

However, some submissions queried that a broadly-based Council would be able to reach sufficient accord to act effectively to deliver the remit described. For those who took this objection, the most usual alternative was that the Council should not be broadly based, but instead confined to representing the interests of one category or group of stakeholders (often, the interests of rightsowners and collecting societies).

However, whilst an overly-wide representation could indeed make developing standards of best practice contentious, an overly-narrow representation runs the risk of the Council being or becoming simply another lobby group. Moreover, whilst a broadly-based Council might encounter entrenched positions, it is at least as likely, if not more so, that it could encourage dialogue between different groups or categories of stakeholders in the Irish copyright community.

It is true that Copyright Councils in other jurisdictions often represent just the interests of one category or group of stakeholders; but these have usually been formed as a private body by that constituency. In the absence of one having already been established in Ireland, we confirm our recommendation that a broadly-based Council ought to be afforded statutory backing. By analogy with the Press Council, the Schedule in the Bill inserts a new Schedule 4 CRRA (the Schedule), which envisages that the Irish copyright community would establish a company limited by guarantee in compliance with various criteria set out in the Schedule to be the Copyright Council of Ireland. If they do so, then section 3 of the Bill inserts a new section 377 CRRA to permit the Minister to recognise it as the Copyright Council of Ireland. The structures established in the Schedule would, in particular, assure the Council's independence from government, from state agencies such as the Controller of Patents, Designs and Trade Marks, and from any one category or group of stakeholders.

Before leaving this topic, we should refer to one alternative structure to which we were referred in the submissions. Rather than following the analogy of the Press Council, it was argued that the company should be granted a licence by the

Department to set up a Copyright Council, by analogy with the means by which the Department of the Environment grants licences relating to waste management organisations (under the Waste Management (Waste Electrical and Electronic Equipment) Regulations 2005 (SI No 340 of 2005)). In the end, there seems insufficient difference between the two structures to compel the abandonment of the analogy with the Press Council proposed in the *Paper* in favour of an analogy with the WEEE Regulations.

Board of Directors

In the *Paper*, we sought to reflect the broad subscribing membership of the Council in the composition of its Board of Directors. Although many of the submissions were in favour of a broadly-based Council, and in favour of a wide composition for its Board, the composition we suggested in the *Paper* was quite heavily criticised because it did not sufficiently track the various categories or groups of stakeholders which had been identified in the *Paper*: (i) rightsowners,¹⁹ (ii) collecting societies, (iii) intermediaries, (iv) users, (v) entrepreneurs, and (vi) heritage institutions.

As was emphasised in the *Paper*, this is an impressionistic division, serving simply as a useful classification with which to organise the submissions and this *Paper*. Moreover, we emphasised that the categories are not mutually exclusive - many actors may wear more than one hat at a time, and therefore come within more than one of these categories. Furthermore, some of the categories are over-inclusive: for example, it was emphasised several times in the submissions that the interests of individual copyright creators (such as “authors” and “performers” as defined in sections 21 and 202-203 CRRA) may be very different from those of corporate holders of copyrights, though they are all rightsowners. Again, it became clear from the submissions that the interests of educational establishments and libraries did not always align with those of other heritage institutions with which they had been grouped in the *Paper*. One submission said that the category of users ought to have been described as consumers - although the category of users in fact extends beyond consumers, there is an important point here.

¹⁹ See page 45 below.

Penultimately, some important members of the copyright community were not adequately represented in our original six-fold division: for example, important elements of industry relate to the manufacture of devices and the provision of services allowing the use of copyright material. Finally, it was recommended several times that the Board of the Copyright Council contain technological experts to ensure that discussions are technologically literate and that any proposed outcomes are technically feasible.

We are persuaded that a better balance of interests is needed than that which we achieved in the *Paper*. As a consequence, we recommend that the membership of the board should more closely track the various categories or groups of stakeholders which we identified in the *Paper*, modified to take account of the points discussed in the previous paragraph. Moreover, given that this breakdown is a snapshot of current needs, which may not represent the needs of the future, we recommend that there should be capacity to invite suitable people to attend or to be an observer at meetings, for example, for a calendar year. We recommend that the Board should act by consensus; where that is not possible, we recommend that the Chairperson should have a second or casting vote. All of this is reflected in section 5 of the Schedule.

It was pointed out that a Board of 13 members is big by commercial standards. However, if the Council and its Board are to be broadly based, it is hard to see how the Board's membership might be smaller than as set out here. Moreover, this is the same as the Board of the Press Council, which served in part as our model for the Copyright Council. Furthermore, it will obviously be open to the Board to form sub-groups to deal with relevant issues. Finally, we recommend that, when considering the nomination of a person to be Chairperson, consideration should be given to ensure that person has the necessary background and skills to manage a Board of this nature.

Membership and Funding

The related questions of membership and funding of the Council were discussed in many of the submissions. In the *Paper*, we recommended that the Council should be funded from subscriptions paid by its members, and we confirm that

recommendation. We further recommend that transparent categories of membership and scales of fees should be introduced by the Council to ensure that as many members of the copyright community can become subscribing members of the Council as is possible. For example, an individual photographer should not have to pay the same fee as a large multi-national corporation, and these kinds of differences should be reflected in the categories of membership and fees charged. Membership is provided for in section 4 of the Schedule.

Many of the submissions argued both sides of the question whether there ought to be some exchequer funding, or even whether it should be exclusively funded by the exchequer. (Indeed, we note in passing that many of the submissions that argued that the Council should represent the interests of one category or group of stakeholders also argued that this narrowly-based Council should nevertheless be state funded. However, where the Council is not broadly based, we can see no case for any exchequer funding at all). We stand by our original proposal that the Council should, in the main, be self-funding, but we do accept that exchequer funding may have a role to play. It could, on an *ex gratia* basis, meet start-up costs or operating shortfalls; and there may be circumstances in which exchequer funding could ensure that the Council is able to act and to continue to act in the overall public interest. It was submitted that the Council should be funded by the National Lottery. We do not consider that such a discretionary source would be sufficiently stable to form the sole basis of the Council's funding. However, if such funding were forthcoming, it would no doubt be welcome. Furthermore, there may be similar sources of funding available from the EU and other appropriate international institutions.

In the *Paper*, we recommended that the Council should have the power to accept gifts or donations, and we confirm that recommendation, provided that it is clear that such gifts are not subject to conditions incompatible with the objects, functions and independence of the Council. We also recommend that the Council should be able to charge fees for its services and for the services of any exchange, service or agency that it may establish, operate or provide.

As a consequence, we recommend that, whilst the Council should in the main be funded out of subscriptions, it should be able to charge fees for its services, and accept gifts and donations, as well as exchequer funding, National Lottery funding, and EU funding.

It was submitted to us that the Council might be funded by various levies, for example, upon collecting societies. On our model, collecting societies that wish to become members of the Council will have to pay their subscriptions like any other members, and we consider that it would be discriminatory to impose additional levies upon them (or, for that matter, upon any other category or group of stakeholders). Moreover, as we said in the *Paper* on the issue of private copying levies, and as we explain again in the chapter on rightsowners below, such levies are a blunt instrument which unnecessarily distort the market. As a consequence, we do not recommend that the Council be funded (either in whole or in part) by these means.

All of these funding considerations are addressed in section 6 of the Schedule.

Functions of the Council

The most important issue under this heading is that the Council should be independent in the performance of its functions, and this is provided for in section 3 of the Schedule. Appropriate funding mechanisms (as discussed above) should reinforce that.

Amongst those who supported a broadly-based Council, there was a great deal of support for a wide range of functions, enabled by broad principal objects, and we received many useful suggestions for what they might be. They are set out in section 2 of the Schedule, and are worth repeating here in full:

The principal objects of the Council shall be to—

- (a) ensure the integrity of copyright whilst protecting freedom of expression and the public interest,
- (b) raise public awareness of the importance of copyright and contribute to public debate about the application and reform of copyright, including by making recommendations to the

- Minister and to other appropriate bodies in Ireland, the European Union and internationally,
- (c) foster dialogue and cooperation in the Irish copyright community,
 - (d) prepare and publish standards and codes of best practice on copyright issues,
 - (e) undertake research on copyright issues, and in particular on the social and economic impact of copyright,
 - (f) support legal and technical means of protecting copyright, and
 - (g) promote creativity, sharing, open access, and innovation.

Digital Copyright Exchange

There was a good deal of circumspect support for the establishment of a Digital Copyright Exchange (the Exchange) as part of the Council. However, there was also some confusion. Some of the submissions presupposed or argued that copyrights ought to be registered, and that the Exchange should function as the registry of all such compulsorily registered copyright material. As we explained in the *Paper*, and as we explain again in the chapter on rightsowners below, this would contradict the State's obligations under international law. The Exchange is intended not as a copyright registry in that sense, but as a mechanism to expand and simplify the collective administration of copyrights and licences; and, on that basis, there were many cautious welcomes for the proposals. Indeed, even many of those who argued that a Copyright Council ought to be established privately to reflect the interests of a specific group or category of stakeholders, saw sufficient merit in the proposal to suggest that the Government should encourage (though not require) an Exchange of some sort.

The submissions properly counselled the need of the Irish Exchange to inter-operate with ongoing developments in the UK²⁰ and the EU, but some suggested that these developments made the Exchange an impractical, ambitious, unrealistic and unnecessary idea for Ireland; and a few raised questions of funding again in this context.

²⁰ See *Copyright works. Streamlining copyright licensing for the digital age. An independent report by Richard Hooper CBE and Dr Ros Lynch* (available at <http://www.ipa.gov.uk/dce-report-phase2.pdf>) leading to the establishment of the Copyright Licensing Steering Group (http://www.clsg.info/CLSG_Home.php) and the Copyright Hub (<http://www.copyrighthub.co.uk/home>), implementing some of the Hargreaves recommendations (see note 4 above).

We are not persuaded that the Exchange is so impractical an idea that it should be abandoned, but also we see merit in allowing the Council and its organs to develop this at the pace that is appropriate to the issue itself and to developments elsewhere. As a consequence, we recommend that the Schedule should be enabling and not mandatory, and simply provide that the Council “may establish” an Exchange. This would allow the Council to decide whether to press ahead in the vanguard, with or ahead of the equivalent UK developments, or to wait and see, and seek to reap the benefit of the UK experience.

Moreover if it were to go ahead, participation in the first instance should be voluntary: because we understand that copyright licensing should be a matter for rightsowners, we are not minded to recommend compulsory licensing at this stage. However, the Council and the Exchange should keep the matter under review. Indeed, as a longstop, should it prove necessary, the Minister could require compulsory licensing of rights or classes of rights, for the purposes of ensuring the success of the Exchange.

Finally, to cover overheads, the Council should be able to charge licensors a small fee for registration, or to require the payment to itself of a small element of fees charged by licensors to licensees for licences, or both. Hence, (reflecting our recommendations above relating to funding), we recommend that the Council should have power to charge such fees, if it deems them appropriate.

All of this is enabled by section 7 of the Schedule.

Alternative Dispute Resolution Service

In the *Paper*, we proposed that the Council should establish a voluntary alternative dispute resolution service. One of the submissions argued that such a service should not be necessary if the legislative provisions were clear enough.

Unfortunately, however well-meaning or well-drafted any piece of legislation might be, disputes are inevitable. Many of the submissions warmly welcomed the idea of a suitable alternative dispute resolution framework outside the court system. We therefore confirm our recommendation that the Council should

establish a voluntary, independent, neutral, impartial, and expeditious ADR service; and this is provided for in section 8 of the Schedule.

Some submissions pointed to ADR models that differed from the voluntary process overseen by the Council proposed in the *Paper*. For example, a large minority (including but not limited to those who felt that the Council should not be broadly based) argued that this should be made available, not through the Council, but through the Patents Office, along the lines of the mediation service offered by the UK's Intellectual Property Office. However, that service had been rarely used,²¹ and the IPO recently revised and re-launched it. One of the strongest criticisms of the former service was that there was very little incentive to use it, and it remains to be seen whether the greater variety of mediation options now being provided will meet that criticism. On the other hand, to provide just such an incentive, we recommend that the Schedule should contain a discretionary stay on court proceedings in support of a contract with an appropriate ADR clause; and this is provided in section 9(1) of the Schedule.

Another alternative model would make the ADR process compulsory. This would resemble the Injuries Board established pursuant to the Personal Injuries Assessment Board Act, 2003 as a statutory body providing independent assessment of personal injury, without the need for many associated litigation costs. Whilst we accept the need to encourage ADR, we consider that making it compulsory is going too far. There are other ways to encourage it. For example, as with the recent UK revisions and the model being developed by the US Copyright Office,²² the Council could provide a wide variety of mediation options, including short telephone advice sessions, as well as tele-conferencing, video-conferencing and online services. Again, the ADR service could publish standard form ADR clauses and contracts. Indeed, the Council might well decide that such clauses should be included in licences obtained through the Exchange. But in cases where licences are individually negotiated, it will be for the parties to decide whether or not to include a standard form ADR clause.

²¹ See *Call for Evidence on the Intellectual Property Office Mediation Service* (UK IPO) para 1.6; available at <http://www.ipo.gov.uk/c4e-mediation.pdf>

²² See note 10 above; and see, generally, <http://www.copyright.gov/docs/smallclaims/>

Specialist Courts: District Court

In parallel with the ADR service, we explored in the *Paper* the possibility of establishing specialist intellectual property jurisdictions in the District and Circuit courts. This, too, met with a great deal of support in the submissions, many of which pointed to section 287 of the Copyright, Designs and Patents Act 1988, which established the special jurisdiction of Patents County Courts in the United Kingdom. That court has recently been renamed the Intellectual Property Enterprise Court, and its procedures have been streamlined to save parties time and money.²³

At the level of the District Court, many comparisons were drawn with the existing Small Claims Court, which provides provide an inexpensive, fast and easy way for consumers to resolve disputes without the need to employ a solicitor. In our view, the analogy is sufficiently strong that intellectual property claims ought to be brought within the Small Claims procedure. Indeed, the District Court already possesses significant powers under the CRRRA's search and seizure provisions, so there is already a legislative judgment that intellectual property issues are not inappropriate in the District Court, and adding intellectual property disputes to the Small Claims procedure simply enlarges the District Court's existing intellectual property jurisdiction. Moreover, this makes it appropriate that the addition to the Small Claims procedure should in principle cover all intellectual property claims, and not simply copyright claims.

There is at present a ceiling on small claims of €2,000; but section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013²⁴ has extended the general monetary jurisdiction of the District Court to €15,000; and several submissions suggested that the ceiling for intellectual property claims should be the standard limit of the District Court's jurisdiction, notwithstanding that they are brought by means of the small claims procedure. We agree. €2,000 is an extremely small amount in the context of intellectual property claims; confining the small claims

²³ See the Press Release at <https://www.gov.uk/government/news/sweeping-reforms-to-ip-court-save-businesses-time-and-money>

²⁴ Available at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2013/a3213.pdf>

jurisdiction to this ceiling would likely mean that the procedure would be rarely utilised. Moreover, the recently-introduced small claims track in the UK²⁵ deals with cases up to £10,000 (which is approximately €12,000).

We therefore recommend that the Small Claims procedure in the District Court be extended to include intellectual property claims up to the value of the standard limit of the District Court's jurisdiction, which at present is €15,000. For this purpose, section 2 of the Bill adds a definition of intellectual property claim to section 2 CRRRA; and section 4 of the Bill adds a new section 16A CRRRA (immediately after the existing section 16 CRRRA concerning the jurisdiction of courts) providing that the District Court has jurisdiction in relation to such claims. We also provide a draft Statutory Instrument to bring such claims within the remit of the small claims procedure.

There were, however, some notes of caution. It was strongly submitted that not all intellectual property disputes would be suitable for hearing in the District Court (or even the Circuit Court). This is true. But, at the end of the day, suitability is a question for the parties; and, in our view, it is better to allow a specialist limited jurisdiction in principle for the cases where it is appropriate, even if other cases are taken in higher courts. Moreover, in the District Court, the Small Claims Registrar could assess whether an intellectual property claim is suitable to the small claims procedures, and advise those that are not to proceed instead in the Circuit Court (or even the High Court).

However, introducing a new jurisdiction to the District Court will require the provision of proper training and sufficient resources; and, although that is a matter for Government, we strongly recommend that such training and resources be provided as a matter of priority.

Specialist Courts: Circuit Court

There was also strong support in the submissions for the establishment in the Circuit Court of a specialist intellectual property court, again by analogy with the

²⁵ See <http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-small-claims.pdf>

Patents County Court (now the Intellectual Property Enterprise Court) in the United Kingdom. It may be that Government will subsume any such jurisdiction within the Circuit Commercial Court promised in the *Programme for Government*,²⁶ but we recommend that, in the meantime, a specialist intellectual property court be established in the Circuit Court.

Since section 14 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 extends the monetary limit of jurisdiction of the Circuit Court to €75,000 (except in cases of personal injuries), we recommend that this ceiling should also apply to the Intellectual Property Court of the Circuit Court. Section 4 of the Bill therefore adds a new section 16B CRRRA providing that the Circuit Court has jurisdiction in relation to such claims.

Again, introducing a new jurisdiction to the Circuit Court will require the provision of proper training and sufficient resources; and, although that is a matter for Government, we strongly recommend that such training and resources be provided as a matter of priority.

Orphan Works

In our *Paper*, we said that orphan works, where rightsowners genuinely cannot be identified or located, are an issue on which the Copyright Council could advise the Minister, who could then make an appropriate Statutory Instrument to deal with the issue, which would need to be consistent with, and work alongside, ongoing EU developments.²⁷ We therefore recommend that the Council should be able to advise the Minister in respect of orphan works, that any regime introduced by the Minister should be as analogous as possible with the EU regime, and that the Statutory Instrument introducing it should be introduced at the same time as any Statutory Instrument implementing the EU regime. Section 11 of the Schedule provides an enabling section for these purposes.

²⁶ Available at <http://per.gov.ie/wp-content/uploads/ProgrammeForGovernmentFinal.pdf>; see p21.

²⁷ See note 7 above. See also the US Copyright Office review of the issue at <http://www.copyright.gov/orphan/>

The key point here is that this structure does not create a free-for-all in which a user can declare a work to be an orphan, and then use it. Instead, it enables the Council to set up an Irish Orphan Works Licensing Agency (the Agency). Any person seeking to make use of an orphan work, where the rightsowner genuinely cannot be identified or located, will have to seek a licence from the Agency subject to a fee to be paid to the Agency to be paid on to any rightsowner who is subsequently identified or located.

The Agency is likely to work closely with the Council's Digital Copyright Exchange, if that too is established as part of the Council. Moreover, as with the licences that may be necessary for the purposes of the Exchange, the Council might well decide that standard form alternative dispute resolution clauses, referring disputes to the Copyright Alternative Dispute Resolution Service, should be included in licences granted by the Agency.

Restatement of Copyright Legislation

The Statute Law (Restatement) Act, 2002, provides that the Attorney General can certify a restatement; and the Law Reform Commission has drafted more than 110 restatements consolidating various areas of the law.²⁸ To ensure that there can be a single authoritative statement of all of the legislative provisions relating to copyright, we recommend that the Council should be able to propose restatements of Irish copyright legislation to the Attorney General for certification under the 2002 Act, and section 12 of the Schedule provides for this. We have therefore drafted our Bill largely as a series of amendments to the CRRRA, so that such consolidated restatement could quite easily be prepared. As a consequence, we have not consolidated all of the post-2000 amendments to the CRRRA into our Bill; it would have made an already long Bill unwieldy; so we leave this as a task for the Council.

²⁸ The Act is available at <http://www.irishstatutebook.ie/2002/en/act/pub/0033/> and the Commission's restatements are available at <http://www.lawreform.ie/revised-acts.84.html>

Controller of Patents, Designs and Trade Marks

A large part of the day-to-day administration of copyright is carried by the Controller of Patents, Designs and Trade Marks, who is the head of the Patents Office. In particular, the Controller has statutory functions relating to patents, industrial designs, trade marks, and copyright and related rights; and the Office provides a great deal of information about intellectual property generally. It is clear that the titles of the Controller and of the Patents Office drastically understate the range of the work which they undertake. Similar offices in other jurisdictions (such as Australia, Canada, China, New Zealand, Russia, Singapore, South Korea, Switzerland, Taiwan, and the UK) now have more inclusive titles referring to Intellectual Property generally; and the United Nations agency which encourages creative activity and promote the protection of intellectual property is the World Intellectual Property Organization.

In the *Paper*, we considered that the Controller's title was both inelegant and incomplete, not least because it did not expressly refer to the Controller's copyright jurisdiction; so we canvassed possible changes of title for the Controller and the Patents Office. The Controller was established in 1927 as the Controller of Industrial and Commercial Property, but the title was changed by section 78(1) of the Patents Act, 1964, and the role has been subsequently expanded, not least by the CRRRA. Moreover, it is always referred to as "the Controller" both in legislation and in common parlance. Whilst we are still of the view that a change in title is merited, we do not consider that the word "Controller" should be removed. Instead, we recommend that the title should simply be the Controller of Intellectual Property (getting very close to the 1927 title), who would be the head of the Office of the Controller of Intellectual Property (by analogy with, for example, the Office of the Director of Corporate Enforcement, the Office of the Director of Public Prosecutions, and the (former) Office of the Director of Consumer Affairs). This change would have minimal statutory impact, but would make significant practical difference. The titles would be more accurate and inclusive, and would allow other functions to be easily incorporated into the remit of the Controller, in particular having regard to the extended definition of intellectual property proposed in the Bill (see section 2(2)(b) of the Bill,

substituting a new section 2(5) CRRRA). This is provided for in section 5 of the Bill.

However, amending titles is of little matter if the office is not properly resourced; and, although that is a matter for Government, we strongly recommend that the office continue to be properly resourced as a matter of priority.

It is important to understand the inter-relationship between the Minister, the Controller, the Council, and the Courts, as it emerges from this *Report*. In principle, it is for the Minister to make policy, for the Controller to implement that policy and to regulate and administer the state's formal intellectual property infrastructure, for the Council to provide education and advice and to advocate to the Minister and the Controller for changes to their policies or procedures, and for the Courts to provide ultimate resolution of disputes. At least three important matters follow from this. First, given these different roles, it would not be appropriate for the Minister or the Controller to be members of or to be represented on the Board of the Council. Second, it should not be the role of the Council to make policy, or to regulate copyright. The making of policy should remain with the Minister, and the regulation of copyright licensing bodies should remain with the Controller (though even in these areas, the Council should be able to make recommendations to the Minister and the Controller). Third, objections to the establishment of the Council that it is a self-regulator for (aspects of) the Irish copyright community miss the point that the Council envisaged in the *Paper* is not a regulator at all. Regulatory functions remain where they have always been, with the Controller.

Moreover, if the current EU discussions relating to collective management of copyright and multi-territorial licensing²⁹ lead to requirements for greater regulation, then this would properly be a matter for the Controller. However, once collective licences have been approved by the Controller, if they contain ADR clauses, then it will be for the Council's ADR service to resolve any disputes arising on foot of those ADR clauses. Moreover, if there were to be a Digital Copyright

²⁹ See http://ec.europa.eu/internal_market/copyright/management/index_en.htm

Exchange as part of the Council's architecture, then it would provide the repository for licences approved by the Controller.

Concern was expressed in the submissions relating to the opaqueness of the process by which the Controller approves licences (under the CRRRA and the Copyright and Related Rights (Proceedings before the Controller) Rules 2009 (S.I. No. 20 of 2009)), and to the rather limited appeal on a point of law to the High Court (under s366 of the Principal Act). Other jurisdictions provide for a much fuller appeal (usually by way of rehearing) in such circumstances to a Copyright Tribunal; some of the submissions suggested that what is necessary in Ireland is a similar Tribunal rather than a Copyright Council.

One way to provide something similar in the structures emerging here is to allow an appeal by way of full rehearing from the Controller to the newly-created Intellectual Property Court of the Circuit Court (similar to the right of appeal in tax cases from a determination of the Appeal Commissioners to the Circuit Court pursuant to section 933 of the Taxes Consolidation Act, 1997). We therefore recommend an appeal by way of full rehearing from the Controller to the Intellectual Property Court of the Circuit Court, and section 4 of the Bill adds a new section 16C CRRRA providing for such an appeal.

Rightsowners

Introduction

In Chapter 4 of the *Paper*, we considered the position of content-creators and rightsowners in copyright law, and how such rightsowners contribute to the process of innovation. However, several of the submissions from rightsowners took the view that we did not sufficiently accept that content-creators are innovators, and that copyright drives innovation. In particular, some of the submissions took the view that there was insufficient focus on individual content-creators. We take this point; we have addressed it in particular in the Copyright Council chapter above; and we will return to it below.

Many submissions went further, taking aim squarely at our Terms of Reference, arguing that copyright is not a barrier to but an enabler of innovation, and that inadequate copyright protection undermines innovation. As one of the submissions put it, reworking Lincoln, copyright is the fuel that feeds the fire of creativity. We agree with the essence of these points, but we are of the view that they must not be pressed too far. Irish copyright law provides content-creators and rightsowners with both economic and moral protection for the fruits of their labours. However, copyright law is not exclusively directed solely to the interests of content-creators and rightsowners. Rather, they are afforded copyright protection not only in their terms, but also because of the public interest in and benefit from the copyright work, and that public interest accommodates the interests of intermediaries, users, and so on. In the chapter in the *Paper* on rightsowners, we looked at the first half of this balance, and we look again at it here.

Registration

It was suggested in various ways in both rounds of submissions that copyrights ought to be formally registered, either initially, or after a suggested period of time so as to qualify for the remainder of the term. However, registration is precluded by Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works,³⁰ to which Ireland is a party. Furthermore, issues relating to the copyright

³⁰ See http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

term have been settled by various EU Directives³¹ by which Ireland is bound. For these reasons, in the *Paper*, we did not make any proposals for reform in this regard, and we do not do so now.³²

A more subtle version of the same point is the suggestion made in some of the submissions that, even if copyright is not formally registered, it should in some other way be expressly or formally claimed. However, once the requirements in section 17 CRRA are met, copyright subsists. In the same way as Molière’s Monsieur Jourdain spoke prose without realising it, copyright vests even if the author does not realise it. This is a basic and fundamental aspect of copyright, and even if we were minded to recommend that it be changed in CRRA (which we are not), we would not be able to do so, as Articles 1-4 EUCD would preclude such a change.

A more specific version of the same point is the suggestion that, in the case of websites in particular, there should be an implied permission to copy that would need to be expressly excluded. However, this undercuts the essence of copyright, which is that the rightsowner can decide who copies (see section 37(1)(a) CRRA). Again, this is a basic and fundamental aspect of copyright, and even if we were minded to recommend that it be changed in CRRA (which we are not), we would not be able to do so, as Article 2 EUCD would preclude such a change.

The Government might decide to lobby on the international or European planes on these issues of registration and the copyright term, but we do not recommend here that it should.

Originality

It was suggested in the first round of submissions that, in the light of recent decisions of the Court of Justice of the European Union [CJEU], the definition of “originality” in section 17 of the Copyright and Related Rights Act, 2000 ought to

³¹ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights; Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights; see http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

³² As the copyright term is now unequivocally a matter of EU law, the Directives in the previous footnote are also the reason we cannot pursue any of the suggestions in the submissions that the copyright term is too long and should be reduced.

be amended. We asked a question to this effect in the *Paper*, to which the replies were almost uniformly in the negative. We are persuaded that there is no reason to amend section 17, either in principle or specifically from the perspective of our Terms of Reference, and we consider that any developments in this area should be left to the case-law of the CJEU.

Authors

The *Paper* considered various issues relating to the definition of “author” in sections 21-23 CRRA. It was submitted that section 23 should provide that the author of a work should be the first owner of the copyright unless the work is commissioned in return for a fee, in which case the person or organisation commissioning the work should be the first owner of any copyright in the work, subject to any agreement to the contrary. We do not consider that such a provision is either desirable or necessary. It is undesirable in principle that content-creators lose a copyright unless they expressly seek to retain it. And it is unnecessary, since the default position provided by CRRA can be modified by contract, so that the person or organisation commissioning the work can explicitly obtain the copyright in the work where this is important to them. We do not consider that the default position provided by CRRA is a barrier to innovation or that an amendment or repeal would promote innovation. However, if a Copyright 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.

Finally, here, to resolve any ambiguity as to the authorship of the sounds on the sound track of a film, we recommend that section 17 CRRA be amended so that the sound track accompanying a film should be treated as part of the film, and this is provided for in section 6 of the Bill.

Unpublished Works

Several submissions in the first round pointed out that an unintended consequence of certain aspects of the Act has the potential to provide for a perpetual copyright in certain unpublished works. We therefore invited submissions whether section 24(1) CRRA should be amended to ensure that copyright in a work should 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, as follows:

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.**

There was a strong positive response to this amendment - some submissions even characterised it as an urgent reform - and we therefore recommend its adoption.

Some of the submissions in the second round suggested that this amendment was necessary but insufficient to achieve the intended goal. Section 9 of the First Schedule (relating to Transitional Provisions) provides that

Nothing in this Act shall affect the duration of copyright in works in which copyright subsists on or before the commencement of Part 11 of this Act and the duration of copyright in those works shall be determined, where applicable, in accordance with the European Communities (Term of Protection of Copyright) Regulations 1995 (S.I. No.158 of 1995), notwithstanding the revocation of those Regulations.

The submissions pointed out that for works in copyright on 1 January 2001, when CRRA came into effect, this section potentially (and unintentionally) established a perpetual term of protection for works unpublished at the date of death of the author. We agree, and therefore recommend that section 9 be amended as follows:

Nothing in this Act shall affect the duration of copyright in works **which have been made available to the public and** in which copyright subsists on or before the commencement of Part 11 of this Act and the duration of copyright in those works shall be determined, where applicable, in accordance with the European Communities (Term of Protection of Copyright) Regulations 1995 (S.I. No.158 of 1995), notwithstanding the revocation of those Regulations.

On a related point, section 34 CRRA provides that any person who, after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously available, may benefit from a 25-

year term of copyright protection. Some of the submissions raised the question of whether this can apply even if the person who publishes the text obtained it without the permission of the person who owns the unpublished work. (One cannot help thinking here of Columba's clandestine transcription of Finian's psalter). In many if not most cases, surreptitious transcription or copying of the unpublished work will amount to a breach of contract or breach of confidence, and thus will not count as lawfully making available for the purposes of section 34.

In the UK, section 16(3) of the Copyright and Related Rights Regulations 1996 puts the matter beyond all doubt, by excluding from the 25-year term a work created pursuant to an "act done without the consent of the owner of the physical medium in which the work is embodied or on which it is recorded". We recommend that a similar provision be added to section 34.

Finally, it was recommended that we merge section 24 and 34 so as to reflect Article 4 of Directive 2006/116/EC,³³ but we consider that the amendments set out above equally achieve this goal.

All of these amendments are included in section 7 of the Bill.

Remedies

It is not enough that copyright-owners hold rights; they must also be able to seek and obtain appropriate and effective remedies when their rights are infringed. Many procedural issues relating to remedies are discussed in the chapter on the Copyright Council in the context of the dispute resolution architecture of the Copyright Council, the intellectual property jurisdiction of the Small Claims Court in the District Court, and the Intellectual Property Court of the Circuit Court. As to substantive issues relating to remedies, from the perspective of our Terms of Reference, we see no reason to extend the criminal offences already provided by CRRA.

³³ See note 31 above.

On the other hand, there was a great deal of support in the submissions for the idea that remedies for breaches of copyright should be proportionate, and that civil sanctions (such as injunctions and damages) should be graduated. In this way, at one end of the scale, unintentional breaches would not be met with significant awards of damages, and that, at the other end of the scale, the most serious breaches would be appropriately dealt with by the award, for example, of restitutionary, exemplary or punitive damages.

The Law Reform Commission *Report on Aggravated, Exemplary and Restitutionary Damages* discussed the retributive and deterrent purposes of an award of exemplary or punitive damages, and recommended a general principle that exemplary (or punitive) damages should bear some reasonable relation to compensatory damages, taking into account the circumstances of the case and the public interest in deterring and expressing condemnation of the wrongdoing involved.³⁴ The Commission also recommended that exemplary (or punitive) damages should not be excluded in cases where there has been a prior imposition of a criminal penalty in respect of a crime arising from the same conduct as the civil wrong concerned; however, the Commission was of the view that exemplary (or punitive) damages should only be awarded in such cases in exceptional circumstances and the prior criminal penalty should be taken into account in the assessment of the quantum.³⁵

Section 128 CRRA provides for remedies for infringement of copyright, and section 304 CRRA provides for similar remedies for infringement of a performer's property rights. However, whilst section 203 CRRA also provides remedies for infringement of a performer's rights generally, the provision is more limited in scope; and section 216 provides a similarly limited provision for remedies for infringement of recording rights. We recommend that all four sections should provide for the same range of graduated civil remedies, so that, at one end of the scale, unintentional breaches are not met with significant awards of damages, and that, at the other end of the scale, the most serious breaches can be appropriately dealt with by the

³⁴ See Law Reform Commission *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60–2000) 50–51 [2.019]; available at http://www.lawreform.ie/_fileupload/Reports/rAggravatedDamages.htm

³⁵ *Id.*, 58 [3.15].

award of restitutionary, exemplary or punitive damages. All of this is provided for in section 8 of the Bill.

We return to the issue of rightsowners' remedies later in this chapter, in the context of photographers, and in the context of technological measures for the protection of copyright or for the management of copyright information.

Levies

Some rightsowners argued that there ought to be a system of levies upon devices or storage media that facilitate copying, but it seemed to us in the *Paper* that such levies are a blunt instrument that would amount to a tax on innovation, and we invited submissions. Events have now overtaken us. In May 2011, the EU Commission launched a mediation process to explore possible new approaches to levies.³⁶ The process was chaired by former EU Commissioner António Vitorino, and he presented his report to Commissioner Barnier at the end of January this year.³⁷ We consider that the best way forward here is for the Government to engage with the Commission on foot of Senhor Vitorino's Report. In the meantime, as that Report recommends and as we commented above in the context of the definition of originality, we consider that any developments in this area should be left to the caselaw of the CJEU. Accordingly, we do not recommend that CRR be amended to introduce levies.

Photographs and Photographers

The position of photographers was a particular concern in both rounds of submissions and at both of the public meetings hosted by the Committee. Digital photographs are now particularly easy to reproduce, and the issues are how to prevent reproductions that infringe copyright, and how to provide proper remedies where such infringements occur.

³⁶ See *Communication of 24 May 2011 on A Single Market for Intellectual Property Rights* COM(2011) 287 final; available at http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf

³⁷ See *Recommendations Resulting From The Mediation On Private Copying And Reprography Levies* (2013); see http://ec.europa.eu/commission_2010-2014/barnier/headlines/news/2013/01/20130131-2_en.htm

Some of the submissions pointed to technical standards, such as robots.txt, which afford some measure of control over the search of images on websites, and to reverse image search services and digital watermarks, which can detect infringements of copyright in photograph. Several submissions made the point that more explicit protection for such digital watermarks and other metadata applied to photographs would assist in discouraging infringement. Metadata is simply data about data. The classic example of metadata is a library card-catalogue, where the metadata on the catalogue card is not incorporated with the relevant work (the book so catalogued). Hence, the metadata about a book is the information on the title page (author, title, publisher, publication date, and so on). The metadata about a webpage often includes descriptions, keywords, and information about the language in which it is written and the tools used to create it. However, this metadata is usually in the source code of the page, and is thus not visible to anyone viewing the page.

In the case of digital photographs and videos, such metadata can provide information about the date and time the photograph was taken or the video was made, and about the exposure and other camera settings, identify the photographer, supply copyright and contact information, and so on. In infringing images and videos, this information is routinely tampered with or removed, even though it is probably already protected by CRRA (for example, a photocopy of the title page of a book would likely constitute an infringing reproduction unless covered by an exception; and a photocopy of the title page with material removed would likely constitute either an infringing reproduction or an infringing adaptation unless covered by an exception). However, to give comfort to content-creators such as photographers, and for the avoidance of doubt, we recommend that metadata be expressly protected, so that tampering with it or removing it constitutes an infringement of copyright.

We therefore make three recommendations. First, section 2(1) should be amended to include a definition of metadata, and this is provided in section 2(2) of the Bill. Second, section 37(3) CRRA should be amended as follows:

- (3) References to the undertaking of an act restricted by the copyright in a work shall relate to the work as a whole or to any substantial part

of the work or to metadata incorporated in the work or to any substantial part of the metadata incorporated in the work and to whether the act is undertaken directly or indirectly.

This is also provided for in section 9 of the Bill.

Third, section 43 CRRA should be amended to provide expressly that the removal of metadata amounts to an infringing adaptation of a work. This is also provided for in section 9 of the Bill. Taken together, these three amendments will ensure that the removal of metadata constitutes an infringement of copyright.

To ensure that all of the issues relating to photographs are dealt with in one place in this *Report*, we deal here (rather than in the context of exceptions) with the issue of the exemption for photographs from the news fair dealing exception in section 51(2) CRRA. In the *Paper*, we raised the question whether that exemption ought to stay or be removed. We were given no strong reason to change the *status quo* in this regard, and we therefore do not recommend that this section be amended. This means that the exemption for photographs from the news fair dealing exception in section 51(2) CRRA remains.


Technological Protection Measures and Rights Management Information

In the *Paper*, we invited submissions relating to technological measures for the protection of copyright or for the management of copyright information, and four issues recurred in the submissions.

First, some of the submissions read section 370 CRRA as not providing remedies to rightsowners but only to their licensees. Section 370(1) “applies where, *by ... the rightsowner ...* copies of copyright works to which rights protection measures have been applied ... are made available to the public” (emphasis added); and section 370(2) provides that “a person who makes available to the public ... the copies referred to in *subsection (1)* has the same rights and remedies ... as a rightsowner has in respect of an infringement of any of his or her rights under this Act”. So, if the rightsowner makes protected copies available under subsection (1), then that rightsowner has the same rights in respect of the protection measures as he or she otherwise has under the Act. However, the section seems to suggest that if the

rightsowner licenses the work, and if the licensee makes the protected copies available, then it is only the licensee who has the relevant rights and remedies.

One solution to this problem is for the rightsowner to specify in the licence that both parties may seek remedies against infringements of rights protection measures. Another is to provide for this in the Act by amending section 370(2), as follows:

(2) **The rightsowner, and any**  person who makes available to the public or re-utilises the copies referred to in *subsection (1)*, has the same rights and remedies ... [remainder unchanged].

We recommend that section 370(2) should be amended in this way, and that section 372 and 375 should be similarly amended. This is provided for in section 10 of the Bill (see, in particular, section 10, subsections (1)(a), (2), and (4)).

Second, some of the submissions read section 370 CRRA as not providing civil remedies to the rightsowner. The reference in subsection (2) to “rights and remedies” (without limitation to the criminal context), and the reference in subsection (3) to “any proceedings under this section, *whether civil or criminal*” (emphasis added), demonstrate that civil remedies are indeed available; so we make no recommendations in this regard.

Third, whilst section 370 catches a range of secondary activities, it does not in terms prohibit the act of circumvention itself, and many rightsowners submitted that a circumvention should be actionable as though it were an infringement of copyright. This is because section 374 provides that technological prevention measures should not operate to prevent any person from undertaking the acts permitted by the exceptions provided in the Act. We will therefore return to this issue in the context of exceptions in the Users chapter, below.

Fourth, section 376 provides that removal or interference with rights management information is an offence, and many of the submissions suggested that it should also constitute a civil infringement of copyright actionable at the behest of the

rightsowner. The amendment to section 375 above, provided for in section 10(4) of the Bill, has this effect.

Finally, we note that CRRRA provisions relating to rights management information might also have provided a means of protecting metadata, or at least some metadata, and that further amendments to these provisions in section 10 of the Bill might provide a means of protecting metadata, or at least some metadata. However, the more precise amendment to sections 37 and 43 CRRRA proposed in section 9 of the Bill obviates the need to pursue this line of analysis.

Conversely, we also note technological protection measures and rights management information might constitute metadata within the meaning of the amendment to sections 37 and 43 proposed in section 9 of the Bill. However, the more precise provisions in sections 375 and 376, as amended by section 10 of the Bill, obviate the need to pursue this line of analysis.

Overall, therefore, in the context of meta-data, technological protection measures and rights management information, the amendments proposed above to sections 37 and 43 (provided for in section 9 of the Bill) and the amendments proposed here to sections 370-376 (provided for in section 10 of the Bill) together provide rightsowners with both remedial belts and technological braces.

Broadcasting

Section 183(a) of the Broadcasting Act, 2009 provided a new definition of “broadcast” for CRRRA purposes:

“ ‘ broadcast ’ means a transmission by wireless means, including by terrestrial or satellite means, whether digital or analogue, for direct public reception or for presentation to members of the public of sounds, images or data or any combination of sounds, images or data, or the representations thereof, but does not include transmission by means of MMDS or digital terrestrial retransmission;”,

The remainder of section 183 went on to deal with the concepts of MMDS and digital terrestrial retransmission.

Section 2 of the 2009 Act also provided a different definition of “broadcast” for the purposes of the 2009 Act, as “transmission ... by electronic communications network”. This definition is technology-neutral in a way that the definition in section 183(a) is not, so we sought submissions in the *Paper* on whether the CRRA definition in section 183(a) should be brought into line with the 2009 Act definition in section 2. Many of the submissions pointed out that the policies in the copyright context in CRRA and the broadcasting context in the 2009 Act are unlikely to be the same, and that, if the Oireachtas had intended to assimilate the definitions in this way, it could have done so in 2009. As a consequence, we do not recommend that section 183(a) of the Broadcasting Act 2009 be amended in this way.

However, we are still concerned that section 183(a) is not a technologically-neutral definition, and some of the submissions argued that it should be amended to along the lines of the amended section 6 CDPA in the UK, which was amended to replace technology-specific references with a technologically neutral definition of broadcast simply as an “electronic transmission” of information. We therefore recommend that the CRRA definition of “broadcast” be constructed upon the neutral concept of an “electronic transmission” of information, whilst retaining as much as possible of the current wording.

The amended section 6 CDPA excludes most internet broadcasts from the definition; and, for the avoidance of doubt, we recommend that the Irish definition should do so too, and in similar terms, to avoid unforeseeable and unintended consequences.

Section 11 of the Bill therefore repeals section 183 of the Broadcasting Act 2009; and provides various amendments to section 2 CRRA. The main such amendment is a new, technology-neutral, definition of “broadcast” for copyright purposes. It retains much of the existing language of section 183 of the 2009 Act, but places it in the technologically neutral foundation of “an electronic transmission of ... data”. Various other definitions (“cable programme service”, “digital terrestrial retransmission”, “electronic transmission”, “multiplex”, and “specified transmissions over the internet”) are also provided. In particular, the definition of

“specified transmissions over the internet” is confined to the same three circumstances as appear in the UK legislation, but leaves the vast majority of transmissions over the internet outside the ambit of the definition of broadcasting, at least for copyright purposes.

It might be thought many of these amendments should appear in section 2(2) of the Bill, but we consider that it makes sense, for the purposes of this *Report*, that they should appear together in section 11 of the Bill, and they are laid out so that each definition explains an aspect of the one before.

Finally, to ensure that all of the issues relating to broadcasting are dealt with in one place in this *Report*, we deal here with an issue that we discussed in the Users chapter of the *Paper*. In that context, we proposed to extend section 99 CRRA from copies made by a broadcaster by means of its own facilities to cover facilities of a person acting on behalf of and under the responsibility of the broadcaster. There was no dissent from, and some welcome for, this proposal; we therefore recommend its introduction; and this is provided for in section 11(3) of the Bill.

Streaming

Sections 103 and 251 CRRA allow for cable programme services to receive and simultaneously retransmit broadcasts without infringing copyright or performers’ rights. Although the language of the section might be stretched to cover internet broadcast and streaming services, it is clear that this section was never intended to do so, and we received many submissions that argued that the section should be amended to clarify that it does not in fact cover internet broadcast and streaming services. As in the context of broadcasts above, we recommend that internet transmissions should be excluded from these sections, to avoid unforeseeable and unintended consequences. We therefore recommend that sections 103 and 251 CRRA be amended to that effect. These amendments are provided for in section 11(4)-(5) of the Bill.

Computer Programs

It was pointed out to us that some at least of the exceptions that we considered in the *Paper* could trench upon the rights of rightsowners in computer programs. An EU Directive,³⁸ as implemented in CRRA,³⁹ provides a separate regime that exclusively determines the exceptions to the exclusive rights applicable to computer programs.⁴⁰ Exceptions outside the scope of the Directive should therefore not be applied to computer programs. This is why computer programs are excluded from the definition of metadata proposed above. However, some of the existing CRRA exceptions, and some of the draft provisions in the *Paper*, seem ambiguous as to whether they respect this exclusion. To resolve any such ambiguity, we recommend the addition of a provision which clarifies that the exceptions do not apply to computer programs; and this is provided for in section 12 of the Bill.

“Rightsowners” and “Rights-holders”

The various sources on which we relied during this Review process, and the submissions which we received, referred interchangeably to “rights-holders”, “rightsholders”, “rights-owners” and “rightsowners”. In the *Paper*, we used “rights-holders”. However, given that CRRA for the most part uses “rightsowners”, we use that term here.

Although CRRA for the most part uses “rightsowners”, there are two occasions when it does not. Section 173(2)(a) refers to a “substantial number of rightsholders”, and section 175(7)(h) refers to “the names of the rightsholder or rightsholders”. We can see no reason why these sections should refer to “rightsholders” rather than “rightsowners”; and, to avoid any unnecessary confusion, we recommend that they be amended to come into line with the standard usage in the remainder of the Act. This is provided for in section 2(4) of the Bill.

³⁸ Council Directive No. 91/250/EEC of 14 May 1991 on the legal protection of computer programs; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>

³⁹ See, in particular, sections 2(1), 43(2)(d), 50(5), 43(3), 80, 81 and 82 CRRA.

⁴⁰ See recital 50, EUCD; see also Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] ECR nyr, [2012] EUECJ C-128/11 (03 July 2012); available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-128/11>

Collecting Societies

In chapter 5 of the *Paper*, we considered the position of collecting societies and copyright licensing bodies. As we set out in the previous chapter, we consider that many, if not most, of the practical issues raised in the submissions are capable of resolution through the good offices of the Copyright Council, and of the Digital Copyright Exchange in particular. Moreover, as we recommended in that chapter, the Controller of Intellectual Property should continue to regulate such societies and bodies; and we noted there that European discussions relating to collective rights management may lead to further such regulation. Other than these observations, we make no further specific recommendations in this regard.

Intermediaries

Introduction

Chapter 6 of the *Paper* considered whether the CRRRA creates barriers to innovation by online intermediaries.

Transient and Incidental Copies

Intermediaries may be primarily liable for breach of copyright where the technological processes of transmitting data result in transient and incidental copies of the data. Article 5(1) EUCD, which provides a defence in such circumstances, has been transposed into Irish law by sections 87(1) and 244(1) CRRRA. However, the CJEU has changed the emphasis of Article 5(1);⁴¹ and, as a consequence, we explored in the *Paper* how sections 87(1) and 244(1) could be amended to come more closely into line with the CJEU's approach to that Article. There were very few comments about this issue, and no objections to the suggested amendment. We therefore recommend that sections 87(1) and 244(1) CRRRA be amended to come more closely into line with the CJEU's approach to Article 5(1) EUCD.⁴² These amendments are provided for in section 13 of the Bill.

Moreover, in the *Paper*, we canvassed the possibility that the position regarding temporary and incidental reproductions made while exercising an exception provided by CRRRA might similarly be copper-fastened by a new subsection (2) in those sections. There were no comments about this in the submissions. We therefore recommend that sections 87 and 244 be amended by the insertion of a new subsection (2), and these amendments are also provided for in section 13 of the Bill.

⁴¹ 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]; available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-403/08>

⁴² The UK Supreme Court has recently referred further questions relating to Article 5(1) EUCD to the CJEU seeking clarification of aspects of *Murphy* (the UKSC decision is *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd* [2013] UKSC 18 (17 April 2013); available at <http://www.bailii.org/uk/cases/UKSC/2013/18.html>; the questions are available at <http://www.ipso.gov.uk/policy/policy-information/ecj/ecj-2013/ecj-2013-c36013.htm>; and the reference is at <http://curia.europa.eu/juris/liste.jsf?&num=C-360/13>). However, since the UKSC's questions in *Murphy* are very fact-specific, it is unlikely that the CJEU's answers will affect our proposed amendments to sections 87(1) and 244(1).

Secondary Liability: Conduit, Caching and Hosting Immunities

Intermediaries may be secondarily liable for breach of copyright where the activities of their users primarily infringe copyright. Irish law,⁴³ implementing a European Directive,⁴⁴ provides for certain immunities from such secondary liability in the case of conduits, caching and hosting.⁴⁵ Although there was some commentary about the immunities in general, most of the discussion in the submissions centred around the ambit of the hosting immunity,⁴⁶ by which an intermediary hosting infringing material will not be secondarily liable for that infringement where the intermediary did not know of the infringement and acted expeditiously to remove the material when it learned of the infringement. Two issues in particular arose.

First, there were calls for greater clarity on expeditious action in such circumstances, and in particular for bright-line rules that say that action within given periods of time will or will not be expeditious. However, standards such as expedition are context-sensitive: a time-period that may be quick in one set of circumstances may be slow in another. For this reason, we are not disposed to recommend the addition of any such bright-line rules to the hosting immunity.⁴⁷

Second, there were calls for standards around what would constitute sufficient notice to a host to take down allegedly infringing material, or what would constitute sufficient action by the host, or whether it would be possible to have a parallel counter-notice procedure to seek to have the material put back online.

In January 2012, the EU Commission commenced an initiative on this issue, to ensure that such “notice-and-action” procedures would lead to a quicker takedown

⁴³ European Communities (Directive 2000/31/EC) Regulations 2003 (SI No 68 of 2003); available at <http://www.irishstatutebook.ie/2003/en/si/0068.html> (the Regulations).

⁴⁴ 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 commerce, in the Internal Market (Directive on electronic commerce); available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT> (the Directive)

⁴⁵ See sections 16-18 of the Regulations, implementing Articles 12-14 of the Directive.

⁴⁶ See section 18 of the Regulations, implementing Article 14 of the Directive.

⁴⁷ *Tamiz v Google Inc* [2013] EWCA Civ 68 (14 February 2013) available at <http://www.bailii.org/ew/cases/EWCA/Civ/2013/68.html> provides some guidance on the issue.

of illegal content, would better respect fundamental rights (in particular the freedom of expression) and would increase legal certainty for online intermediaries.⁴⁸ To the extent that these matters are capable of being resolved at the relatively high level of abstraction at which legislation is necessarily cast, we are of the view that Irish law should await whatever legislative proposals emerge from the EU consultation.

Furthermore, where greater detail is required, we consider that this is not a matter for legislation but instead is exactly the kind of situation where the Copyright Council should develop codes of good practice. Moreover, if nothing comes of the EU consultation, then it may be appropriate at that stage to return to the question of Irish legislative immunities, and this is also a matter that the Copyright Council could monitor.

In the *Paper*, we sought submissions on whether all of the important legislative developments subsequent to the CRRRA should be consolidated into our proposed Bill. The response was largely in favour. However, it would be too awkward to include the conduit, caching and hosting immunities in that Bill. This is because, whilst they apply in the context of the intermediary's secondary liability for copyright infringement, they apply more generally to the intermediary's secondary liability for *any* primary infringement, whether that infringement is breach of copyright, or a tort such as the tort of defamation, or invasion of privacy or breach of confidence, or any other harmful or illegal content, or spam.⁴⁹ It would destabilise this general regime too much to seek to remove copyright from it. It would be equally misleading if the general immunities were to be restated in a legislative initiative otherwise concerned solely with copyright. Hence, whilst many of the post-2000 legislative developments are consolidated into the Bill, these general conduit, caching and hosting immunities are not brought within its compass.⁵⁰

⁴⁸ See note 8 above.

⁴⁹ Indeed, *Tamiz v Google*, to which we referred in note 47 above as a statement of the notice-and-action principles relating to the hosting immunity, is a defamation case and not a copyright case.

⁵⁰ Of course, in the event that the EU Commission's consultation recommends *specialist* copyright immunities (as opposed to more general amendments), those should be added to the Bill.

Finally, on this issue, we should note that the abolition of secondary liability was recommended to us, to make users not just primarily but *exclusively* responsible for content that they publish online. Even if we were minded to accede to this submission, which we are not, it would be precluded by EU law.⁵¹ This is not to say that the principles of secondary liability, and in particular those relating to the conduit, caching and hosting immunities, might not need amending or supplementing. For example, in the current regime, intermediaries bear a significant burden in implementing monitoring or “notice-and-action” procedures, and there are arguments as to whether this burden is a legitimate cost of doing business as an intermediary or an unjust cost of protecting rightsowners’ rights. However, in our view, the current EU consultation and the Copyright Council are the most appropriate means to consider these issues and to achieve effective amendment.

Secondary Liability: Further Immunities?

In the *Paper*, we asked whether technology had developed such that other immunities might now be necessary beyond conduit, caching and hosting. Three general possibilities suggest themselves - relating to search, framing, and cloud computing; and a fourth, specific, immunity of “fair conduit” was suggested in the submissions.

First, the operation of search engines can be accommodated within the existing immunities, but not without analytical difficulties, such that there could be a strong case for a new immunity for search engines.

The second possible immunity relates to the increasing sophistication of browsers. Web pages almost invariably involve a number of different elements (such as text, images, and other media), displayed on a browser’s screen as the web page directs.⁵² While the web page always specifies how these elements are to be

⁵¹ See, in particular, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights; available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:NOT)

⁵² HTML frames are one means by which this division is achieved, so this issue is often referred to as framing. Although using frames for this purpose this is very common, frames are used for many other purposes.

displayed relative to one another, it does not always include the elements themselves, and may merely specify where they may be found on another site. In that situation, it cannot be said that the web page site copies any such element; rather, it merely points to where it is located, and the web page code instructs the browser to fetch it from the other website. The browser displaying the element is reproducing it; the web page is enabling that reproduction.

In these circumstances, if that element is a copyright work, and if no licence or exception⁵³ applies, then the browser displaying the elements is a primary infringer, and the web page site is a secondary infringer. Of course, it may be that, as the architecture of the web continues to develop, such content could come to be regarded as an insubstantial reproduction and thus not an infringement, or existing exceptions or immunities might be found to apply.⁵⁴ On the other hand, if there were no such developments, then there could be a strong case for a new immunity in these circumstances.

Third, one set of responses suggested that there should be similar immunities in relation to cloud computing. To the extent that cloud services are delivered online, they already benefit from the conduit, caching and hosting exceptions. To the extent that the cloud might drive *other* technological developments that may raise issues relating to the secondary copyright liability of intermediaries, it is much too early to tell what those issues might be, let alone how they might be resolved by general legislative immunities.

In respect of all three of these possibilities, we are of the view that Irish law should await whatever legislative proposals emerge from the EU consultation. If nothing comes of it, then it may be appropriate at that stage to return to the question of Irish legislative immunities, and this is also a matter that the Copyright

Moreover, they are not necessary for the process discussed in the text, as the division of webpages into multiple independent parts may be achieved in other ways.

⁵³ For example, section 87 CRRA; see *Public Relations Consultants Association v The Newspaper Licensing Agency* (note 42 above) [27]-[34] (Lord Sumption)).

⁵⁴ For example, a linking exception such as that canvassed later in this chapter would not seem to apply. Although the web page has merely pointed to where the external element was located, this is not functionally equivalent to a link, because a link leaves the person in charge of the browser with a choice whether or not to click on the link and go the external content, whereas in this situation the person viewing the web page has no reason to suppose that anyone else's content is involved.

Council could monitor. However, at present, we make no recommendation in this context relating to search, framing, or cloud computing.

It was argued in the submissions that some of these issues might be dealt with in the context of a fair use exception. We deal with fair use below, but, if such a doctrine is to be introduced, then it is appropriate to note here that the fact that any infringement would be secondary and not primary in nature could be a factor that pulls in favour of a finding of fair use.

Fourth, a principle of a “fair conduit”, by which conduits would be protected against an unintentional copyright breach before they are made aware of it, was proposed to us, either as an additional immunity in this context or as a possible aspect of any proposed fair use policy. However, we consider that the existing conduit, caching and hosting immunities already provide conduits with such protection. Nevertheless, to the extent that the conduit needs additional protection from secondary liability under the rubric of fair use, the suggestion in the previous paragraph that the fact any infringement would be secondary and not primary in nature could be a factor that pulls in favour of a finding of fair use is considered in the Fair Use chapter, below.

No other possible immunities were suggested to us, so we make no recommendations in this regard.

Linking

The Paper also considered the extent to which linking infringes copyright, and invited submissions as to whether CRRRA 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; and, in particular, we asked whether we should provide that:

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.

Since the publication of the Paper, related questions have been decided in the UK Supreme Court⁵⁵ and referred to the CJEU;⁵⁶ and the German Parliament has provided that mere linking should not infringe copyright and therefore cannot be prohibited.⁵⁷ In the submissions, there was a great deal more support for the proposal than there was in opposition to it. Moreover, there was little sense that the text was too detailed, and thus too technology specific.

Interconnectedness by linking is at the very heart of the internet. However, links simply convey that something exists; but they do not, by themselves, publish, reproduce or communicate its content. As a consequence,⁵⁸ to ensure that linking does not infringe copyright, we recommend the adoption of the provision above as new sections 87A(1) and 244A(1) CRRA,⁵⁹ and this is provided for in section 14 of the Bill.

However, in so far as the provision above permits links to infringing copies, we now consider that it is too broadly stated, and that it should not apply where the provider of the link, at the time that he or she provided it, knew or ought to have been aware⁶⁰ that it connects with an infringing copy, unless the provision of the link is in the public interest. We therefore recommend that a provision to this effect should be included as sections 87A(2) and 244A(2) CRRA, as follows:

- (2) Subsection (1) shall not apply where the provider of the link, at the time that he or she provided it, knew or ought to have been aware that it connects with an infringing copy, unless the provision of the link is in the public interest.

This is provided for in section 14 of the Bill, in respect of which, two issues are worth noting.

⁵⁵ See *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd* (note 42 above).

⁵⁶ See Case C-466/12 *Svensson v Retriever Sverige AB*, available at <http://curia.europa.eu/juris/liste.jsf?num=C-466/12>; C-279/13 *C More Entertainment*, available at <http://curia.europa.eu/juris/liste.jsf?num=C-279/13>; Case C-348/13 *Bestwater International*; available at <http://curia.europa.eu/juris/liste.jsf?num=C-348/13>; and Case C-360/13 *Public Relations Consultants Association* (note 42 above).

⁵⁷ See note 2 above.

⁵⁸ Subject to what the CJEU might say in the references in note 52 above.

⁵⁹ Amended only by substituting “that” for “which” for grammatical reasons.

⁶⁰ The formula “knew or ought to have been aware” already appears in ss56(2), 57(3), 67(2) and 234(2) CRRA.

First, it is very important in sections 87A(2) and 244A(2) that the question of whether the link connects with an infringing copy is judged at the time the provider of the link provided it. The content on a page can (and very often does) change after the provider of the link has provided it; and, since the provider has no control over what happens to a site after her or she has provided the link to it, he or she should not be liable if the content is subsequently changed to infringing material.

Second, if a news site wishes to expose sites that stream pirated films or music, it would be unworkable if it could not say where those sites are, and the “public interest exception” would allow the news site to do so without fear of infringing copyright.

Marshalling

In the Intermediaries chapter of the *Paper*, we discussed what we called “marshalling”, a neutral word which we chose to cover activities such as the indexing, syndication, aggregation, and curation of online content. The central case is the marshalling of news, though, in principle, the process can apply to the marshalling of any and all kinds of content. It is an important online business model, with obvious copyright implications where the amount of marshalled text is “substantial”,⁶¹ unless a news exception, or fair dealing,⁶² applies. Effectively, marshalling is a development of linking, at least in as much as the marshalled text provides a context for the linked work.

It is a controversial topic, and it drew much criticism in the submissions, essentially on the grounds that it infringes copyright in the marshalled content. The *Paper* suggests that the issue is considerably more nuanced than that, and that there is likely to be a blend of responses to the issue; and it sought submissions on whether there ought to be a specialist exception for marshalling. As with the

⁶¹ See, eg, *Newspaper Licensing Agency v Marks & Spencer* [2003] 1 AC 551, [2001] UKHL 38 (12 July 2001); available at <http://www.bailii.org/uk/cases/UKHL/2001/38.html>

⁶² *Warman v Fournier* 2012 FC 803 (CanLII) (21 June 2012); available at <http://www.canlii.org/en/ca/ftc/doc/2012/2012fc803/2012fc803.html>

discussion of a possible innovation exception in the *Paper* and again below, since EUCD has not harmonised the adaptation right, that Directive neither precludes such a development nor provides any guidance as to the contents of any such exception.

However, the German Parliament has recently sought to provide a specific exception for news marshalling. On 7 May 2013, the German Parliament passed legislation which provides for an exception to newspapers' copyright in respect of "einzelne Wörter oder kleinste Textausschnitte", that is to say, "single words or very small snippets of text".⁶³ This plainly allows for a certain degree of marshalling without infringing copyright; but, unfortunately, there is no further definition of "very small snippets of text". The legislation took effect on 1 August 2013; it is an indication of how legislatures in other EU member states are addressing these issues; and it suggests a means by which CRRA might be amended to accommodate marshalling.

Having regard both to the locus of much online innovation, and to recent developments in Germany, we consider that it would be a retrograde step not to make some provision for marshalling. We recommended above that new sections 87A(1)-(2) and 244A(1)-(2) CRRA be added to provide an exception for linking, and this is provided for in section 14 of the Bill. We recommend here that a very narrow marshalling exception, modelled on the German provision, but with more definitions and safeguards, should be added to section 87A (and, with appropriate modifications, section 244A), as follows:

- (3) To provide appropriate context for a link permitted under subsection (1), it is not an infringement of the rights conferred by this Part to reproduce reasonably adjacent to the link a very small snippet of the linked work; 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.
- (4) It shall be a matter of fact and degree in any given case as to whether the criteria in subsection (3) are satisfied.
- (5) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
 - (a) no more than one hundred and sixty characters, and

⁶³ See note 2 above (our translation).

- (b) no more than forty words shall constitute a very small snippet for the purposes of subsection (3).
- (6) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
 - (a) no more than two and half per cent of the total number of words in the work, and
 - (b) no more than forty words shall constitute a very small snippet for the purposes of subsection (3).

This is provided for in section 14 of the Bill. As to this draft, subsection (3) takes the German concept of “very small snippets” as a starting point; however, it requires that such snippets must have a context (reasonably adjacent to a link, to explain it); and the proviso expressly makes it subject to the Berne three-step test. As requested in some of the submissions, subsections (5) and (6) provide bright-line definitions of “very small snippets” (either 160 characters, or 2.5%; subject to a cap of 40 words) to cover the normal run of cases.⁶⁴ Thus, the marshalling provisions are inspired by the German provision, but there is far greater definition, precision and certainty. This position is intermediate between those who objected in the submissions to any provision being made for marshalling, and those who argued for a considerably wider exception. In our view, this provision strikes the most appropriate balance between the various competing interests, and serves to encourage online innovation without unduly prejudicing rightsowners’ legitimate interests. In particular, whilst very small snippets may be reproduced, anything more than that will be covered by copyright, and can therefore be monetized by the rightsowners in question.

Finally, it was submitted that, if we were to recommend the adoption of a fair use exception, then this issue should be left to that exception. As we explain in the Fair Use chapter, if there is to be a fair use doctrine, we do not consider that there would be a conflict between specialist exceptions and a fair use doctrine;

⁶⁴ For subsection (5), the total of one hundred and sixty characters reflects assumptions about the German understanding of “very small snippets” (see <http://gizmowired.blogspot.ie/2013/07/germany-passes-new-internet-copyright.html>). For subsection (6), in a newspaper at present, an average news piece is in the order of 600 to 800 words; an average opinion piece is in the order of 800 to 1,000 words; and features can be much longer. 2.5% of 600 is 15 words; of 800 is 20 words, and of 1,000 is 25 words; and 15 to 25 words is about what news aggregators provide at the moment. Both subsections are subject to a cap of 40 words, because 2.5% of a long piece would be considerably longer than that, and this would not constitute “a very small snippet”.

indeed, if there is to be such a doctrine, we are of the view that it could with profit be explicitly linked to and informed by existing statutory exceptions. As a consequence, whatever conclusion is reached in the Fair Use chapter, we recommend the adoption of sections 87A(3)-(6) and 244A(3)-(6), as set out above and as provided for in section 14 of the Bill.

News

Article 5(3)(c) EUCD provides for a series of exceptions for news which go beyond those already provided in section 51(2) CRRA; and we recommended in the *Paper* that section 51(2) be amended to provide for the full range of such news exceptions. Similarly, Article 5(3)(f) EUCD which provides for an exception for political speeches which is similar to section 89 CRRA; and we recommended in the *Paper* that there be a small series of amendments to section 89 to align it more closely with Article 5(3)(f). For the reasons given in the *Paper* and again in the Users chapter below, we are in principle in favour of implementing the full range of EUCD exceptions in CRRA. Moreover, there were no comments against the recommendations in this respect, and we therefore recommend that section 51(2) CRRA be amended to provide for the full range of such exceptions in Article 5(3)(c) EUCD,⁶⁵ and that section 89 CRRA be amended to align more closely with Article 5(3)(f). These amendments are provided for in section 15 of the Bill.

⁶⁵ Subject to the exception for photographs discussed in the Rightsowners chapter, above.

Users

Introduction

Although innovation is traditionally presented as a linear top-down process where innovation is the sole preserve of the producer, it is increasingly an iterative and interactive one in which users play increasingly important roles. This is particularly so online, where technology is making it increasingly easier for users to innovate, and for that innovation to be based upon the transformation of existing content. We have already considered the centrality of rightsowners in copyright law, but the law recognises other interests as well, and seeks to balance the interests of rightsowners in protecting their monopoly against other legitimate interests in diversity and expression.

On the one hand, if the exceptions are too broad, this could disincentivise rightsowners; on the other hand, if the exceptions are too narrow, this could stifle user innovation, to say nothing of freedom of expression.⁶⁶ In the *Paper*, we said

There is a further reason to incorporate the full range of EUCD exceptions and limitations. The recent UK review⁶⁷ 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. The UK government recently announced that it would therefore transpose all of the EU exceptions and limitations into UK law. [Australia and Canada have done something similar] ... If Ireland is not to be at a competitive disadvantage to [the UK, Australia, and Canada], then we need to do the same.

There was nothing in the submissions to alter the thrust of this analysis. Indeed, there was wide and broad support for the adoption of the EUCD exceptions. Nevertheless, there was some difference of opinion, with some submissions questioning whether it would be wise to do so. Indeed, at least one submission, critical of the concept of fair use, objected to this approach as amounting to “fair use by stealth”. We deal with the issue of fair use below; but, for the reasons given above, we do not accept that an approach based on the EUCD exceptions is

⁶⁶ See, in particular, *Ashby Donald v France* 36769/08 [2013] ECHR 28 (10 January 2013); available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>

⁶⁷ See notes 4 and 20 above; *cf* chapters 1 and 3 of the Third Report of Session 2013-14 of the House of Commons Culture, Media and Sport Committee *Supporting the creative economy*; available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcmumed/674/674.pdf>

unwise or misconceived. Indeed, having decided on implementation for reasons of competitiveness, a partial or incomplete implementation would undercut that rationale. Moreover, this point holds even if an individual element of an EUCD exception is not obviously connected with innovation. Accommodating basic and genuine user expectations alongside the legitimate interests of rightsowners makes copyright law stable and sustainable, thereby contributing generally to cultural and economic development and innovation.

Fair Dealing

One of the main exceptions provided by sections 50(4) and 221(2) CRRA is a version of the traditional principle of “fair dealing”; and we invited submissions on whether to amend them so that “fair dealing *includes*” rather than “means” the various matters set out in those sections. Most of the responses were in favour of this, mainly on the ground that it will provide the necessary flexibility for the development of innovative ways of creating and transforming works of authorship. Those who objected did so mainly on the ground that the change would create undesirable uncertainty. While we would accept that this is likely to be the case, at least initially, nevertheless the proposed change leaves the core of the current definition intact, whilst allowing Irish law to reconnect with developments on fair dealing elsewhere in the common law world.⁶⁸ We therefore recommend this change, and it is provided for in sections 16(2) and 16(6) of the Bill.⁶⁹

⁶⁸ See, for example, the five fair dealing cases recently decided together by the Supreme Court of Canada: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* [2012] 2 SCR 231, 2012 SCC 34 (CanLII) (12 July 2012) available at <http://www.canlii.org/en/ca/scc/doc/2012/2012scc34/2012scc34.html>; *Rogers Communications v Society of Composers, Authors and Music Publishers of Canada* [2012] 2 SCR 283, 2012 SCC 35 (CanLII) (12 July 2012) available at <http://www.canlii.org/en/ca/scc/doc/2012/2012scc35/2012scc35.html>; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] 2 SCR 326, 2012 SCC 36 (CanLII) (12 July 2012) available at <http://www.canlii.org/en/ca/scc/doc/2012/2012scc36/2012scc36.html>; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345, 2012 SCC 37 (CanLII) (12 July 2012) available at <http://www.canlii.org/en/ca/scc/doc/2012/2012scc37/2012scc37.html>; *Re: Sound v Motion Picture Theatre Associations of Canada* [2012] 2 SCR 376, 2012 SCC 38 (CanLII) (12 July 2012) available at <http://www.canlii.org/en/ca/scc/doc/2012/2012scc38/2012scc38.html>

⁶⁹ A similar substitution of “includes” for “means” is effected in the first word of section 329(2)(a), provided for in section 24(2) of the Bill (see below, in the Content-mining section of the Heritage chapter).

Private Copying Exceptions

The next five exceptions relate to private use, and it is convenient to make four background points.

First, there was a great deal of support in the submissions for private copying exceptions, except from rightsowners, who by and large argued that if any such exceptions are introduced on foot of EUCD, they should be subject to private copying levies.

Second, the main argument in favour of private copying exceptions relates to users' reasonable assumptions and basic expectations. Users now commonly assume and expect that, if they buy content for personal (as opposed to commercial) use, they should be able to access it in various formats and across multiple devices. As a consequence, many users routinely make copies for private use, and do not believe that this is or should be against the law. Failure to acknowledge this would diminish respect for the system of copyright and undermine the credibility of copyright legislation.

Third, the Vitorino Report⁷⁰ (which is discussed in the previous chapter) took the view that copies made by users for private use do not cause any harm that would require additional remuneration in the form of private copying levies. For this reason, as well as for those set out in the previous chapter, we do not recommend any such levies in the context of any private copying exceptions discussed below.

Taking these three points together, we recommend the introduction of the EUCD private copying exceptions, subject to any drafting points that appear below.

Fourth, many of the drafts in the *Paper* relating to private copying exceptions referred to “the owner or lawful user of a work”, and we therefore provided a draft definition of “lawful user” for section 2 CRRA. However, because specific definitions of “lawful user” are already provided in the CRRA in the context of

⁷⁰ See note 37 above.

computer programs (section 80(2)) and databases (section 320(1)), it is inappropriate to have this definition in section 2, so we suggest that it should appear instead as a new section 49(3) and apply only to the specific context of exceptions, as follows:

- (3) In this Part, “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.

This is provided for in section 16(1) of the Bill; and a similar provision in respect of performances as a new section 220(2) CRRA is provided for in section 16(5) of the Bill.

Reproductions on Paper for Private Use

The draft section 106A CRRA proposed in the *Paper* was directed to implementing Article 5(2)(a) EUCD, which provides for reproductions on paper for private use.⁷¹ Some of the submissions pointed out that section 106A(1)(c), which requires that the “reproduction embodies the work in a form different from the form in which the work is embodied”,⁷² would seem to exclude reprography such as photocopying, which is the principal object of Article 5(2)(a) EUCD. The intention is otherwise (to prevent, for example, a book from being copied as another book), but we accept that the condition is ambiguous. We therefore recommend the introduction of an exception for reproductions on paper for private use without this ambiguous condition. A new section 106A CRRA is therefore provided for in section 16(4) of the Bill.

Reproductions for Private Use: Format-Shifting

The draft section 106B CRRA proposed in the *Paper* was the first of two provisions directed to implementing Article 5(2)(b) EUCD, which provides for “reproductions on any medium” for private use and for non-commercial ends. This provision

⁷¹ See now Joined Cases C-457/11, C-458/11, C-459/11 and C-460/11 *Verwertungsgesellschaft Wort (VG Wort) v Kyocera Document Solutions Deutschland GmbH* [2013] ECR nyr, [2013] EUECJ C-457/11 [67] available at <http://curia.europa.eu/juris/liste.jsf?num=C-457/11> excluding non-analogue mediums of reproduction, and in particular digital mediums, from the scope of Article 5(2)(a) EUCD.

⁷² Compare section 43C(1)(c) of the Australian Copyright Act 1968 (Cth) as inserted by Schedule 6 of the Copyright Amendment Act, 2006 (Cth); see http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s43c.html

related to format-shifting, and the primary objection to this exception was that it should not extend to storing the reproduction remotely (in the cloud) rather than locally (on the desktop). We consider this to be a technologically unrealistic distinction, and we therefore recommend the introduction of a format-shifting exception without this restriction. A new section 106B CRRA is therefore provided for in section 16(4) of the Bill; and a similar provision in respect of performances as a new section 254A CRRA is provided for in section 16(7) of the Bill.

Reproductions for Private Use: Back-Up Copies

The draft section 106C CRRA proposed in the *Paper* was the second of two provisions directed to implementing Article 5(2)(b) EUCD, which provides for “reproductions on any medium” for private use and for non-commercial ends. This provision related to back-up copies, and it was submitted to us that this exception could not apply to computer programs. This was implicit in the treatment of the matter in the *Paper*, and the proposed section 49(2) CRRA set out in the rightsowners chapter makes this explicit. On this basis, we therefore recommend the introduction of an exception for back-up copies; a new section 106C CRRA is therefore provided for in section 16(4) of the Bill; and a similar provision in respect of performances as a new section 254B CRRA is provided for in section 16(7) of the Bill.

Caricature, Parody, Pastiche, and Satire

The draft section 52(6) CRRA proposed in the *Paper* was directed to implementing Article 5(3)(k) EUCD,⁷³ which provides for an exception “for the purpose of caricature, parody or pastiche”. That section referred to “fair dealing ... for the purposes of caricature, parody, pastiche, or satire, or for similar purposes”; and it was objected that this was too widely drawn. We do not agree, not least because the reference to “fair dealing” provides clear limits: it means that the caricature, parody, pastiche, satire, or similar purpose, must conform to the definition of fair dealing set out in section 50(4).

⁷³ This is now the subject of a reference to the CJEU; see Case C-201/13 *Deckmyn and Vrijheidsfonds*; available at <http://curia.europa.eu/juris/liste.jsf?&num=C-201/13>

It was objected in particular that the inclusion of the phrase “or for similar purposes” is unnecessary. We do not agree. The phrase is there to ensure that a use that in principle ought to be exempt is not excluded by an over-literal parsing of section 52(6). Moreover, to ensure consistency in drafting with other provisions in the Bill,⁷⁴ we recommend that the phrase should read “or for other similar or related purposes”.

We consider that we have achieved a good balance between the limits provided by the reference to “fair dealing” and the purposive latitude provided by the reference to “or for similar purpose”. We therefore recommend the introduction of a fair dealing exception “for the purposes of caricature, parody, pastiche, or satire, or for other similar or related purposes”; a new section 52(6) CRRA to this effect is therefore provided for in and section 16(3)(b) of the Bill; and a similar provision in respect of performances as a new section 221(4) CRRA is provided for in section 16(6)(b) of the Bill.

Non-Commercial User-Generated Content

The draft section 106D CRRA proposed in the *Paper*, following the Canadian example,⁷⁵ was directed to providing an exception for non-commercial user-generated content. The main objection to this was that this is not, in so many words, provided in EUCD. However, in our view, it is all of a piece with the four private copying exceptions that we have discussed immediately above. Moreover, we believe that it is teleologically comprehended within Article 5(2)(b) EUCD, which provides for “reproductions on any medium” for private use and for non-commercial ends. As a consequence, we therefore recommend the introduction of an exception for non-commercial user-generated content, and a new section 106D CRRA is therefore provided for in section 16(4) of the Bill; and a similar provision in respect of performances as a new section 254C CRRA is provided for in section 16(7) of the Bill.

⁷⁴ See section 50A(2)(a) CRRA and section 329(3)(a) inserted by section 27 of the Bill, which refers to “other similar or related purposes”; most references to “similar” add “or related”, so that the phrase “similar or related” appears 25 times in the Bill.

⁷⁵ Compare section 29.21 of the Canadian Copyright Act, 1985 (as inserted by section 22 of the Copyright Modernization Act, 2012); see http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/page-8.html

Education

Since the publication of the *Paper*, the Government has published its IP Protocol on Public Research,⁷⁶ which is primarily concerned with promoting innovation by ensuring that all enterprises can avail of the ideas emanating from publicly-funded research with greater ease and certainty. The key point of the Protocol is that publicly funded research institutions must be incentivized in their own terms to research and innovate. In our view, this supports the kinds of education copyright exceptions for publicly funded research institutions such as universities that we canvassed in the *Paper*.

Following the Canadian example, and implementing Article 5(3)(a) EUCD, we took the view in the *Paper* that, since a great deal of education policy is directed to innovation, there are good innovation reasons to include “education” in CRRRA’s “research or private study” exceptions. Beyond that, we considered that the simplest way to incorporate the Article 5(3)(a) EUCD exception for illustration for teaching or scientific research would be to replace the existing section 57 CRRRA with a new section 57 CRRRA, and to add new sections 57A and 57B CRRRA. We also consider that section 221 CRRRA needs amendment, and that new sections 225A, 225B and 225C CRRRA need to be added, to incorporate similar provisions in respect of performances. These various amendments are modelled on Article 5(3)(a) EUCD, on the existing section, and on the Canadian provisions; and they provide exceptions for illustration for education, teaching and research (revised sections 57,⁷⁷ 221 and 225A), for distance learning (new sections 57A and 225B), and for use by educational establishments of work available through the internet (new sections 57B and 225C).⁷⁸ We therefore recommend the introduction of these education exceptions; and this is provided for in section 17 of the Bill.

⁷⁶ *Putting public research to work for Ireland. Policies and procedures to help industry make good use of Ireland’s public research institutions* (Department of Jobs, Enterprise and Innovation, Dublin 2012) available at http://www.djei.ie/publications/science/2012/Intellectual_Property_Protocol_Putting_Public_Research_to_Work_for_Ireland.pdf

⁷⁷ The text of this draft of section 57 differs in two ways from the text in the *Paper*. First, for reasons of continuity with the existing section 57, a new subsection (1)(c) modelled on the existing subsection (1) is introduced. Second, the licensing aspects of section 57 are moved to a new section 57C, as discussed below.

⁷⁸ Another possible education exception (see sections 69A(2) and 235B(2) CRRRA, provided by sections 22(4) and 22(6) of the Bill) is discussed in the Heritage chapter below.

It was objected in the submissions that we had cast the education net far too widely in the *Paper*; we accept these objections; and we therefore recommend a definition of “education” which explicitly confines the education exception to formal education in the non-commercial sector. First, in section 2 CRRA, after “dramatic work” and before “educational establishment”, we recommend the insertion of the following definition of education:

“education” means education, instruction, lectures study, research, teaching or training either in an educational establishment or by any person acting under the authority of an educational establishment, and includes all activities necessary or expedient for or ancillary to such a programme, and “educational purposes” and similar or related phrases shall be construed accordingly;

This will define “education” for CRRA purposes in formal terms, and will preclude loose and spurious attempts to rely upon it, which was a particular concern in some of the submissions. It follows from this definition that, for reasons of consistency, references to “instruction” in sections 53, 55, 63, 168, 171, 172, 223, 224, 230 and 330 CRRA should be replaced by references to “education” so defined; and this is provided for in section 17(2) of the Bill.

Second, we recommend the amendment of the definition of “educational establishment” which already appears in section 2 CRRA to include providers of education or training for the purposes of the Qualifications and Quality Assurance (Education and Training) Act 2012. This will make the definition of the non-commercial education sector as complete as possible.

These two amendments to section 2 CRRA are provided for in section 2(2) of the Bill.

It was also suggested that the extended education exceptions should be subject to a licence override.⁷⁹ We agree. Such an override is already provided for in the existing section 57(3)-(4) CRRA, and it was included in the revised section 57 in the *Paper*. However, having regard to the extended education provisions, we consider

⁷⁹ Compare section 29.4(3) of the Canadian Copyright Act, 1985 (as inserted by section 18 of the Copyright Amendment Act, 1997 and amended by section 23 of the Copyright Modernization Act, 2012); see http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/page-9.html

that a more extended override is necessary; we therefore recommend a new section 57C CRRA as a stand-alone section relating to licensing schemes for educational establishments; and this also is provided for in section 17 of the Bill.

Persons With a Disability

Article 5(3)(b) EUCD provides for exceptions for persons with a disability; but it is very partially implemented in section 104 CRRA. This significantly curtails the life chances of a great many people who are unable, by virtue of their disability, to access and enjoy the full range of cultural materials. Moreover, it reduces the contribution they can make, both in general to society, and in particular to innovation, which is the subject-matter of our Terms of Reference.

The draft sections 104 to 104E CRRA proposed in the *Paper* were directed to implementing Article 5(3)(b) EUCD in full. In the submissions, there was much support for, and little objection in principle to, this approach; and we therefore recommend that the existing section 104 CRRA be amended and supplemented to provide for the full implementation of Article 5(3)(b) EUCD. However, there were many queries about the details of drafting and implementation, and at least four major issues - relating to developments in the UK and at the World Intellectual Property Organization (WIPO), publishers' obligations, and technological protection measures - needed to be addressed. On this basis, new sections 104 to 104G CRRA to this effect are provided for in section 18 of the Bill.

The revised section 104 CRRA provides for personal copies for persons with a disability; the new section 104A CRRA provides for multiple copies made by designated bodies; and both of these sections provide that the relevant exception is to the full range of rights conferred by CRRA. The new section 104B CRRA permits designated bodies to hold intermediate copies; the new section 104C CRRA makes section 104A subject to a licensing override (in much the same way as the education exceptions are subject to a licensing override); and the new section 104D CRRA provides for limits upon the exceptions in sections 104 and 104A. Earlier versions of these sections appeared in the *Paper*; and they are revised here to ensure that the Irish provisions, in line with recent UK proposals, cover all types

of disability and all types of copyright work,⁸⁰ and to allow Ireland to adhere to WIPO's Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.⁸¹

The next three proposed sections - sections 104E, 104F and 104G CRRA - are new since the *Paper*. As to the new section 104E, it was argued in many submissions on behalf of persons with disabilities that publishers should be given an anticipatory duty to retain intermediate electronic versions of works for the purpose of creating accessible copies. Whilst we are of the view that it is sensible that publishers should retain such intermediate electronic versions, we did not receive any submissions from publishers on the issue, so we are minded to proceed with caution on the issue. Hence, we consider that the Minister should introduce any such anticipatory duty and accessibility standards only after appropriate consultation undertaken by the Copyright Council of Ireland. In particular, accessibility standards could be agreed during this process between publishers and groups representing persons with a disability. This is provided for in the new definition of "publisher" in section 2 CRRA provided by section 2(2) of the Bill,⁸² and in the new section 104E CRAA provided by section 18 of the Bill.

The new section 104F CRRA relates to technological protection measures, and it reflects aspects of the Marrakesh Treaty; the new section 104G CRRA provides for various definitions to give effect to the earlier sections; and these are provided by section 18 of the Bill.

Finally, we recommend an amendment to preclude a possible inconsistency between "disability" as it is used in these sections, on the one hand, and, on the other, the different meaning of that word in section 48 of the Statute of Limitations, 1957 as it is applied in sections 144 and 263 CRRA; and this is also provided by section 18 of the Bill.

⁸⁰ See <http://www.ipo.gov.uk/techreview-disability-exceptions.pdf>

⁸¹ The Treaty was agreed in Marrakesh on 27 June 2013 and is available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323

⁸² See also sections 21, 54, and 198 CRRA. Note that this definition is also relied upon in the Heritage chapter below: in section 198 CRRA as amended by section 23 of the Bill, and in section 198A CRRA as inserted by section 24 of the Bill.

We therefore recommend the adoption of the disability exceptions in sections 104 to 104G CRRA as provided for in section 18 of the Bill.

Consumer Protection

In the *Paper*, we invited submissions on proposed amendments to section 2(10) CRRA, which would render void any term or condition in an agreement that purports to prohibit or restrict an exception permitted by the Act. Indeed, the strategy of rendering unfair terms void is used elsewhere in the Act.⁸³ However, it was submitted to us that, whilst there may be a good public policy at the heart of this provision, it goes too far to void all such terms, and that the section should provide a default position which can be individually bargained around. We agree with this point. Indeed, that is the approach taken by the Unfair Contract Terms Directive,⁸⁴ and we therefore recommend amending section 2(10) CRRA by analogy with that Directive. This is provided for in section 19 of the Bill.

Technological Protection Measures

Sections 370-376 CRRA provide for technological protection measures,⁸⁵ and several submissions recommended that the CRRA should be amended to allow circumvention of technological protection measures where this is a necessary step towards performing an exception permitted by the Act. It seems to us that the Act already permits this; section 374 provides:

- Nothing in this Chapter shall be construed as operating to prevent any person from undertaking the acts permitted—
- (a) in relation to works protected by copyright under Chapter 6 of Part II,
 - (b) in relation to performances, by Chapter 4 of Part III, or
 - (c) in relation to databases, by Chapter 8 of Part V,
- or from undertaking any act of circumvention required to effect such permitted acts.

⁸³ See section 57(4) CRRA.

⁸⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML>) as implemented by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (SI No 27 of 1995) (available at <http://www.irishstatutebook.ie/1995/en/si/0027.html>).

⁸⁵ The appropriate ambit of such measures is at issue in Case C-355/12 *Nintendo v PC Box Srl*, currently pending before the CJEU; the Opinion of the Advocate General is available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=141822&doclang=EN> and judgment of the Court is awaited.

The matters referred to in (a) to (c) are the exceptions permitted by the CRAA. However, this section provides no remedy where the technological protection measures do in fact prevent a user from performing an exception permitted by the CRRA. In the UK, section 296ZE⁸⁶ CPDA, provides an elaborate remedy, such that, where technological protection measures prevent a user from performing an exception, the user can complain to the Secretary of State for Business, Innovation and Skills, and the Secretary of State can give directions to resolve the issue. Broadly adopting the structure, though not all of the intricate detail, of section 296ZE CPDA, we recommend the amendment of section 374 as set out in section 10(3) of the Bill.

On the other hand, we noted above in the context of users that section 370 CRRA does not in terms prohibit an act of circumvention, and many rightsowners submitted that a circumvention should be actionable as though it were an infringement of copyright, and we said we would return to this issue in this context. One reason for the lack of a prohibition on circumvention may be because such a prohibition could frustrate the rights provided in section 374(1). But it is possible to allow an action against acts of circumvention, without affecting the rights provided in section 374(1), by amending section 370(2) CRRA. This already provides remedies against a person who (a) makes a circumvention device or (b) provides information about circumvention, as though they were remedies for infringement of copyright; and it would not be difficult to add a paragraph (c) to catch a person who undertakes an act of circumvention other than one permitted by section 370(2). We therefore recommend an amendment to section 370 to this effect, and it is provided for in section 10(1)(b)-(d) of the Bill.

Public Administration

Our proposed amendments to section 71 CRRA were directed to the full implementation of Article 5(3)(e) EUCD, providing an exception for public security and various proceedings. We received very few submissions on the point, but it was pointed out that an exception in respect of “public security” could be unclear.

⁸⁶ Inserted by the Copyright and Related Rights Regulations 2003 (SI No 2003 of 2498); available at <http://www.legislation.gov.uk/ukxi/2003/2498/contents/made>

In part, this is a function of the Directive being implemented, but we do not consider the concept to be lacking in content. We therefore recommend the full implementation of Article 5(3)(e) EUCD in section 71 CRRA, and this is provided for in section 20 of the Bill.

Section 74 CRRA provides an exception for access to material open to public inspection or on official register. In its ongoing *Hargreaves* implementation,⁸⁷ the UK government has recently proposed extending the equivalent exception in section 47 CDPA to material available on the internet.⁸⁸ We recommend a similar extension to section 74 CRRA, and this is provided for in section 20 of the Bill.

Religious or Official Celebrations

Our proposed section 52(5) CRRA was directed to implementing Article 5(3)(g) EUCD, which provides for an exception in respect of “use during religious celebrations or official celebrations organised by a public authority”. It was objected that weddings and official celebrations are a well-established and essential income stream for many photographers. However, this exception does not in any way trench upon the work of photographers in *taking* photographs at weddings, or other religious or official celebrations. If, on the other hand, the *display* of photographs at weddings were a well-established and essential income stream, then there would be force in the objection. And since the exception is directed to the display (“use”) of, rather than the taking of, photographs at religious or official celebrations, we see no reason not to recommend it. Similar points could be made about the use of any copyright works in this context. As a consequence, we therefore recommend the implementation of Article 5(3)(g) EUCD in section 52(5) CRRA, and this is provided for in section 16(3)(b) of the Bill.

Other Exceptions

In the *Paper*, we invited submissions on whether to amend section 97 CRRA relating to social institutions, having regard to Article 5(2)(e) EUCD and section 72

⁸⁷ See note 42 above.

⁸⁸ See <http://www.ipa.gov.uk/techreview-public-admin.pdf>

CDPA in the UK. We received no submissions in this regard, and therefore make no recommendations.

Finally, an exception canvassed in the *Paper* relating to Article 5(3)(l) EUCD concerning demonstration or repair proved uncontroversial in the submissions; we therefore recommend its adoption; and a new section 52(7) CRRRA to this effect is provided by section 16(3) of the Bill.

Entrepreneurs and Innovation

In our Consultation *Paper*, we considered whether the copyright balance between rightsowners and entrepreneurs requires further amendment, in particular to incentivise innovation; and we examined, in particular, whether it was possible to draft a new copyright exception to promote innovation. The essence of innovation is a substantial development or transformation that creates new value, or (in the language of copyright) that creates a new original work. It was our view that, since the EUCD has not harmonised the adaptation right,⁸⁹ it neither precluded the development of an innovation exception nor provided any guidance for it. Moreover, we considered that it could be drafted by reference to “the three-step test” in Article 9(2) of the Berne Convention.

As a consequence, we tentatively suggested in the *Paper* that, subject to a great many qualifications, it would not be an infringement of copyright if the owner or lawful user of a work (the initial work) derives from it an innovative work, where the latter is an original work which either substantially differs from, or substantially transforms, the initial work.

The majority of submissions did not comment on the detail of this proposal; of those that did, there were slightly more detractors than supporters.

By the detractors, it was objected (without elaboration) that, despite our best endeavours, our tentative draft is incompatible with the EUCD, and does not comply with the Berne three-step test. On the other hand, those who supported the proposed innovation exception accepted (again, without elaboration) our analysis that EUCD has not harmonised the adaptation right, and that our draft sufficiently conforms with the Berne three-step test. In the absence of any clear argument rebutting our view that the EUCD has not harmonised the adaptation right, we do not accept that our draft is necessarily incompatible with that

⁸⁹ But subject to whatever the CJEU might say in the recently-referred *C-419/13 Art & Allposters International*; the question is available at <http://www.ipo.gov.uk/pro-policy/policy-information/ecj/ecj-2013/ecj-2013-c41913.htm>; and the reference is at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-419/13>

Directive. Moreover, since we sought to base our draft on the three-step test, in the absence of any argument explaining how we have failed to do so, we maintain the view that our draft complies with that test.

It was also objected that the approach in our tentative draft was flawed in principle, on the grounds that only copyright protection - and not exceptions - drive innovation. Yet for every claim that only copyright protection can drive innovation, there was the opposite claim that robust and flexible exceptions and limitations are at the heart of promoting innovation and economic development. In our view, both of these claims are overstated. To assert that only one group of copyright stakeholders can drive innovation, to the exclusion of the possibility of innovation from any other quarter, simply claims too much. On the one hand, the incentivisation of copyright creators is at the heart of copyright. On the other, as is demonstrated by our discussion of user exceptions (both in the Paper and in this Report), the exceptions facilitate a great deal of scope for beneficial user innovation.

For these reasons, we recommend the introduction of a tightly-drafted and balanced exception for innovation, as proposed in our *Paper*, 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
 - (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.

There were, however, some textual objections to this tentative draft.

First, it was argued that a “substantial” transformation was too unclear a standard for a copyright test. However, as we pointed out in the Paper, “substantial” is a well-settled aspect of copyright law. In particular, on traditional and long-accepted copyright principles, it is only a “substantial” copying that amounts to an infringement.

Second, it was also argued that our qualifications, that the innovative work must neither conflict with the “normal exploitation” of the initial work nor “unreasonably prejudice” the legitimate interests of the owner of the rights in the initial work, are too vague. But these qualifications are based directly on the Berne Convention three-step test. As such, they are well understood. Moreover, they are necessary to ensure the compatibility of the exception with international norms.

Finally, some of those in favour of a new exception argued that its potential is undercut by the requirement that the author of the innovative work must inform the owner of the rights in the initial work about the availability of the innovative work. But this is to overlook that the innovator must inform the initial rightsowner

“unless it is unreasonable or impractical to do so”.⁹⁰ Hence, the obligation to inform is not an absolute one; rather, it is one that is conditioned by concepts of reasonableness and practicality.

In our view, the draft strikes an appropriate balance; subject to the amendment mentioned in the previous paragraph, we recommend the adoption of a new innovation exception in section 106E CRRA; and it is provided for in section 21(1) of the Bill. Finally, to incorporate a similar provision in respect of performances, we recommend the adoption of a new section 254D CRRA; and this is provided for in section 21(2) of the Bill.

⁹⁰ Having regard to other similar clauses in our Bill, we recommend that this formulation be amended to read “Unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise”. Similarly, having regard to note 74 above, we recommend that the reference at the end of subsection 6 to work which is “substantially similar” should refer to work which is “substantially similar or related”.

Heritage

Introduction

Copyright law raises particular issues for heritage institutions such as libraries, archives, museums, galleries, and educational establishments. Many of the CRRRA and EUCD copyright exceptions relate to educational purposes in general (which we discussed in the Users chapter) and to heritage institutions in particular (which we discuss here). Given Ireland’s strong cultural heritage and traditions in art, music and literature, one important strand of innovation is likely to be provided by the creative capacity of artists to generate innovative content. Copyright law must not only provide the means to incentivise and protect this content, but must also ensure that its reach does not adversely impact upon the creative process.

Heritage Institutions

In the Heritage chapter in the *Paper*, we proposed that references to “libraries and archives” be replaced with a more generic reference to “heritage institutions”. There was widespread support for, and little objection to, this proposal; we therefore recommend this amendment; and it is provided for in section 22(1) of the Bill.

In the *Paper*, we provided a definition of “heritage institutions” in a proposed section 59(1). However, we now consider that this definition should appear with the other definitions in section 2 CRRRA,⁹¹ not least because it can then be applied consistently throughout the Act. At present, in section 2 CRRRA, subsections (3)-(5) deal with prescribed libraries, prescribed archives and prescribed museums; and, since these subsections would have to be amended in any event to accommodate the generalised reference to heritage institutions, we recommend that they be repealed. Section 2(3) can then provide for the generic definition of heritage institutions (revised from the version proposed in the *Paper*), and the prescribed libraries, prescribed archives and prescribed museums in the existing subsections

⁹¹ This also has the advantage of correcting the typographical error by which there were two subsection (1)s in the *Paper*’s draft of section 59.

(2)-(5) can be provided for in a more inclusive fashion in section 2(4).⁹² This is provided for in section 22(2) of the Bill.⁹³

One of the other contexts in which the definition of heritage institution could be applied is in the context (discussed above in the Users chapter) of designated bodies making accessible copies for persons with a disability, to allow not just educational establishments but also copyright deposit institutions to be so designated. Section 198(11) CRRA already allows such institutions to receive electronic copies of books; and the aim of section 198A proposed below is to extend copyright deposit from books to digital publications. If those copyright deposit institutions are getting electronic or digital versions of publications for preservation reasons, it makes sense that they should be able to use those electronic or digital versions for the benefit of persons with a disability seeking to use the collection held by the heritage institution. This is achieved in two ways. First, such copyright deposit institutions are included within the definition of heritage institutions (see the new section 2(3)(c) CRRA, as provided by section 22(2) of the Bill). Second, the drafts of the sections relating to persons with a disability (section 18 of the Bill, above), heritage (section 22 of the Bill, under discussion here), and copyright deposit (sections 25 and 26 of the Bill, below) are designed to inter-operate with one another.⁹⁴

In the *Paper*, we proposed four possible new exceptions for heritage institutions. First, we proposed a possible new section 69 on format-shifting by heritage institutions for archival or⁹⁵ preservation purposes, which in turn required amendments to section 59. Second, we proposed a possible new section 69A(1) on the display of works in the permanent collection of a heritage institution on

⁹² Pursuant to the frequent existing CRRA references to “prescribed libraries and prescribed archives”, the relevant libraries and archives are prescribed in 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>

⁹³ A new definition of “intellectual property claim” is located in section 2(5) CRRA by section 2(2)(b) of the Bill.

⁹⁴ See, in particular, the new sections 104E(5), 198(12), 198A(5) and 198A(11) CRRA.

⁹⁵ In this respect, there was a typographical error in the *Paper*, which should have referred to “archival *or* preservation” not “archival *and* preservation”.

terminals, to give effect to Article 5(3)(n) EUCD.⁹⁶ Third, we proposed a possible new section 69A(2) dealing with lectures in heritage institutions. In the absence of such clear statutory permission, heritage institutions have been reluctant to undertake such matters, and they welcomed the proposals. There were very few objections to these three proposals; we therefore recommend their adoption; and they are provided for (with some amendments from the drafts in the *Paper*) in sections 22(4) and 22(6). Similar exceptions in new sections 253A and 253B CRRRA, concerning acts permitted in relation to performances, are provided for in section 23(8).

Catalogues

The fourth possible new exception for heritage institutions that we proposed in the *Paper* related to catalogues. We dealt with this issue in the *Paper* both in the Users chapter and in the Heritage chapter. To ensure that all of the issues relating to catalogues are dealt with in one place in this *Report*, we deal with both issues here.

First, section 66(1) CRRRA sets out five occasions on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in that work; and we proposed that it be amended to permit 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. This was welcomed in the submissions; we therefore recommend that section 66(1) be amended to include, in a new section 66(1)(f), a sixth occasion on which a heritage institution may, without infringing any copyright in the work, make a copy of a work in the permanent collection for the purposes of publishing such a copy in a catalogue relating to an exhibition. This is provided for in sections 23(1) and (2) of the Bill. A similar exception in section 233 CRRRA, concerning acts permitted in relation to performances, is provided for in section 23(4).

⁹⁶ This is now the subject of a reference to the CJEU; see Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG*; available at <http://curia.europa.eu/juris/liste.jsf?&num=C-117/13>

Second, Article 5(3)(j) EUCD provides for an exception in respect of advertising the public exhibition or sale of artistic works to the extent necessary to promote the event, excluding any other commercial use. Section 94(1) CRRA already covers “the purpose of advertising the sale” of the work in question; and, in the *Paper*, we proposed adding “pubic exhibition” to that clause. However, section 94(1) does not contain the limitations in the remainder of the Article. Moreover, it was submitted that the exception should not extend to cover the sale of catalogues. The implementation of the remainder of the Article, in combination with the drawing of a strict line between this provision and our proposed section 66(1)(f) CRRA that deals with catalogues, would meet these concerns. We therefore recommend that section 94(1) CRRA be amended accordingly; and this is provided for in section 23(3) of the Bill.

Donations

In the *Paper*, we invited submissions on the question whether 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. And we provided possible draft statutory text. While some of the submissions welcomed the principle, others argued that the draft seemed to have retrospective effect (with the potential to disturb or affect existing transfers), that the language of the draft was too stark (imposing an automatic presumption that can be rebutted only in a very specific way), and that it therefore tilted the balance too much the other way. We accept these arguments, and therefore recommend the revised section 123 CRRA that is provided for in section 24 of the Bill.

Digital Deposit

Section 198 CRRA provides for legal copyright deposit, which aims to ensure that the nation’s published output (and thereby its intellectual record and future published heritage) is collected systematically, to preserve the material for the use of future generations and to make it available for readers within the designated legal deposit libraries.⁹⁷

⁹⁷ See <http://www.bl.uk/aboutus/legaldeposit/introduction/index.html> Similarly, copyright deposit “benefits authors, publishers, researchers and the general public because it helps to ensure that ... [the] nation’s published output is collected systematically and becomes part of the national heritage ... [and published]

The aim of section 198A is to extend this to our digital heritage. Indeed, the government has recognised that “digital preservation of our social and cultural heritage is imperative”.⁹⁸ A significant part of the Heritage chapter in the *Paper* therefore concerned the possible extension of the copyright deposit provisions relating to books in section 198 CRRA to digital publications.

We proposed a draft section 198A modelled on the existing section 198 CRRA, revised to apply to digital works, with some additional provisions based on the UK’s Legal Deposit Libraries Act 2003.⁹⁹ However, in the course of considering the submissions it became clear that, whilst there was a great deal of support for the principle of digital deposit, there were many problems with the draft section 198A. We received significant help in this respect in the submissions, for which we are grateful. At the same time, in the UK, the Secretary of State for Culture, Media and Sport made the Legal Deposit Libraries (Non-print works) Regulations 2013 (SI No 777 of 2013)¹⁰⁰ applying the 2003 Act to digital publications. As a consequence, we have revised section 198A fairly heavily. Our aim is still to draft on this topic with a light touch, in so far as possible, because it is a moving target, and too much detail will certainly date very rapidly. In particular, technological developments will inevitably render references to specific current technologies, if not obsolete, then at least obsolescent.

By way of background to the revised section 198A, section 2(1) CRRA, as provided for in section 2(2) of the Bill, supplies a new definition of “digital publication”, and inserts it in the existing definition of “work”. This is the key definition on which the new section 198A is constructed. It also relies upon the definition of “publisher” in section 2(1) CRRA as provided for in section 2(2) of the Bill. This definition of “publisher” has already been relied upon in the Users chapter above, in the context of exceptions for persons with a disability. Moreover, this in turn requires that the definition of “publisher” in 65(5) of the National Cultural

material is preserved for the use of future generations”; (see <http://www.tcd.ie/Library/collection-man/legal-deposit.php>).

⁹⁸ See <http://www.djei.ie/press/2012/20121023.htm> (23 October 2012).

⁹⁹ Available at <http://www.legislation.gov.uk/ukpga/2003/28/contents>

¹⁰⁰ Available at <http://www.legislation.gov.uk/uksi/2013/777/contents/made>

Institutions Act, 1997 (as inserted by section 199 CRRRA) be amended to come into line.

Section 2(5) CRRRA, as provided for in section 2(2)(b) of the Bill, supplies a new definition of “intellectual property claim”, which has already been relied upon in the Copyright Council chapter, above.¹⁰¹ This new definition also plays an important role here in limiting the possible liability of publishers in complying with their digital copyright deposit obligations.

Against that background, we recommend the new section 198A CRRRA on digital copyright deposit that is provided by section 26 of the Bill. Section 198A(1) provides that this section applies to the existing copyright deposit institutions and to any other institutions which the Minister might specify. This ties section 198A into the existing provisions relating to copyright deposit in section 198, and in particular ensures that the existing copyright deposit institutions will be able to claim digital publications in the same way as they can claim print publications at present. Moreover, the addition of the power on the part of the Minister to specify other Boards or authorities is to ensure that digital conservation can keep pace with the exponential rate of increase in digital data, and to spread the increasing load that will therefore inevitably arise.

Section 198A(2) sets up the basic right of copyright deposit institutions to have a copy of digital publications. However, it differs from the existing section 198 CRRRA in an important respect. To give effect to the copyright deposit institutions’ entitlement to print publications, section 198(1) CRRRA imposes an obligation upon publishers to deliver the print publication to the copyright deposit institution. It was submitted to us that if a similar obligation to deliver were to be imposed upon publishers of digital publications, the copyright deposit institutions would be swamped with digital ephemera. We agree. Hence, although section 198A(2) states an entitlement on the part of copyright deposit institutions, the details of that entitlement are set out in considerable detail in section 198A(3). This provides

¹⁰¹ See the new sections 16a-16C CRRRA, provided by section 4 of the Bill (on the proposed jurisdiction of the District and Circuit Courts in intellectual property matters).

that the copyright deposit institutions can decide which digital publications they wish to claim and how they wish to claim them, and it ensures that the process is as similar as possible to that which obtains in respect of books pursuant to section 198 CRRRA.

Section 198A(4) relates to the right of UK copyright deposit institutions to demand digital publications; it is a reciprocal right for the right of Irish institutions to demand UK digital publications.¹⁰² This is supplemented by section 198A(15), which is the reciprocal of section 13 of the UK's 2003 Act.

Section 198A(5) deals with a possible overlap between the existing section 198 CRRRA and the new section 198A. Sections 198A(6)-(9) set out some criteria for digital material that must be delivered. In particular subsection (9) deals with publishers' obligations relating to technological protection measures applied to digital publication delivered pursuant to section 198A, and reflects section 104F(4) in the Users chapter (relating to technological protection measures in specified electronic versions prepared by publishers for persons with a disability).

Section 198A(10) provides for sanctions on publishers who fail to comply with their obligations under the section, including a fine not exceeding €1,000 (or any greater sum prescribed by the Minister). There was some discussion in the submissions about the appropriate level of this fine. The main part of this subsection is based on the existing section 198(9) CRRRA, which sets the fine at Ir£500, which is €634.87; adjusted for inflation, that is in the order of €850. We had suggested a fine of €750 in the *Paper*, but it was submitted to us that the fine should be substantially greater. However, we note that no similar fine is mentioned in section 3 of the UK's 2003 Act, which is the enforcement section of the Act. As a consequence, we are content to recommend only a modestly increased fine of €1,000, with the addition of a power on the part of the Minister to increase the fine, either to keep pace with inflation or to ensure greater compliance should that prove necessary.

¹⁰² See section 14(e) of the UK's 2003 Act (note 99 above).

Section 198A(11) allows sections 104E, 198 and 198A to inter-operate. In appropriate cases, it effectively allows one demand and delivery to satisfy a publisher's obligations under all three such sections.

Section 198A(12) provides that copyright deposit institutions must give receipts for all digital publications received; and section 198A(13) provides that demands, notices or receipts made or given pursuant to the section may be either in writing or electronic.

Sections 198A(14), 198A(16) and 198A(17) allow the Minister to impose some conditions on certain uses by copyright deposit institutions of digital publications received pursuant to the section. Section 198A(14) is entirely new since the *Paper*. A significant proportion of the UK regulations relates to the uses specified in subsection 17. Although we did not receive any submissions from publishers in respect of these uses, we consider that have potential merit, and we recommend that the Minister may make regulations dealing with them, should the need arise.

Sections 198A(18) to 198A(20) permit the copyright deposit institution to make copies of our online digital heritage whilst it is available. Sections 198A(21) to 198A(22) provide some limitations on the possible liability of publishers in complying with their digital copyright deposit obligations. Finally, section 198A(23) permits the Minister to make regulations for the purposes of the section. Of course, the Minister already has a general power to make regulations in respect of the CRRA in general and of our proposed amendments in particular; and there are other specific contexts in this section in which it is specifically provided for the Minister to provide additional detail. However, given that digital matters are moving very quickly, a general power in respect of the section as a whole will probably prove necessary. The consultation provision in section 198A(24) is modelled on our proposed section 104D(4) (above).

We therefore recommend this new section 198A CRRA, as provided by section 26 of the Bill.

Finally, in section 2 of the Heritage Fund Act, 2001,¹⁰³ the definition of “heritage object” should be amended to read as follows:

- (b) any book (within the meaning of section 198 of the Act of 2000), **any digital publication (within the meaning of section 2 of the Act of 2000 and for the purposes of section 198A of that Act)**, or any manuscript, other material or part thereof,

This amendment to the Heritage Fund Act, 2001 has the potential to unlock a significant source of funding for copyright deposit institutions archiving our digital heritage;¹⁰⁴ and this, too, is provided for in section 26 of the Bill.

Having regard to the provisions in the new section 198A, above, some amendments to section 198 CRRA are also necessary, and they are provided in section 25 of the Bill.¹⁰⁵

Section 198(9) provides for the same penalties as apply in section 198A(10) above. Sections 198(11) and 198(12) deal with possible overlaps between the existing section 198 CRRA and the new sections 104E and 198A. The existing subsection (12) provides a definition of “publication” which has influenced and then been overtaken by the definition of “publisher” in section 2 CRRA provided by section 2(2) of the Bill (as discussed above), thereby providing space for the new section 198(12). Section 198(13)-(14) set out some criteria for digital material which must be delivered. In particular subsection (14) deals with publishers’ obligations relating to technological protection measures in the same terms as sections 104F and 198A(9) (discussed above). Sections 198(15)-(17) provide some limitations on the possible liability of publishers in complying with their copyright deposit obligations. Section 198(18) provides that demands, notices or receipts made or given pursuant to the section may be either in writing or electronic.

¹⁰³ Available at <http://www.irishstatutebook.ie/2001/en/act/pub/0044/index.html>

¹⁰⁴ In that case, the list of “eligible institutions” in section 2 of that Act may provide a list of some possible Boards or authorities which the Minister might prescribe for the purposes of section 198A(1).

¹⁰⁵ Although we have dealt here with digital copyright deposit in section 198A before copyright deposit in section 198, it makes sense for the amendments to section 198 to appear in the Bill before the new section 198A.

Content-Mining

In the *Paper*, we raised a number of questions about text-mining and data-mining (hereafter called “content-mining”). This is a process that looks for and extracts interesting or important patterns or anomalies in data that might otherwise go unobserved.¹⁰⁶ However, most relevant databases are far too large to be analysed without the use of software algorithms, which usually require not only access to the data but also the possibility of making a temporary copy of the data so as to be able to work with it. As a recent study puts it:

The applications for content-mining range from the mundane to the transcendental. For example, studies have used text-mining techniques to explore social sentiment and public opinion through the analysis of social media. Other studies have been looking at the use of social media to survey health and disease occurrences, for example, by looking for the prevalence of mentions of influenza online. More serious applications include the use of content-mining in biology and medicine.¹⁰⁷

Given this potential for new discoveries from existing data, very significant social benefits stand to be gained from content-mining, and in particular to be gained from a copyright exemption in favour of content-mining for non-commercial research. As a recent UK government assessment puts it:

Copyright is not intended to prevent use of facts for research, and this exception is intended to remove the block on reuse of materials for research using these tools.¹⁰⁸

In the *Paper*, to provide that such a process would not infringe copyright, we proposed a draft section 106F on digital analysis and research along with a draft section 106G on computer security. In retrospect, we consider that the text of section 106F was very loose, not least because it referred to but did not define data-mining. As a consequence, we went back to the drawing board to come up with a more tightly-drawn approach to content-mining that would be more

¹⁰⁶ See Naomi Korn, Charles Oppenheim and Charles Duncan “IPR and Licensing issues in Derived Data” pp2-3; available at <http://www.jisc.ac.uk/media/documents/projects/iprinderiveddatareport.pdf>

¹⁰⁷ Andres Guadamuz and Diane Cabell “Data-mining White Paper: Analysis of UK/EU Law on Data-mining in Higher Education Institutions” p4; available at <http://www.technollama.co.uk/wp-content/uploads/2013/04/Data-Mining-Paper.pdf>

¹⁰⁸ Final Impact Assessment for an *Exception for copying of works for use by text and data analytics* (13 December 2012); available at <http://www.ipso.gov.uk/consult-ia-bis0312.pdf> p1. This part of the UK government’s response to Hargreaves (note 4 above) accepted the recommendation (Hargreaves, p48) in favour of a copyright exception to cover content-mining for non-commercial research within certain restricted limits; and the Intellectual Property Office has published draft regulations in respect of data analysis for non-commercial research; see <http://www.ipso.gov.uk/techreview-data-analysis.pdf>

compatible with the other CRRRA provisions. It is set out in a new section 50A CRRRA (relating to copyright works) and a significantly revised section 329 CRRRA (relating to databases), provided for in section 27 of the Bill.

Our approach here begins with the classical concept of fair dealing. Many existing exemptions, and many of those which we propose, are cast in its terms, and we propose that an exemption for content-mining be cast in fair dealing terms as well. Not only does this approach cast this new exemption in familiar terms, but it also facilitates the application of the same definition in the context of performances and databases.

Sections 50A(1), 329(1) and 329(2)(b) state the basic fair dealing exemption for content-mining; and they make it clear that the content-mining must be “for a purpose and to an extent which will not unreasonably prejudice the interests of” the relevant rightsowner (section 50A, by its terms, is subject to section 50(4), which is in those terms; the point is made expressly in section 329(2)(a)). These provisions, inspired by the Berne three-step test, should meet the commercial objections to the exemption raised by some rightsowners in the submissions.

Sections 50A(2) and 329(3) seek to define the essence of the process of content-mining in language cast at a sufficiently high-degree of generality that it is not dependent upon a specific view of technology; whilst sections 50A(3) and 329(4) seek to confine the exemption within appropriate boundaries. In particular, in common with other fair dealing exemptions, this content-mining exemption applies only to works of which the user is already a lawful user; it does not confer on the user a right of access to data where none exists.

Sections 50A(4) and 329(5) provide for quotation or incidental inclusion (and the former is expressly tied into the general provision on the issue in section 52 CRRRA). Since the analysis and results are unlikely to make sense without the context of the underlying data, these subsections are intended to facilitate quotation from a work that is necessary to explain the results of the process of content-mining.

Sections 50A(5) and 329(6) provide for temporary copies. Indeed, the former is expressly tied into the general provision on the issue in section 87 CRRA: content-mining pursuant to section 50A(5) would constitute the relevant lawful use for the purposes of section 87, and the further conditions in that section apply in this context without the need to restate them again here. Moreover, the terms of section 50A(5) are reproduced in section 329(6). Furthermore, both subsections contain the additional safeguard for the rightsowner that any such reproduction must not survive the process of content-mining.

Sections 50A(6) and 329(7) ensure that rights management information and technological protection measures do not preclude reliance on the content-mining exemption (reinforcing section 374 CRRA).

We have already seen that one consequence of treating the content-mining exemption as an aspect of fair dealing for the purposes of education, research or private study is that the Berne limitation in section 50(4) requires that the exception will not unreasonably prejudice the interests of the owner of the copyright; and this is reproduced in section 329(2)(a). A second consequence is that the section 50A exception will be subject to the licence override in section 57C, relating to licensing schemes for educational establishments; and section 329(8) makes the section 329 exception subject to the same licence override.

In section 50A, the references to or connections with sections 50(4), 52, 57A 87 and 374 are intended to stitch this new exception tightly into the fabric of the existing Act, so as to make it as workable as possible.

As Guadamuz and Cabell point out,¹⁰⁹ content-mining is facilitated not just by appropriate exceptions to copyright and the database right, but also by access to public sector information¹¹⁰ and by means of open access¹¹¹ policies. These topics

¹⁰⁹ See note 94 above.

¹¹⁰ See Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (the Public Sector Information (PSI) Directive) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:EN:NOT>); implemented by the European Communities (Re-Use of Public Sector Information) Regulations 2005 (SI No 279 of 2005) (available at <http://www.irishstatutebook.ie/2005/en/si/0279.html>) and the European Communities (Re-Use of Public Sector

in turn raise copyright issues at both national and EU level,¹¹² and we recommend that the Copyright Council should keep these issues under review, publish relevant codes of practice, and advise the Minister accordingly.

Finally, as noted above, in the *Paper* we proposed a draft section 106F on digital analysis and research along with a draft section 106G on computer security. The content-mining provisions in section 50A and section 329 have removed most of the substance from the draft section 106F, so we recommend that section 106G be merged with what remains of section 106F, as a new section 106F; and this is provided for in section 28 of the Bill.

Information) (Amendment) Regulations 2008 (SI No 103 of 2008) (available at <http://www.irishstatutebook.ie/2008/en/si/0103.html>). The Directive is currently undergoing revision (see http://ec.europa.eu/information_society/policy/psi/revision_directive/index_en.htm).

¹¹¹ See, in particular, the *National Principles for Open Access* (available at <http://www.dri.ie/national-principles-open-access>). These *Principles* complement the *IP Protocol* (noted in the Users chapter, above), in that both the *Principles* and the *Protocol* are directed to encouraging innovation by enabling access to the fruits of publicly-funded research. The European Commission is also committed to optimising the impact of publicly-funded scientific research, at both European and Member State level by means of open access policies; see <http://ec.europa.eu/research/science-society/index.cfm?fuseaction=public.topic&id=1294&lang=1>

¹¹² We also recommend that the opportunity should be taken to ensure that the revision of the Public Sector Information Directive (see note 110 above), the development of European Open Access policies (see note 111 above) and any future amendments of EUCD (see note 5 above) all properly align and inter-operate.

Fair Use

Fair use was a controversial topic in the first round of submissions, with powerful views expressed both for and against the exception. In our *Paper*, we sought to accommodate a range of apparently incompatible views, by tentatively proposing a possible draft of a tightly-drawn Irish fair use exception. This draft was based on three paramount considerations: the statutory text should take full account of the legitimate concerns raised by the doctrine’s critics; it should be tied as closely as possible to, and informed as much as possible by, the existing exceptions; and it should be based on, and take advantage of, the experience of other jurisdictions.¹¹³ The draft sought to integrate the exception with existing, related exceptions in the current law: it provided that, in any given case, the existing exceptions should be exhausted before any claim of fair use could be considered; also that they should be regarded as examples of fair use so as to allow workable analogies to be developed. Moreover, we suggested that any such exception should come into force only when the Minister by order decided that it should, giving time for widespread consultation and preparation by the Copyright Council.

Our Terms of Reference refer to “the US style ‘fair use’ doctrine”, and we fear that this reference may have proved to be somewhat of a distraction. The doctrine is not unique to the US; many other jurisdictions have adopted versions of it,¹¹⁴ most recently South Korea;¹¹⁵ and other jurisdictions, including Australia,¹¹⁶ are actively considering whether to do so. As we noted in the *Paper*, we interpret our

¹¹³ In the *Paper*, we discussed not just the US, but also Holland, India, Israel, the Philippines, and Singapore, as well as the terms of the Berne three-step test.

¹¹⁴ In addition to the jurisdictions discussed in the *Paper* and referred to in the previous note, fair use exceptions have also been adopted in Bangladesh (s72 of the Copyright Act, 2000); Liberia (s2.7 of the Copyright Law, 1997); Sri Lanka (ss11-12 of the Intellectual Property Act, 2003); Taiwan (s65 of the Copyright Act, 2007); and Uganda (s15 of the Copyrights and Neighbouring Rights Act, 2006); set out in Band & Gerafi *The Fair Use/Fair Dealing Handbook* (2013); available at <http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf>

¹¹⁵ See the Copyright Act, 1957 as amended by Act No. 11110 of December 2, 2011 (the Copyright Act, 2011), provides in article 35-3 for “fair use of works”; see http://www.wipo.int/wipolex/en/text.jsp?file_id=281738

¹¹⁶ See, generally, note 4 above. In particular, the Australian Law Reform Commission is considering whether to introduce such a doctrine (see *Copyright and the Digital Economy* (ALRC Issues Paper 42; August 2012) pp71-79, available at <http://www.alrc.gov.au/publications/copyright-ip42>), and it has recently released a Discussion Paper *Copyright and the Digital Economy* (ALRC DP 79, 2013; available at <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>) containing 42 recommendations, including the introduction of a US-style fair use doctrine (see *id*, chapter 4).

Terms of Reference to require us to ask whether the absence of a fair use doctrine from Irish law amounts to a barrier to innovation; the US experience is valuable but - given developments in other jurisdictions - not uniquely so; and the tentative draft sought to probe both the strengths and weaknesses of a fair use defence, proposing a tightly-drawn exception.

Unfortunately, our proposed draft did not provoke any substantial debate on its own terms. The first round of submissions rehearsed the general arguments on both sides of the issue, and the tentative draft sought to take account of as many of those arguments as possible. However, the second round of submissions broadly covered the same ground and generally repeated the arguments (both for and against) that had been made in the first round, without engaging with the reasoning in the *Paper* or with the tentative draft.

On the one hand, many critics simply re-iterated that they were not in favour of “importing” a “US style” fair use exception into Ireland, without recognising that the tentative draft on which we sought responses was not a “US-style” exception at all, but instead represented an attempt to sketch what a specifically Irish exception might look like. In particular, to object that a fair use doctrine would represent a radical break from the current copyright regime overlooks the point that our tentative draft fair use exception is intended to be tied as closely as possible to, and informed as much as possible by, the *existing* CRRA exceptions. The objection that fair use is available only to the litigious overlooks the fact that once a precedent has been set, it benefits everyone, not just the parties - for example, precedents in fair use cases have allowed US copyright law to find generally beneficial accommodations with new technologies (such as photocopiers, VCRs, and online search) as they have arisen, without the need for cumbersome statutory amendment. All in all, the critics of the doctrine provided no objections which we had not considered in the *Paper*, and they signally failed to notice that our tentative draft differed substantially from the US doctrine.

On the other hand, a small number of submissions did note that there was more to our draft than to the US fair use doctrine, but took no position on whether our draft ought to be adopted.

Our *Paper* considered that there is scope under EU law for member states to adopt a fair use doctrine as a matter of national law, and that EUCD does not necessarily preclude it (not least because, in our view, EUCD has not harmonized the adaptation right¹¹⁷). In particular, the *Paper* considered that while EU law accords a high protection to intellectual property rights such as copyright under the EUCD, case law in both the CJEU¹¹⁸ and the ECHR¹¹⁹ is increasingly stressing that these rights must be balanced against the protection of other fundamental rights. Our tentative draft fair use exception was an attempt to weigh up these issues and achieve an appropriate balance consistent with general principles of EU law. However, as with the discussion of the text of our proposed innovation exception, critics of fair use simply asserted that our draft falls outside the ambit of what is permitted by EU law, without any engagement with the reasoning in the *Paper*. In the absence of any substantial argument rebutting our analysis, we do not accept that our draft is necessarily incompatible with EU law.

A related issue is the compatibility of the US version of the fair use doctrine with the Berne three-step test. As we pointed out in the *Paper*, the US Government has taken the view in submissions to the World Trade Organisation that the fair use doctrine is equivalent to the three-step test. There was nothing in the second round of submissions to us rebutting this analysis (although some of them simply asserted the contrary, without argument). We therefore do not accept that a fair use doctrine, even one as broad as the US doctrine, is necessarily incompatible

¹¹⁷ But see note 88 above.

¹¹⁸ See Joined cases C-457/11, C-458/11, C-459/11 and C-460/11 *Verwertungsgesellschaft Wort (VG Wort) v Kyocera Document Solutions Deutschland GmbH* [2013] ECR nyr, [2013] EUECJ C-457/11 [81] (Sharpston AG; citing case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271 [68]); see also Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR nyr, [2011] EUECJ C-70/10 (24 November 2011) [53]; Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR nyr, [2012] EUECJ C-360/10 (16 February 2012) [39] [51].

¹¹⁹ See *Ashby Donald v France* 36769/08 [2013] ECHR 28 (10 January 2013) (note ?? above) [34]-[40] on Article 10 ECHR, which is in the same terms as Article 11 of the EU Charter of Fundamental Rights, and which, in turn, EU Member States must observe when giving effect to Directives (see Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR nyr, [2013] EUECJ C-617/10 (26 February 2013) [19]-[21]).

with the Berne three-step test. *A fortiori*, a draft such as ours which does much to incorporate the three-step test is not subject to a serious criticism on that ground.

There was some discussion in the second round of submissions of the relationship of our tentative draft fair use exception with the other exceptions canvassed in the *Paper*. For example, those who objected both to the very notion of fair use and to the expansion of exceptions, labelled the implementation of the full range of EUCD exceptions as “fair use by stealth”. Again, some submissions said that, the combination of the parody exception discussed in the Users chapter, and the innovation exception discussed in the Entrepreneurs chapter, if enacted, would just about cover much of the ground that fair use is usually understood to cover. Conversely, other submissions said that if fair use were introduced, then these exceptions would not need to be specially provided for. In our view, each of the various exceptions canvassed in the *Paper* has an independent justification, even where aspects of its coverage might intersect with aspects of the coverage of other exceptions. As a consequence, in this *Report*, we discuss the various exceptions in their own terms; and if a case for an exception is established, we accept this conclusion, whether or not the case for another exception is established, or whether or not there is an overlap or intersection between various exceptions.

On the advantages and disadvantages of fair use, there was a great deal of anecdote, but not much by way of determinative evidence. For every submission extolling the virtues of “the copyright industries”, there was another applauding “the fair use economy”. It is often hard to see cause and effect in these studies. The one lesson that can undoubtedly be gleaned from them, and from jurisdictions which already have fair use regimes, is that such an exception can and does sit comfortably alongside the successful exploitation of copyright by rightsowners.

Much has been done of late to strengthen the position of rightsowners¹²⁰, and we make a significant number of recommendations in this *Report* to buttress it

¹²⁰ See Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:265:0001:0005:EN:PDF> (extending

further. The adoption of a tightly-drawn fair use exception would be an appropriate *quid pro quo* for this buttressing. We do not see any legal reason against this development.

Other jurisdictions, both in the EU and in the wider common law world, either have adopted a species of a fair use exception or are actively considering doing so. Not only could Ireland be a part of this trend, but, if it were to adopt our tentatively proposed and tightly-drawn draft fair use exception, it would be in the vanguard. Moreover, in our view, two significant ongoing technological developments make the policy case in favour of the exception: it is simply not possible to predict the direction in which cloud computing and 3D printing are going to go, and it is therefore impossible to craft appropriate *ex ante* legal responses. Instead, a doctrine such as our draft would enable context-sensitive accommodations to be developed as the occasion arises in respect of these and other technological innovations. It will not convert Sandyford into SiliconFord or otherwise transform Irish intellectual property law overnight, but it will send important signals about the nature of the Irish innovation ecosystem, it will provide the Irish economy with a competitive advantage in Europe, and it will give Irish law a leadership position in EU copyright debates.

For these reasons, if not without misgivings, we recommend the introduction of the following section (slightly amended from the draft tentatively put forward in the *Paper*):

49A. 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 particular 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,

copyright term); European Union (Copyright and Related Rights) Regulations 2012 (SI No 59 of 2012) available at www.irishstatutebook.ie/2012/en/si/0059.html (tougher enforcement regime); EU consultation on civil enforcement of intellectual property rights, available at http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm.

take into account such matters as the court considers relevant, including any or some or all of the following—

- (a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part,
 - (b) the purpose and character of the use in question, including in particular whether
 - (i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or
 - (ii) if the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred by this Part.
 - (c) the nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question,
 - (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the work as a whole,
 - (e) the impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market,
 - (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,
 - (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and
 - (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.
- (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.

There are some changes here to the text suggested in the *Paper*. The aim of all of the changes is to make the application of the test as clear as possible. Some of the changes are stylistic. For example, the removal of the unnecessary “copyrighted” before “work” throughout subsection (3), the deletion of “nature and extent” and the addition of “or related” in paragraph (a), and the addition of “having regard to

matters” in paragraph (e), are all of this nature. Again, the substitution of “particular” for “given” in subsection (2), and the addition of “other” in subsection (3)(a), are for reasons of consistency of language between the two subsections.

However, some of the changes are substantive. For example, it was not clear how the factors in subsection (3) of our original draft pulled in favour of, or against, a finding of fair use. Notwithstanding that there is a wide range of experience in other jurisdictions to draw on, we consider that some guidance should be given to a court as to the extent to which these factors pull in favour of, or against, such a finding. We have therefore organised and expressed these matters, so that those which pull in favour are grouped together (now paragraphs (a) to (c)), general matters are grouped together (now paragraphs (d) and (e)), and those which pull against are grouped together (now paragraphs (f) to (h)).

Paragraph (a) is unamended since the *Paper*, and reflects experience in other jurisdictions in which fair use can build by analogy with existing exceptions.

Paragraph (b) is amended since the *Paper*. Paragraph (b)(i) attempts to capture the sorts of adjectives that describe legitimate fair use in other jurisdictions. For example, “non-commercial” and “personal” reflect the personal CRRA exceptions which we have already discussed in the Users chapter, and reinforce subsection (1). Similarly, “incidental” use builds on the insight provided by section 52 CRRA that there ought to be no infringement where the inclusion of the work is not the main purpose of the use (a radio or television playing in the background of a family video posted on YouTube, or an image in a shop-window behind a person posing on the street for a photograph, should not infringe copyright in the radio or television broadcast, or image). Finally, “non-consumptive” and “transformative” allow for uses which are not simply verbatim reproductions and which do not trench upon the creative, expressive or aesthetic purposes of the work being used and therefore pose little or no threat to the commercial interests of rightsowners that copyright law seeks to foster and encourage.

Paragraph (b)(ii) allows a distinction to be drawn between primary and secondary infringements, so that the courts could conclude that the exception could be deployed more readily in the latter context. For example, as we discussed in the Intermediaries chapter above, it may be that, as the architecture of the internet evolves, new intermediary immunities in respect of secondary liability may prove necessary, in particular in the context of search, framing, and cloud computing; and paragraph (b)(ii) could allow at least some of them to evolve under the rubric of fair use.

Paragraph (c) is amended since the *Paper*, to attempt to capture that this factor is approached by courts in other jurisdictions on the basis that, for example, the dissemination of factual matters can benefit the public more than verbatim reproductions of fictional works.

Paragraphs (d) and (e) state general matters; in many cases, “less is more”: under paragraph (d), the less of the work that is implicated in the use in question the more likely it is to be a fair use; conversely, under paragraph (e) the more the use has an impact on the commercial market of the work, the less likely it is to be a fair use.

Paragraphs (f) to (h) deal with matters that are more likely to count against a finding of fair use: paragraph (f) raises the issue of whether the use in question was necessary in all the circumstances; paragraph (g) is a standard Berne Convention limitation; and paragraph (h) is a standard acknowledgement clause (which is amended slightly to come into line with other similar clauses in the Bill).

In our view, this draft section 49A appropriately takes into account the legitimate concerns of rightsowners whilst at the same time providing sufficient space for innovation. By the terms of subsection (2) and subsection 3(a), this exception is tightly bound to the other CRRRA exceptions. Moreover, the factors set out in subsection (3) which can be taken into account in determining whether a use is a fair one or not are quite precisely drafted, to remove ambiguity and to promote as much certainty as possible in their application.

Overall, then, we consider that this section strikes the appropriate balance both within and between the various categories of rightsowners, collecting societies, intermediaries, users, entrepreneurs, and heritage institutions, the better to encourage innovation. We therefore recommend the adoption of this fair use exception in section 49A, and it is provided for in section 29(1) of the Bill. Furthermore, we recommend the adoption of a similar exception in the context of performances, and a new section 220A CRRA to this effect is provided for in section 29(2) of the Bill.

Draft Legislative Provisions

This chapter provides a draft Copyright and Related Rights (Innovation) (Amendment) Bill 2013, and some associated secondary legislation; and we recommend that the Government enact legislation along these lines to implement the recommendations in this *Report*.



An Bille Cóipchirt agus Ceart Gaolmhar (Nuálaíocht) (Leasú) 2013

Copyright and Related Rights (Innovation) (Amendment) Bill 2013

Mar a tionscnaíodh

As initiated

ARRANGEMENT OF SECTIONS

Section

1. Short title, collective citation and commencement.
2. Definitions.
3. Copyright Council.
4. Jurisdiction of Courts.
5. The Controller of Intellectual Property.
6. Sound track accompanying a film.
7. Unpublished works.
8. Remedies.
9. Metadata.
10. Technological protection measures and rights management information.
11. Broadcasting.
12. Computer programs.
13. Temporary copies.
14. Linking.
15. News.

16. Fair dealing.
17. Education.
18. Persons with a disability.
19. Consumer protection.
20. Public administration.
21. Innovation.
22. Heritage.
23. Catalogues.
24. Donations.
25. Copyright deposit.
26. Digital copyright deposit.
27. Content-mining.
28. Digital research and computer security.
29. Fair Use.
30. Review of operation of Act.

SCHEDULE

The Copyright Council of Ireland

Acts Referred to

Broadcasting Act 2009	2009, No 18
Courts of Justice Act, 1924	1924, No 10
Courts (Supplemental Provisions) Act, 1961	1961, No 39
Copyright and Related Rights Acts, 2000	2000, No 28
Industrial and Commercial Property (Protection) Act, 1927	1927, No 16
National Cultural Institutions Act, 1997	1997, No 11
National Lottery Act 2013	2013, No 13
Patents Act, 1964	1964, No 12
Qualifications and Quality Assurance (Education and Training) Act 2012	2012, No 28
Statute Law (Restatement) Act, 2002	2002, No 33
Universities Act, 1997	1997, No 24



An Bille Cóipchirt agus Ceart Gaolmhar (Nuálaíocht) (Leasú) 2013

Copyright and Related Rights (Innovation) (Amendment) Bill 2013

BILL

entitled

AN ACT TO AMEND THE COPYRIGHT AND RELATED RIGHTS ACT, 2000 AND TO MAKE PROVISION FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1. Short title, collective citation and commencement.

- (1) This Act may be cited as the Copyright and Related Rights (Innovation) (Amendment) Act 2013.
- (2) This Act and the Principal Act, as amended, may be cited together as the Copyright and Related Rights Acts 2000 to 2013.
- (3) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

2. Definitions.

- (1) In this Act
 - “the Act of 1927” means the Industrial and Commercial Property (Protection) Act, 1927;
 - “the Act of 1964” means the Patents Act, 1964;
 - “the Act of 2009” means the Broadcasting Act 2009;

“Minister” means the Minister for Jobs, Enterprise and Innovation;

“Principal Act” means the Copyright and Related Rights Act 2000.

(2) Section 2 of the Principal Act is amended

(a) in subsection (1)

before “dramatic work” insert

“digital publication” includes any publication in media other than print, such as a website or any part of a website, or any publication in any digital or electronic or other similar or related technological form or format, but does not include a sound recording or film or both, or such other works as the Minister may from time to time determine;

before “educational establishment” insert

“education” means education, instruction, lectures, study, research, teaching or training either in an educational establishment or by any person acting under the authority of an educational establishment, and includes all activities necessary or expedient for or ancillary to such a programme, and “educational purposes” and similar or related phrases shall be construed accordingly;

before “Minister” insert

“metadata” includes data information about a work, and in particular includes digital data (whether or not it is incorporated with the work or is otherwise associated with it) that

- (a) provides information about the authorship, condition, content, context, origin, ownership, provenance, quality, or structure of the work, or rights pertaining to or associated with the work, or other similar or related matters, and
 - (b) enables the work to be controlled, listened to, located, manipulated, organised, presented, read, used, viewed, or otherwise worked with,
- provided that it does not include computer programs, and in particular does not include the program source code of websites;

before “repeat broadcast” insert

“publisher” includes a person who issues or disseminates or otherwise makes available or causes to be made available, to the public, works in any form or format; and “publication” and other related expressions shall be construed accordingly;

“recognition order” is an order made by the Minister pursuant to section 377;

by substituting the following definition for the definition of “Controller”:

“Controller” means the Controller of Intellectual Property referred to in section 15A;

by substituting the following definition for the definition of “educational establishment”:

“educational establishment” means -

- (a) any school,
- (b) any university to which the Universities Act, 1997, applies,
- (c) any other educational establishment prescribed by the Minister under section 55, and
- (d) any other establishment which is a relevant provider of education or training for the purposes of the Qualifications and Quality Assurance (Education and Training) Act 2012;

in the definition of “work”, after “and includes” and before “a computer program” insert “a digital publication and”;

(b) by substituting the following subsection for subsection (5):

- (5) (a) “Intellectual property claim” means
- (i) any action relating to copyright or a related right under the Copyright and Related Rights Acts 2000-2013,
 - (ii) any action relating to design rights, geographical indications, patents, plant breeders’ rights, trade marks, and the like,
 - (iii) any action for breach of confidence or passing off, or for the protection of know-how or trade secrets, and
 - (iv) any action which the court accepts is sufficiently similar or related to the other actions in this paragraph such that it is appropriate to treat it as an intellectual property claim.
- (b) “Intellectual property right” and other related expressions shall be construed accordingly.
- (c) For the avoidance of doubt, an intellectual property claim includes
- (i) any action which is ancillary to, or arising out of the same subject matter as, an action in paragraph (a),
 - (ii) any action relating to any matter in paragraph (a), whether that matter is registered or not, or capable of registration or not, and
 - (iii) any right to apply for, and any application for, any of the matters in paragraph (a).

- (3) Section 65(5) of the National Cultural Institutions Act, 1997 (as inserted by section 199 of the Principal Act) is amended by substituting the following definition for the definition of “publisher”:
- “ ‘publisher’, for the purposes of this section, has the meaning assigned to it by section 2(1) of the Copyright and Related Rights Act, 2000;”.
- (4) The Principal Act is amended
- (a) in section 173(2)(a) by substituting “rightsowners” for “rightsholders”, and
 - (b) in section 175(7)(h) by substituting “rightsowner or rightsowners” for “rightsholder or rightsholders”.
- 3. Copyright Council.**
- (1) The Principal Act is amended by inserting the following Part after section 376:

“PART VIII

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 (6), 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.

378. 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.”
- (2) In the Principal Act, insert after the Third Schedule and as a Fourth Schedule the text set out in the Schedule to this Act.

4. Jurisdiction of Courts.

- (1) The Principal Act is amended by inserting the following after section 16:-

16A. District Court.

- (1) The District Court shall have jurisdiction to hear and determine intellectual property claims.
- (2) The District Court may entertain an intellectual property claim pursuant to subsection (1) notwithstanding that no pecuniary remedy is sought.
- (3) The District Court Rules Committee, with the concurrence of the Minister and of the Minister for Justice and Equality, may make Rules of Court in relation to claims taken pursuant to this section.
- (4) Paragraph A of section 77 of the Courts of Justice Act, 1924 is hereby amended by inserting at the end of the said paragraph a new clause as follows, that is to say:
 - “(vi) in any intellectual property claim, within the meaning of the Copyright and Related Rights Acts 2000-2013, where the amount of the claim does not exceed such sum as stands specified by or under any Act of the Oireachtas to be the jurisdiction of the District Court for actions in contract;”.
- (5) The Minister may, by order, make regulations for the purposes of this section fixing the day on which this section shall come into operation.

16B. Circuit Court.

- (1) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine intellectual property claims, and shall, in relation to that jurisdiction, be known as the Intellectual Property Court of the Circuit Court (in this section referred to as “the Court”).
- (2) A judge permanently assigned to the Dublin Circuit shall be assigned by the President of the Circuit Court to exercise the jurisdiction of the Court.
- (3) The Court may entertain an intellectual property claim pursuant to subsection (1) notwithstanding that no pecuniary remedy is sought.
- (4) Nothing in this section shall be construed as affecting the ordinary jurisdiction of a Circuit Court.
- (5) Section 2 of the Courts (Supplemental Provisions) Act 1961 is amended, in subsection (1), by inserting, after “ ‘the High Court’ ” means the Court established by section 2 of the Principal Act;” and before “ ‘justice of the District Court’ ”, the following:

“ ‘an intellectual property claim’ has the same meaning as in the Copyright and Related Rights Acts, 2000-2013.”.
- (6) The Third Schedule to the Courts (Supplemental Provisions) Act 1961 is amended by inserting the following:

30.	An intellectual property claim	Where the amount of the claim does not exceed €75,000	The judge of the Intellectual Property Court of the Circuit Court
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- (7) The Circuit Court Rules Committee, with the concurrence of the Minister and of the Minister for Justice and Equality, may make Rules of Court in relation to claims taken pursuant to subsection (1).
- (8) The Minister may, by order, make regulations for the purposes of this section fixing the day on which this section shall come into operation.
- (9) The Court shall have jurisdiction to hear appeals pursuant to section 16C.

16C. Appeal to the Circuit Court.

- (1) Without prejudice to the right of appeal to the High Court provided in section 366, any person aggrieved by a decision of the Controller under this Act or the Principal Act may, on giving notice in writing pursuant to section 14 to the Controller, require that an appeal shall be reheard by the Intellectual Property Court of the Circuit Court (in this section referred to as “the Court”).

- (2) Provision shall be made in the rules made under section 363 limiting the time within which such an appeal may be brought.
- (3) Provisions may be made in the rules made under section 363 for all or any of the following, namely:
 - (a) suspending, authorising or requiring the Controller to suspend the operation of orders of the Controller in cases where his or her decision is appealed;
 - (b) modifying, in relation to an order of the Controller the operation of which is suspended, the operation of any provision of this Act as to the effect of that order;
 - (c) the notification of, or the taking of other steps for securing that, persons affected by the suspension of an order of the Controller shall be informed of its suspension.
- (4) Notwithstanding section 16(b), a decision of the Court under this section shall be final and may not be appealed save pursuant to subsection (5).
- (5) By leave of the High Court, an appeal from a decision of the Court under this section shall lie to the High Court on a question of law.
- (6) If the High Court grants leave pursuant to subsection (5), then section 366 subsections (2) and (3) shall apply to the decision of the Court in like manner as they apply to a decision of the Controller, and a decision of the High Court on this appeal shall be final and may not be appealed.”.

5. The Controller of Intellectual Property.

- (1) Section 77 of the Act of 1964 is repealed.
- (2) The Principal Act is amended by inserting the following after section 15:-

“15A. The Controller of Intellectual Property.

 - (1) The office of Controller of Industrial and Commercial Property continued in being by virtue of section 78(1) of the Act of 1964 shall be known as the Controller of Intellectual Property (in this Act referred to as the Controller), and the Controller may sue and be sued in that name.
 - (2) There shall continue to be, for the purposes of this Act and for such other purposes as have been or may, from time to time, be assigned to it by the Oireachtas, an office for the registration of patents, designs and trade marks which shall be known as the Office of the Controller of Intellectual Property (in this Act referred to as the Office).
 - (3) The Office shall be under the immediate control of the Controller who shall act under the general superintendence and direction of the Minister.

- (4) References in any other Act of the Oireachtas to the Industrial and Commercial Property Registration Office established under the Act of 1927 or to the Patents Office established under the Act of 1964 shall be construed as references to the Office.
- (5) References in any other Act of the Oireachtas to the Controller of Industrial and Commercial Property appointed under the Act of 1927 or to the Controller of Patents, Designs and Trade Marks appointed under the Act of 1964 shall be construed as references to the Controller.
- (6) If the Minister has made a recognition order, then the Controller shall consult with the Council as necessary or expedient.”.

6. Sound track accompanying a film.

Section 17 of the Principal Act is amended by inserting the following subsection after subsection (6):

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

7. Unpublished works.

- (1) Section 24 of the Principal Act is amended, in subsection (1), by substituting “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.” for “irrespective of the date on which the work is first lawfully made available to the public.”
- (2) Section 34 of the Principal Act is amended
 - (a) by designating it as subsection (1), and
 - (b) by adding the following subsection:
 - “(2) For the purposes of subsection (1), a work is not lawfully made available by a person who has obtained it without the express consent of the owner of the physical medium in which the work is embodied or on which it is recorded.”
- (3) Section 9 of the First Schedule to the Principal Act is amended by inserting, after “the duration of copyright in works” and before “in which copyright subsists”, the following: “which have been made available to the public”.

8. Remedies.

- (1) Section 128 of the Principal Act is amended by substituting the following subsections for subsection (3):
 - “(3) Without prejudice to any other remedy, where, in an action for infringement of the copyright in a work, it is shown that the infringement by the defendant was unintentional or otherwise innocent, the plaintiff shall not normally be entitled to damages

against the defendant; provided that, in exceptional cases where damages are awarded, such damages shall not exceed a reasonable payment in respect of the act complained of.

- (4) In exercising its powers under subsection (1) in addition to or as an alternative to compensating the plaintiff for financial loss, the court may award any or some or all of the following heads of damages:
 - (a) aggravated damages,
 - (b) restitutionary damages,
 - (c) exemplary damages, or
 - (d) punitive damages.
 - (5) Having regard to the deterrent and retributive purposes of awards of exemplary or punitive damages, any award to the plaintiff made under paragraph (c) or (d) of subsection (5) shall bear some reasonable relation to any award made to the plaintiff under subsection (1) in respect of the same infringement.
 - (6) An award of damages under subsection (5) shall not be excluded by reason only of the fact that the defendant has been convicted of an offence under this Act arising out of the same facts; provided that any such award shall be assessed having regard to any penalty, and in particular any financial penalty, for which the defendant was liable upon such conviction.”
- (2) Section 203 of the Principal Act is amended by substituting the following subsections for subsection (5):
- “(5) The court may, in an action for infringement of the rights of a performer brought under this section, award such damages as, having regard to all the circumstances of the case, it considers just.
 - (6) Without prejudice to any other remedy, in an action for infringement of the rights of a performer brought under this section, damages shall not be awarded against a defendant who shows that at the time of the infringement he or she did not know and had no reason to believe that consent had not been given.
 - (7) Without prejudice to any other remedy, where, in an action for infringement of the rights of a performer brought under this section, it is shown that the infringement by the defendant was unintentional or otherwise innocent, the plaintiff shall not normally be entitled to damages against the defendant; provided that, in exceptional cases where damages are awarded, such damages shall not exceed a reasonable payment in respect of the act complained of.
 - (8) In exercising its powers under subsection (5) in addition to or as an alternative to compensating the plaintiff for financial loss, the court may award any or some or all of the following heads of damages:
 - (a) aggravated damages,
 - (b) restitutionary damages,
 - (c) exemplary damages, or
 - (d) punitive damages.

- (9) Having regard to the deterrent and retributive purposes of awards of exemplary or punitive damages, any award to the plaintiff made under paragraph (c) or (d) of subsection (8) shall bear some reasonable relation to any award made to the plaintiff under subsection (5) in respect of the same infringement.
 - (10) An award of damages under subsection (8) shall not be excluded by reason only of the fact that the defendant has been convicted of an offence under this Act arising out of the same facts; provided that any such award shall be assessed having regard to any penalty, and in particular any financial penalty, for which the defendant was liable upon such conviction.”
- (3) Section 216 of the Principal Act is amended substituting the following subsections for subsection (2):
- “(2) The court may, in an action brought under this section for infringement of the rights referred to in subsection (1), award such damages as, having regard to all the circumstances of the case, it considers just.
 - (3) Without prejudice to any other remedy, in an action brought under this section for infringement of the rights referred to in subsection (1), damages shall not be awarded against a defendant who shows that at the time of the infringement he or she did not know and had no reason to believe that consent had not been given.
 - (4) Without prejudice to any other remedy, where, in an action brought under this section for infringement of the rights referred to in subsection (1), it is shown that the infringement by the defendant was unintentional or otherwise innocent, the plaintiff shall not normally be entitled to damages against the defendant; provided that, in exceptional cases where damages are awarded, such damages shall not exceed a reasonable payment in respect of the act complained of.
 - (5) In exercising its powers under subsection (2) in addition to or as an alternative to compensating the plaintiff for financial loss, the court may award any or some or all of the following heads of damages:
 - (a) aggravated damages,
 - (b) restitutionary damages,
 - (c) exemplary damages, or
 - (d) punitive damages.
 - (6) Having regard to the deterrent and retributive purposes of awards of exemplary or punitive damages, any award to the plaintiff made under paragraph (c) or (d) of subsection (5) shall bear some reasonable relation to any award made to the plaintiff under subsection (2) in respect of the same infringement.

- (7) An award of damages under subsection (5) shall not be excluded by reason only of the fact that the defendant has been convicted of an offence under this Act arising out of the same facts; provided that any such award shall be assessed having regard to any penalty, and in particular any financial penalty, for which the defendant was liable upon such conviction.”
- (4) Section 304 of the Principal Act is amended by the substitution of the following subsections for subsection (3):
- “(3) Without prejudice to any other remedy, where, in an action for infringement of a performer's property rights, it is shown that the infringement by the defendant was unintentional or otherwise innocent, the plaintiff shall not normally be entitled to damages against the defendant; provided that, in exceptional cases where damages are awarded, such damages shall not exceed a reasonable payment in respect of the act complained of.
- (4) In exercising its powers under subsection (1) in addition to or as an alternative to compensating the plaintiff for financial loss, the court may award any or some or all of the following heads of damages:
- (a) aggravated damages,
(b) restitutionary damages,
(c) exemplary damages, or
(d) punitive damages.
- (5) Having regard to the deterrent and retributive purposes of awards of exemplary or punitive damages, any award to the plaintiff made under paragraph (c) or (d) of subsection (5) shall bear some reasonable relation to any award made to the plaintiff under subsection (1) in respect of the same infringement.
- (6) An award of damages under subsection (5) shall not be excluded by reason only of the fact that the defendant has been convicted of an offence under this Act arising out of the same facts; provided that any such award shall be assessed having regard to any penalty, and in particular any financial penalty, for which the defendant was liable upon such conviction.”
- (5) Section 372 of the Principal Act is amended, in subsection (1), by inserting, after “in cases of” and before “innocent infringement”, the following: “unintentional or otherwise”.

9. Metadata.

- (1) Section 37 of the Principal Act is amended, in subsection (3), by inserting, after “substantial part of the work” and before “and to whether”, of “or to metadata incorporated in the work or to any substantial part of the metadata incorporated in the work”.
- (2) Section 43 of the Principal Act is amended by inserting the following subsection after subsection (3):

“(4) Without prejudice to the generality of section 37 (1)(c), in this Part, where a work includes metadata, “adaptation” includes the reproduction of that work with some or all of its metadata removed.”

10. Technological protection measures and rights management information.

- (1) Section 370 of the Principal Act is amended, in subsection (2),
- (a) by substituting of “The rightsowner, and any” for “A”,
 - (b) by deleting, in paragraph (a)(iv), after “measures”, “or”,
 - (c) by inserting, in paragraph (b), after “measures,” the following: “or”, and
 - (d) by inserting, after paragraph (b) and before “as a rightsowner has” the following paragraph:
 - “(c) circumvents rights protection measures in a work otherwise than for the purposes of undertaking a permitted act pursuant to section 374,”.

- (2) Section 372 of the Principal Act is amended, in subsection (2), by substituting “The rightsowner, and any” for “A”.

- (3) The Principal Act is amended by substituting the following section for section 374:

“374. Rights protection measures and permitted acts.

- (1) Nothing in this Chapter shall be construed as operating to prevent any person from undertaking the acts permitted
- (a) in relation to works protected by copyright under Chapter 6 of Part II,
 - (b) in relation to performances, by Chapter 4 of Part III, or
 - (c) in relation to databases, by Chapter 8 of Part V,
- or from undertaking any act of circumvention required to effect such permitted acts.
- (2) Where a technological protection measure has prevented a person (“the complainant”) from undertaking in respect of a work any of the acts mentioned in subsection (1), then the complainant may invite the holder or licensee of the rights in that work (“the respondent”) to provide an effective means of carrying out that act.
- (3) Where, within a period of 30 working days from the date of the complaint, the respondent declines or fails to provide such an effective means of allowing the complainant to undertake in respect of a work any of the acts mentioned in subsection (1), then the complainant may issue a notice of complaint to the Minister; provided that the complainant issues any such notice within a further period of 15 working days.
- (4) Following receipt of a notice of complaint, if the Minister has made a recognition order, then the Minister shall, within a period of 15 working days from the date of the notice of complaint, consult with the Copyright Council of Ireland; the Council shall respond to the Minister within a period of 15 working days from the date of the

communication from the Minister; the Minister shall reply to the parties within a period of 15 working days from the date of the response from the Council; and in that reply to the parties, the Minister may give to the respondent such directions as appear to him or her to be necessary or expedient to resolve the matter.

- (5) Following receipt of a notice of complaint, if the Minister has not made a recognition order, then the Minister shall, within a period of 15 working days from the date of the notice of complaint, reply to the parties; and in that reply to the parties, the Minister may give to the respondent such directions as appear to him or her to be necessary or expedient to resolve the matter.
 - (6) Where, within a period of 30 working days from the date of any directions given by the Minister, the respondent has failed to comply with or to give effect to such directions, then
 - (a) the complainant may seek any remedy as would be available if the failure of the respondent amounted to a breach of statutory duty; and
 - (b) the Minister or the complainant or both may apply to the Circuit Court or the High Court for an Order directing the respondent to comply with and to give effect to the direction.
 - (7) Any notice, invitation or response made or given pursuant to this section may be either in writing pursuant to section 14 or in any appropriate digital or electronic or other similar or related technological form or format.
 - (8) The Minister may, by order, make regulations to implement and administer this section.”
- (4) Section 375(1) of the Principal Act is amended by substituting “The rightsowner, and any” for “A”.

11. Broadcasting.

- (1) Section 183 of the Act of 2009 is repealed.
- (2) Section 2 of the Principal Act is amended, in subsection (1)
 - (a) by substituting for the definition of “broadcast” the following:

“ ‘broadcast’ means an electronic transmission of sounds, images or data or any combination of sounds, images or data, or the representations thereof, for direct public reception or for presentation to members of the public;”
 - (b) by inserting, before the definition of “film”, the following:

“ ‘electronic transmission’ includes specified transmissions over the internet, and transmission by wireless means, including by terrestrial or satellite means, whether digital or analogue, but does not include transmission by means of MMDS and digital terrestrial retransmission;”

- (c) by inserting, before “statutory inquiry” the following:
 - “ ‘specified transmissions over the internet’ means
 - (i) a transmission taking place simultaneously on the internet and by other means,
 - (ii) a concurrent transmission of a live event, and
 - (iii) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person;”
 - (d) in the definition of “cable programme service” by substituting “including MMDS and digital terrestrial retransmission” for “including MMDS”,
 - (e) by inserting, before “digital publication” (inserted by section 1(2)), the following:
 - “ ‘digital terrestrial retransmission’ means the reception and immediate retransmission on an encrypted basis without alteration by means of a multiplex of a broadcast or a cable programme initially transmitted from another Member State of the EEA;”
 - (f) by inserting, before “musical work”, the following:
 - “ ‘multiplex’ has the meaning assigned to it in section 129 of the Act of 2009;”.
- (3) Section 99 of the Principal Act is amended by inserting after subsection (3) the following subsection:
- “(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.”
- (4) Section 103 of the Principal Act is amended, in subsection (1)
- (a) by designating it as paragraph (a), and
 - (b) by the addition of the following paragraph:
 - “(b) For the avoidance of doubt, this section does not apply to transmissions over the internet, whether or not such transmissions are by means of a cable programme service.”
- (5) Section 251 of the Principal Act is amended, in subsection (1)
- (a) by designating it as paragraph (a), and
 - (b) by the addition of the following paragraph:
 - “(b) For the avoidance of doubt, this section does not apply to transmissions over the internet, whether or not such transmissions are by means of a cable programme service.”

12. Computer programs.

Section 49 of the Principal Act is amended

- (a) by designating it as section (1), and
- (b) by adding the following section:
 - “(2) Except for sections 80 to 82, exceptions provided in this Chapter do not apply to computer programs.”

13. Temporary copies.

- (1) The Principal Act is amended by substituting the following section for section 87:

“87. Temporary 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 doing an act which is permitted by this Act.
- (3) Where a copy, which would otherwise be an infringing copy, is made under this section and 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.”.

- (2) The Principal Act is amended by substituting the following section for section 244:

“244. Temporary copies.

- (1) It is not an infringement of the rights conferred by this Part to undertake or conduct an act of reproduction of a recording 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) 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 recording of a performance where that temporary reproduction is incidentally made as a necessary part of the technical process of doing an act which is permitted by this Act.
- (3) Where a recording which would otherwise be an illicit recording 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 illicit recording for those purposes and for all subsequent purposes.”.

14. Linking.

- (1) The Principal Act is amended by inserting after section 87 the following section:

“87A. Linking.

- (1) 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 that connects with a work elsewhere on the internet.
- (2) Subsection (1) shall not apply where the provider of the link, at the time that he or she provided it, knew or ought to have been aware that it connects with an infringing copy, unless the provision of the link is in the public interest.
- (3) To provide appropriate context for a link permitted under subsection (1), it is not an infringement of the rights conferred by this Part to reproduce reasonably adjacent to the link a very small snippet of the linked work; 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.
- (4) It shall be a matter of fact and degree in any given case as to whether the criteria in subsection (3) are satisfied.
- (5) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
 - (a) no more than one hundred and sixty characters, and
 - (b) no more than forty wordsshall constitute a very small snippet for the purposes of subsection (3).
- (6) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
 - (a) no more than two and half per cent of the total number of words in the work, and
 - (b) no more than forty wordsshall constitute a very small snippet for the purposes of subsection (3).

- (7) Where a copy, which would otherwise be an infringing copy, is made under this section and 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.”
- (2) The Principal Act is amended by inserting the following section after section 244:
- “244A. Linking.**
- (1) 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 that connects with a recording of a performance elsewhere on the internet.
- (2) Subsection (1) shall not apply where the provider of the link, at the time that he or she provided it, knew or ought to have been aware that it connects with an infringing copy, unless the provision of the link is in the public interest.
- (3) To provide appropriate context for a link permitted under subsection (1), it is not an infringement of the rights conferred by this Act to reproduce reasonably adjacent to the link a very small snippet of a work accompanying a recording of a performance; 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.
- (4) It shall be a matter of fact and degree in any given case as to whether the criteria in subsection (3) are satisfied.
- (5) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
- (a) no more than one hundred and sixty characters, and
 - (b) no more than forty words
- shall constitute a very small snippet for the purposes of subsection (3).
- (6) Without prejudice to subsection (4), where the work being reproduced is a literary work, then an extract which is
- (a) no more than two and half per cent of the total number of words in the work, and
 - (b) no more than forty words
- shall constitute a very small snippet for the purposes of subsection (3).
- (7) Where a copy, which would otherwise be an infringing copy, is made under this section and 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.”

15. News.

- (1) Section 51 of the Principal Act is amended by substituting the following subsection for subsection (2):

“(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 do so would be unreasonable or inappropriate or 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 unreasonable or inappropriate or 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.”

- (2) The Principal Act is amended by substituting the following section for section 89:

“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 or related 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 unreasonable or inappropriate or 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.”.

16. Fair dealing.

- (1) Section 49 of the Principal Act is amended by inserting the following subsection after subsection (2) (inserted by section 12 of this Act):
- “(3) In this Part, “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.”
- (2) Section 50 of the Principal Act is amended, in subsection (4), by substituting “includes” for “means”.
- (3) Section 52 of the Principal Act is amended
- (a) by substituting the following shoulder note for the existing shoulder note:

“52. Fair dealing: other examples.”
 - (b) by inserting the following subsections after subsection (4):
 - “(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; provided that 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 other similar or related 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.”.

- (4) The Principal Act is amended by inserting the following sections after section 106:

“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 or related medium, effected by the use of any kind of photographic technique or by some other process having similar or related 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 to do so would be unreasonable or inappropriate or 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.”
- (5) Section 220 of the Principal Act is amended
- (a) by designating it as subsection (1), and
 - (b) by adding the following subsection:
“(2) In this Part, “lawful user” means a person who, whether under a licence to undertake any act restricted by recording rights in relation to a performance or otherwise, has a right to use the recording of a performance, and “lawful use” shall be construed accordingly.”
- (6) Section 221 of the Principal Act is amended,
- (a) in subsection (2), by substituting “includes” for “means”, and
 - (b) by inserting the following subsections after subsection (2):
“(3) Fair dealing with a recording of a performance for the purposes of use during religious celebrations or official celebrations organised by a public authority shall not infringe the rights conferred by this Part; provided that 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.
(4) Fair dealing with a recording of a performance for the purposes of caricature, parody, pastiche, or satire, or for other similar or related purposes, shall not infringe the rights conferred by this Part.

- (5) Fair dealing with a recording of a performance for the purposes of use in connection with the demonstration or repair of equipment shall not infringe the rights conferred by this Part.”
- (7) The Principal Act is amended by inserting the following sections after section 254:

“254A. 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 recording of a performance makes or causes to be made a reproduction of that recording 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 recording being reproduced is an infringement of the rights conferred by this Part, and
 - (b) the person making the reproduction or causing it to be made did not have reasonable grounds to believe that the recording was not such an infringement.
- (3) Where a reproduction which would otherwise be an illicit recording 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 illicit recording 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 recording of a performance 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.

254B. Back-up copy.

- (1) Without prejudice to section 242,
 - (a) it is not an infringement of the rights conferred by this Part if the owner or lawful user of a recording of a performance makes or causes to be made a reproduction of that recording 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; and
 - (b) in particular, it is not an infringement if the reproduction is made as a back-up copy in case the recording is lost, damaged or otherwise rendered unusable.

- (2) Subsection (1) shall apply only if the owner or lawful user of the recording 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 recording being reproduced is an infringement of the rights conferred by this Part, and
 - (b) the person making the reproduction or causing it to be made did not have reasonable grounds to believe that the recording was not such an infringement.
- (4) If the recording is lost, damaged or otherwise rendered unusable, then a reproduction made under subsection (1) shall be treated as the recording.
- (5) Where a reproduction which would otherwise be an illicit recording 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 illicit recording 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 recording from which the reproduction was made disposes of, gives away, rents, or sells that recording to another person without first destroying all reproductions of that work which he or she has made under that subsection.

254C. 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 recording of a performance in the creation or communication of a new work or recording of a performance; 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 to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise, and
 - (c) the creation and communication of the new work or recording does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing recording or on an existing or potential market for it, including that the new work or recording is not a substitute for the existing recording.
- (2) Subsection (1) shall not apply if
 - (a) the existing recording is an infringement of the rights conferred by this Part, and

- (b) the person using the existing work did not have reasonable grounds to believe that the recording was not such an infringement.”.

17. Education.

- (1) The Principal Act is amended, except where the contrary intention appears or the context otherwise requires, by inserting “education,” before “research or private study”, wherever occurring.
- (2) The Principal Act is amended by substituting “education” for “instruction” or “instructions”, wherever occurring
 - (a) in sections 53, 55, 63, 168, 171, 172, 223, 224, 230 and 330, and
 - (b) in the shoulder notes to sections 53 and 223.
- (3) The Principal Act is amended by substituting the following sections for section 57:

“57. 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 or cause to be reproduced a work, or to do or cause to be done, any other necessary act, in order to display it.
 - (c) In particular, reprographic copies of passages from literary, dramatic or musical works or typographical arrangements of published editions or original databases which have been lawfully made available to the public may, to the extent permitted under this section, be made by or on behalf of an educational establishment for the educational purposes of that establishment without infringing any copyright in the work.
- (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) 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.

- (4) Not more than 5 per cent of any work may be copied by or on behalf of an educational establishment under subsection (1)(c) 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.
- (6) 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.

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 an 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.”.

57C. Licensing schemes for educational establishments.

- (1) Any exemption in respect of education provided in sections 50, 50A, 57, 57A, 57B, 61(2), 62(2), 67(3), 92, 221, 225A, 225B, 225C, 229(2), 234(3), 245(3)(a) and 329 shall not apply if
 - (a) a licensing scheme which is certified under this Act and is applicable to the relevant exemption is in force, and
 - (b) the person making use of the work knew or ought to have been aware of the existence of the licensing scheme.
- (2) In the case of licences granted on foot of a licensing scheme certified pursuant to this Act, any term in such a licence which purports to limit or restrict the proportion of a work which may be reproduced or communicated (whether on payment or free of charge) to less than that which would be permitted pursuant to sections 57, 61 and 62, or which has that effect, shall be void.
- (3) If an exemption in respect of education is displaced by a licensing scheme pursuant to subsection (1)(a) and section 173, then sections 152 to 155 shall apply in relation to the scheme as if it were one to which those sections applied pursuant to section 150.”.
- (4) Section 221 of the Principal Act is amended by inserting, after “reporting current events” and before “shall not infringe” the following: “or for the purposes of education, research or private study,”.
- (5) The Principal Act is amended by inserting the following sections after section 225:

“225A. 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 of a recording of a performance 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 or to cause to be reproduced a recording of a performance, or to do or to cause to be done 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) the recording being reproduced or communicated is an infringement of the rights conferred by this Part, and
 - (b) the person making the reproduction or communication or causing it to be made did not have reasonable grounds to believe that the recording was not such an infringement.
- (4) Where a reproduction which would otherwise be an illicit recording 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 illicit recording for those purposes and for all subsequent purposes.
- (5) 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.

225B. 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 recording being reproduced or communicated is an infringement of the rights conferred by this Part, and
 - (b) the person making the reproduction or communication or causing it to be made did not have reasonable grounds to believe that the recording was not such an infringement.
- (3) Where a reproduction which would otherwise be an illicit recording 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 illicit recording for those purposes and for all subsequent purposes.

225C. Use by an 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 recording of a performance 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 recording is protected by a technological protection measure,
 - (ii) the educational establishment knows or ought to have known that the recording 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 recording is posted or on the recording itself.
- (b) The Minister may, by order, make regulations for the purposes of this subsection prescribing what constitutes a clearly visible notice.

18. Persons with a disability.

- (1) The Principal Act is amended by substituting the following sections for section 104:

“104. Personal copies for persons with a disability.

- (1) It is not an infringement of the rights conferred by this Act 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) For the avoidance of doubt, the acts which may be undertaken pursuant to subsection (1) include
 - (a) in the case of a master-copy of an audio-visual work, the making of a copy of the work incorporating subtitles; and
 - (b) in the case of a master-copy of a literary or musical work, performing the work and producing a sound recording of the performance.
- (3) Subsection (1) shall not apply 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.
- (4) Subsection (1) shall 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 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 shall be accompanied by
 - (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement.
- (6) If a person makes or causes to be made an accessible copy on behalf of a visually impaired person under this section and charges for it, the

sum charged shall not exceed the cost of making and supplying the copy.

- (7) 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 (8)(b).
- (8) A person who holds an accessible copy made under subsection (1) may transfer it to
 - (a) a person with a disability entitled to have the accessible copy made under subsection (1),
 - (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), or
 - (c) a designated body.
- (9) The transfer by a person (the transferring person) of an accessible copy made under subsection (1) to another person or body (the recipient) is an infringement of copyright by the transferring person unless
 - (a) subsection (8) applies, or
 - (b) the transferring person has reasonable grounds for believing that the recipient is a person or body falling within subsection (8).
- (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.

104A. Multiple copies made by designated bodies.

- (1) It is not an infringement of the rights conferred by this Act 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 or accessible copies 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,
 - (b) supplies or causes to be supplied an accessible copy or accessible copies to such persons for their personal use,
 - (c) supplies or causes to be supplied an accessible copy or accessible copies to another designated body which is entitled to make accessible copies of the work, or
 - (d) receives from another designated body or from a person with a disability an accessible copy or accessible copies of a work of which it is entitled to make an accessible copy.
- (2) For the avoidance of doubt, the acts which may be undertaken pursuant to subsection (1) include

- (a) in the case of a master-copy of an audio-visual work, the making of a copy of the work incorporating subtitles; and
 - (b) in the case of a master-copy of a literary or musical work, performing the work and producing a sound recording of the performance.
- (3) Subsection (1) shall not apply 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.
 - (4) Subsection (1) shall not apply in relation to the making of an accessible copy if, or to the extent that, copies of the work are commercially available at an ordinary commercial price, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.
 - (5) Subsection (1) shall 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 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.
 - (6) An accessible copy made under this section shall be accompanied by
 - (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement.
 - (7) If a designated body charges for supplying a copy made under this section, the sum charged shall not exceed the cost of making and supplying the copy.
 - (8) A designated body making copies under this section shall, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.
 - (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.

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 for 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 pursuant to 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 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 shall not exceed the cost of the loan or transfer.
- (6) A designated body shall
 - (a) keep records of accessible copies made under section 104A and of the persons to whom or bodies to which they are supplied,
 - (b) keep records of any intermediate copy lent or transferred under this section and of the persons to whom or bodies to which 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 pursuant to section 104A(1), or of lending or transferring an intermediate copy pursuant to this section, or of supplying or causing to be supplied an accessible copy to another designated body pursuant to section 104A(1)(c), the designated body shall notify
 - (a) the Copyright Council of Ireland, if the Minister has made a recognition order, 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) shall not apply if it is not reasonably possible for the designated body to contact the copyright owner.

104C. Licensing schemes.

- (1) If, and to the extent that, a licensing scheme certified pursuant to section 173 is in force under which licences may be granted by a licensing body permitting the making and supply of copies of the work in that form, then section 104A shall not apply to the making of an accessible copy in a particular form by an educational establishment.
- (2) The terms of any such licence which

- (a) purport to prevent, limit or restrict the steps that may be taken under section 104B,
 - (b) purport to exclude, limit or restrict the publishers' obligations pursuant to section 104E or 104F(4), or
 - (c) in either case have that effect,
- shall be void.
- (3) Subsection (2) shall not apply if
 - (a) the 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 104A or 104B is displaced by a licensing scheme pursuant to subsection (1) and section 173, then sections 152 to 155 shall apply in relation to the scheme as if it were one to which those sections applied pursuant to section 150.

104D. Limitations following infringement of copyright.

- (1) The Minister may, by order, make regulations under this section if it appears to him or her that the making of copies pursuant to
 - (a) section 104A, or
 - (b) 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 regulations may prohibit one or more named designated bodies, or one or more specified categories of designated body, from acting pursuant either to section 104A, or to a licence of a description specified in the regulations.
- (3) The regulations 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 regulations pursuant to this section, he or she shall, before making them, consult
 - (a) such publishers or copyright owners or bodies representing publishers or other copyright owners as he or she thinks fit; and
 - (b) such designated bodies or other bodies representing persons with a disability as he or she thinks fit.
- (5) If the Minister proposes to make regulations pursuant to this section which include a prohibition, then he or she shall, before making it, also consult
 - (a) if the proposed regulations are to apply to one or more named designated bodies, that body or those bodies; and

- (b) if they are 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 regulations made pursuant to this section 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. Publishers' obligations.

- (1) For the purposes of enabling accessible copies to be made pursuant to sections 104 and 104A, the publisher of a work shall make or cause to be made at least one specified electronic version of the work.
- (2) For the purposes of this section, the specified electronic version of the work is a version which is in an electronic format which enables, insofar as is practicable, accessible copies of the work to be
 - (a) made without undue difficulty,
 - (b) navigated with sufficient ease, and
 - (c) as accessible to the person with a disability as it would be if he or she did not suffer from the disability.
- (3)
 - (a) The publisher of any work first published or otherwise made available in the State after the commencement of this section shall, where a demand is made by a designated body, deliver within one month after receipt of that demand a copy of the specified electronic version procured or obtained pursuant to subsection (1), including all relevant associated metadata.
 - (b) With that specified electronic version, the publisher shall also deliver a copy of any computer program, manual and any other material or information necessary in order to access the specified electronic version.
 - (c) Except in the case of delivery to a Board or authority referred to in section 198(1) or section 198A(1), the publisher may make the delivery of a specified electronic version pursuant to paragraph (a) subject to the payment of a reasonable charge, provided that such a charge shall not exceed an ordinary commercial price.
- (4) For the purposes of subsection (3)
 - (a) a demand may be made by a designated body either in writing pursuant to section 14 or by means of a communication in any appropriate digital or electronic or other similar or related technological form or format;
 - (b) delivery shall be effected by a publisher
 - (i) by means of an appropriate storage medium delivered to an address named in the demand,
 - (ii) in such digital or electronic or other similar or related technological form or format as may be specified in the demand, or

- (iii) by permitting a designated body, through means (including computer programs, online search, and other automated means) specified in the demand, to harvest, download or otherwise access or acquire the specified electronic version of the work; and
 - (c) it shall be for the designated body in question to specify in the demand which of the three alternative means of discharging the obligation referred to in paragraph (b) shall apply.
- (5) Where a designated body is a Board or authority referred to in section 198 or section 198A, then subsection (3) is without prejudice to the right of such Boards or authorities referred to make a demand pursuant to section 198 or section 198A; and, if such a demand is made, then section 198A(11) shall apply.
- (6) A publisher who fails to comply with this section shall be liable at the suit of a designated body to be ordered to comply with this section, either by the delivery of the specified electronic version in question or by the payment to the relevant designated body of an amount which is not more than the cost of making good the failure to comply.
- (7) The Minister may, by order, make regulations for the purposes of this section
 - (a) prescribing the works to which subsection (1) applies,
 - (b) prescribing the circumstances under which an electronic version of a work is in a form or format which fulfills the conditions in subsection (2),
 - (c) prescribing how a reasonable charge for the purposes of subsection 3(c) may be calculated, and
 - (d) fixing the day on which this section shall come into operation.
- (8) If the Minister proposes to make regulations pursuant to this section, he or she shall, before making it, consult as provided in section 104D(4).

104F. Accessible copies and technological protection measures.

- (1) Persons with a disability or designated bodies shall not be prevented from undertaking the acts permitted by sections 104 to 104B by virtue of the application of technological protection measures to the work.
- (2) In particular, and without prejudice to section 374, nothing in Part VII shall be construed as operating to prevent any person with a disability or any designated body
 - (a) from undertaking the acts permitted by sections 104 to 104B,
 - (b) from undertaking any act of circumvention required to effect such permitted acts, or
 - (c) from removing rights management information from, or altering rights management information in, works where that is required to effect such permitted acts.
- (3) Where, pursuant to section 104A, a designated body makes or causes to be made an accessible copy of a work to which rights protection measures have been applied, then the designated body shall, insofar

as it is reasonably practicable to do so, incorporate or cause to be incorporated the same, or equally effective, measures in the copy, unless the copyright owner agrees otherwise.

- (4) The publisher shall not apply technological protection measures to the specified electronic version of the work made or caused to be made pursuant to section 104E, unless the publisher
 - (a) also delivers an appropriate means of circumvention to the designated body at the same as and in the same manner as the delivery of the specified electronic version is effected, or
 - (b) has already delivered an appropriate means of circumvention to the designated body.

104G. Persons with a disability: final provisions.

- (1) For the purposes of sections 104 to 104G
 - (a) a work or a copy of a 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 work, means a copy which provides for a person with a disability to have appropriate access to the work, having regard to the nature of the work and the problems caused by the disability;
 - (c) an accessible copy may include facilities for navigating that copy but shall 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 any physical or mental disability, and except where the contrary intention appears or the context otherwise requires includes the meanings ascribed to it in any other Act of the Oireachtas, including section 2 of the Equal Status Act, 2000 and section 2 of the Disability Act, 2004;
 - (e) a “designated body” means
 - (i) a heritage institution,
 - (ii) a body making and supplying works modified in order to meet the special needs of persons with a disability; provided that the body is not established or conducted for profit or controlled by a body established or conducted for profit, or
 - (iii) 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; and
 - (f) an “ordinary commercial price”, in the case of a work which is or was available to persons without a disability, means a price which is similar to or lower than the usual price of the work in

the form or format in which it is or was available to persons without a disability.

- (2) The Minister may, by order, make regulations providing for the application of sections 104 to 104G, or any part thereof, to cross-border exchanges of accessible copies.”.
- (2) The Principal Act is amended
 - (a) in section 2, by deleting the definition of “disability”;
 - (b) in section 144, by inserting the following subsection after subsection (4):
 - “(5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.”; and
 - (c) in section 263, by inserting the following subsection after subsection (4):
 - “(5) For the purposes of this section, “disability” has the same meaning as in section 48 of the Statute of Limitations, 1957.”.

19. Consumer protection.

- (1) Section 2 of the Principal Act is amended by substituting the following subsection for subsection (10):
 - “(10) (a) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act, any unfair term in a contract which purports to prohibit or restrict that act shall be void.
 - (b) Whether a term is unfair shall depend on all of the circumstances of the case.
 - (c) In particular, where a contract has not been individually negotiated, a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the party who had not drafted the term in question, taking into account the nature of the work which is the subject-matter of the contract and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.
 - (d) A term shall always be regarded as having not been individually negotiated where
 - (i) it has been drafted in advance by one party and the other party has therefore not been able to influence its substance, particularly in the context of a pre-formulated standard contract, or
 - (ii) it is a term of a licensing scheme made pursuant to this Act.

- (e) It shall be for any party who claims that a term was individually negotiated to show that it was.
- (f) In making an assessment of good faith, particular regard shall be had to
 - (i) the strength of the bargaining positions of the parties,
 - (ii) whether the party who had not drafted the term in question had an inducement to agree to it,
 - (iii) whether the subject-matter of the contract was sold or supplied to the special order of the party who had not drafted the term in question, and
 - (iv) the extent to which the party who had drafted the term in question has dealt fairly and equitably with the other party whose legitimate interests he has to take into account.”.

20. Public administration.

- (1) Section 71 of the Principal Act is amended, in subsection (1), by inserting, after “the purposes of” and before “parliamentary or judicial proceedings” the following: “public security, for the purposes of administrative,”.
- (2) Section 237 of the Principal Act is amended by inserting, after “the purposes of” and before “parliamentary or judicial proceedings” the following: “public security, for the purposes of administrative,”.
- (3) Section 74 of the Principal Act is amended by substituting the following subsection for subsection (2):
 - “(2) Copyright is not infringed in any material open to public inspection pursuant to a statutory requirement where:
 - (a) by or with the authority of the person required to make the material open to public inspection or, as the case may be, the person maintaining the register,
 - (i) the material is copied with a view to the doing of any act authorised by this section;
 - (ii) copies of the material are issued to the public;
 - (iii) the material (or a copy of it) is made available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them; and
 - (b) the purpose of the doing of any act mentioned in paragraph (a) is to:
 - (i) enable the material to be inspected at a more convenient time or place; or
 - (ii) otherwise facilitate the exercise of any right for the purpose of which the statutory requirement is imposed; and
 - (c) the material is not commercially available, by or with the authority of the copyright owner, to the public.”.

(4) Section 74 of the Principal Act is amended by substituting the following subsection for subsection (5):

- “(5) Copyright is not infringed in any material which is on a statutory register or is open to public inspection pursuant to a statutory requirement where:
- (a) the material contains information about matters of general scientific, technical, commercial or economic interest,
 - (b) by or with the authority of the person required to make the material open to public inspection or, as the case may be, the person maintaining the register:
 - (i) the material is copied with a view to the doing of any act authorised by this section;
 - (ii) copies of the material are issued to the public;
 - (iii) the material (or a copy of it) is made available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them; and
 - (c) the acts mentioned in paragraph (b) are done for the purposes of disseminating the information mentioned in paragraph (a); and
 - (d) the material is not commercially available, by or with the authority of the copyright owner, to the public .”.

21. Innovation.

(1) The Principal Act is amended by inserting the following section after section 106D (inserted by section 16 of this Act):

“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 to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise
 - (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 or related.
 - (7) This section shall come into operation on such day as may be fixed by order made by the Minister.”
- (2) The Principal Act is amended by inserting the following section after section 254C (inserted by section 16 of this Act):

“254D. Innovation.

- (1) It is not an infringement of the rights conferred by this Part if the owner or lawful user of a recording of a performance (the initial recording) derives from it an innovative work.
- (2) An innovative work is either an original work or a recording of a performance which is substantially different from the initial recording, or which is a substantial transformation of the initial recording.
- (3) The innovative work must not
 - (a) conflict with the normal exploitation of the initial recording, or
 - (b) unreasonably prejudice the legitimate interests of the owner of the rights in the initial recording.
- (4) Unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise
 - (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 recording about the availability of the innovative work.
- (5) Subsection (1) shall not apply if
 - (a) the initial recording is an illicit recording, and
 - (b) the person making the innovative work did not have reasonable grounds to believe that the initial work was not an illicit recording.
- (6) Subsection (1) shall not apply if, or to the extent that, the owner of the rights in the initial recording can establish by clear and convincing evidence that, within a reasonable time after first publication of the recording, he or she had embarked upon a process

to derive from it a work or recording of a performance to which the innovative work is substantially similar or related.

- (7) This section shall come into operation on such day as may be fixed by order made by the Minister.”

22. Heritage.

- (1) The Principal Act is amended, except where the contrary intention appears or the context otherwise requires
- (a) by substituting “heritage institutions” for “librarians or archivists”, wherever occurring in the shoulder notes to sections 61-62, 64-67, 70, 229, 231-234, and 236,
 - (b) by substituting “heritage institution” for
 - (i) “library, archive”
 - (ii) “library or archive”, and
 - (iii) “prescribed library or prescribed archive”,wherever occurring,
 - (c) by substituting “heritage institutions” for
 - (i) “libraries and archives”, and
 - (ii) “libraries or archives”,wherever occurring,
 - (d) by substituting “A person referred to in section 2(4)” for “The librarian or archivist of a prescribed library or prescribed archive”, wherever occurring,
 - (e) by substituting “a person referred to in section 2(4)” for “a librarian or archivist of a prescribed library or prescribed archive”, wherever occurring, and
 - (f) by substituting “person referred to in section 2(4)” for “librarian or archivist”, wherever occurring.
- (2) Section 2 of the Principal Act is amended, by substituting the following subsections for subsections (3)-(4):
- “(3) A reference in this Act to a heritage institution shall include references to
- (a) prescribed libraries, prescribed archives and prescribed museums,
 - (b) educational establishments,
 - (c) the Boards and authorities referred to in section 198A(1),
 - (d) any eligible institutions to which the Heritage Fund Act, 2001 applies, and
 - (e) such other institutions as the Minister may from time to time prescribe.
- (4) A reference in this Act to a heritage institution shall include references to a person acting on its behalf; and, in particular, a reference in this Act to a heritage institution shall include references to the person having direction of the institution concerned (whether

called the “Director” or by any other name, designation or title), to a person acting under the authority of an educational establishment, to a librarian in a prescribed library, to an archivist in a prescribed archive, and to a curator in a prescribed museum.”

- (3) Section 50 of the Principal Act is amended by substituting the following subsection for subsection (3):
- “(3) The copying by a person, other than a person acting under the authority of an educational establishment, researcher or private student, is not fair dealing where
- (a) in the case of a heritage institution, a person referred to in section 2(4) does anything which is not permitted under section 63, or
 - (b) in any other case, the person copying knows or has reason to believe that the copying will result in copies of substantially the same material being provided to more than one person at approximately the same time and for substantially the same purpose.”.
- (4) Section 59 of the Principal Act is amended, in subsection (2),
- (a) by substituting “70” for “67”,
 - (b) in paragraph (a) by adding after “makes and supplies” and before “a copy”, the following: “, or causes to be made and supplied,”,
 - (c) in paragraph (b) by adding after “makes and supplies” and before “to another”, the following: “, or causes to be made and supplied,”,
 - (d) in paragraph (c), by inserting after “makes” and before “a copy” the following: “or causes to be made”,
 - (e) in paragraph (d),
 - (i) by inserting after “making or supplying” and before “a copy” the following: “or causing to be made or supplied”, and
 - (ii) by substituting “;” for “.”, and
 - (f) by inserting after paragraph (d) the following paragraph:

“(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.”.
- (5) (a) Section 61 of the Principal Act is amended, in subsection (1), by adding, after “make and supply” and before “a copy of an article”, the following: “, or cause to be made and supplied,”.

- (b) Section 62 of the Principal Act is amended, in subsection (2), by adding, after “make and supply” and before “a copy of part”, the following: “, or cause to be made and supplied,”.
 - (c) Section 64 of the Principal Act is amended, in subsection (1), by adding, after “make and supply” and before “to another”, the following: “, or cause to be made and supplied,”.
 - (d) Section 65 of the Principal Act is amended, in subsection (1), by adding, after “make” and before “a copy of a work”, the following: “or cause to be made,”.
- (6) The Principal Act is amended by inserting the following sections after section 68:

“69. Format-shifting by heritage institutions.

- (1) It is not an infringement of the rights conferred by this Part if
 - (a) a heritage institution, being the owner or lawful user of a work,
 - (i) makes or causes to be made a reproduction of that work in a different format, or
 - (ii) in particular, makes or causes to be made a digital reproduction of that 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 or 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 or causing it to be made 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 a work
 - (a) for educational purposes either in an educational establishment or other heritage institution or by any person acting under the authority of an educational establishment or other heritage institution, or
 - (b) during a public lecture given either in an educational establishment or other heritage institution or by any person acting under the authority of an educational establishment or other heritage institution

shall constitute “fair dealing” for the purposes of section 50(1); and the communication of such a reproduction, through the internet or otherwise, shall also 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.”.
- (7) The Principal Act is amended, in section 70, by substituting “67, 68, 69 or 69A” for “67 or 68”.
- (8) The Principal Act is amended by inserting the following sections after section 235:

“235A. Format-shifting by heritage institutions.

- (1) It is not an infringement of the rights conferred by this Part if
 - (a) a heritage institution, being the owner or lawful user of a recording of a performance,
 - (i) makes or causes to be made a reproduction of that recording in a different format, or
 - (ii) in particular, makes or causes to be made a digital reproduction of that recording,
 - (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 or 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 recording being reproduced is an infringement of the rights conferred by this Part, and
 - (b) the heritage institution making the reproduction or causing it to be made did not have reasonable grounds to believe that the recording was not such an infringement.

235B. Fair dealing by heritage institutions.

- (1) The communication by a heritage institution to individual members of the public of recordings of performances 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 still image or a very short clip from a recording of a performance in the permanent collection of a heritage institution

- (a) for educational purposes either in an educational establishment or other heritage institution or by any person acting under the authority of an educational establishment or other heritage institution, or
 - (b) during a public lecture given either in an educational establishment or other heritage institution or by any person acting under the authority of an educational establishment or other heritage institution
- shall constitute “fair dealing” for the purposes of section 50(1); and the communication of the display of such an image or clip, through the internet or otherwise, shall also 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.”.
- (9) The Principal Act is amended, in section 236, by substituting “234, 235, 235A or 235B” for “234 or 235”.

23. Catalogues.

- (1) Section 66 is amended, in subsection (1)
 - (a) by inserting, after “complied with, make” and before “a copy of a work”, the following: “ or cause to be made”,
 - (b) in paragraph (d), by deleting, after “archive”, “or”,
 - (c) in paragraph (e), by substituting “; or” for “,”, and
 - (d) by inserting the following paragraph after paragraph (e):
 - “(f) for the purposes of publishing such a copy in a catalogue relating to an exhibition,”.
- (2) Section 66 is amended, in subsection (2), by inserting, after “purpose to be achieved” and before “.”, the following: “, provided that any copying is accompanied by a sufficient acknowledgement”.
- (3) Section 94 of the Principal Act is amended, in subsection (1)
 - (a) by inserting, after “the purpose of advertising the” and before “sale of the work”, the following: “public exhibition or”, and
 - (b) by inserting, after “sale of the work” and before “.”, the following: “but only to the extent necessary to promote the event, and excluding any other commercial use”.
- (4) Section 233 of the Principal Act is amended
 - (a) in subsection (2), by substituting “Subsection (1)” for “This section”; and
 - (b) by inserting after subsection (2) the following subsections:
 - “(3) Where a recording of a performance is in the permanent collection of a heritage institution, that institution may, where

the prescribed conditions are complied with, reproduce or cause to be reproduced either a still image or a very short clip from that recording

(a) for the purposes of compiling or preparing a catalogue; or
(b) for the purposes of publishing such an image or clip in a catalogue relating to an exhibition, without infringing any copyright in that recording or performance.

(4) Subsection (3) shall apply to reproduction conducted for the curatorial purposes specified in subsection (3), and to an extent reasonably justified by the non-commercial purpose to be achieved, provided that any reproduction is accompanied by a sufficient acknowledgement.”.

24. Donations.

The Principal Act is amended by substituting the following section for section 123:

“123. Copyright to pass in transfers.

Where, after the commencement of this section, 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) a contrary intention is patently indicated in a document effecting that transfer,
(b) a contrary intention otherwise patently appears, or
(c) the circumstances of the transfer otherwise patently require.”.

25. Copyright deposit.

(1) The Principal Act is amended, in section 198, by substituting the following subsections for subsection (9)-(12):

“(9) A publisher who fails to comply with this section shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €1,000 or such greater sum as the Minister may from time to time determine, and in addition the publisher shall be liable to be ordered to comply with this section, either by the delivery of the book in question or by the payment to the relevant Board or authority of an amount which is not more than the cost of making good the failure to comply.

(10) For the purposes of this section, “book” includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, plans, prints or other engravings belonging thereto.

- (11) Where a copy of a book requested under subsection (1) is delivered in a form other than an electronic form, the Board or other authorities referred to in subsection (1) may request, in addition to that copy, a copy in an electronic form readable by means of an electronic retrieval system and on such request being made a copy in electronic form shall be delivered by the publisher to the Board or authority concerned.
- (12) Subsection (11) is without prejudice
 - (a) to section 198A(7), or
 - (b) to the right of the Board or other authorities referred to in subsection (1) to make a demand pursuant to section 104E; and, if such a demand is made, then section 198A(11) shall apply.
- (13) Before delivery of a copy of a book in electronic form is made pursuant to subsection (11), the Boards or authorities referred to in subsection (1) or subsection (5) may
 - (a) require that the copy of the book in electronic form be delivered in a particular format, being one of the formats in which the copy of the book in electronic form is made available, and the publisher shall deliver it in the format required; and
 - (b) require the person delivering the copy of the book in electronic form to deliver, with that copy, a copy of any computer program and any information necessary in order to access the copy of the book in electronic form, and a copy of any manual and other material that accompanies the copy of the book in electronic form and is made available to the public, and the publisher shall deliver the items so required.
- (14) A publisher shall not apply technological protection measures to any copy of a book in electronic form delivered pursuant to subsection (11) to a Board or authority referred to in subsection (1) or subsection (5), unless the publisher
 - (a) also delivers an appropriate means of circumvention to the Board or authority in question at the same as and in the same manner as the delivery of the digital publication is effected, or
 - (b) has already delivered an appropriate means of circumvention to the Board or authority in question.
- (15) Subject to subsection (17), the delivery pursuant to this section of a copy of a book shall not amount to
 - (a) a breach of contract,
 - (b) an infringement of any intellectual property right in relation to the work or any part thereof, or
 - (c) an infringement of section 6 or section 36 of the Defamation Act, 2009.
- (16) Subject to subsection (17), the doing by a Board or authority referred to in subsection (1) or subsection (5) of an act permitted by this

section shall not amount to an infringement of section 6 or section 36 of the Defamation Act 2009.

- (17) The Minister may, by order, make regulations to provide for circumstances in which subsections (15) and (16) shall not apply.
- (18) Any demand, notice or receipt made or given by a Board or authority pursuant to this section may be either in writing pursuant to section 14 or in any appropriate digital or electronic or other similar or related technological form or format.”.

26. Digital copyright deposit.

- (1) The Principal Act is amended by inserting after section 198 the following section:

“198A. Digital copyright deposit.

- (1) The Boards and authorities to which this section applies are the Boards and authorities specified in section 198(1) and such other Boards or authorities as the Minister may from time to time determine.
- (2) The Boards and authorities to which this section applies are entitled to delivery of a copy of every digital publication made available in the State.
- (3)
 - (a) In particular, where a demand referred to in paragraph (b) is made, then the publisher shall, within the deadline referred to in paragraph (c), discharge the obligation referred to in paragraph (d).
 - (b) For the purposes of paragraph (a), the relevant demand is either a demand by a Board or authority to which this section applies made to 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 having control of the National Library of Ireland, a demand made to the publisher of any digital publication made available in the State.
 - (c) For the purposes of paragraph (a), the relevant time limit is one month from the date on which the demand is made, or, where the demand was so made before the digital publication was first made available, one month from the date on which the digital publication is first made available.
 - (d) For the purposes of paragraph (a), the relevant obligation on the publisher is, at his or her own expense, to
 - (i) deliver to the said Boards and authorities to an address named in the demand the number of storage media, each containing a copy of the digital publication, as specified pursuant to paragraph (f),
 - (ii) deliver to the said Boards and authorities in such digital or electronic or other similar or related technological

- form or format as may be specified in the demand the number of copies of the digital publication specified pursuant to paragraph (f), or
- (iii) effect delivery by permitting the said Boards and authorities, through means (including computer programs, online search, and other automated means) specified in the demand, to harvest, download or otherwise acquire as many copies of the digital publication as may be specified pursuant to paragraph (f).
- (e) For the purposes of paragraph (d), it shall be for the Board or authority in question to specify in the demand which of the three alternative means of discharging the obligation shall apply.
 - (f) For the purposes of paragraph (d), the relevant number shall be the number of copies as would be required pursuant to section 198(1) if the digital publication were a book, or such fewer number as may be specified in the demand, or such other number as the Minister may from time to time determine.
- (4) Subject to subsection (14), the publisher of any digital publication first made available in the State after the commencement of this section shall, where a demand is made by the authority having control of each of the libraries referred to in section 198(5), within one month after receipt of that demand or, where the demand was so made before the digital publication was made available, within one month after publication, deliver either to an address in Dublin named in the demand or in such digital or electronic or other similar or related technological form or format as may be specified in the demand a copy of that digital publication for, or in accordance with the directions of, that authority.
 - (5) Subject to subsection (11), where substantially the same work is published in a form or format to which both this section and section 198 apply, then
 - (a) delivery of a book pursuant to section 198 (including, where relevant, an additional copy in electronic form requested pursuant to section 198(11)) 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 and to provide notice thereof to the publisher.
 - (6) In the case of a digital publication made available in a series of numbers, parts or iterations, the demand referred to in subsection (3)

- or subsection (4) may include all numbers, parts or iterations of the digital publication which may subsequently be made available.
- (7) A copy of a digital publication delivered pursuant to this section
 - (a) shall be a copy of the whole digital publication, including all relevant associated metadata, and
 - (b) in the opinion of the Boards and authorities taking delivery of the digital publication, shall be of a quality suitable for its preservation.
 - (8) Before delivery of a digital publication is made pursuant to this section, the Boards or authorities to which this section applies or the authorities referred to in section 198(5) may
 - (a) 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; and
 - (b) 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, and the publisher shall deliver the items so required.
 - (9) The publisher shall not apply technological protection measures to any digital publication delivered pursuant to this section to a Board or authority to which this section applies or to an authority which is referred to in section 198(5), unless the publisher
 - (a) also delivers an appropriate means of circumvention to the Board or authority in question at the same time as and in the same manner as the delivery of the digital publication is effected, or
 - (b) has already delivered an appropriate means of circumvention to the Board or authority in question.
 - (10) A publisher who fails to comply with this section shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €1,000 or such greater sum as the Minister may from time to time determine, and in addition the publisher shall be liable to be ordered to comply with this section, either by the delivery of the digital publication in question or by the payment to the relevant Board or authority of an amount which is not more than the cost of making good the failure to comply.
 - (11) Subsection (3) is without prejudice to the right of the Boards and authorities to which this section applies to make a demand pursuant to section 104E; and a Board or authority which makes a demand pursuant to section 104E may decide that
 - (a) compliance with section 104E is sufficient to comply with any or all of subsection (3), subsection (7) or section 198(11), or

- (b) compliance with any or all of subsection (3), subsection (7) or section 198(11) is sufficient to comply with section 104E; and where it so decides, it shall notify the publisher accordingly in the demand made under the relevant subsection or subsections.
- (12) Boards and authorities taking delivery of a digital publication pursuant to this section shall give a receipt for every digital publication so delivered to them.
- (13) Any demand, notice or receipt made or given by a Board or authority pursuant to this section may be either in writing pursuant to section 14 or in any appropriate digital or electronic or other similar or related technological form or format.
- (14) Without prejudice to any of the permitted acts specified in subsection (16), the Minister may prescribe conditions under which a Board or authority to which this section applies may, in respect of a digital publication which has been delivered to it pursuant to this section, also do any of the additional acts specified in subsection (17).
- (15) If the Minister has made an order pursuant to subsection (14), then without prejudice to any of the permitted acts specified in subsection (16), the Minister may also prescribe conditions under which an authority having control of a library referred to in section 198(5), in respect of a digital publication which has been delivered to it pursuant to this section, also do any of the additional acts specified in subsection (17), provided that the Minister shall not make such regulations unless the Minister is satisfied that
 - (a) as regards the additional acts specified in subsection (17), the restriction of those activities pursuant to the laws of the United Kingdom is not substantially less,
 - (b) as regards the protection of intellectual property rights in the relevant digital publication pursuant to the laws of Ireland, the protection pursuant to the laws of the United Kingdom of corresponding rights is not substantially less, and
 - (c) as regards the protection from liability pursuant to subsections (21) to (23), the protection pursuant to the laws of the United Kingdom in relation to corresponding liability is not substantially less.
- (16) For the purposes of subsections (14) and (15), the permitted acts are those acts permitted
 - (a) in relation to works protected by copyright under Chapter 6 of Part II,
 - (b) in relation to performances, by Chapter 4 of Part III,
 - (c) in relation to databases, by Chapter 8 of Part V, and
 - (d) in relation to any act of circumvention under section 374.
- (17) For the purposes of subsections (14) and (15), the additional acts are, in respect of a digital publication, the ability to
 - (a) transfer or lend it to any other person or body,
 - (b) provide or withhold access to it to any other person or body,

- (c) supply a copy or a part thereof to any other person or body for the purposes of education, research or private study, or for other non-commercial purposes,
 - (d) in the case of a digital publication comprising or containing a computer program or database, adapt it, or
 - (e) dispose of it.
- (18) It is not an infringement of the rights conferred by this Act if a Board or authority to which this section applies reproduces any work that is made available in the State through the internet.
- (19) Where any work has been made available in the State through the internet without a restriction as to its access or use, then it is not an infringement of the rights conferred by this Act if a Board or authority to which this section applies reproduces that work and makes it available through the internet without a restriction as to its access or use, whether or not that work continues to be available elsewhere through the internet.
- (20) For the purposes of this section, a work shall have been made available in the State through the internet where
- (a) it is made available to the public either from a website with a domain name which relates to the State or to a place within the State, or by similar or related means, or
 - (b) it is made available to the public either by a person any of whose activities relating to the creation or the publication of the digital publication takes place within the State, or by a person with similar or related connections to the State.
- (21) Subject to subsection (23), the delivery pursuant to this section of a copy of a digital publication shall not amount to
- (a) a breach of contract,
 - (b) an infringement of any intellectual property right in relation to the work or any part thereof, or
 - (c) an infringement of section 6 or section 36 of the Defamation Act 2009.
- (22) Subject to subsection (23), the doing by a Board or authority to which this section applies or by an authority referred to in section 198(5) of an act permitted by this section shall not amount to an infringement of section 6 or section 36 of the Defamation Act 2009.
- (23) The Minister may, by order, make regulations to provide for circumstances in which subsections (21) and (22) shall not apply.
- (24) The Minister may make regulations to implement and administer this section; provided that, if the Minister proposes to make regulations pursuant to this section, he or she shall, before making them, consult
- (a) the Boards and authorities to which this section applies;
 - (b) the authorities referred to in section 198(5), if their interests would be affected by the proposed regulations; and
 - (c) such publishers or copyright owners or bodies representing publishers or other copyright owners as he or she thinks fit.”.

- (2) The Heritage Fund Act, 2001 is amended, in section 2, by inserting in paragraph (b) of the definition of “heritage object”, after “the Act of 2000),” and before “or any manuscript,” the following: “any digital publication (within the meaning of section 2 of the Act of 2000 and for the purposes of section 198A of that Act),”.

27. Content-mining.

- (1) The Principal Act is amended by inserting the following section after section 50:

“50A. Content-mining.

- (1) For the purposes of section 50, fair dealing for the purposes of education, research or private study shall include an act of content-mining.
- (2) For the purposes of this section,
 - (a) “content-mining” means an algorithmic or technological process of analysis of a work or works, for the purposes of seeking to establish new facts, relationships, patterns, trends or anomalies, or for other similar or related purposes, in the work or works so analysed; and
 - (b) “an act of content-mining” includes
 - (i) access to, use of, extraction from, or adaptation of a work, in whole or in part, for the purposes of content-mining; and
 - (ii) the publication of the results of the content-mining.
- (3) Subsection (1) applies only where an act of content-mining is undertaken in respect to
 - (a) a work to which that person undertaking the act of content-mining already has a right to access or use (whether under a licence or otherwise), or
 - (b) a work which, at the time when the act of content-mining was undertaken, was available through the internet without a restriction as to its access or use, whether or not that work continues to be available through the internet without such a restriction.
- (4) For the purposes of publication pursuant to subsection 2(b)(ii), the reproduction of extracts from a work which are necessary to explain the results of the content-mining shall constitute inclusion in an incidental manner for the purposes of section 52.
- (5) For the purposes of section 87, any reproduction of a work that is necessary for the purposes of an act of content-mining shall constitute a reproduction that is
 - (a) temporary for the purposes of section 87(1)(a), and
 - (b) either transient or incidental, for the purposes of section 87(1)(b);provided that, once the process of content-mining is complete, the reproduction is deleted, erased or otherwise destroyed.

- (6) Without prejudice to section 374, nothing in Part VII shall be construed as operating to prevent any person
 - (a) from undertaking the acts permitted by this section,
 - (b) from undertaking any act of circumvention required to effect such permitted acts, or
 - (c) from removing rights management information from, or altering rights management information in, works where that is required to effect such permitted acts.
- (7) Where a reproduction, which would otherwise be an infringing copy, is made under this section and is not deleted, erased or otherwise destroyed, but instead 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.”.
- (2) The Principal Act is amended by substituting the following section for section 329:

“329. Fair dealing: education, research or private study.

 - (1) The database right in a database 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.
 - (2) For the purposes of this Part “fair dealing”
 - (a) includes the extraction of the contents of a database by a lawful user for a purpose and to an extent which will not unreasonably prejudice the interests of the rightsowner, and
 - (b) includes an act of content-mining.
 - (3) For the purposes of this section,
 - (a) “content-mining” means an algorithmic or technological process of analysis of a database or databases, for the purposes of seeking to establish new facts, relationships, patterns, trends or anomalies, or for other similar or related purposes, in the data in the database or databases so analysed; and
 - (b) “an act of content-mining” includes
 - (i) access to, use of, extraction from, or adaptation of a database, in whole or in part, for the purposes of content-mining; and
 - (ii) the publication of the results of the content-mining.
 - (4) Subsection (2)(b) applies only where an act of content-mining is undertaken in respect to
 - (a) a database to which that person undertaking the act of content-mining already has a right to access or use (whether under a licence or otherwise), or
 - (b) a database which, at the time when the act of content-mining was undertaken, was available through the internet without a restriction as to its access or use, whether or not that database

continues to be available through the internet without such a restriction.

- (5) For the purposes of publication pursuant to subsection 3(b)(ii), the re-utilisation of extracts from a database which are necessary to explain the results of the content-mining shall not constitute an infringement of the database right in the database from which the extracts have been re-utilised.
- (6) It is not an infringement of the rights conferred by this Part to make or cause to be made a temporary reproduction of a database, in whole or in part, where that temporary reproduction is incidentally made as an integral and essential part of the process of content-mining; provided that
 - (a) the reproduction has no independent economic significance, and has as its sole purpose the enabling of the process of content-mining, and
 - (b) once the process of content-mining is complete, the reproduction is deleted, erased or otherwise destroyed.
- (7) Without prejudice to section 374, nothing in Part VII shall be construed as operating to prevent any person
 - (a) from undertaking the acts permitted by this section,
 - (b) from undertaking any act of circumvention required to effect such permitted acts, or
 - (c) from removing rights management information from, or altering rights management information in, a database where that is required to effect such permitted acts.
- (8)
 - (a) A licensing scheme certified under section 173 may displace any exemption in respect of education provided in subsection 2(b).
 - (b) Where a licensing scheme certified under section 173 and applicable to the exemption in respect of education provided in subsection 2(b) is in force, then any such exemption shall not apply if the person making use of the database knew or ought to have been aware of the existence of the licensing scheme.
 - (c) If the exemption in respect of education provided in subsection 2(b) is displaced by a licensing scheme pursuant to paragraph (a) and section 173, then sections 349 to 351 shall apply in relation to that part of the scheme which relates to that exemption as if that part of the scheme were a scheme to which those sections applied pursuant to section 348.
- (9) Where a reproduction, which would otherwise be an infringing copy, is made under this section and is not deleted, erased or otherwise destroyed, but instead 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.”.

28. Digital research and computer security.

- (1) The Principal Act is amended by inserting the following section after section 106E (inserted by section 21 of this Act):

“106F. Digital research and computer security.

- (1) It is not an infringement of the rights conferred by this Act for a person to reproduce a work for the purposes of encryption analysis or research, for the purposes of related analysis or research, or for the purposes of such other similar or related analysis or research as the Minister may by order provide.
- (2) Subsection (1) shall apply only if
- (a) it would not be practical to carry out the analysis or research without making the reproduction,
 - (b) the reproduction is made by or on the directions of the owner or lawful user of the work, and
 - (c) the person making the reproduction has informed the owner of the rights in the work, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.
- (3) 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.
- (4) Once the process of analysis, research or assessment for which the reproduction was made is complete, then the reproduction shall be deleted, erased or otherwise destroyed.
- (5) Where a reproduction, which would otherwise be an infringing copy, is made under this section and is not deleted, erased or otherwise destroyed, but instead 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 deemed to be an infringing copy for those purposes and for all subsequent purposes.
- (6) Without prejudice to section 374, nothing in Part VII shall be construed as operating to prevent any person
- (a) from undertaking the acts permitted by this section,
 - (b) from undertaking any act of circumvention required to effect such permitted acts, or
 - (c) from removing rights management information from, or altering rights management information in, a work where that is required to effect such permitted acts.”.

29. Fair use.

- (1) The Principal Act is amended by inserting the following section after section 49:

“49A. 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 particular 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 some or all of the following
 - (a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part,
 - (b) the purpose and character of the use in question, including in particular whether
 - (i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or
 - (ii) if the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred by this Part,
 - (c) the nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question,
 - (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the work as a whole,
 - (e) the impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market,
 - (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,
 - (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and
 - (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.
- (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.”.

- (2) The Principal Act is amended by inserting the following section after section 220:

“220A. Fair use.

 - (1) The fair use of a recording of a performance 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 particular 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 recording in any particular case is a fair use, take into account such matters as the court considers relevant, including any or some or all of the following
 - (a) the extent to which the use in analogically is analogically similar or related to the other acts permitted by this Part,
 - (b) the purpose and character of the use in question, including in particular whether
 - (i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or
 - (ii) if the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred by this Part,
 - (c) the nature of the recording, including in particular whether there is a public benefit or interest in its dissemination through the use in question,
 - (d) the amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the recording as a whole,
 - (e) the impact of the use upon the normal commercial exploitation of the recording, having regard to matters such as its age, value and potential market,
 - (f) the possibility of obtaining the recording, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,
 - (g) whether the legitimate interests of the owner of the rights in the recording are unreasonably prejudiced by the use in question, and
 - (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or

inappropriate or impossible for reasons of practicality or otherwise.

- (4) The fact that a recording 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.”.

30. Review of Operation of Act.

The Principal Act is amended by inserting the following section after section 378 (as inserted by section 3 of this Act):

“379. Review of Operation of Act.

- (1) If the Minister has made a recognition order, then the Council shall carry out a review of the operation of this Act not later than 5 years after the making of the recognition order and at least once every 5 years thereafter.
- (2) The Council shall submit a report to the Minister of the findings of a review carried out under subsection (1), and shall publish that report no later than two weeks after it has submitted it to the Minister.
- (3) If the Minister has not made a recognition order, then the Minister shall commence a review of the operation of this Act not later than the first day of January 2019 and at least once every 5 years thereafter.
- (4) A review under subsection (3) shall be completed not later than one year after its commencement.”.

SCHEDULE

The Copyright Council of Ireland

Section 3.

FOURTH SCHEDULE

The Copyright Council of Ireland

- 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 freedom of expression and the public interest,
 - (b) raise public awareness of the importance of copyright and contribute to public debate about the application and reform of copyright, including by making recommendations to the Minister and to other appropriate bodies in Ireland, the European Union and internationally,
 - (c) foster dialogue and cooperation in the Irish copyright community,
 - (d) prepare and publish standards and codes of best practice on copyright issues,
 - (e) undertake research on copyright issues, and in particular on the social and economic impact of copyright,
 - (f) support legal and technical means of protecting copyright, and
 - (g) promote creativity, sharing, open access, and innovation.
- 3 The Council shall be independent in the performance of its functions.
- 4(1) Any natural or legal person or body, whether incorporated or unincorporated, shall be entitled to be a subscribing member of the Council.
- (2) The Council shall seek to ensure that the subscribing membership shall be as widely representative as possible of the Irish copyright community as a whole.
- (3) The Council shall publish categories of membership and scales of fees.
- 5(1) The number of directors of the Board of the Council shall be 13, of whom

- (a) one shall be a director who represents the interests of those who create works protected by the Copyright and Related Rights Acts 2000-2013, such as authors and performers;
 - (b) one shall be a director who represents the interests of those who are not authors or performers but who hold rights pursuant to this Act or the Principal Act;
 - (c) one shall be a director who represents the interests of collecting societies;
 - (d) one shall be a director who represents the interests of providers of information society services;
 - (e) one shall be a director who represents the interests of those, such as consumers, who regularly make lawful use of copyright material;
 - (f) one shall be a director who represents the interests of recently-established businesses for which copyright is a significant aspect of their business;
 - (g) one shall be a director who represents the interests of libraries or educational establishments;
 - (h) one shall be a director who represents the interests of heritage institutions other than libraries or educational establishments;
 - (i) one shall be a director who represents the interests of those who manufacture devices or provide services allowing the use of copyright material; and
 - (j) four shall be directors who represent the general public interest, at least one of whom shall possess appropriate technological expertise.
- (2) The providers of information society services referred to section 5(1)(g) are “relevant service providers” within the meaning of section 3(1) of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003).
- (3) The directors referred to in section 5(1)(j) shall be persons who are of standing in the community, and who are independent of the interests referred to in section 5(1)(a)-(i).
- (4) The directors referred to in section 5 shall be selected for appointment
- (a) by a panel of five persons who are, in the opinion of the Minister, independent of the interests referred to in section 5(1)(a)-(i), 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) 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)(j) shall be nominated by the panel to the Minister for appointment 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.
 - (8) The Board may from time to time invite a suitable person or persons to attend or be an observer at meetings of the Board for the duration of any calendar year or part thereof.
 - (9) Every question at a meeting of the Board shall be determined by consensus, but where in the opinion of the Chairperson or other person presiding consensus is not possible, the question shall be decided by a majority of the votes of members present and voting on the question and, in the case of an equal division of votes, the Chairperson or other person presiding shall have a second or casting vote.
- 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 charge fees for its services and for the services of any exchange, service or agency which it may from time to time establish, operate or provide; and, subject to section 11(4)(d), such fees shall be calculated in accordance with such rules as the Council shall make for that purpose.
 - (3) The Council may accept gifts, donations or funding from any person, but only where
 - (a) the donor does not attach to the gift, donation or funding, any conditions incompatible with the objects, functions and independence of the Council,
 - (b) in return for the gift, donation or funding, the Council does not give any undertaking incompatible with its objects, functions and independence, 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.
 - (4) There may be paid to the Council out of moneys provided by the Oireachtas a grant of such amount as the Minister may determine from time to time.
 - (5) There may be paid to the Council pursuant to section 41(1)(g) of the National Lottery Act 2013 a grant of such amount as the Government may determine from time to time.

- (6) The Council may accept funding from the European Union, or from any other appropriate European or International agency or body, where the receipt of any such funding is compatible with the objects, functions and independence of the Council.
 - (7) Any funding, fees, grants, gifts, or donations received by the Council pursuant to this section shall be expended by it for such purposes connected with its objects and functions as in its discretion it thinks fit.
- 7 The Council may provide a copyright licensing service; and, if it does,
- (a) the service shall be called the Irish Digital Copyright Exchange (the Exchange),
 - (b) the Council may, from time to time, advise the Minister in relation to copyright licensing in general and the Exchange in particular, and
 - (c) the Minister may, by order, make regulations in respect of licences and licensing schemes to be granted or operated by the Exchange.
- 8(1) The Council shall provide an alternative dispute resolution service for copyright disputes, called the 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) while the process is ongoing, 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.
- (4) The Council may also provide mediation, conciliation or other dispute resolution services for copyright disputes, such as by telephone, online, or in person.

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 In this Schedule

- (a) “copyright dispute” means any civil or commercial dispute arising under the Copyright and Related Rights Acts 2000-2013 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 Act of the Oireachtas;

- (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.
- 11(1) The Council may, from time to time, advise the Minister in relation to orphan works, and the Minister may, by order, make regulations accordingly.
- (2) For the purposes of this section
- (a) “orphan works” are works which are protected by copyright or related rights under the Copyright and Related Rights Acts 2000-2013 but for which the rightsowner is missing; and
 - (b) a rightsowner is missing where, despite a diligent search having been carried out, no rightsowner can be
 - (i) identified, or
 - (ii) located, even if identified.
- (3) The Minister may, by order, make regulations authorising the Council to grant licences to do, or to authorise the doing of, any act in respect of an orphan work that would otherwise be restricted by copyright or a related right under the Copyright and Related Rights Acts 2000-2013; and this licensing service shall be called the Irish Orphan Works Licensing Agency (the Agency).
- (4) Regulations made by the Minister pursuant to subsection (3) shall prescribe
- (a) the kinds of works in respect of which the Agency may grant licences,
 - (b) the circumstances in which a rightsowner cannot be identified or located,
 - (c) what constitutes a diligent search by an applicant to the Agency for a missing rightsowner,
 - (d) terms and conditions, including fees, upon which such licences may be granted by the Agency,
 - (e) the nature of such licences, and
 - (f) the amount of the fee paid by the applicant that may be retained by the Agency and the amount that must be passed on to a rightsowner who is identified or located after a licence has been granted by the Agency in respect of a work in which the rightsowner is entitled to copyright or a related right under the Copyright and Related Rights Acts 2000-2013.
- (5) Notwithstanding anything in subsection (4), the Agency may provide for further terms and conditions, not inconsistent with that subsection, in any licence granted by it.

- (6) No licence granted pursuant to this section shall afford exclusive rights over an orphan work to a licensee, and any term of any license which purports to do so shall be void.

- 12 The Council may, from time to time, prepare a single text consolidating the Copyright and Related Rights Acts 2000-2013 and related statutes and statutory instruments, and the Attorney General may certify the text as a restatement pursuant to section 2(1) of the Statute Law (Restatement) Act, 2002.

S.I. No. X of 2013
District Court (Small Claims) (Intellectual Property) Rules, 2013

The District Court Rules Committee, in exercise of the powers conferred on them by section 91 of the Courts of Justice Act 1924, section 72 of the Courts of Justice Act 1936, section 34 of the Courts (Supplemental Provisions) Act 1961, section 24 of the Interpretation Act 2005, and section 379 of the Copyright and Related Rights Act, 2000 (as inserted by section 4 of the Copyright and Related Rights (Innovation) (Amendment) Act 2013), do hereby, with the concurrence of the Minister for Justice and Equality and the Minister for Jobs, Enterprise and Innovation, make the following rules of court.

[Dates, names, concurrences, *etc*]

S.I. No. X of 2013
District Court (Small Claims) (Intellectual Property) Rules, 2013

1. These rules may be cited as the District Court (Small Claims) (Intellectual Property) Rules, 2013.
2. These rules shall come into operation on the - day of - 20XX and shall be construed together with all other District Court Rules 1997 to 2013.
3. The District Court Rules 1997 (S.I. No. 93 of 1997) are amended by the amendment of Order 53A (S.I. No. 519 of 2009) as set out in these rules.
4. In section 1 of Order 53A, after “ ‘Form’, unless the context otherwise requires, means a form set out in the schedule hereto, or such modification thereof as may be appropriate in any particular case;” and before “ ‘small claim’, when used without qualification, includes a business small claim and a consumer small claim;” insert

“an intellectual property claim” has the same meaning as in the Copyright and Related Rights Acts, 2000-2013;

“an intellectual property small claim” means an intellectual property claim where the amount of the claim does not exceed such sum as stands specified by or under any Act of the Oireachtas to be the jurisdiction of the District Court for actions in contract;
5. In section 1 of Order 53A, after “ ‘small claim’, when used without qualification, includes” and before “a business small claim and a consumer small claim;” insert “an intellectual property small claim,”.

Recommendations

Introduction

The recommendations in this *Report* are summarized below; and we recommend that the Government introduce a Bill along the lines of the Copyright and Related Rights (Innovation) (Amendment) Bill 2003 provided in this *Report* to implement them.

Copyright Council of Ireland

The *Report* recommends the establishment of a broadly based Copyright Council, analogous in some respects to the Press Council. The intention is that the Copyright Council would be established by the Irish copyright community and legally constituted as a company limited by guarantee. The Council would undertake a number of functions, set out in a Schedule to the Bill:

- (a) ensuring the integrity of copyright whilst protecting freedom of expression and the public interest
- (b) raising public awareness of the importance of copyright and contributing to public debate about the application and reform of copyright, including by making recommendations to the Minister as well as to other appropriate bodies in Ireland and elsewhere
- (c) fostering dialogue and co-operation in the Irish copyright community
- (d) preparing and publishing standards and codes of best practice on copyright issues
- (e) undertaking research on copyright issues, and, in particular on the social and economic impact of copyright
- (f) supporting legal and technical means of protecting copyright, and
- (g) promoting creativity, sharing, open access and innovation.

The Council would, in addition, provide education and advice and act as an advocate to the Minister and the Controller in relation to changes to policy and procedure in this area of IP law. Establishment of the Council on a statutory basis would, in particular, assure its independence from Government, state agencies and from any one category or group of stakeholders. The intention is that the Council would have a broadly-based subscribing membership and comprise a 13 member Board. The Minister or the Controller should not be represented on the Board of the Council.

The Council should, in the main be funded out of subscriptions paid by its members based on a transparent scale of subscription fees and membership categories. It should be in a position to charge fees for its services, to accept gifts and donations as well as to receive exchequer funding, National Lottery funding, and EU funding, if required. Funding by the application of levies of any kind is not recommended.

Digital Copyright Exchange

A further function of the Council would be to enable it to decide to establish a voluntary Digital Copyright Exchange aimed at providing a mechanism to expand and simplify the collective administration of copyrights and licences. The Council should be in a position to decide whether or not to press ahead with a Digital Copyright Exchange immediately, or to wait and seek to reap the benefit of emerging experience in the UK and elsewhere, particularly at EU level.

Participation in the Exchange should, initially at least, be on a voluntary basis with rightsowners deciding whether to engage with the initiative but the issue of whether this should become compulsory should be kept under review. In order to cover the overheads associated with setting up the digital exchange, the possibility to charge licensors a small fee for registration is envisaged.

Alternative Dispute Resolution and Specialist Courts

The establishment by the Council of a voluntary Alternative Dispute Resolution is proposed which would be voluntary, independent, neutral, impartial and expeditious in nature. The intention is to provide for a wide variety of mediation options, including telephone assistance and possibly, online services as well as to develop and make available standard form ADR clauses and contracts that could be used globally.

In parallel with the ADR service, the *Report* recommends the extension of the Small Claims procedure in the District Court to include intellectual property claims up to the value of the standard limit of the District Court's jurisdiction alongside making available the attendant training necessary to allow the District Court to hear IP cases.

Furthermore, the setting up of a specialist Intellectual Property Court in the Circuit Court to deal with cases in which the monetary limit extends up to claims of €75,000 is advocated.

Orphan Works

It is recommended the Council should be able to establish an Irish Orphan Works Licensing Agency and advise the Minister in respect of orphan works, that any regime introduced by the Minister should be as analogous as possible with the EU regime, and that the Statutory Instrument introducing it should be introduced at the same time as any Statutory Instrument implementing the EU regime.

Controller of Intellectual Property

The *Report* recommends that the title Controller of Patents, Designs and Trade Marks be changed to Controller of Intellectual Property to more accurately reflect the role of the Controller given also the Copyright functions that the role fulfills. The Controller should continue to regulate copyright licensing bodies with the potential for a greater role in regulation depending on the outcome of the collective rights management Directive currently being negotiated at European level. However, it is recommended that, in the event of the rejection by the Controller of a licence application, an appeal before the newly-created Intellectual Property Court of the Circuit Court should be possible.

It will remain the role of the Minister to make policy decisions, for the Controller to implement policy and to regulate and administer the State's formal intellectual property infrastructure, and for the Courts to provide ultimate resolution of disputes.

Rightsowners

Under this heading, many issues were considered by the Committee; and, in the case of a number of these issues, it was decided that the status quo should be maintained - these issues include the registration of copyright, the definition of

“originality” of a work and, the introduction of levies upon devices or storage media that facilitate copying.

In order to resolve certain ambiguities in the Copyright and Related Rights Act, 2000 (CRRA), changes have been suggested in a number of areas:

- that the sound track accompanying a film should be treated as part of the film;
- that in relation to unpublished works and to ensure the removal of the potential for them to enjoy perpetual copyright, it should be clearly provided that copyright expires 70 years after the death of the author, irrespective of whether the work was ever made available to the public;
- that remedies for breaches of copyright should be proportionate and provide for a graduated range of civil remedies according to the gravity of the offence. No change is proposed in relation to the criminal sanctions that apply;
- that, with respect to photography, it is recommended that metadata should be defined and that express protection be afforded under copyright legislation to clarify that tampering with it or removing it constitutes an infringement of copyright. Finally, no cause was found to remove the exemption that currently applies in relation to copyright in photographs which allows them to be used under the terms of the news fair dealing exception;
- that legislative protection should be introduced so that rightsowners and licensees alike can seek remedial action against infringement where rights protection measures are invoked and the extension of protection so that the removal or interference with rights management information will constitute a civil infringement of copyright actionable by rightsowners;
- that the definition of “broadcast” be amended to ensure that it is technology-neutral and based on the concept of “electronic transmission” of information. Furthermore, that clarification is provided to the effect that internet transmissions are exempt from

the provisions of the CRRA that enable cable programme services to receive and simultaneously retransmit broadcasts without infringing copyright.

Intermediaries

The *Report* recommends that certain elements of copyright legislation should be clarified to ensure that the mere technological process of transmitting data which result in the making of transient and incidental copies does not result in an act of copyright infringement. Consideration was given also to the issue of “notice and take-down” actions associated with potential secondary infringement of copyright and the liability of intermediaries in the instances of acting as a conduit, caching and hosting content but the recommendation is that further legislative proposals may emerge from the EU arising from CJEU case law in this complex area and that no reform should be contemplated until this becomes clearer. Similarly, no recommendation is proposed in respect of whether further immunities might be required beyond that in place for intermediaries, specifically in respect of search, framing and cloud computing.

The *Report* recommends providing legislative certainty that the act of providing a “link” to news articles does not infringe copyright on the basis that the link conveys that an article exists but does not, of itself, amount to publishing, reproducing or communicating the content of the article. With regard to marshaling activities such as indexing, syndication, aggregation and curation of online content, the *Report* recommends the creation of a very narrow exception under copyright, permitting the use of a very small snippet of the linked work (generally 140 characters, or 2.5%; subject to a cap of 40 words) reasonably adjacent to the link.

With respect to news, the *Report* recommends that the existing CRRA exceptions be amended to provide for the full range of exceptions allowed by EU law.

Users

The *Report* concludes that, if Ireland is not to be at a competitive disadvantage to countries such as the UK, who are transposing the full range of EU exceptions and limitations into UK law, we will need to do likewise. Its recommendations include:

- the insertion of an amendment to the CRRRA definition of “fair dealing” by which acts referred to are not an exclusive list and could include other acts not listed. This should provide the necessary flexibility for the development of innovative ways of creating and transforming works of authorship;
- the introduction of private copying exceptions, including a clear exception for reproductions on paper for private use; a format-shifting exception for private use; and an exception to allow for the making of back-up copies;
- the introduction of a fair dealing exception for the purposes of caricature, parody, pastiche or satire;
- the introduction of an exception for non-commercial user-generated content;
- the introduction of education exceptions for illustration for education, teaching and research, for distance learning and for use by educational establishments of work available through the internet, together with a formal definition confining “education” to formal education on the non-commercial sector;
- the amendment and extension of the existing CRRRA exceptions for persons with a disability to provide for multiple copies made by designated bodies and for such bodies to hold intermediate copies; and
- the introduction of exceptions for public security and various proceedings; for use during religious or official celebrations; and during demonstration or repair.

Entrepreneurs and Innovation

The essence of innovation is a substantial development or innovation that creates new value. The *Report* examined whether it was possible to draft a balanced

copyright exception to promote investment and recommends the introduction of a tightly drafted and balanced exception to allow for innovation, defining an innovative work as an original work which is substantially different from the initial work, or a substantial transformation of the initial work.

Heritage

Given Ireland's strong cultural heritage and traditions in art, music and literature, an important strand of innovation is likely to be provided by the creative capacity of artists to generate innovative content. In the area of heritage, the *Report* recommends that references to "libraries and archives" be replaced by "heritage institutions". It further recommends new exceptions for such institutions in the areas of format shifting for archival or preservation purposes, in the display of works in the permanent collection on terminals, in lectures; and for the publication of a copy of a work in a catalogue relating to an exhibition.

The *Report* considers the possible extension of the existing copyright deposit provisions relating to books to digital publications and recommends new legislation that will ensure that the existing copyright deposit institutions will be able to claim digital publications in the same way as they can claim print publications at present. However, to prevent them being swamped, the deposit institutions will be able to decide which digital publications they wish to claim. Furthermore the Heritage Fund Act, 2001 should be amended to include digital publications, thereby potentially unlocking a significant source of funding for such institutions. With respect to content-mining, the *Report* recommends an exemption for content-mining, cast in similar terms as fair dealing, which make it clear that the content-mining must be for a purpose and to an extent which will not unreasonably prejudice the interests of the rightsowner.

Fair Use

The *Report* acknowledges that fair use is a controversial topic, with powerful views expressed both for and against it. It does not recommend the introduction of the "the US style 'fair use' doctrine" which it considered under its terms of reference, but rather a specifically Irish version.

It recommends the introduction of a new CRRRA section allowing for fair use, but tying it very closely to existing exceptions and making it clear that these exceptions should be exhausted before any claim to fair use should be considered. The exceptions should be regarded as examples of fair use so as to allow workable analogies to be developed, and sets out the criteria for the court to take into account in determining whether or not a matter amounts to fair use.

The *Report* concludes that a fair use exception can and does sit comfortably alongside the successful exploitation of copyright by rightsowners and does not see any legal reason against the development of a tightly-drawn fair-use exception. The *Report* finds that the doctrine as drafted would enable context-sensitive accommodations to be developed as the occasion arises without the need to amend legislation, thereby sending important signals about the nature of the Irish innovation system and providing the Irish economy with a competitive advantage in Europe.

Non-Legislative Recommendations

When considering the nomination of a person to be Chairperson of the Copyright Council of Ireland, consideration should be given to ensure that person has the necessary background and skills to manage a widely-representative Board.

Transparent categories of membership and scales of fees should be introduced by the Copyright Council of Ireland to ensure that as many members of the copyright community can become subscribing members of the Council as is possible.

The introduction of a new intellectual property jurisdiction to the District and Circuit Courts is irrelevant if proper training is not provided and if it this development is not properly resourced; and, although that is a matter for Government, the *Report* strongly recommend that such training and resources be provided as a matter of priority.

The *Report* also strongly recommends that the Office of the Controller of Intellectual Property continue to be properly resourced.

