

ROBERT CLARK

Dear Chairperson and Members of the Review Group

I will not detain you too long in respect of this submission.

My philosophical position is generally pro rightholder; I do not believe that copyright law is fundamentally broken, nor that copyright is an inappropriate means of incentivising creative industries and individual endeavour. I have problems about whether certain rightholders, eg the record industry, is really a creative industry and there is no doubt that copyright lasts too long. On balance however I take the view that copyright must remain in much the same form that it exists at present. In essence Ireland cannot operate outside the EU Acquis and I am opposed to any effort to shift towards a fair use model, which in most cases, is not able to deliver the kinds of flexibility claimed for it in the USA (DCMA will generally 'top' fair use). Nor do I think that the track record of players like Google (eg. Google Books Non Settlement) suggests any respect for author's rights is a part of the DNA of such companies. There are areas where Ireland has room to make useful changes that will usher in innovation.

There would be a lot of sense in changing the test of originality for All copyright works to that of 'author's own intellectual creation'. This would reflect the Infopaq Decision and thus get rid of the not copied / originating with the author test that applies to all copyright works other than software and databases. I would also suggest that the Act should repudiate a sweat of the brow/industrious collection test for both original databases and software. Such a simple measure would help to free up the public domain and deny protection to facts per se.

I would also suggest that the Committee should revisit the question of whether commissioned works that have been paid for by a commissioner should have the benefit of a default rule that says, absent an agreement to the contrary, copyright in any work that has been paid for by a commissioner should vest in the commissioner. For some artistic works in particular the 1963 Act had such provisions and in retrospect getting rid of this rule( as the UK did in 1988) was a bad idea. There is a welter of caselaw in the UK and Australia that finds ownership can be established via implied contract, trust law etc, but this is expensive and uncertain. A default rule the other way might be better. Of course the commissioner should not get rights to background IP ( very important in software contracts) and there will have to be an adjustment for moral rights, but in my experience this is a problem that is more important than orphan works.

I would also suggest that some of the evidentiary issues that arise from time to time can be addressed via specific rules. Take a work created by a team, some being contractors and others being employees, students etc. It should be possible to prove ownership by reference to a standard whereby the commissioner should obtain title by saying that as long as the commissioner has done all that could be expected to effect an assignment of rights, or other means of perfecting title, the fact that some persons cannot be traced or identified should not prevent ownership by the commissioner being established. This would stop Ireland following the logic of recent

Australian caselaw. Other presumptions can readily be identified that will not cut across the Community acquis.

Database rights are a mess in Ireland. I would go back to the drawing board and start again with the Directive. Some provisions in CRRA are actually more restrictive than the Directive requires and after the Yahoo! Reference to the ECJ is resolved, it will be possible to formulate a better statement of the law, drawing on ECJ cases such as Directmedia.

Finally, ADR an effective dispute resolution mechanisms are needed. A look at the new UK twintrack approach and the efforts made in the UK to make the Copyright Tribunal work cheaply and speedily is instructive. A visit to UCD to see how Brian Hutchinson's on-line mediation service works would be a help. The Copyright Association of Ireland will hold a seminar later this year and we will invite you to attend.

I wish the Review Group well in it's work.

bob Clark