

14 July 2011

Copyright Review Committee
Room 517
Department of Enterprise, Jobs and Innovation
Kildare Street
Dublin 2

Ref: Consultation on the Review of Copyright and Related Rights Act 2002

The Commission for Communications Regulation (“ComReg”) would like to make the following submission in response to your request of 9 May 2011, for consideration in your preparation of the consultation referred to above. ComReg’s current remit provides a basis for comment and interest in any developments in the area both in terms of coverage and perspective. ComReg would also be willing to meet with you to discuss the issues raised in more detail in order to better assist the Department in this area.

While ComReg’s remit arguably does not extend to copyright issues per se innovation in the provision of electronic communications is clearly a focus and copyright has a direct influence on this. ComReg’s statutory functions and objectives include the promotion of competition and the interests of users in relation to the provision of electronic communications networks, electronic communications services and associated facilities by promoting innovation.

I have set out our views in response to the particular issues you raised in your request below.

- 1. Examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation.**

The dynamic developments in the provision of broadband access have been specifically analysed by ComReg in recent months. We have issued the following two papers as regards competition in these markets and innovation has been a key consideration:

- [11/49 - Response to Consultation and Decision; Market Review: Wholesale Broadband Access](#)
- [11/40 - Next Generation Access \(NGA\) Remedies in Wholesale Regulated Markets](#)

Against this other innovative developments are relevant to developments in the Broadband arena, for example the Growth of “cloud computing,” allows users to employ a variety of protocols, applications, and transmission techniques to store data and to harness the processing power of remote servers, often controlled by third-party providers. The development of cloud computing, heralded by more-expansive and less-expensive broadband Ethernet connections, is poised to add a new challenge to copyright enforcement as more users take to the cloud to store, transmit, manipulate, and share content. The most recent announcements in the last few weeks of deals between UPC and Microsoft and O2 are noteworthy.

While ComReg does not regulate content, the three strikes rule has also been before the Courts and again has raised issues that are tangential to ComReg’s areas of concern. In the three strikes case Mr Justice Charleton saw the exclusive right of copyright owners as being “flagrantly violated” by peer to peer illegal downloading and in those circumstances it was within the legitimate interests of eircom to act as a body which upholds the law and to do so by means of the “three strikes” procedure did not amount to unwarranted processing of personal data. Justice Charlton also said that the internet is only a means of communication and has not rewritten the legal rules of each nation it passes through.

ComReg has a duty to monitor and enforce the right of functional internet access to the Universal Service Provider (currently eircom) upon reasonable request; and the duty to ensure providers comply with their duty to manage risks posed to the security of an electronic communications network and service but has no remit over what is accessed with the possible exception of a new requirement in the newly transposed 2011 Universal Service Regulations requiring that ComReg may require undertakings providing public communications networks or publicly available electronic communications services to block, on a case by case basis, access to numbers or services where this is justified by reason of fraud or misuse and to require undertakings to withhold relevant interconnection or other service revenues.. (Please see the following link: [European Communities \(Electronic Communications Networks and Services\)\(Universal Service and Users’ Rights\) Regulations 2011 \(S.I. No. 337 of 2011\)](#).) However, this only applies where the Internet is accessed via a phone number which would still exclude UPC.

The effect of innovation via the Internet for the sale of copyrighted works highlights significant changes in producer and customer behaviour, and consequential shifts occurring within the distribution of the value chain. Further, the rate of change appears to be accelerating and hence there is a risk that the legal framework will become insufficient and may potentially constrain and impede innovative change. One can view these trends as progress or threat depending on one’s position within the chain. Is there a net social welfare increase or loss? Again, there is an active debate on these issues. The Department will very likely want to access appropriate sources of technical, industry, consumer and economic expertise to understand fully the market context for copyright.

We also note in the context of procurement in the public sector the maintenance of IPR clauses in public sector contracts is on point, essentially if a public body insists on becoming the legal owner of IP created by the winning tenderer/consultant. During the

recent (and ongoing) procurement processes within ComReg innovation has been considered and our willingness to move from our standard IPR clause to consider different forms of ownership where any creative product (probably a software model) might be created during the project by the consultant for ComReg. Traditionally it had been our view that we must retain full ownership of anything created by the consultant. However increasingly we were coming under pressure in relation to this clause. The IP ownership options proposed in the latest tender ranged from full ownership, joint ownership, to ComReg as mere licensee (with different rights as licensee depending on what was appropriate for that project). This, we suggested, could be further broken down into background and foreground IP and between object and source code etc. The drafting of the IPR clause in these situations can get quite complex and the types of ownership and use is determined (and separately is often difficult to deal with in a procurement process for various reasons).

ComReg has found instructive a number of procurement/e-tenders publications, the Department of Enterprise publications and a document of the European Commission on a similar topic. These documents typically discussed the inappropriateness of IPR in an inventive product/process, resting with a public body whose own primary function was not product development or in business -with the result that the inventive step was contained within the public sector organization and was not further released into industry or capable of being further exploited and built upon. An example given in some of the European Commission literature on the subject made reference to a hospital insisting on full IPR as regards a swing pedal function on some hospital equipment and who were slow to release the IPR back to the company who it retained to solve a problem for it, in order that the company could apply it to other products or otherwise release it to the market. The hospital had no intention or statutory function itself as regards further exploiting or developing the project itself for the market or selling it. It should be noted there is a direct link between price and the IPR/copyright clause- where a public body moves on IPR exclusivity one would expect more competitive quotes.

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

In the context of illegal downloading of music referred to above we are aware that eircom, UPC and other internet service providers O2, Vodafone, 3 and Meteor have been involved in contributing to the debate and in some cases as a result of significant litigation on the related issue of illegal downloading in the Irish Courts. Inward investor companies like Google and Facebook also have a very great interest in these matters and should likewise be listened to; and we suggest that the Review Committee actively seek submissions from these companies and from other members of the Telecommunications and Internet Federation. We would also suggest the appointment of members of the Committee to address specifically the needs of SME innovators and of ordinary users.

We have commented in our Strategy Statements on the expected strong growth in the 'Internet of Things' – more Machine-to-Machine, Smarter Networks, greater use of RFID devices in home, workplace, hospital etc. Copyright law should not be so inelastic as to inhibit such innovations. (Please see the following link [10/47 - ComReg's Strategy Statement 2010 - 2012](#))

Further, ComReg's Spectrum Test and Trial is a possible model for how to encourage innovation in Ireland. The licensing scheme for wireless services and technology trials makes Ireland an ideal location for research and development in wireless innovation allows for innovative and new wireless services to be offered to the public on a trial basis. This allows for new technologies and services to be tested in a realistic environment in order to ensure that subsequent commercial offerings are properly tailored to meet the needs of the market. (Please see the following link for further details including previously issued licences e.g.

Trinity College Dublin, Centre for Telecommunications Value-chain Research	Cognitive radio, cognitive networks, and dynamic spectrum access techniques (IEEE DySPAN 2007)
TYCO Safety Products (Sensormatic)	UHF product testing (865 - 868MHz)
UCD Dublin School of Computer Science and Informatics	UWB location tracking system evaluation

http://www.comreg.ie/radio_spectrum/wireless_test_and_trial_licensing.541.545.html)

ComReg's remit requires not only that it not promote competition at the expense of innovation but also that it be technology neutral. Technological neutrality would also be a valuable consideration for the Review Committee. To this end the review should not be technologically deterministic, i.e. to base a set of rules/laws on a particular view of how technology will evolve and be used. ComReg has continuing exposure and experience of managing this particular issue most recently in the context of next generation access previously referred to above and in the continuing evolution of the use of spectrum.

The experience and proposed recommendations in the UK following the Hargreaves report in May 2011 (Please see <http://www.ipo.gov.uk/ipreview-finalreport.pdf> and <http://www.ipo.gov.uk/press-release-20101206.htm>) are instructive and the following suggestions made by Professor Hargreaves in his recent report are noteworthy:-

- a) Setting up of a new agency to mediate between those wanting to licence music, film and other digital content and rights owners.
- b) To legalise format shifting for personal use i.e. copying music from CDs and DVDs onto digital music players and computers.
- c) The creation of a Digital Copyright Exchanger to deal with orphaned works to allow TV stations and Film Institutes to use archive material which previously would not have been permitted to be shown because of doubt of ownership.
- d) Relaxing laws on parody.

3. Examine the US style “fair use” doctrine to see if it would be appropriate in an Irish/EU context.

Again the UK report is instructive it does not support the concept of “fair use”.

“UK businesses were implacably hostile to adoption of a US fair trade defence in the UK on the grounds that it would bring: massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods...”

“..The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law.”

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.

Copyright laws were originally applied to small sets of producers and there are inevitably problematic issues of compliance where these laws touch on the daily activities of consumers. In ComReg’s view, further evolution in digital permissioning and payment systems is likely to facilitate positive change and higher levels of compliance.

Further clarity as to what is meant by misuse in the context of copyright and the use of the intranet would also be of direct value to ComReg in light of the new framework Regulations transposed directly from the 2009 Directives. (Please see the following link) [Directive 2009/136/EC](#) aka "Citizens' Rights" Directive(*)