

Dr. Eoin O'Dell
Chairman, Copyright Review Committee
Room 517, Department of Jobs, Enterprise and Innovation,
Kildare Street, Dublin 2.

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Via email: copyrightreview@djei.ie

Submission on behalf of Digital Rights Ireland Ltd.

Dear Dr. O'Dell

Digital Rights Ireland (“DRI”) welcomes the opportunity to respond to the call for submissions to the Copyright Review Committee. DRI is a not for profit company which was established for the purpose of defending civil rights in a digital age. The author is chairman of DRI, a lecturer in the School of Law, UCD and a practising solicitor specialising in issues involving information technology and online business. This submission reflects the points raised by individuals who have contacted DRI and also the issues encountered by the author in research and private practice.

Impact on fundamental rights

Copyright is not merely an economic issue but also an issue which impacts on other key fundamental rights. Of its nature, copyright involves conferring the power on one party to limit the communications of others. Consequently this restriction on freedom of expression must be kept in mind in determining whether any particular aspect of copyright law is a proportionate measure towards protecting the legitimate economic interests of creators, and is of particular importance when considering the scope of the copyright exceptions.

In addition, to an increasing extent copyright enforcement measures now present further problems for fundamental rights. Numerous international measures – notably the provisions of the Telecoms Reform Package¹ – have recognised internet access as a fundamental right which is very closely related to the rights of freedom of expression and access to information. However, these rights are threatened where steps are taken to disconnect users or block access to websites, particularly where this is done in an extra-judicial context without a legal basis or fair procedures. The rights to privacy and confidentiality of communications are also implicated where attempts are made to force intermediaries to monitor the activities of internet users. These rights must also be taken into account in determining whether particular enforcement measures are reasonable and proportionate.

Fair use

DRI supports the introduction of a general fair use doctrine into Irish law, while acknowledging that the constraints of the Information Society Directive will require action at an EU level before this can be introduced.² Nevertheless, before going on to consider the extent to which Ireland is free to maneuver within the parameters of that directive, it may be desirable to consider a specific point commonly made in relation to fair use.

It is sometimes said that a fair use doctrine tends to produce uncertainty. This complaint, however, misunderstands the nature of legal principles and demands a level of certainty as to the outcome of litigation which is beyond the capability of the legal system. Whenever a court is called on to apply general principles to the facts of individual cases – whether in the context of fair use, existing fair dealing exceptions or even the duty of reasonable care in negligence – it is possible that there will be a degree of uncertainty about the outcome. This is, however, no fault of the legal principles involved but rather reflects the fact that human interactions are so diverse that no rule can anticipate every possible case. This is particularly so in the area of technology where rapid developments mean that rules which are technology specific become outdated very quickly.

¹ In particular article 1 of Directive 2009/140/EC.

² Assuming that article 5 of Directive 2001/29/EC is intended to be exhaustive.

Consequently, the open-ended nature of the fair use doctrine must be considered as a positive factor, particularly insofar as it facilitates innovation. The alternative – specific fair dealing exceptions – creates a situation where the law will lag behind technology and will give rights holders an effective veto on the development of new products and services. In this regard, DRI would refer to and adopt the comments made by Google in its submission to the Hargreaves Review, where it notes that:

“Without a robust fair use doctrine... many of the online platforms for creativity and research that we take for granted might never have made it off the ground. MP3 players such as the iPod, VCR and DVD players, and search engines such as Google are all fundamentally grounded in the US Fair Use regime that enables innovation.”³

DRI therefore recommends that steps are taken to pursue the development of a fair use exception at EU level.

Developing domestic fair dealing exceptions

DRI would refer to and adopt the conclusions of the Hargreaves Review in relation to developing domestic copyright exceptions so far as permitted by the Information Society Directive, in particular the recommendations that specific exceptions are adopted in respect of format shifting, parody and pastiche.⁴

Database Directive

In 2008 Prof. James Boyle said of the Database Directive that:

“The facts are now in. If the European Database Directive were a drug, the government would be pulling it from the market until its efficacy and harmfulness could be reassessed.”⁵

³ At p. 5.

⁴ Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (HMSO, 2011), pp. 48-50.

⁵ Boyle, *The Public Domain* (CSPD, 2008), p. 217.

In doing so, he pointed out that the Commission's 2006 empirical study on the effect of the Directive had shown that its economic impact was unproven and that it had not stimulated the production of databases in Europe as had been intended.

This departure from evidence based policy might be acceptable if the effects of the Directive were narrowly confined. However, it is worrying when there is evidence that the *sui generis* right created by the Directive has a spillover effect and threatens online activity which does not involve the type of unfair competition it was meant to target.

One example relates to deep linking. It is sometimes claimed that simple deep linking to a publicly available web page (which is not pay-walled or otherwise subject to a technical protection measure) constitutes an infringement of the *sui generis* right and this author is aware of such claims being made in Ireland. Although the bulk of the caselaw in other jurisdictions is against this result⁶, the lack of guidance on this point in Ireland and the potential cost of litigation operates to deter online businesses from linking to websites which object, undermining the role of linking as a means of providing users with easy navigation throughout the web.

The Directive also gives rise to ambiguity as to the extent to which online services (such as search engines) can reuse or index information from other sites where those sites may qualify as a protected database. Notwithstanding recent caselaw from the European Court of Justice, there is still a lack of clarity about the scope of the acts restricted by the Directive and related concepts such as the notion of a "lawful user" in the context of public websites.⁷

Given these side effects of the Directive, DRI submits that the Committee should examine the extent to which the *sui generis* right affects online business with a view to recommending change at EU level if necessary.

⁶ Jennings and Yates, "Scrapping over data" (2008) 4(2) *Journal of Intellectual Property Law & Practice* 120; Mercado-Kierkegaard, "Clearing the legal barriers - Danish court upholds 'deep linking' in Home v. Ofir" (2006) 22(4) *Computer Law & Security Report* 326; Clark, "Sui generis database protection: a new start for the UK and Ireland?" (2007) 2(2) *Journal of Intellectual Property Law & Practice* 97.

Contractual restrictions on use of information

Prof. Lucie Guibault has argued that:

“there is a growing tendency in continental Europe to distribute information subject to the terms of on-line standard form contracts...As a result, the widespread use of on-line licenses may end up posing a threat to the intellectual property policy objectives and the integrity of the public domain, insofar as they may contribute to displace democratically established public ordering assumptions. This remark holds true whether the contractual arrangement attempts to reserve non-protectable subject matter or purports to restrict the exercise of user privileges normally conferred under the laws of intellectual property. In both cases, such contracts may have the effect of shrinking the public domain to the extent that contractual arrangements expand rights of control over informational works provided by intellectual property law.”⁸

This trend may pose a particular risk in Ireland due to the recent decision in *Ryanair v. Billigfluege.de*.⁹ In that case, Hanna J. held that terms of use were binding on a visitor as a result of their use of a site where a hyperlink to the terms was “clearly visible”, notwithstanding that the visitor had not clicked or otherwise taken any affirmative step to indicate their acceptance of those terms. When coupled with the common phenomenon of sites which aggressively claim ownership of information, this wide browsewrap theory potentially enables site owners to assert exclusivity over information above and beyond that granted by either copyright or the *sui generis* right.

At this point, therefore, it becomes important to consider the extent to which Irish law may limit such contracts. The anti-waiver provisions of the Copyright and Related Rights Act (“CRRA”) 2000 are relevant here. The first of these is the general provision in s. 2(10) which provides:

⁷ Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgard, 2008), Ch. 3.

⁸ Guibault, “Wrapping Information in Contract: How Does it Affect the Public Domain?” in Hugenholtz and Guibault (eds.), *The Future of the Public Domain* (Kluwer Law International, 2006).

⁹ [2010] IEHC 47.

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

The second provision – which is specific to databases – is s. 327 which provides:

“327.—(1) Without prejudice to section 324 (3), a lawful user of a database shall be entitled to extract or re-utilise insubstantial parts of the contents of the database for any purpose.

(2) Where, under an agreement, a person has a right to use a database, any term or condition in the agreement shall be void in so far as it purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database for any purpose.

(3) While exercising the entitlement conferred by subsection (1), a lawful user of a database shall not prejudice the owner of any right conferred by this Act in respect of works or other subject matter contained in the database.”

Between them, these two provisions do seem to address the majority of concerns regarding attempts to “wrap information in contract” and s. 2(10) in particular appears to protect the statutory exceptions to copyright. There may be a gap, however, in respect of material or actions which do not fall within either copyright or the *sui generis* right to begin with.

Consider, for example, the Dublin Bikes app case. In 2009 Irish software company Fusio developed a free app for the iPhone which displayed the availability of bicycles in the Dublin public bicycle rental scheme. It did so by accessing a publicly available XML feed hosted by the scheme operators JC Decaux on their DublinBikes.ie site. On learning of this, JC Decaux demanded that the app be removed from the Apple App Store, stating that:

“you do not have the rights to use the information published on the web site <http://www.dublinbikes.ie/>. In particular the data concerning the stations is the property of JCDecaux and cannot be used without our prior authorisation”¹⁰

Fusio withdrew the app shortly afterwards.

¹⁰ “Free iPhone application for bike scheme withdrawn”, *The Irish Times*, 9 September 2009.

In that case, the precise legal basis of JC Decaux's complaint was not clear. However – assuming that reuse of bicycle location information was prohibited by binding terms of use – would either s. 2(10) or s. 327 override that contractual restriction? On the face of it the answer would appear to be no. If we assume that the information as to the location of bikes does not qualify as either a copyright work or a protected database then a contractual restriction on revealing that information would not be affected by either anti-waiver provision. If this analysis is correct, it would lead to the perverse outcome that a site owner can assert *greater* control over information which is *not* protected by either copyright or the *sui generis* right. A similar result may apply to other actions – such as deep linking – which are prohibited by site terms of use but which do not benefit from the anti-waiver provisions.

This is necessarily a preliminary analysis, given the apparent absence of any Irish case law on these anti-waiver provisions. Given this background, however, DRI submits that the Committee should investigate whether Irish law permits site terms of use to tie up information in a manner which is incompatible with the uses which CRRA 2000 seeks to safeguard. As the Dublin Bikes app example illustrates, the possibility of contractual restrictions may inhibit the innovative reuse of information which the legislature has decided should not itself be protected.

Form of take down notices

Finally, a practical problem is faced by online intermediaries who host user generated content. It is not uncommon to receive allegations that material uploaded by users infringes the copyright of a third party, where those allegations either fail to specify the work in question, fail to specify the particular posts or files which are said to be infringing, or fail to specify the URL or location of those files. As a result, Irish services which host user generated content are faced with notices which, in effect, demand that they engage in a costly and inefficient process of seeking to identify unknown material which may infringe the rights of a third party. Whether or not such notices would be valid for the purposes of s. 40(4) CRRA 2000, a considerable workload is created in responding to them.

Surprisingly, despite being given a statutory power to do so in s. 40(5) CRRA the Minister has not prescribed the form of notice to be given in such cases. By contrast, under the US Digital Millennium Copyright Act (“DMCA”) a takedown notice must:

- Identify the work alleged to have been infringed;
- Identify the material claimed to be infringing, including information reasonably sufficient to enable the service provider to locate the material;
- Provide contact details for the complaining party;
- Include a physical or electronic signature;
- Include a statement that the complaining party has a good faith belief that use of the material is not authorised by the copyright owner, its agent, or the law;
- Include a statement that the information in the notice is accurate and, under penalty of perjury, that the complaining party is authorised to act on behalf of the owner of the right in question.¹¹

This prescribed form provides a significant practical benefit for Web 2.0 services and other sites which host user generated content, reducing the administrative burdens faced by them. It also benefits complainants, by providing them with a clear template as to the information they must provide to achieve a takedown, while at the same time serving to deter abusive and fraudulent complaints. As the DMCA system is widely regarded as providing adequate protections for rights holders in the United States, it is difficult to see why a similar requirement could not be adopted in Ireland. DRI therefore submits that the Ministerial power under s. 40(5) (or, if necessary, an amended statutory power) should be used to prescribe a clear and detailed set of requirements, modeled on the DMCA, which must be met in order for a takedown notice to be valid in relation to hosted material.

If we can be of any further assistance to the Committee please do not hesitate to contact us.

Yours sincerely

TJ McIntyre

¹¹ 17 U.S.C. § 512(c)(3).