

Copyright Review Committee Consultation

Fianna Fáil Submission



Introduction

We welcome the opportunity to contribute on this important matter. It is the Fianna Fáil policy that a comprehensive framework on copyright management should be produced, one which balances the rights of copyholders, the privacy of end users, and the need to maintain and encourage innovation. This consultation is welcome as part of that process.

In order to encourage individuals to experiment and innovate, we must ensure that a legislative framework is in place which does not impede their work, that they are undeterred by potential litigation, and that the rights of copyright holders are not impeded.

Unfortunately, the Government has deliberately excluded a key element of that framework i.e. the recently signed Copyright SI. It is an ad hoc law which does not give the courts sufficient guidance when imposing injunctions. It is our view that primary legislation should have been brought forward so that courts are given guidance in this regard.

We would also highlight that issue has been mishandled by the Government. The mixed messages sent out have sent out a dangerous signal on Ireland's position. We should not send out any signals that we are proposing to impede on the dynamism of the internet, on which high-tech firms based here rely.

Focus & Scope of the Review

The Review of our copyright legislation is welcome. The most recent legislation dates back to 2000 and communication and innovation networks have been transformed since then. We agree the views of all stakeholders should be taken on board when preparing legislation on the matter.

It is however disappointing that the scope of the consultation excludes the recently signed Statutory Instrument which provides for injunctions for rights-holders against intermediaries whose services are used to infringe rights-holders' copyright. Any

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consultation should have been initiated before the signing into law of the order, and not after.

This would have given the Minister the opportunity to listen to the concerns of all interested parties. He should then have proposed a comprehensive framework which would balance the rights of copyholders, the privacy of end users, and the need to maintain and protect a dynamic internet.

When Fianna Fáil was in Government, then Minister Mary Hanafin rejected the signing into law of such a SI without consultation. In February 2011, she stated:

“There is absolutely no truth in the rumour circulating in the media that I am about to sign a statutory instrument relating to the Copyright and Related Rights Act 2000 and/or the EU Copyright Directive 2001... It would be normal practice within the Department of Enterprise, Trade and Innovation to consult all the relevant stakeholders in advance of legislation such as this being enacted. I would expect that this consultation will take place when the Department and the new Minister have a clearer view of the best way forward on this issue.”

Unfortunately, Minister Sherlock took a different view. The SI was again mooted over the course of Christmas 2011. In January 2012, the Minister signed the controversial order with a minimum of debate, and then announced the consultation. By operating in this manner, many feel that the consultation is a cynical exercise in public relations management in order to deflect criticism rather than a genuine forum to gather the views of interested parties.

We would also point out that the SI may not have been necessary. The Department had noted that injunctions were already available in Irish law under Section 40 (4) of the Copyright and Related Rights Act 2000 and “by reason of the inherent power of the courts to grant injunctions, which are equitable and discretionary remedies granted according to settled principles, developed by the courts.”

The delay in signing the SI would seem to indicate that the existing legislation was compliant with EU legislation. In the normal course, if any EU Member State fails to

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comply with its obligations pursuant to European Law, infringement proceedings would have commenced before now.

Clarity about Irish Copyright Law & Mixed Messages

We would welcome clarification and modernisation of the basis of Irish copyright law. The Government had proposed to overhaul legislation in order to put Ireland at “cutting edge of creative international copyright” locations.

Again, we would see January’s move as running contrary to this claim. As a country, we work hard to convince companies such as Twitter, Facebook and Google to locate here and hire Irish workers. At the same time, the Government rushed to sign a SI which could undermine their work. As technology writer Karlin Lilington pointed out at the time:

“Rather than create a great big mess, we need to halt the current legislation, wait for the pending copyright law overhaul to be completed, and create a new copyright landscape that helps rather than hinders Ireland, its businesses and its creativity.”

That is why we need a comprehensive framework, and not ad hoc laws that send out mixed messages. Such messages could undermine the good work of agencies such as the IDA who are trying to encourage innovators to locate here. The SI sent out an unwelcome signal regarding our readiness and availability to support and foster investment in the information, communications and technology sectors.

Exclusion of the role of the Oireachtas

The role of the Oireachtas has been undermined during this affair. It is significant that Charleton J. in EMI v. UPC referred to any legislative intervention being properly a matter for the Oireachtas. The judgment of the CJEU, and in particular in the opinion of the Advicat General in Scarlet (Extended) v. SABAM (Case C-70/10)

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similarly referred to a need for legislation in this area to be “democratically legitimised.”

It was undesirable for a matter dealing with fundamental rights to be disposed of by way of secondary legislation. It was the more undesirable in this case, however, given the vague and open-ended nature of the powers involved. This is, in effect, a case of delegation heaped on delegation – rather than rules governing blocking and other remedies being made by primary legislation, or even secondary legislation, they are instead effectively being made by delegation to the judiciary. It seems likely that such an open-ended power will ultimately be the subject of judicial criticism as being unworkable.

The statutory instrument itself gave no guidance to the courts as to how they will exercise their powers to grant injunctions. For example, Minister Sherlock said he was confident the courts will act in accordance with the principle of proportionality and that he does not think the courts will block websites. Why not put it in the form of legislation? Ireland is the only country that will be affected if there is undue disruption of innovators because of the way the judges interpret the scope of the powers we are now giving them. Why not restrict those powers? At the same time as making it explicit that judges can grant injunctions, why not simply write it in the rules which will govern the granting of those injunctions?

Hopefully the outcome of this review and consultation process will clarify those rules. However, in the meantime, an ad hoc law remains in place, one which puts at risk innovation and jobs.

Fair Use and the Need for a Framework Which Promotes Innovation

Investment in science, technology and innovation is an essential part of restoring growth and job creation in the years ahead. Fianna Fáil has shown a strong commitment to the area of innovation in government. We did so because there is no such thing as a high-income economy which fails to invest in science, technology and innovation.

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We believe that Ireland can be a Global Innovation Hub. It is achievable with the right policies – delivering high-quality employment which is sustainable and competitive. When it comes to attracting multi-million investments to this country, as well as helping Irish companies to establish and grow, investment in ideas and people is the biggest competitive edge we can have.

During the General Election, Labour leader Eamon Gilmore said “we can’t all work in a laboratory”. He’s absolutely right: we can’t. But thousands of people are today directly and indirectly supporting hundreds of thousands of jobs through their expertise and innovation. It is crucial that the Government creates a framework which supports such innovators, and not hinders them.

In this regard, the introduction of a Fair Use policy would be a welcome move. It would allow us to compete with other countries which have introduced such policies into their copyright frameworks. Innovation exceptions have also been successfully introduced in Australia.

Innovation results in a significant or substantial improvement, or enhancement, or transformation, or in something different, or even entirely new. These new insights, new goods or new services will have the capacity to generate economic growth and deliver benefits to society as a whole. It seems unlikely that innovation can flourish unless an adaptation right is enshrined in copyright legislation.

Ireland is ideally placed for such an exception. We have invested in our workforce, and now have one of the most highly educated workforces in the world. Our third level campuses are thronged with potential entrepreneurs and technology developers. In order to encourage these individuals to experiment and innovate, we must ensure that a legislative framework is in place which does not impede their work, that they are undeterred by potential litigation, and that the rights of copyright holders are not impeded.

Further Steps Required in Advance of Introduction of Legislation

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It was disappointing that no Regulatory Impact Assessment (RIA) was available for review alongside the SI. This was contrary to Government policy on Better Regulation. The Government's guidelines acknowledge RIAs can contribute to better policy making as they enable policy makers to "identify potential burdens on business and ensure they are kept to a minimum". We would hope that the Government would ensure that a RIA is prepared in advance of the introduction of primary legislation.