Law Society of Ireland

Blackhall Place, Dublin 7, tel 01 672 4800, fax 01 672 4801
DX: 79 Dublin E-mail: general@lawsociety.ie
Website: www.lawsociety.ie

LAW SOCIETY OF IRELAND
SUBMISSION IN RESPECT OF
COPYRIGHT AND INNOVATION, A CONSULTATION PAPER
PREPARED BY THE
COPYRIGHT REVIEW COMMITTEE
FOR THE
DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION
29 JUNE 2012

The Law Society of Ireland (the "Society") welcomes the publication of the Copyright and Innovation Consultation Paper which is a thorough examination of current copyright issues in the context of innovation in Ireland.
The Society has focussed on particular questions raised by the Copyright Review Committee particularly in respect of the proposed Copyright Council, ADR and intellectual property and the Courts.

(1) Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?
In the some 12 years since copyright law has been substantially reviewed in Ireland, there have been dramatic changes in how copyright works are used and exploited. In light of this, we agree with a broad focus and with raising matters, where relevant to do so, that are broader issues than copyright alone (see further responses to questions 15, 16 and 19 to 21).

(2) Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?
The CRRA is a detailed and complex piece of legislation which itself affects the degree to which there is clarity on the basic principles. There certainly seems to be scope for better general education in relation to copyright principles but also better availability of user friendly information and training. The Patents Office is one obvious mechanism for disseminating further information about copyright in Ireland and it already provides some information via its website. As it stands, it is difficult to expect start-ups or even smaller SMEs to have detailed knowledge of Irish copyright law and in particular as a result of limited to no training in this regard in science and technology courses in Ireland.

(3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?
We are strongly of the view that one single (and consolidated) piece of legislation should arise out of the Review. This would in some way make copyright more accessible in Ireland.

(7) Should a Copyright Council of Ireland (Council) be established?
Currently, there is no one single entity representing the various interests in the copyright industry in Ireland. A Council is, in principle, a welcome idea (see further responses to questions 8 and 9).

(8) If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?
(9) Should its subscribing membership be rights-holders and collecting societies; or should it more broadly-based, extending to the full Irish copyright community?
We have grouped our response to questions 8 and 9 together as we are of the view that the response to question 8 follows the approach taken to question 9.
The Consultation Paper mentions the Australian Copyright Council (**ACC**), the Copyright Council of New Zealand (**NZCC**) and the British Copyright Council (**BCC**). A common feature of these organisations is that their members are drawn from either copyright holders or performers. Therefore, they seem to represent one side of copyright law in their jurisdictions (the Consultation Paper itself identifies six categories of relevant interests). It does not seem that these entities have specific or special recognition in local copyright law.
Accordingly, in respect of the Council, it seems that if it is to have any special recognition by the State then it should be more broadly-based, extending to the full Irish copyright community. It does not seem particularly fair to have only one (or similar) interest(s) recognised in some way. If any of the six categories of relevant interests wish to form representative bodies then they are free to do so, either generally or specifically in relation to copyright.

(10) What should the composition of its Board be?
The proposed Fourth Schedule in the Consultation Paper would seem to strike a fair balance in the composition of the Board except and insofar as provision is made for one director only who represents the interests of those who regularly make lawful use of copyright material. This seems in stark contrast to six in the public interest, three in right holders' interests and three who represent the interests of collecting societies.

(11) What should its principal objects and its primary functions be?
Similar to the bodies mentioned above at the response to question 9, the principal objects of the Council could include:

- Raising awareness of copyright law
- Input into copyright policy in Ireland, Europe and Internationally
- Provide an interface between the copyright industry and Government.

Again, based on the bodies mentioned above at the response to question 9, the primary functions of the Council could include:

- Provision of information, guides, seminars and FAQs relating to copyright
- Fostering dialogue and cooperation between the various interests in copyright
- Research in copyright law
- Fostering relationships on a European and International basis.

(12) How should it be funded?
The ACC, NZCC and BCC are all private not-for-profit bodies funded, presumably, primarily through membership fees. A private not-for-profit approach could also be taken in Ireland with a fee for membership as is suggested in the Consultation Paper.

(13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?
As set out in the Consultation Paper, the establishment of an Exchange should be welcomed both in terms of streamlining access to and licensing of copyright works and in terms of Ireland's competitiveness and leadership in this area. The totality of collective licensing could be addressed which is one particular issue raised in the UK Digital Copyright Exchange – *"Rights and Wrongs - is*

copyright licensing fit for purpose for the digital age? The first report of the Digital Copyright Exchange Feasibility Study".[1]

(15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?

In principle, the provision of an ADR Service in respect of smaller claims would be a useful mechanism for the potential resolution of certain copyright disputes. This ADR Service should be independent, non-binding and voluntary as suggested in the Consultation Paper.

However, the experiences of the UK Intellectual Property Office should be borne in mind. The UK IPO has offered a mediation service since 2006. In that time, it has only been used 20 times as evidenced by its recent Call for Evidence.[2] We are of the view that the pursuit of an ADR Service is worthy of consideration but that the matters addressed in our responses to questions 20 and 21 are equally if not more important.

(16) How much of this Council/Exchange/ADR Service architecture should be legislatively prescribed?

The draft Schedule 4 prescribes as much as detail as it necessary in respect of a Council. An Exchange, if it is to be successful, would seem to require flexibility as would an ADR Service and accordingly a minimum level of architecture should be legislatively prescribed.

(17) Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

We agree that the name of the office should be changed to one that reflects its functions across every area of intellectual property law. The powers of that office should be those that are currently enshrined by law and possibly the operation of the ADR Service (see response to question 19 below).

(19) Furthermore, what should the inter-relationship between the Controller and the ADR Service be?

If an ADR Service is to be provided, bearing in mind our comments in response to question 15, we see it either as something that would sit with the Council or with the Controller without any necessary inter-relationship. The latter approach would allow the current infrastructure to be used to facilitate an ADR Service but on the other hand, rightly or wrongly, the Patents Office may not be perceived to be wholly independent by the public insofar as it has powers under various intellectual property acts.

(20) Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

In today's difficult economic environment, many small and medium enterprises (SMEs) cannot afford to institute legal proceedings to defend or enforce their intellectual property rights. Therefore, the introduction of a small claims court or alternatively, a court that specialises in copyright and other intellectual property rights at the District Court level would, we believe, incentivise SMEs to take the necessary legal action in the defence or enforcement of their intellectual property rights rather than abandoning or failing to take any action due to the financial costs involved.

Given that the District Court already has a small claims procedure in place[3] that deals with small claims made by businesses, this may be the best route to proceed down rather than setting up a specialised court. These Rules could be amended to cover intellectual property disputes but we would make the following comments in that regard.

Firstly, the current District Rules state that a "business small claim" is a civil proceeding taken by a "*business purchaser against a business vendor*". This visualises a purchaser and vendor relationship. Clearly, this is not appropriate in respect of intellectual property disputes. Accordingly, this

---

1 *Ch 6.8, para 161, http://www.ipo.gov.uk/dce-report-phase1.pdf*

2 *Para 1.6 "Call for Evidence on the Intellectual Property Office Mediation Service". Intellectual Property Office. http://www.ipo.gov.uk/c4e-mediation.pdf*

3 *See Order 53A of the District Court Rules*

terminology would have to be removed or replaced by language that is appropriate to intellectual property disputes.

Furthermore, the current rules limit a business small claim to those of a business-to-business nature. However, intellectual property disputes can arise due to unauthorised use of a brand owner's intellectual property rights by any third party (including a consumer). Therefore, any amendment should reflect this. By way of suggestion, a business small claim could be defined, from an intellectual property perspective, as "*a civil proceeding instituted under this Order by a business against a third party (including a consumer), irrespective of their monetary value, in relation to intellectual property (including passing off)*".

Secondly, the current Rules states that a business small claim cannot exceed €2,000. We recommend that no monetary level be set on intellectual property disputes save the monetary limit of the District Court. As any intellectual property claim is most likely to exceed €2,000, placing such a monetary restriction on any business small claims procedure would only serve to discourage SMEs to take action and would result in the procedure not being used by businesses. It is interesting to note, in England, that the Government recently announced that a small claims court would be introduced at the Patents County Court where damages will be limited to STG£5,000. It is reported though that this limit will be increased initially to STG£10,000 and subsequently, to STG£15,000. The recommendation for a small claims service was made in the Hargreaves Review of Intellectual Property and Growth. Increasing the monetary limit above demonstrates the recognition by the UK Government that assisting SMEs to defend and protect their rights will boost UK business. If a similar position was to be adopted in Ireland, this would require a revision of the monetary jurisdiction for all the Courts, not just the District Court.

Not all intellectual property disputes though would be suitable to a small claims system. Disputes that would be suitable include certain trade mark disputes (for example, use of a brand owner's trade mark after a license agreement has terminated/expired) or a straightforward trade mark infringement. Patent disputes are unlikely to be suitable for the small claims track. The Small Claims Registrar would play an important in identifying those cases suitable to the small claims procedures, referring those that are not suitable to a separate fast-track system so that they can be dealt with promptly.

(21) Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

To encourage SMEs litigate intellectual property disputes at the Circuit Court level, we believe that a court equivalent to the Patent County Court in the UK should be set up which would specialise in copyright and other intellectual property disputes. Judges in such a court should have intellectual property expertise and be provided with continuing training in that area. An alternative to this though is to create a Commercial Court at Circuit Court level ("Circuit Commercial Court") which is equivalent to that created at High Court level. We note that the Government has committed to the establishment of a Commercial Court at Circuit Court level in the programme for Government, *Government for National Recovery 2011 – 2016* at page 51 (see link[4]).

The Commercial Court at High Court level ("Commercial Court") was created in 2004 to provide efficient and effective dispute resolution in commercial cases. The Commercial Court deals with various types of business disputes including intellectual property disputes. However, the Commercial Court's impact has been dramatic. Through its use of a detailed case management system designed to streamline preparations for trial as well as the removal of stalling tactics, cases progress through the Commercial Court at a rapid rate. Consequently, the Commercial Court is increasingly regarded as a forum of choice for international commercial disputes. This system could also be used at a Circuit Court level subject to some modification.

Firstly, intellectual property disputes are one of various business disputes that are within the remit of the Commercial Court and this should also be the case for any proposed Circuit Commercial Court. However, to ensure that intellectual property disputes are fast-tracked through the Circuit Court, we believe that intellectual property cases should have an automatic right of entry to the Circuit

---

4 http://www.socialjustice.ie/content/programme-government-2011-2016-full-text

Commercial Court once an application has been made by an applicant and assuming the value of the claim falls within the monetary jurisdiction of the Circuit Court.
Secondly, we suggest that the monetary jurisdiction of the Circuit Court be revised upwards. Intellectual property is increasingly becoming an important asset for businesses particularly SMEs and their defence and/or enforcement is vital to the sustainability of all businesses. A straightforward infringement could easily exceed the current level (€38,092.14) which would then require a SME to bring their case to the High Court. This means that the action could (potentially) take longer particularly if the case was not transferred to the Commercial Court (either due to the lack of funds on the part of the SME or the case not being accepted by the Commercial Court) as well as increased costs. This is enough to discourage SME taking any legal action to defend or enforce their intellectual property rights. While the Circuit Court is cheaper and quicker, SMEs are limited in the amount of damages that can be awarded and so, they require a cost-effective forum within which to resolve their intellectual property disputes. A Circuit Commercial Court would provide such a forum.

(26) From the perspective of innovation, should the definition of "originality" be amended to protect only works which are the author's own intellectual creation?
The response to this question has been broken into two parts:
(a) Is the "author's own intellectual creation" test already the test for originality under Irish law?
The test for originality under Irish copyright law is currently governed by Section 17(2)(a) of the CRRA 2000 which provides that copyright subsists in accordance with the Act in "**original** literary, dramatic, musical or artistic works". The CRRA is essentially silent as to the need for a work to be the authors own intellectual creation in order for it to be original. Case law in EU common law countries (such as Ireland and the UK) has historically used a test of "*not copied/originating from the putative author*" as the test for originality.[5]This low threshold for originality in the common law copyright tradition can be contrasted with the continental (or civil law) standard of originality which generally requires a subjective element; in other words, the threshold of the traditional test for originality for civil law jurisdictions is somewhat higher than in Ireland and the UK.
Arising from recent developments at a European level it is arguable that the test for originality has already been harmonised to the civil law standard. In particular the recent ECJ decisions, such as in Infopaq[6] and Bezpečnostní Softwarová Asociace[7], would appear to have extended the "*author's own intellectual creation*" test for originality to literary works. However this is not a unanimously held view - the Meltwater Holding BV[8] case would seems to indicate that the English courts have not accepted that the Infopaq decision changes the common law test of originality.
As such there seems to exist an element of ambiguity as to which test should rightly be applied in an Irish court. For this reason alone the Copyright Review Committee might usefully adopt a view on this matter.
(b) Would adopting "author's own intellectual creation" test promote innovation?
It is generally acknowledged that strong, but balanced, IP rights are conducive to innovation. Article 7 of the TRIPS Agreement states (in the context of the objectives of intellectual property protection) that "*the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, [...] in a manner conducive to a balance of rights and obligations*". In this context, one argument against adopting the "author's own intellectual creation" standard is that it may introduce discretion or ambiguity where previously the standard was relatively easy to understand and ascertain (albeit if only because it was so low a standard). In short raising the standard of originality might create an element of doubt as to what exactly is protectable by copyright.

---

5 ***Clarke, Smyth & Hall,* Intellectual Property Law in Ireland *(3rd Ed.) para. [11.03].***

6 ***Infopaq International A/S v DanskeDagbladesForening. C-5/08 Judgment of the Court (Fourth Chamber) of 16 July 2009.***

7 ***C-393/09 - Bezpečnostnísoftwarováasociace. Judgment of the Court (Third Chamber) of 22 December 2010***

8 ***The Newspaper Licensing Agency and others v. Meltwater Holding BV and others [2011] EWCA Civ 890***

Much of the innovation in a smart economy will be driven by software. It is worth noting therefore that Section 2 of the CRRA 2000 defines a "***computer program***" as meaning "*a program which is **original** in that it is **the author's own intellectual creation** and includes any design materials used for the preparation of the program*" (emphasis added). In other words, this proposed standard of originality is already in place with regard to computer programs. The Copyright Review Committee might usefully consider if this has had any impact on the level of innovation in the software industry in Ireland (compared to say other "literary works" as defined by the CRRA 2000).
In summary innovation will prosper in an environment in which the precise scope of "originality" is clearly understood by all parties concerned. In light of the above mentioned case law developments at EU level, it is appropriate that some clarity be brought to this area by either reinforcing the status quo or by clearly adopting and advocating a fresh standard. A wholesale change of the standard of originality to the "author's own intellectual creation" (to the extent not required by EU law) risks leaving a category of former "works" unprotected in Ireland. This would appear to be a fundamental consideration for any review of the originality standard in Irish copyright law.

(28) Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?
Yes, we agree with this proposal.

(38) If the copyright community does not establish a Council, or if it is not to be in the position to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?
Please see our earlier responses to questions 15, 16 and 19-21.

(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law?
Yes. Also, at a European level it is clear that the effect of the EUCD is that Member States have implemented different aspects of the exceptions permitted by EUCD and we recommend that the Review consider a recommendation that such exceptions are harmonised in order to assist Irish companies in cross-border transactions.

(62) Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purposes to prohibit or restrict than an act permitted by CRRA?
Yes.

(84) Should the post-200 amendments to CRRA which are still in force be consolidated into our proposed Bill?
Yes. Please see our response to question 3.

(85) Should sections 15 to 18 of the European Communities (Directive 2000/31/EC) Regulations 2003 be consolidated into our proposed Bill (insofar as they cover copyright matters?)
Yes.

The Society hopes that the Copyright Review Committee will find the above comments helpful and would be happy to engage further with the Copyright Review Committee if required.

For further information please contact:
Katherine Kane
Secretary
Intellectual Property Law Committee
Law Society of Ireland
Blackhall Place
Dublin 7
Telephone: + 353 1 672 4800
Email: k.kane@lawsociety.ie