

**29<sup>th</sup> June 2012**

**Newspaper Licensing Ireland Ltd  
Further Submission to the  
Copyright Review Committee**

**on**

**Copyright & Innovation  
A Consultation Paper**



Newspaper Licensing Ireland Limited

## **Introduction**

Newspaper Licensing Ireland Limited (“NLI”) welcomes the publication of “Copyright and Innovation, A Consultation Paper” by the Copyright Review Committee. The document will assist in progressing and promoting this important review of existing copyright law.

NLI appreciates the opportunity from the Copyright Review Committee to make a further submission on the Consultation Paper, and for the extension of the deadline within which submissions must be made.

In this submission, we intend making a number of general comments on the Consultation Paper. We will then deal with those specific queries posed in the Consultation Paper by the Committee, and in doing so shall respond to those which are of relevance to NLI.

There are two preliminary points we would make at this stage. Firstly, this further submission should be read in conjunction with our previous submission to the Committee, the content of which continues to represent NLI’s position on the Committee’s terms of reference and on the on-going review.

Secondly, we have seen the further submission of National Newspapers of Ireland (“NNI”). NLI wishes to endorse, and add its voice to, the content of that further submission. In this further submission, where we are silent on anything, it can be taken that we are in agreement with the content of the further submission of NNI. That will enable us to keep this further submission as concise as possible, so as to address specifically those issues of most immediate relevance to NLI.

## **General Comments**

### **1. The need for the Committee to recognise the importance of licensing**

NLI viewed with disappointment the very limited reference in the Consultation Paper to the role which licensing systems play in allowing third parties to exploit copyright content.

We noted with interest and some bemusement the suggestion in some of the submissions that there can be difficulty or frustration in terms of access to collection societies or licensing systems.

The system of licensing is straightforward. NLI, the organisation mandated by newspaper publishers in Ireland, is a ‘one stop shop’ for companies that wish to use newspaper content. Our rates are published through the Patents Office, in accordance with legislation. We reiterate here something contained in our first submission: on every occasion that NLI has been approached by a third party seeking to licence a form of copying or transmission not covered by any of our existing standard licences, we have sought to find a solution to that company’s requirement. The Committee can take it, therefore, that NLI has not been approached by any of the parties who made submissions bemoaning difficulties with licensing systems.

It is worth noting again here, in any event, that the right of any company to apply for an NLI licence is safeguarded in law by Section 154 of the Copyright and Related Rights Act 2000. We would invite the Committee, therefore, to treat with some scepticism any claims that access to licensing and collecting agencies is problematic.

## **2. Terms of Reference**

We endorse the content of the NNI further submission, in so far as the terms of reference give rise to concern, given that they are based on misconceptions and incorrect perceptions.

## **3. Various parts of the Consultation Paper refer to the need for Ireland and the Irish economy to embrace technological change**

NLI submits that insufficient regard has been had by the Committee to the extent to which newspaper publishers themselves promote and drive technological change. In our first submission to the Committee, we identified the manner in which NLI has, at the behest of its member publishers, introduced a new licensing system (incorporating a number of different types of licences) to facilitate all sorts of organisations and technological activities, and that NLI is currently assisting in the development of a central database of Irish newspaper content. This will give licensees access to the full repertoire of member publications with ease. It will be to the benefit of media monitoring companies so as to enhance the service which they can offer to clients.

Separately, all of our members carry out their own technological development and this is evidenced by the various different ways in which our publishers' newspapers can be read and accessed in various digital formats.

NLI submits that, to the extent that there might be an implicit suggestion that a copyright holder is not a party which embraces technological change, the suggestion is clearly not correct and can be seen to be so in the case of newspaper publishers and NLI.

## **4. Content aggregators and search engines**

As stated in our initial submission, aggregators and search engines routinely infringe copyright owned by newspaper publishers. In other words, they are taking whatever content they want, and not paying for it. This is occurring in circumstances where newspaper publishers invest heavily in the creation of unique content. They appear unwilling to accept the principle that newspaper publishers are entitled to a fair return for use of their content. That return is necessary for the newspaper publishers from the perspective of reinvesting in further news creation.

In those circumstances, NLI vehemently disagrees with large portions of Section 6 of the Consultation Paper. The coining of the phrase "marshalling" by the Committee is particularly unfortunate. It appears that this phrase is intended to cover a myriad of different types of activities, including activities which quite clearly involve infringement of copyright owned by third parties.

NLI must also here refer to the paragraph which commences at the foot of page 93 of the Consultation Paper, in the section on “Entrepreneurs”. The Committee appears to state as fact that an internet search function does not “unreasonably prejudice the legitimate interests of the owners of those sites”. That is an incorrect factual statement and it is not understood why the Committee deems it appropriate to state such an assertion as fact without having the input and views of copyright holders such as newspaper publishers. It is a matter of concern if the Committee conducts this review on the basis of such a prejudiced view of whether copyright holders’ legitimate interests are unreasonably prejudiced by search engines. They clearly are.

In order for this Committee to progress its review, it must recognise circumstances where existing copyright law is being infringed and must not endorse or “legitimise” that type of conduct in any way. Failure to do so will undermine the very rationale for copyright law in the first place.

#### **5. The Committee’s examination of the appropriateness of the US style “fair use” doctrine in an Irish/EU context**

We have seen, and endorse, the content of NNI’s further submission in so far as it comments on the prospective introduction of the US style fair use doctrine.

It appears clear that an amendment to EU law would be required before such a change could be countenanced. In any event, such a doctrine should not be introduced in the Irish context, given the uncertainty which it brings and given that it is only those with deeper pockets who would benefit from the introduction of the doctrine.

#### **6. Enforcement**

We repeat the call in our earlier submission for better enforcement of copyright. NLI is happy to engage with the Committee whether that be by way of alternative dispute resolution service, or the giving of a specific jurisdiction to the District Court or Circuit Court. Some steps of this type are required.

#### **Response to the Specific Queries**

In this section of our further submission, we will outline the NLI’s position on a small number of the specific queries raised throughout the Consultation Paper. Where we have not responded to a query, please take it that NLI’s position on any such query is reflected in the further submission made on behalf of NNI. We do so using the same numbering as in the Consultation Paper itself.

***(38) If the copyright community does not establish a Council, or if it is not to be in a position to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?***

It is not understood what “issues” are being referred to here. We have already identified in our initial submission, and this further submission, that NLI operates an open, available one stop shop for licensing in respect of content owned by newspaper publishers. To the extent that the Committee is suggesting that there is an “issue” about difficulty in accessing licensing systems, that does not apply to NLI. It is noteworthy that most of those who complain about difficulties in accessing licensing systems are those who have not made any approach to NLI to be licensed, but yet routinely infringe content owned by newspaper publishers.

NLI would repeat here our call in our initial submission for improvements in terms of ease of accessibility to enforcement of copyright law. NLI welcomes any improvements in that regard, whether it be through the introduction of an appropriate Copyright Council, the establishment of an alternative dispute resolution system, or the giving of a specific jurisdiction to the District Court or Circuit Court.

***(39) Are there any issues relating to copyright licensing and collecting societies which were not addressed in chapter 2 but which can be resolved by amendments to CRR?***

NLI seeks, and would welcome, amendments to the Copyright and Related Rights Act to provide for easier enforcement of copyright.

***(45) Is there any good reason why a link to copyright material, of itself and without more, ought to constitute either a primary or a secondary infringement of that copyright?***

Our response to questions 45, 46 and 47 can be taken together.

It is a matter for the Courts to decide as to whether a link to copyright material constitutes an infringement of copyright. It is the view of NLI that a link to copyright material does constitute infringement of copyright, and would be so found by the Courts. In particular the Committee should have regard to the recent decision of the UK Court of Appeal (Civil Division) in the case of the Newspaper Licensing Agency Limited and Others v Meltwater Holding BV and Others wherein it upheld the findings of the High Court which findings included:

- that headlines are capable of being independent literary works and so copying just a headline can infringe copyright;
- that text extracts (headline plus opening sentence plus “hit” sentence) can be substantial enough to benefit from copyright protection;
- that an end user client who receives a paid for monitoring report of search results (incorporating a headline, text extract and/or link, is very likely to infringe copyright unless they have a licence from the NLA or directly from a publisher.

Any argument that linking in fact drives traffic to the publisher's website, and therefore is in the publisher's interests, ignores the fact that linking directly to the article/report/content by-passes much of the publisher's revenue generating advertising available from the publisher's homepage. If advertisers no longer see the benefit of advertising on a newspaper's homepage because of the prevalence of linking directly to the newspaper's content then a vital revenue stream for newspapers justifying the availability of that content on-line will be removed.

Newspaper publishers have, for many years, invested heavily in quality journalism and content. This has resulted in a relationship of trust between the newspaper and its loyal readers. The newspaper is heavily reliant on awareness, amongst the public, of its brand and its product. Linking threatens that relationship. Linking directly to articles anonymises the article. The relationship between newspaper/brand and reader is severed. The reader should know where an article comes from and how it has been produced. It is unhealthy, in a democratic society, for diversity of newspaper content to be threatened in this way.

NLI, and the newspaper publishers which mandate NLI, recognise a practical distinction between the sending and receipt of links for personal use on the one-hand and the sending and receipt of links for commercial purposes on the other (notwithstanding that the same legal principles apply to both and that our view that a link to copyright material constitutes infringement of copyright applies to both). This is evidenced by the approach taken in the terms and conditions of most newspaper websites, where the distribution of links for personal use is generally expressly permitted, whereas that is not the case for commercial use. NLI has no issue with the distribution of links for personal use. However, the use and distribution of links for commercial purposes without recognition of the rights holder is clearly unfair.

***(46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?***

No. See our answer to 45 above.

***(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?***

This should not arise, see our answer to question 45.

***(48) Does copyright law inhibit the work of innovation intermediaries?***

NLI does not accept that its member publications are not themselves innovation intermediaries. Our members invest heavily in innovative ways to deliver quality content to the reader. Those who wish to commercially benefit from that content can safely do so by obtaining the appropriate licence. There is nothing these entities would want to do which cannot be done if they are appropriately licensed.

NLI has had sight of the submission to the Committee on behalf of Boards.ie Limited dated May 2012 and published by the Committee. In its answer to question 48, Boards.ie Limited has chosen to refer specifically to NLI and asserted, effectively, that the activities of NLI constitute an inhibition to the work of innovation intermediaries. That portion of the submission of Boards.ie Limited is factually inaccurate in a number of ways. NLI takes exception to a decision by Boards.ie Limited to comment on a specific matter (NLI's interaction with Women's Aid) where it clearly does not have possession of all of the facts, nor could it have.

The submission of Boards.ie Limited, and any other similar entities, must be read in the context where the reproduction of material (including material which is copyright of newspapers) on the Boards.ie website is to the commercial benefit of Boards.ie Limited (through sale of on-line advertising and other means).

The analogy has been drawn by representatives of Boards.ie in the past that in the same way that one should not blame the person who constructs a road for the subsequent conduct of drivers on that road, then Boards.ie should not be responsible for the conduct of users who post content on the Boards.ie website. That analogy pointedly ignores the fact that there is on-going commercial benefit to Boards.ie from on-going activity by users on its website.

As stated above, NLI recognises that linking for personal use is part of how individuals communicate on the internet and has no difficulty with that. However, the issue of linking to copyright content for a commercial purpose is a different issue altogether. It is neither just nor lawful for a third party to commercially benefit on an on-going basis from the use of newspaper content (which by necessity is expensive to produce). By taking out an inexpensive and straight-forward licence from organisations such as NLI, those third parties recognise and respect the endeavour, investment and creativity of others, whilst themselves conducting their business in a lawful manner.

***(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?***

No. News publishers are innovators too, as asserted in this further submission and in our initial submission. If their copyright is diluted, it will stifle that innovation. Those involved in the activities which the Committee refers to as "marshalling" can apply to be licensed by NLI.

The coining of the phrase "marshalling" in this context by the Committee is unfortunate and regrettable for the reasons discussed above.

We have had sight of the submission to the Committee made by the Internet Service Provider's Association of Ireland and refer to its response to this question 50 and a number of the following questions. It is suggested in their submission that the existing legislative framework "has a chilling effect and discourages new business models from being created due to the risk of litigation". That is simply not the case. Those involved in the activities which the Committee refers to as "marshalling" in many cases are infringing copyright law. Those doing so can very easily and inexpensively be licensed by NLI. There is therefore nothing "restrictive" about the existing framework, nor is there any basis for the assertion that it has a chilling effect. The creativity and innovation of newspaper publishers, and other innovators, must be recognised when others seek to exploit it for commercial

purposes. Otherwise, it is in fact the innovation of newspaper publishers and other innovators which will be stifled or “chilled”.

***(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?***

No. Where any activities which the Committee has collectively referred to as “marshalling” constitute an infringement of copyright, there is no justifiable or reasonable basis for diluting the rights of the rights holder (the person who innovated and created in order to generate the relevant content). In the case of newspaper publishers, a very accessible and inexpensive licensing system is available for others who would wish to use such content for commercial purposes.

***(53) If so, what exactly should it provide?***

Not applicable. We have had sight of other submissions which suggest that a provision or provisions could be introduced into Irish copyright legislation to say that it is not an infringement of copyright where an entity reproduces on-line headlines or insubstantial portions of news reports as an adjunct to providing links to the news report itself. There is no justifiable or reasonable basis for that approach, and such an approach is in the face of recent Court decisions in the European context.

*Ends*

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