

Newspaper Licensing Ireland Ltd

**Submission to the
Copyright Review Committee
on the**

**Consultation on the Review of the
Copyright & Related Rights Act 2000**

13th July 2011



Newspaper Licensing Ireland Limited

1 About NLI

- 1.1 Newspaper Licensing Ireland Limited (NLI) is a not-for-profit, limited liability company established in 2002 to facilitate the commercial use of newspaper content in Ireland.
- 1.2 By making available a range of licences, NLI allows commercial organisations to legally access, use and copy newspaper content.
- 1.3 NLI is mandated by eight national and 24 regional newspaper publishers representing 110 newspaper publications. Since January 2010, this mandate was amended to include newspaper website content.
- 1.4 In addition to Irish newspapers, NLI has a number of bi-lateral agreements with similar organisations¹ abroad that facilitate licence-holders seeking permission to copy international newspapers.
- 1.5 NLI plays a critical role in ensuring that the intellectual property rights of its members are respected, and that newspaper publishers receive a fair return for the commercial use of their content.

NLI have brought in a new system of licensing

- 1.6 Prior to the establishment of NLI, obtaining approval for use of copyright material could be cumbersome - and all too often ignored.
- 1.7 A commercial organisation would have to contact each relevant publisher every time an employee wanted to copy a newspaper article. Unsurprisingly, this did not happen - exposing companies to potential litigation and depriving publishers of valuable revenue.
- 1.8 With the establishment of NLI, companies were given access initially to an all-inclusive licence allowing them to photocopy, scan, print, fax, email, host (on an intranet), electronically store and republish content on company websites.
- 1.9 With more and more publishers developing websites to deliver newspaper content, NLI further developed its licence offering in January 2010 to include the commercial use and copying of newspaper website content.

¹ NLI is a member of the International Federation of Reproduction Rights Organisations (IFRRO) and the Press Database and Licensing Network (PDLN).

Types of licences

- 1.10 NLI issues licences to commercial organisations across all sectors of the economy. The company provides three categories of licence:
- Media Monitoring Licence (companies that provide press clipping services to clients)
 - Public Relations Licence
 - Commercial Licence (includes Government Departments, Public Bodies, Professional Firms, Educational Institutions, Charities, any Commercial Entity).
- 1.11 NLI is also in the process of developing a new licence allowing for reproduction of on-line content on a professional basis by web media monitoring companies.
- 1.12 Licences are issued via a standard form, all of which are available from NLI's website www.newspaperlicensing.ie).
- 1.13 For each type of licence, a published scale is available which allows the licensee to identify the applicable fee. In accordance with the Copyright and Related Rights Act 2000, all scale fees are notified to the Controller of Patents - this ensures complete transparency throughout the process.

Development of a central database

- 1.14 NLI is currently assisting in the development of a central database of Irish newspaper content giving commercial users access to the full repertoire of member publications.
- 1.15 This will improve the control, visibility and security of how NLI's member publications are commercially used. In particular, it will benefit media monitoring companies and enhance their service by improving the speed of delivery and quality of clippings.
- 1.16 The central database will also provide publishers with a new channel to deliver Irish content to the world market: NLI regularly receives requests from foreign companies to access Irish newspaper content for media monitoring purposes.

2 Publishers willing to cooperate

- 2.1 The fact that NLI has been mandated underlines the willingness of newspaper publishers to allow their content to be used.
- 2.2 It is important to note that they are not obliged to do so. As copyright-holders, they are entitled to veto any proposed copying or transmission of their material by a third party, on the basis that it constitutes an infringement of copyright.
- 2.3 However, newspaper publishers in Ireland are happy to allow companies to use and benefit commercially from their content - as long as the users are licensed and they (the publishers) receive a reasonable fee in return.
- 2.4 As NLI is the only organisation that has been mandated by publishers in Ireland, the system of licensing is straightforward: a 'one stop shop' for companies that wish to use newspaper content. This approach also inherently allows for lower licence fees on the basis of economies of scale - another benefit for third parties who wish to copy or transmit newspaper content.
- 2.5 A good example of publishers' response to the challenges presented by the exploitation of their digital content is the Automated Content Access Protocol ("ACAP"), developed by publishers worldwide, which allows a computer to identify the online content that is protected by copyright and the terms and conditions attaching to that content which facilitate its exploitation. ACAP is one of the publishing industry's practical and reasonable solutions to the challenges presented by the need to protect content whilst facilitating its lawful dissemination. It is disappointing that the larger search engines and web aggregators have failed to positively engage with the ACAP despite the publishing industry's willingness to discuss the matter with those major players in the industry.
- 2.6 It is clear, therefore, that when it comes to licensing their content, newspaper publishers are far from restrictive; their permissive approach has made it possible for any company to use newspaper content.
- 2.7 In any event, it is worth noting here 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. This section provides that a person who claims, in a case to which a licensing scheme relates, that the operator of the scheme has refused to grant or to procure the grant to him or her of a licence in accordance with the scheme, or has failed to do so within a reasonable period, may apply to the Controller for an order declaring that the applicant is entitled to a licence on such terms as the Controller may determine in accordance with the scheme. It is clear that a statutory remedy exists to assist the potential licensee in the event that they feel they are illegitimately being refused access to a licence.

3 Terms of reference of this review

- 3.1 The current review has arisen in part it appears as a result of “a perception in certain industries that national copyright legislation does not cater well for the digital environment and actually creates barriers to innovation and the development of new business models”. It is not stated which industries, or which businesses within those industries, perceive the current legislation in that way.
- 3.2 On every occasion that NLI has been approached by a third party seeking to license a form of copying or transmission not covered by any of the existing (standard) licences, we have sought to find a solution to that company’s requirement.
- 3.3 NLI is a relatively new company operating in a fluid and rapidly-changing environment, and our philosophy is to respond to all developments and requests in a positive and constructive way. (For example, developing a licence for use by web media monitoring companies)
- 3.4 In that respect, we feel that it is unreasonable and entirely unjustified for certain businesses or industries to have formed a perception that copyright owned by newspaper publishers creates a barrier to innovation or the development of new business models.
- 3.5 Have any of these aggrieved companies made any effort to gain a licence? Have they sought to engage with NLI in respect of their needs? As stated, we are willing to work with any potential licence-holder to find a solution that suits all parties. All they have to do is ask!
- 3.6 To consider amending the existing copyright legislation without addressing this fundamental issue appears, to us, premature.

4 Content aggregators and search engines

- 4.1 Clearly, there is a market demand for newspaper content to be included in aggregation services and NLI is willing to explore ways of satisfying that demand.
- 4.2 At present, however, there is a big problem: aggregators and search engines continue to use and unfairly exploit newspaper content for their own commercial gain without providing a mechanism either to obtain permission or agree a system of remuneration for the owners of that content.
- 4.3 In other words, they are taking whatever they want - and not paying for it. How can publishers expect small, possibly cash-strapped Irish companies to respect copyright law when they see major international corporations blithely ignoring it?

- 4.4 The publishers represented by NLI invest heavily in the creation of unique content. They are willing to allow others to use - and benefit from - that content if they play by the rules.
- 4.5 If newspaper publishers cannot secure a fair return for the use of their content in order to reinvest in further news creation, what content will remain in the future for search engines to aggregate?
- 4.6 Proof of unlawful use of copyright material can be seen from a review of developing European litigation. The courts across Europe have upheld the rights of publishers to protect their copyright and demand a fair commercial reward for its exploitation. In 2002 the Danish Commercial Court, in the “Newsbooster case”, held that the offering of deep links directly to newspapers’ online content constituted a breach of the newspapers’ copyright. This position was again reflected in the recent decision of the Belgian Court of Appeal where it stipulated that Google had to desist from providing deep links to articles in the online content of Belgian newspapers in breach of the publishers’ copyright. In November 2010 the English High Court in the “Meltwater case” added to the growing body of European decisions which support the publishers’ right to protect their copyright in the digital context. That decision relied heavily on the judgment of the European Court of Justice in the “Infopaq case” which held that a text extract of 11 words in length was capable of enjoying the protection of copyright law from unlawful acts of reproduction by digital copiers.

5 The US style fair use doctrine

- 5.1 The text of the terms of reference of this review would seem to assume that existing copyright law is a barrier to innovation and that a possible solution to this problem is the introduction of a US style fair use doctrine. At its very core copyright law protects innovation and encourages creative thinking and development by protecting the interests of those who create and innovate. Any suggestion that the existing legislation does otherwise is wrong
- 5.2 NLI does not believe that a change to copyright law to reflect a more permissive fair use doctrine in place of the existing fair dealing defence is warranted or desirable. An examination of the US position reveals a lack of certainty which has led to rafts of lengthy and expensive pieces of litigation. This is undesirable from all perspectives.
- 5.3 An examination of the legislative intent behind the existing provisions reveals a clear wish that fair dealing in copyright works was not meant to include “dealing” of a commercial nature. It has been the NLI experience that the existing fair dealing provisions are poorly understood by Irish business. In order to clarify the position NLI believes that an amendment to the existing fair dealing provisions to reflect the position as stated by section 29(1) of the Copyright, Designs and Patents Act 1998 in the United Kingdom would be of great benefit. Section 29(1) states as follows:

“Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.”

6 Enforcement

- 6.1 Having made it easy and inexpensive for companies to comply with copyright law by making licences readily available, it is reasonable for publishers to expect an enforcement mechanism for companies who deliberately infringe copyright law by using newspaper content without purchasing a licence. Such companies do exist. And, in a case where the relevant newspaper and/or NLI is satisfied that copyright is being infringed by a company, there should be a cheap and inexpensive way to establish the legality or otherwise of the company's actions.
- 6.2 At present, any dispute or claim would most likely have to be pursued through the High Court. While newspaper publishers are quite prepared to follow this course of action, it is clearly not in the interests of any third party to be exposed to two sets of High Court costs in relation to a copyright issue.
- 6.3 Whilst the Controller of Patents does have a role under the Copyright and Related Rights Act 2000 in resolving some disputes, the jurisdiction in that regard is limited. There may be scope to broaden that role so that the Controller has an added function to preside over disputes where the rights owners wish to assert those rights against an alleged infringer.
- 6.4 As the legislation currently stands, therefore, the lack of availability of a quick and inexpensive way to resolve copyright of this type is a barrier to innovation for newspaper publishers and other creators.
- 6.5 It is our submission that either a dedicated copyright tribunal be established or that the role of the Controller of Patents be extended to deal with disputes regarding copyright infringement or that a division of the District Court (or Circuit Court) be established to deal with copyright and related disputes. The tribunal (or division) would provide a dedicated, cost-effective, expert forum to quickly resolve issues. To the extent that the lack of meaningful enforcement options for newspaper publishers is currently a barrier to innovation, such a step would assist in removing that barrier.
- 6.6 The establishment of a copyright tribunal would also be in the interests of third parties, as it will allow issues to be clarified quickly and cheaply regardless of the outcome. Costly, lengthy court procedures are in nobody's interest.

7 Notification to the Controller of the Patents Office of fees

- 7.1 Under Sections 175 and 177 of the Copyright and Related Rights Act 2000, every licensing body is obliged to furnish written details to the Controller of the proposed charges or the scale of charges. NLI complies with this requirement.
- 7.2 As is clear from this submission, NLI is constantly reacting to changing market demands and technological developments in order to devise other types of licences. In some situations, it may be necessary to develop a new licensing arrangement which does not fit within any scale notified to the Controller and published by the Controller. It may well be appropriate that a specific fee would be agreed for that specific licensing arrangement.
- 7.3 In the commercial environment we currently operate in, it may well be beneficial and worthwhile that the scheme be amended to allow for confidentiality where the parties desire it. .
- 7.4 This is particularly relevant for companies involved in developing new technological offerings that would not want, for example, competitors knowing the fee they are paying to NLI in order to utilise newspaper content for that offering.

8. Submission of NNI

- 8.1 NLI endorses the content of the submission made by National Newspapers of Ireland. The two submissions should be read in conjunction with each other and are complementary.

Executive Summary:

- Newspaper publishers have shown they are more than willing to facilitate the dissemination of their content in fair manner in return for a reasonable fee. NLI is willing to work constructively with any business who is willing to discuss its licensing needs. The existing licensing system is permissive of use of copyright material
- Copyright law protects, promotes and nurtures innovation and creativity, including creation of newspaper content. Without that protection Ireland would not have a newspaper industry.
- A US style fair use doctrine is not desirable for Ireland. It is uncertain and has been shown to be a lawyers' benefit.
- The fair dealing defence should be amended to reflect the UK position specifically excluding commercial dealing.
- The enforcement mechanisms open to rights-holders need to be re-examined to allow for cheaper and more efficient assessment of whether copyright infringement has occurred in any given case.
- The system of licence fee notification to the Controller should be reviewed to reflect the need to respect commercial confidentiality in some circumstances.