



Review of the Copyright and Related Rights Act 2000

Submissions of Raidió Teilifís Éireann

1. Introduction

RTÉ welcomes the setting up of the Copyright Review Committee to examine the current legislative framework to identify any areas of the legislation that might be deemed to create barriers to innovation and to make recommendations to resolve any problems identified.

RTÉ shares the perception noted in the consultation document that national copyright legislation does not cater well for the digital environment. Such has been the speed and scale of development of that environment that it is not surprising that the Copyright and Related Rights Act 2000 ('the Act') is in need of an overhaul. The same is true of legislation at the EU level, where RTÉ considers the Irish Government should promote a number of reforms – and strenuously oppose some others that are currently being mooted. The objective should be to update copyright legislation to ensure that it is fit for purpose at a time when digital technology has dramatically altered the way that audio and audiovisual content is made, distributed and accessed by the public.

RTÉ's submissions take account of the recently published independent review by Professor Ian Hargreaves of the UK's intellectual property laws.¹ Irish copyright law shares many of the same roots as UK copyright law, and both his report and the present consultation arise from the need to ensure that the copyright law framework does not create barriers to innovation and growth.

RTÉ's submissions reflect the fact that as Ireland's principal public service broadcaster it is the creator and owner of copyright works, for which a robust protection framework is needed so that the integrity of those creative works can be maintained and their commercial value realised. At the same time, RTÉ is a user of the copyright works of others on a large scale, in which capacity it needs copyright legislation to create licensing frameworks through which it can obtain the right to use those works across the range of its public service activities, and to create a workable set of exceptions to copyright that enable it to use works without permission within clearly-defined parameters.

2. RTÉ's interests as a rights owner

- 2.1 RTÉ is engaged in a continuous process of creating new works in which copyright subsists. Principal among these are radio and television programmes – which are protected within the categories of sound recordings and films defined in the Act – and RTÉ's broadcasts themselves.

¹ "Digital Opportunity. A Review of Intellectual Property and Growth". An Independent Report by Professor Ian Hargreaves. May 2011.

Digital piracy

- 2.2 While the Act accords copyright status to these works, it does not create an effective means for that copyright to be enforced against online piracy. RTÉ wishes to see legislation introduced that will enable rightsholders to take action against illegal file-sharers, supported by obligations upon ISPs to provide a level of co-operation in the process, including ultimately the imposition of technical measures against an ISP's subscribers. Further, RTÉ would like to see legislation that can be invoked by the Minister or by a regulatory body such as ComReg to require an ISP to block access to websites that are persistently engaged in providing unlicensed access to copyright works. These are, of course, the two principal elements of the anti-piracy provisions of the UK's Digital Economy Act 2010, but RTÉ is not advocating the wholesale importation of the features of that Act into Irish copyright law. RTÉ would want to see a regime put in place that would allow technological measures to be imposed at a much earlier stage than the UK legislation envisages, as the UK legislation requires a high volume of court cases to be taken – at very considerable cost – by rights owners before such measures would be introduced.
- 2.3 Moreover, the UK legislation does not address all forms of digital piracy such as cyber locker sites and online streaming services, nor is the responsibility of operators of user-generated content sites clearly defined in respect of the vast amounts of copyright infringing content that many such sites carry.
- 2.4 The absence of effective legislation hurts RTÉ in that it makes some suppliers of programmes to RTÉ reluctant to permit RTÉ to make use of their content in its online services because of concerns that this might lead to illegal uploading to the internet, breaching territorial restrictions and affecting markets in other territories for their programming. RTÉ's ability to introduce innovative services reflecting the full range of its output is jeopardised in consequence.

Retransmissions

- 2.5 A second concern for RTÉ as an owner of rights is that RTÉ's broadcasts may be re-transmitted simultaneously and unaltered on cable within Ireland without infringing RTÉ's copyright in its broadcasts or the copyrights in any works included in its broadcasts and without infringing performers' rights: sections 103 and 251 of the Act. These sections were introduced originally in order to facilitate the development in Ireland of cable systems, such as the system operated by UPC. RTÉ does not believe that there is any good public policy reason for the exception created by these two sections (in general terms) to apply to persons who do not have responsibility for constructing or maintaining or operating the essential technological hardware of such systems but who instead may claim to be "re-transmitting by cable" merely because they offer web-based streaming services over third parties' telecommunications networks. RTÉ wishes to see sections 103 and 251 ultimately recast so that such operators are not included within their scope. There does not seem to be a good public policy reason to extend the exemption to such operators.

3. RTÉ as a user of third parties' copyright works and performances

Collective licensing

- 3.1 Across its radio, television and online services, RTÉ is a major user of copyright works and of performances protected by the Act. The administrative costs of making rights clearances in respect of these are significant. RTÉ seeks to make efficiency savings wherever possible, by standardising terms and conditions for engaging contributors, and by entering into collective licensing agreements with bodies such as Irish Music Rights Organisation, Mechanical Copyright Protection Society Ireland and Phonographic Performance Ireland Limited.
- 3.2 Digital technology has opened up new means of providing programme services to the public, particularly in affording means to provide the public with access to RTÉ's programme archives on an on-demand basis. RTÉ's ability to offer such services would be significantly enhanced if a new collective regime for rights clearances were to be established, as otherwise the administrative costs of making individual clearances is likely to be prohibitively high in many instances. RTÉ therefore wishes to see powers vested in the Minister which would allow him to introduce extended collective licensing schemes when these are shown to be needed. These schemes, long established in the Nordic countries, empower collecting societies to grant rights for certain uses not only in respect of works already within their repertoires but also in respect of works of the same type as those they administer.

Orphan works

- 3.3 Additionally, RTÉ would like to see introduction of a solution to the problem posed by orphan works. RTÉ, like all programme and film producers, sometimes finds itself unable to trace the owner of a copyright work it wishes to use. Usually, after diligent search and because the work is not to be used in a particularly prominent way, RTÉ will go ahead and use the work, on the footing that it will make a licensing arrangement with the owner if he or she subsequently comes forward. In relation to re-use of RTÉ's archive programmes, this problem becomes particularly acute and is likely to inhibit RTÉ's ability to introduce innovative services giving access to the archive. Again, therefore, RTÉ would like to see an amendment to the Act to give the Minister the power to approve arrangements under which a collecting society or societies would be able to grant licences in respect of orphan works. This would need to include criteria for determining that a diligent search had been made and rules for dealing with rights owners who subsequently come forward to 'reclaim' their works.

Regulation of collecting societies

- 3.4 The proposals in the preceding paragraphs imply an increase in the number of collecting societies operating in Ireland and statutory obligations placed upon them to engage in certain licensing activities. To ensure public confidence in them, particularly on the part of the rights owners they will be empowered to represent, RTÉ recommends that they be placed under a greater degree of regulation than applies to them at present. This regulation should go beyond competition law principles and require them to develop and publish codes of practice setting out the principles upon which they will operate, both in respect of the licensing of users and in respect of accepting mandates from parties who wish to be or have to be represented by them

under schemes of the kind referred to above. This regulation would sit alongside the tariff-regulation provisions already set out in the Act.

Exceptions to protection

- 3.5 The current exceptions to copyright protection are extremely important to RTÉ as a broadcaster and programme maker. They have been in place in more or less their present form for many years and are a key part of the balance which the Act strikes between the interests of copyright owners and users. Because of their longevity, their scope is well-understood. It is, accordingly, possible to advise on their application to particular circumstances with some measure of confidence. In RTÉ's view it would be a mistake to sweep away this satisfactory position by importing into Irish law the exception known in US law as 'fair use'. It is unproven that in the US the existence of the exception has given greater scope for innovation than is possible under Irish copyright law. In this respect we draw your attention to the analysis made of that issue in the Hargreaves report in the UK, and also to the research paper published with that report.² It is also clear that to introduce a fair use exception is not permissible under EU law, as the Information Society directive³ contains an exhaustive list of permitted exceptions to copyright protection which does not go so far as to permit a general fair use exception. Finally, it is clear from the US experience that the present, relatively settled state of the law would be superseded by a state of uncertainty, in which RTÉ could not proceed with any confidence to rely on the new exception.
- 3.6 An exception that is permitted by the EU Directive but which is not included in the Act allows use of a work for parody, pastiche and caricature. Ireland has a robust tradition of parody, yet it is undoubtedly the case that innovative programme making can be deterred by the knowledge that a proposed parody element might bring about a legal action by the copyright owner. While this has affected RTÉ as a programme maker for many years, the issue has been given a new dimension because of the ease with which parody material can be produced and disseminated to a wide audience using the new digital technologies. A huge amount of parody material is being produced and disseminated on user-generated content sites that clearly infringes copyright as the law stands, yet has little or no negative commercial impact on the copyright owner, and ought not to be capable of being objected to. Some of the material is suitable for broadcasting on mainstream channels such as those of RTÉ. This activity is more to be encouraged than stigmatised as illegal activity.
- 3.7 An unsatisfactory feature of the fair dealing exceptions as presently defined in the Act is that photographs are excluded from the scope of the exception for reporting current events. This mirrors the UK's Copyright, Designs and Patents Act 1988, into which the exclusion was inserted as a late addition following strenuous lobbying by press photographers, who were concerned that their livelihoods would be undermined if a news photograph they had sold to one newspaper could be used by others to report the same event. Such a use would be most unlikely to be deemed by a Court to be fair in

² Supporting document J. "A Law and Economics Analysis of Fair Use Differences Comparing the US and UK." A Dnes.

³ Directive 2001/29/EC

any event, so the exclusion is in that sense redundant. The fact that the exclusion is a blanket one means that archive photographs cannot be used by RTÉ to illustrate a news story.

- 3.8 In addition to expanding the fair dealing exceptions in this way, the opportunity should be taken to specify that it will not be permissible for the exceptions to be overridden by provisions in a contract between a rights owner and a user.
- 3.9 The Act should give express recognition to the existence of a ‘public interest’ defence to a claim of infringement of copyright (including moral rights) or of performers’ rights. Case-law in the UK has confirmed that the defence is available there, while stating (correctly, in RTÉ’s view) that the circumstances in which the defence may override copyright are not capable of precise categorisation or definition (*Ashdown v. Telegraph Group* [2002] Ch 149, CA at para. 58). RTÉ considers that giving express recognition to this defence would be in keeping with the current recognition in Ireland of the public interest served by whistle-blowing.

‘Broadcast’ definition

- 3.10 The opportunity should be taken to make the definition of ‘broadcast’ in the Act platform-neutral. At present it refers only to wireless transmissions. In doing so it reflects the UK’s Copyright, Designs and Patents Act 1988 in its original form, but that Act has subsequently been amended so as to recognise that broadcasting over the internet has become a reality. Making this amendment will require consequential amendments through the Act, for instance making redundant the definition of cable programme service and the restricted act of including a work in such a service. The Act will, however, continue to need to refer to cable retransmissions, in sections 103 and 251 in respect of RTÉ’s services, and in section 174 in respect of retransmissions of broadcasts from other EEA member states.
- 3.11 One particular consequence of making the definition of “broadcast” platform-neutral is that, as reflected in the UK Act, the statutory licence provisions for the broadcasting of sound recordings, which appear in section 38 of our Act, should be applicable to internet simulcasts of broadcasts. RTÉ would argue that internet-only broadcasts (‘webcasts’) should also be covered by section 38.

Incidental copying

- 3.12 The transmission of copyright works in online services involves an exercise not only of a transmission right (the broadcasting or on-demand right) but also of a reproduction right, because that is how the technology works. These automatic reproductions have no separate economic significance, yet anyone seeking a licence for the use of a work in an online service must take care to ensure that the licence covers the reproduction that will occur in course of the transmissions. The Act should be amended so as to provide that such incidental reproductions are automatically covered by any grant of a transmission licence. Section 87 of the Act does not deal with such intermediate copying.

EU proposals

- 3.13 Finally, turning to the EU level, RTÉ notes that a proposal for a Directive extending the term of protection for performers from 50 to 70 years is again under discussion. When this proposal was first mooted, European academics were united in condemning it as a proposal lacking an evidence base for the purposes it was intended to achieve. RTÉ has been forcibly struck by the determination evident throughout Professor Hargreaves' report to base his judgements upon evidence and by his advice to the UK Government to frame its policy decisions on that basis. Indeed the very first of his 10 recommendations is that:

“Government should ensure that development of the IP system is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights”

RTÉ commends this approach to the Committee, not only with regard to the issue of the term of protection for performers but with regard to the entirety of the task before it.

4. Summary of RTÉ's proposals

- 4.1 Legislation should be introduced to combat all forms of online piracy.
- 4.2 Sections 103 and 251 of the Act should be recast so that the exemption they create will apply only to cable operators in the strict sense.
- 4.3 Powers should be vested in the Minister to allow him to approve extended collective licence schemes when these are needed to enable innovative new services to be introduced.
- 4.4 The Minister should also be given power to approve arrangements under which a collecting society or societies would be able to grant licences in respect of orphan works.
- 4.5 Collecting societies should be placed under a greater degree of regulation than applies to them at present.
- 4.6 A 'fair use' exception based on the US model should not be introduced.
- 4.7 An exception allowing use for parody, pastiche and caricature should be introduced.
- 4.8 Photographs should not be completely excluded from the scope of the fair dealing exception for the reporting of current events.
- 4.9 The Act should forbid the overriding of the fair dealing exceptions by contracts.

- 4.10 The existence of a public interest defence to copyright infringement claims should be expressly recognised.
- 4.11 The definition of ‘broadcast’ should be made platform-neutral.
- 4.12 The statutory licence for the broadcasting of sound recordings should apply to simulcasts and webcasts.
- 4.13 Incidental intermediate copying that takes place in the course of authorised transmissions should not be classed as infringing acts.
- 4.14 The Government should insist that copyright law reform proposals at EU level are evidence-based. The current proposal to extend the term of protection for performers should be analysed against that criterion and opposed.

6th July 2011