

**CONSULTATION ON THE REVIEW OF THE COPYRIGHT AND RELATED RIGHTS ACT 2000
IDA IRELAND SUBMISSION**

IDA Ireland is pleased to make a submission on the Review of the Copyright and Related Rights Act 2000 (the “2000 Act”) initiated by the Minister for Jobs, Enterprise and Innovation.

1. SUMMARY OF RECOMMENDATIONS

Changes to National Copyright Legislation

- The Minister should postpone the proposed introduction of injunctive relief against intermediaries whose facilities are used by third parties to infringe copyright, so as facilitate the adoption of clear legislative guidelines on the steps required to be taken by ISPs and other intermediaries to prevent illegal downloading of copyright works.
- Extend the format shifting exception for TV recordings to cover other instances of private copying that do not entail prejudice to the commercial interests of copyright owners.
- Introduce a parody exception as permitted under Article 5(3)(k) of the Information Society Directive.

Structural Issues

- The Government should, after full consultation with stakeholders, conduct a review of the Rules of the Superior Courts so as to identifying measures that can reduce costs and inefficiencies associated with copyright and other forms of civil litigation. This reform should include the adoption of specific civil procedure rules for dealing with IP disputes.
- The Government should consider establishing an IP specialist court with Circuit Court jurisdiction to hear small to medium IP claims.

EU Level Issues

- The Government should positively support the European Commission’s proposals to create a pan-European collective licensing regime for online services.
- The Government should initiate debate at an EU level on the issue of “non-consumptive” uses of copyright works with a view to assessing whether EU action is needed to create greater legal certainty/harmonisation in this field.
- The Government should promote debate at an EU level on the issue of “user generated

content” with a view to assessing whether EU action is needed to create greater legal certainty/harmonisation in this field.

- The Government should, before adopting a clear position, initiate debate at an EU level on the issue of whether the “fair use” doctrine should be added to the list of exceptions permitted under the terms of the Information Society Directive.
- The Government should request the European Commissioner for Research, Science and Innovation to co-ordinate an EU level response on the issues identified through the relevant Commission Departments – DG Internal Market, DG Competition and DG Information Society and Media.

2. **PRELIMINARY**

- 2.1. Ensuring that Ireland maintains an innovation-supporting regulatory and legal framework is critical to IDA Ireland’s mission of attracting investment and jobs. IDA Ireland recognises that copyright laws are of considerable importance to its clients across a wide range of sectors, including the digital media, creative, information technology, software and communication industries.
- 2.2. IDA Ireland wishes to ensure that Ireland’s copyright laws and the enforcement regime underpinning them remain first in class. IDA Ireland is conscious that other Member States of the European Union are conducting reviews of their national copyright laws. It is important that Ireland maintains its comparative advantage in relation to sectors that are sensitive to copyright legislation. The Copyright Review is therefore both a timely and welcome initiative.
- 2.3. In preparing for this submission, IDA Ireland hosted a discussion forum on 5th July 2011, which was attended by a number of IDA client companies and other stakeholder representatives. The forum generated a variety of views, which we have considered in putting forward the recommendations contained in this submission.

3. **EVIDENCE BASED CHANGES**

- 3.1. A number of IDA client companies expressed the view that proposed changes to copyright law should be supported by evidence. IDA Ireland also firmly supports this principle, although IDA Ireland recognises that empirical evidence may be difficult to obtain in certain instances.

4. **COPYRIGHT AND INNOVATION**

- 4.1. Copyright is recognised as impacting on innovation in two respects:-

- 4.1.1. Copyright grants incentives to engage in creative activity and in this respect it serves to promote innovation.

- 4.1.2. Copyright can potentially restrict/impose costs on the ability to re-utilise copyright works and in this sense it can be argued that it inhibits certain types of innovative activity.
- 4.2. IDA Ireland is of the view that copyright is first and foremost concerned with ensuring that creators have the means to control, and hence commercialise, their works without fear of misappropriation. The 2000 Act does confer a strong degree of protection on copyright owners and therefore, for the most part, IDA Ireland is of the view that Irish copyright law achieves the goal of ensuring that creators have incentives to engage in innovative creative activity.
- 4.3. A number of IDA client companies expressed concerns regarding the enforcement regime and costs associated with litigation (as opposed to substantive copyright law itself). These issues are addressed in the submission below as IDA Ireland believes that an effective and cost efficient enforcement regime is as important to promoting innovation as the substantive copyright laws themselves – the two are inextricably linked and therefore deserve consideration by the Minister under the Terms of Reference.
- 4.4. Regarding the costs/restrictions imposed by copyright, IDA Ireland is of the view that there are a number of discrete areas of copyright law that should be considered for reform as a means of promoting innovation and investment into Ireland. IDA Ireland has set out these recommendations depending on whether the reform needs to be advanced at a domestic (Section 5) or at a European (Section 6) level.

5. **RECOMMENDED REFORMS WHICH COULD BE IMPLEMENTED THROUGH NATIONAL LEGISLATION**

- 5.1. IDA Ireland recognises that Article 5 of the Information Society Directive (Directive 2001/29/EC) provides a closed list of exceptions or limitations on copyright that Member States are allowed to implement into their national laws. Ireland is not therefore allowed to implement limitations or exceptions to copyright that deviate from this list.
- 5.2. A further limiting factor on Ireland's ability to legislate in the field of copyright law is the so called "three-step test" imposed under international treaties. The "three-step test", which is set out in the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and Article 5(5) of the Information Society Directive establishes an overriding principle applicable to limitations or exceptions to copyright, namely that they can "*only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*"
- 5.3. The above two factors have guided IDA Ireland's thinking as to the type and form of innovation-promoting changes that can be implemented at national level. We believe that there is scope within these parameters to reform domestic copyright law in a manner that has the potential to promote innovation and investment.

(a) **Civil Procedure and Litigation Costs**

- 5.4. A number of IDA client companies expressed the view that while Ireland's copyright laws were generally fit for purpose, they perceived shortcomings in the enforcement and civil dispute regime. In particular, it was noted that the cost and time associated with civil litigation had the potential to impact negatively on innovation, since right owners were inhibited from protecting their rights and innovators were fearful of being subjected to expensive legal challenges.
- 5.5. IDA Ireland is aware that the Government is currently considering reforms to reduce legal costs. The message from the IDA Ireland discussion forum is that this review should also encompass a review of civil litigation procedures, since the streamlining of these has the potential to deliver cost savings which can in turn promote innovation. A number of contributors suggested the adoption of IP specific rules on civil procedure (e.g. in relation to discovery) and the establishment of an IP specialist court equivalent to the Patents County Court in the UK, which would have jurisdiction to hear small to medium sized IP cases.

Recommendation

- The Government should, after full consultation with stakeholders, conduct a review of the Rules of the Superior Courts so as to identifying measures that can reduce costs and inefficiencies associated with copyright and other forms of civil litigation. This reform should include the adoption of specific civil procedure rules for dealing with IP disputes.
- The Government should consider establishing an IP specialist court with Circuit Court jurisdiction to hear small to medium IP claims.

Action

- Raise civil litigation reform at Government level and request Department of Justice to commence review process through consultation with stakeholders.

(b) **ISP Liability for Illegal Downloading**

- 5.6. IDA Ireland notes that the Department is conducting a separate consultation on the content of a new statutory instrument for making available injunctive relief against intermediaries whose facilities are used by third parties to infringe copyright. While it was accepted that this legislative amendment is needed in light of UPC decision, a number of discussion forum participants expressed concern that the limited amendment proposed would give rise to further legal uncertainty.

- 5.7. In particular, the view was expressed that no legislative guidance was being provided on the manner in which ISPs would be required to prevent illegal downloading. This lack of certainty was perceived as posing a threat to innovation in the communications sector in that it could result in further protracted litigation.

Recommendation

- The Minister should postpone the proposed introduction of injunctive relief against intermediaries whose facilities are used by third parties to infringe copyright, so as facilitate the adoption of clear legislative guidelines on the steps required to be taken by ISPs and other intermediaries to prevent illegal downloading of copyright works.

Action

- Request that the Minister postpone commencement of the draft statutory instrument on injunctive relief to allow for drafting of legislative guidelines on the steps required to be taken by ISPs and other intermediaries to prevent illegal downloading of copyright works

(c) ***Private Copying/Format Shifting***

- 5.8. IDA Ireland notes that a limited private copying/format shifting exception exists under section 101 of the 2000 Act, but that Irish law does not have a general private copying exception as exists in other Member States. For the most part, the issue of private copying is a consumer issue. However, private copying can also impact on innovation insofar as the absence of a private copying/format shifting exception has the potential to expose device makers and software companies to the risk of secondary copyright liability. IDA Ireland is therefore of the view that the existing format shifting exception provided under section 101 should be expanded to cover other instances of format shifting that do not entail prejudice to the commercial interests of copyright owners.

- 5.9. Participants at the IDA discussion forum were generally open to a limited expansion of the format shifting exception, although there was opposition to the imposition of a levy regime as exists in other Member States.

Recommendation

- Extend the format shifting exception for TV recordings to cover other instances of private copying that do not entail prejudice to the commercial interests of copyright owners.

Action

- Request that Minister draft appropriate legislative amendment.

(d) ***Parody/Transformative Use***

- 5.10. IDA Ireland notes that Irish copyright law does not currently have an exception to permit the use of copyright works for the “*purpose of caricature, parody or pastiche*” as permitted under Article 5(3)(k) of the Information Society Directive. Parody exceptions already exist in other Member States and the United States
- 5.11. On balance, IDA Ireland believes that a parody exception would be a welcome addition to Irish copyright law in that it would provide certainty regarding the innovative transformation of copyright works for limited artistic and expressive purposes without prejudicing the commercial interests of copyright owners. The issue of creating a wider transformative use exception was also raised at the discussion forum, but IDA Ireland feels that a wide exception of this nature would not be permitted under the Information Society Directive.

Recommendation

- Introduce a parody exception as permitted under Article 5(3)(k) of the Information Society Directive.

Action

- Request that Minister draft appropriate legislative amendment.

6. **RECOMMENDED REFORMS FOR ADVANCING AT AN EU LEVEL**

- 6.1. The harmonisation of copyright law achieved under various EU Directives means that many aspects of copyright law now fall within the exclusive competence of the EU. In addition, IDA Ireland notes that the European Commission has identified a number of copyright issues that it is reviewing in the context of promoting innovation and creativity in the Single Market (COM(2011) 287).
- 6.2. IDA Ireland believes that there is an opportunity for the Government to take a leadership role in promoting innovation-supporting copyright law reform in line with the European Commission’s agenda. A positive engagement on these issues will enhance Ireland’s reputation as a jurisdiction that supports and promotes innovation.
7. IDA Ireland recognises that copyright and innovation touches on a number of departmental competencies within the European Commission, including DG Research, Science and Innovation, DG Internal Market, DG Competition and DG Information Society and Media. IDA Ireland believes that the Commissioner for Research, Science and Innovation is well positioned to serve in a co-ordinating role in advancing these issues with the responsible Commission departments.

Recommendation

- The Government should request the European Commissioner for Research, Science and Innovation to co-ordinate an EU level response on the issues identified through the relevant Commission Departments – DG Internal Market, DG Competition and DG Information Society and Media.

Action

- The Government to contact the European Commissioner for Research, Science and Innovation

(a) ***Pan-European Collective Licensing Regime***

- 7.1. A number of participants at the discussion forum expressed dissatisfaction with the fragmented and multi-territorial nature of collective licensing regimes in Ireland and the wider European Union. This state of affairs gives rise to high transaction costs, which in turn inhibits the development of digital content services. IDA Ireland believes that Ireland is well-positioned to benefit from the creation of a pan-European collective licensing regime for online and digital content services. Such a reform would promote competition in the field of copyright licensing.

Recommendation

- The Government should positively support the European Commission’s proposals to create a pan-European collective licensing regime for online services.

Action

- Support the existing European Commission proposals.

(b) ***Non-Consumptive Uses - Text Mining and Data Analytics***

- 7.2. The recently published Hargreaves report recommended that the UK Government introduce exceptions to copyright law to permit “non-consumptive” uses such as text mining and data analytics. This proposal was discussed at the IDA’s discussion forum. In general, it was felt that the issue of creating an exception for “non-consumptive” uses raised complex legal and technical issues.
- 7.3. IDA Ireland is of the view that the impact of copyright law on technical functions such as text mining, search indexing and data analytics requires further detailed study and debate at an EU level, since IDA Ireland feels that legislative reform in this area is likely to occur at an EU rather than a domestic level. Ireland should position itself to offer a supportive legal framework for companies operating in these sectors, while at the same time ensuring that the economic rights of copyright owners are respected.

Recommendation

- The Government should initiate debate at an EU level on the issue of “non-consumptive” uses of copyright works with a view to assessing whether EU action is needed to create greater legal certainty/harmonisation in this field.

Action

- Raise in contact with the European Commission.

(c) ***User-generated Content***

- 7.4. The European Commission has identified “user-generated content” (UGC) as an area requiring analysis at a European level. Ireland has been successful in attracting a number of UGC-focussed Internet businesses to establish operations in Ireland. Whereas IDA Ireland is not aware of threats posed to these businesses by existing copyright laws, the view was expressed that the lack of certainty as to the legal status of UGC was a potential inhibitor to innovation. IDA Ireland believes therefore that the Government should promote examination of UGC at an EU level with a view to identifying whether existing copyright laws present any unnecessary restrictions on the development of this important industry sector.

Recommendation

- The Government should promote debate at an EU level on the issue of “user generated content” with a view to assessing whether EU action is needed to create greater legal certainty/harmonisation in this field.

Action

- Raise in contact with the European Commission.

8. **Fair Use**

- 8.1. The Terms of Reference expressly invite submissions on the merits of introducing a US style “fair use” doctrine into Irish law. At the discussion forum held by IDA Ireland a variety of views as to the advantages and disadvantages of the fair use doctrine were discussed.

- 8.2. Proponents of the “fair use” doctrine argued that it is a flexible concept that is sensitive to technological change. Certain technology businesses in particular see “fair use” as a critical factor in promoting innovation and new business models. They argue that the doctrine affords the US an advantage over Europe in the information technology and digital content sectors.

- 8.3. Opponents of the “fair use” doctrine argued that “fair use” introduces legal uncertainty and thus creates

a greater likelihood of litigation, which in turn serves as a barrier to innovation. In addition, it was argued that an over-extension of the doctrine had the potential to undermine the legitimate economic interests of copyright owners.

- 8.4. IDA Ireland believes that the issue of “fair use” raises two important issues. First, there is the question of whether a flexible doctrine of this nature would be permitted under the terms of the Information Society Directive. Second, there is the substantive issue of whether “fair use” in fact promotes innovation.
- 8.5. On the first issue, while views differed, the predominant view was that a “fair use” doctrine based on the US model would probably require an amendment to the Information Society Directive. For this reason, IDA Ireland believes that the “fair use” doctrine ought to be debated and advanced at an EU level to assess whether it should be added to the list of exceptions permitted under the terms of the Information Society Directive.
- 8.6. As to the merits of the doctrine, IDA Ireland recognises that there is a divergence of opinion. Nonetheless, IDA Ireland believe that the doctrine merits informed debate at an EU level so that all stakeholders and EU partners may have their views heard.

Recommendation

The Government should, before adopting a clear position, initiate debate at an EU level on the issue of whether the “fair use” doctrine should be added to the list of exceptions permitted under the terms of the Information Society Directive.

Action

- Raise in contact with the European Commission.

9. BENEFITS IN TAKING ACTION

- 9.1. IDA Ireland believes that the steps recommended in this submission will deliver a number of benefits to Ireland and that they will advance the wider national innovation policy agenda. In particular, the steps recommended will assist in:-
 - Lowering the costs of doing business in Ireland.
 - Enabling Ireland to continue winning new foreign direct investment in the information technology, digital content, social media and Internet sectors.
 - Positioning Ireland as a better place to develop, protect and commercially exploit intellectual property.

- Enhancing Ireland's reputation as a leader in designing a legal and regulatory framework that is supportive of innovation and new ideas.
- Furthering the research and innovation agendas as set out in the Government's Strategy for Science, Technology and Innovation.

If you have any further queries on the submission please contact;

Deirdre Ardagh BL
EU Regulatory Affairs
Planning & EU Department|IDA Ireland
Wilton Park House|Wilton Place|Dublin 2
Tel: +353 1 6034207|
E.mail: deirdre.ardagh@ida.ie
www.idaireland.com