Irish Copyright Licensing Agency

Copyright Review Committee
Room 517
Department of Jobs, Enterprise & Innovation
Kildare Street
Dublin 2
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14th July 2011

Dear Sirs

Please find outlined below the views of the Irish Copyright Licensing Agency in respect of the Copyright Review announced by Minister Bruton on 6th May 2011.

The Irish Copyright Licensing Agency in the national copyright economy

The ICLA acts on behalf of authors, artists and publishers in licensing the copying of extracts from publications by photocopying and other reprographic means such as scanning. It was founded in 1992 by the Irish Writers' Union (IWU) and the Publishers' Association (CLÉ) on behalf of authors and publishers of books, journals, magazines and other periodicals published in Ireland. It is a not for profit company, limited by guarantee.

The problem to which the ICLA remains the solution arose in the 1980s as photocopying technology enabled the easy, mass reproduction of printed materials and led to widespread infringement of the rights of copyright holders. It is obviously not feasible for users to seek a permission on each and every occasion that they wish to make a copy, nor for rightsholders to pursue infringements.

"Blanket" licences, whereby a group of copyright owners pool their individual rights to offer a collective licence are the answer. The ICLA's licences (which were based on international precedents) provide an effective solution for users who need to obtain lawful access to content at a reasonable price whilst ensuring a fair return to the creators and producers of that content. These "blanket" licences ensure that, whilst incentives for creators and publishers are maintained, users benefit from a simple licence where, for the payment of one annual sum, they are entitled to copy from a large repertoire with minimal administrative inconvenience. The money received for these licences goes (after deducting administrative costs) to rightsholders. A spin-off advantage of use to researchers is a database of rights holders.

ICLA issues licences to organisations in all sectors of the economy. Virtually all of Ireland's schools, colleges and universities are licensed by ICLA to enable them to copy extracts from books, journals and periodicals (SI 514 of 2002 sets out the terms of the licence). Similarly, a large number of organisations in both the public and private sector are licensed. Licences tailored to the needs of businesses that depend heavily on information and research such as law firms and pharmaceutical companies have been developed in consultation with those sectors.

In order to provide licensees with as comprehensive a repertoire (menu of copyable items) as possible, ICLA operates an ***indemnity-backed collective licensing scheme***. Rather than offering a licence limited to a defined list of included titles, ICLA licences operate on the basis that all works published in Ireland are covered by its licence ***unless*** specifically opted-out by the rights holders. We make strenuous efforts to locate copyright owners to ensure that they are aware of the existence of the licences and are given the opportunity to participate in, or exclude themselves from, these licences. But as far as the licensee is concerned, they are entitled to copy from a title unless it is one of the few titles on our excluded list, and the ICLA indemnifies the licence-holder accordingly.

The ICLA's authority is ***non-exclusive***, thus allowing the copyright owner the right to license directly or indeed to grant other parties non-exclusive rights to license. It avoids the risk inherent in systems which apply broader copyright exceptions or which provide statutory licences. It is more flexible in responding to changing economic circumstances than a statutory regime can be.

Artistic works such as photographs, illustrations and drawings appearing within those works are covered by virtue of an agency agreement between ICLA and the Irish Visual Artists' Rights Organisation (IVARO). A network of repertoire exchange agreements with similar organisations throughout the world means that ICLA's collective licences also cover a wide number of overseas publications.

1. Copyright Exceptions – General

The EU Copyright Directive (Directive 2001/29/C on the harmonisation of certain aspects of copyright and related rights in the information society) provides a finite list of exceptions to the general rule of copyright which Member States may apply. All are subject to the application of what is known as the Berne Three Step Test outlined originally in the Berne Convention[1] through Article 5(5) of the Directive. The Article states that exceptions and limitations

"shall 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 right holder*".

Collective licensing is an increasingly important part of the way in which copyright owners exploit their work.

[1] Article 9(2) Berne. The Three Step Test can also be found in Article 10 of the WIPO Copyright Treaty, Article 16(2) of the WIPO Performances & Phonographs Treaty, Article 13 of TRIPS, Article 6(3) of Council Directive 91/250/EEC on the legal protection of computer programs, Article 6(3) of Directive 96/9/EC on the legal protection of databases.

Providing wide exceptions that are likely to be interpreted as meaning that a collective licence is not required would, therefore, conflict with the "normal exploitation of the work".

Collective licensing is a business model for creators and producers of content. Exceptions to copyright should not undermine those business models. A statutory safety net is provided in certain special cases where individual licensing is not feasible and where no licensing scheme exists or is capable of providing a solution to the problem. In the Copyright & Related Rights Act 2000, Sections 53 and 54 for Education and Section 104 providing access for the print disabled are examples of this approach which has worked to the mutual benefit of users and copyright owners. This should not be jeopardised by the adoption of a different approach to the framing or interpretation of those exceptions.

2. Fair Dealing and Collective Licensing

Section 50 (1) and (2) of the Copyright & Related Rights Act 2000 permit fair dealing with specific works, including both literary works and typographical arrangements of published editions for the purpose of "research or private study".

We feel that in failing to confine the exception to non-commercial purposes, this provision materially overreaches which is permitted by the Information Society Directive (principally Article 5(3)(a) thereof) and prevents ICLA from establishing the secondary licensing of works in business and public administration as we are met with the claim that clear commercial uses are made for the purpose of "research" under fair dealing. As stated above, we feel that this wide an exception conflicts with the "normal exploitation of the work". It is interesting to note that the comparable exception in the UK Copyright Designs and Patents Act 1988 was altered in 2003 so as to bring the legislation into line with the Information Society Directive (SI 2003/2498).

This failure to properly implement the Information Society Directive not only causes loss to authors and publishers, but also results in confusion amongst users.

It is clear that an amendment to Sections 50(1) and (2) of the Copyright & Related Rights Act 2000 is required to bring Irish legislation into line with the Information Society Directive.

3. Licensing of Orphan Works

ICLA is a partner in the ARROW+[2] project with the European Commission and is in the process of conducting a feasibility study with national stakeholders in relation to the development of an ARROW database. This feasibility study will be completed by January 2012.

ARROW is a European funded project being delivered by an alliance of national libraries, authors' organisations, publishers' organisations and collective management organisations around Europe.

At this early stage of evaluating the draft proposal on Orphan Works, we would simply say that access to work should only be possible with a licence; that Member States should have the choice as regard the legal system they want to put in place to facilitate the digitization of works and that the right to remuneration should be guaranteed. We will be setting out our views in further detail during the Irish Government Consultation into the draft Directive.

4. Public Lending Right

Following the decision by the ECJ that the exemption granted to educational establishments and public libraries in respect of the obligation to pay remuneration in respect of public lending (CRRA ss 58 and 226) was an incorrect interpretation and transposition of Directive 92/100/EEC, the Government moved to adjust the law by deleting the

[2] Accessible Registries of Rights Information & Orphan Works.

exemptions in respect of authors and performers when books are the subject of lending by public libraries.

The exclusive right to authors' lending is replaced by a remuneration right based on figures compiled about borrowings from public libraries. As with the similar scheme in the United Kingdom, authors are required to register their works in order to receive an income from the public lending right. However, the regulations provide that only living authors may register their works.

We feel that this is discriminatory to the estates of authors who would have benefitted from the right had the directive been correctly transposed by 1st July 1994. The scheme should be amended to facilitate registration of works by estates where the author died between 1st July 1994 and March 2009 when it became possible to first register works.

4. Collecting Societies Forum

ICLA would like to reiterate its support for the issues raised in the submission made by the Collecting Societies Forum and echo the call for a review of the role of the Controller, the IPU and registration requirements at this time.

5. Potentially Perpetual Copyright in Unpublished Work

Section 24 of the Copyright & Related Rights Act 2000 states that "*the copyright in a literary, dramatic, musical or artistic work or an original database shall expire 70 years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public*".

Section 33 of the Copyright & Related Rights Act 2000 states that "*Where the term of copyright in a work is not calculated from the death of the author or authors and the work is not lawfully made*

available to the public within 70 years of its creation, the copyright in that work shall expire on the expiration of that period of 70 years".

However, Section 9 of the Transitional Provisions, First Schedule, Part 1 of the Copyright & Related Rights Act 2000 appears to preserve the status quo with regard to the term of protection of works in which copyright subsisted at the commencement of the Act. Insofar as literary, dramatic and musical works unpublished during the lifetime of the author are concerned, the term runs from creation until 50 years from the date of publication. If publication does not occur, the copyright never expires.

Part of the work of ICLA is to assist users in locating rightsholders to obtain permissions to reuse works which are still in copyright. We feel that this situation is unclear and is therefore a barrier to innovation.

7. Fair Use

The Review is seeking positions on the introduction of a US style "fair use" exemption in Irish and EU law.

We submit that the Information Society Directive precludes the introduction of such an exemption under Irish law and, therefore, the discussion can only be meaningfully conducted in relation to the possible adoption of such an exemption at European level.

We should also like to submit the following points as to why we feel a "fair use" exemption is not appropriate.

Fair use is not the panacea some make it out to be. The "flexibility" which is so often touted by proponents of the model has proven the converse of the certainty and clarity normally sought in a general law. At a time when stakeholders are calling for greater certainty and clarity the introduction of such a defence, pending the lengthy

establishment of a body of case law, would leave copyright owners and users guessing where copyright ends and "user rights" begin.

The "fair use" defence is less certain in its application than fair dealing as currently constructed. This leads to increased litigation and therefore loads costs into the activities of users and copyright owners alike. Lawrence Lessig, a well known advocate of "free culture" in the US has even stated that fair use amounts to little more than "the right to hire a lawyer". American scholar David Nimmer calls "fair use" a "fairy tale" whose complexities have required four separate visits to the Supreme Court, and yet have resulted in a system whose "upshot would be the same … had Congress instituted a dartboard rather than the particular four fair use factors embodied in the Copyright Act".

"Fair Use", like fair dealing, is subject to the Berne Three Step Test. But, in the US, this has to be determined judicially in many cases, whereas the European approach has been to attempt to frame all copyright exceptions so as to meet the Test in the primary legislation, providing a greater degree of certainty.

There seems to be no evidence to support the view that the "fair use" regime explains why major search engines such as Google have launched in the US and not in Europe. In fact it is only in the US that the core search engine function of Google has been subject to litigation (Field vs Google; Perfect 10 vs Google) whereas in Europe litigation has tended to focus on the additional services launched by Google and which, in some way, exploit or rely unfairly on content created by others, but without providing a mechanism either to obtain their permission before hand or to agree on a system to remunerate them for the use of their copyright work.

The Google Book Programme in the US, which involves mass digitisation of works, has of course been expensively litigated and is now subject to a draft settlement agreement which is in effect a collective licence

managed through a collecting society, the Books Rights Registry. Should the settlement be approved (the outcome of the status conference on 19th July 2011 is not yet available), the issue of whether or not the scanning was a "fair use" will not be determined by the court.

When confronted with these additional services, copyright owners, whether located in the US or in Europe, have generally either litigated or negotiated a licence permitting the use (eg: Copie Press in Belgium, ViaCom in the US, PRS/YouTube in the UK and Agence France Presse in France).

In fact the current ViaCom case in the US is looking at the extent to which the US "safe harbour" provisions would apply (comparable in our view to the defences under the EU E-Commerce Directive) and thus is not dependent on a particular analysis of "fair use".

In our view, important policy decisions should remain the responsibility of the Oireachtas, not the courts who are ill-equipped to assess the impact of a decision between two parties on the market and the public as a whole. Introducing a "fair use" regime would mean moving decisions away from the Oireachas to the Courts.

Collective Licensing: whatever system is used, there will always be some doubt about the limits of any copyright exception. Whilst it is clearly desirable to limit this area of doubt as much as possible, collective licensing can offer the certainty that users need by providing permissions which remove any risk to users. They do not have to engage in the difficult exercise of judging whether or not a particular act is within an exception if it is covered by a licence. Nor do they incur the administrative and transactional costs of seeking one-time permissions. By contrast collective licensing offers economies of scale.

A shift to a "fair use" model would undermine existing business models. It has the potential to inhibit investment in the development of an efficient licensing market and impede collective administration of copyright which is essential to compensate copyright holders for their creative efforts and investments.

Several common-law governments, including Australia, New Zealand and the UK, have cited international treaty obligations as one of the reasons for not adopting a "fair use" system. So that, independent of policy decisions, it seems likely that adopting a "fair use" system would violate Ireland's obligations to enact copyright legislation in harmony with international treaty obligations.

8. Necessity/complexity/cost of obtain permissions constrains economic growth?

The Review is also seeking economic evidence in relation to constraints to economic growth. In this regard we would refer you to the report submitted by the Copyright Licensing Agency, Publishers Licensing Society, Authors Licensing & Collecting Society and Design & Artists Copyright Society to the recent Hargreaves review in the UK. [3]

It is clear from the PwC report that, where collective licensing solutions are appropriate, they represent a simple and relatively cheap method for obtaining permissions thus removing any perceived constraint on economic growth.

Rather than constraining economic growth, collecting societies contribute to it in a variety of ways:

- by rewarding creators and producers for the use of their content thereby incentivising their continued efforts;
- by enabling access to information for users;
- by enabling the use of Irish produced content abroad through reciprocal agreements, thereby earning overseas revenues by

[3] An economic analysis of copyright, secondary copyright and collective licensing; Pricewaterhouse Coopers March 2011 http://www.ipo.gov.uk/ipreview-c4e-sub-plsreport.pdf

minimising the administrative and transactional costs of obtaining permissions.

9. Conclusion

This submission is made, and the Copyright Review is taking place, at a time when discussion of exceptions and limitations is high on the agenda at WIPO, the Intellectual Property Strategy for the lifetime of the current Commission has just been released and a draft directive on Orphan Works has just been presented.

The Commission is also developing schemes to promote collective licensing schemes for "out of commerce" works, a draft directive on collective management (due second half 2011) and a commitment to develop viable solutions in relation to access to works for the print disabled.

It is a time when copyright policy is undergoing intense re-evaluation. While the current review is timely, it should not be regarded as a single opportunity to update Irish law.

The Government must ensure that it has the capacity to conduct such surveys and studies as may be necessary, continue to pro-actively consult with stakeholders and interested parties, engage with the European and International processes of decision making and bring forward such legislation as may be appropriate in a timely fashion. The situation which arose in relation to the transposition of the Resale Right for Visual Artists into Irish law should not be allowed to happen in the future.

In this way, the Irish copyright regime can both serve domestic stakeholders and being at the forefront of European policy making.

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