Personal Submission

to the

Copyright Review Committee

as part of the consultation process on the

Review of the Copyright and Related Rights Act 2000

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This brief submission is not made from from a legal perspective, nor is it intended to provide a quick solution to the problem of balancing the intellectual property rights of creative works against the desirability of a free and fair Internet. It is written solely from the standpoint of someone who stands in the middle, who both owes his living to the continuous and freeflowing nature of technology enabled by the Internet in its current form, but who also enjoys and recognises the benefits of works governed by copyright - a 'user', to use the terminology defined in section 2.4 of the CRC consultation paper.

Legal issues

The statutory instrument (SI) central to this debate owes its existence to a supposed need to address a loophole arising from deficiencies in the Copyright and Related Rights Act, 2000. It was prompted principally by proceedings brought against the State by EMI and others in response to alleged copyright infringement by end users of services provided by ISPs. The instrument was signed into law with minimal debate, in an atmosphere that intimated that any such debate was to be cosmetic. It was implied that such change was necessary so as to achieve compliance with EU law and directives. However, a view expressed by SC John Gordon (in the Sunday Business Post of Feb 5th) claimed that no such legislative change was necessary to bring Ireland into compliance with EU law.

Indeed, given the European Court of Justice's ruling in the Scarlet Extended SA v SABAM case, which ruled against an injunction compelling an ISP to filter all traffic it handled, it could be argued that introducing an open-ended statutory instrument with vague wording on this same subject would be in fact contrary to this finding by the ECJ.

Opposition to the statutory instrument signed into law in February has been dismissed by the Minister as misrepresenting what the legislation is intended to do. This is missing the point. 80,500 people signed the 'Stop SOPA Ireland' online petition, not because the Irish legislation is a carbon copy of SOPA - it isn't - but because those involved with the day-to-day running of the Internet as a living recognise the potential future effects of this 'thin end of the wedge' legislation. It purports to target illegal filesharing, but instead will only undermine the underlying infrastructure of the Internet itself.

So we are now left with a piece of unasked-for legislation, passed with minimal debate in the House, in response to proceedings taken by a lobby group with an aim that appears to have been clearly already struck down by a European ruling.

The wording of this legislation has, it has been claimed, been left deliberately vague so that the courts may rule more clearly in this area. These future court rulings will partner the work of the Copyright Review Committee, a body that has so far produced a 182-page consultation paper that attempts to set out a synopsis of the challenges facing the dilemma of free expression and innovation versus the rights of copyright holders, and asks for submissions on the subject.

In other words, the net effect of the statutory instrument so far has been to blur the legal situation regarding the capabilities of ISPs and site owners to go about their business in the face of the possibility of arbitrary legal action by copyright holders regarding the actions of third parties. Even disregarding the ECJ ruling, the finding in the case of EMI Ireland & others vs UPC in 2010 indicated clearly that those in the position of EMI would not be able to seek such ‘injunctive reliefs’. However, the SI turns this position on its head.

Defining the scope of redress of rightsholders

To further question the need for this SI on practical, rather than legal grounds, one can take the position of devil’s advocate. Why should we be concerned about legislation such as this? Why should rightsholders, faced with a shrinking revenue stream (EMI claims profits fell by almost half in 2011 alone) not be able to seek legal redress against theft?

The answer is that these companies who take such actions view the Internet solely as a medium through which thieves may steal from them, when in fact it has grown in its short lifetime to be an essential utility that most in the Western world take for granted, where more and more of us increasingly live more and more of our lives. We communicate with friends and strangers, pay our bills, order our shopping and work nine-to-five at home making a living. It is supremely arrogant of media companies, especially those that have a poor track record of responding to innovation, to consider themselves so important as to be granted special powers over a citizen’s ability to be granted access to this network, an ability which is fast becoming a basic human right.

We are now only beginning to understand the innovative potential of this great communications platform, the last great invention of the 20th century. Its major power is the enabling of

collaboration, of eliminating distance, of accelerating ideas. We already take for granted a 'Sent from my iPhone' at the bottom of emails. Could we have done so only four years ago? It has enabled countless disruptive business ideas, unconstrained by the power of slower incumbents it displaced to prevent progress from taking place.

Therefore, the primary concern over the ability of the courts to impose arbitrary, clumsy 'powers' over how this infrastructure should operate is the perception this creates. As a participant in an industry sector, it would be difficult not to be uneasy about the prospect of the very medium that one works in being potentially affected at the behest of the complaints of a competitor.

The SI leaves it open for courts to actually provide a means for companies - companies with recourse to general legal war chests, yet who cannot use this capital to adapt their business practices to a changing world - to place barriers in the way of this innovative medium. This is a regressive step. It is a disproportionate reaction, and the Irish economy will have to deal with the unintended consequences of stifling expression. We have already seen negative reaction from both Facebook and Google, two large employers in Ireland, to these developments. The reaction from the grassroots community has been even more vocal - 80,500 people signed the 'Stop SOPA Ireland' petition, a cohort that were surely not all teenagers and libertarians.

Counteracting theft

This is not to disregard the instances of blatant theft that the Internet has also facilitated. Only the disingenuous will claim that the majority of traffic over services such BitTorrent, for example, consists mostly of legal file exchanges. It can be argued, however, that much of what media companies view as 'infringement', on Youtube for example, actually leads to revenue generation through further interest in the viewed material, but it is also clear that illegal firesharing is also widespread. The Copyright Review Committee's stated aim appears to be to find a middle way between protecting rightsholders and fostering a free and open Internet. Unfortunately, this is a pointless exercise. Technology cannot be uninvented, and prohibition will simply not work. It is already obvious that pirates can easily stay one step ahead of legislation. The only pragmatic answer of media companies in response to the pirating of copyrighted material must be to provide that material in a more attractive and convenient manner than the currently-rampant illegal option.

It is unfortunate that the most widely-heard arguments from both sides are the most risible. For example, It is often seen argued that downloading copyright material without paying is not in fact theft, as a copy has merely been made and the original unaffected. However, only the most straightfaced thief will adhere to this position, ignoring the obvious point that somebody must pay at some point to make it worthwhile. Similarly, the entertainment industry is fond of quoting figures based on the idea that one download equates to one lost sale, as if to imply that the legions of teenage music downloaders had a working credit card in reserve all along that they instead opted not to use.

Far better arguments exist on the content side. There are numerous disadvantages to pirated material that make it vulnerable to a technologically-superior legal alternative - poor quality media content, for example, which differs from that 'advertised', and, of course, the ever-present threat of viruses and malware. This is not a desirable situation, even for those who insist on seeking out copyrighted material through illegal channels.

We have been here before, and home taping did not, in fact, kill music in the end. The introduction of the CD resulted in a new golden age for the music industry. It would surely, in hindsight, be hard to argue that this had less of an effect than that of introducing a tax on blank cassettes - as in, for example, the 'blank media levy' introduced in Canada in 1997. This new, innovative technology of the CD provided a whole new revenue stream for media companies, as people responding by buying their album collections all over again due to the better quality offered by technological superiority of the medium. This is the feat that these companies must repeat instead of hoping to pursue a costly and quixotic legal quest - they must do the pirates' job better than the pirates do. With the launch of Netflix, for example, it is possible to see that it is only by competing better with copyright infringement through similar technology itself that rightsholders can sustainably carry on a successful business model.

Towards an approach without statutory instruments

The Copyright Review Committee seeks guidance on all areas relating to how copyright may be protected in an open environment that still fosters innovation. However, this is a futile exercise when the SI indicates that the courts will still have the last word. The legalistic verbiage associated with the SI refers to being 'satisfied' that the High Court has 'guidance' to ensure that a 'remedy' will uphold vague freedoms of expression. Yet it is far clearer that the statutory instrument now signed into law quite clearly grants copyright holders the ability to place a court injunction against an ISP that they simply claim is infringing on their copyright. In the real world, the likes of EMI has the resources to bully an independent website into taking the easier option of compliance, whether their claim has any validity or not. Participants in all of this include individuals, small businesses and large corporations alike, who depend for their livelihood on a free and open Internet. It is this open-ended power described by the SI that makes all these participants uncomfortable about the possibility of this same freedom and openness being arbitrarily restricted by the courts in response to the actions of media companies, a relatively small stakeholder in the technology sector.

Until such time as the ideas floated by the Committee have any grounding in law (for example, a Digital Copyright Exchange, or an out-of-court resolution service), legislation such as this SI must be opposed. It is, however, difficult to see where the impetus for such ideas would come from when media rightsholders will still have the ability to respond to perceived threats to their revenue with far greater power through legal avenues.

The entire issue has been framed around the question of when innovation should, if ever, trump copyright. This, however, is not the point. It is simply not possible to resolve such a question in

an environment when one relatively small stakeholder can influence the rules in a way that the SI allows. We currently enjoy a free and ubiquitous Internet, in which the concept of freedom implies that participants are both free to innovate and free to pirate copyrighted material, unwelcome though the latter may be. However, such freedoms are still constrained by libel and copyright law, laws deemed sufficient by the European Court of Justice. To allow media companies to play 'whack-a-mole' through the courts is not in the interest of either Irish citizens or of Ireland itself as a place to do business.

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