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At a Crossroads – Irish Copyright

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This article analyses important proposals to change Ireland’s copyright regime. The proposals are contained in the Copyright Review Committee’s Final Report published on the 1st October 2013. This piece also examines key elements contained in the 2012 Consultation Paper, which started the process of sketching reforms to Irish copyright law. Particular attention is paid to the possibility of introducing a fair use doctrine to the Republic of Ireland.

Introduction

In many respects, the 1st October 2013 was a red letter day for Ireland’s copyright community. On that day, the Department of Jobs, Enterprise and Innovation published its eagerly awaited report (Report) aptly titled ‘Modernising Copyright’. The Report, which was written by the Copyright Review Committee (CRC)¹ and runs to 180 pages, proposes some far-reaching changes to Ireland’s copyright regime. These changes are contained in suggested draft legislation to be found at the end of the Report and titled ‘the Copyright and Related Rights (Innovation) (Amendment) Bill 2013’ (the Bill). The Bill has been drafted as a

¹ The Copyright Review Committee comprised: Dr Eoin O’ Dell (Trinity College Dublin), Patricia McGovern (DFMG Solicitors, Dublin) and Professor Steve Hedley (University College Cork)

series of amendments to the primary piece of copyright legislation in Ireland i.e. the Copyright and Related Rights Act, 2000 (as amended) (CRRA). Sometimes in this article, the author refers to the CRRA as ‘the Principal Act’ as that is the term used in the Copyright and Related Rights (Innovation) (Amendment) Bill 2013.

The CRC’s Report was preceded by a comprehensive consultation paper² (the Consultation Paper) which was published on 29th February 2012. In addition, two public meetings were held to discuss the proposals for change. They were held on 4th July 2011 and 24th March 2012 and together, generated about 280 written submissions.

It is interesting to note that Ireland is just one of a number of common law countries that have either recently reformed their copyright laws or, are in the

² Titled ‘Copyright and Innovation – A Consultation Paper’

process of doing so. Examples include the UK,³ the U.S.,⁴ Canada,⁵ Australia,⁶ and India.⁷

³ See for example the Hargreaves Review ('Digital Opportunity – A Review of Intellectual Property and Growth'), May 2011. Chapter 4 of this Review covers copyright licensing while chapter 5 covers copyright exceptions for the Digital Age. Arguably, one of the most direct outcomes of the Hargreaves Review was the adoption in the course of 2014 of the five copyright exceptions (by way of statutory instrument). The five exceptions are as follows: The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (No. 2361); The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (No. 2356); The Copyright (Public Administration) Regulations 2014 (No. 1385); The Copyright and Rights in Performances (Disability) Regulations 2014 (No. 1384); and, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (No. 1372). The regulations on public administration, disability and research, education and libraries/archives came into force on 1st June 2014 while the regulations on personal copies for private use and those on quotation and parody came into force on 1st October 2014. The publication of these copyright exceptions was preceded in December 2012 by the Government's response to consultation on copyright exceptions and clarifying copyright law titled 'Modernising Copyright: A Modern, Robust and Flexible Framework'. On a separate point, reform of UK collecting societies is envisaged by way of the Copyright (Regulation of relevant licensing bodies) Regulations 2014. This secondary legislation puts in place a system of self-regulation by UK collecting societies (termed 'licensing bodies' in the legislation), something that was recommended in the Hargreaves' Review. Interestingly, the Enterprise and Regulatory Reform Act 2013 gives the Government the power to make secondary legislation to remedy, and, where warranted, penalise gaps in self-regulation by the relevant licensing bodies. The 2014 Regulations were adopted against the backdrop of the EU Directive on Collective Rights Management which seeks to improve standards for the operation of collecting societies throughout the 28 Member States of the EU and pursues the Commission's long-term aim of facilitating multi-territorial licensing of musical works for online use. The full title of this Directive is Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. It was adopted on 26th February 2014.

⁴ See the Department of Commerce's Green Paper titled 'Copyright Policy, Creativity and Innovation in the Digital Economy' published in July 2013. The Green Paper was prepared by the Department of Commerce's Internet Policy Task Force, an entity established in 2010 by the Secretary of Commerce to conduct a comprehensive review of privacy policy, copyright, the global free flow of information and cybersecurity and their respective relationships to innovation in the internet economy. The Internet Policy Task Force obtained additional input for the Green Paper through reviewing the submissions made to the Office of the Intellectual Property Enforcement Coordinator (IPEC) in connection with the 2013 Joint Strategic Plan for Intellectual Property Enforcement. Interestingly, four months prior to the publication of the aforementioned Green Paper, the U.S. Register of Copyright, Maria Pallante stood before Congress and called for a new copyright law. Pallante's prepared remarks to the U.S. House of Representatives, Subcommittee on Courts, Intellectual Property and the Internet called for 'bold adjustments' to U.S. copyright law. Pallante's

prepared remarks can be accessed via the following link:

<http://copyright.gov/regstat/2013/regstat03202013.html>

⁵ See the Copyright Modernisation Act 2012 which came into force on 7th November 2012. This Act amends the 1985 Copyright Act. Some of the principal changes wrought by the 2012 Act are spelt out in its preamble: (a) it updates the rights and protections of copyright to better address the challenges and opportunities of the internet, so as to be in line with international standards; (b) It clarifies ISPs' liability and makes the enabling of online copyright infringement itself an infringement of copyright; (c) It expands the notion of fair dealing to include: satire, parody and education; (d) it introduces general user exceptions to copyright covering copying for private purposes (subject to certain conditions) and format shifting/time shifting; and (e) It grants educational institutions and instructors exceptions to use works and other materials available through the internet, subject to conditions. For example, under the 2012 amendments, it is not an infringement of copyright for an educational institution to make a single copy of a work or other subject-matter that is communicated to the public by telecommunication. It may later perform that copy for educational or training purposes.

⁶ See ALRC Report 122 'Copyright and the Digital Economy' (published November 2013). In its report, the ALRC considers whether the existing exceptions and statutory licences in the Copyright Act 1968 are both adequate and appropriate in the digital environment and whether further exceptions should: 1. Recognise fair use of copyright material; 2. Allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and, 3. Allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

⁷ See India's Copyright (Amendment) Act 2012. This Act ensures that Indian copyright law now complies with the two WIPO Internet Treaties of 1996, - the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. It also bolsters the digital rights management component of Indian copyright law by inserting three new provisions into the 1957 Copyright Act: Section 65A, criminalising the circumvention of an effective technological protection measure; Section 2 (xa) defines Rights Management Information (RMI) ; and Section 65B criminalises certain acts relating to RMI, chiefly, the unauthorised removal or alteration of RMI on copies of work and the unauthorised and 'knowing' distribution, importation, broadcast or communication to the public of such copies of works. Separately, the fair dealing provisions have been expanded by virtue of Section 52 (1) (a). The expansion ensures that fair dealing can now apply to any work (except a computer program) and to a wider range of purposes.

The EU too recently completed a public consultation on the review of its copyright rules.⁸ The aim of this consultation process, which ran from 5th December 2013 to 5th March 2014, is to try and ensure that the EU copyright regulatory framework remains fit for purpose in the digital environment.

The Background

The CRC was established on 9th May 2011 by the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton and was tasked with the following terms of reference:

1. Examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation
2. Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation

⁸ The 36-page consultation document can be viewed at:

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf . The public consultation focused on issues identified in the *Communication on Content in the Digital Single Market* (COM (2012)789 final, 18/12/2012). The issues identified in this communication are: territoriality in the internal market, harmonisation, limitations and exceptions to copyright in the digital age, fragmentation of the EU copyright market and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform. Separately, the Licences for Europe process has also been finalised as demonstrated by the publication of the document 'Ten Pledges to bring More Content Online' (accessible via the link: http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf) . While, on the legislative front, the EU has also been quite active over the past three years with the adoption in October 2012 of the Orphans Work Directive (Directive 2012/28/EU) and the Directive on Collective Rights Management and Multi-Territorial Licensing of Musical Works for Online Use (Directive 2014/26/EU) in February 2014.

3. Examine the U.S. style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.
4. If it transpires that national copyright legislation requires to be amended but cannot be amended (bearing in mind that Irish copyright legislation is bound by both EU and international obligations), make recommendations for changes to EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.

The twin themes of innovation and economic competitiveness

The related themes of innovation and economic competitiveness are much to the fore, particularly in the Consultation Paper. The early part of the Consultation Paper makes reference to the 2010 report written by Ireland’s Innovation Taskforce.⁹ There is an acknowledgement that by encouraging innovation, Ireland also encourages new technologies, new business methods and new companies. Through its public policy, Ireland needs to foster an innovation ecosystem that will drive the development of a knowledge-based or smart economy.¹⁰

The Innovation Taskforce observes that the ‘regulation of IPRs in Ireland is a vital part of the overall legislative framework that promotes, protects and encourages innovation’.¹¹ The Consultation Paper looks at the intersection between copyright and innovation from two perspectives. The first is that copyright law can support innovation by rewarding the introduction of a novelty with a long monopoly. The second is that copyright law can deter innovation by preventing the alteration of what is already established. The key, of course, is a well-balanced copyright regime which is attuned to the processes and benefits of innovation which would reward novelty without deterring further enhancement.¹² (CP, p. 6). One of the principal aims of the Irish review is to determine whether domestic copyright law strikes that balance appropriately.

⁹ Innovation Ireland. Report of the Innovation Taskforce [Innovation Ireland] (Stationery Office, Dublin 2010) (see http://www.forfas.ie/media/Report_of_the_Innovation_Taskforce.pdf).

¹⁰ ‘Copyright and Innovation – A Consultation Paper’ at p. 5.

¹¹ Ibid, p. 22

¹² ‘Copyright and Innovation – A Consultation Paper’ at p. 6

Innovation and competitiveness – The IT industry Competitiveness Index 2011

Given the strong synergies between IP and IT, it is unsurprising that the Consultation Paper refers to the IT Industry Competitiveness Index 2011¹³ prepared by the Economist Intelligence Unit for the Business Software Alliance.

Using the term ‘global digital competitors’, it hones in on Ireland, India, and Israel, three countries often bracketed together when it comes to competition in the global IT sector. The Consultation Paper notes how Ireland, despite its economic problems, appears to have redoubled efforts to cultivate one of the world’s most competitive environments for IT producers. A combination of increased private sector R&D spending (in the early part of Ireland’s economic downturn), increased enrolment in science programs and IT patent generation all helped boost Ireland’s score for the R&D environment. The net effect was to push Ireland into joint 8th position (in the 2011 Competitiveness Index), up from 11th in 2009. However, there is no room for complacency as Ireland’s digital competitors also climbed the rankings. Thanks to a similar improvement in the R&D environment, higher private sector spending and increased patent activity, Israel climbed from 13th to joint 10th position in the 2011 index. The 2011 index shows that India recorded the biggest improvement in terms of actual ranking, moving up ten places to joint 34th. Significant improvement across all R&D environment indicators as well as in higher education enrolment attributed to India’s improved standing. Unfortunately, it seems as if the 2011 index was the last time that an IT Industry Competitiveness Index was compiled so it is difficult to gauge how Ireland, India and Israel have performed since then.

The Report’s Centrepiece Recommendations

The Report’s centrepiece recommendations include the establishment of a Copyright Council of Ireland (Copyright Council) and specialist intellectual property tracks in the District and Circuit Courts along with the introduction of tightly-drawn exceptions for innovation, fair use, and very small snippets of text in the context of online links.

¹³ <http://globalindex11.bsa.org/country-table/>

In addition to the key recommendations, the position of rightsholders will be improved, by recommendations to extend remedies, technological protection measures and rights management information. Photographers, in particular, will benefit from the recommendation that copyright protection for metadata be strengthened. The position of copyright users is also likely to be improved by virtue of recommendations to introduce the full range of exceptions permitted by EU law, including format shifting, parody, education, disability, and heritage, as well as related exceptions for non-commercial user-generated content and content mining. All users will also benefit from a comprehensive recommendation that any contract term which unfairly purports to restrict an exception permitted by the Act should be void.

Copyright Council of Ireland

Under the proposed reforms, the Copyright Council would be afforded statutory backing, would take the form of a company limited by guarantee and would be ‘independent in the performance of its functions’. This would ensure the Copyright Council’s independence from government, from state agencies such as the Controller of Patents, Designs and Trade Marks, and from any one category or group of stakeholders.

The Report advocates a wide range of functions for the Copyright Council, enabled by broad principal objects. It is worth repeating those objects in full here. They are, as follows:

- a) Ensure the integrity of copyright whilst protecting freedom of expression and the public interest;
- b) Raise public awareness of the importance of copyright and contribute to public debate about the application and reform of copyright, including by making recommendations to the Minister and to other appropriate bodies in Ireland, the European Union and internationally,
- c) Foster dialogue and cooperation in the Irish copyright community
- d) Prepare and publish standards and codes of best practice on copyright issues;
- e) Undertake research on copyright issues, and in particular on the social and economic impact of copyright;
- f) Support legal and technical means of protecting copyright, and
- g) Promote creativity, sharing, open access, and innovation

Using the Press Council as its model, the CRC recommends a 13-member Board with the power to form sub-groups to deal with relevant issues.

In terms of the funding of the Copyright Council, the Report recommends that it be funded from subscriptions paid by its members. But, to ensure that as many members of the copyright community become subscribing members of the Copyright Council as possible, the Report recommends the putting in place of ‘transparent categories of membership and scales of fees’ (p. 20). While the Copyright Council should in the main be self-funding, the Report does not preclude the possibility of it charging fees for its services, accepting gifts and donations (so long as they are not subject to conditions incompatible with the objects, functions and independence of the Council), exchequer funding,¹⁴ National Lottery funding and EU funding.

Digital Copyright Exchange

An examination of the submissions shows that there was a good deal of circumspect support for the establishment of a Digital Copyright Exchange (the Exchange) as part of the Copyright Council. Such Exchange would act as ‘a mechanism to expand and simplify the collective administration of copyrights and licences’. On that basis, there were many cautious welcomes for the proposals.

The Report acknowledges that many of the submissions counselled the need for the Exchange to interoperate with ongoing developments in the UK (for example, the establishment of the Copyright Licensing Steering Group and the Copyright Hub, which implement some of the Hargreaves recommendations). The CRC sees merit in allowing the Copyright Council and its organs to develop the notion of the Exchange ‘at the pace that is appropriate to the issue itself and to developments elsewhere’. Consequently, the CRC recommends that the Schedule be enabling and not mandatory and that it should simply provide that the Copyright Council ‘may establish’ an Exchange. In the CRC’s view, this approach would allow the Copyright Council to decide whether to press ahead in

¹⁴ The exchequer funding could for example on an ex gratia basis meet start-up costs or operating shortfalls. There may also be circumstances in which exchequer funding could ensure that the Council is able to act and to continue to act in the overall public interest (p.20).

the vanguard, with or ahead of the equivalent UK developments, or, to wait and see, and seek to reap the benefit of the UK experience (p. 23).

If the Exchange were established, the CRC recommends that in the first instance participation in same should be voluntary, as it considers copyright licensing should be a matter for rightsowners. While the CRC does not recommend compulsory licensing in the initial stages, it does recommend that the Copyright Council and Exchange keep the matter under review. If it proved necessary, the Minister could require compulsory licensing of rights/classes of rights, for the purposes of ensuring the success of the Exchange. (p. 23)

Alternative Dispute Resolution Service

The idea of a suitable alternative dispute resolution framework outside the court system proved very popular during the submissions stage. Consequently, the CRC recommends that the Copyright Council establish a ‘voluntary, independent, neutral, impartial and expeditious ADR service’.

Two possible models are set out by the CRC at page 24 of its Report. The first model should be made available not through the Copyright Council but through the Patents Office, along the lines of the mediation service offered by the UK Intellectual Property Office (UK IPO). However, the Report goes on to state that that mediation service was rarely used and that the UK IPO recently revised and relaunched it. The second model considered would make the ADR process compulsory. This would resemble the Injuries Board established pursuant to the Personal Injuries Assessment Board Act, 2003 as a statutory body providing independent assessment of personal injury, without the need for many associated litigation costs.

However, the CRC, whilst acknowledging the need to encourage ADR, considers that making it compulsory is a step too far. Referring to recent UK revisions and the model being adopted by the U.S. Copyright Office, the Report recommends that the Copyright Council provide a wide variety of mediation options, including short telephone advice sessions, as well as tele-conferencing and online services. Another recommendation was that the ADR Service could publish standard form ADR clauses and contracts. Indeed, the Copyright Council could decide that such clauses should be included in licences obtained through the Exchange.

Specialist Courts

The possibility of establishing specialist intellectual property jurisdictions in the District and Circuit courts was explored in the Consultation Paper. Many of the submissions supported this possibility, pointing in the process to section 287 of the UK's Copyright, Designs and Patents Act, 1988 which established the special jurisdiction of the former Patents County Courts (renamed the Intellectual Property Enterprise Court on 1st October 2013) whose procedures have been streamlined so as to save the parties time and money and includes a small claims track.

The Report points out how Ireland's Small Claims Court (a service provided by the District Court offices) provides for an inexpensive, fast and easy way for consumers to resolve disputes without the need to employ a solicitor. The CRC finds that analogy sufficiently compelling and recommends that IP claims ought to be brought within the small claims procedure. In fact, as things stand, the District Court already has an element of IP jurisdiction as it possesses significant powers under the CRRA's search and seizure provisions.¹⁵ This 'precedent' signifies that IP issues are not inappropriate to the District Court and, arguably, the extension of the small claims procedure should cover all IP claims, not simply copyright claims.

Referring to section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, which extended the general monetary jurisdiction of the District Court to €15,000, the CRC recommends that the small claims procedure in the District Court be extended to include IP claims up to the value of €15,000. On a practical note, the

¹⁵ See in particular section 132 CRRA, 2000

CRC noted how the introduction of a new jurisdiction to the District Court would require the provision of proper training and sufficient resources. It therefore recommends that the Irish government provide such training and resources as a matter of priority.

Specialist Courts : Circuit Court

Just like the support shown at submissions stage for a specialist IP court at District Court level, similarly strong support was shown for a specialist track at Circuit Court level, once again using the analogy of the UK's Intellectual Property Enterprise Court. The Report speculates whether any such jurisdiction would be accommodated by a new Circuit Commercial Court, promised in the Programme For Government.¹⁶ However, until such court is established, the CRC recommends that a specialist IP court be established in the Circuit Court and that the new monetary limit of jurisdiction of the Circuit Court of €75,000¹⁷ apply to such court. Once again, the CRC recommends that the government provides proper training and sufficient resources and that they be provided as a matter of priority

Fair Use – As covered in the Report

The CRC's terms of reference refer to "the U.S. style 'fair use' doctrine" but this reference to the *American* doctrine may, the CRC believes, have proven to be both controversial and distracting! The CRC's Report points out that the doctrine is not unique to the U.S. and in fact cites Band and Gerafi's *Fair Use/Fair Dealing Handbook* (2013) which states that 'more than 40 countries with over one third of

¹⁶ See: <http://www.socialjustice.ie/content/programme-government-2011-2016-full-text> (Programme for Government 2011-2016 at p. 51)

¹⁷ Established by virtue of section 14 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013

the world's population have fair use or fair dealing provisions in their copyright law'.¹⁸

The Report specifically identifies some of the jurisdictions in which fair use exceptions have been adopted: Bangladesh,¹⁹ Liberia,²⁰ Sri Lanka,²¹ Taiwan,²² Uganda²³ and South Korea.²⁴ Interestingly, one month after the publication of the Irish Report, the Australian Law Reform Commission recommended the replacement of its purpose-built exceptions with a flexible fair use style exception. The recommendations for change are contained in the Australian Law Reform Commission's report 'Copyright and the Digital Economy',²⁵ published in November 2013.

Fair Use – As covered in the Consultation Paper

Separately and distinctly, the Consultation Paper also covered certain countries which have either adopted a fair use doctrine or, are considering doing so. Clearly, the U.S. is one of the most prominent

¹⁸ Jonathan Band and Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (published March 2013), at page 1 (Introduction). The Handbook can be accessed at: <http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf>. Fair use and fair dealing are different concepts. In Ireland and elsewhere, fair dealing covers very restricted uses of copyright-protected material in situations such as criticism or review or, research and private study. In contrast, fair use is a much broader idea, which leaves the courts free to assess whether a new use falls within the exception, as in the U.S. Judicial activism in the U.S. has helped to broaden the parameters of fair use significantly in that country.

¹⁹ Section 72 of the Copyright Act, 2000

²⁰ Section 2.7 of the Copyright Law, 1997

²¹ Sections 11 and 12 of the Intellectual Property Act, 2003

²² Section 65 of the Copyright Act, 2007

²³ Section 15 of the Copyrights and Neighbouring Rights Act, 2006

²⁴ See the Copyright Act, 1957 as amended by Act No. 11110 of December 2, 2011. Article 35-3 provides for 'fair use of works'.

²⁵ ALRC Report 122, 'Copyright and the Digital Economy', November 2013. The ALRC Report considers that the fair use exception should contain three elements: 1. an express statement that a fair use of another's copyright material does not infringe copyright; 2. a non-exhaustive list of four fairness factors to be considered in determining whether use of that copyright material is fair; and 3. a non-exhaustive list of illustrative uses or purposes.

countries to adopt the doctrine. In the U.S., the fair use exception was developed by the country's courts as a safety valve upon the exclusive rights granted by copyright, permitting limited and reasonable uses without permission or payment. It was codified in the Copyright Act 1976 (17 U.S. Code § 107). Section 107 of the U.S. Copyright Act sets out four factors that have to be considered when determining whether the use made of a work in any particular case is a fair use. They are as follows:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect of the use upon the potential market for or value of the copyrighted work

The consideration of these four factors allows for a 'flexible and sensitive calibration of the impact of the particular use in any given set of circumstances'.²⁶

The Consultation Paper then goes on to examine the fair use doctrine in other countries. Israel, for example, applies a fair use clause by virtue of section 19 of its Copyright Act 2007. India introduced an expanded fair dealing exception by way of its Copyright (Amendment) Act 2012 and this goes a long way down the road to a fair use doctrine. The Singaporean fair use defence (contained in section 35 (2) of its Copyright Act, 1987 (as amended)) is in similar terms to section 107 of the U.S. Copyright Act, but with the addition of a fifth factor i.e. the possibility of obtaining the work or adaptation within a reasonable

²⁶ Consultation Paper, at p. 112

time at an ordinary commercial price. Perhaps unsurprisingly, the mixed legal system of the Philippines also provides for a fair use clause helped by the fact that its IP regime is influenced by that of America. Section 185 of the Philippines' Intellectual Property Code²⁷ contains a fair use clause. Interestingly, this particular provision also explicitly states that decompilation²⁸ may constitute fair use.

Fair Use – How the CRC interpreted their Terms of Reference in this regard

The CRC interpreted their terms of reference in respect of the Fair Use component to require them to try and answer the following question: whether the absence of a fair use doctrine from Irish law amounts to a barrier to innovation.

The Report reiterated how many of the submissions expressed opposition to the importation of a 'U.S. style' fair use exception into Ireland. The Report clarifies that the tentative draft (contained in the Consultation Paper) on which the CRC sought responses was not a 'U.S. style' exception at all, but instead represented an attempt to sketch what a specifically Irish exception might look like. The Report makes clear (at p. 90) that what is proposed is not a radical break from the current copyright regime, but rather a tentative draft fair use exception which is intended to be tied as closely as possible to, and informed as much as possible by the existing CRRA exceptions.²⁹

²⁷ That is, Republic Act No. 8293 (1997)

²⁸ Section 185 of the Philippines' Intellectual Property Code defines the term 'decompilation' as 'the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs'.

²⁹ Permitted acts are governed by chapter 6 of the CRRA. The two provisions of the CRRA which explicitly refer to 'fair dealing' are: section 50 (research or private study) and section 51 (criticism or review).

Fair Use and competitive advantages within the EU

The Report notes that other jurisdictions, both in the EU and in the wider common law world have either adopted a species of fair use exception or are actively considering doing so.³⁰ The Report argues that if Ireland were to adopt the CRC's 'tentatively proposed and tightly-drawn draft fair use exception' it could position itself in the fair use vanguard. The Report also points to important technological developments in the guise of cloud computing and 3D printing which defy *ex ante* legal responses. The CRC posits that its draft fair use doctrine would enable context-sensitive accommodations to be developed as the occasion arises in respect of cloud computing and 3D printing, and other technological innovations. It also adopts the realistic attitude that a new fair use doctrine will not transform Irish intellectual property law overnight but it will send important signals about the nature of the Irish innovation ecosystem. The CRC further argues that their draft fair use doctrine would provide the Irish economy with a

³⁰ However, this assertion seems to fly in the face of the InfoSoc Directive which delimits the exceptions permitted. Article 5 of the InfoSoc Directive contains a closed list of 20 possible exceptions, all of which are meant to meet the three step test contained in Article 5 (5) of the same Directive.

competitive advantage in Europe and it would give Irish law a leadership position in EU copyright debates.

Accordingly, the CRC recommends the insertion of a new section (i.e. section 49A) on fair use in the CRRA, 2000. The version of section 49A (contained in the Report) is slightly amended from the draft tentatively put forward in the Consultation Paper. Given the import of this new section, it is worth examining it in detail.

Section 49A (1) states the general principle that the fair use of a work is not an infringement of the rights conferred by Part II of the Principal Act.

Subsection (2) of the new section provides that ‘other acts permitted by Part II of the Principal Act shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by Part II of the Principal Act.

The important subsection (3) imposes an obligation on the court when it is deciding whether or not the use made of a work in a particular case is a fair use. In essence, the court is obliged to take into account such matters as it considers relevant to include ‘any or some or all’ of the following eight factors. Clearly, the list of eight factors is a non-exhaustive list and the court may take into account additional factors (which fall outside the list of eight) when making its assessment.

The list of eight factors is as follows:

- a) The extent to which the use in question is analogically similar or related to the other acts permitted by Part II of the Principal Act.
- b) The purpose and character of the use in question, including in particular whether
 - i. It is incidental, non-commercial, non-consumptive, personal or transformative in nature, or

- ii. If the use were not a fair use within the meaning of the section, it would otherwise have constituted a secondary infringement of the right conferred (by Part II of the Principal Act)
- c) The nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question
- d) The amount and substantiality of the portion used, quantitatively and qualitatively, in relation to the work as a whole³¹
- e) The impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market³²
- f) The possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case
- g) Whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question³³
- h) Whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise

³¹ With this factor, the less of a work that is implicated in the use in question, the more likely it is to be a fair use.

³² With this factor, the more the use has an impact on the commercial market of the work, the less likely it is to be a fair use

³³ Oddly, factor (g) only refers to one step from the three-step test. It omits reference to 'certain special cases' and, the fact that the reproduction 'does not conflict with a normal exploitation of the work'. In that regard, it offends both Article 9 (2) of the Berne Convention and Article 5 (5) of the InfoSoc Directive.

Subsection (5) permits the relevant Minister to make regulations which prescribe what constitutes a fair use in particular cases and which fix the day on which the new section 49A comes into operation.

The Eight Factors – Pulling in favour of or against a finding of fair use

One of the substantive changes in the Report (compared with the Consultation Paper) is the decision by the CRC to offer some guidance to the courts in terms of whether the eight factors pull in favour of, or against, a finding of fair use. Consequently, in the Report, the CRC organises and expresses the factors so that those that pull in favour are grouped together in paragraphs (a) – (c) above, general matters are grouped together (paragraphs (d) and (e) above), and those which pull against are grouped together (paragraphs (f) – (h)).

Draft section 49A strikes an appropriate balance between the relevant stakeholders in the copyright domain

The CRC argues that draft section 49A appropriately takes into account the legitimate concerns of rightsowners whilst at the same time providing sufficient space for innovation. It points out that the exceptions set out in subsection (2) and subsection 3 (a) are tightly bound to the other CRRA exceptions. Moreover it argues that the eight factors set out in subsection (3) which can be taken into account in determining whether a use is a fair one or not are quite precisely drafted so as to remove ambiguity and to promote as much certainty as possible in their application.

The CRC members conclude by saying that they consider the draft section 49A strikes the appropriate balance both within and between the various categories of rightsowners, collecting societies, intermediaries, users, entrepreneurs, and heritage institutions and this cannot but encourage innovation. They therefore recommend the insertion of a fair use exception in the CRRA, 2000. This would take the form of a new section 49A (which is provided for in section 29 (1) of the **suggested Bill**). Furthermore, the CRC recommends the adoption of a similar exception in the context of performances. This would be done by inserting a new

section 220A into the CRRA, 2000 and this change is reflected in section 29 (2) of the suggested Bill.³⁴

Remedies

The Report makes the general statement that it is not enough that copyright holders hold rights, they must also be able to seek and obtain appropriate and effective remedies when those rights are infringed (at p. 360). Referring to the submissions made, the Report records the significant support for the idea that remedies for breaches of copyright should be proportionate and that civil sanctions such as injunctions and damages should be graduated. In this regard, the Report refers to one end of the scale – the unintentional breaches – they should not be met with significant awards of damages. The other end of the scale – the most serious breaches – would, the Report argues, be appropriately dealt with by the award, for example of restitutionary, exemplary or punitive damages.

Referring to the Irish Law Reform Commission's Report from May 2000 on Aggravated, Exemplary and Restitutionary Damages,³⁵ which discusses the retributive and deterrent purposes of an award of exemplary or punitive damages, the Report highlights the recommendation contained in the Law Reform Commission's Report that there be a general principle that exemplary (or punitive) damages should bear some reasonable relation to compensatory damages, taking into account the circumstances of the case and the public interest in deterring and expressing condemnation of the wrongdoing involved.³⁶

The Report goes on to refer to another recommendation contained in the Law Reform Commission's Report, namely, that exemplary (or punitive) damages should not be excluded in cases where there has

³⁴ Arguably, this recommended exception would also be contrary to the three-step test.

³⁵ LRC 60-2000

³⁶ Law Reform Commission Report on Aggravated, Exemplary and Restitutionary Damages (May, 2000) [LRC 60-2000], at p. 30 [para 2.019] (correct done)

been a prior imposition of a criminal penalty in respect of a crime arising from the same conduct as the civil wrong concerned. However, the Law Reform Commission was of the view that exemplary (or punitive) damages should only be awarded in such cases in exceptional circumstances and the prior criminal penalty should be taken into account in the assessment of the quantum.³⁷

Setting out the four sections in the CRRA which provide for remedies – section 128 (remedies for infringement of copyright), section 304 (remedies for infringement of performers' property rights), section 203 (remedies for performers' rights generally, albeit more limited in scope than section 304) and section 216 (remedies for infringement of recording rights), the Report recommends that all four provisions should provide for the same range of graduated civil remedies, so that, at one end of the scale, unintentional breaches are not met with significant awards of damages, and that, at the other end of the scale, the most serious breaches can be appropriately dealt with by the award of restitutionary, exemplary or punitive damages.

Photographs and Photographers

The Report acknowledges that the position of photographers was a particular concern in both rounds of submissions and at both of the public meetings hosted by the CRC. There is equal acknowledgement of the fact that digital photographs are now particularly easy to reproduce and the key issues are how to prevent reproductions that infringe copyright, and how to provide proper remedies where such infringements occur.

³⁷ Law Reform Commission Report on Aggravated, Exemplary and Restitutionary Damages (May, 2000) [LRC 60-2000] at p. 59 [para 3.15] (correct done)

The Report notes (at p. 39) that in cases of infringing images and videos, the metadata³⁸ is ‘routinely tampered with or removed’. To give comfort to content-creators, such as photographers, and for the avoidance of doubt, the CRC recommends that metadata be expressly protected, so that tampering with it or removing it constitutes an infringement of copyright. This explicit protection is provided through three CRC recommendations.

The first recommendation is that the Interpretation provision of the CRRA, namely section 2 (1), be amended to include a definition of metadata and this is provided in section 2 (2) of the Bill. The proposed definition reads as follows:

‘ “Metadata” includes data information about a work, and in particular includes digital data (whether or not it is incorporated with the work or is otherwise associated with it) that

- (a) provides information about the authorship, condition, content, context, origin, ownership, provenance, quality, or structure of the work, or rights pertaining to or associated with the work, or other similar or related matters, and

³⁸ In the Report, metadata is described as ‘data about data’. In essence, metadata is data that describes other data. It summarises basic information about data, which can make finding and working with particular instances of data easier. For example, author, date created, data modified and file size are all very basic document metadata. In terms of digital photos, metadata may be written into a digital photo file that will identify who owns it, copyright and contact information, which camera created the file along with exposure information and descriptive information such as keywords about the photo, making the file searchable on the computer and or the internet. Some metadata is written by the camera and some is input by the photographer and/or software after downloading to a computer. In terms of metadata written by the camera, this can be described as EXIF data and encompasses such things as lens aperture, focal length, camera shutter speed, ISO sensitivity, whether flash was used or not, etc.

- (b) enables the work to be controlled, listened to, located, manipulated, organised, presented, read, used, viewed, or otherwise worked with, provided that it does not include computer programs, and in particular does not include the program source code of websites ’

The second recommendation refers to a change in the wording of the CRRA provision on restricted acts, namely, section 37 (3). As the wording currently stands, it refers to ‘the undertaking of an act restricted by the copyright in the work’ and then clarifies that such act must ‘relate to the work as a whole or to any substantial part of the work’. In short, the proposed alteration brings within the notion of a restricted act, ‘metadata incorporated in the work’ or, ‘any substantial part of the metadata incorporated in the work’.³⁹

The third recommendation also involves a change to the wording of a CRRA provision. This time, the provision in question is section 43 CRRA and the proposed change is that there be explicit reference to the fact that the removal of metadata be deemed an infringing adaptation of a work.⁴⁰

The CRC believes that taken together, these three recommendations will ensure that the removal of metadata constitutes an infringement of copyright.

Conclusions

Despite the CRC’s far-reaching recommendations for change, it is regrettable that there has been so little tangible progress since the

³⁹ The proposed change is contained in Section 9 (1) of the Bill.

⁴⁰ The proposed change is contained in Section 9 (2) of the Bill.

publication of the CRC Report in October 2013. Furthermore, given the impending general election in Ireland (to be held by 7th April 2016 at the latest), it is rather difficult to see copyright reform being suddenly prioritised, particularly given all the inertia (on the reform front) throughout 2014. It is also slightly ironic that in March last year, Ireland made a submission to the European Commission in the context of the EU public consultation on the review of the copyright rules. The first sentence of this submission states as follows: ‘It has become increasingly clear that copyright reform is necessary in order to meet the needs and demands created by the uses of copyrighted works in our modern society’.

It has to be questioned whether the CRC’s proposal to adopt even a ‘specifically Irish’ fair use doctrine is realistic given Ireland’s international copyright obligations. Each of the following conventions/treaties requires adherence to the three-step test: the Berne Convention (Article 9 (2)); the TRIPS Agreement (Article 13); the WIPO Copyright Treaty (Article 10); and, the WIPO Performances and Phonograms Treaty (Article 16). In addition, the InfoSoc Directive stipulates a three-step test by way of its Article 5 (5). Is it even plausible that Ireland could ignore the three-step test which is so clearly enshrined at multilateral level?

While the foregoing assertion is grounded on legal obligations, surely practical and pragmatic considerations would influence Ireland away from the fair use doctrine? After all, the country is home to a large number of content creators/ software producers. Well-known IT behemoths such as Google, Microsoft, Yahoo, Oracle, SAP, Facebook and Cisco all have a presence in Ireland. Given that the fair use doctrine in a way operates to limit copyright so as to bolster innovation and competition, it would be perfectly understandable if some (or all) of the aforementioned tech companies felt uncomfortable about Ireland’s possible adoption of a fair use doctrine. While an Irish fair use doctrine would undoubtedly accommodate transformative uses, it would also

engender copyright uncertainty, something at which the large IT companies in Ireland might balk.

Lastly, there are some clear parallels between UK copyright developments and the recommended/ proposed changes for Ireland. One clear parallel (and this is alluded to in the Final Report) is that of the proposed Irish Digital Copyright Exchange and the UK's Copyright Hub. The latter evolved from Prof Hargreaves' recommendation that a Digital Copyright Exchange be created for the purpose of streamlining copyright licensing across the sectors in global digital markets. Another parallel exists between the mooted specialist intellectual property jurisdictions in the District and Circuit courts in Ireland and the UK's Intellectual Property Enterprise Court (IPEC). It seems that Ireland drew inspiration from its nearest neighbour when the CRC recommended that Ireland's Small Claims Court (a service provided by the District Court offices) be used for IP claims. The small claims track for copyright, trade mark and unregistered design cases in the UK is situated within the IPEC. Its jurisdiction covers cases where the amount claimed is less than £10,000.

The End