

COPYRIGHT COMMENT

Major reform of Irish copyright

With Ireland's copyright reform process gathering pace, Matheson's **Alistair Payne** and **Amy Lawless** discuss redesigning legislation for the digital age



Alistair Payne,
Matheson

Amy Lawless,
Matheson

Copyright in Ireland is on the brink of major reform. In 2011, the minister for jobs, enterprise and innovation established the Copyright Review Committee with a mandate of recommending ways to modernise copyright legislation in the digital age. The fruits of its labour were published on 29 October, in a 185-page report, entitled 'Modernising Copyright'. The report recommends a major overhaul of Irish copyright legislation with some innovative, if not radical, twists.

This article will provide a brief overview of the principal proposals and an analysis of the more controversial recommendations relating to the proposed innovation exception and those for linking and marshalling and fair use.

Overview of principal recommendations

The report describes the proposed establishment of a Copyright Council of Ireland as one of its centrepiece recommendations. It is proposed that the council will be an independent, self-funding organisation, created by the Irish copyright community and underpinned by legislation. The role of the council will be to ensure the protection of copyright and the general public interest as well as encouraging innovation, providing education and advice on copyright issues and advocating for development in copyright policy.

The report also recommends that the council establish an Irish Orphan Works Licensing Agency, where any person seeking to make use of an orphan work may seek a licence from the agency, with the licence fee being passed to the rights owner if he or she is subsequently identified. However, as the

EU is currently reviewing the overall policy on orphan works, it is likely that any Irish developments will not come into effect until the EU regime is finalised.

"Of particular benefit to photographers is the proposal that metadata should be protected so that tampering or removal constitutes an infringement of copyright. This is an innovative amendment that would bolster the protection of online photographs."

A key recommendation is the establishment of specialist IP courts in Ireland. At present, IP disputes are litigated in the Commercial Court, a branch of the High Court with specialist judges. Litigation in this forum tends to be limited to high value claims as costs escalate quickly. It is open to litigants to file proceedings in Ireland's lower courts, however the disadvantage with this approach is that it is a general jurisdiction and there are often long delays.

The report recommends the establishment of specialist intellectual property jurisdictions in

the lower district and circuit courts, with claims limits of €15,000 and €75,000 respectively. Such courts would be of particular benefit to smaller rights owners as it would provide them with a mechanism of enforcing their rights in a cost effective and focused manner. In practice, there is unlikely to be an economy of scale issue when compared with the UK Intellectual Property Enterprise Court and the efficacy of these proposals will be dependent on whether proper training and proper resources are allocated to these specialist courts.

Of particular benefit to photographers is the proposal that metadata should be protected so that tampering or removal constitutes an infringement of copyright. This is an innovative amendment that would bolster the protection of online photographs.

The report further recommends bolstering the position of copyright users by transposing the full range of EU copyright exceptions, including format-shifting, parody, education, disability, and heritage, as well as exceptions for non-commercial user-generated content and content mining. The committee takes the view that as the UK is transposing these exceptions, Ireland will be at a competitive disadvantage if it does not do likewise.

Linking and marshalling

Linking is a controversial topic. There are three pending references to the Court of Justice of the European Union (CJEU) as to whether linking amounts to copyright infringement in various circumstances. Pundits question how the internet would operate if linking is found to constitute infringement?

The report recommends a sort of half-way house approach. In short – linking should be considered as an exception to copyright, rather

than as something that does not fall within the scope of copyright protection. The idea is that the exception will not apply in circumstances where the provider of the link knew, or ought to have known, that the link connects with infringing content.

In relation to 'marshalling' (indexing, syndication and aggregation of online content), the report recommends adopting a narrow exception on the basis that marshalling provides a context for the linked work. The Irish recommendation is modelled on the German legislation that came into effect in August and provides an exception for "single words" or "very small snippets of text". The underlying proposal is that it is not an infringement to reproduce a very small snippet of a linked work if such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the interests of the author. If this recommendation proceeds, the courts will be left to thrash out the meaning of normal exploitation and unreasonable prejudice. However, the Irish proposal does provide more definitions and safeguards than its German counterpart and in particular, explicitly defines a "small snippet" as no more than 40 words or 160 characters. The committee suggests that these additional safeguards ensure that the Irish marshalling exception would comply with the Berne Convention.

These proposals could, in any event, end up being redundant if the pending CJEU decisions fall in line with the European Copyright Society view that linking should fall outside the scope of copyright protection altogether.

Innovation

In an effort to incentivise innovation, the report recommends a "tightly-drawn" exception for innovation. There is some debate in Europe as to whether the Information Society (InfoSoc) Directive precludes member states from adopting their own innovation exceptions. However, the report takes the view that as the adaptation right has not been harmonised, member states may legislate freely for innovation exceptions.

The suggested exception relates to transformative uses and provides that "it would not be an infringement of copyright if the owner or lawful user of a work derives from it an innovative work, where the latter is an original work which either substantially differs from, or substantially transforms, the initial work".

While in broad principle a good idea, this proposal is of itself so innovative and the "line" is so hard to define, that it is potentially fraught with difficulty. In addition, it is not clear

that member states do in fact have the right to freely legislate for innovation exceptions. This issue is currently before the CJEU in the case of *Art & Allposters International*, in which Allposters claims that as its canvas prints transform the base work, they do not infringe the underlying copyright of the original work. It is likely that the Irish government will await a decision in this case, before proceeding on the assumption that it has the right to legislate for transformative use.

"Compared with the relative certainty of the traditional 'pigeon hole' approach to fair dealing, there is a risk of opening a Pandora's box of uncertainty, but then perhaps this is the price of flexibility and innovation?"

Fair use

One of the terms of reference for the report was to "examine the US style fair use doctrine to see if it would be appropriate in an Irish/EU context". The report recommends the implementation of all of the exceptions set out in the InfoSoc Directive relating to private use, format-shifting, back-ups, parody, non-commercial user-generated content, public administration, news and official celebrations, as well as a tightly drawn Irish specific 'fair use' provision.

Happily (for clients, although perhaps not for lawyers), the proposal is not as broad-sweeping as the US doctrine and incorporates the existing fair dealing exceptions (research and study, criticism and review, reporting of current events). It provides that these exceptions must be exhausted before fair use can be considered. The draft section then sets out eight factors that must be considered by a court in assessing fair use: the extent to which the use is similar to other uses permitted; the purpose and character of the use; the nature

of the work; the amount and substantiality of the portion used; the impact of the use on the normal commercial exploitation of the work; the possibility of obtaining the work at an ordinary commercial price; whether the legitimate owners of the work are unreasonably prejudiced; and whether the use is accompanied by an acknowledgment.

The report suggests that a tightly drawn fair use exception will encourage innovation by accommodating new technologies as they arise, which would prevent the need for cumbersome statutory amendment every time that technology changes. The intention is to try and make a doctrine of fair use fit with the fast paced nature of an ever-changing digital environment.

It is claimed in the report that the introduction of a uniquely Irish fair use doctrine would send important signals to potential investors in the Irish economy and would give Ireland a competitive advantage over its neighbours. Critics question whether the price to be paid for this investment by rights owners is too high? The report claims that the appropriate balance is struck between rights owners and intermediaries and users, but, with pending interpretation by the courts, it is difficult to say how 'fair' such a fair use doctrine would be. By way of example, the question of 'substantiality' is a subjective one and the proposals do not provide any indication as to how a court would apply such a test. In fact, questions remain as to whether such a test would be appropriate as the InfoSoc Directive does not refer to 'substantiality'. This underlined the *Infopaq* decision, in which the CJEU held that the real test in relation to reproduction is the originality of the part extracted, rather than its substantiality. Compared with the relative certainty of the traditional 'pigeon hole' approach to fair dealing, there is a risk of opening a Pandora's box of uncertainty, but then perhaps this is the price of flexibility and innovation?

Comment

As is evident from our whistle-stop tour of the principal proposals, the report recommends a dramatic overhaul of the Irish copyright landscape. The shape of the proposals may change following parliamentary debate and some of the proposals may need to be amended in order to ensure compliance with new EU policies and the pending decisions of the CJEU. Considering the scope and detail of the report, if the proposals are enacted, Irish copyright legislation will be much better prepared for the advent of the Irish government's much discussed 'smart economy'.