# Copyright - Back in the Spotlight!

It is increasingly clear that the market for digital products and services is growing exponentially. But, for this writer at least, the competition *Your Country Your Call* provided an insight into both the economic promise that this offers Irish enterprise, and the interesting times that lie ahead for copyright and other IP practitioners.

Is it not remarkable that both of the winning entries in the competition have at their very centre the application of copyright in the digital environment?

Neil Leyden's Global Media Hub involves the creation of an international content services centre. As envisaged, it will act as a "world class digital cluster", offering a facilitating environment to creative industry practitioners and digital content service companies, to exploit and distribute content globally.

The project will rely on those parts of the copyright regime that concern the protection, licensing and management of content in the online environment.

Cianan Clancy and Colm MacFhlannachadha propose a strategy for a "data island". Apparently, the amount of data distributed on the web is expected to grow by 44 times between now and 2020. The proposal involves creating "green mega data centres" for all of this data. It will place Ireland in the vanguard of development in services such as cloud computing, information storage and online gaming.

Both projects will almost certainly involve innovative software, database rights, and the application of rights management information and technological protection measures.

This is the environment in which we are now operating. These are our clients and our future clients. It is exciting. It heralds a boost for IP practitioners who are willing to keep abreast of the issues.

There are however some stubborn legal obstacles to the development of projects such as these. Protection of material online is universally problematic. Peer to peer file sharing is a thorn in the side of the right holders of musical, visual and audiovisual works. There has been a fragmented approach to this issue, both within Europe and elsewhere. Here in Ireland, in the recent case of EMI Records

and Others –v- UPC Communications Ireland Limited[1], Charleton J. held that Irish law does not provide the court with the power to grant orders to oblige internet service providers to block access to internet sites habitually carrying infringing material, nor to cut off internet access to subscribers engaging in peer to peer file sharing. These remedies do exist in other countries, although in no jurisdiction has the legislature found it easy to find an appropriate balance between the interests of the rightholder, the internet service provider and the user. In Britain, the Digital Economy Act 2009 provides for precisely the type of remedy sought in the UPC case, once certain procedures are followed. The practical details of the scheme have yet to be finalised by a regulatory code to be published shortly by Ofcom, the independent UK regulator. The relevant Irish legislation, largely the Copyright and Related Rights Act 2000, is now a decade old, and - as shown by the UPC case – is not equal to the task of containing peer to peer infringement[2].

Almost as significant a problem is the question of cross-border licensing of protected material. This is the other side of the enforcement question. The manner in which licensing is conducted by collective management organisations ("CMO"s) on behalf of right owners has traditionally been both sector-specific and highly territorial. The traditional model has been that authors assign worldwide exploitation rights to their national CMO, which then grants licences on their behalf. CMOs enter into reciprocal rights agreements with each other for mutual representation in each other's territories. Authors are not free to join a CMO in another territory, and in order to join their national CMO, they must assign all of their rights to that CMO.

This traditional model has constricted the development of online distribution. The European Commission has taken various steps short of a legal instrument to try to loosen the stranglehold. In 2005 it issued a Recommendation proposing a series of measures for legitimate online music services.[3] This met with limited success, and in 2008, following two years of negotiations with CISAC (the International Confederation of Societies of Authors and Composers), in what is known as the "CISAC case", the European Commission found that clauses relating to territorial exclusivity and membership restriction in the CISAC model reciprocal rights agreement were anti-competitive, and in breach of Article 81 of the Treaty. The decision has left some uncertainty in its wake as to how precisely

[1] Judgment delivered 11th October 2010.
[2] An article in the next issue of The Irish Intellectual Property Law Quarterly will analyse the issues arising in the UPC case.
[3] Commission recommendation of 18th May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).

the practices of the societies have altered in response to the decision, and the impact on access to licensing repertoire.

It has to be said that, during this period, there have been several cross-border licensing initiatives in the music and other sectors. In so far as music is concerned, these are acknowledged in the European Commission report on the monitoring of the effect of its 2005 Recommendation.[4] In keeping with the time-honoured tendency of collecting societies to bury meaning under a hail of acronyms, the initiatives are called by such names as CELAS, PEDL and SACEM-UMPG. In the visual art sector, EVA, the European umbrella body for visual artists' collecting societies, has established OLA - a system of online licensing of visual works linked to the websites of its member organisations in a number of countries. Collecting societies in the literary sector have participated in online heritage and library projects such as the ARROW project.[5] And outside the system of collective management, industry players have found ways to collaborate to provide online services.

The fact remains however that securing licences across borders is extremely difficult and that the response of the collective management organisations to this obvious need has been remarkably slow and uneven. However, unless the drive for access to content is met with easier access to licences, the rightholder will increasingly be by-passed. As Google bears witness - publishing first and asking later - it is too easy to engineer this fact in the digital world.

A closely related difficulty is that of orphan works – how a licence to use protected material can be obtained in circumstances where the owner of the copyright either cannot be identified, or located. This is a particular problem for libraries and archives. They are often unable to obtain rights clearance to digitise and publish such material online, and are therefore prevented from providing electronic access to a considerable body of valuable cultural works.

Here then are three significant challenges which need to be addressed to enable projects such as those submitted to *Your Country Your Call* to grow and prosper. Solutions are needed not only to benefit fledgling projects such as these however. They are needed to sustain enterprises engaged across the whole spectrum of economic activity that includes the media, IT, communications, e-commerce, entertainment and culture, and to enable Europe to compete more effectively in these sectors.

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[4] Monitoring of the 2005 Music Online Recommendation, 07.02.2008

[5] See further below.

How are the problems to be solved, and by whom?

In March last, the European Commission proposed the *Europe 2020 Strategy*. It was endorsed by the European Council in June. The document opens with these words:

"Europe faces a moment of transformation. The crisis has wiped out years of economic and social progress and exposed structural weakness in Europe's economy. In the meantime, the world is moving fast and long-term challenges – globalization, pressure on resources, ageing – intensify. The EU must now take charge of its future.

Europe can succeed if it acts collectively, as a Union. We need a strategy to help us come out stronger from the crisis and turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion. Europe 2020 sets out a vision of Europe's social market economy for the 21st century".

The strategy proposes seven flagship initiatives, interlocking around the principles of smart, sustainable and inclusive growth. Three of these have already been published: *A Digital Agenda for Europe* was finalised in late August; *Youth on the Move* was launched on 15th September, and *Innovation Union* was published on 6th October.

Neelie Kroes, Vice-President of the European Commission and Commissioner for the Digital Agenda, has presented a wide-ranging programme of action in the *Ditigal Agenda* document. The objective of the Agenda is to "chart a course to maximize the social and economic potential of information and communications technology, most notably the internet…… to spur innovation, economic growth and improvements in daily life."

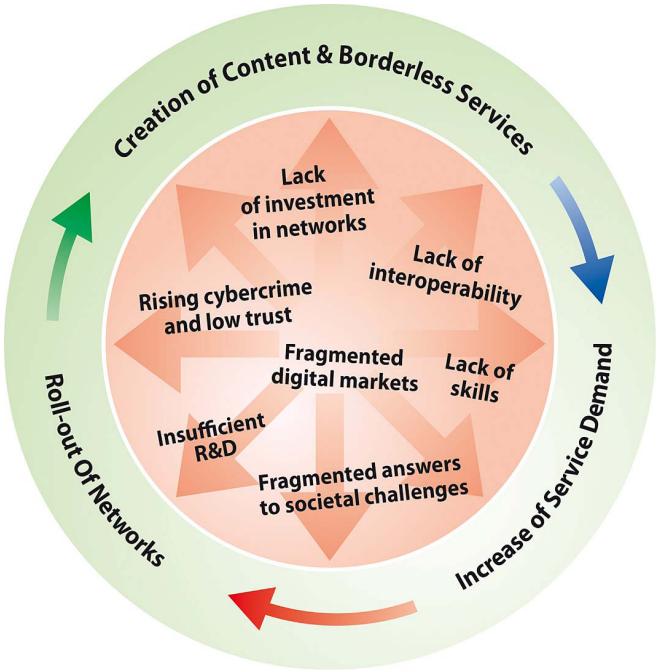
The document points out that persistent fragmentation is stifling Europe's competitiveness in the digital economy. The EU has fallen behind in markets such as media services, both in terms of what consumers can access and in terms of business models that can create jobs in Europe. Most of the recent successful internet businesses (Google, eBay, Amazon Facebook et al) orginate outside Europe.

A "virtuous cycle" of activity is illustrated: attractive content and services need to be made available in an interoperable and borderless internet environment; this stimulates demand for higher speeds and capacity, which in turn creates the

business case for investments in faster networks; and this in turn opens the way for innovative services employing higher speeds.

Seven significant obstacles are described and shown in the centre of the "virtuous cycle, shown below:

**The "virtuous cycle"**




To address the problems, the agenda pulls together a set of proposals across an extraordinarily broad spectrum, many of them to be commenced in 2010.

The key actions of most interest for copyright purposes are these:

- ❖ A Proposal for a Directive on collective rights management, establishing pan-European licensing for (online) rights management, to be delivered in 2010;
- ❖ A Proposal for a Directive on orphan works to facilitate digitisation and dissemination of cultural works in Europe, to be delivered in 2010;
- ❖ Proposals to be made for up-dating the eCommerce Directive for online markets, to be delivered in 2010.
- ❖ A report on the Review of the Directive on the enforcement of intellectual property rights, to be delivered in 2012.

- ❖ A review of the Directive on Re-Use of Public Sector Information, to be delivered in 2012

By a framework directive on collective rights management, the agenda seeks to achieve enhanced governance and transparency of CMOs, and pan-European licencing. There are a number of issues that will need to be addressed in this context. At a public consultation organised by DG Internal Market & Services last April, various user groups gave their opinions on what is needed. Multi-territory licensing was taken as given. So also was a competitive and well-regulated market for collective management, with clarity about rights and licence terms. But other issues figured prominently. These included the need to reform the levy system used in European countries to remunerate private copying, and the provision of an effective system for resolving disputes between users and rights owners.

Where the CMOs were concerned, there seems to be an acceptance that regulation of some kind is inevitable and will contribute to the development of European digital markets. These comments made on behalf of GEMA[6] are instructive:

"GEMA shares the view of DG Markt that it is time now to issue a European directive on collective rights management. This directive should set the framework for the collective rights management in the modern borderless environment.

During the last ten years we have learned that competition law alone does not provide for solutions….The decision of the Commission in the CISAC case brought great uncertainty about how the collecting societies shall deal among themselves…. The bundling of repertoire was made more difficult than before.

When it comes to a regulation of collective rights management, GEMA proposes a broad approach… We need a horizontal framework directive that covers all of the activities of collecting societies."

The process of finding the right solutions to create a new, open online licensing environment cannot be an easy one. The *Digital Agenda* is looking for "innovative business models" through which content can be accessed and paid for in many different ways, finding a fair balance between right holder's revenues and the general public's access to content and knowledge. While a directive is proposed, the document also states that "the Commission does not exclude or favour at this

[6] German collecting society GEMA represents music composers and publishers.

stage any particular option or legal instrument". And that "legislation may not be necessary to enable such new business models to prosper if all stakeholders cooperate on a contractual basis."

The orphan works problem has bothered the Commission for some time, hindering access to content, and interfering with one of the flagship projects of the i2010 strategy, the public online library EUROPEANNA. To assist in the development of EUROPEANNA, the Commission supported the ARROW project [7] collaboration by a consortium of European national libraries, representatives of publishers and writers. It aims to enable libraries and other users to obtain information as to who owns relevant rights, what rights they own, who owns and administers them and how permission can be obtained to digitise and make works available to user groups. The project also seeks to enhance the interoperability of available information. Solutions envisaged by the venture include the establishment of systems for the exchange of rights data, the creation of registries of orphan works, information on or registries of works out of print, and supporting the creation of a network of rights clearance mechanisms.

The Commission has been working towards an impact assessment aimed at evaluating solutions to remedy the orphan works issue in the digital environment. In May this year it published an "Assessment of the Orphan Works Issue and the Costs of Rights Clearance"[8] as a step in the process. It contains some interesting statistics. For example, it is reckoned that across Europe there are 3 million orphan books, which represents 13% of the total number of in-copyright books. Film archives categorise approximately 129,000 film works as orphan, and a survey in museums in the UK found that the rights holders of 17 million photographs (or 90% of the total held by the museums) could not be traced. The assessment also concluded that the clearance of rights is both a time consuming and costly exercise.

A solution to the orphan works problem was promised by the Green Paper on Copyright in the Knowledge Economy. [9] It now falls within the frame of the *Digital Agenda*, with the Proposal for a Directive promised before the end of this year.

Curiously, the *Digital Agenda* does not address the issue of online piracy, beyond expressing the view that effective licensing is one way of dealing with the issue. As the exemptions which apply to the liability of internet service providers are contained in the E-Commerce Directive, it appears that this issue will be addressed in the context of the proposal to up-date that directive, scheduled to

[7] Accessible Registries of Rights Information and Orphan Works towards Europeana
[8] DG Information Society and Media, Unit E4 Access to Information, May 2010
[9] COM (2008) 466/3

commence before the end of 2010, with enforcement generally to be reviewed later, in 2012.[10]

In fact, developments *outside* the EU may explain the omission of this issue from the *Digital Agenda* and may provide an insight into the type of solution that the Commission will propose.

A "final draft" of the controversial international Anti-Counterfeiting Trade Agreement ("ACTA") was published on 6th October. The background to this is intriguing. In 2006, at a meeting in Tokyo, US and Japanese trade representatives conceived the idea of a "plurilateral treaty", designed to have the effect of raising the international standard of IP enforcement. The idea was borne of frustration that the enforcement measures of the TRIPS Agreement [11] are simply not effective enough, particularly in the online environment. It was felt that, in by-passing the WTO, the normal forum for such discussions, a better result might be achieved. Canada, the European Commission and Switzerland joined the talks in 2007, and the group has since grown to a sizeable number.[12]

The negotiations were conducted *in secret*. It was only when leaks concerning the proposals under discussion led the European Parliament to deplore the cloak-and-dagger nature of the proceedings – in which its own Commission was participating – that the text under discussion was made public, on April 20th last. The Parliament was not only concerned about the lack of transparency, but the extent to which the proposed treaty might pre-empt the EU position on criminal sanctions for IP infringement, privacy and other issues.

The draft treaty contains range of measures.[13] It provides criminal sanctions for certain acts of counterfeiting and piracy. Section 5 deals with enforcement in the digital environment. In so far as the responsibility of the internet service provider

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[10] D-G Internal Market & Service is in fact currently consulting on "the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)". One of the subjects specified in the consultation document is the liability of intermediary information society service providers. The public consultation closed on October 15th.

[11] Trade Related Intellectual Property Agreement, 1994, administered by the World Trade Organisation

[12] The US Trade Representative cites participants as including Australia, Canada, the European Union represented by the European Commission and the EU presidency (Belgium) and the EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

[13] The text is published on the website of the Office of the United States Trade Representative, at www.ustr.gov.

is concerned, while it is clear from the early drafts of the document that both disclosure of the identity of repeat online infringers, and potential termination of an internet subscriber's account were contemplated within a mandatory framework, in the final draft these provisions are replaced by a much milder provision stating:

> "Each Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of infringement of at least trademark and copyright or related rights and where such information is being sought for the purpose of protecting or enforcing at least the right holder's trademark and copyright and related rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with each Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy"

The European Parliament is expected to have more to say about this treaty and the manner in which it was concluded. Despite the satisfaction expressed by the US Trade Representative at the conclusion of the negotiations, it has to be questioned how the internal tension in Europe will be resolved. However, it is surely reasonable to assume that this draft ACTA provision will be the starting point for EU policy in relation to the responsibilities of the internet service provider. As to the future of ACTA, there is a good deal of speculation as to whether the treaty will ultimately be signed, and if so, the impact it will have on the TRIPS Agreement.

Here in Ireland, we have been very fixated on our own economic crisis. Our government is perceived as providing neither strategy nor leadership. In fact a number of strategy documents have been produced. We have had *Building Ireland's Smart Economy* in 2008, *Making it Happen – Enterprise Growth in Ireland* in 2009, and most recently, *Trading and Investing in a Smart Economy.* The *Innovation Taskforce Report*, published in March this year, contains a number of focused ideas for cultivating entrepreneurship[14]. The proposals in these documents are aimed at improving the climate for innovation, but there is nothing new in them which would have an impact on our current copyright regime. It seems that we have not, as has been done in the UK, looked at the

[14] These documents can be accessed from the website of the Department of the Taoiseach, www.taoiseach.gov.ie

reverse perspective - how changes to the copyright regime might benefit innovation.

However, although our media has paid little attention to it, a crisis exists right across Europe. While at home we may feel short of strategy and leadership, it appears that Europe is working very hard to provide both. Apart from providing some excitement for copyright lawyers, there may even be grounds for a little optimism.