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Copyright policy – Europe's Agenda and Ireland's Needs

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Domestic policy for economic recovery

For the past two years, government policy for economic recovery has been built around the notion of the "knowledge-based economy".

The intention is to establish Ireland as the "Innovation Island" – developing Europe's best research, innovation and commercial ecosystem; developing Ireland as a dub for global high-technology enterprises and clusters, and so forth. We see ourselves as well-placed to succeed in this endeavour, as a creative people with a well-educated young workforce. The idea is reinforced by the fact that a range of multinationals in the information and communications technology (ICT) sector have chosen to locate here.

There is increasing evidence of investment in this policy – for example, in July the Taoiseach announced the provision of €500 million for Innovation Fund Ireland; on November 15th the Atlantic Bridge 11 Venture Capital Fund was launched, providing €85 million to help establish high-tech companies with a particular interest in communications technology, semiconductor and software products.

With a general election on the horizon, we are now facing a period of uncertainty in terms of government. However as the main opposition parties also espouse innovation as a priority, and as – according to the Irish Times today - IMF recommendations for Ireland include that public resources should be targeted to the knowledge-based economy, this strategy for economic recovery seem certain to remain at the centre of government policy, irrespective of a change in government.

The question that has interested me in relation to this policy for economic growth is the role of intellectual property law (IP), and specifically the role of copyright law. There is no one here this evening who would not recognise that good IP is a central support to a policy involving the creation of a knowledge or innovation economy. As a copyright lawyer, my particular interest is in the needs of the sectors which depend on the existence of a good copyright regime. This includes the cultural and creative industries and the parts of the ICT sector which rely on copyright. These sectors can be expected to play an important role in the economy that we are striving to create. I wondered what – if anything at all - was being said in government policy documents about our copyright regime and its fitness for purpose in this new environment. So I set about following the trail of recent Government policy documents to find out.

Building Ireland's Smart Economy

It was the 2008 document *Building Ireland's Smart Economy* which proposed positioning Ireland as an Innovation Hub. There was very little in this document concerning IP, over and above advocating more favourable tax treatment of the purchase of IP in order to encourage foreign companies to locate the ownership and management of their IP in Ireland.

However in pursuit of the objective of positioning Ireland as an Innovation Hub, in 2009 the government appointed an Innovation Taskforce, which reported in March 2010.

The taskforce was made up of 6 representatives from the higher education sector, 12 from industry, with the majority representing technology sectors, 6 from Government departments, a member of Science Foundation Ireland and one from the High Level Group on Green Enterprise. There was one IP lawyer, with a strong background in technology transfer.

Innovation Taskforce Report

The Taskforce made a number of focused recommendations concerning IP. In brief outline, these included:

- The establishment of a set of ground rules to determine ownership and terms of access to research conducted in HEIs, and an easy and predictable system to enable business and industry to identify and access such IP;
- The development and marketing of Ireland as an international Innovation Services Centre offering an attractive location for global IP management and licensing. and the provision of IP trading services. To support this:
    - Our tax regime should be further improved to make it attractive to mobile IP-rich businesses to locate their IP in Ireland;
    - Improvements should be made at the Patent Office, including by e-filing, and the provision of educational supports to industry;
    - National initiatives should be undertaken to increase the public awareness of IP issues (e.g. through the BT Young Scientist exhibition)
    - Certain EU harmonisation measures should be supported, including the European Patent Litigation Agreement, the Single Community Patent; and the London Agreement should be ratified.

While it is certainly the case that multi-national content industries might stand to benefit from tax and other incentives to locate IP in Ireland, you can see from this brief overview of the recommendations that that the focus of the Taskforce Report was on the improvement of the industrial property regime and clarity about technology transfer between the HEIs and industry. It is reasonable to suggest that these priorities were pre-determined by the composition of the taskforce.

In July this year Minister Batt O'Keeffe appointed an expert group of technology-transfer practitioners and cross-sector industry representatives to work on implementation of the IP recommendations of the Innovation Taskforce. This is called the "IP Implementation Group".

The stated purpose of this group is to develop the recommendations in the Innovation Taskforce, and composition of the group reflects this. It will therefore, as the taskforce before it, be focused on the industrial property side of IP, tax and technology transfer.

Making it Happen – Growing Enterprise in Ireland

This is the title of a set of Forfas recommendations to government published on 24th September.

In this document, there is recognition of the importance of the creative sectors of the economy. It is contained in a section entitled "Emerging Opportunities and Untapped Potential". The creative industries are grouped with other areas of "untapped potential", such as green technologies, marine and maritime, healthcare and education.

Here is a little of what is said:

"Creative industries are virtually synonymous with innovation, characterised by a rapid innovation cycle, responsive to changing customer demands and intense competition.

The creative industries are increasingly recognised in enterprise policy globally for their role in stimulating innovation and productivity improvements across *all* business sectors. For instance, design is a key competitiveness factor for all companies seeking to differentiate their product or service, irrespective of the sector or markets that they operate in. It is … critical for branding and marketing, particularly for niche, premium products. Design is often embedded and implicit within a product or service so its impact is not necessarily readily understood or valued.

It was recommended that a National Creative Alliance Network be created, with membership from Government, industry, education, State Agencies and the not-for-profit sector. Key objectives of this Creative Alliance should be to:

- Facilitate networking and collaborations across the creative industry sub-sectors, such as digital media (including audiovisual content creation) and design, particularly across MNCs, SMEs, sole traders and academia;

- Promote greater linkages between creative design companies with software and manufacturing companies, particularly in relation to product design and development;

- Develop/promote education and training initiatives to increase capacity and skills in the areas of design and innovation; and

- Develop the capacity of companies in the creative sector to engage in international trade through exporting and greater involvement in the tourism sector.

While this proposal will certainly be of interest to the copyright constituency, there is no mention of the copyright regime.

Trading and Investing in the Smart Economy

This is the most recent policy document, published on 28th September. In so far as IP is concerned, it does no more than endorse the Forfas *Making it Happen* document. It does not reiterate the specific recommendations of the Forfas document and it is hard to see, for example, whether the recommendation to appoint the National Creative Alliance Network has been adopted by Government.

That completes the mainstream governmental policy trail. Running alongside it is the adoption by government of some of the ideas which emerged from the Global Economic Forum.

Global Economic Forum

The Forum was established at Farmleigh in September 2009. One of these ideas emerging from it was the development of an International Content Services Centre in Ireland. This was something that Neil Leyden, one of the winners of the *Your Country Your Call* competition was already promoting. The idea was to establish a content sector, similar to the financial services sector, which would benefit from tax and other regulatory supports. It would attract content services of all kinds and act as trading centre for rights in content. Clearly copyright would be at the heart of it.

In a Government report last February it was said that the Dept. Communications Energy and Natural Resources had convened a task force to examine "content trading, taxation, legal and intellectual property issues associated with the establishment of an International Content Services Centre". This might have been a vehicle for examining copyright concerns. However, while it seems that the idea has not gone away, a high level task force which met on a number of occasions in 2010, is no longer operational, and that the idea is being pursued in other ways, following its success in the *Your Country Your Call* competition.

It appears to be the case therefore that in elaborating the policy to create Ireland as an innovation island and a global media hub, the relevance of the copyright regime has been overlooked.

Copyright is integral to an innovation policy.

It is not necessary here I think to labour the importance of copyright to certain of the sectors which are identified as having high growth potential for driving innovation. It is the case that:

- In the ICT sector, computer software is reliant on copyright protection.
- Databases are reliant on both traditional copyright and the *sui generis* database right.
- The technological protection measures and rights management information applied to protected material are also themselves protected by copyright law.
- Copyright is the legal tool for protection of all content disseminated online.
- Internet service providers, search engines, and other intermediaries are regulated by copyright.
- In the cultural & creative sectors, all of the objects which form the subject matter which give the sector value – from literary works, to works of visual art, music, film and multi-media; works of animation, electronic games and mobile apps; craft, fashion, website design - all depend on copyright protection. In the UK, the cultural and creative industries are estimated to represent 6.4 % of GDP.

A good copyright regime is important not only to authors and right owners. It is equally important to users – from industry and business users to educators, researchers and consumers. It is important for these constituencies that there is clarity about the manner in which protected works can be used, and that there be ready access to licences.

It seems remarkable that the question of the capacity of our copyright regime to serve innovation and the knowledge economy has not yet been addressed in any of our Government policy documents.

Is copyright law in need of review?

You could of course ask whether it is the case that our copyright law is sufficiently advanced to provide support for our economic strategy– that there is nothing which needs to be done.

Well, those of you who are copyright practitioners will be familiar with the fact that in the decade since its enactment, the Copyright and Related Rights Act 2000 (CRRA) has manifested a number of shortcomings.

The recent UPC case demonstrated the fact that Irish law is not adequate to the task of containing P2P file sharing. You could say this is a universal problem and we cannot be

expected to solve it, although on one reading of the judgment, it might be argued that if the CRRA had been better aligned with the E Commerce Directive a better outcome might have been possible. There are many other issues however:

- The CRRA seems badly aligned in a number of respects with the 2001 Information Society Directive, (sometimes called the "Copyright Directive"), especially in relation to the exceptions to copyright permitted by the Directive. As the CRRA was enacted prior to the finalisation of the Directive, the draftsman was obliged to some extent to anticipate the content of the Directive. In relation to the fair dealing exemptions, for example, the research and private study exemption may over-reach what is permitted by the Directive. The issue of whether the S. 97 exemption for the playing of music in hotel bedrooms over-reaches both the Copyright Directive and the Rental & Lending Right Directive was argued in the High Court last March and certain questions have been referred to the ECJ. The longstanding copyright principle, enshrined in S37(3), that the copyright owner controls the use of the whole or a substantial part of the work appears also to be at odds with the statement of the scope of the reproduction right as defined in the Directive.

- There were opportunities to expand our exemptions and limitations created by the Directive which were not availed of, and which could be reconsidered now. These include the opportunity to create a defence based on caricature, parody or pastiche.

- The library and archive exemptions of the CRRA are a huge problem for libraries and archives, museums and public galleries. The sections of the CRRA are largely copied from the UK Act of 1988 and it is impossible to interpret them confidently by reference to any act which involves digitization. Cultural institutions throughout Europe have problems with the extent to which they can digitize and disseminate information without permission of the rightowner, especially in the case of so-called orphan works, but in Ireland the position is worse than in other countries. Our law did not utilize the possibilities provided by the Copyright Directive and is couched in terms that can really only be understood in an analogue context.

- There are anomalies in the Act, including that there is the potential for perpetual protection for unpublished material and also that the "first publication right" in S.34 can have the effect of providing a surprising bonus for researchers, at the expense of institutions in which their research has been conducted. There are some puzzling internal inconsistencies too, such as between the very broad exemption relating to the use of material in public records contained in S.73, and the limited exemption which immediately follows it in S.74, relating to material on a statutory register.

- The Artists Resale Right is not working adequately. There are material difficulties with enforcement. Recent submissions to Government by IVARO point out that the Regulations made pursuant to the Resale Right Directive need to be altered by substantive legislation.

- The legislation aside, there are practical problems in the regime. From the user's perspective, there are two problems: uncertainty concerning the position relating to the use of material accessed online, and difficulty in obtaining licences to use protected material. The latter can be particularly frustrating, when a user is perfectly happy to pay a licence fee. I tried recently to procure a permission to use a particular piece of music for a digital media company, and after four weeks, the company had

to give up and have a piece of work commissioned. This was entirely due to difficulties in the systems dealing with the processing of applications for licences.

- Right owners have difficulties which include a shortage of targeted information for start-ups and SMEs. There is a lack of confidence in putting material online for fear of uncertainty as to whether it enjoys protection. There is also uncertainty concerning the extent of protection of databases in the wake of the ECJ decisions in the British Horseracing Board v. William Hill, and related cases.

- Enforcement and dispute resolution are significant problems. Small businesses simply cannot afford to litigate infringements to protect their rights.

It is only possible to point to some of the issues here. I would suggest that there is a host of them to be addressed. Some relate to the way in which the law was framed in 2000. Others relate to the enforcement structure. And some are a matter of making information more readily available for businesses, and the need for accessible forms of licensing and dispute resolution. All of the problems are intensified when put under pressure of use in the online environment.

It is my argument that thus far government policy has failed to address the question of how our copyright regime needs to be overhauled in order to cure the deficiencies already identified, to make it fit for the digital era, and to make a positive contribution to current policies for economic growth. I believe that this is a significant omission. And I am afraid that unless we better prepare ourselves in this regard, we will be left behind our neighbours in Europe and in the UK and will lose whatever edge we might have in the smart world.

I'd like if I may to outline what is happening in relation to the development copyright policy in Europe.

Europe 2020 and the Digital Agenda

There are different strands of policy development in Europe affecting copyright law. The most immediate of these is *a Digital Agenda for Europe,* published recently as part of the *Europe 2020* strategy. *Europe 2020* was published last March as a comprehensive strategy for economic recovery in Europe. It establishes seven flagship initiatives sets within three interlocking priorities: smart, sustainable and inclusive growth.

Strategy documents for three of the seven flagship initiatives have been published in the last three months. These are:

- *A Digital Agenda for Europe*: a strategy for the creation of a single market in the online environment
- *Innovation Union*: a strategy to improve access to finance for research and innovation to ensure that creative ideas can be turned into products and services that create growth and jobs;
- *Youth on the Move*: a strategy to enhance education systems and facilitate the entry of young people to the market.

The strategy of most interest for copyright purposes is the Digital Agenda. This aims to create a digital single market – a seamless EU online environment. The document points to the fact that the ICT sector has a value of €660 billion, but contributes in fact far more to the

economy because of high levels of dynamism inherent in the sector and the enabling role the sector plays in changing how other sectors do business.

The document argues that the potential of ICT needs to be mobilized through an interoperable and borderless internet environment. This will stimulate demand for higher speed and greater capacity which in turn will stimulate investment in the networks, and that in turn will open the way for innovative service using those improved networks.

The document proposes a number of key actions, with a table of specific legislative actions, planned delivery dates, key performance targets and an implementation and governance structure. These actions range across a wide spectrum. There are two which relate directly to copyright and require delivery of Proposals for Directives before the end of 2010. These are:

- A Proposal for a framework Directive on collective rights management, establishing pan-European licensing for online rights management, to delivered by end 2010;
- A Proposal for a Directive on orphan works to facilitate digitization and dissemination of cultural works in Europe, to be delivered before end 2010

There are others of direct interest, including:

- The making of proposals updating the E-Commerce Directive, again before end 2010. This is already the subject of a consultation. It is expected to include proposals relating to the issue of the liability of ISPs for copyright infringement.
- A report on the review of the enforcement of IP rights, by 2012
- A review of the Directive on Re-Use of Public Sector Information, by 2012

This is a remarkable programme of activity. If the strategy is successful in removing or even reducing existing barriers and inhibitions to the growth of the online market in goods and services, clearly this will expand opportunities in the content and ICT industries.

There are other strands of consultation and development of EC policy relevant to the development of copyright law, running alongside the issue of the online internal market. The Green Paper on Copyright in the Knowledge Economy established a consultation by DG Internal Markt in 2008 on exceptions and limitations to copyright contained in the Copyright Directive. In the follow-up document of October 2009 the following exceptions and limitations were identified as needing further consideration in the context of the appropriate balance to be found concerning dissemination of material in electronic form:

- Libraries & Archives
- Teaching and research
- Persons with disabilities
- User-created content.

While the focus is very much on the Digital Agenda at present, this strand of development will continue, the “next steps” having been identified in the follow-up paper. In fact it seems unavoidable that certain of the exemptions will be dealt with in the context of the Digital Agenda programme. The issues concerning user created content, for example, would seem inevitably to arise in connection with a consultation recently announced concerning online distribution of creative content, even though the follow-up paper indicated that it was too soon to address the issue.

A consultation on “Unblocking the potential of the cultural and creative industries” by DG Education & Culture just closed at the end of September. This paper “aims to spark a debate on the requirements of a truly stimulating creative environment for the EU’s cultural and creative industries”. It emphases the need for innovation support mechanisms to benefit not just the CCI sector but also to help that sector provide more innovative solutions to other sectors. The paper discusses a “place-based development approach”, with “laboratories for user-centred and open innovation and experimentation”, with various disciplines working together, and “cultural and creative industries clusters”. The paper does not deal with issues of copyright law, but is interesting for the reason that the Irish idea of the content services centre would seem to fit well within the “place-based” approach.

But all of this is European strategy and we are going to have to compete for the advantage it creates. We see ourselves as having some kind of edge as entrepreneurs, innovators, especially in the ICT and creative sectors. But every country in Europe is examining these policies and gearing-up to take advantage of them.

In the UK, for example, practitioners must be groaning under the weight of reports produced in the last decade on how IP policy can be used to stimulate economic growth. The *Gowers Report* (2006), *Creative Britain – New Talents for a New Economy* (2008) and the *Digital Britain Report* (2009) all looked at ways in which IP, including copyright, could be improved in the interests of “securing the position of the UK as one of the world’s leading digital knowledge economies”. The Digital Britain Report led to the Digital Economy Act 2010. In 2008 a *Strategic Advisory Board for IP Policy* was established, drawn from a wide range of external experts as well as senior key policy officials from government departments.

The SABIP has produced a number of documents, including reports on

- The Relationship between Copyright and Contract law;
- IP Enforcement for Smaller UK Firms
- The Flow of Knowledge from Academic Research Bases into the Economy

The Intellectual Property Office produced The *Way Ahead – A Strategy for Copyright in the Digital Age*, in 2009. This is a reflective document intended to inform long term strategy on copyright that can be developed independently and alongside European policy developments.

The SABIP was merged into the UK Intellectual Property Office this July and they now have a single work programme, with the ongoing objective of informing policy in order to serve innovation and business performance. The approach they have taken so far is to build the evidence base for policy-making. This involves consulting widely every step along the way of policy formulation, so that for example, the Report on *IP Enforcement for Smaller UK Firms* was preceded by a survey of attitudes and opinions among 1800 micro firms and SMEs, which disclosed such real-life facts as:

- Costs actually deter enforcement
- 25% of firms have been involved in IP disputes.
- IP rights are considered important by smaller firms
- Only a quarter have IP insurance

This evidence-based approach to policy seems obvious, and very advantageous.

A concerted approach has been taken in the UK to examine every nook and cranny of IP law and to shake it very hard indeed to see what can be made to fall out in terms of economic advantage. In the last two weeks David Cameron has announced yet another review, the

"Review of Intellectual Property and Growth" Their IP Minister Baroness Wilcox has appointed Professor Ian Hargreaves to lead an independent review and report by April next on how the UK IP framework can further promote entrepreneurialism and economic growth, specifically identifying barriers to growth in the system, the cost of enforcement of IP and the cost and complexity to SMEs of accessing IP services to help them protect and exploit IP. In all of the work done to date, the UK approach has kept copyright very much in view, understanding the contribution it can make to the new economy.

Conclusion

It is my contention that:

- In the domestic drive to create Ireland as a Knowledge Economy, the needs of those sectors of the economy that depend on good copyright law have been overlooked. Those sectors include the cultural and creative sectors and parts of the ICT sector, both of which make a very material contribution to the economy, not only in terms of the value they create directly, but because they act as important drivers of other sectors.

- Our central piece of copyright legislation is now a decade old and in need of overhaul. A number of deficiencies and anomalies have been apparent for some time. It cannot be regarded as fit for purpose in the current environment.

- There is a great deal of new copyright law in the pipeline from Europe. We need to prepare for this.

- There is a good deal we can learn from the UK, and especially from its evidence-based approach to policy making.

In short, our copyright regime needs a thorough evaluation in the light of the current needs of stakeholders, the aspirations of current government policy, and what is coming down the track from Brussels.

Back in December 1996, WIPO convened in Diplomatic Conference in Geneva, its purpose to reach agreement on new international copyright norms in the light of the development of digital technology. Ireland's presidency of the EU, then drawing to a close, gave Irish negotiators a role in the forefront of those negotiations. The conclusion of WCT and the WPPT were regarded as a signal success by the European Commission and represented a feather in the cap of the Irish negotiators.

At the time, Irish copyright law was in a sorry state. We were in breach of our international obligations under the TRIPS Agreement . We had failed to implement a number of EU Directives on copyright. While the rest of the world was talking about new norms for the digital environment, we were making-do with dog-eared copies of the 1963 Copyright Act, introduced by Jack Lynch in the days when colour television was a novelty.

Shortly after the conclusion of the WIPO Treaties, the WTO invoked dispute settlement proceedings against Ireland within the framework of the TRIPS Agreement. This produced political action. We had just begun to develop a reputation as Europe's "silicon valley", and with the location here of a number of US multi-nationals in the sector, had become the second largest software exporter in the world. The state of our copyright law was of increasing concern to these companies. The Irish Government was embarrassed.

A commitment was given to the WTO that new copyright legislation would be produced before July 1998. With the benefit of the WIPO experience behind them, an enhanced IP unit of the Department of Enterprise Trade & Employment set about producing the ambitious piece of legislation that became the 2000 Act. A wide-ranging consultation process on the Bill took place with stakeholders. Several open Parliamentary Committee hearings took place. The Bill went through many drafts. By the end of the process, the legislation was admired as representing the state of the art in European terms, and our multi-national corporations were impressed.

We need to revisit that process. We have been very slow to get off the blocks on this one. Instead of waiting for directives to emanate from Europe, we need to become proactive, to consult with the copyright stakeholders, and to figure out *firstly* how we can cure the existing deficiencies in the CRRA, *secondly* how the legislation can be made more fit for the digital world and *finally* how the regime can be used in a positive way to promote the growth of the copyright sectors. We do not have any time to spare in this regard.