

## ALAI 2011 – Dublin Congress (29-30 June 2011)

### Draft Questionnaire (-v2-) Boundaries and Interfaces

#### Irish Response

##### 1. The Subject Matter of Protection – Works

- 1.1 **How do your legislators or caselaw define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?**

#### What are literary works?

“Literary works” are defined by the Copyright and Related Rights Acts 2000 to 2007 (the “CRRRA”). However, the definition provided by the CRRRA is extremely broad. In practice, one must look to case law to determine what can and cannot amount to a literary work.

Section 2 of the CRRRA defines a literary work as meaning “a work, including a computer program, but does not include a dramatic or musical work or an original database, which is written, spoken or sung”.

Section 2 goes on to define a dramatic work as “a choreographic work or a work of mime”; musical work “means a work consisting of music, but does not include any words, or action, intended to be sung, spoken or performed with the music”; and an original database “means a database in any form which by reason of the selection or arrangement of its contents constitutes the original intellectual creation of the author”.

Consequently, the CRRRA provides a broad and non-exhaustive definition of literary works.

The classic definition of the concept of a “literary work” under Irish law is set out in *University of London Press v. University Tutorial Press*<sup>1</sup> where Peterson J held that ““literary work” covers work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word ‘literary’ seems to be used in a sense somewhat similar to the use of the word ‘literature’ in political or electioneering literature and refers to written or printed matter.”<sup>2</sup>

There is comparatively little Irish case law discussing the scope of “literary works”. Consequently, Irish practitioners tend to be guided by the decisions of the English Courts in this field.

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<sup>1</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601.

<sup>2</sup> [1916] 2 Ch. 601 at 608.

## Spoken Words Can Enjoy Copyright

Copyright can subsist in speech, provided that the other requirements for copyright protection (notably originality and fixation) are met. As noted above, Section 2 CRRA defines a literary work as being one which is “written, spoken or sung”.

Section 18 CRRA sets out the fixation requirements for, *inter alia*, a literary work. It provides that “copyright shall not subsist in a literary ... work ... until that work is recorded in writing or otherwise by or with the consent of the author”. It should be noted that the permissible modes of fixation, “in writing or otherwise”, is extremely broad. Consequently, it would appear that once the speech has been recorded in any way (i.e. note taking, video recording etc...) with the consent of the author, then the speech may be protected by copyright (provided, of course, that the other requirements for protection, such as originality, are met).

The issue of copyright in speech was considered by the Irish Supreme Court in *Gormley v. EMI Records*.<sup>3</sup> The defendant record label marketed a recording entitled “Give Up Yer Old Sins” which consisted of Irish children telling gospel stories. These recordings were originally produced in the 1960s by a religion teacher as a pedagogical device. The success of this record largely derived from the fact that the children’s retelling of the various tales inadvertently and humorously deviated from scripture. The plaintiff, who was one of the children featured on the recording, brought a copyright suit. She argued, *inter alia*, that notwithstanding the fact that her recitation had not been recorded in writing, it had been recorded by her teacher and amounted to a literary work. More specifically, she claimed that the trace on the magnetic tape produced by her speech amounted to “a notation”.

This argument was rejected by the High Court. This position was affirmed by a unanimous Supreme Court on appeal.

The Supreme Court noted that there was no distinction in principle between taking down speech in shorthand and recording in on tape. However, the court held that the symbol which comprises the notation must be capable, without more, of being understood. This was not the case with a magnetic trace on a tape and so something recorded in this way would not be entitled to protection as a literary work. It should be noted that, in coming to this position, the Supreme Court noted but disagreed with the positions taken by English copyright treatises<sup>4</sup> and chose not to follow a contrary authority from New Zealand interpreting an identical provision.<sup>5</sup>

*Gormley* is a useful authority as it clearly establishes that speech, once recorded, can enjoy copyright protection. However, it should be noted that the actual decision

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<sup>3</sup> *Gormley v. EMI Records* [1999] 1 ILRM 178.

<sup>4</sup> Specifically, the Court referred to Copinger and Skone James on *Copyright* (12th ed, 1980) at [164]; Laddie, Prescott and Vitoria, *The Modern Law of Copyright* (1980) at [2.12] and [2.14]-[2.17]; and Ricketson, *The Law of Intellectual Property* (1984) at [3.15] and [5.36].

<sup>5</sup> *Green v. Broadcasting Corporation of New Zealand* [1989] RPC 469.

in this case was based on the fact that under old Irish copyright legislation, fixation for the purpose of a literary work had to be reduced to writing *or some other material form*. This position may have been overturned by the CRRA, which provides that fixation “in writing *or otherwise*”<sup>6</sup> will suffice.

### Ex Tempore Speech

While it is clear that a prepared speech can amount to a literary work under Irish law,<sup>7</sup> it is less clear if *ex tempore* speech, or off the cuff conversation, enjoys similar protection.

The leading treatise on Irish IP law<sup>8</sup> suggests that *ex tempore* speech may not enjoy protection as it is not a “work”. While the CRRA fails to provide a clear explanation as to what constitutes a “work” for the purposes of Irish law (as opposed to simply noting that “works” include the various forms of copyright protected material), the learned authors opine that:

*...[c]onversational speech, extempore remarks, and so on, are not likely to be works, but a speech, lecture or announcement, for example, that has been deliberated upon (whether or not in ‘bullet point’ or ‘back of an envelope’ basis) may be a work, because of the intellectual effort expended in considering and creating the work in question.*<sup>9</sup>

It is unclear if this approach will be adopted by the Irish Courts.

### An Alternative Remedy

Outside of the realm of copyright, the common law contains an ancient proprietary right to control the public dissemination of one’s own literary composition.<sup>10</sup> A person who takes note at a public lecture is not entitled to publish that lecture in the absence of some express or implied contract.<sup>11</sup> This may provide a speaker with an alternative mode of protection. However, we would note that, in our experience, this right is rarely invoked in practice.

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<sup>6</sup> Section 18(1) CRRA.

<sup>7</sup> Subject to fixation.

<sup>8</sup> Clark, Smyth and Hall, *Intellectual Property Law in Ireland* (3<sup>rd</sup> ed, Bloomsbury Professional, 2010).

<sup>9</sup> *Ibid* at [11.32].

<sup>10</sup> *Abernethy v. Hutchinson* (1825) 1 H & Tw 28.

<sup>11</sup> *Nicols v. Pitman* (1884) 26 Ch D 374, *Caird v. Sime* (1887) 12 App Cas 326.

**1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by *de minimis* rules? [In the EU discuss *Infopaq* and how the case is accommodated in national law].**

Traditional Position

Irish law does not generally provide copyright protection for single words or short phrases. As Clark, Smyth and Hall have noted “it is difficult to obtain copyright protection for the title of a book, a song an advertising slogan or word”.<sup>12</sup> Most commentators take the view that the Irish position is broadly in line with English law, and that copyright cannot subsist in individual words or short phrases, such as slogans or book titles, irrespective of the skill, labour, and judgment that may have been employed in thinking up the word or slogan.<sup>13</sup>

This position is largely motivated by a feeling that words or phrases are too insubstantial to enjoy protection under copyright. Such material is usually only of value to the extent that it forms part of a corporate brand or identity. Consequently, the correct way to protect such material is via trademark registration or the tort of passing off.

In *Gormley*, discussed above, the plaintiff claimed she enjoyed copyright in her original description of Judas Iscariot as a “dirty auld squealer”. This argument was dismissed by the Supreme Court which held that there could be no copyright in the phrase as such.

Infopaq

This traditional position may need to be reconsidered in light of the ECJ’s judgment in *Infopaq*.<sup>14</sup>

Here, the ECJ considered whether or not an electronic information service which scanned newspaper articles and sent strings of 11 word extracts to its users infringed copyright in the scanned text. The ECJ accepted that such extracts could be protected by copyright:

*The possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper*

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<sup>12</sup> Clarke *et al*, n8 at [11.15].

<sup>13</sup> Murphy and Kelly, *Copyright and Related Rights Act 2000* (Roundhall, 2002) at 32.

<sup>14</sup> Case C-5/08 *Infopaq International v. Danske Dagblades Forening* [2009] ECR I-6569.

*article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article.*

The traditional position does not allow short works to enjoy copyright simply because they are short works; a *de minimis* rule applies. The degree of labour that went into creating this work is immaterial. For example, in *Exxon*<sup>15</sup> the English Court of Appeal refused to find that the word “Exxon” was an original literary work, notwithstanding the fact that it was a fictional word created at considerable expense. A word (and to a lesser extent a phrase) could not convey information, instruction or pleasure and this was fatal to a claim of copyright.

*Infopaq* does not sit comfortably with this traditional position. The ECJ stressed that what mattered was that the material was an “intellectual creation” and was original. The common law has ignored this issue and has focused on whether the work was substantial.

To date, there have been no Irish cases considering how *Infopaq* would impact on Irish law. However, there have been two English High Court decisions on point which may be instructive. In *SAS Institute v. World Programming*<sup>16</sup> Arnold J held that

*It is now clear from Infopaq that there will only be reproduction of a substantial part of a literary work, including a compilation, where what has been reproduced represents the expression of the intellectual creation of the author of that literary work.*

The facts in *Newspaper Licensing Agency v. Meltwater Holding*<sup>17</sup> were very similar to those in *Infopaq*: The defendant provided a media monitoring service which provided its customers with reports setting out the headline, opening text and extracts from newspaper articles that matched search terms selected by the customer. Proudman J found for the claimants in a judgment which largely adopted *Infopaq* into English law. The learned judge stressed that the relevant test was that set out in *Infopaq* and that it was the originality, rather than the substantiality, of the material which was key.

#### Towards a new “originality” test?

*Infopaq* is binding on the Irish courts and must be followed. In so doing, it is quite likely that the Irish courts will adopt the same approach as their English colleagues in *Newspaper Licensing Agency*: verbosity will no longer be protected at the expense of succinctness. What matters is whether the work represents an original intellectual creation of the author.

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<sup>15</sup> *Exxon Corporation v. Exxon Insurance Consultants International* [1981] 3 All ER 241.

<sup>16</sup> *SAS Institute v. World Programming* [2010] EWHC 1829.

<sup>17</sup> *Newspaper Licensing Agency v. Meltwater Holding* [2010] EWHC 3099.

### 1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

Irish law provides for an extremely broad, opened ended and flexible concept of an “artistic work”.

Section 2 CRRA defines an artistic work as “*including a work of any of the following descriptions, irrespective of their artistic quality –*

- a) *photographs, paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, prints or similar works, collages or sculptures (including any cast or model made for the purposes of a sculpture),*
- b) *works of architecture, being either buildings or models for buildings, and*
- c) *works or artistic craftsmanship.”*

The concept of “artistic works” under CRRA 2002 has been correctly described as being “fluid”.<sup>18</sup> Instead of providing an exhaustive list of works, s. 2(1) CRRA 2000 provides that an artistic work “includes a work of any of the following descriptions, irrespective of their artistic quality”.

The only other elaborated definition is a broad one given to photographs, which are “recording[s] of light, or any other radiation on any medium on which an image is produced, or from which an image may by any means be produced and which is not part of a film.”<sup>19</sup>

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<sup>18</sup> Clark *et al*, n8, at [11.38].

<sup>19</sup> S. 21(1) CRRA.

#### 1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- **Surveillance Art, Installations, Collage.**

We are unaware of any court decisions on point.

Surveillance art may be able to enjoy protection as a film, as opposed to an artistic work. Section 2 CRRA defines a film as being “a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device”. CCTV footage enjoys copyright protection as a film under Irish law.<sup>20</sup> There would appear to be no reason why surveillance, which is produced for artistic reasons could not enjoy similar protection.

Individual aspects of an installation could be protected as falling into one of the categories expressly enumerated by Section 2 CRRA, i.e. painting, sculpture. In this regard, it is worth noting the recent decision of the English Court of Appeal (which would likely be followed in Ireland) in *Lucas Film v. Ainsworth*<sup>21</sup>, in which a “sculpture” was held to be a three dimensional work created by an artist’s hands which is not utilitarian in function. It is not clear if there are any grounds on which the installation, as a whole, could be protected. The English case of *Creation Records Ltd. v. News Group Newspapers Ltd.*,<sup>22</sup> an album cover photograph featuring people and objects around a swimming pool was not found to be a work protected by copyright. It was held not to be a dramatic work, or a “work of action”, and nor was it an artistic work, as it was “less than ephemeral” i.e. it only lasted for a few hours.<sup>23</sup>

However, in light of the fact that installation art is a well established mode of artistic expression, a strong argument could be mounted that it should be recognised as a new category of artistic work under Section 2.

Collage is expressly protected as an artistic work under Section 2 CRRA.

- **Performance Art**

We are unaware of any court decisions on point.

It is unlikely that performance art could enjoy protection as an artistic work as there is no fixation. However, performance art may be able to enjoy protection as a “dramatic

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<sup>20</sup> Murphy and Kelly, n13, at 35.

<sup>21</sup> *Lucas Film v. Ainsworth* [2010] EMLR 12.

<sup>22</sup> *Creation Records Ltd. v. News Group Newspapers Ltd.* [1997] EMLR 444.

<sup>23</sup> *Ibid.*, at 450.

work”. Section 2 CRRA defines a dramatic work as including “choreographic work or a work of mine”. Clark, Smyth and Hall note that:

*...the dramatic work must be capable of performance in the sense that elements such as music, movement, scenery, lighting and declaration may coalesce; of these elements movement seems to be crucial element.*<sup>24</sup>

They go on to note that visual spectaculars, such as the opening ceremony of the Olympic Games, can enjoy protection as a dramatic work so long as the emphasis is on human movement.<sup>25</sup>

It is submitted that much performance art may fall within the scope of the definition of “dramatic work” and enjoy protection on this basis.

- **Conceptual Art**

We are unaware of any court decisions on point.

Due to the vast degree of creativity in the field of conceptual art it is impossible to say, in the absence of specific examples, whether or not any given work could enjoy protection. However, it is likely that the same issues discussed in the context of installation art would also apply here. Individual parts of a conceptual art piece may be able to enjoy protection as paintings or sculptures. In addition, it is possible that a “conceptual art” could be recognised as a distinct class of artistic work in a suitable case.

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<sup>24</sup> Clark *et al*, n8 at [11.34].

<sup>25</sup> *Ibid*.



**1.4 Are there any judicial decisions/ academic opinions on other forms of protected expression (e.g. Perfumes)?**

None of which we are aware.

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**1.5 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)**

We are unaware of any court decision on point.

Irish law does not give any specific protection to sporting events. As Cox has noted, the “broadcasting rights” which are granted by the organisers of sporting events are fundamentally contractual rights:

*The only way in which the event organiser (or the governing body for the relevant sport as the case may be) can secure any degree of exclusivity over the event for the broadcaster is by ensuring, through contractual agreement with the venue owner and spectators, that the official broadcaster and only the official broadcaster gains access to the venue.<sup>26</sup>*

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<sup>26</sup> Cox, ‘Legal Regulation of the Broadcasting of Sporting Events in Europe’ (2004) 11(1) *DULJ* 146.

## 2. Creativity – the Originality Standard

### 2.1 How does your legislation set out the requisite originality standard?

#### Literary, Dramatic, Musical or Artistic Works

The bare bones of the originality standard are set out in legislation. One must look to the case law to find details as to what exactly constitutes “originality”.

Section 17(2)(a) CRRA provides that copyright subsists in original literary, dramatic, musical or artistic works. Section 17(2)(d) provides that copyright subsists in original databases.

Section 17(5) provides that copyright shall not subsist in a work which infringes, or to the extent that it infringes, the copyright in another work. Section 17(6) provides that copyright shall not subsist in a work which is, or to the extent that it is, a copy taken from a work which has been previously made available to the public.

Thus, the CRRA merely tells us that there is an originality requirement that where works are copied they are not original! Consequently, we must turn to the case law to work out what actually constitutes the “originality standard”.

The basic concept of originality is set out in *University of London Press v. University Tutorial Press*.<sup>27</sup> Peterson J held that:

*[T]he word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought... the originality which is required relates to the expression of the thought ... the Act does not require that the expression must be in an original or novel form but that the work must not be copied from another work.*

In *Gormley*, the facts of which are discussed above, the Supreme Court appeared to retreat somewhat from this approach and stressed that while originality does not require the work to be unique, there must still have been some original thought.

In particular, the Court stressed that “it is not the words used which makes the work original or creates copyright”. Where the material is copied it is necessary to show “the necessary skill, labour and judgment to create a truly new work.” There could be no copyright in a well known plot or story because there is nothing original about, even if it was told using different words. In this case, the fact that the child “copied what she had been told albeit that she had put some or all of it into her own language” meant that the work lacked originality.

While the originality standard may require some thought, it is generally accepted that this is to a very low standard. In practice, the “originality” test really acts as a filter to protect works that are seen as meritorious in some way (if not necessary because of

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<sup>27</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 608-609

their originality) while denying protection to those which are not. As Clark, Smyth and Hall put it:

*The limited nature of the originality standard is in part due to the tendency of common law systems to provide copyright protection for creations which cannot be described as intellectually or culturally meritorious. The investment made in terms of time and effort is seen as worthy of protection because of the fact that the appropriation of another person's work cannot be satisfactorily addressed through traditional routes such as the criminal law or tort – Irish law does not recognise a tort of unfair competition, for example.*<sup>28</sup>

The Community legislator had not sought to harmonise the originality standard so it is generally believed by Clark Smyth and Hall that the lower common law standard of originality could be retained and applied in the UK and Ireland.<sup>29</sup> It is possible that the originality standard for photographs is higher than that for other artistic works. Article 6 of the Term Directive<sup>30</sup> provides that photographs, which are “original in the sense that they are the author’s own intellectual creation”, shall be afforded copyright protection. It also leaves open to the Member States the possibility of protecting “other photographs”. The CRRA was enacted after the Term Directive so the question arises as to whether Ireland has a lower originality standard which protects photographs, which are original according to the Directive, and “other photographs”. This may become a moot question if the *Infopaq* case requires an intellectual creation test for all artistic works.

In the case of *Infopaq*, as discussed above, casts some doubt on this low common law standard of originality. The case held that Article 2(1) of Directive 2001/29/EC only applied to “a subject matter that is original in the sense that it is its author’s own intellectual creation.”<sup>31</sup> This suggests that works covered by the reproduction right in Art 2 must meet an intellectual creation test. However, it is for the national court to determine this issue.<sup>32</sup>

### Computer Programmes and Original Databases

In contrast to literary, dramatic, musical and artistic works, the originality standard for computer programmes and original databases are prescribed by statute.

Section 2(1) provides that an original database is “a database in any form which by reason of the selection or arrangement of its *contents constitutes the original intellectual creation of the author*”.

Section 2(1) defines a computer programme as being “a programme which is *original in that it is the author’s own intellectual creation*”.

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<sup>28</sup> Clark *et al*, n5, at [11.05].

<sup>29</sup> *Ibid*, at [11.06].

<sup>30</sup> Directive 2006/116/EC, originally enacted as Directive 93/98/EEC.

<sup>31</sup> *Infopaq*, n14, paras 36 and 37.

<sup>32</sup> *Ibid*, paras 47 and 48.

These tests are perceived as being tougher than that applied in respect of literary, artistic, musical or dramatic works. This flows out of the fact that these rights come from European law.<sup>33</sup>

Much of the English case law on computer programs may be unreliable as many computer programs are compilations of existing code, routines, and sub-routines. However, it was still held that such linking together of several distinct programs is protected under copyright as a compilation of works.<sup>34</sup>

With regards to databases, if there is originality, in the “intellectual creation”, relating to the selection or arrangements of the contents of the database (for example, an indexed anthology of poems selected by the editor to reflect a theme) then the compilation *per se* is an original database and is protected by copyright. . Section 17(3) CRRA clarifies that “Copyright protection [...] in respect of original databases, shall not extend to their contents and is without prejudice to any rights subsisting in those contents”, thus an editor of an indexed anthology of poems does not obtain copyright in the constituent poems, and the copyright of the editor is without prejudice to the underlying copyright of each individual poet in his or her poem.

A *sui generis* database right has no originality requirement. Instead, it requires “a substantial investment in obtaining, verifying or presenting the contents of the database”.<sup>35</sup> Such a right also provides protection against extraction and re-utilisation<sup>36</sup> for a period of 15 years.<sup>37</sup>

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<sup>33</sup> Murphy and Kelly, n13, at 32.

<sup>34</sup> *Accounting Systems 2000 (Developments) Pty Ltd v CCH (Australia) Ltd* (1993) 27 IPR 133; *Ibos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275; *Trumpet Software Pty Ltd v Ozemail Pty Ltd* (1996) 34 IPR 481.

<sup>35</sup> Section 321 CRRA.

<sup>36</sup> Section 324 CRRA.

<sup>37</sup> Section 325 CRRA.

## 2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

Yes, from the perspective of originality, the various forms of copyright can be grouped into three categories:

1. Those which apply the statutory originality standard, as supplemented by case law (i.e. literary, artistic, dramatic and musical works);
2. Those which use the “author’s own intellectual creation” test (i.e. original databases, computer programmes, and possibly photographs); and
3. Those which do not require any originality (i.e. sound recordings, film, broadcasts, cable programmes and typographical arrangements of published editions).

In addition, some commentators suggest that within the first category of copyrights the originality test may vary. Clark, Smyth and Hall suggest that that the originality standard is easier to meet for a musical work than a literary work.<sup>38</sup>

However, it should be noted that in light of *Infopaq*<sup>39</sup> the statutory standard of originality, as supplemented by case law, may be subject to harmonisation. While the position remains somewhat up in the air, it seems likely that originality “in the sense that it is the author’s own creation”<sup>40</sup> may in future be required for literary, artistic, dramatic and musical works.

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<sup>38</sup> Clark, n8, at [11.04]

<sup>39</sup> Case C-5/08 *Infopaq International v. Danske Dagblades Forening* [2009] ECR I-6569.

<sup>40</sup> *Ibid.*, at para 37.

**2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has “sweat of the brow” been treated in recent case-law?]**

Irish law has adopted two distinct approaches to compilations/collections. Under the old Copyright Act 1963 compilations were protected as a literary work. Under CRRA they are protected as databases or original databases.

Copyright Act 1963

The issue of compilations was one of the most litigated under the old copyright Act.

The leading judgment is that of Lardner J in *RTE v. Magill TV Guide*.<sup>41</sup> The plaintiffs in this case were the Irish public service broadcaster, RTÉ, the UK national broadcaster, BBC and a UK independent broadcaster ITV. The broadcasters published magazines which contained, among other things, listings of scheduled TV programmes for the next week. The plaintiffs only permitted other periodicals to publish TV listings one day in advance. The defendant published a magazine which contained weekly TV listings.

The plaintiffs claimed that the publication of these schedules infringed their copyright. The defendants argued that TV listings could not be protected by copyright.

In the High Court, Lardner J found for the plaintiffs, and held that a TV guide could amount to a literary work:

*If materials are assembled in an original compilation which involves time, labour and skill on the part of the author, he is entitled to copyright therein.*

In the case of a TV guide, Lardner J seemed to equate the skill involved in compiling the guide to the skill involved in actually organising the television schedule:

*Each weekly broadcasting schedule is the result of preliminary consideration, work and the exercise of skill and judgement by, and as such is the creation of, the plaintiffs.*

The approach adopted by Lardner J is somewhat unusual. The learned judge appeared to equate the skill and intellectual effort involved in actually devising a TV schedule with the somewhat more prosaic task of publishing a list of up coming programmes.

Clark, Smyth and Hall criticises the judgment on this ground, noting that:

*[I]t is arguable that on this point Lardner J's judgment may be open to attack. Some cases make the point that the skill and judgment that comes within the protected sphere of copyright is the skill and judgment needed to*

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<sup>41</sup> *RTÉ v. Magill TV Guide* [1990] ILRM 534.

*create the literary work, not the investment that went into creating the underlying product.*<sup>42</sup>

A similar approach can be seen in the case of *Allied Discount Card v. Bord Fáilte Éireann*.<sup>43</sup> The plaintiffs were in the business of compiling books of discount vouchers. In the course of doing this, they would negotiate and reach agreement with various vendors. They would then compile the various offers into a booklet of vouchers.

The defendants, a statutory body entrusted with promoting Ireland's tourism sector, commissioned the plaintiffs to produce a booklet of vouchers for tourists visiting Ireland. The plaintiffs did the necessary "leg work", compiled the booklet of vouchers and provided it to the defendants. The defendant decided not to hire the plaintiffs in subsequent years. Rather, relying on the plaintiff's initial work, the defendant directly contacted the vendors involved and compiled a new book of vouchers directly. The plaintiffs sued for copyright infringement and unjust enrichment.

Lynch J in finding for the plaintiffs noted that "there is no doubt but that copyright can exist in compilations" and held that the plaintiff's booklets were protected by copyright.

However, in this case the judge seemed to want to protect the underlying work done by the plaintiffs, over which the defendants were attempting to free-ride, rather than the copyright in the actual vouchers (many of which were, in any event, actually different from the ones prepared by the defendant).

The final reported case in this area is *Private Research v. Brosnan and Network Financial Services*.<sup>44</sup> Here, the plaintiff's publication consisted of a listing of all annual returns filed with the company's office in the previous four weeks. A number of companies were also analysed on foot of the statutory disclosures.

McCracken J accepted that this could amount to a literary work. Frustratingly, however, the judgment is not clear as to whether the copyright protection was available only because of the inclusion of an original work in the form of the original analysis.

Traditionally Irish law has been extremely sympathetic to the creators of compilations. It is noteworthy that in all of the above cases the judges avoided considering whether a pure compilation without any separate intellectual contribution could in and of itself enjoy copyright protection. Rather, in each case the Courts found some original intellectual contribution in the background (e.g. TV scheduling, negotiating deals) which they then attributed to the compilation.

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<sup>42</sup> Clarke *et al*, n8, at [11.12].

<sup>43</sup> *Allied Discount Card v. Bord Fáilte Éireann* [1990] ILRM 881.

<sup>44</sup> *Private Research v. Brosnan and Network Financial Services* [1996] 1 ILRM 27.



## Copyright and Related Rights Act 2000-2007

The Database Directive has now been implemented in CRRA, which marked a sharp change in how Irish law treated compilations. Whereas previously compilations were treated as a literary work they are now protected as original databases. However, there is nothing preventing an Irish party contending that their compilation is a literary work under the Irish case law, as discussed above.

As noted above, an original database has an EU law originality test, i.e. it must be one which “by reason of the selection or arrangement of its contents *constitutes the original intellectual creation of the author*”. It is arguable that this represents a retrenchment from the previous liberal position. The “original intellectual creation” standard would call into question the extent to which works which are no more than a mere gathering of facts could enjoy protection, although such compilations may enjoy database rights (as discussed above). This will require future judicial discourse on the area in Ireland.

We are unaware of any judicial authority conclusively addressing this point.

**2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).**

As noted above, Irish law expressly recognised copyright protection for TV listings in *RTE v. Magill TV Guide*. However, it should be noted that this case largely turned on the fact that the publisher of the television listings was also the broadcaster.

As no Irish cases have considered the protection of compilations under the CRRA it is not possible to express a definitive view on this point.

### 3. **Achieving Access for the visually impaired**

#### 3.1 **Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?**

Section 104 CRRA allows a “designated body” to make a copy of a work for the purpose of modifying that copy to meet the special needs of a person who has a physical or mental disability and to supply that modified copy to such a person.

This is unconditional and covers all individuals who have a special need. “Designated body” covers all organisations and establishments making and supplying works which are modified in order to meet the special needs of persons who have a physical or mental disability and which are not established or conducted for profit or controlled by a body established or conducted for profit.

#### 3.2 **What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?**

The exception covers all works.

The CRRA allows the works to be supplied directly to the individual.

#### 3.3 **Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?**

Section 106 CRRA allows for the creation of an adaptation of the work. Section 374 CRRA allows for the circumvention of rights protection measures to give effect to these rights to copy and adapt the work.

#### 3.4 **Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?**

The Irish government has not expressed a public view of the World Blind Council Treaty. We are, however, informed by the relevant department that the Government does not support the Treaty as it is of the view that a treaty process will take too long. The Irish Government supports the EU initiative to pass a joint resolution on the topic. This is seen as the most pragmatic approach.

The Government intends to ratify the UN Convention on the Rights of Persons with Disabilities “as soon as possible”.<sup>45</sup> Ireland signed the Convention in 2007 but it is yet to be ratified. Its ratification may have an impact on Irish copyright law with its aim of facilitating access to “accessible information and communication technology”<sup>46</sup> for people with disabilities.

**3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?**

No.

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<sup>45</sup> <http://www.irishtimes.com/newspaper/ireland/2011/0108/1224287042291.html>, last accessed 23<sup>rd</sup> June 2011.

<sup>46</sup> Article 2 Convention on Rights of Persons with Disabilities.  
<http://www.un.org/disabilities/convention/conventionfull.shtml>, last accessed 23<sup>rd</sup> June 2011.

#### 4. **Access to the Internet as a Human Right**

##### 4.1 **Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?**

Not expressly. However, the Irish Constitution does recognise an implicit or unenumerated right to communicate (distinct from a right of free speech).<sup>47</sup> It is quite possible that this right may be used in a future case to claim a right of “internet access”.

##### 4.2 **Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?**

The right to communicate is not absolute and can be restricted by law. As a matter of Irish constitutional law, any such restriction would likely have to be proportionate.

In *EMI Records v. Eircom*<sup>48</sup> Charlton J expressed very strong support for an industry proposal to cut off the internet access of file sharers. It would appear likely that the protection of IP would amount to a legitimate restriction of any right to internet access.

The European Commission has expressed the view that Internet access is a fundamental human right. The question of proportionality may arise when balancing the right to access of the Internet and limiting IP infringements. The Minister for Jobs, Enterprise and Innovation has declined to adopt a “three strikes” solution proposed by the Copyright/Infosoc Directive 2001 by explicitly providing the Courts with the power to grant an injunction to a copyright owner against an ISP.<sup>49</sup>

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<sup>47</sup> *Paperlink v. AG* [1984] ILRM 373.

<sup>48</sup> *EMI Records v. Eircom* [2010] IEHC 108.

<sup>49</sup> <http://www.djei.ie/science/ipr/copyrightconsultation.htm>.

## 5. Orphan Works

### 5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

Yes, Section 88 CRRA governs this area. Copyright is not infringed when “it is not possible to ascertain the identity of the author of the work by reasonable enquiry, and ... it is reasonable to assume that the copyright has expired.” This applies to all works.

### 5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

Section 88 sets out a two stage test.

First, it must not be possible to ascertain the identity of the author of the work by reasonable enquiry. Secondly, it is reasonable to assume that the copyright has expired.

As the test is based on a presumption that the copyright in the work has expired, there is no requirement to pay compensation.

There is no requirement for judicial or administrative approval.

### 5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

The European Commission published a draft proposal for a Directive on Orphan works on 24<sup>th</sup> May 2011.<sup>50</sup> The main aim of this draft Directive is to create common rules for the digitisation of orphan works by making them publically accessible.

The draft proposes a “diligent search” before a work can be considered an orphan work. “Article 3 explains how the diligent search is to be carried out by those who are permitted to use orphan works. Article 3 clarifies that a diligent search need only be carried out in the Member State of first publication of the work.”<sup>51</sup>

The Department of Jobs, Enterprise and Innovation is conducting a consultation on a review of the Copyright and Related Rights Act 2000,<sup>52</sup> which is directly applicable to orphan works. It aims to identify any areas of the legislation that might be deemed to

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<sup>50</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/orphan-works/proposal\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf), last accessed 23<sup>rd</sup> June 2011.

<sup>51</sup> *Ibid*, at p. 4.

<sup>52</sup> [http://www.djei.ie/science/ipr/copyright\\_review\\_2011.htm](http://www.djei.ie/science/ipr/copyright_review_2011.htm), last accessed 23<sup>rd</sup> June 2011.

create barriers to innovation and to make recommendations to resolve any problems identified.

6. **Graduated Response Laws or Agreements**

**6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?**

No. In addition, it was held in *EMI v. UPC*<sup>53</sup> that Irish Courts do not have the power under the CRRA to order an ISP to cut off a filesharer or to block certain sites (in this case Pirate Bay) due to the hosting of copyright infringing material. However, the Minister for Jobs, Enterprise and Innovation has proposed that the CRRA may be amended to provide injunctive relief against ISPs.<sup>54</sup>

**6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?**

N/A

**6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?**

N/A

**6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services?**

N/A

**6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?**

<sup>53</sup> *EMI Records v. UPC Communications* [2010] IEHC 377.

<sup>54</sup> See above. <http://www.djei.ie/science/ipr/copyrightconsultation.htm>.

Yes. Eircom, the largest Irish ISP, has entered into an agreement with the major record labels to institute a “3 strike” system against suspected filesharers.

In *EMI v. Eircom*<sup>55</sup> Charleton J held that this arrangement was compatible with European data protection law.

**6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?**

Yes. As noted above Eircom has concluded such an agreement with the major record labels. UPC refused to enter into such an arrangement and successfully defended an application for an injunction directing them to participate in such a scheme.<sup>56</sup>

**7. Private Agreements and UGC**

**7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?**

None of which we are aware.

**7.2 How is the filtering to be accomplished?**

N/A

**7.3 Have there been any cases concerning such agreements or “best practices”?**

No

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<sup>55</sup> *EMI Records v. Eircom* [2010] IEHC 108.

<sup>56</sup> *EMI Records v. UPC* 2010 IEHC 377.

**7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?**

No.

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