

To the legal draftsman, Attorney General's Office,

We understand that the government is under pressure to change Irish copyright law in order to implement the European InfoSoc Directive. We thank you for making a draft of your implementation, and especially the explanatory notes, available for comment.

Rightsholders in Ireland were broadly satisfied with the protection the Irish Copyright and Related Rights Act of 2000 offered them:

"We are pleased that the Irish government has led the way in strengthening the rights of copyright owners in music, software and databases. This innovative bill will, we believe, serve as a role model for other EU countries to follow."

Dick Doyle, Director General of IRMA, the Irish recording industry association,
(<http://www.ifpi.org/site-content/press/20000711.html>)

Yet, users could rely on a broad set of exceptions, such as fair dealing rights, which acted as a balance to the power given to rightsholders. Unfortunately, due to intensive lobbying by rightsholder interest groups, the InfoSoc Directive failed to find this balance.

Having studied the draft of your proposed changes, our main concerns are with Clauses 2 and 5. However, we would like to begin by welcoming the conclusion of the Department not to subject the exceptions in Articles 5.2 (a), (b) and (e) of the InfoSoc Directive to payment, in view of the fact these are subject to the rigours of the three-step test.

Clause 2 of the draft adds two further ways in which a device might be considered a "protection defeating device". Our concern here is with the test of "limited commercially significant purpose or use". There is a lot of software available which has enormous utility value but might, nevertheless, be considered as having "limited commercially significant purpose or use".

Some free software, for example, would have this property. In certain cases, a piece of general purpose software might aid in the disabling of a protection measure and inappropriately fall under your proposed definition. We don't feel it is your intent to prohibit useful general purpose software in this way. We suggest that this test be altered; perhaps "limited utility" would be more suitable.

In the Act of 2000, Chapter 6 of Part II makes many acts explicitly non-infringing. It is clear that these acts are considered important since two separate provisions are made to protect them. Firstly, Section 2(10) asserts that a user's rights to perform these acts cannot be overridden by an agreement. Secondly, although Chapter 1 of Part VII gives substantial legal support for protection measures, Section 374 asserts that this Chapter "shall not be construed as operating to prevent any person from undertaking the acts permitted". In particular, it explicitly allows "any act of circumvention required to effect such permitted acts".

Clause 5 of the draft proposes to replace Section 374. The result of the change is that, if a rights protection measure is used, the user may no longer perform these non-infringing acts. Although the principle expressed in the current section is maintained, by removing the means to perform these acts, that principle becomes an aspiration rather than a reality. The rightsholder is required to "make available to the beneficiary the means of benefitting from the permitted act" but no details are given which explain how, when or in what form such means would be provided. That this is unsatisfactory is made clear by Subsection 3, where a procedure for disputes is discussed.

Although we welcome that the change places obligations on the rightsholder, applying to the High Court as a means of redress is wholly inadequate. For a student who needs to exercise fair dealings rights with respect to an e-journal, or a blind person who wishes to use a particular screen reading technology to access an e-book, this is an unrealistic solution. To be effective, a dispute resolution mechanism would need to have clear, transparent procedures regarding time limits, costs, class actions, level of access provided, etc. Otherwise, the unequal position of the

parties effectively renders the remedy useless. We do not believe that this is your intention.

Some countries have chosen to provide protection for certain exceptions in their implementation of the InfoSoc Directive. For example, the UK have recognised the value of research into cryptography with an exception for research of this kind (see Recital 48 of the InfoSoc Directive). Other countries are considering special provisions for non-infringing activities such as making a backup copy or platform shifting by consumers, for example, to listen to a legally acquired music CD in the car. In Ireland's case, to ensure that users can actually perform the non-infringing acts of our copyright law, we strongly urge you to leave Section 374 as it was.

We conclude by reiterating our two main points: Firstly, the definition of "protection defeating device" should be changed to avoid its inappropriate test of "commerciality". Secondly, the proposed changes to Section 374 should be dropped or altered to support the permitted acts of Chapter 6.

Thank you for your careful consideration,

Malcolm Tyrrell,

on behalf of:

[names removed for online publication]