

Kluwer Copyright Blog

‘Copying into Copyright Law’: Ireland’s minimalist transposition of Directive 2019/790

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As testified by collections such as those of Trinity College’s Old Library, copying and illustrating manuscripts by hand was such a well-developed practice among members of mediaeval religious orders in Ireland that two Christian saints – Columba and Finnian – ended up having the [first recorded copyright dispute](#) in the Western world’s history. The most modern instalment of this long history comes in the form of another kind ‘copy’, less richly decorated, yet more relevant and politically sensitive for a country that has established a long-term foreign investment “partnership” with the tech and communication industry: the transposition of Directive 2019/790 into Irish law. This piece aims to provide a concise overview of how Ireland implemented such a hotly debated piece of EU legislation (herein, ‘**the Directive**’).



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Missed deadline and transposition

In the same way as many EU member states, Ireland missed the transposition deadline (7 June 2021). The relevant act, seeking to bring Ireland in line with the Directive, is the Statutory Instrument 567/2021 ‘European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021’ (hereinafter ‘**the Regulations**’). The Irish legislative transposition finally became law on 19 November 2021. The key element to note here is that the Regulations are a type of secondary legislation, known as a Statutory Instrument. By using this method of implementation, the Regulations avoided any parliamentary scrutiny by the Oireachtas (the Irish Parliament) and thus did not benefit from any debate or amendments.

Core provisions

Despite its minimalist approach, the national transposition of the Directive has allowed the introduction of novel provisions into Irish law.

Text and data mining

The first among these changes concerns, in Part 2 of the Regulations, the introduction of a text and data mining exception for purposes of non-commercial research into the Copyright and Related Rights Act (CRRA) 2000 (cf. Section 53A). The exception is broadly similar to that contained in Article 3 of the Directive. However, it does deviate slightly from the European prototype as regards the level of security of the data being extracted from a protected work for purposes of computational analysis. The Regulations provide that the exception under Section 53A shall be available *only* to researchers having lawful access to copies of protected works under the supervision of a person who is responsible, within a research institution, for the security and integrity of the networks and databases. This Section also provides that right holders shall be informed about this type of use of their works and shall be entitled to ask the exception's beneficiary to implement more stringent security measures.

In cases of computational analysis of commercial significance, by contrast, the new Section 53B of the CRRA closely follows the Directive's provision under Article 4 by acknowledging the logic of proprietary control over data contained in copyright works. This means that copyright holders can expressly reserve (in an appropriate manner) the exercise of such right for purposes of text and data mining. In the absence of such reservation, consistent with the Directive's text, Section 53B provides that the right-holders shall enable lawful users of their copyright works to engage in activities of text and data mining to the extent justified by this specific purpose. Despite their novelty in the Irish copyright framework, the report published by the Copyright Review Group in 2013 had already advocated the introduction of a balanced and broader exception for such computational analysis, although the proposal did not contemplate the onerous security and storage requirements that are not prescribed in the above-mentioned provisions (see [Report of the Copyright Review Committee, "Modernising Copyright", 29 October 2013](#)).

Exceptions for online teaching activities and out-of-commerce works

The Regulations introduced mandatory exceptions from the Directive that seek to foster cross-border teaching activities (cf. Article 5 of the Directive) and to facilitate non-commercial uses of out-of-commerce works (cf. Article 8 of the Directive). Previously, no legislative framework existed in Ireland for qualified users such as educational establishments and cultural heritage institutions to pursue these public policy goals in digital settings (see Department of Business, Enterprise and Innovation [public consultation](#) on the transposition of Directive). Irish educational institutions are now free to give their teaching staff and students access to copyright works through secure electronic environments subject to appropriate authentication procedures insofar as they acknowledge the source of these materials and ensure compliance of uses within the specific purpose and the limited scope imposed by the so-called three step test (Section 57A CRRA). Moreover, in line with the Directive's Article 8, Sections 7 to 9 of the Regulations amended Irish copyright law by introducing provisions allowing Irish cultural heritage institutions to use out-of-

commerce works under a licence granted by a collective management organisation or, where none exists, under an exception for non-commercial use with sufficient acknowledgement (cf. Section 58A CRRA).

Transparency and fair remuneration claims for authors and performers

Sections 25-29 of the Regulations introduce totally new provisions for Irish law. Although these rules replicate the Directive's wording (cf. Chapter 3: Articles 18 to 23) with no expansion from a textual perspective, their transposition has *per se* the potential to significantly strengthen authors' and performers' bargaining power, as well as that of their respective collecting societies. These provisions introduce principles of appropriate and proportionate remuneration (Section 26) and transparency of information (Section 27) across value chains created by licensees and sub-licensees of authors' and performers' rights. These contract law provisions, totally alien to the Irish legal tradition, are designed to apply in negotiations and contractual relationships between artists and commercial exploiters of their works, including social media platforms and streaming services. This new cluster of norms provides an interesting foray into Irish contract law by allowing artists to claim access to unprecedented information regarding exploitations of their works and the revenue streams their works generate. The fact that the Regulations grant artists the rights to renegotiate (Section 28) or revoke (Section 29) their contracts where unfairness occurs – essentially granting them an avenue outside of the principles of equity – is certainly a very welcome improvement for individual creators in a legal system traditionally based on freedom of contract.

Press publishers' right

Sections 13-17 of the Regulations implement the *sui generis* protection for news publishers, contemplated under Article 15 of the Directive. In particular, Section 13 excludes hyperlinks from the scope of this new right without providing guidance on how this should work in practice. The useful dimension of this solution is that it indirectly allows the scope of the Irish rights of news publishers to be determined by (and be compatible with) the notion of 'communication to the public' and protected hyperlinks stemming from the CJEU case law. Moreover, Sections 14, 15, 16 and 17 provide that the exceptions for text and data mining, teaching and non-commercial uses of out-of-commerce works shall apply also in the domain of news publications and limit the scope of this new type of right.

Liability of social media platforms

Article 17 of the Directive embodies the most controversial and arguably radical set of provisions of the whole Directive, introducing key limitations to the principle of intermediary liability exemptions for 'online content-sharing service providers' (the Directive's terminology to identify social media platforms). Without doubt, transposing this provision was particularly problematic because, as the European home of some of the world's largest tech companies, Ireland has [notoriously avoided](#) – in ways which are often of dubious legitimacy – taking a hard stance over the compliance of digital businesses with EU law.

The Irish version of Article 17 faithfully follows the convoluted text of the Directive almost word for word. In doing so, Sections 18-24 of the Regulations consciously minimise the operational framework of this infrastructure while remaining open to pan-European industry-led developments regarding new licensing and data-sharing practices in the social media industry. The Regulations identify the main issues that arise from algorithmic copyright enforcement as follows: (i) how free expression and copyright can be best balanced (Section 21); (ii) how transparent and accurate content removal practices will be for right-holders (Section 22); and (iii) whether social media companies will put in place effective and expeditious complaint and redress mechanisms (Section 23). However, considering that law enforcement activities in Ireland are likely to be kept, as usual, at a minimum level, such a minimalist approach entails that the resolution of these complex issues will be entirely delegated to the internal policies and decisions of social media companies and the architecture of their platforms.

A particularly obscure and unfortunate aspect of the Regulations is the contrast between Section 19(1) and 19(2) as regards the identification of the right-holders who shall benefit from the direct liability of social media platforms and the expected increase of revenues their licensing activities will produce. According to Section 19(2) these are the rights protected by Sections 37 and 40 of the [Act of 2000](#), which only address copyright without mentioning rights related to copyright. The mere reference to ‘copyright’ openly conflicts with the broader definition of Sect 19(1), which correctly refers to copyright-protected works or ‘other protected subject matter’ uploaded by their users. This is obviously a flaw to consider (and to remedy) because there is no justification to discriminate against rights related to copyright, especially those of music performers, whose entitlements are not included in the Irish notion of ‘copyright’. This is just one example of how minimalist and generally unfocused (if not sloppy, in some sections) the Irish transposition is.

Critical remarks and conclusion

As we have seen very briefly, Ireland’s transposition is very much a word-for-word copy of Directive 2019/790. On the one hand, for some of the legal issues and dilemmas the Directive sought to solve, this might prove to be a suitable approach in so far as it ensures the openness and flexibility of the Irish legal system to EU-wide industry-led solutions and practices, as well as the clarifications and concepts which might materialise in the future case law of the CJEU. On the other hand, such a minimalist approach is a great source of concern wherever it does not allow Ireland to fill those gaps and develop solutions that, even in the new copyright regime designed under Directive 2019/790, should be properly addressed at national level.

Arguably, a prominent example is the lack of an institution such as a specialized and independent copyright ‘council’ or ‘tribunal’ such as those which exist in other common law jurisdictions, like the US, the UK and Australia, for a broad variety of purposes including mediation, dispute resolution and royalty setting. The absence of such a dedicated body was already highlighted in the above-mentioned Copyright Review Group’s 2013 [report](#). This institutional vacuum is not filled as in other European countries (for instance: France) by active units or offices in the Irish Intellectual Property Office or within a relevant ministry. This situation makes it difficult for Ireland to engage in stakeholder consultations – as evidenced even in the preparatory works for the Directive’s transposition – and in activities, such as mediation or arbitration procedures, that are vital for the enforcement of copyright holders’ and users’ rights under the Directive (see also Eoin O’Dell [here](#)). As they stand, the Regulations leave a large degree of uncertainty, especially as to how

mediation and arbitration mechanisms should function in providing, as stipulated by Article 17 of the Directive, out-of-court settlements for complex disputes arising in social media scenarios. Section 24 of the Regulations generically refers to the Mediation Act 2017 and the Arbitration Act 2010 as frameworks supporting dispute settlement solutions with no state involvement. This is without doubt a weakness, which leaves both creators and users at the veritable mercy of online platforms.

While the logic of the Directive aims at empowering rights holders in the digital age, the lacklustre Irish transposition frustrates this aim by openly rejecting the idea of scrutiny of the licensing and enforcement practices of the largest content gatekeepers in the social media industry. Instead, Irish law potentially leaves online platforms with the freedom to dictate their own rules and to impose their Terms of Service (or partnership agreements) onto content creators. This is an approach that has already proved to be problematic, considering the legal uncertainties that have emerged as regards users' and creators' rights on said platforms, in particular as regards unfair or inequitable enforcement of copyright policies (see also the European Copyright Society [here](#) and Advocate General Saugmandsgaard Øe [here](#)).

It seems fair to conclude that the Regulations are yet another example of Ireland's renowned reluctance to genuinely embrace the EU's new digital strategy. It is obvious from the adoption of recent EU regulations – from the 2016 [GDPR](#) to the 2022 [Digital Services Act](#) – that, at least in Europe, the enforcement of human rights such as the right to privacy and other economic rights such as creators' copyright is difficult or impossible without enhancing the degree of liability and direct involvement of online gatekeepers (cf., the 'very large online platforms' that are now identified and targeted under the DSA). Ireland's non-cooperative attitude has been manifest in fields like data protection and online safety, where Irish regulatory efforts (or indeed lack thereof) have been repeatedly [criticised](#). It has to be seen whether a similar attitude and a lack of adequate commitment will characterise, for purely internal and opportunistic reasons, the enforcement of right-holders' and users' prerogatives under the new copyright rules. An important element that points to the Irish government's less than enthusiastic approach to the Directive – and makes us feel pessimistic about the future – is that the Regulations still have not been published in Gaeilge (the Irish language) as is required by [law](#). This is somewhat ironic, given that the Regulations are in essence an exact copy of the Directive which is itself available in Gaeilge.

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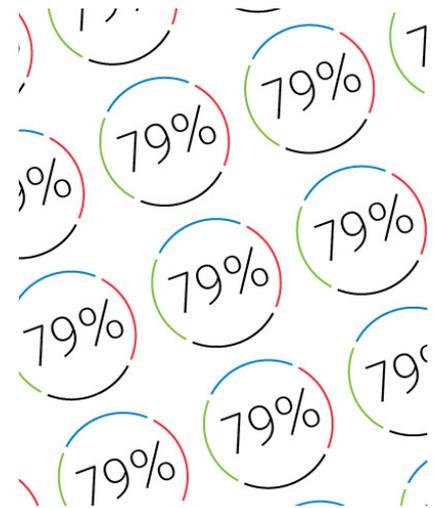
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