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## Copy That! Ireland Implements EU Copyright Directive

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As we outlined previously [here](#), Ireland has become the seventh EU Member State to implement the Directive on Copyright in the Digital Single Market ((EU) 2019/790) (CDSM Directive) on 19 November 2021. It did so under the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (Irish Regulations). Implementation of the CDSM Directive in Ireland marks a significant evolution in Irish copyright law, amending the Copyright and Related Rights Act 2000 to reflect international developments.

While the Irish Regulations broadly implement the CDSM Directive, they provide further clarity and guidance. This Briefing examines differences in transposition between the CDSM Directive and the Irish Regulations, how this elucidates the key issues of the CDSM Directive and potential gaps which remain.

### **An Update to Ireland's Copyright Exemptions for Text and Data Mining**

The CDSM Directive requires Member States to introduce an exception to copyright infringement to allow research organisations and cultural heritage institutions to engage in text and data mining of lawfully accessed copyright-protected material for scientific research.

Ireland had already introduced text and data mining exemptions in 2019, following the publication of the *Modernising Copyright*, a report by Ireland's Copyright Review Committee. *Modernising Copyright* recognised the potential for new discoveries from existing data and for significant social benefits to be gained from content mining. It therefore recommended exemptions in favour of content mining for non-commercial research. Ireland's existing exemptions allow any person to engage in computational analysis of lawfully accessible copyright-protected material for non-commercial research purposes without infringing copyright. The existing exemptions require

sufficient acknowledgement by the text/data miner. Copyright infringement still arises where a copy of the copyright-protected work made for text/data mining purposes is transferred to another person without the copyright owner's consent or where the copy is used for a commercial purpose.

The CDSM Directive requires that text/data miners store copies made under the Article 3 test and data mining exemption with "an appropriate level of security". It also provides that rightsholders should be allowed to take necessary measures to ensure the security and integrity of networks and databases where they store their own copyright works. The CDSM Directive requires Member States to encourage rightsholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning these security measures. The Irish Regulations take a distinctive approach to applying these requirements to the existing Irish text and data mining exemptions. Notably, the Irish Regulations

1. anticipate commonly agreed industry standards by including more elaborate provisions on appropriate levels of security; and
2. appear to take features of the CDSM Directive that allow rightsholders to protect their own networks and databases from being overwhelmed by automated access requests from text/data miners and translate those features into more detailed obligations on text/data miners to protect copies of copyright-protected works after they have been made.

Under the Irish Regulations, the person responsible for the security and integrity of the network and database where a copy of a copyright-protected work is held, must ensure only those with lawful access are permitted to access it. The Irish Regulations suggest that the responsible person may achieve this through IP address validation or user authentication.

The rightsholder must be informed of the making of a copy and may request information on the steps taken by the responsible person to ensure appropriate security measures. The rightsholder may also request additional security measures, although they are only entitled to know as soon as practicable whether these additional measures have been applied.

The CDSM Directive and the Irish Regulations also go further than the existing Irish exemption, creating an additional exemption allowing any person to engage in text and data mining of lawfully accessible copyright-protected material unless the rightsholder has reserved the use of a work in an appropriate manner. This new exemption is not limited to text and data mining for scientific or non-commercial purposes. The Irish Regulations provide that the rightsholder may reserve the use of the work using machine-readable methods (such as meta-data or terms and conditions of use/service) or, where the content is not publicly available online, by clearly communicating the reservation to all persons who have lawful access.

## **Negotiation Mechanism for Audio-Visual Works on Video-on-Demand Platforms**

The CDSM Directive requires Member States to ensure that an impartial negotiation mechanism is available to parties facing difficulties licensing audio-visual works on video-on-demand platforms. The CDSM Directive allows for an impartial body to be established and designated or for the use of mediators. From those options, the Irish Regulations opt to provide that parties may engage in mediation consistent with the Mediation Act 2017.

## Implementation of the Press Publishers' Right

A striking reform brought about by the CDSM Directive was the creation of a new ancillary right to protect press publishers in a similar way to copyright holders. This new right was intended to address a perceived imbalance between the protection of authors of copyright-protected works and of others who were involved in the publishing process (editors, formatters, and publishers). Essentially, the CDSM Directive has created a new right for publishers of press publications in the EU to claim revenue for online uses of their publications by information society service providers (**ISPPs**) (**press publishers' right**).

The press publishers' right is implemented in the Irish Regulations without clarifying certain ambiguities in the CDSM Directive. For example, the CDSM Directive and the Irish Regulations provide that the press publishers' right will not apply to private/non-commercial uses of press publications, "the use of individual words or very short extracts", or "acts of hyperlinking". However, there is no guidance in the Irish Regulations as to the meaning or application of these terms.

The CDSM Directive also provides that authors of works incorporated in a press publication shall receive an "appropriate share" of the revenues received by press publishers from ISSPs. The Irish Regulations do not provide guidance on what constitutes an "appropriate share".

The Irish Regulations provide that the exception to the right in publication extends to text and data mining for research and certain commercial purposes, as discussed above, in addition to an exception for the digital use of works for teaching or in cultural heritage institutions. The scope and application of Article 15 will only become apparent in practice.

## Liability of Online Content-Sharing Service Providers

A controversial provision of the Directive, Article 17, has been the subject of Guidance issued by the European Commission in June 2021 (see [here](#) for our article). Article 17 alters the existing content management and liability rules for online content-sharing service providers (**OCSSPs**). The definition of OCSSP in the Directive is intended to cover platforms such as YouTube.

Article 17 makes OCSSPs responsible for instances of copyright infringement committed by their users in respect of a copyright-protected work unless they demonstrate that they:

- a. made best efforts to obtain prior authorisation from the rightholder;
- b. made best efforts to ensure the unavailability of the work if the rightholder had given them enough information about the work; and
- c. removed it expeditiously upon notification from the rightholder and made best efforts to prevent future uploads.

The Irish Regulations implement Article 17 without modification and do not seek to resolve the much-debated ambiguities within the Article. For example, they do not address the perceived tension between the "best efforts" provision, the "keep up" requirement, and ex ante blocking and filtering.

- Article 17(4) requires best efforts to be made to obtain an authorisation to share content protected by copyright.
- Article 17(7) provides that works that do not infringe copyright must not be blocked.
- The Guidance seems to recommend ex ante blocking and filtering in some circumstances.

Stakeholder reaction to the Guidance on Article 17 was mixed, with criticism of hesitancy and lack of clear instruction. Advocate General Saugmandsgaard Øe suggested in the case [C-401/19, \(Polish CJEU Case\)](#) that where there is ambiguity regarding Article 17, the courts, not the platforms, should play the determining role. It is likely that this provision will be closely watched in the future.

Article 17 of the Directive requires Member States to ensure that out-of-court redress mechanisms are available to settle disputes. The Irish Regulations have confirmed that Article 17 disputes may be submitted to mediation in accordance with the Mediation Act 2017. In addition, under the Irish Regulations, disputes may be referred to arbitration in accordance with the Arbitration Act 2010. The types of disputes appropriate for arbitration remains to be seen.

## **Fair Remuneration in Authors' and Performers' Contracts**

The CDSM Directive requires that authors and performers receive appropriate and proportionate remuneration where they have licensed or transferred exclusive rights to their work. The Irish Regulations clarify aspects of the fair remuneration and information requirements.

The Irish Regulations provide that appropriate and proportionate remuneration should be proportionate to the actual or potential economic value of the licensed or transferred rights. The author's contribution to the overall work and all other circumstances, including market practices, the actual exploitation of the work and merchandising revenues, will be considered when determining appropriate and fair remuneration.

The CDSM Directive requires that authors and performers receive "relevant and comprehensive information on the exploitation of ... their works" at least once a year. The Irish Regulations clarify that this information comprises a detailed description of how any work has been exploited, an itemised list of the euro value of all copyright revenues, and notification of the rightsholder's rights under the Regulation.

The Irish Regulations also provide further detail on the contract adjustment mechanism that will be applied where authors seek to have a disproportionately low original remuneration adjusted in the future. This is largely dependent on the circumstances of each case, the remuneration practices in different content sectors, and revenues relevant to the rights at issue.

The Irish Regulations address the right of revocation, with instructions about how and when an author might exercise this right.

## Conclusion

The Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar, has noted that the CDSM Directive and the Irish Regulations are part of a discussion on the future of media and will be important in ensuring “the rights of our creators, writers, journalists and performers are upheld.” Articles 15 and 17 of the Directive are likely to lead to litigation across Member States. The CJEU’s final decision in the Polish CJEU Case is awaited, and the European Commission may also release further guidance following that decision.

We will continue to monitor developments related to the implementation of the Irish Regulations and broader CDSM Directive provisions.

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