



Provided by the author(s) and University of Galway in accordance with publisher policies. Please cite the published version when available.

Title	No three strikes for Ireland (yet): EU Copyright Law and individual liability in recent internet filesharing litigation
Author(s)	Kennedy, Rónán
Publication Date	2011
Publication Information	Kennedy, R. (2011) 'No Three Strikes for Ireland (Yet): EU Copyright Law and Individual Liability in Recent Internet Filesharing Litigation'. <i>Journal of Internet Law</i> , 14 (11).
Publisher	Wolters Kluwer
Link to publisher's version	<a href="https://lrus.wolterskluwer.com/store/product/journal-of-internet-law-monthly/">https://lrus.wolterskluwer.com/store/product/journal-of-internet-law-monthly/</a>
Item record	<a href="http://hdl.handle.net/10379/6079">http://hdl.handle.net/10379/6079</a>

Downloaded 2024-04-17T19:39:40Z

Some rights reserved. For more information, please see the item record link above.



# No Three Strikes for Ireland (Yet)

Rónán Kennedy\*

November 15, 2010

## Abstract

This article is a summary of recent Irish cases involving peer-to-peer file-sharing. These cases are another step in the ongoing development of this fast-changing area of the law, and raise some interesting questions about issues of privacy, Internet service provider responsibility for copyright infringement by users and the legality of “three strikes and you’re out” Internet disconnection procedures in Europe. More importantly, they indicate that finding a solution to the conflict between protecting, on the one hand, the interests of copyright holders on the Internet and, on the other hand, the scope of service providers to innovate and develop their services, will remain a difficult challenge for quite some time to come.

## 1 Introduction

The High Court of Ireland recently decided some important cases dealing with Internet file-sharing and the legal issues that this problem raises. The background to these cases will be well-known to those who have been following the development of copyright law and policy over the past decade or more. The Internet makes it easy to share and distribute content.<sup>1</sup> The development of peer-to-peer (P2P) file-sharing protocols have made it very straightforward for non-technical users to share large volumes of files, usually music and video, with unknown others. The music industry claims that this has led to a sharp fall in revenues as individuals turn to free (and illegal) downloads instead of purchasing items on CD and DVD (and more recently, through digital download services such as the iTunes store).

The initial strategy of the music industry was to sue the companies offering file-sharing software. It had some success with this in cases such as Napster (US)<sup>2</sup> and KaZaa (Australia),<sup>3</sup> but P2P software changed in response, redesigning itself so as to avoid liability under copyright law and becoming decentralised so as to avoid being a target for litigation.<sup>4</sup> The courts have been reluctant to shut P2P down entirely, as it does have legitimate uses, and the academy has called for the principle of “net neutrality” to be respected in order to protect the ability of service providers to continue to innovate without needing permission from content industries for the development of new technologies.<sup>5</sup> As a result, the content industries concerned (now including film studios and likely to soon include book publishers) have begun to target Internet service providers (ISPs) directly, in the hope of controlling P2P traffic at the intermediary level.<sup>6</sup>

This article looks at three recent Irish cases that involve file-sharing. It sketches the background to the cases, and discusses the legal issues raised. It also looks at some of the problems which the judgments raise, and discusses the directions in which Irish law may develop in the future. Finally, it looks at what these cases might mean for copyright law and policy internationally. It concludes that lobbying pressure is likely to lead to “three strikes and you’re out” disconnection procedures for repeat infringers becoming widespread, but the implementation of such policies must take account of human rights concerns, such as privacy, freedom of expression and the right to earn a livelihood.

## 2 The Cases

### 2.1 *IRMA v. Eircom*

The Irish Recorded Music Association (IRMA) sued Eircom, the largest ISP in the country,<sup>7</sup> in order to force them to implement a “three strikes and you’re out” policy. After eight days at hearing, Eircom settled the case,<sup>8</sup> agreeing to implement such a policy, but only if it was in compliance with data protection law and only if IRMA sought to have other Irish ISPs implement similar rules in order to ensure a “level playing field”.<sup>9</sup> The terms of the settlement were not made public, although a memorandum on the arrangement did leak<sup>10</sup> indicating that a graduated response “three strikes and you’re out” policy would apply for disconnecting subscribers who continued to be reported by the music industry for downloading (although no personal information would be supplied by Eircom) and that Eircom would not oppose a court application to block access to the Pirate Bay web site. In a later judgment, discussed below, Charleton J. also indicated that the settlement required an education and awareness program from Eircom directed at its customers,<sup>11</sup> and provided an outline of the three strikes policy:

1. The first warning would be a notification of an infringing download with a subscriber’s bill.
2. The second warning would be a formal warning letter.
3. The third warning would involve a review of the evidence by a person (the previous two steps are automatic), which could end in the issuance of a termination notice, after which the subscriber would have 14 days to put forward extenuating circumstances or have their service cut off.<sup>12</sup>

It is important to note that this process operates in such a way that the music industry do not obtain individual subscriber details. They supply IP addresses at which they allege that infringing conduct took place at a given time; it is for Eircom to consult its records and determine which subscriber is involved.

IRMA went on to apply for, and obtain, court orders blocking access to the Pirate Bay web site (which is a notorious source of information on where to obtain unauthorised downloads) from Eircom’s systems. Eircom did not oppose these applications.<sup>13</sup>

It is difficult to analyse the settlement without access to full details, but enough information on it is in the public domain to point to some potential problems. Given that

disconnection from the Internet can have serious consequences (particularly for those who rely on access to work), that the infringer may not be the subscriber, and that the Irish Constitution guarantees the right to earn a livelihood, the lack of judicial oversight is troublesome, particularly when some jurisdictions are declaring that access is a human right<sup>14</sup> and the European Data Protection Supervisor is not satisfied that “three strikes” policies are proportionate.<sup>15</sup> However, Charleton J. considered these issues and was satisfied that there were sufficient safeguards built into a three-stage process to protect the rights of innocent parties. If the procedure works as intended, only persistent infringers will see their accounts terminated.<sup>16</sup>

## 2.2 Data Protection Commissioner Intervention

At this point, the Data Protection Commissioner (DPC) intervened, as he was concerned that a three strikes policy raised privacy questions. However, the court was not prepared to give him indemnity for his costs and so this issue was argued and decided against the DPC without hearing him.<sup>17</sup> The court considered three issues in arriving at its decision.

### 2.2.1 IP Addresses as Personal Data

The first was whether IP addresses are “personal data” for the purposes of the Data Protection Acts, 1988-2003 (DPA), which would require that the protections afforded to such data under that legislation would apply.

Personal data is defined by § 1 of the Data Protection Act, 1988, as amended by the Data Protection (Amendment) Act, 2003, as “[d]ata relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller.” The judge held that “in most, if not all, statutory contexts that likely means probable; no more or less than that.”<sup>18</sup> The judge held that because the music industry had abandoned its previous strategy of seeking Norwich Pharmacal orders against ISPs in order to obtain details of individual subscribers whom they suspected of engaging in infringing downloads,

... none of the plaintiffs have any interest in personally identifying any living person who is infringing their copyright by means of the settlement and protocol. I do not regard it as at all likely that they will attempt in any way to use the IP address as supplied to them by DtecNet of those engaged in illegal downloading in order to find out their names and addresses. Further, since, on the affidavit evidence before me, the plaintiffs had previously engaged in expensive litigation against Eircom in order to find out who they were, there seems no legal avenue open to them to get that information apart from an application for the names and addresses of the copyright thieves to the internet service provider. It is proved to me to be close to impossible that they could have recovered them by any easier or less pricey means. Nor do any of the plaintiffs have any intention of engaging in any illegal activity.<sup>19</sup>

On that basis, the judge concluded that IP addresses are not personal data under the DPA.

## 2.2.2 Disconnection as “Prejudice to Fundamental Rights”

In order to complete the third step in the three strikes procedure (termination), Eircom would need to process “personal data” on a subscriber. § 2A of the DPA prohibits this unless the protections in § 2 of that Act<sup>20</sup> are complied with and

at least one of the following conditions is met:

- (a) the data subject has given his or her consent to the processing or, if the data subject, by reason of his or her physical or mental incapacity or age, is or is likely to be unable to appreciate the nature and effect of such consent, it is given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the data subject and giving such consent is not prohibited by law,
- (b) the processing is necessary—
  - (i) for the performance of a contract to which the data subject is a party.
  - (ii) in order to take steps at the request of the data subject prior to entering into a contract.
  - (iii) for compliance with a legal obligation to which the data controller is subject other than an obligation imposed by contract, or
  - (iv) to prevent—
    - (I) injury or other damage to the health of the data subject or
    - (II) serious loss or damage to property of the data subject,or otherwise to protect his or her vital interests where the seeking of the consent of the data subject or another person referred to in paragraph (a) of this subsection is likely to result in those interests being damaged.
- (v) the processing is necessary—
  - (i) for the administration of justice,
  - (ii) for the performance of a function conferred on a person by or under an enactment,
  - (iii) for the performance of a function of the Government or a Minister of the Government, or
  - (iv) for the performance of any other function of a public nature performed in the public interest by a person.

- (c) the processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the fundamental rights and freedoms or legitimate interests of the data subject.

The DPC was concerned that the processing involved in the disconnection process (assuming that it involved “personal data”) would fall foul of the last exception and would be “unwarranted ... by reason of prejudice to the fundamental rights and freedoms or legitimate interests of the data subject”.

The judge held that copyright was a fundamental right in Irish law, relying on a dictum by Keane J in *Phonographic Performance Ireland Ltd. v Cody*:<sup>21</sup>

The right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of article 40.3.2° and Article 43.1 of the Constitution of Ireland, 1937, as is the similar right of a person who has employed his or her technical skills and/or capital in the sound recording of a musical work. As such, they can hardly be abolished in their entirety, although it was doubtless within the competence of the Oireachtas to regulate their exercise in the interests of the common good. In addition and even in the absence of any statutory machinery, it is the duty of the organs of the State, including the courts, to ensure, as best they may, that these rights are protected from unjust attack and, in the case of injustice done, vindicated.<sup>22</sup>

According to Charleton J., Eircom, “as a responsible company”, had a number of legitimate interests here. First, abiding by the law: “[t]hat is what the court expects of both individuals and companies. That expectation is derived from the rights protected under the Constitution and the general pact which the people of Ireland mutually made in founding a legal system, as the Preamble to the Constitution clearly declares, that is dedicated to attaining true social order.”<sup>23</sup> Second, the subscriber had given consent under the contract in return for obtaining Internet access.<sup>24</sup> (Eircom’s standard customer service agreement includes a clause prohibiting customers from using its facilities “to create, host or transmit material which infringes the intellectual property rights including, but not limited to, the copyright of another person or organisation”.<sup>25</sup>)

In addition, Charleton J. held that

[T]here cannot be a right to infringe the constitutional rights of others, absent some argument as to a genuine and compelling competing right. In some instances, the purpose for which a right is asserted undermines its character as a right. There could not be, for instance, a constitutional right to privacy that extended to the organisation of a violent crime over the internet or by telephone. There is nothing disproportionate, and it is therefore not unwarranted, about cutting off internet access because of three infringements of copyright. The exceptions in the protocol, to which I have already referred in detail, provide for

upholding relevant rights to medical care, to livelihood and to business use in appropriate circumstances. The protocol, at the relevant stage, is not inhumane or arbitrary. Rather, there is a right to make representations and these will, I am assured and I believe, be listened to if sensible and credible.<sup>26</sup>

The judge also considered the relevance of European law, specifically the Framework Directive<sup>27</sup> and Specific Directives on electronic communications networks and services<sup>28</sup> (although not yet brought into Irish law), and § 40 of the Copyright and Related Rights Act, 2000 (CRRA), which the judge saw as giving effect to Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. He “interpret[ed] the Copyright and Related Rights Act 2000 as extending to the making of an injunction against an innocent third party in order to block, in the appropriate way that is convenient as to the balance between the parties and that is just, as to their standing and conduct, the wholesale illegal destruction of the right to livelihood through creative effort which copyright, as a fundamental concept in law, is designed to defend and to vindicate.”<sup>29</sup> This interpretation became questionable in the later UPC case.

### 2.2.3 Assumption that an Offence Has Been Committed

The third issue which the judge considered was whether the processing involved in the three strikes procedure involved “sensitive personal data”. Under § 1 of the DPA, “sensitive personal data” includes

personal data as to - ...

(d) the commission or alleged commission of any offence by the data subject, or

(e) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

§ 140 of the CRRA criminalises copyright infringement.<sup>30</sup> However, the judge was

... satisfied that neither the plaintiffs as owners or assignees of valuable copyright, nor Eircom as the internet service provider, are in any way interested in the detection or prosecution of criminal offences. ...

Nothing in the affidavits that I have seen, nor anything in the evidence which I have heard, shows any interest by any of the plaintiffs, much less by the defendant, in alleging the commission by the person illegally downloading copyright material, the data subject, of a criminal offence. Nothing in the protocol to which I have referred will ever involve “the disposal of... proceedings” or “the sentence of any court”. This strikes me as having high relevance to the third issue. Furthermore, since one is dealing here not with a regulatory offence, one which carries no necessary mental element of culpability, but with a true criminal offence, which does, there is nothing in the terms of the settlement, or the

resulting protocol, or the attitude of the parties, which is directed at that crucial, and elusive, proof of the relevant mental element in criminal law. Rather, everything that I have seen is based upon civil law principles. In contrast to the criminal process, these establish liability by virtue of the proof of external facts, without any necessity to proceed to look to knowledge or intention, to recklessness or to criminal negligence (an element exclusive to manslaughter not relevant here). Even in the law of negligence, one is concerned with what ought to have been realised or done and not, as in criminal law, with what was perceived. As to the principles of liability, civil and criminal law are entirely different.

I do not believe that, in truth, this issue arises at all. Nor do I believe that it is necessary that there should be an investigation by an authorised body, or a determination made by a court of competent jurisdiction, following the conduct of a fair and impartial hearing, in order to determine that an offence has in fact been committed. That is because, in reality, no one is accusing anyone of an offence. There is no issue as to anything beyond civil copyright infringement. To accuse them of the criminal offence it would have to be copyright infringement together with the mental element expressly required by the crime.<sup>31</sup>

## 2.2.4 Analysis

The DPC judgment raises more complex issues than the Eircom settlement.

First, whether an IP address is “personal data” is a difficult question which has various answers in different contexts: an almost complete ‘no’ in France; an almost complete ‘yes’ from the Article 29 Data Protection Working Party;<sup>32</sup> and a very definite ‘yes’ from the Court of Rome and the Italian Data Protection Authority in P2P litigation.<sup>33</sup> If the judge had held otherwise, it would almost certainly be illegal for the music industry and its security advisors to hold and process such information, as was the case in the Italian Peppermint case.<sup>34</sup>

A more important issue, and not at all discussed in the judgment, is that IP addresses are also “traffic data”<sup>35</sup> and may be “location data”,<sup>36</sup> as it is possible to link addresses in a particular range to a geographical location (although this may not be very precise).<sup>37</sup> Under Article 5(1) and 15 of the E-Privacy Directive,<sup>38</sup> without enabling legislation, traffic and location data can only be processed with the consent of the service user.<sup>39</sup>

In addition, interception of electronic communications is only permitted if three fundamental criteria are fulfilled: the existence of a legitimate legal basis, a pressing social need, and the implementation of measures that are proportionate to the objective pursued. The European Court of Justice considered these questions in the *Promusicae*<sup>40</sup> case (which involved requests from the music industry to an ISP for subscriber details) and decided that the justifications for the restrictions of privacy permitted under Article 13(1) of the Data Protection Directive,<sup>41</sup> which include “the protection of the ... rights and freedoms of others” should be construed broadly, meaning that interception of traffic data by a rights holder investigating P2P is most likely legitimate if it has a legislative basis.<sup>42</sup> Given that the Eircom contract expressly prohibits the use of its facilities for copyright infringement, and customers enter into this contract voluntarily and in order to obtain a useful and valuable service, it

would seem to be true that while the processing of personal data for the purposes of a three strikes policy is a prejudice to the interests of the consumer, there is consent to this type of processing, and the legitimate interests of third parties are engaged here.

The judge's conclusion on the question of "sensitive personal data" is difficult to follow, particularly as he speaks of "theft" elsewhere in the judgment.<sup>43</sup> It is clear that copyright infringement can be a criminal offence,<sup>44</sup> and that the copyright industry might change its tactics again in the future, to seek criminal prosecutions for P2P. The DPA clearly differentiates between data "as to ... the commission or alleged commission of any offence by the data subject" on one hand and "as to ... any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings". It protects both. If the protection only extended to the latter, the judge's conclusion would seem sound, but the protection under the first leg does not require a criminal investigation or proceedings; it simply requires that there is "the commission or alleged commission" of an offence. In this regard, it is important to note that the Belgian Privacy Commission has held that copyright societies are not permitted to use IP addresses for the investigation of P2P downloading, even where this is not punishable in the criminal law.<sup>45</sup>

Finally, § 8 of the DPA provides, in relevant part:

Any restrictions in this Act on the disclosure of personal data do not apply if the disclosure is—

...

( d ) required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property ...

This exception is not mentioned in the judgment. The extent to which it applies is open to question, as the DPC was challenging the processing, rather than the disclosure, of personal data. The music industry would also need to show a need to move urgently to prevent serious loss or damage to property, although this would not be difficult.

## 2.3 EMI v UPC

### 2.3.1 Background

IRMA then moved onto discussions with other ISPs on a three strikes policy, which became litigation when some were not keen to follow Eircom's lead. UPC, a major broadband provider and part of a large European group, were particularly unhappy with the proposals (echoing similar responses from UK ISPs<sup>46</sup>), so it was no great surprise that a case involving that company began.<sup>47</sup>

### 2.3.2 The Judgment

Charleton J., who had also heard the Eircom litigation, heard this case.<sup>48</sup> He was of the view that because P2P has legitimate, and sometimes important, uses, it is impossible to simply

shut it down. These legitimate uses also mean that it would not be proportionate to use packet inspection to throttle P2P transmissions.<sup>49</sup>

He discussed a number of technical solutions: the use of DtecNet<sup>50</sup> to identify the IP addresses of those offering copyrighted material for download, which the judge approved of; the Global File Registry,<sup>51</sup> which the judge thought was too experimental to be required as part of an injunction; and the CopySense<sup>52</sup> warning system operated by US universities, which the judge approved of but thought could not be implemented without UPC's cooperation.<sup>53</sup>

The judge was "not satisfied that the attitude of UPC toward the illegal sharing of copyright material over the internet is either reasonable or fair".<sup>54</sup> UPC has a policy of not commenting on file-sharing and associated issues, which the judge said was unfair, and he found that "UPC has no interest in doing anything other than making deceptive noises by reference to its acceptable usage policy."<sup>55</sup> The judge then reviewed the application of *Norwich Pharmacal*<sup>56</sup> orders (which force a third party to release information on a wrong-doer in a civil case) to file-sharing cases. These are not realistic options, as it seems that the costs in three cases brought in Ireland were €680,000, but these only brought in some €80,000 in settlements.<sup>57</sup>

The judge was "of the view that there are no privacy or data protection implications to detecting unauthorised downloads of copyright material using peer-to-peer technology", because the music industry only has IP addresses rather than full subscriber details.<sup>58</sup>

The outcome of the case turned on the application of § 40 of the CRRA. Particularly important were § 40(3) and 40(4):

(3) Subject to subsection (4), the provision of facilities for enabling the making available to the public of copies of a work shall not of itself constitute an act of making available to the public of copies of the work.

(4) Without prejudice to subsection (3), where a person who provides facilities referred to in that subsection is notified by the owner of the copyright in the work concerned that those facilities are being used to infringe the copyright in that work and that person fails to remove that infringing material as soon as practicable thereafter that person shall also be liable for the infringement.

The judge held that because UPC could prevent infringing material from transiting its network, but could not remove it from the user's home computer, it could not fall into § 40(4). He also held that UPC was a "mere conduit" in the sense used by the Electronic Commerce Directive,<sup>59</sup> and that while this directive did require national laws to include the possibility of injunctions against ISPs where infringing material is being made available, it left the form of these procedures to the discretion of national law-makers, a step not yet taken in Ireland. Contrasting the minimal Irish procedures with the UK Digital Economy Act, the French HADOPI legislation, what might emerge from the Belgian *Scarlet v. Sabam* case and the US Digital Millennium Copyright Act, he concluded that the Irish legislature needed to intervene "to protect constitutional rights to copyright and foster the national resource of creativity."<sup>60</sup>

Interestingly, the judge reviewed two of his own previous decisions in file-sharing cases, mentioned in the second paragraph above. While he held that his decision regarding the data

protection issues involved was still correct, he concluded that he did not have the right to grant an order blocking accessing to the Pirate Bay site<sup>61</sup> and suggested that the parties should consider appealing that case.<sup>62</sup>

### 2.3.3 Analysis

**Remaining a “mere conduit”** The judge says a number of things which are of concern for the future development of Internet regulation. He is of the view that a broadband package advertised as “suitable for users who regularly download or send large files such as music or movies” is “the exploitation by UPC of the difficulties of the recording companies with piracy”,<sup>63</sup> because internal UPC correspondence shows that senior management do not wish to get involved in the file-sharing debate. While it may be true that UPC see the music industry’s difficulty as their opportunity, it is difficult to see what UPC can do about this issue, particularly by way of public comment, while remaining a “mere conduit”. If they come out against file-sharing, and particularly begin to proactively target users who are engaging in this type of activity, they may lose their immunities under the Electronic Commerce Directive.

Many jurisdictions have enacted legislation to give online service providers legal immunity for content which they carry on behalf of their users, on the basis that they could not realistically monitor or control the flow of information which governments wanted to facilitate. In Europe, the relevant legislation is the Electronic Commerce Directive,<sup>64</sup> implemented in Ireland by Statutory Instrument 68/2003. This applies to those providing an “Information Society service”, defined in the Technical Standards and Regulations Directive as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.<sup>65</sup>

Article 12 of the Directive exempts online service providers from liability when they act as a “mere conduit”:

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, ... the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

Article 14 exempts service providers from liability for hosting content:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, ... the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information

and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Article 15 makes it clear that there is no obligation on service providers to monitor content on their systems:

Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

In order to continue to benefit from “common carrier” defences, it is critical that an intermediary does not modify the contents of what is carried from one place to another.<sup>66</sup> Charleton J. is aware of this: “Tacking on an advertisement to a transmission, or modifying it so that some of it is lost, as opposed to being transmitted slowly, would disable the mere conduit defence.”<sup>67</sup> If UPC were to take an active role in policing its network, it risks being liable for copyright infringement on its network in the same way as was Usenet.com.<sup>68</sup> The “common carrier” defences, whether arising under general principles of tort law, the DMCA or the E-Commerce Directive, exist for a reason: to protect entrepreneurs when they provide services that are useful to the community as a whole, at the risk of individual plaintiffs going without an effective remedy. By insisting on these protections, and refusing to go beyond their legal obligations in cutting off their subscribers (and their income streams), UPC are upholding the law (and the underlying innovation policy) as much as the music industry are.

**Copyright “Theft”** Throughout his judgment, Charleton J. uses “theft” as a label for P2P file-sharing of material without a licence. This is problematic in three ways. First, is it correct to say that intellectual property (IP) can be “stolen”? In Irish law, theft is to “dishonestly appropriate[] property without the consent of its owner and with the intention of depriving its owner of it”,<sup>69</sup> where “property” is “money and all other property, real or personal, including things in action and other intangible property”.<sup>70</sup> Although the use of “theft” in the context of copyright infringement is a common rhetorical device,<sup>71</sup> it is difficult to justify the application of the offence of theft to intellectual property. It could apply to, for example, the taking of a unique physical object which embodies IP, such as a painting, but it does not sit well with the unauthorised duplication of an easily reproduced digital representation of a musical or cinematic work which remains available for purchase through other means. It is debatable (although unclear) whether the intention to permanently deprive the owner of their intellectual property right exists.<sup>72</sup>

The United States Supreme Court has considered this issue and held that

[t]he copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections ...

The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially like infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose—‘stolen, converted or taken by fraud’—to describe the sorts of goods whose interstate shipment is proscribed.<sup>73</sup>

In Irish law, for non-commercial infringement to be a criminal offence, it must involve “mak[ing] available to the public to such an extent as to prejudice the interests of the owner of the copyright”.<sup>74</sup> This indicates an intention on the part of the legislature to exclude small-scale infringement from criminal sanction. Large-scale infringement that does “prejudice the interests of the owner of the copyright” will attract criminal liability either under the CRRA or, arguably, under the Criminal Justice Act, 2001, as it will deprive the owner of the enjoyment of his property rights. Some, but not all, P2P activity is criminal under Irish law. In addition, § 9(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 might, on first glance, seem to have application here:

A person who dishonestly, whether within or outside the State, operates or causes to be operated a computer within the State with the intention of making a gain for himself or herself or another, or of causing loss to another, is guilty of an offence.

However, this creates an offence of “operat[ing] a computer without a claim of right made in good faith ...In other words, the section will apply only where the operation of the computer is unauthorised.”<sup>75</sup>

This is not to minimise or disregard the serious consequences of large-scale copyright infringement. Content industries are suffering badly in the context of a serious recession. Copyright infringement can clearly be a criminal offence in Irish law. However, not all cases will involve criminal liability: although a final determination of the question will have to await a decided case (which is likely to be slow in coming), it would seem that only large-scale sharing (“to such an extent as to prejudice the interests of the owner of the copyright”) can be prosecuted. Therefore, labelling this conduct as “theft” without enquiring further into what this means is unsatisfying and raises the question that, if it is theft, why is not being investigated by the proper authorities? The most likely answer is that the police have limited resources and choose to use them to investigate other activity which they see as more harmful than P2P. (Contrast the attention which is devoted to dealing with the circulation of child pornography on the Internet.)

**Conflicts of Rights in P2P cases** P2P file-sharing cases necessarily involve conflicts between competing rights: the copyright interests of the owner of the downloaded works against the rights of the individual accused of having engaged in downloading. While the most obvious right is privacy, some jurisdictions have begun to recognise a right of access to the Internet.<sup>76</sup> The Constitutional Council of France considered this right to be part of the

right of freedom of expression as protected under the laws of that country,<sup>77</sup> and the restrictions of the UK Copyright, Designs and Patents Act 1988 may breach the guarantee of free expression enshrined in Article 10 of the European Convention on Human Rights (ECHR):<sup>78</sup>

According to the case law of the European Court of Human Rights, a measure limiting freedom of expression should be “indispensable” in the sense that no other measure less restrictive of the freedom to receive information exists in order to achieve the legitimate aim (protection of copyright and of the authors).<sup>79</sup>

Unfortunately, the judge does not discuss these other human rights in the context of regulating P2P.

**Privacy Issues** On the issue of privacy, Charleton J. made this interesting statement:

I find it impossible to recognise as a matter of constitutional law, that the protection of the entitlement to be left in the sphere of private communications could ever extend to conversations, emails, letters, phonecalls or any other communication designed to further a criminal enterprise. Criminals leave the private sphere when they infringe the rights of other, or conspire in that respect. ... In the case of internet file sharing to infringe copyright, I am of the view that there are no privacy or data protection implications to detecting unauthorised downloads of copyright material using peer-to-peer technology...<sup>80</sup>

As background, the right of privacy in Irish law is one of the unenumerated rights implied by the Courts into, but not found in, the text of the Constitution. It has its roots in the case of *Kennedy and Arnold v Ireland*,<sup>81</sup> which involved the tapping of the telephones of journalists by the State in an effort to find the source of leaks from the cabinet. In his judgment in that case, Hamilton P. said:

Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, or by the requirements of the common good, and it is subject to the requirements of public order and morality ... [T]he nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words “deliberately, consciously and unjustifiably” because an individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference.<sup>82</sup>

There is Irish legislation which generally prohibits the interception of telecommunication messages by parties other than the State,<sup>83</sup> but this is not mentioned in the judgment. Given that the DtecNet process is described as “[c]ontinually scanning and rescanning internet communications, it finds the material being transmitted in various directions from peer-to-peer, or similar, swarms and, in effect, follows the communication down the line until it ends up in a particular computer and takes note of its IP number”, this is surprising. It is not clear whether DtecNet simply engages in a typical file-sharing transaction, which is arguably not interception, or engages in some form of “tapping” of communications, but a discussion of the issue would be useful.

One of the striking features of Charleton J.’s decision is that he seems to assume that everyone accused of file-sharing is guilty of this “offence”. The reality is more complex: detection methods are not reliable and content is mis-identified,<sup>84</sup> so the IP addresses identified by the music industry as engaging in downloading may not, in fact, be doing so because of errors in the surveillance software used, deliberate mis-direction by determined downloaders or mistakes as to whether the material downloaded is subject to copyright.

As we have seen, engaging in file-sharing does not necessarily make an individual a criminal.<sup>85</sup> In addition, Irish copyright law contains a number of defences, notably “fair dealing”, which (although more restrictive than the American concept of “fair use”) is a factor to consider. To be specific, § 50 (2) of the CRRA permits fair dealing “for the purposes of research or private study”. This is not likely to apply to many instances of unauthorised downloading of copyrighted material, but does need to be considered, even in a civil case.

It may be true that “[c]riminals leave the private sphere” from the perspective of the criminal authorities, but this case is a civil matter between corporate entities, not a criminal prosecution. Should the constitutional right of privacy give way in a private dispute, and if so, by how much? The overuse of surveillance to deal with copyright infringement risks over-restricting individual autonomy, due process rights and freedom of expression.<sup>86</sup>

In addition, if this conclusion is correct in Irish constitutional law, it may not be correct in light of European Convention on Human Rights (ECHR) jurisprudence. The European Convention of Human Rights Act 2003 incorporated the ECHR into Irish law. There is no ECHR case law relating to private surveillance, or P2P software monitoring, but “interceptions are unacceptable unless they fulfill three fundamental criteria: the existence of a legitimate legal basis, a pressing social need, and the implementation of measures that are proportionate to the objective pursued.”<sup>87</sup> It would seem likely that all of these criteria are met: the constitutional right to intellectual property, the dire straits in which the copyright industries find themselves (“I am satisfied that the business of the recording companies is being devastated by internet piracy.”<sup>88</sup>) and what the judge considers to be a measured response to the issue (“I am taking into account the fact that the process of detection through DtecNet is essentially anonymous. ...The recording companies do not thereby harvest the names and addresses of infringers of copyright for data purposes, or for future communication or for evidence in a potential criminal case. They get nothing apart from a set of numbers. ... The abuse of an internet service for copyright theft is a serious matter from the point of view of the general enforcement of copyright protection. An internet service provider is entitled to have a policy against it.”<sup>89</sup>). Nonetheless, a balancing of interests within the framework of ECHR jurisprudence would be of great assistance in dealing with this difficult issue.

**Responsibilities of Commercial Enterprises to Non-Shareholders** In the DPC case, Charleton J. approved of Eircom's approach to the question of P2P, namely co-operation with content-owners:

It is completely within the legitimate standing of Eircom to act, and to be seen to act, as a body which upholds the law and the Constitution. That is what the court expects of both individuals and companies. That expectation is derived from the rights protected under the Constitution and the general pact which the people of Ireland mutually made in founding a legal system, as the Preamble to the Constitution clearly declares, that is dedicated to attaining true social order. ... it is legitimate for Eircom to have a corporate policy whereby the facilities that it hires out to the people of Ireland are used for lawful purposes only.<sup>90</sup>

He was, as has been discussed above, much less happy with what he labelled the "attitude" of UPC:

I am not satisfied that the attitude of UPC toward the illegal sharing of copyright material over the internet is either reasonable or fair. ... The Court finds as a matter of fact that UPC has no interest in doing anything other than making deceptive noises by reference to its acceptable usage policy. Unlike in the case of a non-payment of a bill, UPC intends to do nothing about copyright piracy.<sup>91</sup>

Although the judge does not expressly mention the concepts, his approach seems to rely on notions of "authorising infringement" (or vicarious liability) and "corporate social responsibility".

On authorising infringement, the most significant precedent on the issue in these islands is *CBS v. Amstrad*,<sup>92</sup> where the defendant sold dual-tape cassette systems with an advertising campaign that emphasized how they facilitated copying of tapes through high-speed dubbing. The House of Lords held that they could not be held responsible for what consumers did with their equipment after purchase. In the US, the recent Supreme Court decision in the *Grokster* case<sup>93</sup> clarified that although the *Sony*<sup>94</sup> rule which protects technology with both infringing and significant non-infringing purposes still stands, indirect liability for copyright infringement may attach to a defendant who actively induces users of technology to infringe. Elsewhere, the Australian Federal Court found the operators of the Kazaa file-sharing network liable for facilitating copyright infringement because they encouraged it and directly profited from it through advertising to their users,<sup>95</sup> while the Supreme Court of Holland upheld a decision of the Court of Appeals that Kazaa were not liable because the network operated independently of the company, it was not possible to identify copyrighted content, the company was not responsible for the acts of its users and some of the files shared were legitimate.<sup>96</sup> It would seem that under any of these theories of "authorisation", UPC are not liable for the activities of its users. Indeed, an Italian court has held as much and ruled that ISPs have an obligation to connect users to the Web.<sup>97</sup>

On the second issue:

The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time. ... Before anything else, the business institution is the basic economic unit in our society. As such it has a responsibility to produce goods and services that society wants and to sell them at a profit. All other business roles are predicated on this fundamental assumption.<sup>98</sup>

In expecting UPC to take into account the difficulties of the copyright industries, the judge seems to be taking a broad view of the “stakeholders” to whose interests the directors should have regard. However, stakeholder approaches to corporate governance focus on the participation of employees and giving a broader scope to directors’ duties, and limitations on profit-making for shareholders as the primary purpose of a company are controversial and slow to gain acceptance.<sup>99</sup> Unfortunately for the judge’s expectations, as a general rule, directors owe duties to the company alone, not to other enterprises or to society as a whole.<sup>100</sup> Although there is a move to see the company as a “constituency of stakeholder interests”, in practice, reconciling these diverse and divergent interests is a significant challenge. § 172 of the UK’s Companies Act, 2006 does require consideration of the interests of third parties, but there is no similar legislative requirement in Ireland.<sup>101</sup> This is in keeping with the policy in the UK and Ireland to keep CSR as a voluntary measure,<sup>102</sup> and with the Irish tendency to lag behind the UK government in developing a framework for CSR.<sup>103</sup> The Company Law Review Group is working towards a significant revision and restatement of Irish company law, and this will include a codification of directors’ duties, but this will only add a duty on directors to have regard to the interest of the company’s employees in general.<sup>104</sup>

UPC is clearly fulfilling its economic expectations by focusing on its bottom line and refusing to co-operate with what it claims to be “costly and disproportionately difficult”<sup>105</sup> solutions. It may not be correct in that assessment, but that is its choice to make. It is also complying with the letter of the law: the judge holds that its actions are legal and he has no power to grant an injunction against them, much as he would like to. If it is not living up to its corporate responsibilities, these clearly fall into the categories of ethical and discretionary expectations. “Ethical responsibilities embrace a range of norms, standards, or expectations of behavior that reflect a concern for what consumers, employees, shareholders, the community, and other stakeholders regard as fair, right, just, or in keeping with stakeholders’ moral rights or legitimate expectations [while] [e]xamples of philanthropy might include business giving, community programs, executive loan programs, and employee voluntarism.”<sup>106</sup> To what extent can we say that protecting the rights of copyright owners is something that “consumers, employees, shareholders, the community, and other stakeholders” hold to be “fair” and “just”? This is not an easy question to answer.

The legal position is clear: copyright infringement can be both a civil and a criminal wrong, and many would agree that unfettered copying is immoral. However, the very scale of the problem which confronts the content industries underlines the extent to which many of the general public do not see anything wrong with small-scale downloading of copyrighted material from the Internet for free.<sup>107</sup> This disconnect between the legal regime and social norms about copyright is a complex issue,<sup>108</sup> and one which is at the root of the reasons why copyright has moved from being a somewhat static area of the law to daily headline news. It

will not be solved by finding that an ISP which refuses to co-operate with rights-holders in the absence of a legal obligation to do so is “dishonest”.<sup>109</sup>

The rights guaranteed by copyright provide an economic incentive, not so much for the creation of content (which is something that many will engage in without any reward<sup>110</sup>), but for the creation of an infrastructure for its widespread distribution and sale. This has been the foundation of the success of the large music and film companies, and the intermediaries, such as music stores and cinemas. The development of information and communication technologies, and particularly the wide availability of broadband Internet service, also brings with it many social and economic benefits, but this also requires a level of investment that will not be forthcoming if there is uncertainty regarding liability.<sup>111</sup> Copyright law also attempts to strike a difficult balance between the economic interests of creators and content owners and the rights of individuals to gain access to knowledge, freedom of expression, and to participate in the cultural life of the community.<sup>112</sup> European law is already somewhat uneven in its approach, overly favouring the former.<sup>113</sup> Moving this balance too far towards greater legal liability for ISPs for P2P could have negative impacts on society overall, as it will lead to greater centralisation which is not good for the development of this type of technology.<sup>114</sup> The transition from one communications infrastructure to the other is proving difficult; a balanced approach to the challenges involved is much more likely to lead to a socially beneficial outcome overall.<sup>115</sup> If copyright policy- and law-making is to move beyond the state of flux and uncertainty in which it is, and has been for much of the past two decades, lawyers and legislators must discuss the conflicts between the interests of diverse economic stakeholders in an open and measured fashion.

### 3 Conclusion

#### 3.1 The Future of P2P in Irish Copyright Law

It is clear that if the Irish parliament changes the law to allow it, Charleton J. will readily grant an injunction against UPC, and most likely any other Irish ISP, requiring a “three strikes” policy. The music industry has already called on the government to introduce new legislation in the area,<sup>116</sup> but the response from the Minister of State with responsibility for Science, Technology and Innovation has been to suggest an agreement between the content and ISP industries.<sup>117</sup> Eircom seems to be considering an “all-you-can-eat” service,<sup>118</sup> but this may be too late to recover or retain those subscribers who are likely to move their business to UPC or other ISPs who are less likely to cooperate with efforts to clamp down on infringing P2P downloads. The music industry may also attempt to recover damages from the Irish State for incomplete transposition of European law.<sup>119</sup> Whatever emerges, P2P will continue to be a live issue in Ireland for some time.

However, Ireland is a small economy (and becoming smaller by the day). Why does what happens in Ireland matter? What is occurring in other jurisdictions, and can we draw any overall conclusions for the broader context from the Irish experience?

## 3.2 P2P Developments Internationally

### 3.2.1 United Kingdom: The Digital Economy Act

In the United Kingdom, the new Digital Economy Act no longer contains a contentious draft provision which would have allowed the Secretary of State to amend it by secondary legislation without parliamentary oversight. However, it nonetheless attracted considerable controversy, particularly as it was enacted in the “wash-up” period between the announcement of a forthcoming general election and the dissolution of parliament. It does not include a three-strikes requirement, but instead allows the Office of Communications (Ofcom) to develop a code of conduct for the limitation of subscriber services. It allows the Secretary of State to make regulations for “a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright”.<sup>120</sup> Sanctions for ISPs who do not comply can include significant costs, including fines of up to £250,000.<sup>121</sup>

### 3.2.2 France: HADOPI

In France, recent legislation has created the *Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet* (HADOPI), which has responsibility for safeguarding French language and culture on the Internet and protecting intellectual property online. The first version of this legislation included a “three strikes” disconnection procedure which was declared unconstitutional by the *Conseil constitutionnel* because it did not involve judicial oversight. The so-called “HADOPI II” legislation rectifies this defect, criminalises unauthorised file-sharing and requires ISPs to prevent P2P and enforce access suspension orders,<sup>122</sup> although it seems that some are refusing to do so.<sup>123</sup>

### 3.2.3 Belgium: *Scarlet v Sabam*

There is a conflict between significant European laws that govern the activities of copyright holders and ISPs. The Electronic Commerce Directive prohibits the imposition of a general monitoring obligation on ISPs, although it permits the use of injunctions to control their activities. The Copyright Directive, discussed above, requires Member States to ensure that rights holders can obtain such injunctions. In the *Scarlet v Sabam* case, the question of how these can be reconciled with each other has been referred from the Belgian Court of Appeal of Brussels to the European Court of Justice, along with questions regarding the level of consent which an ISP must obtain from its users before engaging in filtering and surveillance.<sup>124</sup> Belgium is also considering legislation to introduce a “four strikes” graduated response policy and a flat-fee licensing system to allow unlimited downloads.<sup>125</sup>

### 3.2.4 Australia: iiNet case

The Australian case of *Roadshow Films v iiNet*<sup>126</sup> is similar to the UPC litigation. The Australian movie industry brought a claim for copyright infringement against iiNet, one of the larger Australian ISPs, on the basis that it had authorised copyright infringement by not taking action against its subscribers who it knew to be engaging in this activity. The Federal Court of Australia found that iiNet did not authorise copyright infringement: it did not provide the “means” to do so (this was BitTorrent, not Internet access); it did not have any reasonable means for dealing with infringement, and it did not “sanction, approve [or] countenance” any infringement of the applicants’ copyright.<sup>127</sup>

In light of Charleton J.’s views on the unwillingness of UPC to cooperate,<sup>128</sup> it is of interest to note this statement by the Federal Court:

There is no legal obligation or duty on any person to protect the copyright of a third party. There is only a legal prohibition on doing an act composed in the copyright without the licence of the owner or exclusive licensee of that copyright or authorising another to do that copyright infringing act. Consequently, merely being indifferent or inactive in the knowledge that copyright infringement is occurring cannot possibly constitute authorisation.<sup>129</sup>

The decision is currently under appeal.<sup>130</sup>

### 3.2.5 New Zealand: Copyright (Infringing File Sharing) Amendment Bill

In New Zealand, the Copyright (Infringing File Sharing) Amendment Bill<sup>131</sup> is working its way through parliament there. It includes a three strikes procedure, but following public criticism, disconnection has been softened from applying as the result of an accusation of infringement to involving a determination by the Copyright Tribunal, a power which will require an order from the Commerce Minister to bring into force.<sup>132</sup>

## 3.3 Broader Consequences of Irish Litigation

We can draw some conclusions from these developments. As the Irish and Australian experiences show, existing laws generally do not impose any obligation on ISPs to protect the copyrights of others or to cooperate with efforts to introduce “three strikes” policies. ISPs who do work with the copyright industries are likely to find themselves at a competitive disadvantage in the short term, with higher compliance costs and customers moving to providers who are less likely to disconnect them. Although they are reluctant to discuss it publicly, US ISPs have been co-operating with “graduated response” three strikes-style policies for some time.<sup>133</sup> Will UPC’s success in this case make them less inclined to work with the content industry in this way, or will the sympathetic ear of the judge to the plaintiff make them decide that three strikes will become a reality in the future and they would be better to continue to help in this fashion?

One signal that may sway them is that legislatures worldwide either have enacted (for example, France and Korea) or about to enact (for example, the UK and New Zealand) three

strikes laws. These are not likely to be the only such jurisdictions. Those who prefer to reduce their legal risks and prepare for future regulation should look into cooperating with the copyright industry.

However, there may also be a need for human rights awareness training for ISPs. The growing importance of human rights in the European legal order may bring about a reduction in the scope of intellectual property rights.<sup>134</sup> In the particular context of P2P, we have seen that a three strikes policy raises issues of due process, criminal liability and privacy. Although these issues have been in the background of copyright law and policy for some time, the changes in strategy by the copyright industries from targeting gatekeepers to targeting individuals and now back to targeting gatekeepers again means that they are likely to come to the fore once more, as large ISPs have the resources and willingness to raise these points in a court of law.<sup>135</sup> For the protection of individual rights, it is good to have a judge decide these issues.

Given the importance of these questions, it would have given us much certainty if the Irish High Court had provided a more nuanced judgment; however, as with much commercial litigation, the answers we are given are formed by the context of the dispute and not by the broader policy debate. They provide us with decisions that need to be tackled by policy-makers and industry in order to move forward on a journey that is likely to prove interesting for some time to come.

---

\* Law School, National University of Ireland Galway, Galway, Ireland. *Email:* ronan.m.kennedy@nuigalway.ie. The author would like to thank his colleagues Dr. Ciara Hackett, Ms. Caterina Gardiner and Shivaun Quinlivan for their assistance in researching corporate social responsibility, corporate governance and constitutional law respectively, Professors Colette Cuijpers and Bert-Jaap Koops of the Tilburg Institute for Law, Technology, and Society (where much of this article was written) and Professor Robert Clark of University College Dublin for discussion of privacy issues. Any errors are the author's responsibility.

<sup>1</sup> For the early history of file-sharing, see Daniel Smith and Mark Taylor, *File Sharing—the Early Years*, 16 *COMPUTER & TELECOMM. L. REV.* 113 (2010).

<sup>2</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001).

<sup>3</sup> *Universal Music Australia Pty. Ltd. v. Sharman License Holdings Ltd.* [2005] FCA 1242.

<sup>4</sup> David L. Wardle, *Broken Record: Revisiting the Flaws in Sony's Fair Use Analysis in Light of the Grokster Decision*, 26 *LOY. L. A. ENT. L. REV.* 1, 9 (2005).

<sup>5</sup> See Tim Wu, *The Broadband Debate: A User's Guide*, 3 *J. TELECOMM. & HIGH TECH. L.* 69 (2004); Paul Ganley and Ben Allgrove, *Net Neutrality: A User's Guide*, 22 *COMPUTER L. & SECURITY REP.* 454 (2006).

<sup>6</sup> Genan Zilkha, *The RIAA's Troubling Solution to File-Sharing*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 667, 670–689 (2010).

<sup>7</sup> Eircom had 49.2% of fixed broadband subscriptions in Q2 2010. Commission for Communications Regulation, *Quarterly Key Data Report Q2 2010*, available at [http://www.comreg.ie/publications/quarterly\\_key\\_data\\_report\\_q2\\_2010.539.103704.p.html](http://www.comreg.ie/publications/quarterly_key_data_report_q2_2010.539.103704.p.html).

<sup>8</sup> John Kennedy, *Big four music labels and Eircom in landmark piracy settlement* (Jan. 28, 2009), available at <http://www.siliconrepublic.com/new-media/item/12181-big-four-music-labels-and-e>.

---

<sup>9</sup> EMI Records (Ireland) Ltd. v. Eircom PLC [2010] IEHC 108 (Ire.), available at <http://www.bailii.org/ie/cases/IEHC/2010/H108.html> (hereinafter DPC judgment), ¶ 10.

<sup>10</sup> *Briefing Note on arrangement between eircom and the Irish Record Music Association (IRMA) with regard to Copyright Infringement March 2009*, available at <http://www.scribd.com/doc/13630351/Eircom-Irma-Briefing-Note-March-2009>.

<sup>11</sup> The DPC judgment, ¶ 11.

<sup>12</sup> *Id.*, ¶ 13.

<sup>13</sup> EMI Records (Ireland) Ltd. v. Eircom PLC [2009] IEHC 411 (Ire.), available at <http://www.bailii.org/ie/cases/IEHC/2009/H411.html>.

<sup>14</sup> Andres Guadamuz, *Costa Rican court declares the Internet as a fundamental right* (Oct. 2, 2010), available at <http://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right>.

<sup>15</sup> Eva Nagle, “*To Every Cow Its Calf, To Every Book Its Copy*” – *Copyright and Illegal Downloading after EMI (Ireland) Ltd and Others v Eircom Ltd.*, 21 ENT. L. REV. 209, 212 (2010).

<sup>16</sup> DPC judgment, ¶ 30. See *infra* “Disconnection as “Prejudice to Fundamental Rights””.

<sup>17</sup> *See id.*, ¶ 2

<sup>18</sup> *Id.*, ¶ 23.

<sup>19</sup> *Id.*, ¶ 25.

<sup>20</sup> § 2.1 provides:

A data controller shall, as respects personal data kept by him, comply with the following provisions:

- (a) the data or, as the case may be, the information constituting the data shall have been obtained, and the data shall be processed, fairly,
- (b) the data shall be accurate and, where necessary, kept up to date.
- (c) the data—
  - (i) shall be kept only for one or more specified and lawful purposes,
  - (ii) shall not be used or disclosed in any manner incompatible with that purpose or those purposes,
  - (iii) shall be adequate, relevant and not excessive in relation to that purpose or those purposes, and
  - (iv) shall not be kept for longer than is necessary for that purpose or those purposes,
- (d) appropriate security measures shall be taken against unauthorised access to, or alteration, disclosure or destruction of, the data and against their accidental loss or destruction.

<sup>21</sup> [1998] 4 I.R. 504 (Ire.)

<sup>22</sup> *Id.* at 511.

<sup>23</sup> DPC judgment, ¶ 29.

---

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, ¶ 14.

<sup>26</sup> *Id.*, ¶ 30.

<sup>27</sup> Parliament and Council Directive 2002/ 21/ EC on a common regulatory framework for electronic communications networks or services, 2002 O.J. (L 108/ 33).

<sup>28</sup> Defined by Article 2 of the Framework Directive as “Directive 2002/ 20/ EC (Authorisation Directive), Directive 2002/ 19/ EC (Access Directive), Directive 2002/ 22/ EC (Universal Service Directive) and Directive 97/ 66/ EC”.

<sup>29</sup> DPC judgment, ¶ 35.

<sup>30</sup> See discussion *infra* “Copyright “Theft””.

<sup>31</sup> *Id.*, ¶ 38–41.

<sup>32</sup> Fanny Coudert and Evi Werkers. *In The Aftermath of the Promusicae Case: How to Strike the Balance?* 18 INT’L J. L. & INFO. TECH. 50, 58–59 (2010).

<sup>33</sup> Giangiacomo Olivi, Valeria Finazzi and Giancarlo Frosio, *The Peppermint Case: Peer-to-Peer, Privacy and Copyright Enforcement in Italy*, 09/ 08 WORLD COMM. REG. REP. 26 (2008).

<sup>34</sup> *Id.* at 60.

<sup>35</sup> Under Article 2 (b) of Parliament and Council Directive 2002/ 58/ EC concerning the processing of personal data and the protection of privacy in the electronic communications sector 2002 O.J. (L 201/ 37) (the E-Privacy Directive), “any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof”.

<sup>36</sup> Under Article 2 (b) of *id.*, “any data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service”.

<sup>37</sup> J.Y. Tsai et al, *Location-Sharing Technologies: Privacy Risks and Controls*, 6 I/ S: J. L. & POL’Y FOR INFO. SOC’Y 119, 123 (2010).

<sup>38</sup> Parliament and Council Directive 2002/ 58/ EC concerning the processing of personal data and the protection of privacy in the electronic communications sector 2002 O.J. (L201/ 37).

<sup>39</sup> C. Cuijpers and B.J. Koops, *How Fragmentation in European Law Undermines Consumer Protection: The Case of Location-Based Services*, 33 EUR. L. REV. 880, 892 (2008).

<sup>40</sup> Case C-275/ 06, *Promusicae v. Telefónica*, 2008 E.C.R. I-271 (2008).

<sup>41</sup> Parliament and Council Directive 95/ 46/ EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data 1995 O.J. (L281/ 31).

<sup>42</sup> Coudert and Werkers, *supra* note 32, 63–64.

<sup>43</sup> For example, the DPC judgment, ¶ 1: “A settlement has been effected in the litigation between the parties. Its purpose is to diminish the theft of copyright material over the internet. ... Nothing suggests any willing infringement of copyright by Eircom, or that they were in any way a party to copyright theft. ... Remuneration for [creative work] is shrinking by reason of copyright theft over the internet.”

<sup>44</sup> See discussion *infra* at 2.3.3.

<sup>45</sup> Coudert and Werkers, *supra* note 32, 61.

---

<sup>46</sup> Rohan Massey, *Independent Service Providers or Industry's Secret Police? The Role Of The ISPs in Relation to Users Infringing Copyright*. 19 ENT. L. REV. 160 (2008).

<sup>47</sup> Mary Carolan, *UPC File-Sharing Court Action Begins*, IRISH TIMES, June 18, 2010, available at <http://www.irishtimes.com/newspaper/breaking/2010/0618/breaking50.html>.

<sup>48</sup> EMI Records (Ireland) Ltd. v. UPC Communications Ireland Ltd., Ir. H. Ct., unreported, Oct. 11, 2010, available at <http://www.scribd.com/doc/39104491/EMI-v-UPC> (hereinafter UPC judgment).

<sup>49</sup> *Id.*, ¶ 29–33.

<sup>50</sup> <http://dteconet.com/>

<sup>51</sup> <http://www.globalfileregistry.com/>

<sup>52</sup> <http://audiblemagic.com/products/%2Dservices/copysense/>

<sup>53</sup> UPC judgment, ¶ 34–49.

<sup>54</sup> *Id.*, ¶ 50.

<sup>55</sup> *Id.*, ¶ 53.

<sup>56</sup> *Norwich Pharmacal Co. & Others v Customs and Excise Commissioners* [1974] A.C. 133.

<sup>57</sup> UPC judgment, ¶ 62.

<sup>58</sup> *Id.*, ¶ 68.

<sup>59</sup> See discussion *infra* “Copyright “Theft””.

<sup>60</sup> *Id.*, ¶ 131.

<sup>61</sup> See *supra* “IRMA v. Eircom”.

<sup>62</sup> UPC judgment, ¶ 135–137.

<sup>63</sup> *Id.*, ¶ 51.

<sup>64</sup> Parliament and Council Directive 2000/ 31/ EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market 2000 O.J. (L 178/ 1).

<sup>65</sup> Parliament and Council Directive 98/ 48/ EC on the provision of information in the field of technical standards and regulations O.J. 1998 (L 204/ 37).

<sup>66</sup> Annemarie Bridy, *Graduated Response and the Turn to Private Ordering In Online Copyright Enforcement*, 89 OREGON L. REV. 81, 37–41 (2010) [FIX PAGE NUMBERS].

<sup>67</sup> UPC judgment, ¶ 108.

<sup>68</sup> See Bridy, *supra* note 66, at 44–45.

<sup>69</sup> Criminal Justice (Theft and Fraud Offences) Act, 2001, § 4(1).

<sup>70</sup> Criminal Justice (Theft and Fraud Offences) Act, 2001, § 2(1).

<sup>71</sup> Patricia Loughlan, *"You Wouldn't Steal A Car...": Intellectual Property and the Language of Theft*, 29 EURO. INTEL. PROP. REV. 401 (2007).

<sup>72</sup> Alex Steel, *Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property*, 30 SYDNEY L. REV. 575, 598–603 (2008).

---

<sup>73</sup> Dowling v United States, 473 U.S. 207; 105 S. Ct 3127 (1985) at 3133 *cited in* Loughlan, *supra* note 71 at 402—403.

<sup>74</sup> Copyright and Related Rights Act 2000, § 140 (1) (e).

<sup>75</sup> T. J. McIntyre, *Computer Crime in Ireland: A Critical Assessment of the Substantive Law*, 15 IRISH CRIM. L. J. 1, 5 (2005).

<sup>76</sup> Zilkha, “The RIAA’s Troubling Solution to File-Sharing,” *supra* note 6, 693.

<sup>77</sup> Alain Strowel, *Internet Piracy As A Wake-Up Call For Copyright Law Makers - Is The "Graduated Response" A Good Reply? Thoughts From A Law Professor "Who Grew Up In The Gutenberg Age"*, 1 WIPO J. 75, 81 (2009).

<sup>78</sup> Robert Danay, *Copyright vs. Free Expression: The Case Of Peer-To-Peer File-Sharing Of Music in the United Kingdom*, YALE J. L. & TECH. 2, 8 (2005–2006).

<sup>79</sup> Strowel, *supra* note 77, at 83.

<sup>80</sup> UPC judgment, ¶ 68.

<sup>81</sup> [1987] I.R. 587.

<sup>82</sup> *Id.* at 592–93.

<sup>83</sup> Postal and Telecommunications Services Act, 1983 § 98 (1), as amended by Interception Act, 1993 § 13 and Postal and Telecommunications Services (Amendment) Act, 1999 § 7.

<sup>84</sup> Zilkha, *supra* note 6, 696–97.

<sup>85</sup> See discussion *supra* “Copyright “Theft””.

<sup>86</sup> Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J. L. & TECH. 222, 320–35 (2004).

<sup>87</sup> Coudert and Werkers, *supra* note 32, 63.

<sup>88</sup> UPC judgment, ¶ 8.

<sup>89</sup> *Id.*, ¶ 68.

<sup>90</sup> *Id.*, ¶ 29.

<sup>91</sup> *Id.*, ¶ 50–53.

<sup>92</sup> [1988] A.C. 1013.

<sup>93</sup> Metro-Goldwyn-Mayer Inc. v. Grokster Inc. 545 U.S. 913 (2005).

<sup>94</sup> Sony Corporation of America v. Universal Studios 464 U.S. 417 (1984).

<sup>95</sup> Michael Williams and Siabon Seet, *Authorisation in the Digital Age: Copyright Liability in Australia after Cooper and Kazaa*, 12 COMP. & TELECOMM. L. REV. 74.

<sup>96</sup> Patricia Akester, *Copyright and the P2P Challenge*, 27 EURO. INTEL. PROP. REV. 106 (2005).

<sup>97</sup> Daniela De Pasquale, *Federazione Antipirateria Audiovisiva (FAPAV) v Telecom Italia*, 10 E-COMMERCE L. REP. 10 (2010).

<sup>98</sup> Archie B. Carroll, *Corporate Social Responsibility*, 38 BUS. & SOC’Y 268, 283 (1999).

<sup>99</sup> Ben Pettet, *The Stirring of Corporate Social Conscience: From “Cakes and Ale” to Community Programmes*, 50 CURRENT LEGAL PROBS. 279, 310–311 (1997).

<sup>100</sup> DEIRDRE AHERN, DIRECTORS’ DUTIES: LAW AND PRACTICE 168 (2009).

---

<sup>101</sup> *Id.* at 187–89.

<sup>102</sup> JOEP M. LOZANO, LAURA ALBAREDA, AND TAMYKO YSA, GOVERNMENTS AND CORPORATE SOCIAL RESPONSIBILITY: PUBLIC POLICIES BEYOND REGULATION AND VOLUNTARY COMPLIANCE 94 (2007).

<sup>103</sup> *Id.* at 110.

<sup>104</sup> Company Law Review Group, *General Scheme of the Companies Bill*, 156, available at <http://www.clrg.org/companies-bill.aspx>.

<sup>105</sup> UPC judgment, ¶ 56.

<sup>106</sup> Archie B. Carroll, *Ethical Challenges for Business in the New Millennium: Corporate Social Responsibility and Models of Management Morality*, 10 BUS. ETHICS Q. 33, 36–37 (2000).

<sup>107</sup> Lior J. Strahilevitz, *Charismatic Code, Social Norms, and the Emergence Of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 538–45 (2003).

<sup>108</sup> See D.J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 50–53 (2004).

<sup>109</sup> UPC judgment, ¶ 56.

<sup>110</sup> See Rebecca Tushnet, *The Boundaries of Copyright And Trademark/Consumer Protection Law: Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

<sup>111</sup> Weixiao Wei, *ISP Indirect Copyright Liability: Conflicts of Rights on the Internet*, 15 COMP. & TELECOMM. L. REV. 181, 182–83 (2009).

<sup>112</sup> See Patricia Akester, *The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture*, 32 EURO. INTELL. PROP. REV., 372 (2010).

<sup>113</sup> Marcella Favale, *Fine-Tuning European Copyright Law to Strike a Balance Between the Rights of Owners and Users*, 33 EURO. L. REV. 687 (2008).

<sup>114</sup> Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. P’Y 15, 69 (2006).

<sup>115</sup> Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information*, 1 INTELL. PROP. Q. 8 (2010).

<sup>116</sup> John Collins, *Ruling Means Internet Users will not be Cut Off for Engaging in Music Piracy*, IRISH TIMES (Oct. 12, 2010), available at <http://www.irishtimes.com/newspaper/ireland/2010/1012/1224280878922.html>.

<sup>117</sup> enigmax, *Irish Government Wants File-Sharing Compromise, or Legislation Will Follow* (Nov. 15, 2010), available at <http://torrentfreak.com/irish-government-wants-file-sharing-compromise-or-legislation-will-follow-101115/>.

<sup>118</sup> Collins, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> Digital Economy Act, 2010, § 17.

<sup>121</sup> Benjamin Farrand, *The Digital Economy Act 2010 - A Cause For Celebration, Or A Cause For Concern?* 32 EUROPEAN INTELLECTUAL PROPERTY REVIEW, 536 (2010).

<sup>122</sup> Lyombe Eko, *American Exceptionalism, The French Exception, Intellectual Property Law, And Peer-To-Peer File Sharing On The Internet*, 10 J. MARSHALL REV. INTELL. PROP. L. 95, 147–50 (2010); Strowel, *supra* note 77, at 79–84.

---

<sup>123</sup> Benjamin Ferran, *Free fait de la résistance face à l'Hadopi*, LE FIGARO (Oct. 5, 2010), available at <http://www.lefigaro.fr/web/2010/10/05/01022-20101005ARTFIG00474-free-fait-de-la-resistance-face-a-l-hadopi.php>.

<sup>124</sup> Patrick Van Eecke and Maarten Truyens, *Recent Events in EU Internet Law*, 14 JOURNAL OF INTERNET LAW 20 (2010).

<sup>125</sup> Emmanuel Szafran and Tatjana Klaeser, *Belgium: Legislation - Copyright - Proposed Bills - Internet Regulation*, 16 COMP. & TELECOMM. L. REV. N111–113 (2010).

<sup>126</sup> [2010] FCA 24 (Fed. Ct. (Austl.)), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html>.

<sup>127</sup> John Swinson and Laura Pearson, *Roadshow Films Pty Ltd v iiNet Ltd (No.3)*, 16 COMP. & TELECOMM. L. REV. N75, N77 (2010); Ian Robertson and Linda Luu, *Roadshow Films Pty Ltd v iiNet Ltd (No.3): ISPs' Liability For Pirated Films - Federal Court of Australia Rules in Test Case*, 21 ENT. L. REV. 155 (2010).

<sup>128</sup> See discussion *supra* “Copyright “Theft””.

<sup>129</sup> [2010] FCA 24 ¶ 492.

<sup>130</sup> Swinson and Pearson, *supra* note 127, at N77.

<sup>131</sup> <http://www.legislation.govt.nz/bill/government/2010/0119/latest/versions.aspx>

<sup>132</sup> Rick Shera, NZ's copyright proposal: Guilty until you prove you're innocent (updated) (Nov. 5, 2010), available at <http://lawgeeknz.posterous.com/nzs-copyright-proposal-guilty-until-you-prove>.

<sup>133</sup> Bridy, *supra* note 66, at 23–24.

<sup>134</sup> Christophe Geiger, *Intellectual "Property" After The Treaty Of Lisbon: Towards a Different Approach in the New European Legal Order?* 32 EURO. INTELL. PROP. REV. 255 (2010).

<sup>135</sup> See, for example, Andres Guadamuz, *ISPs Set to Fight Future IP Data Disclosure in the UK* (Oct. 4, 2010), available at <http://www.technollama.co.uk/isps-set-to-fight-future-ip-data-disclosure-in-the-uk>.