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<tr>
<td><strong>Author(s)</strong></td>
<td>O'Flanagan, Michael</td>
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<td><strong>Publication Date</strong></td>
<td>2016-12-14</td>
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Taking and Publishing Photographs
(An Examination of the Legal Rights and Restrictions)

This thesis is submitted to the National University of Ireland, Galway
in fulfilment of the requirement for the degree of

Doctor of Philosophy in Law

by


Supervisor: Ms. Marie McGonagle

School of Law

National University of Ireland, Galway

December 2016
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Declaration

I, Michael O’Flanagan, certify that this thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of any of this work.

Signed: M.O’Flanagan

Date: 15th July 2016
Acknowledgements

I would like to express my immense gratitude to my Supervisor, Ms. Marie McGonagle. Marie’s knowledge of my research topic and her interest in my research work has been invaluable to me. From the outset, Marie consistently offered me excellent guidance, constructive criticism of my research work, encouragement and support.

I would also like to thank the members of my Graduate Research Committee (Dr. Conor Hanly, Dr. Charles O’Mahony and Ms. Maureen O’Sullivan) for their interest in my research work and for their advice.

This research work has been funded by the School of Law, NUI Galway under the R.D.J. Glynn Doctoral Research Fellowship. I would like to thank the School of Law and Prof. Donncha O’Connell, Head of the School of Law, for awarding me this funding.
Summary of Contents

This doctoral thesis investigates the legal rights of photographers and photograph publishers in Ireland to take and/or publish still photographs. For comparative purposes, an analysis of the applicable law in the United Kingdom was undertaken. Particular attention has been paid to developments in law and policy occurring at E.U. and Council of Europe levels. The thesis examines the over-arching right of photographers and photograph publishers to freedom of expression and the main vehicle for the implementation in practice of that right by them, namely through copyright law. It identifies and examines photographers’ rights under copyright law, how copyright law protects those rights and the remedies available under copyright law to the owners of the copyright in photographs against the infringement of those rights. It investigates whether, how and the extent, if any, to which photographers and publishers’ rights under copyright law are being eroded and diluted and whether those rights should be further protected and enforced.

Photographers’ and photograph publishers’ rights are not absolute and this thesis investigates the types of legal restrictions and/or prohibitions, which may be placed upon those rights, as a consequence of, for example, the protection and enforcement of the legal, personal rights of others, and of the State’s duty to maintain public order; to protect the security and defence of the State; to prevent and/or to investigate crime, and to protect public morals. The thesis offers a number of recommendations, which would strengthen the protection and enforcement of photographers’ and photograph publishers’ existing legal rights – particularly their rights under copyright law. It also recommends the enactment of statutory provisions concerning some specific rights of individuals, including the right to privacy and the right not to be harassed by photographers and photograph publishers.
General Introduction

1) Thesis Research Topic
This doctoral thesis is an investigation of the legal rights of photographers and photograph publishers to take and publish still photographs. It also investigates the types of legal restrictions and prohibitions, which may be placed upon photographers’ and photograph publishers’ rights as a consequence of either the protection and enforcement of the legal rights of others or of the State’s duty to maintain public order; to protect the security and defence of the State; to prevent and/or to investigate crime, and to protect public morals. In addition, ethical codes of behaviour may also result in restrictions being imposed on photographers’ and photograph publishers legal rights. While researching this thesis, cognisance was taken of the fact that the creation and the publication of a still photograph are two separate, but related, activities and that a still photograph may be published either by the individual who created the photograph (the photographer) or by another third party, such as a newspaper publisher. The thesis focuses exclusively on still photography and does not extend to encompass movie (film or digital) photography. Although this research thesis is orientated towards professional photographers, the legal rules and principles discussed in the thesis apply equally to amateur photographers.

2) Origin of Research Topic Idea
Over many years, my interest in, and knowledge of, the legal rights and responsibilities of taking and publishing photographs has developed. From my commercial experience, and particularly as a practising commercial photographer, I am aware of the lack of a comprehensive, cohesive and clear legal knowledge base for still photographers and publishers of still photographs. Throughout my 25 years of employment with Shannon Development, and primarily while I was its Marketing Services Manager, I was responsible for the research, creation, implementation and evaluation of marketing (advertising, promotional and public relations) plans, programmes and campaigns to promote Ireland’s Shannon Region as the ideal location for both indigenous and inward investment industries. Managing the planning and production of quality photographic images for use in advertising, promotional and public relations campaigns was an integral element of such responsibilities. This work included the production of photographic images by the Company’s in-house Photography Department, commissioning external specialist photographers and selecting and purchasing existing, suitable photographic images from external photo libraries. My commercial experience has given me the necessary practical perspective on this doctoral research topic. Also, while I was completing my LL.B. in 2001, I undertook my final year research project on the topic of “The Individual’s Right to Privacy v Taking Photographs for Commercial Gain without Written Permission”. That research work fuelled my interest in researching this topic at a doctoral level.
3) Brief Introduction to Still Photography

For the purpose of understanding the photographic process and the changes that have occurred over the years since the early laws applicable to photographs and photography were devised, a brief outline of the main developments is presented at this juncture. Also, it facilitates a better comprehension of the foundations of copyright in photographs under copyright law, which will be discussed in Chapter (2).

Traditional, still photography is the art of creating images or pictures on a material that has been pre-coated with a light-sensitive chemical and onto which light is exposed in a controlled fashion using a camera. The material is then chemically-processed to reveal the created, latent image. Since its creation in the mid-1820s, the process of still photography has gone through numerous stages of development and refinement. Originally, wet-coated, metal, photographic plates were used. Long exposure times were necessary. These photographic plates had to be processed immediately following their exposure to light and involved the use of highly toxic chemicals. It was a laborious process and required the expenditure of considerable time, effort and skill on the part of photographers. As photographers had direct control over the various stages of production, they could be held liable where they were deemed to have breached the laws then in place.

Joseph Niépce is recognised as being the creator of what is thought to be the first, still-existing photograph – a view from an upstairs window at his country estate taken circa 1826. The exposure lasted for eight hours.\(^1\) Louis Daguerre is credited for discovering “image development” – the process of converting a latent image into a visible one.\(^2\) His circa 1838–1839 street scene photograph of Boulevard du Temple in Paris shows a man getting his shoes shined. That photograph is regarded as being the first one to include people.\(^3\) The creation of light-sensitive, paper negatives by William Fox Talbot in 1835 facilitated the reproduction of multiple photographic prints from an original image contained on a negative.\(^4\) The invention of the camera and developments such as Fox Talbot’s, therefore led the way for photographs to be reproduced in printed works. Previously only wood cuts and etchings could be reproduced in newspapers, for example, so this was a major break-through and, although expensive and its widespread use in printed works took some time, it was to be expected that the laws developed in respect of printed works would be applied also to printed photographs.

In 1851, Frederick Scott Archer developed the collodion process – a method of attaching silver compounds to a glass photographic plate by coating it with a mixture of cellulose nitrate (guncotton), sulphuric ether and alcohol.\(^5\) This process reduced image exposure times to a couple of seconds.

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For a while, the use of glass plate negatives became popular. George Eastman’s Dry Plate Company patented his new product – film with a gelatine emulsion on a paper backing – in 1884. This product was followed by a new type in 1889 – a nitrocellulose film coated with a silicate of soda and a gelatine emulsion that was wound on a spool, which the user put into the camera. The benefit of Eastman’s dry, light-sensitive gel roll film was that it did not need to be processed immediately following its exposure to light. In 1912, the British firm Ilford commenced the production of roll film. Gradually, therefore, the process of creating and reproducing photographs was becoming more refined and less laborious.

While various materials such as metal plates, glass, paper and film may be used to create photographs, the latter is now the most commonly-used. Two types of still film are manufactured – negative and positive (the latter is also known as transparency film, as it shows a positive image when it is viewed with a light). If an image is created using negative film, then the processed negative film must be further exposed to a chemically coated, light-sensitive material such as photographic paper, which is then chemically processed to create a positive copy of the image. Originally photographs were monochrome and although James Maxwell created the first colour photograph in 1861, it was not until the early 20th century that full colour film was commercially available. In 1932 Agfa introduced its Agfacolor-Neu colour film to the market.

As a result of the Japanese government’s desire to create a film manufacturing industry in Japan, Fujifilm was established in 1934. Eastman Kodak introduced its Kodachrome full colour, transparency (positive) film to the market in 1935 in a 16mm motion picture version and in 1936 as a still film. Although Kodachrome still film suffered from colour problems during its early years, it became the most popular and most loved film of all time among both professional and amateur photographers due to its high colour saturation, contrast and archival qualities. As a result of a declining film market, Kodak ceased the production of Kodachrome in 2009 and Dwayne’s Photo in Parsons, Kansas, U.S.A. processed the last roll of this iconic film on the 30th December, 2010.

6 Note: The Lawrence Collection of late 19th century and early 20th century photographs of Ireland were created on glass plates.
7 Adrian Bailey, The Illustrated Dictionary of Photography (Winward 1987) 57
10 Adrian Bailey, The Illustrated Dictionary of Photography (Winward 1987) 107
14 ——— ‘Last Roll of Kodachrome film developed as digital revolution brings 75 years of camera history to a close’ Daily Mail (London, 31 December 2010) <http://www.dailymail.co.uk/sciencetech/Article-1343015/Last-roll-Kodachrome-film-developed-digital-revolution-brings-75-years-camera-history-close.html> accessed 16 February 2012
Polaroid’s instant picture process dates from 1948 and it introduced its instant process, peel-apart, colour sheet film in 1963. Polaroid later introduced instant, positive, roll film to the market. Although Polaroid has ceased the production of its instant peel-apart paper sheet and its instant roll film, a similar instant peel-apart paper sheet film is still made by Fujifilm.

While the process of creating images was being developed into a less time-consuming and more user-friendly process employing less toxic chemicals, cameras were also being developed from the original wet-plate cameras to those which could hold a roll or sheet of dry film. To create more sharply focused images, better quality camera lenses were also being developed. Film cameras are classified according to the size and type of the film used in them. Common examples include large format 10” x 8” and 5” x 4” sheet film cameras; medium format roll film cameras – 6cm x 7cm and 6cm x 6cm, and 35mm roll film cameras (36mm x 24mm film frame size). The larger the film size used, the greater the overall definition or detail contained across the whole frame of the piece of film. As a frame of 6cm x 7cm film is 4.86 times the size of a frame of 35mm film, a lesser degree of enlargement is required to make a print of an image from a frame of 6cm x 7cm than from a frame of 35mm film.

In 1888, George Eastman launched the Kodak No. 1 camera, which at five guineas was expensive. He subsequently launched a pocket Kodak in 1895 for 1 guinea and the Kodak Brownie for five shillings in 1900. The latter camera was at the forefront of bringing photography to a wider market audience and particularly to the amateur photographer market. Leica launched the 35mm format camera in 1925. During the latter half of the 20th century, the 35mm became the most popular camera format among the mass market due to its high quality, yet lower cost, bulk and weight than larger camera formats.

The digital camera was invented by Eastman Kodak engineer Steve Sasson in 1975. Although companies such as Nikon and Canon developed and refined the idea, professional photographer level digital cameras were not fully marketed until the late 1990s and it was the early 2000s before consumer level digital cameras were available at reasonable prices. The difference between a digital camera and a film camera is that instead of using film, a digital camera contains an electronic device – a sensor (either a CCD – a charged coupled device or a CMOS – a complimentary metal-oxide semiconductor), which is able to see and record blue, green and red light waves and an internal processor converts the viewed light waves into a recorded photographic image. Newspapers and magazines were the early adopters of digital cameras due to factors such as the immediate availability of prints for publication and the lower, on-going, overall costs of running digital as opposed to wet-lab photographic departments. To keep-on getting work and also to reduce their

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16 Note: Other film sizes such as the 126, 127 and 110 have been used in pockets-size cameras.
17 Adrian Bailey, The Illustrated Dictionary of Photography (Winward 1987) 93
19 Richard Gillis, ‘Portrait of inventor who saw the big picture’ The Irish Times (Dublin 6 October 2009)
overheads, freelance press photographers had to quickly follow their in-house, staff photographer colleagues and go digital. Other professional photographers were initially slow to switch-over from film to digital cameras due to the high cost of digital camera bodies and lenses and their concerns about the quality of images available from digital cameras. Although the digital camera has now taken over both the professional and amateur photography markets, the use of film remains the medium of choice with many professional photographers. There also has been a resurgence in the use of black and white film at the amateur level.

Side-by-side with the development and use of digital cameras, computer software programmes for the manipulation and management of photographs, such as the industry-standard Adobe Photoshop, have been developed. Also, more affordable peripheral equipment for professional photographers such as digital, dye-sublimation and ink-jet photo printers and film scanners have been created. Inexpensive, lower quality versions of such equipment have been developed for the consumer market.

As a result of the development of digital photography, the role of photographers and their relationship to their work has changed substantially, whether they are commercial or press photographers. A pertinent question therefore, is whether laws framed in earlier centuries are still applicable, whether they have kept pace with the developments that have occurred or whether they are in need of repeal or reform? Have the emergence of democratic societies and the recognition of human and civil rights enhanced the position of photographers, particularly those providing images for the media, given that the media and freedom of expression are now regarded as the cornerstone of a democratic society? These and other issues will be explored in the chapters of this thesis.

4) The Business of Professional Photographers

While most professional photographers work as generalists, many specialise in either one or a number of related areas such as advertisements; fashion; products; architectural; commercial and industrial; landscape; legal; portraiture, social and weddings; press and public relations; sports; travel, and nature and wildlife. Within the scientific, medical and engineering fields, highly technical photography such as microscopic and extremely high speed photography is undertaken using either specialist or purpose-built cameras, lenses and lighting. Computer generated images are frequently used in the creation of the photographic element of manufacturers’ advertisements such as in the automobile and drinks sectors. Within the newspaper and magazine sectors, some photographers are employed full-time. Others work on a contracted, freelance basis – either full-time basis or on a per job basis. However, the majority of press and magazine feature photographers are totally freelance and sell their images to whatever news media organisation or picture agency will either buy or sell them on their behalf. In such cases, the decision to publish a photograph is taken by the pictures editor and not by the photographer. The photographer will have certain rights and be subject also to certain restrictions under the law for the taking of a photograph but any legal liability for its publication will rest with those involved in the editorial and publication processes. Although a
small number of paparazzi photographers are employed directly by picture agencies, which may have vicarious liability in certain circumstances, virtually all of them are freelancers. While many large, commercial and industrial organisations employ their own full-time photographers, others contract-out their photographic work to self-employed, freelance photographers. An Garda Síochána and the Police in the United Kingdom employ their own crime scene photographers. The majority of all practising professional photographers are self-employed. Some professional photographers use agents to source work for them, while the vast majority do not. Self-employed, professional photographers sell their photographic services to a variety of markets, namely their contracted commercial clients and individuals; newspapers and magazines; news picture agencies; advertising agencies, and to publishers of books and other printed products such as calendars, postcards and greeting cards. Images created by paparazzi photographers are sold either directly by the photographer or through a news picture agency to newspapers, magazines or news websites either on an exclusive or non-exclusive basis and with or without further reproduction fees. Legal issues arising from these various sets of circumstances will be considered in subsequent chapters of this thesis.

5) The Photography Market

Traditionally, the primary outlets for publishing photographs have been in the print media (newspapers and magazines) as illustrative news and feature items; as elements of corporate promotional materials (advertisements, printed promotional materials and graphic display systems); in books; on calendars, postcards and other promotional giftware; on printed packaging such as chocolate boxes, and in photographic exhibitions. With the development of the internet, websites, blogs and social media sites have become new outlets for the publication of photographs. The main differences between the traditional, photo publishing outlets and the internet are that with the latter there is no pre-requisite of having to get a client to agree in advance to purchase an image for publication before it is published. It is less controlled, relatively inexpensive and easy to access, and publication is generally immediate once an image has been loaded onto a website’s server. With consumer level, digital SLR camera and zoom lens kits available for a few hundred euros and as cameras are an integral element of virtually all mobile phones and hand-held computer tablets currently on the market, everyone has immediate access to some sort and quality of a digital camera. Everyone is now a photographer and we have also seen the creation of a growing number of “citizen photo-journalists”. This proliferation of cameras and a change in attitude by both the general public and many commercial organisations towards the value of professionally-created, high quality photographs has resulted in many commercial photographers seeing a decline in their incomes.

Due to the widespread submission to news media organisations of images created by amateur photographers, who are seeking publication of their photographs without any payment, and with a desire to drive down their overheads, many media outlets are no longer willing to pay for submitted professional images, while others will only do so at reduced fee levels and they may then be slow to
make payments. Such a move is impacting on professional press photographers’ incomes. Many wedding photographers are running price wars with amateur photographers (“week-end warriors”). Due to the current economic recession, commercial and industrial photographers are having to accept lower fees in order to obtain work from corporate clients, that now have reduced budgets available to them for photography. Similarly, photographers who generate their income from the wholesaling of photographic products such as calendars and postcards to the retail trade have also seen a decline in business, as retailers either cannot sell their current stocks and/or do not have the money to buy new stock.

Stock photo agencies\(^{20}\) have existed for many years. While some agencies only sell images that have been created by themselves, the majority offer either contributors’ images and/or their own images. Traditionally, photographers gave stock photo agencies a copy of an image’s negative. In the case of transparency film, the photographer gave the agency the frame of transparency film or sometimes a copy of it. Now, the agency is wired a digital copy of the image, irrespective of whether the original image was shot on either a film or digital camera. The agency then, on a commission basis, offers to sell usage licences for digital copies of such images to commercial clients and members of the public. Such image licences are sold either as “rights-managed” or as “royalty-free” and at various file (quality) sizes depending upon the intended usage of the image. Copies of images sold by a stock photo agency under a “rights-managed” contract are priced according to their intended usage. For example, in the case of a photograph to be used in a magazine advertisement, factors such as the proposed print size of the advertisement, the page location of the advertisement in the magazine, the magazine’s print run size, the number of language editions and the number of issues of each language edition of the magazine in which the advertisement will be inserted will be used to calculate the cost of acquiring usage of the photograph. Consequently, acquiring a licence to use a “rights-managed” photograph may in some instances be more expensive than having a custom photograph commissioned. Usage licences for “royalty-free” images are sold at much lower, once-off payments. The advantage of acquiring a licence to use stock photos is that one has immediate access to a selection of potentially suitable images and does not need to commission a photograph. The disadvantage is that an image acquired from a stock photo agency does not offer the purchaser the exclusive use of that image. It is not uncommon to see the same image being used by a number of commercial advertisers – even competitors advertising in the same issue of a publication. With the widespread availability to the general public of cheap digital cameras and a desire among many amateur photographers to have their photographs seen on the internet, allied with the establishment of a large number of stock photo agencies, the “royalty-free” market has become swamped with images of varying types, scenes and associated quality. Also, the commission rates paid by stock photo agencies to photographers are constantly changing.\(^{21}\)

\(^{20}\) Note: One of the largest Irish stock photo agencies, Stockbyte of Tralee, sold its collection of 85,000 royalty-free images to Getty Images for $135 million in 2006.


\(^{21}\) Note: For example, Getty Images offers a commission rate of 20% to new contributors of photographs.
6) Aim of the Research
Research through *Index to Theses* showed that a number of doctoral studies have been undertaken on specific aspects of photography, such as aerial photography or on the works of selected, internationally-renowned photographers like Ansel Adams. However, little research work has been done on the wide-ranging, legal aspects of photography, apart from a few doctrinal studies on the interplay of photography and single issue topics, such as copyright law. Using an appropriately designed research framework, the aim of my research has been to undertake an in-depth critical examination, analysis and assessment of the wide range of legal rights of, and restrictions on, photographers and publishers of photographs. This research topic centres on the inter-play between, and the balancing of, the rights of photographers to take and publish photographs and the rights of others such as the right to privacy, the right to a good name, the right to a fair trial and private property rights. While a significant body of academic work has been produced on individual areas of law pertinent to this topic, such as on rights, defamation, privacy and copyright law, there is a lack of a comprehensive, cohesive and clear legal knowledge base for photographers and publishers of photographs. This research project aims to fill that void.

7) Objective of the Research
The objective of the research was to produce an authoritative body of work on the topic, which would:

1. add to the existing literature and scholarly work in the field
2. be a comprehensive, cohesive, analytical investigation, that would fill a current void in both the research and scholarship
3. provide a foundation for policy makers and legislators in the development of aspects of law, which are pertinent to photographers and photograph publishers
4. be of significance and benefit to NUIG’s School of Law as the first doctoral study on this topic undertaken in Ireland.

8) Research Questions
The central research questions underlying this thesis are as follows:

- What is the theoretical and conceptual basis of the legal rules, principles and doctrines from and upon which the various types of rights and restrictions applicable to photographers have been developed?

- What are the sources, legal basis and extent of the existing legal rights of photographers to both take and publish photographs?

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Alamy offers photographers a 50% commission rate on sales.

• Are the existing legal rights of photographers and photograph publishers fair and adequate? Are photographers’ and photograph publishers’ legal rights being diluted? If “yes”, how is this occurring? Should and how may further dilution of their rights be prevented?

• What legal restrictions are or may be placed upon photographers’ legal rights to create and/or publish photographs? What are the rationales underlying these restrictions? Are these restrictions proportionate to their aims and are they justified? How are these restrictions balanced with photographers’ rights? What are the legal tests and how are they applied by the courts?

• What legal remedies are available to photographers and publishers to both protect and enforce their legal rights? Are they adequate? Do they need to be reinforced and if “yes”, how should they be reinforced?

• Given the developments in communications technologies, particularly computing and mobile telecoms devices and the associated communications platforms of the internet and social media networking sites, is there a need for greater regulation or different approaches to or forms of regulation and the enforcement of regulations dealing with the publication of photographs through the internet and social networking platforms? The increasing use of these communications platforms by members of the public and the online behaviour of some individuals is raising a number of issues of public concern. Issues which can arise from the publication of photographs include the infringement of persons’ right to privacy, the unauthorised use of personal images, the right to a good name and the right to a fair trial. Is there a need for the introduction of a general, statutory right to privacy? Should one have a personal image right? If “yes”, how should such rights be framed, regulated, protected and enforced and how would this affect photographers?

• Do ethical codes of behaviour have a relevance to photographers and photograph publishers? If “yes”, which codes are relevant? What are the codes’ principles? How and to what extent, if any, do they restrict photographers’ and photograph publishers’ legal rights to take and/or publish photographs?

9) Methodology
The methodology used in undertaking this research was advanced legal research techniques. The research method was desk-based research using library resources and external electronic databases. It included the identification, assembly and evaluation of both primary and secondary sources of information.
10) **Approach**

10.1) **Doctrinal Analysis**
The research work featured a doctrinal analysis, with a rights foundation, of the existing law, in order to identify, examine and analyse the regulatory framework underpinning the relevant law.

10.2) **Qualitative Analysis**
A qualitative analysis of the law pertinent to photographers and photograph publishers was undertaken in order to comprehend its structure and function.

10.3) **Comparative Analysis**
For comparative purposes, an analysis of the applicable law within Ireland and the United Kingdom was undertaken. Particular attention has been paid to developments in law and policy at E.U. and Council of Europe levels.

11) **Outline of Thesis Chapters**

**Chapter (1)**
Chapter (1) of this thesis examines the theoretical and conceptual basis of the legal rules, principles and doctrines from and upon which the various types of rights and restrictions applicable to photographers has been developed. Having considered rights as a concept and the origin and types of rights that exist, Chapter (1) of the thesis identifies and examines the foundation of the legal right to take and publish photographs. Central to this examination is the right of freedom of expression and particularly the rights of artistic and commercial expression. Chapter (1) goes on to investigate photographers’ and photograph publishers’ rights granted under the Constitution of Ireland, statutory provisions, international conventions and treaties and as recognised by the common law.

**Chapter (2)**
Having examined the over-arching right of photographers to freedom of expression in Chapter (1), Chapter (2) will examine the main vehicle for the implementation in practice of that right by photographers’ and photograph publishers’ namely through copyright law. Consequently, Chapter (2) identifies and examines photographers’ and publishers’ rights under copyright law. It also examines how copyright law protects those rights and the remedies available under copyright law to the owners of the copyright in photographs against infringers of their rights under copyright. It investigates whether, how and the extent, if any, to which photographers’ and publishers’ rights under copyright law are being eroded and diluted and whether those rights should be further protected and enforced.

**Chapter (3)**
Photographers’ and publishers’ legal rights to take and publish photographs are not absolute rights. They may be restricted in order to protect the guaranteed, legal rights of others. Chapter (3) examines the range of personal rights which frequently come into contention with the rights of
photographers and photograph publishers, including the individual’s right to privacy, the right not to be harassed, the right to one’s good name, the right to be forgotten and private property rights. Chapter (3) also examines the concepts of individuals having a legal right over their personal images and a right of publicity.

**Chapter (4)**

In addition to the legal restrictions that may be imposed on the legal rights of photographers as a consequence of the protection and enforcement of the rights of other individuals, restrictions may also be placed on photographers’ and photograph publishers’ rights as a result of the State undertaking its legally-required duties. The State has a duty to maintain public order, to protect the security and defence of the State and its citizens; to prevent, investigate and prosecute criminal activity and to protect the administration of justice. Its duties also extend to the protection of public morality. Chapter (4) investigates how and the extent to which these various duties as placed upon and exercised by the State may restrict the rights of photographers and photograph publishers.

Other restrictions on the activities of photographers may result from a variety of statutory provisions, such as those designed to protect wildlife, or due to the terms of contracts or accreditation schemes. In addition, the rights of photographers and photograph publishers to take and/or publish photographs may also be restricted on ethical grounds. Ethical standards or codes of behaviour as implemented by a range of organisations, such as the Press Council of Ireland, the Advertising Standards Authority of Ireland and the National Union of Journalists, may result in the restriction of photographers’ and photograph publishers’ rights. Chapter (4) will examine the various codes of practice, which have a direct relevance to, and impact on, the activities and work practices of photographers and photograph publishers.

**Chapter (5)**

Chapter (5) discusses the overall conclusions of this research work and it also offers a range of recommendations for legislative changes. These recommendations would assist photographers by enhancing the legal protection and the enforcement of their copyright in their created works. They would protect the interests of photographers (particularly press photographers and photo-journalists) in legally protecting their sources of information. The thesis offers a range of recommendations which would enhance the legal protection of some specific rights of individuals, including the right to privacy, the right not to be harassed by photographers and photograph publishers and the right to a fair trial and fair procedures. Also, this thesis recommends the repeal of the constitutional offence of blasphemy and the amendment of some specific public law statutes.

**12) Note on Websites accessed during Research Work**

Website addresses (URLs) referenced in this thesis were correct on the accession dates as shown in the footnotes to the respective chapters. Website operators frequently change the URLs for material published on their websites. They also remove published materials completely from their
websites. Some website operators archive previously published material and use different URLs to do so. Consequently, there may be instances where a search using a URL referenced in this thesis will not return the item to which it refers.

The law stated in this thesis is the law as at 31 May 2016.
Chapter One

The Legal Rights of Photographers and Photograph Publishers

1.1) Introduction
As explained in the General Introduction, the creation and publication of photographs are two distinct, but related activities. Photographers and photograph publishers enjoy a range of legal rights, which are derived both directly and indirectly from a number of sources at global, European, European Union and national levels, international treaties and conventions, the Constitution of Ireland, statutory legislation and the common law. Through their application of constitutional, statutory or common law, the courts have recognised the legal right of individuals to both take and publish photographs. However, these legally-recognised rights are not absolute and they may be restricted either by legislative provisions or by the courts when they are balancing the rights of photographers and photograph publishers with the competing rights of others. Underlying the rights of photographers and photograph publishers to take and/or publish photographs is the right of freedom of expression, including its subsets – the right of artistic expression and the right of commercial expression. Chapter (1) will examine how the right of freedom of expression and the rights of photographers and photograph publishers have developed in Ireland and how such development has been both influenced and contributed to by Ireland’s participation in international affairs at global, European and European Union levels. While keeping my central research questions to the fore and particularly the question: “What is the theoretical and conceptual basis of the legal rules, principles and doctrines from and upon which the various types of rights and restrictions applicable to photographers have been developed?”, it is firstly of benefit to briefly consider rights in theory – the origin, the types of rights that exist – and how this relates to the rights of photographers in practice.

1.2) Rights in Theory: Their Origin, Types and Justification
In defining a “right”, Black states: ‘a right signifies a power, privilege, faculty or demand, inherent in one person and incident upon another.’ Rights are viewed as having two distinct origins – natural rights which exist under natural law and man-made rights which have been created under positive law. Natural law is perceived as having its origin at the time of the creation of nature by God or a higher being. Campbell makes a valid point by suggesting ‘…the genesis of rights in the idea of natural law may be a problem for the reputation of rights in a world that has largely lost the belief in a natural order ordained by God.’ However, the status of natural law has been recognised by positive law, which has given it a ranking antecedent and superior to that of positive law. An example of such is Article 43 of the Constitution of Ireland, which shall be discussed further below. Wack suggests that two theories of rights exist, namely the “will” or “choice” theory and the “interest”

1 Henry Campbell Black, Black’s Law Dictionary (3rd edn, West Publishing Co. 1933) 1558
2 Tom Campbell, Rights: A Critical Introduction (Routledge 2006) 6
theory. He further states that the “will” theory ‘holds that when I have a right to do something, what is essentially protected is my choice whether or not to do it. It stresses the freedom and individual self-fulfilment that are regarded as essential values which the law ought to guarantee. The “interest” theory on the other hand claims that the purpose of rights is to protect, not individual choice, but certain interests of the right-holder.’ Donnelly suggests that ‘Rights do have correlative duties. Many (but not all) duties have correlative rights. But particular rights and duties may stand in a great variety of relations to one another. And many rights are held independent of the discharge of duties.’

1.2.1) Types of Rights
People possess numerous rights across a broad range of issues. Black says ‘rights are also classified in constitutional law as natural, civil and political, to which there is sometimes added the class of personal rights.’

Natural Rights: ‘Are those which grow out of the nature of man and depend upon personality, as distinguished from such as are created by law and depend upon civilized society; or they are those which are plainly assured by natural law.’

Civil Rights: ‘Are such as belong to every citizen… or to all inhabitants and are not connected with the organization or administration of government. They include the right to property, marriage, protection by the laws, freedom of contract, trial by jury, etc.’

Political Rights: ‘Consist in the power to participate, directly or indirectly, in the establishment or administration of government, such as a right of citizenship, that of suffrage, the right to hold public office, and the right to petition.’

Social, Economic and Cultural Rights: This class of rights include the right ‘…to adequate food, adequate housing, to education, to health, to social security, to take part in cultural life, to water and sanitation, and to work.’

Personal Rights: ‘Personal rights is a term of rather vague import, but generally it may be said to mean the right of personal security, comprising those of life, limb, body, health, reputation and the right to personal liberty.’

3 Raymond Wacks, Understanding Jurisprudence: An Introduction to Legal Theory (3rd edn, Oxford University Press 2012) 236
4 ibid
6 Henry Campbell Black, Black’s Law Dictionary (3rd edn, West Publishing Co. 1933) 1559
7 ibid
8 ibid
9 ibid
11 Henry Campbell Black, Black’s Law Dictionary (3rd edn, West Publishing Co. 1933) 1559
Human Rights: Jones states that …the language of natural rights has largely been replaced by that of human rights, a term that is less open to misunderstanding. He classifies human rights as being rights possessed by all human beings simply as human beings. He contrasts human rights with what he refers to as being special rights – rights which arise out of a special relationship between people, for example rights arising from contracts. The United Nations Office of the High Commissioner for Human Rights refers to human rights as being ‘rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic group, colour, religion, language, or any other status. We are equally entitled to our human rights without discrimination.’

Fundamental Rights: Murdoch defines fundamental rights as being ‘interests recognised and protected by the courts, which are superior to the law, the respect of which is a duty and the disregard of which is a wrong.’ The Constitution of Ireland guarantees a range of basic or fundamental rights.

As will be shown later in this and the subsequent chapters of the thesis, a number of these categories of rights could apply to photographers’ rights. For example, the central right of photographers – freedom of expression – can be categorised as both a fundamental right (it is necessary in a democracy), a personal right (it belongs to everyone), and a public/political right (it contributes to public debate). Also, copyright, which is an important safeguard for photographers’ artistic and commercial ventures, can be categorised as both a property (intellectual property or private property) right, a personal right (the right to artistic expression and the right to a livelihood), an economic right (to be recompensed for one’s artistic creations), and a socio-political or cultural right (to enable the public to enjoy a created artistic work). Together with the property and economic aspects of copyright, there are moral rights, which be discussed in detail in Chapter (2).

1.2.2) Theories on Freedom of Expression

The term “Freedom of expression” embraces the right to ask or search for, to receive and/or to communicate to others ideas, opinions or information through any medium of communication without hindrance. The creation and publication of photographs is one such medium. Another is speech and the term freedom of speech is often used as a synonym for freedom of expression. On theories of freedom of speech, Barendt suggests that four theories are frequently advanced in order to justify a free speech principle under which speech is ‘…entitled to protection from regulation or suppression.’ These are the importance of the discovery of truth, free speech as an aspect of self-

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12 Peter Jones, Rights (The Macmillan Press Ltd. 1994) 81
15 Constitution of Ireland, Arts. 40–44 (on Fundamental Rights)
16 There are various classifications of rights including perfect and imperfect rights, rights in rem and in personam, and primary and secondary rights. For further details on these classifications, see Henry Campbell Black, Black’s Law Dictionary (3rd edn, West Publishing Co. 1903) 1559
fulfilment, citizen participation in a democracy and suspicion of government. Briefly examining each of these individually, if free speech is not permitted within a society, then its members will be prevented from discovering and communicating to others accurate, factual information and opinions of value relating to any particular issue without being hindered. This theory of truth, as advanced by English philosopher John Stuart Mill, had been previously put forward by Milton. Barendt suggests that ‘...Mill’s argument that the utility of an opinion cannot be divorced from its truth is unpersuasive. It is not inconsistent to defend a ban on the publication of propositions on the ground that their propagation would seriously damage society, while conceding that they might be true. The interests of truth are, to some extent, protected if the wisdom of the ban can be freely debated.’ In addition, Barendt argues that ‘...the suppression of speech...creates a suspicion of authority and destroys tolerance.’ While the permitting of free speech will not guarantee that the truth about a particular matter will be discovered, neither will its restriction.

Freedom of speech or of the wider freedom – freedom of expression – may be viewed as an enabler for individuals to develop their personalities and to become self-fulfilled. The prevention of individuals from freely obtaining information, expressing their opinions and beliefs or communicating information could be seen as a hindrance to their personal growth and self-fulfilment. Publishing is an enabler of the right of free speech and McQuail suggests it can never be ‘...completely without constraint or consequences. It may often only be free in the sense of being legally permitted.’ He is of the view that the operation of free market forces and a fear of offending a large proportion of one’s audience or of losing advertisers are among the main sources of constraint on freedom of publication rather than laws and regulations. The unrestricted exercise of the rights of freedom of speech and of expression on the premise that they are being exercised for the purpose of self-development or self-fulfilment may result in harm being caused to others. Examples of such harm include the infringement of a photographer’s copyright in his created works, the creation and/or publication of photographs which infringe the privacy or property rights of others, the incitement of hatred towards individuals or groups within society and the undue influencing of individuals through false advertising.

Barendt suggests that the argument that free speech is a necessity if citizens are to truly participate in a democracy and to have the requisite information to hold governments to account ‘...only covers political expression; there would be little justification for extending its protection to literary and artistic discourse, let alone sexually explicit material or commercial advertising.’ He also suggests that the democracy argument for free speech is ‘...firmly utilitarian or consequentialist.’ Everyone has a

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18 ibid 6–23
19 ibid 7
20 ibid 8
21 ibid 9–9
22 Denis McQuail, Media Accountability and Freedom of Publication (Oxford University Press 2003) 184
23 ibid 188
25 ibid 19
right to fully participate in public debate and as a consequence ‘...temporary political majorities are formed.’ Barendt goes on to advocate: ‘This right is so fundamental that it cannot be surrendered to the powers of the elected majority. It would be wrong for the majority to suppress the right of minorities to express their dissent.’ The extension of a constitutional protection of political expression to include other forms of expression, such as commercial expression, has not been without controversy according to Barendt, who suggests that the courts have been slow to regulate some forms of ‘non-political speech, either because they distrust the ability of the legislature to distinguish it from genuine discussion of public affairs, or because they fear that the latter will be inhibited by the imposition of restrictions on freedom of expression.’

On the argument of justifying free speech because of a suspicion of government, Barendt classifies it as a “negative argument”, as ‘...it highlights the evils of regulation, rather than the good of free speech.’ But, individuals must have the ability to make themselves aware of when a government acts inappropriately, its reasons for doing so and to hold it to account. The creation and publication of photographs is one of the means by which members of society may gather evidence of inappropriate behaviour by a government and inform society in general of such behaviour. If freedom of speech, and particularly freedom of expression through the medium of photography, is either prohibited or is overly restricted through laws, then society is at the mercy of government.

1.3) Development of Photographers’ and Photograph Publishers’ Rights
Ireland’s participation in international affairs at global, European and European Union levels and its ratification of international conventions and treaties has both influenced and contributed to the development of rights in general in Ireland and specifically the right of freedom of expression. The right of freedom of expression is the core right upon which photographers’ and photograph publishers’ rights are founded. It is therefore the focus of the following sections which trace its origin and development and identify the key principles that have emerged in relation to freedom of expression.

1.3.1) Universal Declaration of Human Rights, the ICCPR and its Optional Protocols and the International Covenant on Economic, Social and Cultural Rights
The Universal Declaration of Human Rights details a wide range of rights of individuals, which the United Nations has classified as being “fundamental rights”. The preamble to the Declaration makes specific mention of four, basic freedoms, namely ‘freedom of speech and belief and freedom from fear and want’. The highlighting of these four basic freedoms in the preamble was a reflection of

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26 ibid
27 ibid
28 ibid 20
29 ibid 21
31 ibid preamble
the thoughts advocated in the then United States President Franklin D. Roosevelt’s Annual Message to Congress on the State of the Union in 1941, which became known as his “Four Freedoms Speech”. The articles of the Declaration detail a broad range of fundamental rights including the right to privacy; the right of freedom of thought, conscience and religion; the right to freedom of opinion and expression; the right to participate in and enjoy the cultural life of one’s community, and the right of authors to have their moral and material interests in their scientific, literary or artistic productions protected. On freedom of expression, Article 19 of the Declaration specifies:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The Declaration is not binding on member states of the United Nations. It is purely a declaration – an announcement. It sets out the fundamental or basic rights, which should be enjoyed by people and how, in an ideal world, states should treat people while they enjoy those rights. However, nearly 20 years after the adoption of the Declaration, two covenants, namely the International Covenant on Civil and Political Rights (hereafter “the ICCPR”) and its two optional protocols and the International Covenant on Economic, Social and Cultural Rights (hereafter “the ICESCR”), were adopted by the General Assembly of the United Nations in December 1966. They respectively entered into force in March 1976 and January 1976. The first and second optional protocol to the ICCPR were respectively adopted by the United Nation's General Assembly in December 1966 and December 1989. These two covenants and the two optional protocols to the ICCPR are legally binding on member states, which have signed and ratified them. Together with the Universal Declaration of Human Rights, these covenants and the ICCPR’s optional protocols have become jointly-known as the “International Bill of Rights”. The individual articles of the Universal Declaration are the foundation stones and guiding principles of the articles contained within these two covenants. In essence, these two covenants give legal effect to the contents of the articles of the Declaration. By their very nature, for one to freely enjoy the rights enshrined in the ICCPR and the ICESCR, two essential requirements are the right to hold opinions and beliefs and the right of freedom of expression. If one may not freely hold and express opinions and beliefs, then one’s ability to enjoy or

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34 ibid art 19
enforce one’s other fundamental rights or to have them upheld is completely restricted and is virtually an impossible task. Also, without the right of freedom of expression it would not be possible to freely promote an awareness and understanding of the existence of the other fundamental rights available under the Universal Declaration, the ICCPR and the ICESCR. The importance of the right of freedom of information was highlighted during the first session of the General Assembly of the United Nations in December 1946, when it passed Resolution 59(1).\textsuperscript{40} The view that freedom of information is the “cornerstone” of the international human rights legal system was advanced in the preamble to Resolution 59(1):

‘Freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated; Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world; Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent; Understanding and co-operation among nations are impossible without an alert and sound world opinion, which, in turn, is wholly dependent upon freedom of information.’\textsuperscript{41}

Freedom of expression is the indispensable enabling element of freedom of information and the positioning of the right of freedom of expression as the cornerstone or touchstone of all human rights has gained currency. References to such are frequently made at both international and national levels. For example, in discussing freedom of expression and the media, the United Nations’ Human Rights Committee’s 2011 General Comment No. 34 on Article 19 of the ICCPR suggested:

‘A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.’\textsuperscript{42}

It is important to note for the purposes of this thesis that the terms “media” and “journalist” ordinarily encompass photographers, both press and freelance, and photo-journalists, who supply the media with photographic images.\textsuperscript{43} This belief in the crucial role of a free media in a democracy has also been asserted at a national level. In replying to a question posed during the 2011 Dáil Éireann


\textsuperscript{41} ibid

\textsuperscript{42} United Nations Human Rights Committee, General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (on Freedom of Expression) CCPR/C/GC/34 para 13 (Geneva, 12 September 2011) <www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accessed 04 April 2016

\textsuperscript{43} Note: Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers states that a “journalist” means: ‘any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication’. It also states that ‘Information’ means ‘any statement of fact, opinion or idea in the form of text, sound and/or picture’. Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Strasbourg, 08 March 2000), Appendix. <https://wcd.coe.int/ViewDoc.jsp?id=342907&Site=CM> accessed 21 July 2015
debates on human rights and freedom of the press, the then Tánaiste and Minister for Foreign Affairs and Trade, Eamon Gilmore, T.D. stated:

‘Ireland strongly condemns any efforts to intimidate, censor or silence the media and we fully support the work of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression. Free, independent media will always be a cornerstone of democracy and respect for human rights and conditions for independent and pluralist journalism can only aid social and economic development.’

Writing on the topic of “Thought, Expression, Association and Assembly” Boyle and Shah suggested:

‘Not only is freedom of expression inseparable from freedom of thought, association and assembly, it is essential for the enjoyment of all rights, including economic, social and cultural rights.’

The right of freedom of information or the right to have access to information held by public bodies as a corollary to the right of freedom of expression has been given legal effect in numerous countries. For example, in Ireland this right has been legally granted by the Freedom of Information Act 1997, as amended. However, this right is not an absolute right and is subject to restrictions permitted by the Act in support of other interests, primarily privacy-related. The assertion expressed in the above-mentioned preamble to the Universal Declaration has been re-affirmed and given international legal effect through both the ICCPR and the ICESCR. Of primary relevance to this thesis are Article 19 of the ICCPR, which deals with the right of freedom of expression and Article 15 of the ICESCR, which concerns both one’s right to participate in cultural life and the right to the protection of one’s moral and material interests in one’s authored works.

Under Article 19 of the ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be only such as are provided by law and are necessary:
   (a) For respect of the rights and reputations of others;

46 Freedom of Information Act 1997, s 6
Essentially, Article 19(2) clearly defines the scope of the right of freedom of expression, namely the right to seek, receive and impart information and ideas through any medium. While the ICCPR guarantees this right, it is not an absolute right. However, the right of freedom of expression may only be subject to restrictions, which are provided for in law and which are necessary for the purposes stated in the above-mentioned Article 19(3). The Human Rights Committee (a body of independent experts) performs a number of monitoring functions in relation to the ICCPR. Such functions include the monitoring of the implementation of the ICCPR by States parties, that have ratified it; the examination of state reports on their implementation of the ICCPR and the production of recommendations in the form of concluding comments on such reports; the examination of both inter-state complaints under Article 41 of the ICCPR and individual complaints under the First Protocol to the ICCPR. Under Article 1 of the First Protocol, States parties to it recognise the authority of the Committee to consider complaints from individuals, who claim that their rights enumerated in the ICCPR have been violated by such a state party. The Protocol permits individuals, who claim that any of their ICCPR enumerated rights have been violated by a State party and who have exhausted all available domestic remedies, to lodge a written complaint for consideration by the Human Rights Committee. Similarly, in relation to the ICESCR provisions exist under Articles 1 and 2 of the Optional Protocol to the ICESCR, which permit the Committee on Social, Cultural and Economic Rights to consider complaints made by individuals or groups claiming a violation of their rights under the ICESCR by a State Party to the Protocol.

In writing on General Comment No. 34 on Article 19 of the ICCPR on freedom of opinion, and specifically in defining the purpose of a “general comment”, O’Flaherty declared:

‘General comments are, as Philip Alston puts it, the “means by which a UN human rights expert committee distils its considered views on an issue which arises out of provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement”.’

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48 ibid Art 41 <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 04 April 21016
49 Office of the High Commissioner for Human Rights, Human Rights Committee <www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> accessed 04 April 21016
50 Optional Protocol to the International Covenant on Civil and Political Rights, Art 1 <www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> accessed 04 April 2016
51 ibid Art 2
52 Optional Protocol to the International Covenant on Economic, Cultural and Social Rights, Arts. 1–2 <www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> accessed 04 April 21016
O’Flaherty highlighted the importance of the right of freedom of expression and its relevance to one’s enjoyment of other rights during his presentation to the American Society of International Law on limitations on the right of freedom of opinion and expression. O’Flaherty remarked:

‘While we try to avoid suggesting a hierarchy of human rights, it is necessary to acknowledge the exceptional significance of freedom of expression – at once a crucial right in itself and also necessary for the enjoyment of so many other rights, be they civil, political, economic social, or cultural. It is truly a “meta-right”.’

During the first reading by the Human Rights Committee of the draft General Comment No. 34, there was much debate on the relationship between the right of freedom of opinion and expression and the other rights enumerated in the ICCPR and also on whether freedom of expression and opinion were the cornerstones for any society or solely for those which were free and democratic.

The Committee’s General Comment No. 34 stated:

‘Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone of every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.’

On the relationship between the right of freedom of opinion and expression and other rights enumerated in the ICCPR, General Comment No. 34 also expressed the view:

‘Among the other articles that contain guarantees of freedom of opinion and/or expression, are articles 18, 17, 25 and 27 [sic]. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the right of assembly and association, and the exercise of the right to vote.’

As to the scope of the term “freedom of expression”, the General Comment stated, that freedom of expression includes:

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57 ibid para 4

Note: Articles 17, 18, 25 and 27 of the ICCPR respectively relate to the right to privacy, family, home and correspondence, and protection of honour and reputation; freedom of thought, conscience and religion; the right to take part in the conduct of public affairs and to vote in elections; the right of minorities to enjoy their own cultures, to profess and practice their own religion and to use their own language. International Covenant on Civil and Political Rights, Arts. 17, 18, 25 and 27 <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 04 April 2016
‘...political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.’

As well as the reference to the role of journalism, the reference to “cultural and artistic expression” and indeed, “commercial advertising”, have a particular relevance to photographers. Furthermore, according to the General Comment, Article 19(2) protects all forms of expression including:

‘said, written and sign language and such non-verbal expression as images and objects of art.’

Again, one need hardly point out the special relevance for photographers of the relevance to “images and objects of art”. The General Comment defined “means of expression” as:

‘Means of expression includes books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.’

The General Comment also reflected the central importance of freedom of expression to the media by stating:

‘A free, uncensored and unhindered press and other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function...’

The right of freedom of information as a corollary to the right of freedom of expression was also referred to in General Comment No. 34, which stated that the right of access to information controlled by public bodies comes within the meaning of Article 19(2) of the ICCPR. Any restriction placed on the right of freedom of expression in accordance with Article 19(3) of the ICCPR “may not put in jeopardy the right itself”. The General Comment also stated, that there is a duty on States parties to implement measures to protect those who exercise their right of freedom of expression and it makes specific reference to the need to protect the rights of journalists. While a State party...

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59 ibid para 12
60 ibid
61 ibid para 13
62 ibid para 18
63 ibid para 21
64 ibid para 23
may, in accordance with Article 19(3)(a) of the ICCPR, restrict the right of freedom of expression in order to protect the rights and reputation of others, the General Comment stated that the use of the term “rights” in Article 19(3)(a) includes ‘human rights as recognized in the Covenant and more generally in international human rights law’. An example of such a restriction is where the right of freedom of expression is restricted to protect one’s right to privacy – a right granted under Article 17 of the ICCPR. In respect of the other ground provided for under Article 19(3)(b) of the ICCPR for the restriction of the right of freedom of expression, namely the protection of national security, of public order or of public health or morals, the General Comment was of the view:

‘It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.’

Any restrictions on the right of freedom of expression by States parties must be provided for by law and they must be “necessary” for a legitimate purpose and ‘proportionate to the interest to be protected’. Also, there is a duty on States parties to ensure that such restrictions are proportionate not only in the laws providing for such restrictions, but also in the administrative and judicial applications of such restrictions. Where a state party applies a restriction on the right of freedom of expression, there is a requirement on it to show ‘a direct and immediate connection between the expression and the threat’. The drafters of the General Comment comprehended that in certain circumstances it may be necessary to restrict the freedom of journalists to report on certain events or from certain places as a consequence of the implementation of journalist accreditation systems by event organisers. However, the General Comment stated that any systems for the licensing of journalists by States parties are incompatible with the provisions of Article 19(3) of the ICCPR. One of the cornerstones of journalism is the right to one’s sources of information and the General Comment noted, that States parties should respect this limited privilege as a constituent element of journalists’ right of freedom of expression. The General Comment also pointed-out that the organs of the media through which people express their opinions and freedom of expression have developed and diversified in recent years and that:

‘States parties should take account of the extent to which developments in information and communications technologies, such as the internet and mobile based electronic information...

65 ibid para 28
68 ibid para 33
69 ibid para 34
70 ibid
71 ibid para 35
72 ibid para 44
73 ibid para 45
dissemination systems, have substantially changed communication practices around the world."  

In view of the fact that communications technologies have substantially developed and expanded since the time of the adoption of the ICCPR, it is interesting to note that subsequent to the publication of General Comment No. 34, the United Nations Human Rights Council in July 2012 adopted Resolution No. 20/8, which concerned freedom of expression online and the right to enjoy the same rights online as those enjoyed offline. Article 1 of that resolution stated that the Human Rights Council:

‘Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;’

Closely linked to the right of freedom of expression are the rights granted through Article 15 of the ICESCR, which deals with socio-economic rights. Under Article 15, which has a clear significance for photographers:

‘(1) The States parties to the present Covenant recognize the right of everyone:
   (a) to take part in cultural life;
   (b) to enjoy the benefits of scientific progress and its applications;
   (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

(2) The steps to be taken by the States Parties to the present Covenant to achieve full realization of this right shall include those necessary of the conservation, the development and the diffusion of science and culture.

(3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

(4) The State Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.’

The United Nations’ Committee on Economic, Social and Cultural Rights addressed the right to take part in cultural life in its General Comment No. 21 of 2009 on Article 15(1)(a). The General
Comment stated, that the right to participate or take part in cultural life embraces three elements, namely participation, access and contribution to cultural life. On one’s participation in cultural life, having stated that participation in cultural life may be undertaken either alone, in association with others or as a community, the Comment went on highlight that:

‘Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.’

In relation to one’s access to cultural life, the General Comment noted:

‘Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication…’

On one’s right to contribute to cultural life, the General Comment stated that everyone has the right to:

‘…be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.’

By definition, these three, above-mentioned elements of the right to participate in cultural life require that everyone has a right of freedom of expression. General Comment No. 17 of the Committee on Economic, Social and Cultural Rights on Article 15(1)(c) of the ICESCR concerns the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. In this General Comment, in 2005, the Committee made an important differentiation between the human right granted under Article 15(1)(c) and intellectual property rights granted under other international intellectual property treaties and national intellectual property legal regimes. The Committee expressed the view that:

‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1 (c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as

79  ibid para 15
80  ibid para 15(a)
81  ibid para 15(b)
82  ibid para 15(c)
the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.\(^83\)

The Committee’s Comment goes on to state:

‘…In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person.’\(^84\)

The distinction is important both in theory and in the realisation of human rights, although as we shall see in Chapter (2), the more limited intellectual property rights are of considerable, practical importance on a day-to-day basis for photographers and others.

1.3.2) Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

Established in 1949, the Council of Europe is the largest human rights organisation in Europe.\(^85\) It currently comprises 47 member states of which 28 are also members of the European Union.\(^86\) As a member of the Council, Ireland is a signatory to, and has ratified,\(^87\) its 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended.\(^88\) Among the provisions of the Convention, \(^89\) Article 10 guarantees the right of freedom of expression.\(^90\) However, the rights provided under Article 10 are not absolute rights. Also, Article 19 of the Convention provided for the establishment of a European Court of Human Rights (hereinafter ECtHR), whose function is to ensure through its judgments in the cases that come before it that the contracting parties observe their duties and responsibilities under the terms of the Convention.\(^91\) The provisions of this Convention have been incorporated into Irish law, at a sub-constitutional level, through the

\(^{83}\) Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, General Comment No. 17: Article 15(1)(c) – Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, introduction and basic principles para 2 (E/C.12/GC/17), (Geneva, 12 January 2006) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> accessed 04 April 2016

\(^{84}\) ibid para 2


\(^{86}\) Council of Europe, About Us, Who we are <www.coe.int/en/web/about-us/who-we-are> accessed 04 April 2016

\(^{87}\) Council of Europe, Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms Status as of 03/04/2016 <www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=e3Cc9qy8> accessed 03 April 2016


\(^{90}\) ibid art 10

\(^{91}\) ibid art 19
European Convention on Human Rights Act 2003. Article 10(1) of the ECHR enshrines the right of freedom of expression:

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’

It is noticeable, that while the latter part of Article 10(1) makes provision for the licensing of specified forms of media, it does not do so in respect of the print media, which in 1950s Europe would have been the dominant sector of communications media, but mainly in private hands rather than the responsibility of, and subject to, licensing by the State. However, the freedom of expression through the print media is not without restriction. Like other organs of the media, the print media may be subject to any restrictions, which States Parties may impose in accordance with Article 10(2):

‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

The key elements of Article 10(2) and its implications for photographers will be discussed in detail in Chapter (3). There is an onus on the Irish Courts while they are interpreting Irish law to take cognisance of the provisions of the Convention and to aim to be compatible with them. Decisions of the ECtHR are highly persuasive but are not binding on the Irish Courts. However, under Section 4 of the 2003 Act the Irish courts must take due cognisance of, among other matters, the decisions of the ECtHR. The ECtHR has deliberated in many cases upon the Article 10 right of freedom of expression and three seminal cases, namely Handyside v The United Kingdom, The Sunday Times v The United Kingdom and Müller et al. v Switzerland, are worthy of mention at this juncture, as they raised important issues relating to the right of freedom of expression. In Handyside, the ECtHR discussed the scope of the right to exercise the right of freedom of expression and whether such a

92 European Convention on Human Rights Act 2003
93 ibid schedule 1, art 10(1)
94 ibid schedule 1, art 10(2)
95 ibid s 2(1)
96 ibid s 4
97 Handyside v The United Kingdom 1 EHRR 737
98 The Sunday Times v The United Kingdom [1979] ECHR 1
99 Müller et al. v Switzerland App no 10737/84 (ECtHR, 24 May 1988)
right included expressions, which were not favourably received either by a State or a section of the general public. The Court held:

‘Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.’

In *The Sunday Times*, the Court, in dealing with the invocation of an interference with the right of freedom of expression, held:

‘It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.’

In *Müller*, the Court dismissed the applicants’ claim that the Swiss court in ordering the confiscation of Müller’s paintings and the imposition of a conviction and fine on the applicants for publishing obscene materials at their public exhibition had breached their Art. 10 right. However, in reaching this decision the Court confirmed that “artistic expression” does come within the meaning of “freedom of expression” in Art. 10(1) of the Convention. The Court held that the “broadcasting, television or cinema enterprises” referred to in Art. 10(1) were “…media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19(2) of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas “in the form of art.” But, the Court went on to state that artists were not immune from the limitations that may be imposed on the right of freedom of expression in accordance with Art. 10(2) of the Convention.

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100 *Handyside v The United Kingdom* EHRR 737, para 49
101 *The Sunday Times v The United Kingdom* [1979] ECHR 1, para 65
102 *Müller et al. v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) paras 37 and 44
103 *ibid* para 27
104 *ibid* para 34
From the above example cases, it is clear that photography comes within the scope of Article 10 of the ECHR and that it enjoys the same rights and is subject to the same limitations as other media and forms of expression. This topic will be discussed in detail in Chapter (3) and Chapter (4).

1.3.3) Charter of Fundamental Rights of the European Union

As a result of Ireland becoming a member of the European Union (formerly known as the European Economic Community), a large body of E.U. law has become part of Irish law. Directives, regulations and decisions of the European Union have legal effect in Ireland. This has resulted in additional EU-related rights being made available to Irish citizens, such as the right to freedom of movement. The Lisbon Treaty of the European Union came into force in December 2009 and as a result the Charter of Fundamental Rights of the European Union ‘was given binding legal effect equal to the Treaties of the European Union.’ The preamble to the Charter of Fundamental Rights of the European Union states that it “…reaffirms with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters as adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.’

On freedom of expression, Article 11 of the Charter states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.

Article 11 of the Charter does not itself place any restrictions on the right of freedom of expression. However, this right is not absolute and is subject to limitation, as Article 52 of the Charter provides for the limitation of rights granted by the Charter. But, any limitations implemented must meet the criteria specified in Article 52(1):

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limits may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

105 Official Journal of the European Union, Charter of Fundamental Rights of the European Union


106 ibid preamble

107 ibid Art 11(1)

108 ibid Art 52(1)
The Council of the European Union in its 2014 “EU Human Rights Guidelines on Freedom of Expression Online and Offline” highlighted the significance of the right of freedom of expression:
‘Freedom of opinion and expression are essential for the fulfilment and enjoyment of a wide range of other human rights, including freedom of association and assembly, freedom of thought, religion or belief, the right to education, the right to take part in cultural life, the right to vote and all other political rights related to participation in public affairs. Democracy cannot exist without them.”

The Guidelines make specific mention of freedom of artistic expression and state:
‘Freedom of expression, including artistic expression, is essential for the development and manifestation of individuals' identities in society.’

The Guidelines also drew attention to both the need for, and the importance of, a free and independent media so as to protect the right of freedom of opinion and expression:
‘Free, diverse and independent media are essential in any society to promote and protect freedom of opinion and expression and other human rights...Without freedom of expression and freedom of the media, an informed, active and engaged citizenry is impossible.’

While recognising that the right to freedom of opinion and expression is not an absolute right and may be subject to restriction, Annex (1) to the Guidelines highlighted a range of actions and activities that would undermine the enjoyment of the right of freedom of opinion and expression and the use of which the Council opposes. For example, the Council opposes any attacks on people, particularly journalists, solely because of their practising their right of freedom of expression. The Council states that any restrictions imposed on the right must be provided for in law; they must be necessary and proportional to their aims. In relation to defamation legislation, such should not be used for the purpose of restricting criticism or debate on public issues. Similarly, national security laws and particularly those relating to anti-terrorism must conform to international human rights law.

On the use of blasphemy laws to restrict freedom of expression, the Guidelines state that the EU recommends the decriminalisation of blasphemy. The Guidelines also state that legislation concerning “hate speech” – a term, which according to the Guidelines, does not have a universally accepted definition under international law – should not be misused to prevent debate on topics of public interest. In relation to the right of freedom of expression “online”, the Guidelines make specific mention of the restriction of access to the internet by operators and that such should only be undertaken in limited circumstances and in conformity with legislation (for example, legislative

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110 ibid para 2
111 ibid para 3
112 ibid para 4
113 ibid annex 1
provisions concerning child pornography) or court orders.\textsuperscript{114} According to the Guidelines, the restriction of access to websites for the purpose of the protection of intellectual property rights, and specifically copyright protected materials, could amount to a ‘disproportionate restriction’ and that any such restriction ‘must comply with the three part cumulative test…’\textsuperscript{115} In keeping with the principles of legal certainty, predictability and transparency; legitimacy, and necessity and proportionality, this three part cumulative test holds that any restrictions imposed must:

‘(1) …be provided for by law, which is clear and accessible to everyone…
(2) …pursue one of the purposes set out in article 19.3 ICCPR, i.e. to protect the rights or reputations of others; to protect national security, public order or public health or morals…
(3) be proven necessary and as the least restrictive means required and commensurate with the proposed aim…’\textsuperscript{116}

On the relationship of the right to privacy and data protection with the right of freedom of expression, the Guidelines stated:

‘Illegal surveillance of communications, their interception, as well as the illegal collection of personal data violates the right to privacy and the freedom to hold opinions without interference and can lead to restrictions on freedom of expression.’\textsuperscript{117}

It is evident from these Guidelines that freedom of expression is recognised as being a necessity for members of society to enjoy their other human rights. Freedom of expression includes the sub-set of artistic expression, which includes photography. Photographers enjoying their rights of freedom expression and of artistic expression may be subject to limitations being placed on those rights. Any limitations placed on the enjoyment of these rights by photographers must be in compliance with the above-mentioned three-part test. Chapter (3) and Chapter (4) will discuss the application of this test in practice.

1.3.4) Rights under Intellectual Property Conventions and Treaties
Ireland has ratified a number of intellectual property conventions and treaties, namely the Berne Convention for the Protection of Literary and Artistic Works,\textsuperscript{118} the World Intellectual Property Organisation (WIPO) Copyright Treaty\textsuperscript{119}, and the World Trade Organisation’s Agreement on Trade-
related Aspects of Intellectual Property Rights (TRIPS).\textsuperscript{120} As the rights granted under these conventions and treaties which pertain to photographers and photograph publishers concern rights under copyright law, they will be discussed in Chapter (2), which exclusively examines “Photographers’ and Photograph Publishers’ Rights under Copyright Law”.

1.3.5) Rights under the Constitution of Ireland

1.3.5.1) Freedom of Expression

In 1937, the people of Ireland enacted the current Constitution of Ireland. It is the fundamental law of the land and is superior to any laws enacted by the Oireachtas. Articles 40–44 of the Constitution deal with fundamental rights. Some, but not all, fundamental rights are specifically mentioned in the Constitution. Those that are specified are grouped under the following categories: Personal Rights, The Family, Education, Children, Private Property and Religion.\textsuperscript{121} Of the personal rights specified in the Constitution, the right of freedom of expression is the one most pertinent to the topic of this thesis. The Constitution does not explicitly include a legal right to either take or publish a photograph. These rights are, however, provided through the constitutional rights of freedom of expression and freedom of communication. The Constitution expressly guarantees the right of freedom of expression and of the press under Art. 40.6.1\textsuperscript{º}. However, these rights are not unqualified and they may be restricted.\textsuperscript{122} Article 40.6.1\textsuperscript{º}(i) of the Constitution states:

‘The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

(i) The right of the citizen to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.’\textsuperscript{123}

Writing in 2008 on the drafting of Article 40.6.1\textsuperscript{º}, Hogan was of the view that:

‘...while the drafters were anxious to preserve the substance of the right of free speech, they had little enthusiasm for (what they would have considered) extreme versions of free

\textsuperscript{120} World Trade Organisation, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) <www.wto.org/english/tratop_e/trips_e/ehtrips_e/trips_e.htm#1> accessed 04 April 2016
\textsuperscript{121} Constitution of Ireland (Arts. 40-44) (on Fundamental Rights)
\textsuperscript{122} Constitution of Ireland (Art. 40.6.1\textsuperscript{º}) (on Personal Rights)
\textsuperscript{123} Constitution of Ireland (Art. 40.6.1\textsuperscript{º}(i)) (on Freedom of Expression)
speech, whether it be matters touching on morality as pornography on the one hand or apologies for violence uttered by members of illegal organisations on the other.”

Interestingly, the only offence specified within the Constitution is the above-mentioned offence of “the publication or utterance of blasphemous, seditious or indecent matter”. As noted by the 2008 First Report of the Houses of the Oireachtas Joint Committee on the Constitution, while Article 40.6.1º(i) respects the rightful liberty of expression by organs of public opinion including the press, it appears that it is more concerned with the State ensuring that such organs of public opinion are not used to undermine public order, morality or the authority of the State. As will be discussed further below, the Irish Superior Courts have held that the rights of freedom of expression and of the press under Article 40.6.1º(i) apply not only to the expression of opinions, but also to the expression and communication of facts and information. Opinions, facts and information may be expressed or communicated through photographs. Article 40.6.1º(i) is open-ended rather than being exclusive in its express reference to ‘organs of public opinion, such as the radio, the press, the cinema’ – the means of mass communication at the time of its writing (1937). Thus, more modern means of mass communication, such as television, the internet and its social media sub-platforms, would all come within the Article’s meaning of organs of public opinion.

As the constitutional right of freedom of expression is not an absolute right, it may be restricted either by laws or by the courts. McGonagle, writing in 2003, on the restriction of this right by the courts expressed the view:

‘...until recently, the courts did not pay much attention to the guarantee of freedom of expression, particularly in the media context. Other rights were allowed to take precedence over it. Long-standing common-law rules, such as defamation and contempt, were allowed to continue to operate unperturbed. There were relatively few instances of the courts invoking Article 40.6.1º(i) in support of media freedom.’

The Irish Supreme Court case of *The State (at the prosecution of Seán Lynch) v Cooney and The Attorney General* was the first case in which the constitutional right to free speech was deliberated upon by the superior courts. In *Lynch*, the prosecutor, who was a member of the political party Sinn Féin and a candidate in the February 1982 General Election, had been invited by RTÉ (the national radio and television broadcaster in Ireland) to participate in radio and television broadcasts prior to the Election. The Minister for Posts and Telegraphs issued a ministerial order under Section 31(1) of

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126 Constitution of Ireland (Art. 40.6.1º(i)) (on Freedom of Expression)
127 Note: This topic will be discussed in detail in Chapter (3) and Chapter (4).
129 *The State (at the prosecution of Seán Lynch) v Cooney and The Attorney General* [1982] 1 IR 337
the Broadcasting Authority Act 1960 prohibiting such broadcasts\(^{130}\) and the prosecutor sought to have that order quashed on the grounds that it contravened his constitutional right of freedom of expression under Article 40.6.1º(i). In Lynch, O’Higgins CJ stated that the second paragraph of Article 40.6.1º(i), as quoted above, placed an obligation upon the State to ensure that organs of public opinion are not used to undermine the authority of the State.\(^{131}\) In refusing to grant the requested order O’Higgins CJ held:

‘…The broadcast, whatever its content, was intended to seek and rally support for the Sinn Féin organisation. On the basis of the information which he had, it cannot be doubted that the Minister had cogent grounds for believing that Sinn Féin aimed at undermining the authority of the State. Therefore, any broadcast which sought support for such an organisation could properly be regarded by him as being likely to promote or incite to crime or to tend to undermine the State’s authority…A democratic State has a clear and bounden duty to protect its citizens and its institutions from those who seek to replace law and order by force and anarchy, and the democratic process by the dictates of the few. In my view, it is abundantly clear that the Minister was not only justified in forming the opinion that he did form but that he could not have formed any other.\(^{132}\)

The decision of the Court to restrict the right of freedom of expression in the case of Lynch was made in support of the authority of the State during a period of political violence in Northern Ireland. The publication, particularly the broadcasting, of photographs during that period could also be restricted if they were deemed to be likely to promote or incite crime or to undermine the authority of the State.\(^{133}\) Since then, decisions of the courts have gradually given more recognition to the positive role of freedom of expression and of the media in a democratic society and have been increasingly influenced by Article 10 of the ECHR. As mentioned above, the ECHR was finally incorporated into Irish law by the European Convention on Human Rights Act 2003.

1.3.5.2) The Right to Communicate

The creation and publication of photographs is one of a number of methods through which one may communicate personal ideas and beliefs or information to other members of society. But, does one have a legal right to communicate? Is the right to communicate an integral element of the right of freedom of expression or is it a separate right? The personal right to communicate was one of the issues raised in 1983 in the Irish High Court case of A.G. v Paperlink Ltd.\(^{134}\) In Paperlink, Costello J differentiated the right of freedom of expression from the right to communicate and he held:

‘But the activity which the defendants say is inhibited in this case is that of communication by letter and as this act may involve the communication of information and not merely the expression of convictions and opinions I do not think that the constitutional provision dealing

\(^{130}\) The State (Lynch) v Cooney [1982] 1 IR 337, 357

\(^{131}\) ibid 360

\(^{132}\) ibid 365–366

\(^{133}\) Broadcasting Authority Act 1960, s 31 as amended by Section 16 of the Broadcasting Authority (Amendment) Act 1976

\(^{134}\) A.G. v Paperlink Ltd. [1983] ILRM 373
with the right to express convictions and opinions is the source of the citizen’s right to communicate. I conclude the very general and basic human right to communicate which I am considering must be one of those personal unspecified rights of the citizen protected by Article 40.3.1°.135

The recognised constitutional right to communicate is not an absolute right and it may be restricted by the State. In Paperlink Costello J went on to hold that the State may, through laws, restrict either the ‘…nature of the matter communicated’…or…the ‘mode of communication’.136 The right to communicate was also raised in the later Irish Supreme Court case of The Irish Times v Ireland.137 In The Irish Times, Barrington J held that Article 40.6.11(i) guaranteed a right to citizens to communicate facts and to impart information as well as to express their opinions. In The Irish Times, Barrington J stated:

‘A constitutional right which protected the right to comment on the news but not the right to report it would appear to me to be a nonsense. It therefore appears to me that the right of the citizens “to express freely their convictions and opinions” guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them.’138

Barrington J went on to state that the recognised constitutional rights of freedom of expression and of communication ‘…may overlap and may be complimentary.’ and that the former right is ‘…primarily concerned with the public statements of the citizen.’139 These two constitutional rights may come into contention with other constitutionally-guaranteed personal rights.

1.3.5.3) Freedom of Expression, the Right to Communicate and the Public Interest
While Chapter (3) and Chapter (4) will examine in detail how the courts have restricted or may restrict the right of freedom of expression and specifically the legal rights of photographers and photograph publishers, the following sample cases highlight a number of specific issues in respect of the right of freedom of expression, which are relevant to photographers. First of all, the courts must take the public interest into account, when they are balancing competing rights. In the Irish Supreme Court case of National Irish Bank Ltd. v Radio Telefís Éireann,140 a majority of the Court held:

135  ibid para 31
136  ibid para 32
137  The Irish Times v Ireland [1998] 1 IR 359
138  ibid 404
139  ibid 405

Note: While referencing the decision in The Irish Times v Ireland in relation to the right of freedom of expression and right of communication under Article 40.6.11 of the Constitution, Hogan and Whyte suggested that the courts had begun to ‘…consider the content of the guarantee, as opposed to the various restrictions on its scope’.
‘...there is a public interest in defeating wrongdoing and where the publication of confidential information might be of assistance in defeating wrongdoing then the public interest in such publication could outweigh the public interest in the maintenance of confidentiality.’\textsuperscript{141}

Although a hierarchy of constitutionally-guaranteed personal rights is not favoured by the courts as a means of balancing conflicting rights, in the Irish High Court of \textit{M.M. v Drury},\textsuperscript{142} which, among other matters, concerned the photographing and publication of children without parental consent, the Court drew attention to the strength of the explicit guarantee of freedom of expression in the Constitution. In \textit{M.M.}, O’Hanlon J, while refusing to grant an interlocutory injunction, stated:

‘In the present case the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly-expressed guarantees in favour of freedom of expression in that document.’\textsuperscript{143}

The issue of whether the media is required to prove a “public interest” justification for the publication of a news story or a photograph in order to invoke its right of freedom of expression and whether the media’s right to exercise that right is confined to stories of worth were raised in the Irish Supreme Court case of \textit{Mahon v Post Publications}.\textsuperscript{144} In \textit{Mahon}, Fennelly J stated in relation to the public interest:

‘The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest. I have no doubt that much of the material which appears in the news media serves no public interest whatsoever. I have equally no doubt that much of it is motivated, and perfectly permissibly so, by the pursuit of profit. Publication may indeed be prompted by less noble motives. So far as the facts of the present case are concerned, the decision of Mr. O’Kelly to publish the names of three T.Ds in direct defiance of the wishes of the tribunal was disgraceful and served no identifiable public interest. On the other hand, that does not mean that it was unlawful.’\textsuperscript{145}

It should be noted that prior to the \textit{Mahon} case, the Irish Court of Criminal Appeal in the 2003 case of \textit{The People v Catherine Nevin}\textsuperscript{146} considered the above-mentioned point of the publication of material by the media which serves no public interest. Although it dismissed the appeal, the Court in \textit{Nevin} held that ‘there were circumstances in which a trial would be stopped on grounds of adverse

\textsuperscript{141} ibid 494
\textsuperscript{142} \textit{M.M. v Drury} [1994] 2 IR 8
\textsuperscript{143} ibid
\textsuperscript{144} \textit{Mahon v Post Publications} [2007] IESC 15
\textsuperscript{145} ibid para 86
\textsuperscript{146} \textit{The People (at the suit of the Director of Public Prosecutions) v Catherine Nevin} [2003] 3 IR 321
media publicity.' In Nevin, it was stated that the trial judge had banned specific newspapers from publishing photographs of, and commentary on, the applicant’s ‘….hairstyle, dress, jewellery, nail varnish, reading matter or demeanour in court.’ Geoghegan J held: ‘The judge quite rightly ruled that the applicant’s right to a fair trial far outweighed the media’s right to comment.’ As to whether or not the right of freedom of expression was limited to publications of worth, Fennelly J in Mahon stated:

‘The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works. The undoubted fact that news media frequently and implausibly invoke the public interest to cloak worthless and even offensive material does not affect the principle.’

This viewpoint of Fennelly J would apply equally to the publication of photographs. The right to publish photographs that were taken in a public street featured in the Irish High Court of Hickey v Sunday Newspapers Ltd. In finding for the defendant newspaper, Kearns P held that there is ‘…an inherent illogicality in asserting rights to privacy over material which is already in public circulation and which was, I would add in this case, notoriously so.’ Having not been provided with any convincing evidence which would tilt the balancing of the competing rights in favour of the plaintiff, Kearns P stated:

‘Were I to hold otherwise, it would represent a radical ratcheting up of the right to privacy at the expense of the right of freedom of expression to a degree which, in my view, should more properly be the subject matter of legislation.’

Furthermore, on the issue of the legal right to take photographs of people in public places and to publish them as elements of news stories, Kearns P also stated:

‘A finding in favour of the plaintiffs would also give rise to a situation where a newspaper might feel itself inhibited from publishing a photograph of any public person attending, for example a funeral, or leaving or entering a court building or polling station. In any of these situations it is not difficult to imagine circumstances where a claimant could invoke some consideration of privacy.’

The issue of the granting of a prior restraint of publication of a news story and thus the restricting of the right of freedom of expression at an interlocutory stage was central to the 2010 Irish High Court case of Murray v Newsgroup Newspapers. In Murray, a case concerning the publication of images...
of a convicted sex offender, Irvine J held that for a prior restraint to be granted at the interlocutory stage the applicant must present the court with a “convincing case” that the prohibition sought is “likely” to be granted by a trial court. In order to do so, Irvine J held that:

‘...the applicant must show that the interference with freedom of expression sought is justified by one of the recognised exceptions to that right and that the proposed restriction will be proportionate to the aim to be achieved.’ Furthermore, the onus is on such an applicant to convince the court that the balance of convenience lies in his favour when seeking a prior restraint of publication order.

1.3.5.4) Personal Rights

On Personal Rights, Article 40.3.1 of the Constitution states: ‘The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.’ In addition, Article 40.3.2 provides:

‘The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.’

The use of the words “in particular” in Article 40.3.2 signals that other rights are also contemplated and the courts have used them to identify other rights including a right to privacy and a right to earn a living. The fact that the right of freedom of expression is not an absolute right and that it may have to give way to other constitutionally-guaranteed personal rights was to the fore in the Irish Supreme Court case of Proinsias De Rossa v Independent Newspapers Plc. In De Rossa, Hamilton CJ stated:

‘...it is accepted that the right of freedom of expression enjoyed by the press is not absolute and is subject not only to the restrictions contained in the said Article but must also be considered in the light of the provisions of Article 40.3.1.’

Hamilton CJ further stated, illustrating the courts’ preference for a “due balancing” of rights rather than a hierarchy as such:

156 ibid para 68
157 Note: The ‘recognised exceptions’ to the right of freedom of expression as referred to by Irvine J in Murray are specified by Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

158 Murray v Newsgroup Newspapers Limited [2010] IEHC 249, para 68
159 ibid para 85
160 ibid (Art. 40.3.1) (on Personal Rights)
161 ibid (Art. 40.3.2)
162 Proinsias de Rossa v Independent Newspapers Plc [1999] 4 IR 432
163 ibid 449
The exercise of such right is subject however to the provisions of the Constitution as a whole and in particular the provisions of Article 40.3.1° and 40.3.2° which require the State by its laws to protect as best it may from unjust attack, and in the case of injustice done to vindicate the good name of every citizen. Neither the common law nor the Constitution nor the Convention give to any person the right to defame another person. The law must consequently reflect a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name.

The implication of the Court’s decision in *De Rossa* for publishers of photographs is that they must be mindful of the constitutionally-guaranteed personal rights of others, when they are deciding whether or not to publish a particular photograph.

Many unenumerated, fundamental rights – those personal rights which are not specifically mentioned in the Constitution – have been identified and confirmed to exist by the courts, by reference to the use of the words “in particular” in setting out specific personal rights in Article 40.3.2°. For example, a right to marital privacy was established by the Irish Supreme Court in the 1973 case of *McGee v Attorney General*. In the 1987 case of *Kennedy and Arnold v Ireland*, which involved the tapping by the government of two journalists’ private telephones, the Irish High Court recognised the right to personal privacy in one’s telephone conversations as being another unenumerated personal right under the Constitution.

Under Article 43.2 of the Constitution: ‘The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.’ However, Article 43 recognises that the “exercise of the rights guaranteed by it ‘...ought, in civil society, to be regulated by the principles of social justice.’ Consequently, Article 43 of the Constitution makes provision for the State to place limitations on the exercise of the private property rights guaranteed by Article 43 for the purpose of ‘...reconciling their exercise with the exigencies of the common good.’ Copyright, which is a right of central importance to photographers, was recognised as a property right by the Irish High Court, in 1994, in the case of *Phonographic Performance (Ireland) Limited v William Austin Cody and Princes Investments Limited*. In *Phonographic Performance*, Keane J held:

‘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...’

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164 Proinsias de Rossa v Independent Newspapers Plc [1999] 4 IR 432, 456
165 McGee v Attorney General [1974] IR 284
166 Kennedy and Arnold v Ireland [1987] IR 587 (HC), 593
167 Constitution of Ireland (Art. 43.2) (on Private Property)
168 ibid Art. 43.2.1°
169 ibid Art. 43.2.2°
171 ibid 511
As shall be discussed in Chapter (2), an artistic work is defined by the CRRA as including a photograph.

1.3.6) Photographers’ and Photograph Publishers' Statutory Rights
Since the State gained its independence from the United Kingdom in 1922, the Oireachtas has passed a wide range of statutes designed to create and/or protect both legal and statutory personal rights. Recent examples of such are the Copyright and Related Rights Act 2000, as amended; the Defamation Act 2009, as amended, the Non-Fatal Offences Against the Person Act 1997, as amended (Section 10 of which deals with “harassment and the interference with one’s personal privacy”) and the Data Protection Acts, 1998–2003, as amended. No statute of the Oireachtas grants one either a specific or a general legal right to create a photograph. However, the right of freedom of expression is recognised in Irish statute law the European Convention on Human Rights Act 2003, as amended, which incorporates the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms into Irish law at a sub-constitutional level. If individuals have the statutory right of freedom of expression and to exercise that right through the publication of photographs, then, by definition, they must also have an implied statutory right to create photographs for such publications. Freedom of expression is also recognised indirectly through the Defamation Act 2009, as amended. Section 44 of the Act made provision for the legal recognition of the Press Council of Ireland as the Press Council in Ireland and Schedule 2 of the Act specified the minimum requirements for such a body. Under Schedule 2, the first expressed principal object of the Press Council is for it “…to ensure the protection of the freedom of expression of the press.” The Copyright and Related Rights Act 2000, as amended, confers a wide range of legal rights on both the authors of photographs and photograph publishers. Consequently, copyright law will be examined in detail in Chapter (2).

1.3.7) Common Law Right to Take Photographs
Either one or more than one person may be involved in taking a photograph and publishing it. In practical terms and from a legal perspective they are two separate activities and it is important to highlight this distinction. Since the public became fascinated with photography in the latter part of the 19th century, it had been generally understood, that there was a common law right to take a photograph in a public place or a place to which the public is admitted without any restrictions being placed upon such admittance. The common law right to take a photograph was recognised in 1916 in English High Court case of Sports and General Press Agency Limited v “Our Dogs” Publishing Company Limited. In Sports and General, Horridge J held:

172 Note: In Ireland, there is no statute which specifically grants a general right to personal privacy. To a large extent, the Data Protection Acts 1998–2003, as amended, have become a surrogate Privacy Act.
174 Defamation Act 2009, s 44
175 ibid schedule 2
176 ibid schedule 2, s 2
‘In my judgment no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful. Those rights do not exist.’

Horridge J went on to conclude:

‘As, therefore, the Ladies’ Kennel Association had no exclusive right to take photographs – as distinguished from their means of obtaining the right by virtue of their possession of the land – I do not think they could grant, as property, the exclusive photographic rights as they purported to do by their agreement with Fall. In my view, therefore, the plaintiffs have no right of property which the defendants have knowingly infringed, and this action fails and must be dismissed with costs.’

On the questions of one having a sole right to take photographs and on taking a photograph of one property from another property, Horridge J stated:

‘It is quite true that, as they were in possession of the spot where it would probably be convenient to place the camera for the purpose of photographing, they had the advantage, so far as the land in their possession was concerned, of being the only persons who could conveniently take photographs, but that is a very different thing from saying that they had the sole right to photograph anything inside the show. If any person were to be in a position, for example from the top of a house, to photograph the show from outside it, the association would have had no right to stop him.’

On appeal, the Court of Appeal, in confirming the above-mentioned decision of Horridge J, held that the right to take photographs on a piece of property was not part of the property rights attached to that property. However, the right to take photographs could be made subject to a contract of admission to the property. In Sports and General, Swinfen Eady LJ held:

‘In my opinion it is not accurate to speak of the right of taking photographs as property. No doubt the Ladies’ Kennel Association had the grounds for the day, and also the right of allowing those persons to enter of whom they approved and excluding those of whom they did not, and that right carried with it the right of laying down conditions binding on the parties admitted; it might be a condition that they should not use cameras or should not take photographs or make sketches. But they did not lay down any such conditions; that was not the position taken up. Baskerville was admitted to the show and took photographs of the dogs exhibited; there was no contract between him and the Ladies’ Kennel Association; indeed, it is not suggested that there was any breach of contract on his part. The answer to the plaintiffs’ argument is that they could have acquired by contract such a right as they claim, and that they failed to do so.’

178 ibid para 884
179 ibid
180 ibid
As a consequence of this judgment, it has become common practice for the promoters of events taking place on privately-owned properties, that are open to the public through the purchase of an admission ticket, to include a term in their contract of admission contained on the admission tickets, which prohibits admitted people from taking photographs within the event’s venue without prior approval of the event organisers. Also, when event organisers are granting sole photography rights to photographers, it is common practice to do so via a written contract.

In the English High Court case of Bernstein of Leigh (Baron) v Skyviews and General Ltd.,182 (a trespass and invasion of privacy case involving aerial photography), it was held that there is no law, which, in general, prevents the taking of a photograph. However, as will be shown in Chapter (3) and Chapter (4) of this thesis a range of legal mechanisms, rights and interests may either restrict or prohibit one from taking photographs either in public and private places. In Bernstein, while dealing with the issue of one’s right to the airspace above one’s land Griffiths J rejected the maxim “cujus est solum ejus est usque ad coelum et ad inferos” (to whomever the soil belongs, he owns also to the sky and to the depths)183 and he stated:

`if applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden.”184

Griffiths J went on to state:

`The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public.”185

Having held that the defendant’s aircraft did not infringe the plaintiff’s rights in his airspace and therefore did not commit a trespass, Griffiths J stated:

`The plaintiff’s complaint is not that the aircraft interfered with the use of his land but that a photograph was taken from it. There is, however, no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff’s air space into one that is a trespass.”186

In general, the over-flight of an aircraft for the purpose of taking a once-off aerial photograph, as opposed to undertaking continuous aerial photography, would not amount to an harassment and an actionable nuisance. However, one should not take as a given, that the judgement in Bernstein

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182 Bernstein of Leigh (Baron) v Skyviews and General Ltd. [1978] QB 479
183 Henry Campbell Black, Black’s Law Dictionary (3rd edn, West Publishing Co. 1933) 487
184 Bernstein of Leigh (Baron) v Skyviews and General Ltd. [1978] QB 479, 487
185 ibid 488
186 ibid
would prevent the taking of an action by a person aggrieved against aerial photographers in every circumstance. In Bernstein, Griffiths J stated:

‘The present action is not founded in nuisance for no court would regard the taking of a single photograph as an actionable nuisance. But if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief.’187

On the invasion of one’s privacy from the skies, McMahon and Binchy writing in 2013 regarded Bernstein as being the English authority on this topic.188 Also, they do not regard the right to sue for such a trespass as being restricted purely to the “owners” of land and they suggest that the “occupiers” of land would also have such a right.189 Traditionally, aerial photography has been undertaken from either helicopters or small planes. Due to their increased availability and lower, long-term running costs in comparison to the cost of aircraft hire, the use of drones for aerial photographic purposes is growing in popularity and particularly for the creation of videos. Section 4.6.2 of Chapter (4) examines the legal restrictions on the use of drones and specifically on their use for commercial photography purposes.

The question of the legal right to take a photograph has not featured in cases at the Irish Superior Courts. In a few instances, such a right has been raised during cases in the lower Irish Courts. Two recent public order cases in the Irish District Court dealt with, among other more central issues, the right to take photographs in public places and particularly of members of An Garda Síochána making arrests in public places. In 2009, for example, the Irish Examiner carried a report of a case resulting from an investigation by the Garda Síochána Ombudsman Commission into an allegation of assault. Two members of An Garda Síochána were convicted for assaulting a member of the public (Eoin Lawless), who used a mobile phone camera to photograph gardaí in attendance at a disturbance on a street. During that incident, Lawless was arrested and one of the arresting gardaí seized his mobile phone and deleted the images recorded on it. Both gardaí were fined for assault and ordered to pay compensation to Lawless, while one of them was also convicted and fined for criminal damage. The Irish Examiner report stated:

‘Judge Patrick Clyne said he accepted Mr. Lawless’ evidence and said the gardaí had acted illegally’190 by seizing and deleting the images.

The Evening Herald’s report on the case stated that one of the gardaí (Garda Damien Kildea) told the court that ‘he saw Mr. Lawless recording and he genuinely felt what he was doing was wrong,

187 Ibid 489
189 Ibid
190 — — ‘Gardaí fined for assaulting man who was filming row’ Irish Examiner (Cork, 05 December 2009) <www.irishexaminer.com/ireland/gardaí-fined-for-assaulting-man-who-was-filming-row-107224.html> accessed 09 February 2016
though he said he now realised he had no legal right to take the camera.’¹⁹¹ The newspaper’s report is silent on whether the court queried the garda as to what statutory provision, if any, formed the legal basis on which he reached that conclusion and for his subsequent decision to arrest the individual, seize his phone and delete its recorded photographic images. In 2012, a similar type of public order case, which also featured the photography of gardaí making arrests, was reported on by the Limerick Post. In that case, an individual had been photographing gardaí making arrests of third parties during a disturbance in Limerick. Having been told by the gardaí to move-on, he failed to do so and was arrested and charged with having committed an alleged public order offence. The Limerick Post reported:

‘Having heard the evidence, Judge O’Kelly said he was very disturbed by the CCTV footage …the footage shows that this man was standing very steady, recording the arrest of a third party on his mobile phone, which is not an offence’.¹⁹²

While some members of An Garda Síochána may dislike anybody taking photographs of them while they are performing their legal duties in public places that does not make the taking of such photographs an illegal act. A person who finds himself in circumstances as those described in the two immediately-above cases could sue the member of An Garda Síochána for trespass to goods. However, one should note McMahon and Binchy’s view that ‘A number of aspects of the tort are uncertain in the absence of clear Irish authorities in point.’¹⁹³ In the Irish High Court case of Farrell v The Minister for Agriculture and Food,¹⁹⁴ Carroll J agreed with such an assertion¹⁹⁵ and held that the tort consists of ‘wrongfully and directly interfering with the possession of chattels.’¹⁹⁶ A person’s lack of an appreciation that their wrongful and direct interference with the goods of another without lawful authority was an offence will not absolve their liability. Not all interferences with the goods of another may be tortious, as the interferer may have lawful authority¹⁹⁷ to do so. In summary, while one has a common law right to take a photograph either in a public place or in a privately-owned place to which one is admitted without any restrictions on photography, this right is neither an exclusive nor an absolute right.

¹⁹⁴ Farrell v The Minister for Agriculture and Food 1990 No. 12011P (11 October 1995) High Court
¹⁹⁵ ibid
¹⁹⁶ ibid
¹⁹⁷ Note: See Chapter (4) on the legal powers of members of An Garda Síochána to seize and retain anything which they believe to be evidence of a criminal offence.
at global, European, European Union and national levels, namely international treaties and conventions, the Constitution of Ireland, statutory legislation and the common law. The creation of a photograph is one of the methods and stages involved in the process through which a person may express and communicate his ideas, beliefs or other information with others. The right to take a photograph in a public place or in a place to which members of the public are admitted without any restrictions on the taking of photographs is founded in the common law. It is also founded in the legal right of freedom of expression and in particular its sub-set – the right of artistic expression. The right to publish a created photograph is founded upon the rights of freedom of expression, including its sub-sets of artistic and commercial expression, and freedom of communication. These rights are not absolute rights. The right to take and/or publish a photograph may be restricted by either legislative provisions, the rights of others or the courts when they are protesting and/or enforcing any competing rights.
Chapter Two
Photographers’ and Photograph Publishers’ Rights under Copyright Law

2.1) Introduction
Chapter (1) of this thesis synopsised the development of still photography and the current areas of practice and market conditions pertaining to commercial still photography. It examined the right of freedom of expression, including its subsets – the right of artistic expression and the right of commercial expression, which underlie the rights of photographers and photograph publishers to take and/or publish photographs. Chapter (1) also briefly discussed the theoretical basis of the legal concept of freedom of expression, including artistic expression of which still photography is an integral element. Chapter (2) will examine the legal rights of photographers and photograph publishers which are provided through copyright law. It will also examine whether these existing legal rights are being diluted and need to be protected and enforced by the State. Prior to examining in detail in Chapters (3) and (4) the broad range of restrictions that may be imposed on photographers’ and photograph publishers’ rights to freedom of expression and related rights in specific circumstances, Chapter (2) will examine the nature, scope and practical application of the now statutory rights collectively known as copyright and moral rights. The rights under copyright will be examined before the other rights, as copyright, being a specific property right, follows more directly historically and materially from the description of the process of still photography as described in Chapter (1). Copyright is self-contained and sui generis, whereas the restrictions associated with freedom of expression are more wide-ranging and require a more thorough philosophical and jurisprudential treatment. In addition, as the first copyright in a photograph comes into being upon the creation of a photograph, it has an immediate relevance to, and impact on, photographers’ economic interests and it is of crucial importance to their commercial activities.

While maintaining the central research questions of this thesis to the fore, Chapter (2) will focus on the following questions:

- What are the sources, legal basis and extent of the existing legal rights of photographers to both take and publish photographs?

- Are the existing legal rights of photographers and photograph publishers fair and adequate? Are photographers’ and photograph publishers’ legal rights being diluted? If “yes”, how is this occurring? Should and how may further dilution of their rights be prevented?

- What legal remedies are available to photographers and publishers to both protect and enforce their legal rights? Are they adequate? Do they need to be reinforced and if “yes”, how should they be reinforced?
• Given the developments in communications technologies, particularly computing and mobile telecoms devices and the associated communications platforms of the internet and social media networking sites, is there a need for greater regulation or different approaches to or forms of regulation and the enforcement of regulations dealing with the publication of photographs through the internet and social networking platforms?

2.2) Photographers’ and Photograph Publishers Rights under Copyright Law

While one has a general, common law right to take photographs, the legal right to publish any created photographs is another matter. The primary source of photographers’ rights over their created works is copyright law. The right to copyright has existed in Ireland for centuries – since the days of the Brehon Law. Over time, it was developed and refined both by the common law and through the enactment of statutes and statutory instruments by the Parliament of the United Kingdom and since 1922 by the Oireachtas. Through Ireland’s membership of the European Union and its ratification of conventions and treaties dealing with intellectual property, and also as a consequence of court judgments, Irish copyright law has been further developed and harmonised. While copyright, in general, has been developed and refined over time, the right to possess a copyright in a photograph has been granted legal standing in relatively recent times. The legal right to copyright in photographs is however subject to limitations, restrictions and exemptions.

2.2.1) Origin and Development of Photographers’ Right to Copyright

Although the Constitution of Ireland does not contain any references to a right to copyright, Article 40.3.2°, on personal rights, guarantees that the State will protect, among other things, the property rights of every citizen from unjust attack. Also, in relation to private property, Article 43.1.1° of the Constitution states:

‘The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.’

The right to copyright as a property right under these two Articles was recognised by Keane J in the 1994 Irish High Court case of Phonographic Performance (Ireland) Limited v William Austin Cody and Princes Investments Limited. In Phonographic Performance, Keane J held:

‘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…’

1 Constitution of Ireland (Art. 40.3.2°) (on Personal Rights)
2 ibid (Art. 43.1.1°) (on Private Property Rights)
4 ibid 511
In the Irish High Court cases of *EMI Records (Ireland) Ltd. and Others v UPC Communications Ireland Ltd.*\(^5\) and *EMI Records (Ireland) and Others v Eircom Ltd.*\(^6\) Charleton J cited and applied as binding the above-mentioned determination by Keane J. A right to protect one’s copyright in a work has been recognised for a long time in Irish law. Prior to the arrival of the common law system to Ireland, copyright was recognised under Brehon Law. While land was either the property of, or controlled by, the clan, copyright could be privately owned.\(^7\) That right to copyright under Brehon Law is still quoted today and in *EMI Records (Ireland) and Others v Eircom Ltd.*\(^8\) Charleton J stated:

‘There is fundamental right to copyright in Irish law. This has existed as part of Irish legal tradition since the time of Saint Colmcille. He is often quoted in connection with the aphorism: *le gach bó a buinín agus le gach leabhar a chóip* (to each cow its calf and to every book its copy). I regard the right to be identified with and to reasonably exploit one’s own original creative endeavour as a human right.’\(^9\)

Thus, the right to property (private and intellectual) has a particular significance and a strong constitutional status in Irish law.

### 2.2.1.1) Right to Copyright under Common Law

A right to copyright in respect of a range of types of works, such as books and musical and dramatic works, had earlier developed under the common law system.\(^10\) This common law right was recognised in 1758 by the English High Court of *Duke of Queensbury v Shebbeare*.\(^11\) While *Queensbury* related to copyright in an unpublished work, the common law right to copyright in a published work was recognised in the 1769 English High Court case of *Millar v Taylor*\(^12\) in which the Court held that such a right had not been abolished by the Copyright Act 1709.\(^13\) However, the House of Lords subsequently held in the case of *Donaldson v Beckett*\(^14\) that the common law right to a perpetual copyright had been removed by the 1709 Act.\(^15\)

### 2.2.1.2) Right to Copyright under Legislation

The passing of a number of statutes has resulted in photographers being conferred with a statutory right to own the copyright to any photographs created by them. While the Copyright Act 1709 – Statute of Anne\(^16\) – was the first copyright statute enacted in the United Kingdom, it was not until the...

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\(^5\) *EMI Records (Ireland) Ltd. and Others v UPC Communications Ireland Ltd.* [2010] IEHC 377, para 85


\(^7\) Fergus Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies 1998), 100 and 240

\(^8\) *EMI Records and Others v Eircom Ltd.* [2010] IEHC 108

\(^9\) ibid para 28

\(^10\) Robert Clark, *Irish Copyright and Design Law* (Butterworths 2001) A/2

\(^11\) *Duke of Queensbury v Shebbeare* (1758) 2 Eden 329, 330

\(^12\) *Millar v Taylor* (1769) 4 Burr 2303

\(^13\) ibid 2417

\(^14\) *Donaldson v Beckett* (1774) 1 ER 837

\(^15\) ibid 847

\(^16\) Copyright Act 1709 8 Ann, C 21
enactment of the Fine Arts Copyright Act 1862\(^{17}\) and to the disapproval of some members of the House of Commons to the inclusion of photographs as being fine art within the terms of the Act\(^{18}\) that photographs were given a statutory copyright protection. The Copyright Act 1911 abolished the common law right to copyright\(^{19}\) and the right to copyright is now governed by legislation. Shortly after the foundation of Saorstát Éireann, the Industrial and Commercial Property (Protection) Act 1927\(^{20}\) was introduced. This Act was primarily concerned with the establishment of an Industrial and Commercial Property Registration Office, patents, designs and trademarks. However, it did include provisions in respect of the copyright in photographs. Section 154(1) of the Act granted a right to copyright in ‘...every original literary, dramatic, musical, and artistic work...’\(^{21}\) and S.158(2) of the Act detailed the rights of a copyright owner.\(^{22}\) Remedies for infringement of copyright were provided for under Section 159 and Section 160 of the Act.\(^{23}\) An “artistic work” was defined by S.177(1) as including “photographs”\(^{24}\) and S.171 defined the duration of the term of copyright in a photograph as being ‘...fifty years from the making of the original negative from which the photograph was directly or indirectly derived...’\(^{25}\) The Act abrogated the common law right to copyright\(^{26}\) and S.4 of the Act repealed the whole of the Copyright Act 1911.\(^{27}\) As a consequence of the Irish Supreme Court’s decision in Performing Rights Society v Urban District Council of Bray,\(^{28}\) the Copyright (Preservation) Act 1929\(^{29}\) was enacted to ensure the continuation of any copyright, which had previously existed in accordance with the terms of the Copyright Act 1911 and prior to the signing of the Treaty between Ireland and Great Britain on 6\(^{th}\) December 1921.

Moving on in time to the early 1960s, Ireland was at the commencement stage of a programme to industrialise the country. New methods of communications were being developed and expanded, principally through the broadcasting of television programmes by RTÉ, which commenced on the 31\(^{st}\) December 1961.\(^{30}\) During this period, a legislative reform initiative was also underway and as an element of that, the Copyright Act 1963 was enacted.\(^{31}\) This was the first, stand-alone statute dealing with copyright enacted by the State. It was designed to consolidate statutes dealing with copyright and to take account of the development in communications technologies, such as the broadcasting

\(^{17}\) Fine Arts Copyright Act 1862, s 1

Note: Fine art photographs are those which are produced for their aesthetic value. While photography is recognised as a branch of fine art, many photographers, and not just artists who use paint brushes, will argue about whether or not photographs in general or a particular photograph is a work of fine art. To a great extent, the argument is a subjective matter.

\(^{19}\) Copyright Act 1911, s 31
\(^{20}\) Industrial and Commercial Property (Protection) Act 1927
\(^{21}\) ibid s 154(1)
\(^{22}\) ibid s 158(2)
\(^{23}\) ibid s 159–160
\(^{24}\) ibid s 177(1)
\(^{25}\) ibid s 171
\(^{26}\) ibid s 176
\(^{27}\) ibid s 4 and first schedule

\(^{29}\) Copyright (Preservation) Act 1929
\(^{30}\) RTÉ, ‘RTÉ TV 50’ <www.rte.ie/tv50/history/1960s.html> accessed 11 February 2016

Note: At the same time, a new, stand-alone statute dealing with trade marks and patents – the Trade Marks Act 1963 – was also enacted.
of television programmes; the expansion and diversification of the recording industry and of Ireland's obligations under international agreements dealing with copyright. The 1963 Act was amended by the Copyright (Amendment) Act 1987 at the request of the Industrial Development Authority (IDA) to facilitate a company (Hyster), which was proposing to establish a manufacturing plant in Limerick to produce copy spare parts. Hyster's plan was to produce drawings of parts, that had been originally manufactured by other firms, namely the original equipment manufacturers, and to then manufacture copy spare parts based on its own drawings of those original parts. Hyster wished to avoid copyright infringement law suits from the original manufacturers of the parts by having this amendment inserted in the 1963 Act. While the Hyster plant was never established in Ireland, this amendment would have facilitated anyone, who wished to set-up a Hyster type operation and circumvent existing copyrights. The IDA was of the opinion, that the amendment was necessary in order to facilitate an increase in competitiveness and the level of technology within Irish firms and also to attract overseas firms involved in copying to establish operations in Ireland. The 1987 Act also amended Section 27 of the 1963 Act, which dealt with the offence of, and penalties for, dealing in infringing copies of copyrighted works. This latter amendment was introduced as a consequence of the increasing incidences of the importation and distribution of illegal copies of videos. The 1963 Act was further amended by the Intellectual Property (Miscellaneous Provisions) Act 1988. Section 2 of the 1988 Act amended Section 26 of the 1963 Act by inserting a number of presumptions in respect of the ownership of the copyright in a work, while Section 3 amended Section 27 of the 1963 Act, which dealt with penalties and summary proceedings in respect of dealings which infringed copyright.

Save for Section 59, the entire Copyright Act 1963; the entire Copyright (Amendment) Act 1987, and Sections 2 and 3 of the Intellectual Property (Miscellaneous Provisions) Act 1988 were repealed by the Copyright and Related Rights Act 2000. The current legislation in Ireland is the Copyright and Related Rights Act 2000 (hereafter ‘CRRA’), as amended. The 2000 Act, which was a major piece of legislation and will be discussed in detail below, has itself been amended by the Copyright

32 Dáil Deb 28 November 1962, vol 198, col 240
33 Copyright (Amendment) Act 1987, s 1
34 Dáil Deb 25 Nov 1987, vol 375, col 1713–1714
35 Copyright (Amendment) Act 1987, s 2
36 Seanad Deb 07 June 1984, vol 104, col 343
38 ibid s 3
39 Note: Section 59 of the Copyright Act 1963 amended Section 70 of the Industrial and Commercial Property (Protection) Act 1927, which dealt with copyright in registered designs.
40 Copyright and Related Rights Act 2000, second schedule, part 1
41 Note: In many respects the actual wording of the Copyright and Related Rights Act 2000 is very close to that of the United Kingdom’s Copyright, Designs and Patents Act 1988.
and Related Rights (Amendment) Acts of 2004\textsuperscript{42} and 2007\textsuperscript{43} and also by a number of statutory instruments, principally the European Communities (Copyright and Related Rights) Regulations 2004\textsuperscript{44} and the European Union (Copyright and Related Rights) Regulations 2012.\textsuperscript{45} These two statutory instruments, which will be discussed later, gave further effect to the EC Copyright Directive – Directive 2001/29/EC.\textsuperscript{46}

\textbf{2.2.2) Copyright and Related Rights Act 2000}

\textbf{2.2.2.1) Statutory Definition of Copyright}

Like the 1963 Act,\textsuperscript{47} the CCRA formally recognises copyright as a property right, which from an economic point of view makes it an important right and asset for a photographer to possess. Section 17(1) of the Act states:

‘Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description’.\textsuperscript{48}

\textbf{2.2.2.2) Other Statutory Definitions Relevant to Copyright in Photographs}

Section 2(1) of the Act includes a number of inter-related definitions, which are relevant to copyright in photographs and are drawn-together through Section 17 of the Act. Such definitions include:

\textit{“Photograph”} ‘means a recording of light, or any other radiation on any medium on which an image is produced, or from which an image may by any means be produced and which is not part of a film’.\textsuperscript{49}

This broad definition of a “photograph” would include both traditional still film photography and other modern methods of photographic image capture, such as digital camera sensors, thermal imaging, magnetic resonance imaging, ultra sound and x-rays, on which still photographic images may be recorded.

\textit{“Film”} ‘means a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device’.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{42} Copyright and Related Rights (Amendment) Act 2004
\item \textsuperscript{43} Copyright and Related Rights (Amendment) Act 2007
\item \textsuperscript{44} European Communities (Copyright and Related Rights) Regulations, 2004 SI 2004/16
\item \textsuperscript{45} European Communities (Copyright and Related Rights) Regulations, 2012 SI 2012/59
\item \textsuperscript{47} Copyright Act 1963, s 47
\item ibid s 17(1)
\item ibid s 2(1)
\item ibid
\end{enumerate}
\end{footnotesize}
The word “film” as defined by Section 2(1) of the Act refers to what one could also call a “movie” and not to a piece of still photographic film. In many Sections of the Act, “films” are treated separately from “photographs”. This thesis deals purely with still photography.

“Artistic work” includes a work of any of the following descriptions, irrespective of their artistic quality:
(a) photographs, paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, prints or similar works, collages or sculptures,
(b) works of architecture, being either buildings or models of buildings, and
(c) works of artistic craftsmanship.

Interestingly, a “photograph” is the only type of “artistic work” that is defined (see above) by the Act. The CRRA states that a “copyright work” is a work in which a copyright subsists. It defines a “work” as:
‘…a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, typographical arrangement of a published edition or an original database and includes a computer program except in Part II, Chapter 7 where “work” means “literary, dramatic, musical or artistic work or film”.

2.2.2.3) Subsistence of Copyright in an Artistic Work
Section 17(2)(a) of the Act states that ‘Copyright subsists, in accordance with this Act, in (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films, broadcasts or cable programmes, (c) the typographical arrangement of published editions, and (d) original databases. Notably, the term “original” is only used in respect of sub-sections (a) and (d) above. As photographs, as defined above, are classed as “artistic works”, copyright may subsist in them.

2.2.2.4) Originality in an Artistic Work
The CRRA is silent on what specifically constitutes an “original” artistic work. It is rather unfortunate, that the drafters of the Act, who would or ought to have been aware of the past legal problems caused by the inclusion of the non-defined term “original” as also contained in previous Copyright Acts of both Ireland and the United Kingdom, did not include such a definition or alternatively did not refrain from including the word “original” in the CRRA. Consequently, it has been left to the courts to continue to determine what constitutes an “original” artistic work. Instead of taking the commonly accepted meaning of the word “original” (first, initial, something from which a copy is made), the courts in justification for the decisions in their judgments have created their own interpretations of the meaning of the word, when used in relation to copyright. The courts have

51 ibid
52 ibid
53 ibid
54 ibid s 17(2)(a)
55 Copyright and Related Rights Act 2000, s 17(2)(a)
56 Copyright Act 1911, s 1(1); Copyright Act 1963, s 8(1) and Copyright, Designs and Patents Act 1988, s 1(1)
mandated that certain pre-requisites must be demonstrated to exist in a work before it will be classified as being “original”. They have held that for an artistic work to be “original”, (a) it must be an expression of the author’s thoughts and (b) its author must expend a degree of “knowledge, labour, judgment and skill” in producing the work. In the English High Court case of University of London Press Limited v University Trust Press Limited,\(^{57}\) Peterson J stated:

> ‘The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.’\(^{58}\)

In the House of Lords case of G.A. Cramp and Sons Ltd. v Frank Smythson Ltd.,\(^{59}\) Lord Porter stated:

> ‘Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree. Different minds will differ, as may be seen in the present case from the divergence of opinion in the courts below.’\(^{60}\)

To determine the degree or extent of work, labour and skill necessary to be present in a work for it to qualify for copyright protection is to a great extent a subjective judgment. Also, a work’s artistic quality is irrelevant to such a subjective judgment, as S.2(1) of the Act states than an “artistic work” includes a work of any of the following descriptions, irrespective of their artistic quality...\(^{61}\) Michalos states that the courts in the United States have in recent times searched for more than labour, judgment and skill and have introduced a “creativity” element.\(^{62}\) An example of such is the case of Feist Publications Inc. v Rural Telephone Service Co.\(^{63}\) In Feist, O’Connor J held that:

> ‘To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.’\(^{64}\)

It would appear that O’Connor J adopted a common sense approach to dealing with the issue of “originality” in Feist. Court cases concerning copyright and the originality in photographs do not occur often. However, it should be relatively easy to prove originality in a photograph, as the threshold standard required by the courts is relatively low. In the English High Court case of Antiquesportfolio.com v Rodney Fitch,\(^{65}\) Neuberger J stated:

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57 University of London Press v University Tutorial Press [1916] 2 Ch 601
58 ibid 608–609
59 G.A. Cramp and Sons Ltd. v Frank Smythson Ltd. [1944] AC 329
60 ibid 340
61 Copyright and Related Rights Act 2000, s 2(1)
62 Christina Michalos, The Law of Photography and Digital Images (Sweet and Maxwell 2004) 110
64 ibid para 10
65 Antiquesportfolio.com Plc v Rodney Fitch and Co. Ltd. [2001] FSR 23
‘In terms of what is original, for the purpose of determining whether copyright subsists in a photograph, the requirement of originality is low, and may be satisfied by little more than the opportunistic pointing of the camera and the pressing of the shutter button. There seems no reason of principle why there should be any distinction between the photograph which is the result of such a process and a photograph which is intended to reproduce a work of art, such as a painting or another photograph.’

The definition of “artistic work” in Section 2(1) of the CRRA includes a “print”. A photographic print made from an original photographic image contained on either a frame of negative or positive film or on a digital camera’s sensor would be a copy of such an image. While the author of the original image would be its first copyright owner and therefore permitted to make a copy of that image, for such a print to also be copyrightable, the author would have to demonstrate that such a print meets the “originality” test for an artistic work. Photographic prints created from scanned copies of frames of film and prints made using photocopiers, dye-sublimation, digital inkjet or any other type of electronic photograph printer would all have to meet the originality test for them to be eligible to benefit from copyright protection. Leggatt LJ held in the English High Court case of The Reject Shop Plc v Robert Manners that using a photocopier to create enlarged, printed copies of drawings did not create a copyright in the enlarged drawings ‘as the process of enlargement was wholly mechanical and involved no exercise of artistic skill and labour’.

The question of “originality in a photograph” featured in the Court of Justice of the European Union (hereinafter CJEU) case of Painer v Standard Verlags GmbH. In Painer, the Court referred to Directive 93/98/EEC which defined the level of originality required for a photograph to qualify for copyright protection. Directive 2006/116/EC repealed Directive 93/98/EC and it contains a similarly-worded definition, namely:

‘A photographic work within the meaning of the Berne Convention is to be considered original if it is the author’s own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account.’

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66 ibid para 30
67 Copyright and Related Rights Act 2000, s 2(1)
68 The Reject Shop Plc v Robert Manners [1995] FSR 870
69 ibid para 1
70 Case 145/10 Painer v Standard Verlags GmbH [2012] ECDR 6
72 Case 145/10 Painer v Standard Verlags GmbH [2012] ECDR 6, paras 15–17
74 ibid recital 16
2.2.2.5) Copyright does not subsist in Ideas or in Infringing Works

Ideas may not be copyrighted. Section 17(3) of the CRRA states: “Copyright protection shall not extend to the ideas and principles which underlie any element of a work…” Also, copyright does not subsist in a work which infringes the copyright in another work or in a copy taken from a work which has been previously made available to the public. While there is a fixation requirement in respect of some specified types of works under Section 18(1) of the Act, that requirement does not apply to artistic works, which includes photographs.

2.2.2.6) Author of a Photograph and First Owner of Copyright in a Photograph

Under Section 21 of the CRRA, the “author” of a work is the person who creates a work and in the case of a “photograph” that is the “photographer.” The Act also makes provision for joint authors of a work and defines a work of joint authorship as:

‘...a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.’

The first owner of the copyright in a photograph is the author of the work unless:

(a) the work is made by an employee in the course of employment, in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary,

(b) the work is the subject of Government or Oireachtas copyright,

(c) the work is the subject of the copyright of a prescribed international organisation, or

(d) the copyright in the work is conferred on some other person by an enactment.

Also, Section 23(2) of the CRRA states:

‘Where a work, other than a computer program, is made by an author in the course of employment by the proprietor of a newspaper or periodical, the author may use the work for any purpose, other than for the purposes of making available that work to newspapers or periodicals, without infringing the copyright in the work.’

The question of whether a joint ownership of the first copyright in a photograph exists could potentially arise in a number of situations, including where a photo stylist or an assistant photographer is involved in a photo shoot. Ideally, the issue of copyright ownership in created

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Footnotes:

75 Copyright and Related Rights Act 2000, s 17(3)
76 ibid s 17(5)
77 ibid s 17(6)
78 Note: Section 2(1) of the Act defines a “fixation” as: ‘the embodiment of sounds or images or any combination of sounds or images, or the representation thereof, from which they can be perceived, reproduced or communicated through a device’.
79 ibid s 18(1)
80 ibid s 21(h)
81 ibid s 22(1)
82 ibid s 23(1)
83 ibid s 23(2)
84 For example see: Celebrity Pictures Ltd. and Tyson Sadlo v B. Hannah Ltd. [2012] EWPCC 32.
photographs should be explicitly stated in any photographer’s contract for services. Joint copyright ownership is also of relevance to press photographers, who are employed by newspapers or periodicals and who may wish to use their created photographs for other purposes like including them in exhibitions; personal, printed promotional materials or selling prints of them to third parties. Many press photographers work through photo agencies on a contractual basis and in some instances the images photographed by a number of photographers at an event are pooled and later selected from by the photo agency for publication. Depending upon the terms of the contract between a press photographer and a photo agency, the owner of the copyright in such photographs may be either the individual photographers or a joint ownership may exist between the photographers and the photo agency.  

2.2.2.7) Presumption of knowing a Work’s Author and its First Copyright Owner

As regards one’s knowledge of who is the author of, and by definition the first copyright owner to, a work, Section 2(7) of the CRRA states: ‘The author of a work shall be deemed to be known where it is possible for a person, without previous knowledge of the facts, to ascertain the identity of the author of the work by reasonable enquiry.’ This presumption is important and is relevant to the topic of orphan works, which will be discussed below.

2.2.2.8) Duration of Copyright in a Photograph

The copyright in a photograph expires ‘…70 years after the date of the death of its author, irrespective of the date on which it has been first lawfully made available to the public.’ In accordance with S.35 of the CRRA, the term of copyright in respect of a photograph commences on the first day of January in the year following the event that gives rise to that term. It should be noted, that the copyright in an artistic work, which is ‘anonymous or pseudonymous shall expire 70 years after the date on which the work is first lawfully made available to the public.’ It would be virtually an impossible task for anybody other than a photographer himself to accurately state whether or not any of the individual images contained within his lifetime’s collection of works were ever made available by him either anonymously or pseudonymously to the public and if they were the individual dates on which each such image was first made available to the public. Consequently, if photographers wish to have a clearer and longer copyright duration to subsist in their works, it would be better for them to only make their works available during their lifetime under their own

85 In Celebrity Pictures, at para 8, regarding instructions from two of Oxygen 10’s employees to Sadlo (the photographer) concerning suggested poses and the placing of the individual being photographed (styling of the images), Floyd J held:

‘I do not think these general instructions to the photographer as to the type of photographs, or the very general acceptance that there was a team effort involved in the photo-shoot as a whole, are sufficient to make anyone other than Mr. Sadlo the author of the photographs. There is no evidence to suggest that the Fionas were in control of any aspect of the taking of the photograph. I accept Mr. Sadlo’s evidence, and hold, that the photographs were exclusively Mr. Sadlo’s creation. Accordingly, Mr Sadlo was the first owner of the copyright.’


87 Copyright and Related Rights Act 2000, s 2(7)

88 ibid s 35

89 ibid s 24(2)
names and not anonymously or pseudonymously. Once an author’s term of copyright in a photograph has expired, in certain circumstances, another person may be able to enjoy the benefit of a right to copyright in that photograph. Section 34 of the Act states:

‘Following the expiration of the copyright in a work, any person who lawfully makes available to the public for the first time a work which was not previously so made available, shall benefit from rights equivalent to the rights of an author, other than the moral rights, for 25 years from the date on which the work is first lawfully made available to the public.’

The effect of this provision is that in the case of an unpublished photograph the availability of the protection of the photograph through copyright could run for a minimum of 100 years after the death of the author of the photograph.

2.2.2.9) Qualification for Copyright Protection

In general, copyright shall not subsist in a work unless the qualification requirements, as specified in the CRRA, in respect of the work’s author and the country, territory, state or area in which the work is first lawfully made available to the public are satisfied. In accordance with Section 183 of the CRRA, a work shall qualify for copyright protection if its author was at the material time a qualifying person. Qualifying persons are defined by the Act as including, among others, an Irish citizen and ‘a citizen or subject of, or an individual domiciled or ordinarily resident in the State, or in any country, territory, state or area to which the relevant provisions of this Part extend;’… Under Section 184(1) of the Act, a photograph (being an artistic work) qualifies for copyright protection ‘…where it is first lawfully made available to the public (a) in the State; or (b) in any country, territory, state or area to which the relevant provision of this Part extends’. Section 184 goes on to state:

‘…lawfully making available to the public a work in one country, territory, state or area shall be deemed to be the first lawful making available to the public of the work even where the work is simultaneously lawfully made available to the public elsewhere; and for this purpose, lawfully making available to the public of a work elsewhere within the previous 30 days shall be deemed to be simultaneous.’

2.2.2.10) Registration of Copyright is not a Legal Requirement

There is no legal requirement under the CRRA that the copyright in a work must be registered for it to subsist. However, one may register a copyright in a work with and/or to licence it through one of the registered copyright licensing bodies, such as the Irish Visual Artists Rights Organisation.

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90 ibid s 34
91 ibid s 182
92 ibid s 183(2)
93 ibid s 184(1)
94 ibid s 184(2)

Note: Section 188(1) of the CRRA, as amended, provides for the extension of the provisions for the qualification of works for copyright protection, as specified in Sections 183 and 184, to any convention country, state or area. Under the Third Schedule to the Act, the list of agreements, treaties and conventions which shall be reckonable for the purpose of the extension of the qualification of copyright protection to works under Section 188 of the Act includes, among others, the Berne Convention and the WIPO Agreement.
Under Section 175 of the Act, the Controller of Patents, Designs and Trade Marks licenses and maintains a register of copyright licensing bodies. Normally, licensed copyright licensing bodies deduct a commission on any copyright royalties collected on behalf of their members. For example, I.V.A.R.O. currently deducts a commission of 25% from copyright licensing and reprography royalties and 15% from resale royalties collected. Also, the authors of qualifying works (books) may register their works with the Registrar of the Public Lending Rights Remuneration Scheme in order to receive a remuneration for the lending of their works by public libraries.

2.2.2.11) Copyright Owner’s Rights

Subject to a range of exemptions contained within Chapter 6 of the CRRA, which will be dealt with later, the owner of the copyright to a work (a photograph) obtains exclusive rights under Section 37(1) of the Act and may undertake or authorise others to undertake acts, which S.37(1) terms as “acts restricted by copyright”, namely:
(a) to copy the work;
(b) to make available to the public the work;
(c) to make an adaptation of the work or to undertake either of the acts referred to in paragraph (a) or (b) in relation to an adaptation. 

Section 39(2) of the CRRA gives a copyright owner “reproduction rights” – the right to make copies of the copyrighted work or to authorise other people to make copies of the work. Under Section 39(1), copying includes the storage of the copyrighted work in any medium and in relation to an artistic work the making of three dimensional copies of a two dimensional work and the making of two dimensional copies of a three dimensional work. The owner of a copyright has, under Section 40 of the CRRA, what is termed a “making available right”. That is the right to make either the original work or copies of the work available to the public or to authorise others to do so. A copyright owner also has distribution, rental and lending rights.

Note (1): The Public Lending Remuneration Scheme was established by S.7 of the Copyright and Related Rights (Amendment) Act 2007.
Note (2): In June 2013, the Chief Executive Officer of the Local Government Management Agency was designated as the Registrar of the Scheme by the Minister for the Environment, Community and Local Government through the Copyright and Related Rights (Public Lending Remuneration Scheme) (Amendment) Regulations 2013 SI 2013/221, reg 4

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100 Copyright and Related Rights Act 2000, s 37(1)
101 Copyright and Related Rights Act 2000, s 39(2)
102 ibid s 39(1)
103 ibid s 40(8)
104 Note: Under Section 40(4) of the CRRA, where a person who provides facilities for the making available of a copy of a work has been advised by the owner of the copyright in that work that those facilities are being used to infringe that copyright and he fails to remove the infringing material, that person shall be liable for the infringement of the copyright in the work.
105 ibid s 42(6)
“rental” means making a copy of a work available for use, on terms that it is to be or may be returned after a limited period of time, for direct or indirect economic or commercial advantage’, while Section 42(2)(b) states that “lending” means making a copy of a work available for use, on terms that it is to be or may be returned after a limited period of time, otherwise than for direct or indirect economic or commercial advantage, through an establishment to which members of the public have access. A number of exclusions to the above-mentioned renting and lending rights are specified under Section 42(3) of the Act, which states:

References in this Part to “rental” or “lending” shall not include the making available of copies of a work for the purposes of:

(a) performing, playing or showing in public, broadcasting or inclusion in a cable programme service,
(b) exhibition in public, or
(c) on the spot reference use.

The above-mentioned making available and lending rights of a copyright holder were amended by the Copyright and Related Rights (Amendment) Act 2007 Act so as to provide for the establishment of a public lending remuneration scheme under which the authors of qualifying books would receive remuneration for the lending of their works by public libraries. In relation to the making available rights, Section 5 of the 2007 Act amended Section 40(1)(g) of the 2000 Act by deleting the words “without payment of remuneration to the owner of the copyright in the work” and S.9 of the 2007 Act repealed S.69 of the 2000 Act. Section 6 of the 2007 Act inserted a new Section 42(7) in the 2000 Act. This new Section 42(7), which created a new exemption for public libraries to a copyright holder’s lending rights, states:

The lending right in relation to a work does not apply at any time in a period during which a scheme for the remuneration of authors is in effect, pursuant to Section 42A, in relation to works of a class in which that work is included, whether the author, or (in the case of a work of joint authorship) any of the authors, is a participant in that scheme or not.

Also, Section 7 of the 2007 Act inserted a new Section 42(A) in the 2000 Act to authorise the Minister to establish a Public Lending Remuneration Scheme ‘to remunerate authors…for the lending by public libraries of qualifying works’. The Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008, as amended by the 2013 Regulations, established this Scheme. As a consequence of the creation of the above-mentioned lending right exemption

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106 ibid s 42(2)
107 ibid s 42(3)
108 Copyright and Related Rights (Amendment) Act 2007, s 6(b)
109 ibid s 5
110 ibid s 9
111 Copyright and Related Rights Act 2000, s 42(7)
112 Copyright and Related Rights (Amendment) Act 2007, s 7
113 Copyright and Related Rights Act 2000, s 42(A)
114 Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008 SI 2008/597
115 Copyright and Related Rights (Public Lending Remuneration Scheme) (Amendment) Regulations 2013 SI 2013/221
under Section 42(7) of the Act and as membership of the Scheme by authors of books is voluntary, it would be prudent for any photographer, who has published a photography book, to register as a member of the Scheme, which is administered by the Public Lending Remuneration Office. By doing so, they would have a possibility of receiving some level of remuneration for the lending-out of copies of their works by public libraries.

Making an adaptation of a work is an act restricted to the owner of the copyright in that work and Section 43(1)(a) of the CRRA states that for the purposes of Section 37 of the Act, ‘an adaptation is made when it is recorded in writing or otherwise’. In addition, Section 43(2)(c) states that ‘an adaptation of an artistic work includes a collage of the work with other works, an arrangement or other alteration of the work.’

The rights granted through S.37(1) of the CRRA to the owners of the copyright in photographs are very important rights for photographers from an economic point of view. However, in many instances the enforcement of such rights is extremely problematic due to (1) the theft of photographers’ images and their subsequent unauthorised usage by third parties on internet websites, social media sites and in printed promotional materials and (2) photographers’ inability to obtain payment for such unauthorised usage from the owners and/or client users of such sites.

2.2.2.12) Infringement of Copyright

Section 37(2) of the CRRA states that ‘the copyright in a work is infringed by a person who without the licence of the copyright owner undertakes, or authorises another to undertake, any of the acts restricted by copyright.’ Furthermore, Section 37(3) states that ‘references to the undertaking of an act restricted by the copyright in a work shall relate to the work as a whole or to any substantial part of the work and to whether the act is undertaken directly or indirectly.’ Consequently, one may infringe the copyright in a work by either copying the work in its entirety or a substantial part of it. In the case of photographs, the issue of a “substantial part” of the work is problematic, as the Act does not define what constitutes a “substantial part” of a photograph. On a normal reading, one would view a copy image of a copyrighted photograph as being a substantial part of the copyrighted photograph, if it contains a straight crop and copy of the majority percentage of the copyrighted photograph. It has been for the courts to determine what constitutes a “substantial part” of a photograph and their views have differed. They have looked at the actual subject matter content

116 Public Lending Remuneration Office, About the PRL Scheme <www.plr.ie/about-plr/> accessed 16 February 2016
117 Copyright and Related Rights Act 2000, s 43(1)(a)
118 ibid s 43(2)(c)
captured in a photograph while determining whether a photograph is a copy of another. *Creation Records Ltd. v News Group Newspapers*¹²² and *Temple Island Collections v New English Teas*¹²³ are two example cases. In the English High Court case of *Creation Records*, Lloyd J held:

"If the subject matter is not itself copyright, in principle two different photographers can take separate photographs of the same subject without either copying the other. Of course copyright subsists in the official photograph and if it were the only source of the scene it would be an infringement to copy that, either by a direct copying process or by the scene being recreated and a fresh photograph taken of that recreation."¹²⁴

The English Patents County Court case of *Temple Island Collections* is an interesting illustration of a court’s treatment of the issue of “substantial copying”. *Temple Island* concerned a claim for infringement of copyright in photographs and it followed a similar case between the parties over another set of photographs in which the judge in the instant case – Birss J – had given judgment.¹²⁵ The case concerned not the originality of two in-camera created photographs, but rather the originality of two greyscale¹²⁶ photographic prints, each of which, among other elements, contained a “spot coloured”¹²⁷ red London bus, which were the resulting output from the use of image manipulation software, such as Adobe Photoshop, during a post-production stage. Both images shown in Annex 1 and Annex 2 of the judgment report contained some similar constituent elements, namely a red coloured London Routemaster bus, Big Ben, House of Parliament, Westminster Bridge and a white sky. They were shot from different angles – one was from road level, while the other was from below road level and also showed the River Thames. On one’s viewing of the photographs, while they both comprise of some similar elements (the most eye-catching being the spot-coloured red bus), that is where the visual similarities stop. However, it was determined, that an infringement of the copyright in the claimant’s photograph had been made.

In reaching such a determination, Birss J stated:

‘Copyright is infringed by reproducing the whole or a substantial part of a work in a material form (s16 and s17 of the 1988 Act).¹²⁸ First one asks whether there has been copying and if so which features have been copied, and then asks whether that represents a substantial part of the original. One does not then ask if the alleged infringement looks on the whole similar, because one can reproduce a substantial part without necessarily producing something that looks similar even though of course it may do so."¹²⁹

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¹²² *Creation Records Ltd. v News Group Newspapers* [1997] EWHC Ch 370
¹²³ *Temple Island Collections v New English Teas* [2012] EWPCC 1
¹²⁴ Ibid para 15
¹²⁵ *Temple Island Collection Limited v New English Teas Limited and Anor* [2011] EWPCC 21
¹²⁶ Note: A greyscale photograph is one in which all colour is reduced to a range of grey shades.
¹²⁷ Note: Spot colouring is a printing process through which a colour is added to a specific section of a greyscale image.
¹²⁸ Copyright, Designs and Patents Act 1988, s 16 and s 17
¹²⁹ *Temple Island Collections Limited v New English Teas Limited and Anor* [2012] EWPCC 1, para 30
He further stated:

'I have referred to the obvious similarities between the works. The defendants went to considerable lengths to point up the differences between the images…The differences do not negative copying, on the facts of this case they have a bearing on whether a substantial part is taken.'

Birss J went on to hold:

'It is clear that some important and visually significant elements of Mr. Fielder's original artistic work have not been reproduced by the defendants. The question is whether, without them, what has been reproduced is a substantial part of the claimant's work. Looking at the two images side by side, the differences are apparent. The vantage point in Annex 2 is different from the point in Annex 1. They are not the same photograph. The defendants submit that copyright law does not stretch to protecting Mr. Fielder's idea; it protects his expression of that idea but the expression of the idea by the defendants is different, they say, in almost every respect. They urge on me that the composition of the claimant's work is extraordinarily ordinary. As such it could only really be infringed by lifting the image itself, i.e. facsimile reproduction. The level of skill and labour which went into the image manipulation is so low that it would not be infringed by anything other than facsimile reproduction, which of course has not happened.'

Birss J went on to state that the defendant:

‘…could have simply instructed an independent photographer to go to Westminster and take a picture which includes at least a London bus, Big Ben and the Houses of Parliament. Whatever image was produced could then have been used on the tins of tea. Such an image would not infringe. It may or may not have the same appealing qualities as the claimant's image. Even if it did they would be the result of independent skill and labour employed by the independent photographer.'

Even though Birss J, as stated above, held that they were not the same photograph, he went on to find for the plaintiff and stated:

'Mr. Davis submitted that a finding of infringement in this case would give the claimant a monopoly which was unwarranted. He uses the word “monopoly” in a pejorative sense but it does not help. All intellectual property rights are a form of monopoly, properly circumscribed and controlled by the law. In any case I do not accept that a finding for the claimant in this case is unwarranted.'
It would appear from the concluding statements in this judgment, that the basis of the decision was more concerned with the constituent elements of the photographer’s idea for the image’s contents rather than the expression of such through a photograph and that it was carried by the defendant’s admission of having previously seen the claimant’s work. Had the defendant’s image been reproduced in full colour or in true, full black and white, there is no basis on which these two images could be said to be a copy of each other. The defendant had copied the general idea for his photograph’s contents. Also, as Birss J had previously resolved a similar dispute between the parties in favour of the plaintiff, such litigation history would not have been to the defendant’s advantage in the instant case.

In addition to the above-mentioned provisions relating to copyright infringement under Section 37(2) of the CRRA in Ireland, under Section 44(2), a copy of a copyrighted work ‘shall be an infringing copy (a) where the making of it constitutes an infringement of the copyright in the work concerned or (b) where it has been or is to be imported into the State, and its making in the State would have constituted an infringement of the copyright in the work concerned, or a breach of an exclusive licence agreement relating to that work’.\(^{135}\) While one may infringe the copyright in a copyrighted photograph by creating an unauthorised adaptation of it,\(^{136}\) one may also commit a secondary infringement of a copyrighted work by dealing with an infringing copy of the work\(^{137}\) or by providing another party with the means for making infringing copies of the work.\(^{138}\) In addition, if one transmits a copy of a copyrighted work without the permission of the copyright owner via a telecommunications system (which would include by email, telephone, fax or through the internet), such a transmission and subsequent reception of the copy of the copyrighted work would amount to an infringement of the copyright.\(^{139}\) The purpose of the infringement provisions of the CRRA is to protect the rights of the copyright holders in qualifying works.

\(^{135}\) Copyright and Related Rights Act 2000, s 44(2)
\(^{136}\) ibid s 43
\(^{137}\) ibid s 45
\(^{138}\) ibid s 46(1)
\(^{139}\) ibid s 46(2)
2.2.2.13) Exempted Acts permitted in respect of Copyrighted Works

The CRRA provides a range of exemptions in respect of a range of activities, which may be undertaken by third parties and which will not constitute an infringement of the copyright in an artistic work. Such exempted acts, which do have limitations, relate to fair dealing for research or private study; for purposes of criticism or review, or reporting of current events; incidental inclusion of a copyrighted material; educational, library and archive activities, and public administration. “Fair dealing” with an artistic work for research or private study purposes is defined by the CRRA as: "the making use of a literary, dramatic, musical or artistic work,..., for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright."

The test, therefore, is one of reasonableness. The Act further states that fair dealing with a work for the purposes of criticism or review of either that work or another work ‘...shall not infringe any copyright in the work where the criticism or review is accompanied by a sufficient acknowledgement.” However, in relation to the reporting of current events there is a specified exclusion in respect of use of photographs under Section 51(2), which states: ‘fair dealing with a work (other than a photograph) for the purpose of reporting current events shall not infringe copyright in that work, where the report is accompanied by a sufficient acknowledgement.”

One may ask why are photographs granted an exemption to fair dealing for the purposes of reporting current events under Section 51(2) of the Act? During the Dáil Éireann and Seanad Éireann debates on the Copyright and Related Rights Bill 1999, discussion relating to Section 51 did not make any mention as to why a photograph should or should not be granted this exemption. The Copyright Act 1963 did not contain such an exemption for photographs. However, it is noted that the wording of Section 51(2) of the Act is virtually identical to that of Section 30(2) of the United Kingdom’s Copyright, Designs and Patents Act 1988, which relates to “fair dealing for the purposes of reporting current events”. Section 30(2) of the 1988 Act states:

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140 ibid s 50(1)
141 ibid s 51(2)
142 ibid s 52(1)
143 ibid s 53–58
144 ibid s 56–70
145 ibid s 71–77
146 ibid s 50(4)
147 ibid s 51(1)
148 ibid s 52(2)
149 Dáil Deb 11 November 1999, vol 510, col 1091
150 Seanad Deb 30 June 1999, vol 160, col 66
151 Copyright Act 1963
‘Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subSection (3)) it is accompanied by a sufficient acknowledgement.’

Without such an exemption, the income which photographers (particularly freelance photographers) may derive from the publication and re-publication of their photographs would be in serious jeopardy and would impact on their livelihoods. The copyright in a copyrighted work, including photographs, is not infringed if it is included in another work in an incidental manner. The Act does not define what constitutes an “incidental” inclusion. This exception may possibly apply if a copyrighted photograph is included in another photograph, but in the background and not forming the majority of the contents of the latter photograph. However, if such an inclusion is undertaken in a manner which unreasonably prejudices the interests of the owner of the copyright to that work, then it would not come within this exemption.

Sections 53–58 of the CRRA provide for a broad range of exemptions, subject to limitations, in respect of education, libraries and archives. Under Section 53(1) of the Act, a copyrighted, published artistic work may be copied without infringing its copyright if it is ‘…copied in the course of instruction or of preparation for instruction’. This exemption does not apply to unpublished artistic works. Also, the exemption does not apply unless:

(a) the copying is done by or on behalf of a person giving or receiving instruction,
(b) the copying is not by means of a reprographic process, and
(c) the copy is accompanied by a sufficient acknowledgement.

152 Copyright, Designs and Patents Act 1988, s 30(2)
Note: The exclusion of photographs under Section 30(2) was centre stage in both the House of Lords and the House of Commons debates on Section 30 of the Copyright, Design and Patents Bill 1987. This issue entered the House of Lords debate through Leitrim resident, journalist and author Lord Kilbracken.
See: (1): HL Deb 08 December 1987, vol 491, cols 111–115
accessed 15 February 2016
(2): HC Deb 28 April 1988, vol 132, cols 565–566
accessed 15 February 2016
<http://find.galegroup.com/tda/infomark.do?andsource=galeanduserGroupName=nli_ttdaandtabID=T003anddocPage=ArticleandsearchType=BasicSearchFormAnddocId=IF502995756andtype=multipageandcontentSet=LTOandversion=1.0>
accessed 15 February 2016

153 Copyright and Related Rights Act 2000, s 52(1)
154 ibid s 52(3)
Note: For example see: Oliver Laurent, ‘Getty Images fights copyright infringement in French Court’ British Journal of Photography (London, 23 January 2012)
accessed 19 August 2013

155 Copyright and Related Rights Act 2000, ss 53–58
156 ibid s 53(1)
157 ibid s 53(2)
Due to the CRRA’s definition of a “reprographic process”, this S.53(1) exemption may not be availed of to copy photographs published either in books or in an electronic format or to copy published, stand-alone photographs. Section 58 of the CRRA, as amended by Section 8 of the Copyright and Related Rights (Amendment) Act 2007, also grants an exemption to educational establishments in respect of the lending by them of copyrighted works. Sections 59–70 of the CRRA, as amended, provide exemptions, subject to limitations, in respect of the copying of copyrighted works by specified libraries and archives.

For the purposes of public administration, the CRRA also provides for exemptions to the rights of copyright owners. Under Section 71(1) of the Act, ‘The copyright in a work is not infringed by anything done for the purposes of parliamentary or judicial proceedings or for the purpose of reporting those proceedings.’ Thus, the copyright in photographs prepared for a client as part of his evidence in a court case would not be infringed by the making of copies of them for or by his opponent in the case. A similar exemption exists in respect of statutory inquiries. Under Section 73 of the Act, ‘Any material which is comprised in records which are open to public inspection may be copied, and a copy may be supplied to any person, without infringement of copyright.’ There is a limitation to this exemption in that no use other than for public record inspection purposes may be made of a copy of a public record containing copyrighted material without the copyright owner’s permission. This limitation must be clearly marked on any copy of a public record made available to the public. From a photographer’s perspective, unless such a mark is clearly displayed on the facing side of any hardcopy photographs made available the practical benefit of this limitation and marking requirement would be of little use.

The European Communities (Copyright and Related Rights) Regulations 2004 were introduced to give further effect to Directive 2001/29/EC and inserted a new Section 87 in the CRRA. Under the new Section 87(1), temporary acts of reproduction do not infringe the copyright in a work:

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158 Note: Section 2(1) of the CRRA defines “reprographic process” as: “a process for (a) making facsimile copies, or (b) involving the use of an appliance for making multiple copies, and includes, in relation to a work held in electronic form, any copying by electronic means, but does not include the making of a film or sound recording;”
159 ibid s 58
160 ibid ss 59–70
161 ibid s 71(1)
162 ibid s 71(2)
163 ibid s 73
164 ibid s 74(2)
165 ibid s 74(3)
166 European Communities (Copyright and Related Rights) Regulations 2004 SI 2004/16
which acts are transient or incidental and which are an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use, of a work or other subject-matter to be made, and which acts have no independent economic significance."

Section 87(1) grants a copyright infringement exemption to cover the reproduction of copyrighted works by internet intermediaries, which is a necessity in the course of their provision of transmission services to and between their clients. A recent decision by the German Federal Supreme Court may act as words of caution for photographers regarding the possibility or not of an infringement by intermediaries, and in particular by search engines, of their copyright in photographs which they have published on the internet. The German Federal Supreme Court determined that the search engine Google had not infringed the copyright in photographs by displaying thumbnail copies of them in the results generated following a search for an image topic using Google’s image search facility. The Court referred to its decision in a similar case in 2010 in which the Court had held that while:

'It recognised that the works were protected by copyright and that the plaintiff had not authorised Google either expressly or tacitly to use them...the BGH found that no illegal breach of copyright had taken place...However, the plaintiff herself had not taken any suitable measures, which were technically possible, to prevent people accessing the images of her work via the image search engine. The defendant had therefore been entitled to conclude that the plaintiff did not object to her works being shown in thumbnail form. Consequently, the defendant's intrusion on the artist's copyright had not been illegal'.

This decision of the BGH is shifting the onus onto the copyright owner to prevent images being located on the internet and copied by search engines. It is similar to saying that because a person’s house does not have a burglar alarm installed, a burglar is legally entitled to conclude that its owner would not object if he broke into it. While one may prevent a search engine’s crawler from finding photographs on a website through, for example, the inclusion of a “robots.txt” file in a website’s software code, in reality doing so would defeat a commercial photographer’s ability to sell copies of

168 Copyright and Related Rights Act 2000, s 87(1)
Note: In Case C-360/13 Public Relations Consultants Association Ltd. v The Newspaper Licensing Agency Ltd. and Others (5 June 2014), the CJEU, at para 63, held that 'Article 5 of Directive 2001/29 must be interpreted as meaning that the on-screen copies and the cached copies made by an end-user in the course of viewing a website satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the conditions laid down in Article 5(5) of that directive, and that they may therefore be made without the authorisation of the copyright holders.'

Note (1): BGH: The Bundesgerichtshof – the Federal Court of Justice of Germany – is the supreme court and deals with criminal and private law.
Note (2): See also: Anne Yliniva-Hoffmann, 'Germany: BGH rules again on thumbnail admissibility', IRIS Merlin, IRIS 2012–1:1/17

'Although the plaintiff in this case had not granted the right to use the image of his work to the operators of the websites mentioned, he had granted such a right to a third party. His consent to the online publication of the image in thumbnail form was not limited to copies that he had expressly permitted. This was evident from the fact that automatic search engines could not distinguish between legal and illegal copies. In this case, the copyright holder was still entitled to take legal action for breach of copyright against the parties who had posted the images on the Internet without his consent.' <http://merlin.obs.coe.int/iris/2012/1/article17.en.html> accessed 29 February 2016
images displayed on his website, as only individuals who would know the exact URLs for the website’s image galleries would be able to find them. Some social media websites do take notice of the rights of image copyright holders. For example, one may insert a Pinterest “pinterest nopin” meta tag on one’s website. Upon seeing this meta tag, Pinterest’s web crawler will prevent copyright protected images being pinned from such websites to Pinterest by its account holders. Also, even though they are not always successful, the use of search engine image finders, like Google’s “Image Search”, are handy tools for photographers to use in tracking down the unauthorised use of their copyrighted images by other websites.

Commonly referred to as “freedom of panorama”, one may photograph buildings, sculptures, models of buildings and works of artistic craftsmanship that are permanently on public display and situated either in a public place or on a premises that is open to the public without infringing any copyright in such works. Also, one may subsequently make created photographic copies of such artistic works available to the public without infringing the copyright in the original artistic works.

It is not an infringement of the copyright in an artistic work if a copy of it is made for the purpose of including such a copy in an advertisement to sell that work. If that copy of the original work is later ‘…sold, rented or lent, or offered or exposed for sale, rental, loan, or otherwise made available to the public.’, then it would be an infringement of the copyright in the original work.

Where one is the author of, but not the copyright owner to, an artistic work, one may make another subsequent copy of that work without infringing the copyright in that work ‘provided the author does not repeat or imitate the main design of the earlier work.’ In essence, for a photographer to benefit from this exemption, his copy image would have to look substantially different to his previously created image. When selling photographs, photographers should carefully evaluate the effect of selling their copyright in their images along with the images on their legal ability to subsequently create very similar images.

2.2.2.14) Dealings with Rights in Copyrighted Works
The copyright in an artistic work is a property right independent of any property rights attached to that physical work. In accordance with Section 120(1) of the CRRA, ‘the Copyright in a work is transmissible by assignment, by testamentary disposition or by operation of the law, as personal or moveable property.’ Also, under Section 120(2) ‘a transmission of the copyright in a work by assignment, by testamentary disposition or by operation of law may be partial, so as to apply (a) to

171 Copyright and Related Rights Act 2000, s 93(2)(c)
172 ibid s 93(3)
173 ibid s 94(1)
174 ibid s 94(2)
175 ibid s 95
176 Copyright and Related Rights Act 2000, s 120(1)
one or more but not all of the acts the copyright owner has the right to undertake or authorise, and (b) to part but not the whole of the period for which the copyright in the work is to subsist.” 177 Thus, the owner of the copyright in a work could decide to assign, licence or transmit by testament the right to make the work available to the public for a period of one month, but not the right to copy or make an adaptation of the work. For an assignment in whole or in part of a copyright in a work to have legal effect, it must be in writing and signed by the assignor or on his behalf. 178 A copyright licence granted by a copyright owner to a third party is:

‘...binding on every successor in title to his or her interest in the copyright, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser...’ 179

A copyright licence may be granted on either a non-exclusive or an exclusive basis. 180 An “exclusive licence” is defined by the CRRA as:

‘...a licence in writing which is signed by or on behalf of an owner or prospective owner of the copyright which authorises the licensee, to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner and references to an exclusive licensee shall be construed accordingly’. 181

In the course of business, photographers frequently grant copyright licences to third parties for either a specific or an indefinite duration on a non-exclusive basis. If a photographer were to grant an exclusive licence to a third party, he would be excluding himself (and possibly to his own financial detriment) from undertaking for the duration of the licence any of the acts restricted by the copyright in a work. 182

2.2.2.15) Moral Rights

In addition to the above-discussed, range of economic rights granted to the owner of the copyright in artistic works, the CRRA, as amended, also grants a number of moral rights, namely a Paternity Right, an Integrity Right and a Right Against False Attribution to a Work. Furthermore, the CRRA grants a Privacy Right to people who commission the creation of photographs for private or domestic purposes. Under Section 107 of the Act, the author of a work has the right to ‘...be

177 ibid s 120(2)
178 ibid s 120(3)
179 ibid s 120(4)
180 ibid s 122(1)
181 ibid s 122(1)
182 Note: When photographers are granting third parties permission to use their images, if they do so through a licence agreement, they would generally use their own licence agreements. In recent years, some photographers have begun to use “Copyleft” and “Creative Commons” licensing systems, rather than drafting and using their own licences. As these licensing systems operate within copyright law, they will not be discussed in this thesis. Copyleft, What is Copyleft? <https://copyleft.org/> accessed 25 April 2016 Creative Commons, What is Creative Commons? <https://creativecommons.org/about/> accessed 25 April 2016
identified as the author and that right shall also apply in relation to an adaptation of the work.\textsuperscript{183} An author who uses a pseudonym, initials or other form of identification has the right to use such a form to identify his work.\textsuperscript{184} The right to be identified as the author is known as the \textit{paternity right}. However, under Section 108 there are a number of exemptions to this right and any acts done under Sections 52, 53(5), 71, 72 or 88 of the CRRA, which relate respectively to the incidental inclusion of copyright material; anything done for the purposes of examinations; parliamentary and judicial proceedings; statutory inquiries, and anonymous or pseudonymous works do not infringe the paternity right.\textsuperscript{185} The paternity right does not apply to ‘anything done by or with the authority of the copyright owner where the copyright in the work originally vested in an employer under Section 23.’\textsuperscript{186} It also does not apply to a work created for the purpose of reporting current events\textsuperscript{187} or a newspaper, periodical and other specified types of publications.\textsuperscript{188} Furthermore, it does not apply to works in which either a Government or Oireachtas copyright subsists, or to works in which the copyright originally vested in a prescribed international organisation unless the work’s author had previously been identified as its author in copies of the work that had been made available to the public.\textsuperscript{189} The paternity right does not apply in respect of an artistic work whose author died before the commencement of Part II of the Act.\textsuperscript{190} In addition, a paternity right in respect of an artistic work shall not apply:

\begin{itemize}
  \item[(a)] where copyright first vested in the author, to anything which by virtue of an assignment of copyright made or licence granted before the commencement of Part II of this Act may be done without infringing copyright,
  \item[(b)] where copyright first vested in a person other than the author, to anything done by or with the licence of the copyright owner.
\end{itemize}

Section 109 of the CRRA concerns the “\textit{Integrity Right}” and states:

‘...the author of a work shall have the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would prejudice his or her reputation and that right shall also apply in relation to an adaptation of the work’\textsuperscript{191}

Like the above-mentioned paternity right, the integrity right is also restricted by the terms of Sections 12(1) and 12(2) of Part I of the First Schedule to the Act.\textsuperscript{192} Also, Sections 110 and 111 of the Act contain a wide range of exemptions and qualifications to this integrity right. One infringes an integrity right by possessing, dealing in or making available ‘a work or a copy of a work or an adaptation

\begin{flushleft}
\textsuperscript{183} ibid s 107(1) \\
\textsuperscript{184} ibid s 107(2) \\
\textsuperscript{185} ibid s 108(1) \\
\textsuperscript{186} ibid s 108(2) \\
\textsuperscript{187} ibid s 108(3) \\
\textsuperscript{188} ibid s 108(4) \\
\textsuperscript{189} ibid s 108(5) \\
\textsuperscript{190} Copyright and Related Rights Act 2000, first schedule, part I, s 12(1) \\
\textsuperscript{191} ibid s 12(2) \\
\textsuperscript{192} Copyright and Related Rights Act 2000, s 109(1) \\
\textsuperscript{193} Copyright and Related Rights Act 2000, first schedule, part I, ss 12(1)–12(2)
\end{flushleft}
thereof which has, and which he or she knows or has reason to believe has, been subjected to any distortion, mutilation or other modification or other derogatory action within the meaning of Section 109'.

The "Right against False Attribution to a Work" is granted under Section 113 of the CRRA. This right ‘…also applies where a work is falsely represented as being an adaptation of the work of a person in the same manner as it applies where the work is so represented as being the work of a person.’ An “attribution” is defined by Section 113(5) of the Act as being ‘…a statement, express or implied, as to who is the author of the work.’ This right is infringed if one undertakes any one of a number of specified actions, such as the sale of a work or a copy of a work with a false attribution while ‘…knowing or having reason to believe that the attribution is false.’ Court cases concerning the false attribution of artistic works are a rarity and particularly so in relation to photographs.

In addition to the above-mentioned integrity rights granted to the owners of the copyright in photographs, Section 114 of the CRRA grants a privacy right to people, who commission photographers to create photographs for private or domestic purposes. Although this right can be expressly waived in favour of a photographer, it is a right against rather than to photographers. Consequently, this right to privacy will be examined in Chapter (3). The paternity right, the integrity right and the right to privacy in photographs ‘…shall subsist for the same period of time as the copyright in a work subsists.’ – namely the lifetime of its author and for 70 years after his death.

However, under Section 115(2) the right against the false attribution of a work subsists for 20 years after the death of the person on whom that right is conferred. This right against false attribution of authorship existed under the Copyright Act 1963 and had a similar duration limitation. Although this moral right was discussed during the Oireachtas Select Committee on Enterprise and Small Business Debate on the Copyright and Related Rights Bill 1999, there was no specific discussion relating to the duration period of this right. It would appear that this 20 year duration limitation was simply carried-over to the 2000 Act resulting in this moral right having a shorter duration period than that of the other above-mentioned moral rights. It is also noted, that it is of a similar duration to that provided for under the United Kingdom’s Copyright, Designs and Patents Act 1988 and its duration limitation.

194 ibid s 112
195 Copyright and Related Rights Act 2000, s 113(1)
196 ibid s 113(4)
197 ibid s 113(5)
198 ibid s 113(2)
199 See: (1) Clark v Associated Newspapers Ltd. [1998] EWHC Patents 345
(2) Chris Tryhorn, ‘Sun to pay Lily Allen £10,000 damages’ The Guardian (London, 25 September 2009)
200 Copyright and Related Rights Act 2000, s 114(3)
201 ibid s 115(1)
202 ibid s 115(2)
203 Copyright Act 1963, s 54(5)
204 Oireachtas Select Committee on Enterprise and Small Business Deb 17 Feb 2000
205 Copyright, Designs and Patents Act 1988, s 86(2)
preceding Act – the Copyright Act 1956.\textsuperscript{206} As stated above, the Copyright Act 1963 was primarily based on this latter Act.\textsuperscript{207} The statutory right against false attribution of authorship has its origin in Section 7 of the Fine Arts Copyright Act 1862, which stated:

‘...no Person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any Painting, Drawing, or Photograph, or the Negative thereof, any Name, Initials, or Monogram...’\textsuperscript{208}

Section 7 also stipulated the penalties for offences committed under that Section during the lifetime of the author of a work or within twenty years of his death and that such penalties could not be imposed following that twenty year period.\textsuperscript{209} It would be appropriate to amend the duration of this moral right to that of the other moral rights, namely the life of an author and 70 years after his death. In contrast to copyright, any moral rights attached to a work are not assignable or alienable.\textsuperscript{210} Under Sections 107 and 109 of the Act, only the author of a work may be granted respectively a paternity or an integrity right. The right against false attribution of authorship of a work may apply to anybody,\textsuperscript{211} while the right to privacy in a work commissioned for private and domestic purposes only applies to the commissioner of such a work.\textsuperscript{212} Section 119 of the CRRA concerns the transmission of moral rights upon death and it states that upon the death of any person entitled to a paternity right, an integrity right or a privacy right:

\begin{itemize}
  \item[(a)] the right passes by testamentary disposition to such person as the person entitled to the right may direct,
  \item[(b)] where there is no direction as to whom the right passes but the copyright in the work concerned forms part of an estate, the right passes to the person to whom the copyright passes, and
  \item[(c)] where the right does not pass under paragraph (a) or (b), it is exercisable by the personal representatives of the person entitled to the right.\textsuperscript{213}
\end{itemize}

In relation to the right against false attribution, Section 119(5) of the Act provides that:

‘Any infringement of the right conferred by Section 113 in relation to a false attribution of a work after the death of a person is actionable by the personal representatives of that person.’\textsuperscript{214}

\begin{flushleft}
\textsuperscript{206} Copyright Act 1956, s 43(5)
\textsuperscript{207} Dáil Deb 28 November 1962, vol 198, col 240
\textsuperscript{208} Fine Arts Copyright Act 1862, s 7
\textsuperscript{209} ibid
\textsuperscript{210} ibid s 118
\textsuperscript{211} ibid s 113(1)
\textsuperscript{212} ibid s 114(1)
\textsuperscript{213} ibid s 119(1)
\textsuperscript{214} ibid s 119(5)
\end{flushleft}
2.2.2.16) Remedies available for an Infringement of Copyright and Moral Rights

The CRRA grants copyright owners a range of remedies for the infringement of their copyright. It also grants to exclusive licensees of the copyright to a work ‘...except as against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment’.215 Under Section 135(2) of the Act, such rights and remedies ‘...are concurrent with those of the copyright owner...’216 An infringement of copyright is actionable by a copyright owner217 and in such an action ‘...all relief by way of damages, injunction, account of profits or otherwise is available to the plaintiff as it is available in respect of the infringement of any other property right.’218 A court may award damages for an infringement of copyright.219 In addition to granting compensation for any financial loss suffered by a plaintiff from an infringement of his copyright, a court may award either aggravated or exemplary damages or both.220 However, under Section 128(2) of the Act, and without prejudice to any other remedy available to a court, if it is shown in such an action that at the time of the infringement that the defendant ‘...did not know and had no reason to believe that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against the defendant.’221 In order for a defendant to benefit from this prohibition on the award of damages against him for a proven infringement of copyright, he would have to rebut an application of any of the presumptions which exist under Section 139 of the Act.222 Of primary relevance here is the presumption that copyright subsists in a work until the contrary is proved.223 Also, under Section 139(3) ‘...where the subsistence of copyright in a work is proved or admitted, or is presumed under sub-Section (2), the plaintiff shall be presumed to be the owner or, as the case may be, the exclusive licensee of the copyright, until the contrary is proved.224

Section 97(1) of the United Kingdom’s Copyright, Designs and Patents Act 1988, as amended, contains a provision that is closely worded to that of the above-mentioned Section 128(2) of the CRRA.

215 ibid s 135(1)
216 ibid s 135(2)
217 ibid s 127(1)

Note: Case C-441/13 Pez Hójduk v EnergieAgentur.NRW (22 January 2015) concerned the infringement of an Austrian photographer’s copyright in her photographs through the uploading of them by a third party on a Germany-based website. In Pez Hójduk, the CJEU, at para 38, held that ‘...in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.’

Pez Hójduk concerned a preliminary ruling on the interpretation of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which relates to “Special Jurisdiction” (Brussels Regulation).


218 Copyright and Related Rights Act 2000, s 127(2)
219 ibid s 128(1)
220 ibid s 128(3)
221 ibid s 128(2)
222 ibid s 139(2)
223 ibid
224 ibid s 139(3)
Central to the defence’s case in the Patents County Court case of Hoffman v Drug Abuse Resistance Education (UK) Ltd. was this Section 97(1) defence. In Hoffman, the defendant had commissioned a third party website design firm to design two websites for it. In doing so, the design firm copied nineteen of the claimant’s images from a government sponsored (Department of Health) website entitled “Talk to Frank”. The defendant advanced a Section 97 defence that its website designer had believed that the website from which the images had been copied (“Talk to Frank”) was covered by Crown copyright and thus it was not illegal for it to copy and use the images in question without infringing the claimant’s copyright. However, it transpired that a Crown copyright did not pertain to the “Talk to Frank” website. In rejecting the advanced Section 97 defence, Birss J stated:

‘The defendant understood it had permission under what it understood to be the relevant copyright. That is a very different thing from an argument that the defendant had no reason to believe copyright subsisted at all...To believe that one had permission under (in this case) Crown copyright is the opposite of a belief or reason to believe that there is no copyright in existence.’

While the claimant sought the N.U.J. scale of recommended reproduction fees, but did not advance any detailed supporting evidence on same, Birss J decided to discount the multi-annual use fees and awarded £10,000 in damages plus interest to the claimant. The claimant had previously rejected a Department of Health offer of £50,000 to settle the claim. Ideally, the N.U.J. scale of fees for photographers should be the standard rates to be used by a court when it is determining the quantum of damages to be awarded to a claimant and without the claimant having to prove an actual specific figure for his financial loss as a result of a copyright infringement. Hoffman illustrates how a judge may invoke his personal views when determining the quantum of damages in the absence of a detailed and supportable damages claim being advanced by a claimant.

Among the other remedies available to a copyright owner for an infringement of his copyright under the Irish Act is the right to seek a court order for the delivery-up of infringing copies of the work from any person, who in the course of business, is in possession of infringing copies of the copyrighted work and any Article used to make infringing copies. An application to the court for such an order must be made within 6 years from the date on which the infringing copy of the work was made. Also, under Section 144(3) of the Act an order for delivery-up in criminal proceedings taken under S.142 may not be made ‘...after the expiration of 6 years from the date on which the proceedings

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225 Copyright, Designs and Patents Act 1988, s 97(1)
226 Hoffman v Drug Abuse Resistance Education (UK) Ltd. [2012] EWPCG 2
227 ibid paras 11–13
228 ibid para 31
229 ibid paras 33–47
230 Copyright and Related Rights Act 2000, s 131
231 ibid s 144(1)
under that Section were initiated’. A copyright owner may also apply to a District Court for a seizure order and a District Court, on being satisfied that any seized copy is an infringing copy, may order that the copy be either destroyed or delivered-up to the owner of the copyright or otherwise dealt with as the Court may determine. One should exercise caution prior to seeking a District Court seizure order, as under Section 132(5):

‘After the implementation of an order under this Section, the court may, on the application of a person aggrieved by it, award damages against the applicant for the court order as it considers just, on being satisfied that:

(a) no infringement of copyright has been established and
(b) the information on which the copyright owner applied for the order was given maliciously.’

In instances where it is impracticable for a copyright owner to apply to the District Court for a seizure order under S.132, he may himself seize an infringing copy of a copyrighted work if ‘…it is found being hawked, carried about or marketed.’ The CRRA places a number of specific restrictions and requirements on a copyright owner in exercising this right, including a requirement to inform a member of An Garda Síochána in the District Court area in which the seizure is to be made of the location and time of the seizure in advance of making such a seizure.

While Section 133(5) of the Act states: ‘A person exercising the right to seize and detain conferred by subSection (1) may enter premises to which members of the public have access.’ this right under Section 133(1) is effectively of little benefit to a copyright owner, as Section 133(6) states:

‘A person exercising the right to seize and detain conferred by subsection (1) may not seize anything in the possession, custody or control of a person at his or her permanent or regular place of business, trade or profession, and may not use any force.’

With reference to the conversion or detention by any person of infringing copies of a copyrighted work, articles used to create infringing copies or copyright protection-defeating devices, a copyright owner is entitled under Section 134 to all rights and remedies as he would be entitled to if he were the owner of the infringing copies, articles or devices since they were made. However, under Section 134(2) of the CRRA and in accordance with Section 12(2) of the Statute of Limitations 1957, as amended, a six year limitation is placed on the bringing of an action to enforce the rights granted under S.134(1). This six year limitation period may be postponed in the case of a fraud or

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232 ibid s 144(3)
233 ibid s 132(1)
234 ibid s 132(2)
235 ibid s 132(5)
236 ibid s 133(1)
237 ibid s 133
238 ibid s 133(5)
239 ibid s 133(6)
240 Copyright and Related Rights Act 2000, s 134(1)
241 Note: The Statute of Limitations 1957 was amended by the Statute of Limitations (Amendment) Acts of 1991 and 2000
242 Copyright and Related Rights Act 2000, s 134(2)
a mistake and it shall not begin to run until the plaintiff has discovered the fraud or mistake or could have discovered it through reasonable diligence.243

The European Union (Copyright and Related Rights) Regulations 2012244 inserted a new Section 40(5)(a) in the CRRA to give legal effect to Article 8 of EC Directive 2001/29/EC.245 Section 40(5)(a) of the Act states:

‘The owner of the copyright in a work may, in respect of that work, apply to the High Court for an injunction against an intermediary to whom paragraph 3246 of Article 8 of Directive 2011/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society applies’.247

While such a remedy would be available to a photographer whose photographs are being illegally displayed in breach of copyright on a third party’s website, the legal costs associated with an injunction application to the High Court to order a website’s internet service provider (website host), to prevent the continuation of the infringement of such copyright would be prohibitive.

In addition to the above-mentioned remedies granted by the CRRA in respect of the infringement of the copyright in a work, the Act also grants remedies to the owner of a moral right attached to a work and granted by the Act for the infringement of that moral right. A moral right owner may apply to the appropriate court for damages or other relief, where there is claimed to be an infringement of such a right.248

2.2.2.17) Criminal Offences relating to Copyright

Infringement of copyright is a criminal offence. Many individuals are either unaware of or do not recognise this fact. This is possibly because while copyright is legally classified as being a property right, it is not tangible like a piece of real property. Also, it is possible that many people do not view the copyright in a work as being a property and do not see anything really wrong with infringing a copyright. Sections 140 and 141 detail a number of offences in relation to copyright infringement. Section 140(1) of the Act states:

243 Statute of Limitations 1957, s 71(1) and s 72(2)
244 European Union (Copyright and Related Rights) Regulations 2012, SI 2012/59
245 ibid reg 2
Note: Paragraph 3 of Article 8 of this Directive states: ‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’
247 Copyright and Related Rights Act 2000, s 40(5)(a)
Note: For an example of such an injunction application see: EMI Records (Ireland) Ltd. and Others v UPC Communications Ireland Ltd. and Others [2013] IEHC 274.
248 Copyright and Related Rights Act 2000, s 137
Note: Section 2 of the CRRA defines “appropriate court” as being either the District Court, Circuit Court or the High Court depending upon the value of the damages sought by a claimant.
‘A person who, without the consent of the copyright owner:
(a) makes for sale, rental or loan,
(b) sells, rents or lends, or offers or exposes for sale, rental or loan,
(c) imports into the State, otherwise than for his or her private and domestic use,
(d) in the course of a business, trade or profession, has in his or her possession, custody or control, or makes available to the public, or
(e) otherwise than in the course of a business, trade or profession, makes available to the public to such an extent as to prejudice the interests of the owner of the copyright,
a copy of a work which is, and which he or she knows or has reason to believe is, an infringing copy of the work, shall be guilty of an offence.’

Other offences relating to articles that have been specifically designed or adapted for the making of copies of a work and to copyright protection-defeating devices are also specified by the Act. Also, the showing of a copyrighted artistic work in public without the authorisation of the copyright owner is a criminal offence and the person who caused it to be shown is guilty of an offence, if he was aware or had reason to believe that the copyright in the work would be infringed by doing so. A person found guilty of a Section 140(1), 140(3) or a 140(4) offence is liable on summary conviction to a fine not exceeding £1,500 [€1,904] in respect of each infringing copy or to a term of imprisonment not exceeding 12 months or both. If convicted on indictment, one is liable for a fine not exceeding £100,000 [€126,974] or to a term of imprisonment not exceeding 5 years or both. Similar penalties apply in respect of the offence of infringing the copyright in an artistic work by showing it in public. Section 141 makes it an offence to make a false claim to copyright for financial gain. A person found guilty of this offence ‘...shall be liable on conviction on indictment to a fine not exceeding £100,000 [€126,974] or to imprisonment for a term not exceeding 5 years, or both.’ Criminal prosecutions for copyright infringement are extremely rare, as is the media coverage and/or commentary on such offences.

It is common practice for professional photographers to implement any of a number of copyright protection measures in order to protect their copyright. Such measures include the overprinting of

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249 ibid s 140(1)
Note: For the purposes of Section 140, S.140(2) defines a “loan” as: ‘...a loan for reward and in particular does not include a loan to a family member or friend for private and domestic use, and “lends” shall be construed accordingly.’
250 ibid s 140(3) and s 140(4)
251 ibid s 140(5)(c)
252 Note: Under S.6(3) of the Fines Act 2010, this maximum fine upon summary conviction would now be a Class “C” fine of €1,000 – €2,500.
253 Copyright and Related Rights Act 2000, s 140(7)(a)
254 ibid s 140(7)(b)
255 ibid s 140(8)
256 ibid s 141
257 Note: For an example of such a case see: DPP v McGoldrick [2005] IE CCA 84. McGoldrick concerned the possession for trade of copyright infringing video cassette recordings of movies and not the infringement of the copyright in a still photograph.
258 Note: Section 2(1) of the Copyright and Related Rights Act 2000 defines a “rights protection measure” as: ‘...any process, treatment, mechanism
a copyright watermark on any photographs published by them on their own websites; the inclusion of a copyright notice within the metadata file of any photographs, which they either publish on their own websites or provide to their clients in a digital format; the inclusion of anti-copying or reproduction measures on disks of images supplied to their clients for image viewing and/or selection purposes, and the printing of a copyright notice on either the facing or rear side of any hardcopy photographic prints supplied to clients. While one could initiate a civil action in respect of an infringement of a rights protection measure attached to a photograph, the legal costs involved may make such a course of action prohibitive and particularly so where multiple, individual cases of such infringement are involved. The CRRA does offer some remedies to rights owners in respect of such infringements through its criminalisation of the act of unlawful interference with rights management information.

Under Section 375(1) of the Act:

'A person who provides rights management information has the same rights and remedies against a person who:

(a) removes or alters rights management information from copies of copyright works...knowing or having reason to believe that the primary purpose or effect of such removal or alteration is to induce, enable, facilitate or conceal an infringement of any right conferred by this Act,

(b) makes available to the public copies of copyright works..., knowing or having reason to believe that rights management information has been removed or altered from those copies, or

(c) (i) sells, rents or lends, or offers or exposes for sale, rental or loan,
(ii) imports into the State, or
(iii) in the course of a business, trade or profession, has in his or her possession, custody or control, copies of copyright works..., knowing or having reason to believe that rights management information has been removed or altered from those copies,

as a rightsholder has in respect of an infringement of any of his or her rights under this Act."

Under Section 376(1) of the Act, a person who undertakes any of the actions specified in S.375(1) above shall be guilty of an offence. It is the norm for photographers to insert rights management information into the metadata files of their photographs. However, the Act does not make any mention of this type of data file or the illegality of the unauthorised removal of rights management

Note: A metadata file is a digital data file that contains descriptive data relating to other data. A digital photograph’s data file may include a metadata file, which details the rights management information and other particulars relating to the photograph.

Copyright and Related Rights Act 2000, s 376(2)
information from a photograph’s metadata file. The prosecution of offences under either Section 140 or Section 376 of the Act could not be classified as being one of the priorities of An Garda Síochána.

To initiate either a Section 140 or a Section 376 prosecution is made difficult due to the fact that it would be necessary to identify the individual who actually either infringed the copyright in the work or removed the rights management information from the photograph’s metadata file. Then, it would be necessary to prove that that individual did so knowing that to do so constituted an offence under the Act. In respect of Section 376 prosecutions, the Irish Professional Photographers’ Association in its submission to the Copyright Review Committee stated that its members were not aware of a single case in which a prosecution had been taken for the unlawful removal of rights management information from a photograph.  

In practical terms, the current high level of both the infringement of copyright and of rights management information in photographs would necessitate An Garda Síochána devoting its complete resources full-time to the prosecution of offences under either Section 140 or Section 376, should it be inclined to prioritise the prosecution of such offences. Such a strategy will never become a reality. Ideally, the CRRA should be amended to include a strict liability, specific offence of the unauthorised interference with and/or removal of rights management information contained in a digital photograph’s metadata file. Also, should the Oireachtas contemplate the re-organisation of the Irish Patents Office into an Intellectual Property Office and the broadening of the responsibilities of its Controller in respect of copyright, consideration should be given to the granting of prosecutorial powers to the Controller in respect of Section 140 and Section 376 offences.

In addition to the offences specified under the CRRA, a person who uses a computer to infringe the copyright in a photograph could, in certain circumstances, be prosecuted under the Criminal Justice (Theft and Fraud Offences) Act 2001, as amended. Section 9(1) of the Act, which concerns the unlawful use of a computer, states:

“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.”


263  Note: One could always initiate a private prosecution for copyright infringement. In the Irish High Court case of Kelly and Anor v District Court Judge Ryan [2013] IEHC 321, Hogan J, at paras 14–22, stated that the right to initiate a private prosecution in respect of an offence still existed under Irish law and was not abolished by the Criminal Procedure Act 1967, as amended by the Criminal Justice Act 1999, except where barred from doing so by a number of statutes. While one would have the legal right to initiate a private prosecution for a Section 140 or Section 376 offence, Hogan J stated, at para 42D, that its continuation would be dependent upon the express consent of the Director of Public Prosecutions.


265  Criminal Justice (Theft and Fraud Offence) Act 2001, s 9(1)

Note: Upon conviction on indictment of such an offence, under Section 9(2) of the CRRA a person is liable to a fine or imprisonment for a term of up to 10 years or both.
For the successful conviction of an individual charged with a Section 9(1) offence, it would be necessary for the prosecution to prove both that the individual had acted dishonestly and that he intended to either make a gain for himself or to cause a loss to another person.

2.2.3) Copyright Protection under International Conventions and Treaties

Ireland is a party to a number of international copyright conventions and treaties, namely the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organisation (WIPO) Copyright Treaty. The CRRA has updated Irish legislation to incorporate the provisions of these conventions and treaties.266

2.2.3.1) Berne Convention for the Protection of Literary and Artistic Works

Ireland became a party to the 1886 Berne Convention in 1927.267 Essentially, Berne lays down a set of basic, minimum rights of protection for authors of various types of qualifying literary and artistic works. It also provides for exceptions and limitations to such rights. The countries that are parties to Berne may individually determine the specific terms of protection and any limitations on such protection, which they will apply to qualifying works. A number of the provisions of Berne are of direct relevance to photographers. Photographs are included as literary and artistic works for protection purposes under Article 2(1) of the Convention which states:

‘The expression “literary and artistic works” shall include...photographic works to which are assimilated works expressed by a process analogous to photography...’268

For a work to benefit from copyright protection under Berne, it is irrelevant whether a qualifying work has been published or not269 and no formalities, such as the registration of a copyright in a work, are required of an author for him to enjoy and exercise the rights protected under Berne.270 Article 6bis(1) grants authors a range of moral rights, which are independent of an author’s economic rights. The moral rights granted by Berne are:

‘…the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.’271

266 Copyright and Related Rights Act 2000, third schedule
267 World Intellectual Property Organisation, Treaties and Contracting Parties: Berne Convention, Ireland
268 Berne Convention for the Protection of Literary and Artistic Works, art 2(1)
269 ibid art 3(1)(a)
   Note: Published works are defined by Art.1(3) of Berne as ‘...works published with the consent of their authors’.
270 ibid art 5(2)
271 ibid art 6bis(1)
While Berne states that the duration of the term of the protection offered by it is the life of the author of a work and fifty years after his death, Article 7(4) makes specific reference to the term of protection for photographs and states:

“It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.”

Clark, Smyth and Hall suggest that this specific reference to photographs in Article 7(4) was designed to “…encourage the prompt exploitation of news photographs”. In respect of EU Member States, Article 1 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights increased the term of protection in artistic works, which include photographs, to 70 years after an author’s death. According to Article 9(1) of Berne, ‘Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form’. Signatory countries to Berne may permit exceptions to this reproduction right. However, they may only do so ‘…in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’. This has become known as the “Berne Three Step Test”. Authors of artistic works are given an exclusive right in respect of authorising adaptations, arrangements or other alterations to their work under Article 12. Moral rights are also granted to the author of a work under Article 6(1) of the Convention, which states: ‘Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation’.

The term of duration of these moral rights is provided for under Article 6(2). Berne includes provisions for the free use of works covered by it, such as for the making of quotations and for

272 ibid art 7(1)
273 Note: The “Union” referred to in Art. 7(1) of Berne should not be confused with the European Union. Art. 1 of Berne states ‘The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.’
274 ibid art 7(4)
275 Robert Clark, Shane Smyth and Niamh Hall, Intellectual Property Law in Ireland (3rd edn, Bloomsbury Professional 2010), 233
278 ibid art 9(2)
279 ibid art 12
280 ibid art 6(1)
281 ibid art 6(2)
teaching purposes.\textsuperscript{282} Also, on the use of photography in the reporting of current events, Article 10bis(2) states:

‘It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informative purpose, be reproduced and made available to the public.’\textsuperscript{283}

For an author of a work protected under Berne to be regarded as its author and thus entitled to institute infringement proceedings to protect his rights, the appearance of his name or his pseudonym on that work will be sufficient proof of him being its author unless the contrary is proven.\textsuperscript{284} Berne also makes provision for the seizure of infringing copies of protected works.\textsuperscript{285} While the above-mentioned provisions in the Berne Convention have been incorporated into Irish legislation through the CRRA, as amended, and as a result of Ireland’s member of the European Union and its implementation of EU Copyright Directives, other countries outside of the European Union may rely directly on Berne. Consequently, Berne is of relevance to Irish photographers doing business in any non-EU countries.

\textbf{2.2.3.1.1) Artists’ Resale Right (Droit de Suite)}

The artists’ resale right, also known as the droit de suite (the right to follow) permits the authors of works of art to receive a commission on the re-sale of their works. Article 14ter(1) of Berne states:

‘The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.’\textsuperscript{286}

This right under Berne may only be claimed by an author if the country to which he belongs has introduced legislation permitting the right and ‘...to the extent permitted by the country where this protection is claimed.’\textsuperscript{287} The artists’ resale right ‘...forms an integral part of copyright and is an essential prerogative for authors’ according to Directive 2001/84/EC.\textsuperscript{288} Under the European Communities (Artist’s Resale Right) Regulations 2006,\textsuperscript{289} which transposed Directive 2001/84/EC

\begin{thebibliography}{289}
\bibitem{282} ibid art 10
\bibitem{283} ibid art 10bis(2)
\bibitem{284} ibid art 15(1)
\bibitem{285} ibid art 16(1)
\bibitem{286} ibid art 14ter(1)
\bibitem{287} www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html accessed 19 February 2016
\bibitem{289} European Communities (Artist’s Resale Right) Regulations 2006, SI 2006/312
\end{thebibliography}
into Irish law, and as amended,290 artists have obtained, subject to specific provisions, a right to receive a royalty on the re-sale value of any original works of art, which they sell. The 2006 Regulations were introduced in Ireland on 13th June 2006 following the initiation of a High Court action by artist Robert Ballagh against the State for its failure to implement Directive 2001/84/EC before the implementation deadline date of the 1st January 2006. In reporting on that case, The Irish Times stated that O’Neill J awarded Ballagh €5,000 in compensation in respect of his loss on rights relating to the resale of his works between 1st January 2006 and 13th June 2006.291 Photographs are included within the definition of “an original work of art” contained in Directive 2001/84/EC.292 Copies of works of art that are covered by the Directive and which are made in limited numbers by an artist or under his authority are also considered as being original works of art under the Directive.293

Regulation 3(1) of the 2006 Regulations states:

“The author of an original work of art shall, in accordance with these regulations, have a right (‘resale right’) to a royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author (‘resale royalty’).”294

The sale of an original work of art is considered as a resale under regulation 5(2) if the following conditions are met:

‘(a) the buyer, the seller or, if the sale takes place through an agent, the agent of the buyer or the seller, is acting in the course of a business of dealing in works of art and

(b) the sale price is not less than €3,000.’295

Regulation 9(1) details the scale of royalty percentages payable upon a resale of an original work of art up to a maximum royalty amount of €12,500.296 The duration of an artist’s resale right in an artistic work is the same as that of the copyright in such a work.297 The 2006 Regulations had stipulated that this right extinguished upon the author’s death.298 But, the 2011 Amendment

Note (1):
Art. 8(1) of Directive 2001/84/EC states that the term of protection of the resale right shall correspond to that specified in Art. (1) of Council Directive 93/98/EEC.

Note (2):

Note (3):

Note (4):
European Communities (Artist’s Resale Right) Regulations 2006, SI 2006/312, reg 10
Regulations extended the duration of a resale right by re-defining it as being ‘...the lifetime of the author and for 70 years after his or her death’.\textsuperscript{299} In addition, the 2011 Amendment Regulations introduced the right to transmit a resale right ‘...by testamentary disposition or in accordance with the rules of intestate succession as personal or moveable property’.\textsuperscript{300} Thus, the heirs of artists may benefit from the resale right.

2.2.3.2) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)

Ireland became a member of the World Trade Organisation on the 1\textsuperscript{st} January 1995\textsuperscript{301} and in doing so it became a signatory to the WTO’s Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which came into effect on the same date.\textsuperscript{302} With some exceptions, TRIPS embraces the provisions of the Berne Convention. Articles 9–14 of TRIPS deal with the area of copyright and related rights.\textsuperscript{303} Under Article 9(1) of TRIPS, compliance with Articles 1–21 of the Berne Convention is a requirement. However, member countries do not have rights or obligations under TRIPS in respect of the moral rights granted under Article 6\textsuperscript{bis} of Berne.\textsuperscript{304} As to the scope of copyright protection under TRIPS, Article 9(2) states:

‘Copyright protection shall extend to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such’\textsuperscript{305}

In dealing with the term of protection of rights in a work, TRIPS contains an exemption with respect to photographs. Article 12 of TRIPS states:

‘Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.’\textsuperscript{306}

Although adherence to the Berne “Three Step Test” relating to limitations and exceptions is covered under the compliance requirement of Article 9 as mentioned above, TRIPS re-iterates this test in Article 13, which states:

‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably

\textsuperscript{299} European Communities (Artist’s Resale Right) (Amendment) Regulations 2011, SI 2011/709, reg 10(1)
\textsuperscript{300} ibid reg 4A
\textsuperscript{301} World Trade Organisation, Membership Information: Ireland and the WTO <www.wto.org/english/thewto_e/countries_e/ireland_e.htm> accessed 19 February 2016
\textsuperscript{303} World Trade Organisation, Intellectual Property (TRIPS) Agreement Text <www.wto.org/english/tratop_e/trips_e/trips_e1_agm3_e.htm#1> accessed 19 February 2016
\textsuperscript{304} ibid art 9(1)
\textsuperscript{305} ibid art 9(2)
\textsuperscript{306} ibid art 12
prejudice the legitimate interests of the right holder.”

2.2.3.3) World Intellectual Property Organisation Copyright Treaty

The World Intellectual Property Organisation (WIPO) is a self-funding agency of the United Nations. Ireland has been a member of WIPO since 1970 and it ratified the 1996 WIPO Copyright Treaty in 2009. Essentially, the WIPO Treaty updates the Berne Convention taking into account recent technological developments. In relation to the duration of the protection of photographic works, Article 9 of WIPO states ‘...the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention’. As mentioned above, under Article 7(4) of Berne, photographs were granted copyright protection for the life of the author and twenty-five years after his death in contrast to the general term of protection for artistic works of fifty years after an author’s death. The effect of Article 9 of WIPO was to remove this distinction in Berne and to increase the term of protection for photographs to fifty years after the author’s death. Article 11 stipulates the obligations on parties contracting to the Treaty to provide legal protection and remedies against the circumvention of technological measures used by authors to prevent unauthorised acts in respect of their works. Article 12 contains similar stipulations in relation to the circumvention of any rights management information (digital rights management information) employed by an author in his work or the unauthorised removal or alteration of same by third parties in order to infringe an author’s rights. Articles 6 and 7 of Directive 2001/29/EC deal specifically with the obligations contained in Articles 11 and 12 of WIPO and the transposition of the provisions of this Directive was completed with the commencement of the European Communities (Copyright and Related Rights) Regulations 2004.

2.3) Dilution of Photographers’ Rights

Photographers’ rights through their ownership of the copyright in their works are being diluted as a consequence of reforms in copyright law at EU and national levels, such as the law relating to

307 ibid art 13
309 ibid Information by Country: Ireland accessed 19 February 2016
310 ibid Administered Treaties: Contracting Parties accessed 19 February 2016
311 WIPO Copyright Treaty, Art 9 accessed 19 February 2016
312 ibid art 11
313 ibid art 12
315 European Communities (Copyright and Related Rights) Regulations, 2004 SI 2004/16
316 Note: The Chapter Sub-Section “Dilution of Photographers’ Rights” contains research material, that I also incorporated into a two-part article entitled “Copyright Reform: A Modernisation or the Start of the Death of Copyright for Photographers?”, which I published as part of my research work for this thesis in the peer-reviewed journal Communications Law – The Journal of Computer, Media and Telecommunications Law.

“orphan works”. As discussed below, the question is whether this dilution is justified in order to protect competing interests, particularly public interest considerations? Photographers’ rights are potentially subject to further legal reform if some of the proposals contained in copyright review reports and government recommendations are implemented. In addition, through a number of marketplace activities including the stripping of rights management information from their images’ files by third parties; the terms of use of websites (particularly social media websites) and the terms of contracts offered by commissioning clients to photographers their rights are being diluted on an almost daily basis.

2.3.1) Orphan Works

The term “Orphan Work” is a recent creation. Orphan works are copyrighted works whose rights owner(s) are either unidentifiable or untraceable. They were not provided for in the CRRA, as amended. However, Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works required that it be transposed into Irish law by the 29th October, 2014.317 In defining an orphan work, Article 2(1) of this Directive states:

‘A work or a phonogram shall be considered an orphan work if none of the right holders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the right holders having been carried out and recorded in accordance with Article 3.’318

The Directive covers certain uses of orphan works made by publicly accessible libraries, educational establishments and museums; archives; film or audio heritage institutions, and public-service broadcasting organisations established in Member States in order to achieve aims related to their public-interest missions.319 It applies to specified types of published works including books, journals, newspapers, magazines and cinematographic and audiovisual works held by the above-mentioned types of institutions, which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.320 It also applies to specific types of unpublished works, namely:

‘...works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the right holders, provided that it is reasonable to assume that the right holders would not oppose the uses referred to in Article 6.’321

318 ibid art 2(1)
319 ibid art 1(1)
320 ibid art 1(2)
321 ibid art 1(3)
Member States may limit the application of the Directive in respect of these specific unpublished works to those which were deposited with the above-specified types of organisations prior to 29th October, 2014.\textsuperscript{322} Also, under Article 1(4), the Directive applies to:

‘...works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.’\textsuperscript{323}

The Directive applies to all the above-mentioned types of works, which are protected by Member State copyright legislation on or after 29th October 2014 and also to acts concluded and rights acquired prior to that date.\textsuperscript{324} While stand-alone photographs are not currently covered by the Directive, there is a real possibility that they will be, as Article 10 states:

‘The Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images.’\textsuperscript{325}

The number of orphan works in the possession of the above-mentioned types of organisations must be vast. The volume of such works held by Irish organisations covered by the Directive is unknown. However, in relation to photographs, the 2010 Vuopala study on orphan works sheds a light on the number of orphan photographs in existence. Vuopala reported:

‘...a survey amongst museums in the UK found that the rights holders of 17 million photographs (that is 90% of the total collections of photographs of the museums) could not be traced. The right holders could only be identified in 10% of cases’.\textsuperscript{326}

On the granting of orphan work status to photographs, Vuopala also highlighted a number of specific problems:

‘Establishing copyright status and subsequently orphan status is quite an intricate matter for photographs...While sufficient right holder information about photojournalists may be lacking due to poor crediting of photographs published in newspapers, hardly any identification information is available for entire collections of unpublished photographs created by non-professionals. These materials are typically photographs of local views, or family and daily life situations. Without such information, the copyright or related rights status may in fact be impossible to assess with legal certainty...Examples show that there are significant amounts of photographs in the archives around Europe. The institutions have usually not acquired any rights to use them when accepting a collection as a donation. It is virtually

\begin{thebibliography}{9}
\bibitem{322} ibid
\bibitem{323} ibid art 1(4)
\bibitem{324} ibid art 8
\bibitem{325} ibid Art 10
\end{thebibliography}
impossible to obtain licenses for the use of them later. If the photographs are unpublished their use may not be possible even based on a limitation.\textsuperscript{327}

In comparing the costs of digitising and obtaining clearing rights in respect of collections held by cultural institutions, Vuopala stated:

‘The cost of clearing rights may amount to several times the cost of digitising the material. As cultural institutions normally do not have the resources or expertise to conduct rights clearance for digitisation projects, specific funding is always necessary, in particular for large scale digitisation projects. In the absence of efficient sources of rights information to works (such as book rights registries), it can take from several months to several years to clear permissions for only a limited number of works. Sometimes it is impossible to clear the rights at all.’\textsuperscript{328}

It would appear that having the ability to make use of works classified as orphan works would be of great financial benefit to the types of organisations covered by the Directive. The United Kingdom’s Intellectual Property Office conducted an Impact Assessment on Orphan Works in 2012, which estimated that an orphan works scheme in the United Kingdom would have a business net present value of £34m and a net cost to business of £3.9m per annum.\textsuperscript{329} While these figures may appear very positive, a 2013 study by the I.P. Office on Orphan Works in the UK and Overseas found that the representatives of overseas organisations surveyed stated that the creation of an online gallery of archive material had resulted in only a 5% increase in its use.\textsuperscript{330} An organisation wishing to use a work, which it believes to be an orphan work, must undertake a diligent search in good faith to establish whether or not the work is actually an orphan work prior to doing so. Under Article 3 of the Directive, which deals with the topic of “diligent searches”, it will be up to the individual Member States to determine the research sources appropriate for each category of work. However, such sources must, at a minimum, include those listed in the Annex to the Directive.\textsuperscript{331} For example, in the case of photographs, the research sources should include the listed sources for published books, newspapers, magazines, journals and periodicals; the databases of the relevant collecting societies and picture agencies.\textsuperscript{332} While the Directive specifies the minimum categories of sources to be consulted by these organisations, it does not specify the minimum degree of diligence to be applied by these organisations while searching them. Diligence levels vary from one person to another. Thus, it will be for each Member State to measure the degree of diligence actually applied by the organisations covered by the Directive during their searches prior to giving them approval to use a

\textsuperscript{327} ibid
\textsuperscript{328} ibid 44
\textsuperscript{332} ibid annex
work, which they claim is an orphan work. The rights holder to a particular work may or may not be resident in the country of the organisation seeking to use that work. However, under Article 3(4) of the Directive, if it is evident that the relevant information on a rights holder may be located in other countries, then the sources of information available in those other countries must be consulted.\textsuperscript{333} Once a work has been granted orphan work status in one Member State, such a status shall apply not just in that State but in all other Member States and it may be used and accessed in all Member States.\textsuperscript{334}

Regarding the permitted uses of orphan works, Article 6(1) of the Directive requires Member States to make exceptions to the reproduction and making available rights under Directive 2001/29/EC, so that the organisations and institutions specified in the Directive may use orphan works in their collections by:

\begin{itemize}
  \item \textsuperscript{(a)} making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;
  \item \textsuperscript{(b)} by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.\textsuperscript{335}
\end{itemize}

The above-mentioned Articles 2 and 3 of Directive 2001/29/EC respectively cover the exclusive reproduction right (by any means and in any form) and the communication and making available rights (by wire or wireless means) of authors of works.\textsuperscript{336} The Directive is silent on whether organisations making works available under an orphan works scheme would themselves be liable for facilitating any subsequent infringement of the copyright in a made available work by another third party. The Orphan Works Directive restricts the uses to which orphan works may be put by the designated organisations and institutions and Article 6(2) states:

\begin{itemize}
  \item The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.\textsuperscript{337}
\end{itemize}

\textsuperscript{333} ibid art 3(4)
\textsuperscript{334} ibid art 4
\textsuperscript{335} ibid art 6(1)
The Directive’s articles do not specify the actual means through which orphan works may be made available to the public – for example, online and/or through exhibitions and publications. While Recital 1 of the Directive includes the following statement:

‘…Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods.’,

one could not take this to mean that the sole permitted means of making works available would be through “online”. In generating revenue from orphan works for the “exclusive” purpose of covering digitisation costs, the Directive does not specify the types of costs, which could be included in “digitisation and making available costs”. Could it, for example, include contributions towards staff salaries; website development and management; printing costs, and exhibition creation, promotion and management costs? Such costs would have a bearing on any charges which might be levied on the public to access any made available orphan works. The Directive does not place any duty on the covered organisations to make any report on the costs they expend in making use of orphan works. It is not inconceivable that creative price transfers could be employed to generate an actual profit from such works.

The Orphan Works Directive is being implemented on a public interest ground not at the request of the general public, but at that of those institutions which currently are in possession of the types of works covered by the Directive. In the interests of public accountability and transparency, organisations making use of orphan works should be required to make a publicly-available, annual return detailing the digitisation, reproduction and making available costs and the revenues generated from the individual orphan works reproduced and made available by them. For the present time, Article 6(2) prevents the designated types of organisations from commercialising their collections of orphan works purely for the overt purpose of profit generation. However, such a restriction could be removed by the EU at a future date. Its removal would be to the advantage of not only the specified types of organisations but also to the Member States, as invariably the latter fund these organisations. The types of works covered by this Directive are broad and the cost of digitising and making them available also varies. For example, it would be cheaper to digitise a stand-alone photograph than a book. A significant number of the orphan works in the possession of the organisations covered by this Directive would not have any great commercial value. Digitising and making available works such as stand-alone photographs, which could generate revenue and a possible profit, could be of greater financial benefit to them. An onus is placed on organisations using orphan works to indicate the name of the identified authors and right holders in any use of such works. This requirement could be of some assistance to rights owners seeking to identify the use of their works under an orphan works scheme. There is a saving for right holders in Article 5, which states:

338 ibid recital 1
339 ibid art 6(3)
Member States shall ensure that a right holder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.\footnote{ibid art 5}

Copyright holders located following a diligent search or those who become aware of the use of their works as orphan works would have a right to either prohibit or put an end to such a use of their works. It is possible that copyright holders may not be aware of the locations of works to which they hold the copyright. Diligent searches may not locate such copyright holders. Thus, in many instances it would only be “after the event”, that a copyright holder would be able to “opt-out” of an orphan works scheme. The Directive requires the covered organisations to maintain specified records of their diligent searches and to provide such records to a national competent authority.\footnote{ibid art 3(5)}

Also, Member States must take the necessary measures to have such specified records recorded in ‘a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market’ (OHIM).\footnote{ibid art 3(6)} As a work granted orphan works status may be used in any Member State, the quality standard of the OHIM’s orphan works record-keeping and the ease of access to those records will have a direct bearing on one’s ability to check the use of a work as an orphan work. The Directive is silent on whether fees would apply to copyright holders wishing to undertake a search of this database. In the interest of openness, ease of accessibility and the non-creation of an unnecessary financial burden on the public, and particularly on copyright holders, such searches should be fee free.

For rights holders to be able to use the Article 5 opt-out clause, they will have to be aware of this central EU-wide database and their right to search it. A central database for works such as books would be relatively straightforward to set-up and search by author, subject or title. However, if the Directive becomes applicable to stand-alone photographs\footnote{Note: Article 10 of Directive 2001/28/EU states: ‘The Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images. By 29 October 2015, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, in the light of the development of digital libraries.’ At the time of writing, no review report had been published.}, then the searching of photographs in this central database will be problematic. The database would have to display each image individually. For a searcher to determine if a specific image classified as an orphan work is actually one of his copyrighted images, one of two possible options would have to be employed. Either the searcher would have to upload his original image to the OHIM and the latter would have to employ comprehensive, image comparison verification software or the searcher would have to download the image from the database and do the comparison himself. Such comparative work could cripple the OHIM database system. Also, such a central database has the potential to become the largest, single photographic database in the EU and it could aid copyright infringement. A major publicity
campaign across the EU will be a necessity, as the general public is not aware of the concept of orphan works. The management of rights, including extended collective licences, does not come within the scope of the Directive (Recital 24).\textsuperscript{344} Member States may decide whether or not they will create such a licensing system for their orphan works scheme. Under Article 6(5) of the Directive, Member States shall provide for the payment of a fair compensation to rights holders that put an end to the orphan work status of their works in respect of the use that has been made of such works by any of the organisations and institutions designated under Article 1 of the Directive.\textsuperscript{345} Furthermore, it shall be for Member States ‘to determine the circumstances under which the payment of such compensation may be organised’.\textsuperscript{346} The term “fair compensation” is very loose and it will be problematic. It is not a specified figure or percentage. What will be the basis upon which the compensation will be determined and by whom? Will it be a fixed fee or a fixed or variable percentage of the "after costs" figure? Will it be a nominal amount or a full market rate? When will it be paid? Will there be an appeals procedure? While all of these points will need to be clarified, Recital 18 of the Directive gives a degree of clarity and states:

‘For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States’ cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to right holders.’

Prior to the publication of legislation to transpose the Directive into Irish law, the Department of Jobs, Enterprise and Innovation published its \textit{Consultation on Transposition of the Orphan Works Directive and the Use of Orphan Works under Irish Law}.\textsuperscript{347} That document shed some limited insight into the Department’s thinking surrounding the mechanics of implementing the Directive. However, it did not make mention of limiting the application of the Directive to works, that had been held by the prescribed types of organisations prior to the 29th October, 2014, even though it could have done so under Article 1(3)\textsuperscript{348} of the Directive. The Consultation Paper was also silent on whether either registration or licence fees would apply to the registration and use of orphan works by the type of organisations prescribed under the Directive. Directive 2012/28/EU was transposed into Irish law through the European Union (Certain Permitted Uses of Orphan Works) Regulations 2014.\textsuperscript{349}

\textsuperscript{344} ibid recital 24
\textsuperscript{345} ibid art 6(5)
\textsuperscript{346} ibid
\textsuperscript{347} Department of Jobs, Enterprise and Innovation, Consultation on Transposition of the Orphan Works Directive and the Use of Orphan Works under Irish Law (Dublin 2014)
\textsuperscript{349} European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 SI 2014/490
The Regulations also amended the CRRA by inserting two new sections (S.70A and S.236A) in the Act to deal with the copying of orphan works by libraries or archivists.\textsuperscript{350} Aside from transposing the Directive into Irish law, these Regulations do not contain any additional, radical provisions. The Regulations do not limit the application of the Directive to works, that have been in the possession of relevant bodies prior to the 29th October 2014. “Overt” commercialisation of orphan works by relevant bodies is not permitted by the Regulations. A relevant body, as defined in the Regulations,\textsuperscript{351} may make use of an orphan work for the ‘sole purpose of covering the costs incurred by it in digitising the orphan work concerned and making it available to the public’.\textsuperscript{352} The Controller of the Irish Patents Office has been assigned a number of functions under the Regulations. These include the receipt from relevant bodies of their records of diligent searches carried-out\textsuperscript{353} and the forwarding of such information to the OHIM\textsuperscript{354} and the determination of fair compensation, if any, to be paid to a right holder, who has not reached an agreement with a relevant body regarding same.\textsuperscript{355} Under Regulation 11, where a right holder puts an end to the orphan work status of a relevant work, fair compensation is due to the right holder for the use that had been made of that work by a relevant body.\textsuperscript{356} Where an agreement has not been reached between a right holder and a relevant body in respect of such fair compensation, either party may petition the Controller for a determination.\textsuperscript{357} The Regulations specify the criteria (as contained in the above-mentioned Recital 18 of the Directive) to be used by the Controller in making such a determination.\textsuperscript{358} Thus, it would appear that it is unlikely that commercial rates for the use of a relevant work will be awarded to right holders through such determinations by the Controller. Part 3 of the Regulations stipulate explicit procedures, which must be adhered to by a petitioner to the Controller. It also details the procedures to be followed by the Controller while managing the determination process.\textsuperscript{359} The Regulations do make provision for an appeal by a dissatisfied petitioner to the High Court.\textsuperscript{360} However, due to the high costs associated with taking cases to the High Court, it is unlikely that this provision will be of much benefit to petitioners except in a few cases. Access to a Small Claims Court within the jurisdiction of both the District and Circuit Courts should also be available to petitioners to appeal lower value determinations made by the Controller.

In addition to Directive 2012/28/EU on orphan works, Directive 2014/26/EU of the European Parliament and of the Council\textsuperscript{361} is also of relevance to photographers. Photographers who licence

\textsuperscript{350} ibid reg 12  
\textsuperscript{351} ibid reg 2(1)  
\textsuperscript{352} ibid reg 8(4)  
\textsuperscript{353} ibid reg 5(3)  
\textsuperscript{354} ibid reg 5(4)  
\textsuperscript{355} ibid reg 11(5)  
\textsuperscript{356} ibid reg 11(1)  
\textsuperscript{357} ibid reg 11(4)  
\textsuperscript{358} ibid reg 11(6)  
\textsuperscript{359} ibid part 3  
\textsuperscript{360} ibid reg 15  
\textsuperscript{361} Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market  
others to use their copyrighted works do so either by negotiating directly with prospective licensees or by using a licensing and collection agency to both licence their works and to collect the licensing fees. Among other issues, Directive 2014/16 is concerned with the collective management of copyright and related rights and it requires Member States ‘to ensure the proper functioning of the management of copyright and related rights by collective management organisations’. In essence, this Directive establishes a common legal code throughout the European Union for the regulation of the collective rights management sector. Directive 2014/26/EU has been transposed into Irish law through the European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations 2016. The Regulations cover the activities of both collective management organisations (CMOs) and Independent Management Entities (IMEs). A CMO is defined by the Regulations as:

‘…an organisation of any legal form which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of the rightholders, as its sole or main purpose, and which fulfils either or both of the following criteria:

(a) it is owned or controlled by its members;
(b) it is organised on a not-for-profit basis;’

An IME is defined by the Regulations as:

‘any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of the rightholders, as its sole or main purpose, and which is –

(a) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders, and
(b) organised on a for-profit basis;’

Compliance by CMOs and IMEs with their duties and responsibilities under these Regulations is monitored by the Controller of Patents, Designs and Trade Marks.

2.3.2 Ireland’s Submission to the European Commission on Copyright Rules

In March 2014, Ireland made a submission to the European Commission’s public consultation on copyright rules. On the matter of the term of protection afforded to copyright holders, it stated:

‘The terms of protection for copyright in the European Union are amongst the longest terms of protection available internationally. In any re-examination of appropriate term of protection

Note: Directive 2014/26/EU was required to be transposed into Irish law by the 10th April 2016.

362 ibid art 1
364 ibid reg 2
365 ibid
366 ibid reg 33
for the digital era, it is worthwhile to strive for balance in protecting the rights and income stream of rights holders with that of the potential benefits of greater access to works by the public. Consideration on the longevity of works in the digital era should also be a factor as well as whether this should be industry or format specific.\footnote{367}

This view on the term of copyright protection is in marked contrast to the Minister's welcoming of the extension of the term of copyright protection for musicians from 50 to 70 years.\footnote{368} Whether the shortening of the term of protection afforded to the holders of copyright in artistic works, which includes photographs, would or would not encourage them to make such works more readily available is an unanswerable question. Photographers publish and/or make their created works available to the public on either a free or fee-paying basis for a variety of reasons, such as to show them to others, to elicit criticism and review of their works or to generate income. When they are creating images, photographers would not generally take any great cognisance of how quickly they would need to capitalise their works, as they would have a 70 year copyright term. News photographs for immediate publication or images having a possibility of capitalisation within either a short or a longer time period (depending upon the contents of the images) would be an exception to such and consequently a photographer would weigh-up his capitalisation options in respect of such images. It is possible, that a significant reduction in the copyright term applicable to photographs could result in created works being either published or made available to the public more quickly than would otherwise be the case. However, it could also lead to product price increases from image producers, who actively capitalise their created works, so as to maximise their returns during a shortened timeframe. Also, photographers may not wish to have pressure placed upon their heirs in copyright to publish their images more quickly due to a shortened copyright term after their death.

In relation to the “education” exception to copyright, the submission suggested that it should remain limited to formal education in the non-commercial sector.\footnote{369} While being an advocate of copyright licensing systems in preference to copyright exemptions and that all users of copyrighted works should pay for the use of such works, one would have to question the inequality of treatment of the commercial and non-commercial sectors – particularly at third level. On “User Generated Content”, the Department suggested:

‘It would however, be prudent to explore the possibility of a legal provision to address user generated content stipulating that any such use is exclusively for non-commercial purposes, accompanied by a sufficient acknowledgement of the original creator and that the new work

\footnote{367} Department of Jobs, Enterprise and Innovation, Submission from Ireland: European Commission Public Consultation on the Review of Copyright Rules (Dublin 2014) 6
\footnote{368} Department of Jobs, Enterprise and Innovation, Term of protection for Musicians’ copyright extended from 50 to 70 years – Minister Sherlock: The Minister for Research and Innovation, Seán Sherlock TD, today (Tuesday) announced the signing into law of the European Union (Term of Protection of Copyright and Certain Related Rights) (Directive 2011/77/EU) Regulations 2013 (Dublin, 05 November 2013)
\footnote{369} ibid 7
does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work.  

This proposal is problematic on a number of fronts, namely the enforcement of the non-commercialisation of such user-generated works; an acknowledgement of an original work will not pay the bills for its creator and, by definition, this exemption would cause an adverse financial effect on the original work’s creator. An exemption for the format shifting of legally acquired copyrighted works to any medium for personal use is also proposed. Such an exception would cover a transfer from a digital file to a print. While format shifting by photographers’ clients without permission is a problem for photographers, making it legal would most likely lead to photographers changing their current business practices and pricing systems. Also, photographers would lose control over the quality of reproductions of their works; they would have no control over their output, yet they would be attributed as the creators of such reproduced works.

2.3.3) Copyright Reform in Ireland and the United Kingdom

Reviews of the copyright legislative framework have been undertaken in both Ireland and the United Kingdom in recent years. As the review undertaken in the United Kingdom’s pre-dates the Irish review, it will be firstly examined.

2.3.3.1) Copyright Reform in the United Kingdom

In 2010, the UK’s Prime Minister announced the establishment of an independent review of the UK’s intellectual property framework to determine how it supports growth and innovation and to recommend how it could be amended so that it would offer greater support to growth and innovation. Chaired by Prof. Ian Hargreaves, the Review Committee made ten recommendations in its May 2011 report and three of these concerned copyright, namely: copyright licensing, orphan works and limits to copyright. In relation to copyright licensing, the Report recommended the establishment of a Digital Copyright Exchange and a legal requirement that copyright collecting societies would adopt codes of practice approved by the Intellectual Property Office and the competition authorities. Subsequent to the publication of the Hargreaves Report, the Enterprise and Regulatory Reform Act 2013 was enacted, which amended the Copyright, Designs and Patents Act 1988 (hereafter CDPA). It inserted new sections in the CDPA relating to the licensing of

370 ibid
371 ibid 8
374 ibid 8
376 Enterprise and Regulatory Reform Act 2013, s 77
orphan works; extended collective licensing; the authorisation and regulation of licensing bodies, and the Copyright Tribunal. Regulations covering the Use of Orphan Works, the Licensing of Orphan Works, Extended Collective Licensing and the Regulation of Relevant Licensing Bodies have come into force. The Comptroller-General of Patents, Designs and Trade Marks has been appointed as the authorising body in respect of these schemes.

Under the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, although “stand-alone” photographs are not specifically mentioned, photography is included as a category of work covered by the Regulations. Under Regulation 6, a relevant body may make use of an orphan work to generate revenue ‘otherwise than for the exclusive purpose of covering the costs of the relevant body in digitising orphan works and making them available to the public’ or ‘in order to achieve aims which are not related to its public interest mission’. Thus, they may make full commercial use of orphan works within their collections. Regulation 2 specifies the types of such bodies, which are permitted under the Regulations to make use of orphan works.

Under the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, once the Comptroller-General (the authorising body) has received the information prescribed in Regulation 4 from a relevant body, it may grant it an orphan licence to use an orphan work. An orphan work may be licensed for use in the United Kingdom on a non-exclusive basis. However, the sub-licensing of such a work is prohibited. Regulation 4 details the requirements of a diligent search before a licence may be issued in respect of an orphan work and the record of such a search, which must be maintained by the authorising body – the Comptroller-General. Also, the Comptroller-General must maintain and make available to the public free of charge a register of orphan works in respect of which orphan licences have been either granted or refused. Orphan licences may be granted for a term not exceeding 7 years. However, the Comptroller-General may renew an orphan licence for a further 7 year term.
If within the period between the receipt of an application for and the granting of an orphan work licence or within 8 years or less from the date on which an authorising body has granted an orphan licence in respect of a work, a right holder satisfies the authorising body as to his identity and his ownership of relevant rights in an orphan work, then one of two things may happen. If following a diligent search an orphan licence has not been granted, the work will cease to be an orphan work. If an orphan licence has been granted, it shall continue in force for the remainder of the unexpired term of the licence or until the expiration of the notice period contained in the licence. The authorising body must notify the licensing body of the identity of the right holder within two months and pay to the right holder an amount equal to the licence fee paid by the orphan licensee in respect of the orphan work.\footnote{ibid reg 12} Under Regulation 13, if after 8 years following the granting of an orphan licence a right holder satisfies the authorising body as to his identity and his ownership of a relevant right in the work, the authorising body ‘may make such payment to the right holder as the body considers reasonable in all the circumstances of the case.’\footnote{ibid reg 13} As no obligation is placed by Regulation 13 upon the authorising body to make such payments, how fair they actually will be to right holders will only become evident in due course.


‘The UK orphan work scheme is wider in its scope and application and has been designed by the Government to be complementary to the Directive.

- The Directive is narrower in its use and scope
- It provides for an exception to copyright law rather than a licensing scheme as under the domestic process.
- It focuses on the digitisation and making available online of orphan works by publicly accessible cultural and heritage bodies only for non-commercial use – unlike the UK scheme which provides for broader commercial and non-commercial use.
- It excludes stand-alone artistic works such as photographs which constitute a large part of orphaned works in archives (however, embedded works, such as a photograph within a book, are included).
- It allows for the reproduction and making available of a work for example to digitise a work and put it on a cultural institution’s website. This will allow EU citizens to view orphan works online without physically visiting the library, archive or museum.
- The EU Orphan Works Directive allows use across the EU, but the UK scheme only allows use within the UK. However it does not provide for publication in a book or
communication to the public by means of a TV programme - even by museums and archives." 398

The licensing of the use of orphan works is essentially being married with extended collective licensing. The Intellectual Property Office’s 2013 consultation paper on extended collective licensing stated:

‘Extended collective licensing (ECL) is a form of licensing for which a collecting society is given permission to extend an existing collective licence to cover the works of all rights holders in the sector, except those who opt out. While traditional collective licensing relies on right holders opting in by giving the collecting society an express mandate, extended collective licensing assumes that rights holders want their works to be licensed unless they opt out.’ 399

It would appear that extended collective licensing will be given priority over a copyright holder's existing legal right to determine whether or not and how his work may be used by third parties. A copyright holder wishing to retain such rights will have to object to the use of his work under an ECL scheme. He will have to “opt-out”. The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 set-out the regulation of the extended collective licensing of relevant works. Regulation 2 defines an “Extended Collective Licensing Scheme” as:

‘a collective licensing scheme under which a relevant licensing body may grant licences in accordance with an authorisation under regulation 4 in respect of relevant works –

(a) in which copyright is owned by non-member right holders; or

(b) in relation to which the restricted acts in relation to the performance may be permitted or prohibited by non-member right holders;’ 400

This Regulation also defines a “non-member right holder”, 401 while Regulation 3 defines a “right holder” and a “relevant work”. 402 While extended collective licensing schemes will operate on an “opt-

400 The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 SI 2014/2588, reg 2
401 ibid
Note: A “non-member right holder” is defined by Reg. 2 as ‘…a right holder who is represented by the relevant licensing body under an Extended Collective Licensing Scheme but who is not a member of the relevant licensing body and whose rights in the relevant works are not the subject of an express contractual agreement with the relevant licensing body;’
402 ibid reg 3
Note (1): A “right holder” is defined by Reg. 3(3) as ‘(a) an owner of the copyright in the relevant work; (b) a licensee under an exclusive licence in relation to the relevant work; (c) a person with rights to permit or prohibit one or more of the restricted acts in relation to a performance recorded by the relevant work and, in the case of a performance, which is embedded in, or incorporated in or constitutes an integral part of a relevant work, a person with rights to permit or prohibit one or more of the restricted acts in relation to the performance; and (d) a licensee under an exclusive licence in relation to those rights.’
Note (2): A “relevant work” is defined by Reg. 3(2) as ‘a work which is protected by copyright or a performance in respect of which certain acts constitute restricted acts.’
Note (3): Reg. 3(2) states that a relevant work ‘…includes a reference to a work or a performance, which itself falls within the definition of “relevant
out" rather than an “opt-in” basis, a rights holder may exclude or limit the granting of an extended collective licence in respect of his rights in a relevant work by following the prescribed form of opting-out.\textsuperscript{403} Also, a non-member right holder wishing to exercise the right to opt-out must also inform the relevant, authorised collective licensing body that he wishes to have his name listed and the relevant work identified as “opted-out”.\textsuperscript{404} The Regulations oblige licensing bodies to publish a list of opted-out right holders and their identified opted-out works.\textsuperscript{405} Regulation 18 deals with licence fees and a right holder may request a licence fee adjustment.\textsuperscript{406} Also, where one or more right holders have either not been identified or located and their work has been licensed by a licensing body, the latter must publish and update information on such licensed works within 12 months of the end of each financial year in which it collected licence fees.\textsuperscript{407} Licensing bodies which generate licence fee income from works whose right holders have either not been identified or located must transfer the net licence fee to the Secretary of State within three years of the end of the financial year in which the licence fee income was generated.\textsuperscript{408} After a period of 8 years, the Secretary of State may determine the use of such non-distributed, net fee income and may use some or all of it to fund social, cultural and educational activities for the benefit of non-member right holders.\textsuperscript{409} Thus, while licensees of orphan works may commercialise and generate profit from them, the licence fee income generated from such works could potentially become a source of significant revenue for the State.

The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 prescribe specific criteria, which must be adopted as a code of practice and adhered to by authorised licensing bodies.\textsuperscript{410} These criteria cover areas such as obligations to rights holders, members and licensees; requirements imposed on licensees; conduct of employees, agents and representatives; information and transparency; reporting requirements; resolution of complaints and an Ombudsman Scheme. The reporting requirements include, among other items, the production of an annual report detailing the number of rights holders represented; the number of non-member rights holders represented by any extended collective licensing scheme; revenue generated during the report’s period; total and itemised costs incurred in administering licences and licence schemes, and allocation and distribution of payments of revenues received.

On the limits to copyright, the Hargreaves Report recommended the introduction of a limited private copying exception without the imposition of copying levies.\textsuperscript{411} The Copyright and Rights in

\begin{footnotesize}
\begin{enumerate}
\item ibid reg 16(1)
\item ibid reg 16(2)
\item ibid reg 16(6)
\item ibid reg 18(4)
\item ibid reg 18(5)
\item ibid reg 19(1)
\item ibid reg 19(3)
\item The Copyright (Regulation of Relevant Licensing Bodies) Regulations, 2014 SI 2014/898
\end{enumerate}
\end{footnotesize}
Performances (Personal Copies for Private Use) Regulations 2014\footnote{Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361} inserted a new Section 28B in the Copyright, Designs and Patents Act 1988 to permit the private copying for personal use of a copyrighted work owned by a person making the copy.\footnote{Copyright, Designs and Patents Act 1988, s 28B} However, this new statutory exemption did not include a compensation mechanism under which copyright owners would be fairly compensated for privately-made copies of their copyrighted works. Also, where the copyright owner of a work has included copying preventative or restrictive measures in such a work, the Secretary of State may on the receipt of a complaint from a complainant order that copyright owner to provide the complainant with the means to defeat such copying restrictions and therefore to be able to take benefit of the S.28B exemption.\footnote{ibid s 296ZEA} In the High Court judicial review case of The Queen (on the application of British Academy of Songwriters, Composers and Authors and Others v Secretary of State and Others,\footnote{The Queen (on the application of British Academy of Songwriters, Composers and Authors and Others v Secretary of State and Others [2015] EWHC 1723 (Admin)}} Green J stated that it is mandatory under Directive 2001/29/EC\footnote{Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 5(2)(b) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> accessed 23 February 2016} for a Member State implementing an exception to the reproduction right under Article 2 of the Directive for private copying purposes under Article 5(2)(b) of the Directive to implement a compensation mechanism for reproduction rights owners irrespective of whether or not it resulted in any compensation actually being paid them.\footnote{ibid para 273} Green J held that the introduction of Section 28B in the absence of a compensation mechanism was unlawful,\footnote{ibid paras 232–272} as the evidence relied upon by the Secretary of State that the introduction of the exemption without a compensation mechanism would result in minimal or zero harm was flawed.\footnote{Note: See also: "‘Academic behind copyright law changes warns that rights holders could lose even more control of content by taking test cases to court’ Out-Law.com (07 March 2014) <www.out-law.com/en/articles/2014/october/academic-behind-copyright-law-changes-warns-that-rights-holders-could-lose-even-more-control-of-content-by-taking-test-cases-to-court/> accessed 03 March 2016}  

2.3.3.2) Copyright Reform in Ireland

The Copyright Review Committee (hereafter ‘CRC’) was established by the Irish Government in May 2011. It recommended a number of changes to copyright legislation in its 2013 Report.\footnote{Department of Jobs, Enterprise and Innovation, Modernising Copyright: The Report of the Copyright Review Committee (Dublin 2013) <https://www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf> accessed 23 February 2016} The terms of reference of the CRC were to identify barriers to innovation within the current national copyright legislation and to offer solutions to such barriers; to examine the appropriateness of a US style ‘fair use’ doctrine in the Irish/EU context, and to recommend changes to EU law to facilitate changes to Irish copyright legislation.\footnote{ibid 8} While a number of the CRC’s recommendations are similar to those of
the above-mentioned Hargreaves Report, the CRC’s Report is to a large extent an assessment of the compatibility of the CRRA with the exceptions and limitations which Member States may provide for under Article 5 of the EU Copyright Directive 2001/29/EC to the reproduction rights granted under Article 2 of that Directive. The Report makes a number of worthwhile recommendations, but if some of its other recommendations are implemented they will impact on the current rights of photographers in their copyrighted works. Those which would have a direct bearing on photographers will be dealt with below.

**Copyright Council of Ireland**

The Report proposed that a Copyright Council should be established on a statutory basis by the copyright community, independent from the Government, legally constituted as a company limited by guarantee and with a 13 member board. The idea for the proposed Copyright Council is modelled on the Irish Press Council. The CRC outlined a set of broad functions for the proposed Copyright Council, which among others included raising public awareness, fostering dialogue and co-operation, and the preparation and publication of codes of best practice in relation to copyright issues. The CRC Report referred to the “copyright community”. In reality, there is no such thing in Ireland. What exists are (1) copyright owners, (2) current licensed users of copyrighted works, (3) copyright licensing agencies, (4) current non-users that would be willing to pay to use a copyrighted work, (5) those who are unaware of existence of copyright law and (6) those who are aware of the existence of copyright law, but prefer to infringe copyright rather than to part with money for the usage of copyrighted materials. These broad groupings are not a “community” in any sense of the word, just as they are not all “stakeholders”. They do not have the same aims and objectives. The Irish Press Council has a relatively small-sized, identifiable membership and common objectives. This proposed Copyright Council’s membership is not identifiable and it could comprise of anybody, such as those in the above-mentioned, broad groupings. The CRC suggested that the proposed Copyright Council would be primarily funded by subscriptions and service fees. Unlike the Irish Press Council, which is funded by its identifiable membership, namely print media publishers and owners, it would be a major task for the proposed Copyright Council to source the necessary funding to establish itself and to continue in operation undertaking the above-proposed functions. It is submitted that the ideal solution would be to expand the role of the Controller of the Irish Patents Office. As mentioned above, the Controller already has a legal responsibility for the implementation

425 ibid 170

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of certain aspects of copyright under the CRRA, namely the licensing and the registration of
copyright licensing bodies,\(^{428}\) and also in respect of orphan works. As part of an expanded remit, it
could undertake functions of the type outlined above.

**Digital Copyright Exchange**

It is proposed that a digital copyright exchange, initially on a voluntary basis, be established by the
Copyright Council to provide ‘a mechanism to expand and simplify the collective administration of
copyrights and licences’.\(^{429}\) The Committee also envisaged that the Digital Exchange would charge
licensors a fee. It is quite likely that the placing of any compulsion on copyright holders to participate
in a digital copyright exchange would be severely resisted, as copyright holders have the right,
subject to the above-mentioned types of exemptions under the CRRA, as amended, to decide
whether and how their works are or are not to be published.

A number of copyright licensing bodies currently operate under licence from the Controller of the
Irish Patents Office in accordance with Section 175 of the CRRA.\(^{430}\) The Committee’s Report is silent
on whether its proposed Digital Copyright Exchange would require or result in either the closure of
such licensed agencies or the transfer of them from the Controller of the Irish Patents Office to the
proposed Digital Exchange. One would have to question the need for this proposed new licensing
and collections agency. If it were to be established, it should not be to the commercial detriment of
the existing licensed agencies and it should become a function of the Controller of the Irish Patents
Office. The Controller is currently responsible for licensing copyright licensing bodies and if there are
real issues relating to copyright licensing agencies, their codes of practice (if any) and/or royalty
collection, then the better option would seem to be to have the Controller’s Office address them.

**Alternative Dispute Resolution and Specialist Courts**

The CRC’s proposal for the establishment of an alternative dispute resolution system is worthwhile,
as it could be a means to resolve some disputes between copyright holders and other parties. Such
a mechanism could be faster, less acrimonious and less expensive than litigation. However, both
parties would have to be agreeable to the use and determination of such a service for it to have
effect. The Report suggests the expansion of the Small Claims Court within the District Court to
include copyright claims up to the jurisdiction limit of the District Court.\(^{431}\) The District Court’s civil
claims jurisdiction limit is currently €15,000.\(^{432}\) The Report also recommended the establishment of a
Small Claims Court within the Circuit Court capable of handling copyright issues with a monetary

\(^{428}\) Copyright and Related Rights Act 2000, chapters 16 and 17
\(^{429}\) Department of Jobs, Enterprise and Innovation, Modernising Copyright: The Report of the Copyright Review Committee (Dublin 2013) 171
\(^{430}\) Irish Patents Office, Register of Copyright Licensing Bodies
\(^{431}\) Department of Jobs, Enterprise and Innovation, Modernising Copyright: The Report of the Copyright Review Committee (Dublin 2013), 171–172
\(^{432}\) Courts and Civil Law (Miscellaneous Provisions) Act 2013 s 15
limit of €75,000. This figure is the jurisdiction limit of the Circuit Court in civil proceedings other than personal injury claims.

Many users of the internet are under the impression that it is perfectly in conformity with social norms for one to download and reproduce images from websites without paying the creators reproduction fees. In two Irish High Court cases, EMI Records (Ireland) & Ors. v Eircom Ltd. and EMI Records (Ireland) Ltd. & Ors. v UPC Communications Ireland Ltd., Charleton J repeatedly referred to “copyright theft”. Normally copyright infringers would not regard their actions as theft or they are oblivious to such a fact. Even when they know that to do so is illegal, they believe that they will either not be caught and/or not be chased for reproduction fees, as more often than not the cost of chasing individual reproduction fees would outweigh the actual reproduction fees involved.

While it has its benefits from a consumer’s perspective and also in respect of a number of specified business claims, the current Small Claims Court in Ireland does not provide for the hearing of claims of alleged infringements of copyright. In contrast, the Small Claims Track within the Intellectual Property Enterprise County Court (formerly known as the Patents County Court) in England and Wales offers a facility to adjudicate claims in respect of ‘uncomplicated and low value trade mark, copyright and unregistered design disputes with a value of up to £10,000’. The Small Claims Track has been available since October 2012 and legal representation is not a necessity at

433 Department of Jobs, Enterprise and Innovation, Modernising Copyright: The Report of the Copyright Review Committee (Dublin 2013), 171–172
434 Courts and Civil Law (Miscellaneous Provisions) Act 2013 s 14
435 EMI Records (Ireland) & Ors. v Eircom Ltd. [2010] IEHC 108
436 EMI Records (Ireland) Ltd. & Ors. v UPC Communications Ireland Ltd. [2010] IEHC 377
437 District Court (Small Claims) Rules 2009, SI 2009/519
438 Ministry of Justice, Intellectual Property Enterprise Court
439 Intellectual Property Office, Small Claims Track
such proceedings.\textsuperscript{440} A similar, low cost type of court facility in Ireland to resolve uncomplicated, low value copyright and reproduction rights disputes would be most beneficial to Irish photographers.

\textbf{Orphan Works}

The CRC suggested that the proposed Copyright Council would establish an Orphan Works Licensing Agency as one of the activities to be undertaken by such a Council.\textsuperscript{441} At the time of writing neither the proposed Copyright Council nor its Orphan Works Licensing Agency has been established.

\textbf{Rights Owners}

A wide range of issues were considered under this heading by the CRC\textsuperscript{442} and changes were recommended on a number of specific issues. For instance, the potential currently exists under the CRRA (s.24 and s.34) for the creation of a perpetual copyright in a work and anybody may obtain a copyright in an unpublished work after the expiration of 70 years following the death of the author of such a work by publishing it. As evidenced from a number of submissions\textsuperscript{443} to the CRC, this legal loophole is not to the liking of a number of libraries and galleries, as they fear that other third parties would have the ability to jump the gun on them and publish such works, thereby obtaining a copyright in them. The CRC proposed that this legal loophole be closed, which would seem prudent.\textsuperscript{444} The CRC also recommended the creation of a graduated scale of remedies in civil cases for breaches of copyright.\textsuperscript{445} No reasonable person could object to remedies being proportionate to the damage done. However, the actual benefit or not of this recommendation in respect of the infringement of copyright in photographs will only become apparent following the instigation of a number of such civil cases, which to-date have been few and far between in Ireland and invariably have not reached a determination in the Superior Courts. While the CRC’s Consultation Paper\textsuperscript{446} questioned whether the current exemption under Section 51(2) of the Act for photographs from fair dealing for news reporting should be removed, the CRC decided not to make such a recommendation in its Report, as it had not received any ‘strong reason to change the status quo’.\textsuperscript{447}

\begin{itemize}
\item \textsuperscript{440} ibid
\item \textsuperscript{441} Department of Jobs, Enterprise and Innovation, Modernising Copyright: The Report of the Copyright Review Committee (Dublin 2013), 172 <www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf> accessed 23 February 2016
\item \textsuperscript{442} ibid 32–45
\item \textsuperscript{443} Department of Jobs, Enterprise and Innovation, Copyright Review Committee, Submissions Received 2012 on foot of the Copyright Review Consultation Paper <www.djei.ie/science/ipr/crc_submissions2.htm> accessed 30 November 2013
\item \textsuperscript{444} Department of Jobs, Enterprise and Innovation, Copyright Review Committee, Submissions Received by the Copyright Review Committee <www.djei.ie/science/ipr/crc_submissions.htm> accessed 05 December 2013
\item \textsuperscript{446} ibid 109–110
\end{itemize}
With respect to rights protection measures and rights management information (descriptive metadata files), the CRC proposed welcome amendments to the CRRA to introduce civil remedies for copyright holders in instances of the infringement of such rights. The Committee also proposed that “metadata” should be defined in the Act and that its removal from a copyrighted work would constitute an infringing adaptation of such a work. The issue of metadata stripping was highlighted on a number of occasions by The Irish Professional Photographers’ Association in its submission to the CRC.

**Intermediaries**

With regards to the liability of internet intermediaries in cases of online copyright infringements and “notice and take-down” actions, the CRC decided not to make any recommendations, preferring to wait and see if the EU proposes any legislative changes in this area and also the outcome of matters pending before the CJEU. However, it could have made recommendations on these matters irrespective of whether they subsequently become part of Irish law and such recommendations could have been influential in respect of any future EU proposals. The CRC suggested that links containing “very small snippets” should be permitted. This proposal relates solely to the creation of links to written words and not to images.

**Users**

The Committee made a number of recommendations in relation to “fair dealing” by users of copyrighted works and it is under this heading that the Committee was trying to be “innovative”.

Chiefly among these, from a photographer’s perspective, are:

1) *Copying and reproduction on paper and format shifting exceptions for private use.*

   The Review Committee proposed the creation of an exception to the limitation on reproduction rights for the purpose of the creation of paper copies of works for private use. This recommendation was fuelled by the Committee’s desire to have Art. 5(2)(a) of Directive 2001/29/EC implemented in Ireland. Under Article 5(2)(a) of this Directive,
Member States may create exceptions or limitations to the Article 2 reproduction right in respect of:

‘reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation’.457

The effect of this proposal is that it would, for example, legally permit the scanning of photographic prints and their subsequent reproduction for personal use or what may be also referred to as “private copying”. The Committee also proposed the creation of an exception to the existing reproduction rights to permit format shifting of copyrighted works.458 This proposed exception is designed to implement Art. 5(2)(b) of Directive 2001/29/EC under which Member States may create exceptions or limitations to the Art. 2 reproduction right in respect of:

‘reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.’459

The two above-mentioned proposed exceptions for “private copying” would affect a photographer’s rights where, for example, he has given a disk of an image to a client for stated “viewing only” purposes while retaining his reproduction rights and the client then makes a print to display at home. Both of these proposals beg the question as to how the right holder “would receive fair compensation” if such excepted uses are permitted? It would be virtually impossible for rights holders to detect such uses. In any event, this exception as proposed by the CRC did not include a measure, as required under Art. 5(2)(b) of the Directive, to fairly compensate a work’s rights owner through financial levies in respect of copies made for private use.460

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Note (1): The CRC Report, at page 60, took on board the view expressed in the Vitorino report that ‘…copies made for private use did not cause any harm requiring addition compensation in the form of private copying levies.’

2) Exceptions for illustrative purposes in education, teaching and research undertaken by non-commercial educational establishments.

This recommendation is in line with the provision of Article 5(3)(a) of Directive 2001/29/EC under which Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in respect of:

‘use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;’

Establishments covered under this exemption would also include universities and other colleges. Although they are publicly funded and fulfill a public interest function, they have large budgets and have to pay for the acquisition of other products and services. One may question why universities should get such an exemption to the economic detriment of photographers?

3) Exceptions for public security and various proceedings; for use during religious or official celebrations; and during the demonstration and repair of equipment.

In his report, at page 4, Vitorino recommended 'Clarifying that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.'

Note (3): On the issue of “fair compensation”, Recital 35 of Directive 2001/29/EC makes specific mention of the “harm” caused by an exception to copyright and states ‘In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question.’


Note (4): Failure to pay private copying levies is a tort. While Ireland has not implemented Article 5(2)(b) of Directive 2001/29/EC, it is interesting to note that in a case from the Court of Justice of the European Union, the Court held that such claims may be brought in the domestic court of the jurisdiction in which the harmful event occurred.

The Court also held (at para 52) that such tort claims may be brought in the domestic court of the jurisdiction in which the harmful event occurred.
Article 5 of Directive 2001/29/EC makes provision for the implementation of such exceptions by Member States, if they desire to do so. The CRC argued that the creation of this exception for the display (use) of photographs at religious or public authority organised official celebrations would not interfere with the income of photographers, as it does not cover the taking of photographs. Yes, such is true. However, the CRC’s Report is silent on whether such display reproductions of images would be created by the original photographer or by the end-user and also on fees to photographers in respect of such reproductions. Both religious organisations and public authorities have access to large amounts of funding, so this exception could not be argued on a financial basis.

**Entrepreneurs and Innovation**

The CRC proposed an exception for the adaptation of an existing work, which results in a “substantial” transformation of the work into a new work. It did not define what constitutes a “substantial transformation”. It stated that this exception was based on the Berne Three Step Test. Under this Test, countries may “…permit the reproduction of such works in certain special circumstances, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” As to whether a substantial transformation of photographic works would prejudice the rights of their authors of the original work would have to be viewed on a case by case basis.

**Heritage**

The CRC Report stated that a “Heritage Institution” shall refer to prescribed libraries, archives and museums; educational establishments; Section 198 boards and authorities (i.e. libraries with which publishers must deposit a copy of any book published in the State in accordance with Section 198 of the CRRA); Heritage Fund Act 2001 institutions (National Archives, National Gallery of Ireland, National Library, National Museum of Science and Art and Irish Museum of Modern Art) and other institutions that may be prescribed by the Minister. One of the proposals of the CRC in respect of Heritage Institutions concerned “Donations”. Section 123 of the CRRA currently provides that the application of this exception must strike a fair balance between the rights of a rights owner to a work being parodied and the right of freedom of expression of the person undertaking the parody.

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466 ibid 72–75
469 Heritage Fund Act 2001, s 2
copyright in an unpublished work is included with the transfer of the work under a bequest unless a contrary intention is indicated by the testator, who was the owner of the copyright in the work immediately prior to his death.\footnote{471} Section 123 only applies to unpublished works that are “fixated” and therefore it does not apply to unpublished, still photographic images. Under the heading of “Donations”, the Committee proposed a replacement new Section 123 entitled “Copyright to pass in transfers” and with the following wording:

“Where, after the commencement of this section, a person is entitled, beneficially or otherwise, to any material thing containing an original fixation of a work, any transfer by that person of that thing shall be construed as including the copyright in the work in so far as the transferor is the owner of the copyright at the time of the transfer, unless

(a) a contrary intention is patently indicated in a document effecting that transfer,

(b) a contrary intention otherwise patently appears, or

(c) the circumstances of the transfer otherwise patently require.”\footnote{472}

Unlike the existing Section 123, which only covers bequests of fixated works unpublished prior to a testator’s death, the suggested new S.123 refers to all transfers and not just to bequests. However, as the proposed wording for a new S.123 includes the word “fixation”, photographs would not be covered by it. The words “any transfer” would cover both published and unpublished works. In effect, this proposal aims to minimise future copyright issues within Heritage Institutions relating to works acquired by them. However, the proposed new wording for Section 123 does not specify that it applies solely to Heritage Institutions. Also, it removes the current right to transfer the copyright in either a published or unpublished work to a third party independently of the actual work while one is alive.

Another proposal of the CRC deals with the existing Section 198 of the CRRA, which covers the deposition of certain copyrighted materials (books) with specified libraries and universities. The Committee has proposed the extension of this provision to cover digital publications. The CRC also proposed including such a similar extension in the Heritage Fund Act 2001.\footnote{473} The CRC was of the view that such an amendment would facilitate the “unlocking of significant sources of funding for such institutions.”\footnote{474} The CRC suggested the insertion of the following wide-open, all embracing definition of a “digital publication” in the CRRA:

“‘digital publication’ includes any publication in media other than print, such as a website or any part of a website, or any publication in any digital or electronic or other similar or related technological form or format, but does not include a sound recording or film or both, or such other works as the Minister may from time to time determine.”\footnote{475}

\footnote{471 Copyright and Related Rights Act 2000 s 123}
\footnote{473 ibid 154}
\footnote{474 ibid 176}
\footnote{475 ibid 103}
Among other things relating to this issue, the CRC proposed the insertion of a new Section 198A(19) in the CRRA which states:

‘Where any work has been made available in the State through the internet without a restriction as to its access or use, then it is not an infringement of the rights conferred in the Act if a Board or authority to which this Section applies reproduces that work and makes it available through the internet without a restriction as to its access or use whether or not that work continues to be available elsewhere through the internet’.476

In essence, this proposal constitutes State-approved plundering of copyrighted materials published on the internet to fulfil the CRC’s stated aim of ‘potentially unlocking a significant source of funding for such institutions’.477 The practicality of this proposal for photographers is that they could have unrestricted images displayed on their own or their licensed clients’ websites. A Board could then copy and re-publish them unrestricted thereby leaving the photographs open to be copied by other third parties and used commercially. Although photographers would be foolish to publish unrestricted images in which they have a copyright on the internet, it is most likely that their licensed image users would not wish to use images with over-printed copyright watermarks on their websites. If this proposal is to be implemented, there should be a specific exemption in respect of photographs published on the internet. It should be noted that it is virtually impossible to prevent the copying of an image from a website – irrespective of the quality of the copy of the image obtained. Taking a “screen shot” is the simplest method of doing such. Its subsequent reproduction in print form would be of low quality and such would also interfere with a copyright holder’s existing rights, including reputational rights and moral rights to integrity.

Fair Use

The CRC Report stated that “Fair Use” was a controversial topic in the first round of submissions.478 Nevertheless, it pushed ahead with a recommendation to have its own version of the U.S. Fair Use doctrine introduced, but ‘...tying it very closely to existing exceptions and making it clear that these exceptions should be exhausted before any claim to fair use should be considered.’479 Its “Fair Use” recommendations480 are not that far removed from those contained in the more clearly worded
All photographers need to publicise their businesses as part of their marketing strategy to both hold on to their existing clients and more importantly to obtain new business. They will use many avenues to generate publicity, including social media and photo sharing websites and entering photographic competitions. By doing so, they are voluntarily permitting their rights under copyright to be possibly diluted. Websites such as Facebook, Flickr, Twitter, Tumblr, Instagram, YouTube, Pinterest and Reddit permit the uploading of photographs to them. The terms of service of such websites frequently include terms under which the photographer grants a royalty-free reproduction right to both the websites and to their users. In some instances, as in the case of Reddit, an irrevocable, commercial licence is granted by a user of the website, who uploads content use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market, (f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case, (g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and (h) whether the use in question is accompanied by a sufficient acknowledgement, unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise. (4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section. (5) The Minister may, by order, make regulations for the purposes of this section — (a) prescribing what constitutes a fair use in particular cases, and (b) fixing the day on which this section shall come into operation.\footnote{Note (1): Section 107 of the 1976 Act deals with "Fair Use" exemption and states: 'Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'}

\footnote{Note (2): The above-mentioned Section 106 and Section 106A of the United States Copyright Act 1976 respectively deal with "Exclusive Rights in Copyrighted Works" and "Rights of Certain Authors to Attribution and Integrity."}

\footnote{Copyright Act of 1976, s 107, 17 USC 481}


\footnote{Facebook, Statement of Rights and Responsibilities <www.facebook.com/legal/terms> accessed 23 February 2016 483}

\footnote{Yahoo!, Yahoo! Terms of Service <https://policies.yahoo.com/us/en/yahoo/terms/utos/index.htm> accessed 23 February 2016 Note: Flickr.com is owned by Yahoo! 484}

\footnote{Twitter, Terms of Service <https://twitter.com/tos> accessed 23 February 2016 485}

\footnote{Tumblr, Terms of Service <www.tumblr.com/policy/en/terms_of_service#dmca> accessed 23 February 2016 486}

\footnote{Instagram, Terms of Use <www.instagram.com/about/legal/terms/#> accessed 23 February 2016 487}

\footnote{YouTube, Terms of Service <www.youtube.com/t/terms> accessed 23 February 2016 488}

\footnote{Pinterest, Terms of Service <https://about.pinterest.com/en/terms-service> accessed 29 February 2016 489}

\footnote{Reddit, Reddit User Agreement <www.reddit.com/help/useragreement> accessed 23 February 2016 490}
including photographs to it. These websites’ terms of service may also include a requirement on the photographer to grant them an indemnity against any claims from third parties as a result of the uploading of photographs.\(^4^9\) While some people might say that any publicity is good publicity for a full-time professional photographer, publicity on its own does not pay the bills. Photographers should carefully balance the possible gains to be made from using such websites for publicity purposes with the legal rights (principally their reproduction rights), which they would be giving away due to the websites’ terms of service.

Numerous photographers, both professional and amateur, submit entries to a multitude of photographic competitions that are organised each year both on an international and national level by magazines, newspapers, photographic societies and websites. From time to time, at a national level, local authorities and commercial firms organise photographic competitions for the sole purpose of acquiring a body of photographic images, which they may subsequently use in the production of both their own printed promotional materials and online presence. In submitting entries to photographic competitions, entrants will most likely have to grant some form of reproduction rights to the competitions’ organisers on a royalty-free basis.

2.3.5) Media Practices in relation to Copyright and Reproduction Fees

Sections of the mainstream print media are not averse to reproducing images without either the authorisation of the image’s creator, paying reproduction fees or acknowledging the ownership of the copyright to such published images. In the current media world, where publications are vying for circulation, readership and revenue increases and costs reductions, they are to an ever-increasing degree incorporating more sensational style still and video images into their online editions. In many instances, they are not required to pay reproduction fees for such materials. Newspapers frequently print “Photo courtesy of Joe Bloggs” or “Photo Credit: Joe Bloggs” underneath published photographs. The use of such terms is simply a form of saying “thank you”. They are not an acknowledgment of Joe Bloggs as being the owner of the copyright in the printed images. Their usage also begs the question as to whether they actually means “thank you for the reproduction use of your images for free”? The terms of contracts offered to photographers in respect of specific photographic jobs frequently dilute their copyright and reproduction rights. Often, the print media will use a “paid for” image in both their print and online editions, yet will only pay a fee equating to their here-to-fore print edition reproduction fee. Consequently, press photographers’ reproduction fee incomes are being eroded.

\(^{49}\) Note: See: Christian M. Bron, ‘Germany: Liability of Website Operators for Users’ Infringements’ IRIS Merlin, IRIS 2010–1:1/13

‘In the absence of adequate verification of the rights to the images, the stipulation in the defendant’s general terms of business that uploading copyrighted content onto its platform was prohibited, was not sufficient. Therefore, by making the photos available for download from its internet site, the defendant had infringed the plaintiff’s exclusive right to make content available under Art. 15 para. 2 no. 2 and Art. 19a of the Urheberrechtsgesetz (Copyright Act - UrhG.).’

Ruling of Federal Supreme Court, Germany, 12 November 2009 (Case No. I ZR 166/07)

2.3.6) Corporate Clients Taking All Rights

There is a tendency for corporate clients to require photographers to waive all of their rights in any images, which they create for them. A good example of such practice is a tender request for photographic services issued by the Department of Foreign Affairs and Trade.\(^\text{492}\) The Request for Tender (RFT) documentation stipulated that photographers submitting tenders would have to assign the copyright to all created photographs to the Department.\(^\text{493}\) The RFT’s Appendix III “Financial Schedule” did not provide for a cost heading entitled “Purchase of Copyright”.\(^\text{494}\) In effect, the Department of Foreign Affairs and Trade required tendering photographers to assign their copyright to any created images to the Department for free. Section 7(1) of the RFT’s Appendix V “Framework Agreement for the Provision of Professional Photography Services”, which dealt with intellectual property rights, stated:

‘All Intellectual Property Rights title and interest in all photographs, images, records, (including without limitation all and any audio or audio visual recordings, transcripts, books, papers, records, notes, illustrations, photographs, diagrams) produced for the purposes of this Agreement (collectively “the Materials”) (or any part or parts thereof) shall vest in the Customer and the Contractor so acknowledges and confirms. For the avoidance of doubt the Contractor hereby assigns all Intellectual Property Rights, title and interest in the Materials to the extent that any such Intellectual Property Rights title or interest may be deemed by law to reside in it in the Materials to the Customer absolutely.’\(^\text{495}\)

Although the Department of Foreign Affairs was prepared to require any photographers, whose tenders were accepted and offered membership of this multi-party framework agreement, to assign their legal rights under copyright to any photographs created by them under the framework agreement, it also required such photographers to respect the legal rights of others. Section 2 of the RTF dealing with the Establishment and Rules of the Framework Agreement, stated:

‘Framework members (and their sub-contractors, if any) must comply with all relevant Irish statutory obligations including, in particular, data protection, employment rights and minimum wage requirements, and must hold a current tax clearance certificate.’\(^\text{496}\)

Also, the Department required the contracting photographers to indemnify it against all claims arising from the contract.\(^\text{497}\) Surprisingly, rather than requiring selected photographers to abide by either its own or an inter-Departmental code of conduct in relation to photography over which it would have direct control, it required successful tenderers to abide by the code of conduct of an

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\(^{493}\) ibid statement of requirements, s 1(x)

\(^{494}\) ibid appendix III

\(^{495}\) ibid appendix V, s 7(1)

\(^{496}\) ibid establishment and rules of the framework agreement, s 2(3)

\(^{497}\) ibid appendix V, s B(4)
In its submission to the CRC, in relation to photographers’ moral rights, the Irish Professional Photographers’ Association (IPPA) stated:

‘…the grant of moral rights to the photographer has meant very little, when public and corporate clients now insist as a matter of course on a contractual waiver of the rights. A typical clause (again from a contract with a semi-state body), states: “The Photographer hereby unconditionally waives in favour of the Commissioner all moral rights conferred on the Photographer by the Copyright and Related Rights Act 2000… (and any amendments or re-enactments thereof)”’ 500

The IPPA suggested that the CRC’s Report should recommend that ‘…publicly-funded bodies should take the lead in the acceptance of the rights granted to photographers under the CRRA and refrain from the practices of issuing non-negotiable contracts containing “all rights” clauses and waivers of moral rights.’ 501 However, the CRC’s Report did not include such a recommendation.

2.4) Brief Conclusions

In Ireland, photographers’ rights under copyright law are broad in scope and, in general terms, the terms of protection offered to photographers through copyright law are good. However, the exercise of such rights and the attainment of the protection afforded to them are under attack by copyright infringers and vested interest groups. Existing rights of copyright holders need to be actively enforced by the State and new legislation is required to permit the effective protection and enforcement of the copyright in photographs. The unauthorised use of photographers’ copyrighted works by third parties, particularly online, is perhaps one of the biggest problems facing professional photographers on a daily basis. In addition, the current exemptions to the rights of copyright holders, as permitted under the CRRA, are also detrimental to the rights of copyright holders – particularly their reproduction and economic rights and also to their moral rights. The CRRA should be amended by converting the existing, permitted exempted acts into acts permitted under a licence from a copyright holder. Chapter (5) discusses a number of recommendations relating to the amendment of copyright law in Ireland, which would be of benefit to copyright holders.
Chapter Three

Legal Restrictions on Taking and Publishing Photographs resulting from the Protection and Enforcement of the Personal Rights of Others

3.1) Introduction

Chapter (1) of this thesis discussed the rights both to create and/or publish photographs; the legal basis of these rights; the extent to which and how they are or may be protected and enforced by both the State and rights owners; the balancing of these rights by the courts with the rights of others; how photographers’ and publishers’ rights are or may be eroded and what is or should be done by the State to reduce such an erosion of rights. Chapter (2) then examined the nature, scope and practical application of one discrete right that is of particular importance to the day-to-day business of photographers, namely copyright. While copyright is recognised as a constitutional right and also embraces the personal right to earn a living, it presupposes a right of photographers to freedom of expression, both artistic and commercial. In essence, it protects the output of creative expression in the interests of photographers, while also ensuring that the public can reap the benefits of their created works.

None of the rights pertaining to the taking or publishing of photographs is absolute. Rather, they may be restricted in support of other interests. Rights carry with them duties and responsibilities to others and, as set-out in Article 10(2) of the ECHR, limitations and restrictions on them are possible in certain, specified circumstances. It is these limitations and restrictions that will be examined in this and the following Chapter. Chapter (3) will focus specifically on the “private” or individual rights and interests that may warrant restrictions, while Chapter (4) will focus on the more “public” rights or State interests that may also do so.

While guaranteeing freedom of the press, Article 40.6.1º.i of the Constitution goes on to state separately:
‘…the State shall endeavour to ensure that organs of public opinion…shall not be used to undermine public order or morality or the authority of the state.’

As a consequence of Article 40.6.1º.i, the State has the legal power to introduce legislative measures, which could result in restricting photographers’ and photograph publishers’ right of freedom of expression. Also, as discussed in Chapter (2), the creation of a photographic image is

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1 See Chapter (2), Section 2.2.1)
2 See Chapter (1), Section 1.3.2)
3 Constitution of Ireland (Art. 40.6.1º.i) (on Personal Rights)
an integral element of one’s artistic expression and the ECtHR held in the case of *Müller et al. v Switzerland*⁴ that the right of freedom of expression guaranteed under Article10(1) of the Convention⁵ includes freedom of artistic expression.⁶ However, this Article 10 right may be restricted in accordance with Article 10(2) of the Convention, which states:

‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’⁷

Restrictions and prohibitions on the taking of photographs and/or on the publication of photographs may be imposed for a variety of reasons, such as to protect public order, the security and defence of the State and the administration of justice; as a consequence of miscellaneous statutory provisions, contractual and/or accreditation system restrictions; on public morality grounds and as a consequence of ethical codes of behaviour. While photographers and publishers of photographs are free to enjoy their freedom of expression rights, including both artistic and commercial expression, they have both a legal and moral duty to respect and not infringe the legal and moral rights of members of the public. The protection and enforcement of the guaranteed, private rights of others, irrespective of whether those rights are founded on provisions of the Constitution of Ireland or are given recognition through statutes, European Union law, international treaties and conventions or the common law, may result in the restriction of photographers’ and publishers’ rights. In determining whether or not to enforce the protection of photographers’ and publishers’ freedom of expression rights, the courts must balance those rights with any competing rights. However, as highlighted by Sajó J and Tsotsoria J in their joint dissenting opinion in the 2015 ECtHR Grand Chamber case of *Delfi AS v Estonia*,⁸ ‘The protection of freedom of expression cannot be turned into an exercise in imposing duties.’⁹

In dealing with the various restrictions, which may be imposed on photographers and publishers as a consequence of the protection and enforcement of the legal private rights of others, Chapter (3) will focus on the following categories of rights, namely:

- **Personal Rights:** Right to privacy; private property rights; right to confidentiality; right against the misuse of private information; right of publicity and personal image rights; right not to be harassed; right to one’s good

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⁴ *Müller et al. v Switzerland* App No 10737/84 (ECHR, 24 May 1988)
⁵ *Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms* art 10(1)
⁶ *Müller et al. v Switzerland* App No 10737/84 (ECHR, 24 May 1988) para 27
⁷ *Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms* art 10(2)
⁸ *Delfi AS v Estonia* App No 64569/09 (ECHR, 16 June 2015)
⁹ *ibid* para 38
name; right against false accusation of a crime, and the right to a fair trial and fair procedures.

- Commercial Rights: Contractual rights; copyright and trademarks ownership rights.
- Performers’ Rights: Performers’ copyright and moral rights.

Chapter (3) will examine whether or not and the extent to which duties, if any, are being created and placed upon photographers and publishers by the courts through their interpretation of the law on freedom of expression. From a jurisdiction comparison perspective, this chapter will focus on Ireland and the United Kingdom. It will also examine the relevant European Union law and determinations by the Court of Justice of the European Union and the European Court of Human Rights.

While maintaining the central research questions of this thesis to the fore, Chapter (3) will focus specifically on the following questions:

- What legal restrictions are or may be placed upon photographers’ legal rights to create and/or publish photographs? What are the rationales underlying such restrictions? Are these restrictions proportionate to their aims and are they justified?
- How are these restrictions balanced with photographers’ rights? What are the legal tests and how are they applied by the courts?
- Given developments in communications technologies, particularly computing and mobile telecoms devices and the associated communications platforms of the internet and social media networking sites, is there a need for greater regulation or different approaches to or forms of regulation and the enforcement of regulations dealing with the publication of photographs through the internet and social networking platforms? Is there a need in this regard for the introduction of a general, legal right to privacy? Should one have a personal image right? If “yes”, how should such rights be framed, regulated, protected and enforced? If “no”, are any changes necessary?

3.2) Restrictions resulting from the Protection and Enforcement of the Personal Rights of Others

Photographers’ and photograph publishers’ rights are not absolute rights and they may be restricted by the requirement to both protect and enforce the rights of others. This section of the thesis will examine the various rights of others and how they may result in restricting photographers’ and photograph publishers’ rights.

3.2.1) Restrictions resulting from the Individual’s Right to Privacy

The individual’s right to privacy frequently comes into contention with the freedom of expression rights of photographers and photograph publishers. A number of questions need to be addressed, namely, what is the legal basis of the right to personal privacy? How is it protected and enforced?
while being balanced with the rights of photographers and photograph publishers? What restrictions on photographers and publishers result from such a balancing exercise?

3.2.1.1) Privacy Rights under the Constitution of Ireland

The Constitution of Ireland does not contain an expressed, general right to personal privacy. In fact, the word “privacy” is not mentioned in the Constitution. However, the Irish Supreme Court in McGee v Attorney General held that an individual may invoke the personal rights guaranteed under Art. 40.3.1º of the Constitution to establish an implied right to personal privacy. In referring to the personal rights granted under Art. 40 of the Constitution and the State’s duty under Art. 40.3.1º of the Constitution to guarantee “in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”, Budd J stated:

Whilst the “personal rights” are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognized and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in the realm of privacy.

The balancing by the courts of the implied constitutional right to privacy, which was recognised by the Irish Supreme Court in McGee as one of the unenumerated personal rights guaranteed under Art. 40.3.1º of the Constitution, with the rights of photographers and photograph publishers will be examined in Section 3.2.1.6 below.

3.2.1.2) Privacy Rights under Irish Statutes

Although there have been proposals to create a general statutory right to privacy in Ireland, such has not come into being. While focussing on the protection of the right to privacy from threats resulting from surveillance and aiming to “…enhance the protection provided by the privacy shield against intrusion”, the Law Reform Commission’s Report on Privacy: Surveillance and the Interception of Communications in 1998 recommended the creation of a Tort of Privacy-Invasive Surveillance to protect the right of privacy from threats of surveillance. The Commission’s Report stated that it did not recommend the creation of a “general” privacy tort, as “…such a tort is generally assumed to be directed at ‘information privacy’ in the main and would embrace the publication of private information no matter how obtained.” It recommended the creation of a statutory tort that would protect a “reasonable expectation” of privacy against threats posed by surveillance. The Commission’s Report stated that a consequence of this recommendation would be that the courts, while making a determination in any particular case, would have to weigh-up a range of factors (as detailed in Chapter 2 of its Report). It went on to state that ‘The ordinary and

11 Constitution of Ireland (Art. 40.3.1) (on Personal Rights)
14 ibid 7.04–7.05
15 ibid 7.06–7.07
natural incidences of everyday life, including for example, being photographed by a passing tourist, must be tolerated."^{16}

Subsequent proposals to enact legislation following the Report of a government-appointed Working Group on Privacy in 2006, were unsuccessful due to concerns about some of the provisions envisaged in the draft Bill. Concerns which were expressed by legislators, academic commentators and journalists, among others, might be summarised as concerns ‘…to ensure it achieves its twofold objective of preventing unwarranted intrusions into individuals’ personal privacy and striking a proper balance between the rights of individuals and the public interest. It must do so in a manner that protects the right to individual privacy and other individual rights while respecting democratic values and the constitutional right to freedom of expression.’^{17} The achievement of such a balance between the competing rights of privacy and freedom of expression is of importance in the sphere of photographers and photography as it is in others sectors of society.

In the absence of a statutory, general right to privacy, in Ireland, a number of statutes, such as the Copyright and Related Rights Act 2000 (hereinafter CCRA 2000), the Data Protection Acts 1988–2003 and the Broadcasting Act 2009,^{19} provide for the protection of one’s right to privacy in respect of specific aspects of one’s life. Of particular interest in the context of photography, Section 114(1) of the CCRA 2000 provides that, in certain circumstances, individuals have a moral right to privacy in photographs and films:

‘A person who, for private or domestic purposes, commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have the work or copies of the work made available to the public’.^{20}

Also, ‘the act of making available to the public or authorising the making available to the public, of a work or copies of work referred to in subsection (1) without the authority of the person who commissioned the work infringes the right conferred in subsection (1)’.^{21} The Act does not define

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16 ibid 7.08

Note: Chapter 2, Section 2 of the Commission’s report states that the factors relevant to a reasonable expectation of privacy include: ‘The place (whether public or private), the object or occasion of the surveillance, the purpose for which material obtained was intended to be used including publication, the means employed (long-range or surreptitious devices), the status or function of the person, the conduct of the person prior to the surveillance and the overall context including the relationship between the surveillant/s and the person/s under surveillance.’


19 Note: Section 42(1) of the Broadcasting Act 2009 places a duty on the Broadcasting Authority of Ireland to implement codes of broadcasting standards and practice and under S.42(2)(d) of the Act such codes must ensure that ‘in programmes broadcast by a broadcaster, and in the means employed to make such programmes, the privacy of any individual is not unreasonably encroached upon’. Section 39(1)(e) of the Act places a similar restriction on broadcasters’ encroachment on the privacy of individuals.

20 Copyright and Related Rights Act 2000, s 114(1)

21 ibid s 114(2)
what constitutes ‘private or domestic purposes’. However, it may be taken as to mean the photography of family-type events such as weddings, private parties, birthday celebrations, etc. to which family and/or friends are invited, which are not open to the general public and which are not being organised for commercial reasons. When someone commissions a professional photographer to take photographs for private or domestic purposes it involves the payment of a fee to the photographer. It is possible that the right granted under S.114 of the Act could also apply to cases in which the photographer offered to forgo payment for such work. This S.114 right to privacy may be waived in writing under S.116 of the Act. Clark suggests, that this specific moral right to privacy in photographs and films under S.114 of the Act is designed to prevent photographers from subsequently commercially exploiting such photographs. Section 114 does indeed restrict the promotional activities of commercial photographers specialising in wedding and portrait photography, as it curtails their ability to create an up-to-date portfolio, which they may use to promote and advertise their services to prospective new clients. However, under Section 13 of Part I of the First Schedule to the CRRA, any rights conferred under Section 114 of the Act do not apply to photographs created before the commencement date of Part II of the Act, namely 1st January, 2001. This exclusion may be of interest and benefit to longer established photographers, who may wish to feature portraits or wedding photographs that were created prior to the 1st January 2001 in their promotional materials. A photographer wishing to have this right to privacy legally waived by a commissioning client via a term contained in a written contract for photographic services would have to expressly state in such a term, that the specified, existing, legal right is being voluntarily waived by the client in respect of specified image(s) for the stated reproduction use(s) by the photographer and the client would have to expressly agree to such a waiver before it would have any legal effect.

In the absence of a specific statute granting a general right to privacy, the Data Protection Acts 1988–2003 have become a surrogate and are relied on in a wide variety of actions. These Acts offer privacy protections to individuals in respect of their personal data. While photographs are not specifically mentioned in the Acts, they are covered under them. Section 2(a)(iv) of the 2003 Act re-defined “personal data” as:

‘data 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’.

This definition of personal data would embrace photographs of individuals in which their faces are clearly visible and they are identifiable. “Other information” as mentioned in the above definition of “personal data” could include, for example, an identifiable relative of an unidentified individual who

22 ibid s 116
23 Robert Clark, Irish Copyright and Design Law (Butterworths 2001) E/30
24 Copyright and Related Rights Act 2000, first schedule, part I, s 13
25 Data Protection (Amendment) Act 2003, s 2(a)(iv)
are both featured in a group photograph. Section 1 of the 1988 Act, as amended, provides a number of definitions of particular relevance.

A “data controller” is defined as:
‘a person who, either alone or with others, controls the contents and use of personal data’.

A “data processor” is:
‘a person who processes personal data on behalf of a data controller but does not include an employee of a data controller who processes such data in the course of his employment’.

A “data subject” is:
‘an individual who is the subject of personal data’.

In respect of the processing of information or data, S.2 of the 2003 Act re-defined “processing” as:
‘…performing any operation or set of operations on the information or data, whether or not by automatic means, including:
(a) obtaining, recording or keeping the information or data,
(b) collecting, organising, storing, altering or adapting the information of data,
(c) retrieving, consulting or using the information of data,
(d) disclosing the information or data by transmitting, disseminating or otherwise making it available, or
(e) aligning, combining, blocking, erasing or destroying the information or data’.

It is reasonable to assume, that the above-mentioned definitions of “personal data”, “data controller”, “data processor”, “data subject” and “processing” would encompass the typical activities of photographers and publishers of photographs and the subject matter of a significant percentage of created photographs, namely those of people. A photographer could be classified as being either a data controller or both a data controller and a data processor. For example, where a photographer controls the contents of a photograph and how such a photograph is to be used, he would fall under the heading of a data controller. However, if such a photographer were to undertake any of the types of functions specified in (a) – (e) above, then he would also act as a data processor. For example, the actual taking of a photograph of an individual, the storing of the image’s contents on a computerised photo filing system and the retrieval of the image at a later stage to either view, edit, manipulate, print or send it to a publisher for publication are all activities which would come within the above definition of “processing”. In effect, virtually all photographers, who photograph people, are both data controllers and data processors. Section 3(a) of the 2003 Act amended S.2 of the 1988 Act by inserting a new S.2(1) in the 1988 Act dealing with the terms.

26  Data Protection Act 1988, s 1
27  Data Protection (Amendment) Act 2003, s 2(a)(v)
under which a data controller may collect, process, keep, use or disclose personal data relating to data subjects.

Under this new S. 2(1) of the 1988 Act:

‘A data controller shall, as respects personal data kept by him or her, 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 complete and, where necessary, kept up to date;
(c) the data (i) shall have been obtained only for one or more specified, explicit and legitimate purposes; (ii) shall not be further processed in a manner incompatible with that purpose or those purposes; (iii) shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they were collected or are further processed, 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 unauthorised alteration, disclosure or destruction of, the data, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.’

On the relevance of the “fair obtaining” of personal data to the taking and use of photographs and in particular of school children, the Data Protection Commissioner’s case study on this topic is important for photographers as it is for journalists, film-makers and others. In it, the Commissioner stated:

‘…“fairness” in my judgement requires that the clear and informed consent of parents or guardians must be obtained before any use is made of the children's data. This is particularly so where the use envisaged involves the posting of data on the worldwide web.’

Under Section 22 of the 1988 Act, which concerns the disclosure of personal data, it is an offence for someone to access and disclose personal data without the prior authority of the relevant data controller or data processor by whom the data is kept. However, under S.21 of the 2003 Act, an exemption in relation to the requirements under S.2 of the 1988 Act is provided for in respect of the collection and processing of personal data for journalistic, artistic or literary purposes. This exemption is in keeping with the requirement under Article 9 of Directive 95/46/EC of the European

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28 Data Protection Act 1988, s 2(1) as inserted by S.3(a) of the Data Protection (Amendment) Act 2003
Note: See also: ‘School children awarded €62,500 over images’, The Irish Times (Dublin, 30 April 2008)
30 Data Protection Act 1988, s 22
Parliament and of the Council of 24 October 1995 to reconcile the right to privacy with the rules
governing freedom of expression.\(^{31}\) Section 21 of the 2003 Act inserted a new S.22A in the 1988
Act, which states:

'(1) Personal data that are processed only for journalistic, artistic or literary purposes shall
be exempt from compliance with any provision of this Act specified in subsection (2)\(^{32}\) of
this section if –

(a) the processing is undertaken solely with a view to the publication of any
journalistic, literary or artistic material;

(b) the data controller reasonably believes that, having regard in particular to the
special importance of the public interest in freedom of expression, such publication
would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance
with that provision would be incompatible with journalistic, artistic or literary
purposes'.\(^{33}\)

Thus, a photographer or publisher should be able to claim the benefit of the above-mentioned
exemption under S.22A of the 1988 Act in many instances. If not, in certain circumstances, then a
model release\(^{34}\) would be required. Neither the 1988 nor the 2003 Act defines what constitutes
"journalistic, artistic or literary purposes". Also, the "public interest" requirement is a key element
when a claimed right to privacy is being balanced with the right of freedom of expression. As press
photographers create photographic images for journalistic purposes, their work would come within
this exemption. For the purposes of determining whether or not the publication of journalistic,
artistic or literary material would be in the public interest, the Data Protection Commissioner must
take cognisance of any code of practice submitted to, and approved by, the Commissioner in
accordance with S.13 of the 1988 Act, as amended.\(^{35}\) In determining complaints which have
centred on this exemption, the Commissioner has also given due regard to other codes of practice
which had not been submitted to the Commissioner for approval, such as that of the UK Press

\(^{31}\) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the
processing of personal data and on the free movement of such data [1995] OJ L281/31

\(^{32}\) Note: The provisions of the 1988 Act referred to in S.22(2) of the 2003 Act are: Section 2 (as amended by the 2003 Act) (on the collection,
processing, keeping, using and disclosing personal data) other than Sub-Section (1)(d) (on the security of collected personal data); Sections 2A, 2B and 2D (as inserted by the 2003 Act), (respectively on the processing of personal data, the processing of sensitive
personal data and the fair processing of personal data); Section 3 (on the right of a data subject to object to the processing of his personal data which is likely to
cause damage or distress) and Section 6B (on rights in relation to automated decision taking) (both Sections inserted by the 2003 Act).

\(^{33}\) Data Protection Act 1988, s 22A

\(^{34}\) Note: A "model release" is a contract signed by a person featured in a photograph. It stipulates the terms under which the photograph may be
published. Frequently, model releases will stipulate that images will not be used in a manner which portrays the featured person in a
negative light, involved in illegal activities or endorsing a product/service. If a publisher is in possession of a signed model release form
relating to a specific image and depending upon whether it contains any expressed uses of the image, he will be in a better position to
defeat a claim of either defamation or passing-off. The inclusion of a rider with a published image stating that the person featured in the
image is a model and does not endorse the product/service would be of additional benefit to its publisher.

\(^{35}\) ibid s 22(A)(3)
Complaints Commission. It is to be expected that now the Commissioner would also take account of the Code of Practice of the Irish Press Council, which extends to photographs and photographers.

Section 6A in the 1988 Act grants data subjects the right to object to the processing of their personal data, where such is likely to cause unwarranted damage or distress either to them or to another person. However, this right does not apply in respect of specified instances including where a data subject has given his explicit permission for the data to be processed. If a data subject requests, in writing, that a data controller is to cease processing his personal data, the data controller must within 20 days after the receipt of such a written request inform the data subject of his having complied or of his intent to comply or of his reasons for not complying with such a request. While such a right is available to data subjects, it may not be of benefit to them in some instances. An example of such is where a photographic image is created by a photographer without the consent of the image’s data subject with the view to it being published immediately. Unless the data subject takes immediate steps to exercise the right available to him under S.6A, he would not be able to use that right in order to prevent any further processing of the image – its publication. However, the data subject may be able to prevent a re-publication of the image by exercising the S.6A right.

In the absence of a specific statute providing a general right to personal privacy, it would appear, as stated above, that the Data Protection Acts are in many respects filling that void. Consequently, the provisions of these Acts are of particular relevance to photographers and photograph publishers, who do not wish to be subject to privacy infringement claims. In instances where the above-mentioned journalistic, artistic and literary exemption is clearly not available to a photographer, for example one who practices commercial photography, a signed model, property or personal property release form, as appropriate, should be obtained prior to either taking or publishing such a photograph. While it could be argued that print media news publishers should also be required to obtain the consent of every subject featured in their printed news photographs, such a requirement would be an extremely onerous task considering the volume of photographs published by newspapers, the number of people featured in them and the likelihood of people refusing to grant consent to the publication of photographs which feature them. Such a requirement could also seriously impact on their ability to report the news through photographs and possibly on their commercial viability.

38 Data Protection Act 1988, s 6A(1)
39 ibid s 6A(3)
40 ibid s 6A(4)
Related to the State’s duty to protect the individual’s right to privacy from intrusion is its analogous duty to protect the unauthorised intrusion upon the individual’s online data. This matter was central to the 2014 Irish High Court judicial review case of *Schrems v Data Protection Commissioner*.\(^{41}\) Following the Edward Snowden revelations concerning the interception and surveillance of internet and telecommunications by the United States National Security Agency through its PRISM\(^{42}\) programme, the applicant in *Schrems* claimed that the Data Protection Commissioner’s decision to refuse to order the cessation of the transfer of his online data from Facebook Ireland to its parent company in the United States was unlawful.\(^{43}\) The Data Protection Commissioner claimed that the applicant’s complaint could not be defended as the Safe Harbour Privacy Principles\(^{44}\) permits such data transfers following the European Commission’s conclusion that the United States does offer adequate data protection.\(^{45}\) In *Schrems*, Hogan J disagreed with the applicant’s assertion that the Data Protection Commissioner had not adhered to the requirements of the relevant E.U. law. Hogan J determined that the essence of the applicant’s objection was ‘…to the terms of the Safe Harbour Regime itself rather than to the manner in which the Commissioner has actually applied the Safe Harbour Regime.’\(^{46}\) Having noted that the Safe Harbour Principles had come into effect before the development of social media\(^{47}\) and the Snowden revelations on data protection practices in the United States and the entry into force of Article 8 of the EU Charter,\(^{48}\) Hogan J decided to refer to the Court of Justice of the European Union (hereinafter CJEU) the question:

> Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in Commission Decision of 26 July 2000 (2000/520/EC) having regard to Article 7 and Article 8 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), the provisions of Article 25(6) of Directive 95/46/EC notwithstanding? Or,

\(^{41}\) *Schrems v Data Protection Commissioner* [2014] IEHC 310

\(^{42}\) *Schrems v Data Protection Commissioner* [2014] IEHC 310, paras 10–15

\(^{43}\) ibid para 1


Note: Art. 5 of this Decision states: ‘The adequate level of protection for the transfer of data from the Community to the United States recognised by this Decision, should be attained if organisations comply with the safe harbour privacy principles for the protection of personal data transferred from a Member State to the United States (hereinafter “the Principles”) and the frequently asked questions (hereinafter “the FAQs”) providing guidance for the implementation of the Principles issued by the Government of the United States on 21 July 2000. Furthermore the organisations should publicly disclose their privacy policies and be subject to the jurisdiction of the Federal Trade Commission (FTC) under Section 5 of the Federal Trade Commission Act which prohibits unfair or deceptive acts or practices in or affecting commerce, or that of another statutory body that will effectively ensure compliance with the Principles implemented in accordance with the FAQs.’

\(^{45}\) *Schrems v Data Protection Commissioner* [2014] IEHC 310, para 2

\(^{46}\) ibid para 69

\(^{47}\) ibid para 63

\(^{48}\) ibid para 69
alternatively, may the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission Decision was first published?"  

The Grand Chamber of the CJEU determined in 2015 that:

‘Article 25(6) of Directive 95/46/EC…read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC…does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.’

Following the CJEU’s decision the matter returned to the Irish High Court for consideration and Hogan J stated that the Data Protection Commissioner was now consenting to orders quashing the 2013 refusal and to remitting the matter for re-consideration by the Commissioner. Subsequently, the Office of the Data Protection Commissioner issued a statement to the effect that the Commissioner proposed to seek ‘a declaratory relief in the Irish High Court and a referral to the CJEU to determine the legal status of data transfers under Standard Contractual Clauses.’

3.2.1.3) Privacy Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms

Adopted in 1950 by the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) was incorporated into Irish law under the European Convention on Human Rights Act 2003 and into the law of the United Kingdom under the Human Rights Act 1998. Article 8.1 of the Convention recognises a right to privacy and states:

49 ibid para 71
50 Case C-362/14 Maximillian Schrems v Data Protection Commissioner (06 October 2015) para 107(1)
54 Human Rights Act 1998, Schedule 1

Note: The commencement date for Section 19 of the Human Rights Act 1998 (dealing with a statement of compatibility with the rights under the
'Everyone has the right to respect for his private and family life, his home and his correspondence.'  

This right to privacy under the ECHR is not an absolute right. However, it should not be interfered with except in accordance with the law and where such an interference is necessary in a democratic society and for one of the reasons specified under the Convention. Article 8.2 states: 

‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’  

The right to privacy frequently comes into contention with the right of freedom of expression, which is guaranteed by Article 10 of the Convention. It shall be shown below at Section 3.2.1.6 how the courts balance these competing rights in cases concerning the taking and publication of photographs.

3.2.1.4) Privacy Rights under the Charter of Fundamental Rights of the European Union

The contents of the 2010 Charter of Fundamental Rights of the European Union are broadly similar to those of the Council of Europe’s Convention. In relation to privacy, Article 7 of the Charter states: 

‘Everyone has the right to respect for his or her private or family life, home and communications.’

While the Charter does not define what constitutes “personal data”, Article 8.1 of the Charter states: ‘Everyone has the right to the protection of personal data concerning him or her.’  

As regards the processing of personal data, Article 8.2 states: ‘Such data must be processed fairly for the specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.’  

The Charter goes on to state that ‘Compliance with these rules shall be subject to control by an independent authority.’

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55 European Convention on Human Rights Act 2003, Sch 1, Art 8(1)
56 ibid Art 8(2)
57 ibid Art 10
59 ibid Art 8(1)
60 ibid Art 8(2)
61 ibid Art 8(3)
52 of the Charter makes provision for the limiting of the rights and freedoms recognised by the Charter. However, any such limitations must be proportionate, necessary and ‘...genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’ Like the European Convention, the Charter also recognises a right of freedom of expression and information. Article 11 of the Charter states: ‘Everyone has the right to freedom of expression.’ There are a number of significant differences, however, between the right to privacy recognised under the Convention and under the Charter. While the Charter makes specific reference to the protection of one’s “personal data”, the Convention unsurprisingly does not do so since it was drafted in 1950. Also, the Convention refers to one’s “correspondence”, whereas the Charter adopts an approach in keeping with modern means of communication and refers to one’s “communications”. These rights of privacy, the protection of personal data and freedom of expression and information are not absolute and, as is the case with the broadly similar rights granted under the European Convention, they frequently come into contention and have to be balanced by the courts.

3.2.1.5) Privacy Rights under the Universal Declaration of Human Rights, the ICCPR and its Optional Protocol

The United Nations’ Universal Declaration of Human Rights of 1948 states that individuals are entitled to a wide range of rights, which the United Nations has classified as being “fundamental rights”. Among such rights are the right to privacy and the right to a good name. Article 12 of the Declaration states:

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’

Ireland is a signatory to the Universal Declaration, but it is not binding on member states of the United Nations. It is purely a declaration – an announcement. It sets-out the fundamental or basic rights, which should be enjoyed by people and how, in an ideal world, states should treat people while they enjoy those rights. However, almost 20 years after the adoption of the Universal Declaration, the International Covenant on Civil and Political Rights (hereafter “the ICCPR”) and

Note (1): The European Data Protection Supervisor is charged with ensuring that E.U. institutions and bodies respect people’s privacy rights when they are processing their personal data. It also engages with national authorities to ensure that their application of data protection rules is consistent.

Note (2): At a national level, the respective E.U. Member States’ Data Protection Commissioners are responsible for upholding individuals’ right to personal data protection.
62 ibid art 52
63 ibid Art 11
65 ibid art 12
the International Covenant on Economic, Social and Cultural Rights (hereafter “the ICESCR”) were adopted by the General Assembly of the United Nations in December 1966. They respectively entered into force in March 1976 and January 1976. The United Nations General Assembly adopted two optional protocols to the ICCPR, namely the Optional Protocol in December 1966 and the Second Optional Protocol in December 1989. Essentially, the ICCPR, the ICESCR and the ICCPR’s two Optional Protocols give legal effect to the articles of the Universal Declaration.

Of relevance to this chapter of this thesis is the ICCPR and its Optional Protocol. Article 17 of the ICCPR regarding privacy contains the same wording as the above-mentioned Article 12 of the Universal Declaration. The Optional Protocol to the ICCPR deals with the recognition by states parties to the Protocol of the competence of the United Nations Human Rights Committee to consider complaints from individuals, who have exhausted all domestic remedies, concerning claimed violations by a State Party, as opposed to violations by another individual, of the rights granted under the ICCPR. As highlighted by the then Irish Human Rights Commission in its 2014 submission to the UN Human Rights Committee, while the ICCPR and its Optional Protocol have been ratified by Ireland, they have not been incorporated into Irish domestic law. While the Optional Protocol grants individuals a remedy for a perceived breach by a State party of their right to privacy, as recognised by the ICCPR, in reality that remedy is of no value to individuals who believe that their privacy has been breached by either a photographer or photograph publisher.

Under Article 1 of the Optional Protocol, they would not be able to submit a communication to the Committee in respect of such a perceived breach of their right.

68 ibid Optional Protocol to the International Covenant on Civil and Political Rights <www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> accessed 06 March 2015
69 ibid Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty <www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx> accessed 06 March 2015
71 Optional Protocol to the International Covenant on Civil and Political Rights, arts 1-3 <www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> accessed 06 March 2015
72 Note: The Irish Human Rights and Equality Commission came into being on 01 November 2014 under the Irish Human Rights and Equality Commission Act 2014

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3.2.1.6) Addressing of Privacy Rights by the Courts

In their seminal, 1890 article in the *Harvard Law Review* on “The Right to Privacy”, Warren and Brandeis made famous Judge Cooley’s view on the individual’s right to privacy or as he termed it “the right to be let alone”. While making specific reference to photographers and newspaper publishers, their article complained:

‘Recent inventions and business methods call attention to the next step, which must be taken for the protection of the person and for securing to the individual what Judge Cooley calls “the right to be let alone”…Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life….For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right to circulate portraits; and the question whether our law will recognize and protect the right to privacy in this and other respects must soon come before our courts for consideration. Of the desirability – indeed of the necessity – of some such protection, there can it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency.’

Many years since that article, the matters which Warren and Brandeis complained about have come before and been addressed by the courts in many countries, including Ireland, and at international levels. In Ireland’s case, the courts have recognised a general right to privacy based on the Constitution. However, that right to privacy is not absolute and the courts, in determining a claim for an infringement of that right, must balance it with any competing right(s), particularly the right of freedom of expression, while also taking public policy considerations into account. In the Irish High Court case of *Kennedy and Arnold v Ireland* Hamilton P, while identifying the nature of privacy stated:

‘The right to privacy is not in issue, the issue is the extent of that right or the extent of the right “to be let alone”.’

Hamilton P further stated:

‘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, by the requirements of the common good and is subject to the requirements of public order and morality.’

76 *Kennedy and Arnold v Ireland* [1987] IR 587
77 ibid page 592
78 ibid
Hamilton P held that the tapping of the plaintiffs’ telephones ‘...without any lawful justification...’ and the interference and intrusion on their privacy was ‘...an attack on their dignity and freedom as individuals and as journalists’...and was aggravated ‘...by the fact that it was done by an organ of the State which is under a constitutional obligation to respect, vindicate and defend their rights.’

Not surprisingly, therefore, it has been suggested that the decision in Kennedy ‘has removed any lingering uncertainty over the recognition by the Irish constitutional order of an individual right to privacy’. While there have been many Irish court cases involving various aspects of privacy in one’s life, the following sample cases raised specific issues regarding the invasion of the right to privacy either by photographers or through the publication of photographs.

In the Irish High Court case of Hanahoe V Hussey [1998] 3 IR 69, Kinlen J held that a leak by a member of An Garda Síochána to the media about a proposed raid on a firm of solicitors’ offices, which resulted in the presence of press photographers outside the premises at the time of the raid and subsequent publicity in the media, amounted to negligence by the State and a breach of the applicant’s right to privacy. In balancing the public’s right to know with the individual’s right to privacy, Kinlen J stated:

‘We live in an era of fantastic and intrusive invasions of privacy. The State, the media and the many electronic devices have combined in a growing and worrying assertion that the invasion is allowable because of the battle against crime and corruption and also based on the alleged "public’s right to know". These invasions are increasing, but the courts must be the restraining arm to protect privacy and only allow invasion into privacy where on balance it can be justified. In the present case, justification is the specific legislation which is new and must be carefully considered and analysed by any judge making an order on foot of it.’

While considering the claimed effect of the alleged breach of privacy on the applicants, Kinlen J held that the deliberate leak to the media ‘...was intended to embarrass and distress the applicants and it most certainly did. It was an outrageous interference with their privacy and their constitutional rights.’ It would appear that the Court in Hanahoe, while balancing the competing rights, placed a significant weight on the purpose of the deliberate leak, namely to cause embarrassment and distress to the applicants, as it classified the interference with their rights as being at an “outrageous” level. Kinlen J concluded that the invasion of privacy by the person(s) who leaked the information to the media had caused ‘considerable and probably irreparable harm’ to the applicants. While the press photographers and the newspapers that respectively took and

79 ibid 594
81 Note: The legislation referred to in Hanahoe was the Criminal Justice Act 1994, as amended.
82 Hanahoe v Hussey [1998] 3 IR 69, page 96
83 ibid page 108
84 ibid page 109
published the images of the raid were direct contributors to this breach of privacy, they escaped liability as they had not been named as defendants to this cause of action.

In the unreported Irish High Court case of *Sinnott v Carlow Nationalist* in July 2008, Budd J increased the amount of previously awarded damages of €6,500 to €11,000 for ‘breach of privacy, intentional infliction of emotional harm and negligence’ following the publication by the defendant of a photograph showing the plaintiff’s exposed genitals while he participated in a Gaelic football match. While the publication of such a photograph could be regarded as being negligent and in poor taste, without its publication, the general population would have been totally unaware of the “exposure”. Obviously, its publication was of embarrassment to the plaintiff. However, the judgment in this case does raise the question of whether it was privacy or pride, which was actually invaded by the publication of the photograph: whether the right to the protection of one’s privacy includes the protection of one’s own feelings and whether both should be protected following one’s own negligence? *The Irish Times*’ report on the case stated that the *Carlow Nationalist’s* Sports Editor told the Court that he had not been aware ‘…of the offending nature of the photograph…and that its publication was a “blunder”…’ However, in ruling that the publication of the photograph was negligent, Budd J was reported as stating ‘…it “strained all credulity” that the publication was simply accidental’ and that ‘he believed, on the balance of probabilities, that the problem with the photograph must have been seen by the photographer and the pagemakers."

The image at the centre of the plaintiff’s action was more than likely one from a rapid series of images shot by the photographer at a particular point during the football match and the “exposure” displayed in the published photograph may or may not have been noticed during the photo selection and editing stages of the publication. Although *The Irish Times*’ report does not mention whether or not the Court held that the photograph should not have actually been taken, it was its publication as a result of negligent newspaper editing by the defendant that was held by the Court to have breached the plaintiff’s privacy. It is feasible that the photographer could also have been added as a defendant in the action and held liable, if he had been the person who had been responsible for selecting the image in question from the created images for publication. Thus, photographers should be mindful of a publisher’s responsibilities towards the privacy of individuals, when they are selecting images for submission for publication.

A breach of privacy was one of the claims in the Irish High Court case of *Hickey v Sunday Newspapers* following the publication of photographs of the first plaintiff, her partner and their new-born child taken outside the Registry of Births, Marriages and Deaths in Dublin. In rejecting the plaintiffs claim Kearns P held that the competing rights of privacy and freedom of expression

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86 ibid
87 ibid
88 *Hickey v Sunday Newspapers* [2011] 1 IR 228
must be balanced by the Court ‘...similar to the balancing exercise, which is required under Articles 8 and 10 of the European Convention on Human Rights.’\textsuperscript{89} In highlighting the importance of the right of freedom of expression Kearns P stated that the right to privacy would outweigh it only in exceptional cases.\textsuperscript{90} Furthermore, Kearns P held that the right of freedom of expression ‘is its own public interest’ and that it is not necessary to specify a particular public interest when justifying it.\textsuperscript{91} On the right to photograph a person in a public place, Kearns P stated that were the Court to find against the defendant:

‘...it would have the extraordinary consequence that no public figure could be photographed, for example, attending a funeral or performing any other function in a public place.’\textsuperscript{92}

The Court held that the plaintiffs had not established in evidence that they had been subjected to ‘ongoing surveillance’, that ‘other photographs had been taken or published by the defendant’ or that they had been ‘followed or bothered by any photographer employed by the defendant.’\textsuperscript{93} As regards the information disclosed in the published photographs, Kearns P held that they did not disclose anything which any other person present at the scene could not have seen.\textsuperscript{94} Furthermore, Kearns P stated:

‘The existence of the second plaintiff, his age and identity of his parents were already a matter of public record and the first plaintiff accepted that she had spoken to a journalist with the specific intention of publicity being accorded to the very matters in respect of which she now sought privacy. Nothing in the photographs published identified the second plaintiff or exposed that child to risk or danger of any sort whatsoever.’\textsuperscript{95}

As mentioned above, Kearns P paid particular attention to the privacy rights of the child. The privacy of children will be examined further below at Section 3.2.1.10.

\textbf{3.2.1.7) Breach of Confidence, Misuse of Private Information and Privacy}

The approach to the development of privacy law in Ireland has differed to that in the United Kingdom with the former having its basis on the constitutional protection of the right to privacy and the right to privacy under the ECHR, whereas in the UK it has been based on the equitable remedy of breach of confidence and the ECHR right. From this equitable remedy, a cause of action termed

\textsuperscript{89} ibid para 25
\textsuperscript{90} ibid para 26
\textsuperscript{91} Hickey v Sunday Newspapers [2011] 1 IR 228 para 25
\textsuperscript{92} ibid para 27
\textsuperscript{93} ibid para 28
\textsuperscript{94} ibid
\textsuperscript{95} ibid
the misuse of private information has also been developed in the UK. Although they are not
unknown under Irish law, cases concerning breach of confidence and misuse of private information
have arisen mainly in the U.K.

3.2.1.7.1) Breach of Confidence and Privacy
Breach of confidence was recognised as a cause of action in the 1849 English High Court of
Chancery case of Prince Albert v Strange. The decision in Prince Albert was applied by that Court
by North J in Pollard v Photographic Company – a case concerning the unauthorised use of a
portrait photograph by its photographer in a Christmas window display at his premises. The
doctrine was further developed in the English High Court case of Coco v A.N. Clark. In Coco,
Megarry J stated that three essential elements must be proven for a claim of breach of confidence
to succeed, namely, the information communicated must be confidential in nature and not common
knowledge; the circumstances under which the information was communicated must have implied
an obligation of confidence and the communicated information must have been used without
authorisation and to the detriment of its communicator. In the English High Court case of
Hellewell v Derbyshire Chief Constable, Laws J equated a breach of confidence to a breach of a
right of privacy and stated:

‘If someone with a telephoto lens were to take from a distance and with no authority a
picture of another engaged in some private act, his subsequent disclosure of the
photograph would, in my judgement, as surely amount to a breach of confidence as if he
found or stolen a letter or diary in which act was recounted and proceeded to publish it. In
such a case, the law would protect what might reasonably be called a right of privacy,
although the name accorded to the cause of action would be breach of confidence.’

How does an obligation of confidence arise for a photographer and how does a photographer
become aware of its existence? It will depend upon the circumstances and as Mann QC (sitting as
a Deputy High Court Judge) in the English High Court case of Shelley Films Limited v Rex
Features Limited stated:

‘If there is one aspect of the law relating to breach of confidence which is beyond doubt it
is that it is by no means simple to define with precision the circumstances in which
confidentiality and its corresponding duty not to disclose arise.’

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96 Prince Albert v Strange (1849) 2 De Gex and Smail 652; 64 ER 293, paras 701–702
97 Pollard v Photographic Company (1888) 40 ChD 345
98 Coco v A. N. Clark (Engineers) Ltd. [1969] RPC 41
99 ibid 47
100 Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804
101 ibid 807
Note: There is no statutory prohibition on the use of any specific type of camera lenses either in Ireland or in the United Kingdom.
102 Shelley Films Limited v Rex Features Limited [1994] EMLR 134
103 ibid 144

136
An obligation of confidence may arise for a photographer through a number of different situations. For example, the contractual terms of engagement of a photographer on a commercial basis may expressly contain a confidentiality requirement in relation to any photographs created under the contract. It could arise where one is an invited guest to a private function and is either pre-advised or advised upon arrival at the event either directly or through generally-conveyed, explicit information such as signage, that unauthorised photography would not be permitted at the event. Were one to obtain admittance to such an event without invitation, one could be under a similar obligation of confidence in respect of any photography undertaken at the event. However, it should be noted that in Shelley Films, Martin Mann QC, in deciding whether or not to impose an obligation of confidence on a photographer, stated that he was not convinced that ‘…an express prohibition on photography was necessarily an essential ingredient on which one may found a claim of breach of confidence.’ Having placed greater weight on the claimant’s assertion that the release of the information contained in the photographs in question would be detrimental to its commercial interests, Mann QC granted the requested injunction. The Court held that it would be necessary for a court trial to determine if the photographer was subject to an obligation of confidence and whether or not the ‘…defendant’s knowledge of the circumstances in which the photograph was taken was sufficient for it to be subject to an equitable obligation of confidence.’

While the English Court of Appeal case of Douglas and Others v Hello! Ltd. (No.1) concerned a claim for breach of privacy, it was more so a claim over the control of publicity. In Douglas, the defendant successfully appealed a prior restraint injunction, which prevented it, until the time of a trial, from publishing photographs that had been taken without approval at the plaintiff’s wedding and subsequently sold to, and published by, the defendant without the plaintiff’s consent. In dismissing the injunction, Brooke LJ stated:

‘It is well settled, then, that equity may intervene to prevent the publication of photographic images taken in breach of an obligation of confidence. In other words, if on some private occasion the prospective claimants make it clear, expressly or impliedly, that no photographic images are to be taken of them, then all those who are present will be bound by the obligations of confidence created by their knowledge (or imputed knowledge) of this restriction. English law, however, has not yet been willing to recognise that an obligation of confidence may be relied on to preclude such unwanted intrusion into people’s privacy when those conditions do not exist.’

The implication of this decision for photographers is that they would leave themselves open to a claim for breach of confidence, if they have been made aware of a prohibition on photography at a

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104 Shelley Films Limited v Rex Features Limited [1994] EMLR 134
105 ibid 148
106 ibid
107 ibid 151
108 ibid 135
109 Douglas and Others v Hello! Ltd. (No.1) [2001] 2 WLR 992
110 Douglas and Others v Hello! Ltd. (No.1) [2001] 2 WLR 992, para 71
private event and they proceed to take photographs. The same may also apply in the case of a non-private event, for example a paid entry event to which a prior notice prohibiting photography was a term of the admission payment contract.

In differentiating between a claimed right to privacy and a publicity right, Sedley LJ, however, made the point that Mr. Douglas and Ms. Zeta-Jones had effectively sold most of their privacy and all that remained was in the form of an image or publicity right:

‘The first two claimants had sold most of the privacy they now seek to protect to the third claimant for a handsome sum. If all that had happened were that “Hello!” had got hold of “OK!”’s” photographs, “OK!” would have proprietary rights and remedies at law, but Mr Douglas and Ms Zeta-Jones would not, I think, have any claim for breach of the privacy with which they had already parted. The present case is not so stark, because they were careful by their contract to retain a right of veto over publication of “OK!”’s” photographs in order to maintain the kind of image which is professionally and no doubt also personally important to them. This element of privacy remained theirs and “Hello!”’s” photographs violated it.’

It would appear from the above statement, that Sedley LJ was equating a control over personal images – effectively a publicity right – as being an element of one’s privacy rights. They are, however, two separate issues although they may both relate to a particular individual. While a claimed personal image publicity right and a claimed privacy right may concern the same particular individual, the former is not a sub-set of the latter right. A personal image right relates to having a legal control over the publication of one’s personal image. This topic will be examined at Section 3.2.2 below. On appeal to the House of Lords, the appellants in Douglas v Hello! claimed that any photographic information concerning their wedding other than the authorised published images was private. Nicholls L described the unauthorised publication of such private photographic information as a ‘misuse of this information’. Furthermore, he distinguished between breach of confidence and the misuse of confidential information as causes of action and stated that while the former protected privacy, the latter protected secret or confidential information. However, he went on to state:

‘…information may qualify for protection both on the grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy may be invaded by further publication of information or photographs already disclosed to the public.’

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111 ibid para 140
112 Douglas and Others v Hello! Ltd. and Others [2007] UKHL 21
113 ibid para 251
114 ibid
115 ibid para 255
116 ibid
Other issues may arise in respect of improperly obtained photographs. Due to its visual nature, a published photograph has the ability to convey more information and to have greater impact on its viewers than a written article describing the information conveyed in the photograph. A court may restrain the publication of an improperly obtained photograph while permitting the publication of a description of the information contained within it. While a publisher in the printed media might regard such a restriction as the lesser of two evils, as he would be free to publish a written description of the photograph’s contents in a large, attention-grabbing typeface, if he so wished, a photographer, who publishes his own photographs, would in reality, be completely restrained by such a court order. Also, he would not have the ability to sell the image to a publisher in the printed media. The English High Court adopted the above-mentioned approach in the case of Theakston v MGN. In Theakston, Ouseley J granted an injunction against the publication of photographs of the plaintiff taken in a brothel without his permission but not against the publication of the written story by the defendant’s newspaper – The Sunday People, as ‘…the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way.’ In the English Court of Appeal case of D v L [2003], Waller LJ took the view the restraining of the publication of an improperly obtained photograph even if its photographer is free to publish a description of the information contained in it would be ‘…clearly a lesser restriction on freedom of expression, and in any event prima facie Article 10 (2) would recognise that obligations of confidence should be upheld.

3.2.1.7.2) Misuse of Private Information and Privacy

The cause of action misuse of private information was coined by Lord Nichols of Birkenhead in the 2004 House of Lords case of Campbell v MGN Ltd, in which he stated:

‘Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.’

On the misuse of private information as a cause of action, Warby, Moreham, Christie and Tugendhat suggest that it is ‘…the closest thing English law has to a free-standing right to privacy.’ Although Evans LJ determined in the 1994 English Court of Appeal case of Kitechnology B.V. and Others v Unicor GmbH Plastmaschinen and Others that the equitable cause of action of breach of confidence was not also a tort, in the 2014 English High Court case...
of Judith Vidal-Hall and Others v Google Inc., Tugendhat J held that misuse of private information was a tort in its own right for the purpose of serving a civil bill out of the jurisdiction.

On appeal to the Court of Appeal, McFarlane L and Sharp L affirmed Tugendhat J’s decision in Vidal-Hall and stated:

‘…in the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort for the purposes of service out of the jurisdiction. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists.’

Thomson and McCann assert that ‘the availability of a claim for misuse of private information depends on there being a publication (or threatened publication). As a consequence, intrusive activities prior to publication or in the absence of publication will not give rise to such a claim.’

They further suggest that misuse of private information as a cause for action protects privacy as opposed to secrecy and that the latter ‘…may be reinforced by a claim for breach of confidence.’

The House of Lords case of Campbell v MGN Ltd. concerned the publication by The Mirror newspaper of an article on, and accompanying photographs of, the plaintiff (fashion model Naomi Campbell) outside a Narcotics Anonymous meeting after she had previously stated publicly that she did not take drugs. In Campbell, Nicholls L stated that an everyday description of information relating to a person’s private life would be that it is private rather than confidential information and its wrongful disclosure would be better termed as a ‘misuse of private information’ rather than a breach of confidence.

In upholding the appeal, Hope L held that where a public figure lies about his or her private life, ‘…the press will normally be entitled to put the record straight.’ However, he went on to hold that unlike the publication of a correction of a falsehood, the publication of information concerning the plaintiff’s addiction treatment was confidential information and ‘…any reasonable person who came into possession of it would realise it was obtained in confidence.’

126 Judith Vidal-Hall and Others v Google Inc. [2014] EWHC 13 (QB)
127 ibid para 70
128 Google Inc. v Judith Vidal-Hall and Others [2015] EWCA Civ 311, para 51
129 Mark Thomson and Nicola McCann, ‘Harassment and the Media’ (2009) 2 Journal of Media Law 149, 149
130 ibid
131 Campbell v MGN Ltd. [2004] 2 AC 457
132 ibid para 14
133 ibid para 82
134 ibid para 83
Central to a breach of confidence claim is the question of whether the information disclosed is of a private nature which a plaintiff wishes to protect or whether it is of a public nature. Hope L stated that where the answer to that question is not clear, the required test is:

‘...whether disclosure of the information about the individual (“A”) would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.’\(^{135}\)

Holding that the information concerning the plaintiff’s addiction treatment was ‘easily identifiable as private’;\(^ {136}\) he stated that she had a reasonable expectation of privacy relating to that information.\(^ {137}\) Hope L criticised the Court of Appeal’s approach in *Campbell* due to its failure to balance the right to privacy, ‘which lies at the heart of an action for breach of confidence’, with the media’s right of freedom of expression as required under the Convention.\(^ {138}\) He went on to hold that a person’s privacy right may be limited by the public’s interest in being informed about particular aspects of a person’s personality or private life. However, in balancing the competing rights, he stated that it was difficult to accept that there was a compelling interest in the public being made aware of the name of the organisation where the plaintiff was undergoing addiction treatment or of details of the such treatment.\(^ {139}\) He put great emphasis on the publication of the photographs with the accompanying article on the plaintiff and he said that if based on the text of the article alone, he would have regarded the competing rights as being evenly balanced. However, the publication of the photographs and captions with the text of the article was held to have ‘...added greatly overall to the intrusion which the article as a whole made into her private life.’\(^ {140}\)

Having stated that the primary issue was whether the contents of the published photographs were offensive, Hope L turned to the actual taking of the photographs in a public street and stated: ‘The taking of photographs in a public street must, as Anderson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, “be taken to be one of the ordinary incidents of living in a free community”.’\(^ {141}\) On the publication of photographs of people taken in a public street, Hope L stated that where people appear incidentally in a photographed street scene, generally they cannot object to its publication. However, if the street scene is used purely as a background for a photograph of a specific person, then the publication of such a photograph without the authorisation of that person is a different matter and the question to be addressed is whether there is public interest in having the contents of such a photograph published.\(^ {142}\) Hope L held that the published photographs were not just ordinary street scenes, but showed the doorway of the addiction therapy centre which had been secretly photographed for publication with the article and the faces of those other than

\(^{135}\) ibid para 92
\(^{136}\) ibid para 95
\(^{137}\) ibid para 96
\(^{138}\) ibid paras 104–105
\(^{139}\) ibid paras 120–121
\(^{140}\) ibid para 122
\(^{141}\) ibid
that of the plaintiff were pixelated in the published photographs. As the published photographs were not self-explanatory, he dismissed the assertion that they added to the credibility of the article’s contents. In applying the above-mentioned test, he concluded that the published photographs would have added to the plaintiff’s distress on seeing them published with the article’s contents and were ‘...a gross interference with her right to respect for her private life.’ Hope L stated that the additional distress factor was ‘...more than enough to outweigh the right of freedom of expression which the defendants are asserting in this case.’ The defendant in Campbell subsequently sought a declaration from the ECtHR that its right of freedom of expression under Article 10 had been violated by the above-mentioned House of Lords decision and by its decision to impose the payment of a success fee as part of the claimant’s awarded legal fees. The ECtHR held that there had not been a violation of Art.10:

‘...the relevancy and sufficiency of the reasons of the majority [of the judges in the House of Lords] as regards the limits on the latitude given to the editor’s decision to publish the additional material is such that the Court does not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the House of Lords...’

3.2.1.8) (1) ECtHR Test for Balancing Competing Claims of Privacy and Freedom of Expression and (2) “Public Figure” Test in Privacy Claims

The competing rights of privacy and freedom of expression have been adjudicated by the ECtHR on numerous occasions. The Court has developed a test – the Von Hannover (No. 2) – for use by it in reaching determinations. It has also cited Clause 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, which defines a “public figure”. This section of the chapter examines the development and application of the Von Hannover (No. 2) test by the ECtHR and the application by the UK courts of the Clause 7 definition of a public figure, while they were reaching determinations on breach of privacy claims in which photography had been a central issue.

Von Hannover v Germany was the first of three, separate cases taken by Princess Caroline Von Hannover to the ECtHR in which she claimed breaches of her privacy rights by photographers and publishers. In finding for the applicant, the Court stated that despite the fact the she was well-known to the public, the public does not have ‘...a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded...’ Furthermore, it stated that even if there is such a

143 ibid
144 ibid para 123
145 ibid para 124
146 ibid
147 MGN Ltd v United Kingdom[2011] ECHR 66, paras 155–156
Note: The ECtHR held that there had been a violation of Art. 10 in relation to the second issue regarding the high fees imposed on the applicant newspaper.
MGN Ltd v United Kingdom[2011] ECHR 66, paras 219–220
148 Von Hannover v Germany[2004] EHRR 294
149 ibid para 77
legitimate public interest or a publisher’s commercial interest in publishing photographs of her, such interests must give way to her privacy rights.\textsuperscript{150} The Court also held that the national courts did not fairly balance the competing privacy and freedom of expression rights, as the criteria adopted by the courts were ‘…not sufficient to ensure the effective protection of the applicant’s private life and she should, in the circumstances of the case, have had a “legitimate expectation” of protection of her private life…’\textsuperscript{151}

The central issue of the 2012 ECtHR case of \textit{Von Hannover v Germany (No. 2)}\textsuperscript{152} was the alleged inadequacy of protection offered by the domestic courts to the applicant’s right to privacy. The Court stated that it would require compelling reasons for finding fault with the decisions of the domestic courts on their balancing of the competing rights of privacy and freedom of expression, provided that they had followed the criteria laid down by the ECtHR case law.\textsuperscript{153} Based on the Court’s case law, it prescribed a six point test to be evaluated by a national court when balancing these competing rights, namely:

‘(1) The contribution of the article or photographs to a debate of general interest?  
(2) How well known is the person concerned and what is the subject of the report?  
(3) The prior conduct of the person concerned?  
(4) The method of obtaining the information and its veracity?  
(5) The content, form and the consequences of the publication?  
(6) The severity of the sanction imposed?’\textsuperscript{154}

Consequently, photographers and photograph publishers need to take cognisance of this six point test, when they are planning to take and/or publish images of individuals, particularly well-known individuals or public figures, in order to reduce the possibility of invading the privacy rights of those individuals. In holding that there had not been a violation by the national courts of the positive obligations imposed by Art. 8 on the State, the Court stated that the national courts had carefully balanced the competing rights; they had taken explicit account of the ECtHR case law when reaching their decisions on the applicant’s claim and the Federal Court of Justice had altered its approach following the above-mentioned \textit{Von Hannover} judgment.\textsuperscript{156} The \textit{Von Hannover (2)} privacy and freedom of expression balancing test was applied by the ECtHR in the 2012 case of \textit{Axel Springer AG v Germany}.\textsuperscript{157} In finding that the applicant’s Art. 10 right had been violated by the State, the Court held that there was:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{150} \textit{ibid}
\item \textsuperscript{151} \textit{ibid para 78}
\item \textsuperscript{152} \textit{Von Hannover v Germany (No. 2)} (2012) 55 EHRR 15
\item \textsuperscript{153} \textit{ibid para 107}
\item \textsuperscript{154} \textit{ibid paras 108–113}
\item \textsuperscript{155} \textit{Von Hannover v Germany} [2004] ECHR 294
\item \textsuperscript{156} \textit{Von Hannover v Germany (No. 2)} (2012) 55 EHRR 15, paras 124–125
\item \textsuperscript{157} \textit{Axel Springer AG v Germany} [2012] ECHR 227
\end{itemize}
\end{footnotesize}
‘no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company’s right to freedom of expression and, on the other hand, the legitimate aim pursued.’

It was also applied by the ECtHR in the 2014 case of Lillo-Stenberg and Saether v Norway. In Lillo-Stenberg, the Court determined that there had not been a violation of the applicants’ Art. 8 rights following the publication of unauthorised photographs of their wedding. The applicants, respectively a musician and an actress, were both known to the public in Norway and in an effort to distinguish their claim from Von Hannover (2) they claimed that they were not public figures and that the published material did not contribute to a debate of public interest. However, while the Court acknowledged that the applicants did not perform public community functions, it held that they were well-known, performing artists and therefore were public figures. While noting that opinions on the outcome of a judgment may differ, the Court determined that, as the Norwegian Supreme Court had carefully followed the ECtHR’s case law, particularly Von Hannover (2) and Axel Springer, it had not failed in its obligations under Art. 8 to protect the applicants’ rights to privacy under the Convention. The Von Hannover (2) test is now the balancing standard being applied by the ECtHR in cases concerning these competing rights and it expects national courts to do so also. The raising by an applicant of a claim of not being a public figure, as featured in Lillo-Stenberg, in an effort to prevent a reduction in his or her reasonable expectation of privacy, is an interesting issue.

Clause 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, as cited by the ECtHR in Von Hannover (No. 2), defines public figures as:

‘…persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.’

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158 ibid para 110
159 Lillo-Stenberg and Saether v Norway [2014] ECHR 59
160 ibid para 21
161 ibid para 37
162 ibid paras 44–45
163 See also: (1) Von Hannover v Germany (No. 3) [2013] ECHR 835 in which the Von Hannover (No. 2) test was applied against the complainant. (2) Couderc and Hachette Filipacchi Associés v France (App No 40454/07) (ECHR, 12 June 2014) Note (1): Court judgment report is only available in the French language. Note (2): Registrar of the Court, ‘The judgment against Paris-Match for publishing information on the private life of Prince Albert of Monaco breached the magazine’s freedom of expression’ European Court of Human Rights (Strasbourg, 12 June 2014) <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4786727-5830013#tieid=003-4786727-5830013> (Accessed 19 March 2015)
164 Von Hannover v Germany (No. 2) (2012) 55 EHRR 15, paras 70
The Assembly’s resolution goes on to state:

‘Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.’

This definition of a public figure is fairly broad and it does not impose any minimum threshold level on the extent to which a person must play a role in public life in order to come within its reach. While this Resolution makes particular mention of politicians, its scope is not limited to people involved in political life. It covers any person who is a public figure and the public’s right to be made aware of specific matters concerning their private lives. Therefore, well-known individuals could face a difficult challenge in invoking a claim of not being public figures in an effort to convince a court to grant their privacy rights greater weight than the right of freedom of expression.

The Assembly’s definition of a public figure was adopted by Tugendhat J in the 2012 English High Court case of Spelman v Express Newspapers\(^{167}\) in which a pre-publication injunction was refused.\(^{168}\) It has also been applied in a number of other recent cases such as the 2012 English High Court case of McClaren v News Group Newspapers Ltd.,\(^{169}\) where Lindblom J held that the claimant (a former manager of the England football team) was in his view ‘…undoubtedly a public figure within the definition recognized by Tugendhat J in Spelman.’\(^{170}\) In the English High Court Case of Edward RocknRoll v News Group Newspapers Ltd.,\(^{171}\) the Court refused to accept the defendant’s assertion\(^{172}\) that the claimant had a reduced expectation of privacy as a result of being a public figure in the social sphere. Briggs J held:

‘…there is nothing of substance, either in fact or in law, in the defendant’s submission that the claimant has deprived himself of what would otherwise be a reasonable expectation of privacy relating to his conduct at a private party, either by being a public figure, or by contributing for reward to publicity about his first marriage.’\(^{173}\)

Having described the claimant as being ‘…no more than a not very conspicuous middle manager in his uncle’s private business empire…’,\(^{174}\) Briggs J went on to state:

‘The claimant has, inevitably, briefly become something of a public figure as a result of his relationship with, and now marriage to, Miss Winslet. To some unavoidable degree this has led to published photographs of them together, but not so as to place the claimant in the public sphere in his own right.’\(^{175}\)

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166 ibid clause 9
167 Spelman v Express Newspapers [2012] EWHC 355 (QB), para 49
168 ibid para 119
169 McClaren v News Group Newspapers Ltd. [2012] EWHC 2466 (QB), para 34
170 Edward RocknRoll v News Group Newspapers Ltd. [2013] EWHC 24 Ch
171 ibid para 10
172 ibid para 14
173 ibid para 15
174 ibid para 16
175 ibid para 16
The Court was not persuaded that the defendant would convince a trial court that the proposed publication would add to any public debate on matters of public interest.\(^{176}\) Holding in favour of the claimant, the Court also took into consideration the potential damaging effect the publication of the photographs could have on the claimant’s relationship with Ms. Winslet’s children and the latter’s risk of being ridiculed at school over the activity of their newly-acquired step-father.\(^{177}\)

The public’s right to be informed was a deciding factor in the English Court of Appeal’s refusal of a publication injunction in the 2013 case of AAA (By her litigation friend BBB) v Associated Newspapers Ltd.\(^{178}\) In AAA, the Master of the Rolls held:

‘It is not in dispute that the legitimate public interest in the father’s character is an important factor to be weighed in the balance against the claimant’s expectation of privacy. The core information in this story, namely that the father had an adulterous affair with the mother, deceiving both his wife and the mother’s partner and that the claimant, born about 9 months later, was likely to be the father’s child, was a public interest matter which the electorate was entitled to know when considering his fitness for high public office.’\(^{179}\)

### 3.2.1.9 Privacy and the Pixelation of Published Images

Related to the individual’s right to privacy and the media’s right to publish photographs of individuals is the practice of pixelating\(^{180}\) or blurring the faces of specific people featured in photographs published, particularly by newspapers and magazines, either in hard copy or online formats. While there are statutory prohibitions and restrictions on the visual or other identification of specific types of individuals, such as child defendants in court proceedings\(^{181}\) and the complainants and the accused in certain sexual offence cases,\(^{182}\) and there are constraints imposed on the use of the personal data contained in photographs of individuals under the Data Protection Acts 1988–2003, there is no explicit, general statutory requirement to pixelate or blur the face of any person featured in a published photograph. In the House of Lords case of Campbell v MGN Ltd.,\(^{183}\) as mentioned above, the pixelation of the faces of individuals other than that of the applicant, who were featured in the published photographs, was a central issue. Apart

\(^{176}\) ibid para 33
\(^{177}\) ibid paras 36 and 39
\(^{178}\) AAA (By her litigation friend BBB) v Associated Newspapers Ltd. [2013] EWCA Civ 554
\(^{179}\) ibid para 55


Note: A “pixel” is a dot or a single point contained within a graphic image and “pixelation” is the process of blurring pixels, so that a portion of a published image is not clearly visible to a viewer.

Children Act 2001, s 93(2)

Note (1): Criminal Law (Incest Proceedings) Act 1995, s 7 (On the anonymity of a person charged under the Punishment of Incest Act 1908 and of a person to whom the offence relates). Section 27 of the Criminal Law (Sexual Offences) Bill 2015 proposes to repeal the 1995 Act and to amend the 1908 Act.

Note (2): Criminal Law (Rape) Act 1981, as amended, s 7 (On the anonymity of a complainant in a charge of rape) and s 8 (On the anonymity of a person charged with rape prior to conviction).

Note (3): Criminal Law (Sexual Offences) Act 2006, as amended, s 6 (On the application of s 7 and s 8 of the Act of 1981 to the offence of defilement under the 2006 Act).

\(^{180}\) Note:  A “pixel” is a dot or a single point contained within a graphic image and “pixelation” is the process of blurring pixels, so that a portion of a published image is not clearly visible to a viewer.

\(^{181}\) Children Act 2001, s 93(2)

\(^{182}\) Note (1): Criminal Law (Incest Proceedings) Act 1995, s 7 (On the anonymity of a person charged under the Punishment of Incest Act 1908 and of a person to whom the offence relates). Section 27 of the Criminal Law (Sexual Offences) Bill 2015 proposes to repeal the 1995 Act and to amend the 1908 Act.

\(^{183}\) Campbell v MGN Ltd. [2004] 2 AC 457
from being ordered by a court to do so, as occurred in 2009 Belfast High Court case of Callaghan v Independent News and Media Ltd.\textsuperscript{184} For example, publishers may take an editorial decision to pixelate the faces of individuals featured in their published photographs for a number of practical reasons. It is common to see published photographs of members of An Garda Síochána attending incident scenes or while present at other locations in which some or all of their faces are pixelated.\textsuperscript{185} There is neither a secret police force in Ireland nor any statutory right available to members of An Garda Síochána under which they may object to the taking and/or publication of photographs of them while they are performing their duties in either a public or a private place to which the public is freely admitted without a prohibition on photography. Also, in Ireland\textsuperscript{186} there is no statutory prohibition on doing so either. The identification of certain plain clothes members of An Garda Síochána involved in lawful, under-cover duties, such as members of the National Surveillance Unit, could jeopardise their ability to undertake such duties. Aside from such individuals, one posits that the reason the faces of specific, individual members of An Garda Síochána, who either are in plain clothes with Garda Síochána insignia clearly visible on their clothing and/or headgear or are in uniform, are pixelated is to obtain their co-operation to be included in such photographs.

Similarly, from time to time one sees published photographs of uniformed Prison Officers with their faces pixelated while they are performing their duties in public places, such as leading prisoners to and from the courts.\textsuperscript{187} There is no law prohibiting the taking and/or publication of such photographs and they do not have any statutory rights to object to the taking of photographs of them in such situations or to their publication. It is possible that photographs of prison officers are pixelated in order to give them a level of protection against being identified and later attacked by associates of the individuals that they are escorting to and from the courts. Newspapers often publish photographs of convicted criminals in the company of other individuals. So as to avoid any

\textsuperscript{184} Callaghan v Independent News and Media Ltd. [2009] NIOQB 1


See also: Dearbhail McDonald, ‘Amid the usual teen court dramas, a case that will shock the nation’ Irish Independent (Dublin, 05 December 2015) <www.independent.ie/irish-news/courts/amid-the-usual-teen-court-dramas-a-case-that-will-shock-the-nation-34260969.html> accessed 05 December 2015

Note: This article included a photograph showing four uniformed members of An Garda Síochána with their faces pixelated while casually standing outside Tallaght District Court. No other individuals were visible in the photograph.

\textsuperscript{186} Note: As shall be discussed in Chapter (4), in the United Kingdom the taking and/or publication of a photograph of a police officer could constitute a criminal offence under the Terrorism Act 2000, as amended. Section 76(1) of the Counter-Terrorism Act 2008 inserted a new S.58(A) in the Terrorism Act 2000, which states that ‘A person commits an offence who (a) elicits or attempts to elicit information about an individual who is or has been (i) a member of Her Majesty’s forces, (ii) a member of any of the intelligence services, or (iii) a constable, which is of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) publishes or communicates any such information.’ However, Under S. 76(2), ‘It is a defence for a person charged with an offence under this section to prove that they had a reasonable excuse for their action. Press photographers could possibly avail of such a defence.’

\textsuperscript{187} Note: A Home Page story on the Irish Independent’s website contained a heading for an article on convicted murderer Graham Dwyer and featured two photographs – one of Graham Dwyer being led from a court in handcuffs by a Prison Officer whose face was pixelated and the other photograph was of a lady referred to in the article – Emer McShea. Neither Graham Dwyer’s nor Emer McShea’s faces were pixelated.

— Graham Dwyer abused ex-girlfriend Emer and took ecstasy and LSD’ Irish Independent (Dublin, 30 March 2015) <www.independent.ie> accessed 30 March 2015
likely claims for defamation, the faces of the other individuals featured in such photographs will be pixelated. Frequently, news photographs show individuals present at incidents. Some or all of the individuals may or may not have been involved in the incidents depicted in the images. Again, so as to avoid any potential claims for defamation or to maintain a presumption of innocence and to not prejudice any future criminal trial, the individuals’ faces may be pixelated. However, the pixelation of individuals central to criminal investigations is not always undertaken and the identification of suspects in criminal investigations prior to them being charged with a criminal offence could jeopardise their right to a presumption of innocence and in certain circumstances amount to contempt of court.

The registration plates of vehicles featured in published news photographs are frequently pixelated. A possible reason for doing such is to avoid being accused of contravening the Data Protection (Amendment) Act 2003 by the linking of the personal data contained in a photograph of a person with that contained in a photograph of a vehicle’s registration number. The Act defines “personal data” as being ‘data 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’. However, as the personal data relating to any person connected to the number displayed on a vehicle registration plate is only legally accessible by either An Garda Síochána, Local Authority personnel and any other prescribed bodies, it is highly questionable as to whether the publication of a photograph clearly showing a vehicle registration plate would be in contravention of the Data Protection (Amendment) Act 2003. An example of such pixelated, published photographs is that of a marked Garda Síochána Traffic Corps squad car shown in the near foreground of a photograph with its registration plate pixelated while in the background uniformed members of An Garda Síochána are shown attending to a road traffic accident.

The use of pixelation must be done, however, in a manner that is effective in protecting the privacy issues at stake. An example of largely ineffective use of pixelation occurred in the case of pixelated

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Note: The published bodycopy accompanying a pixelated image showing the faces of two armed gunmen stated that the image had been pixelated at the request of An Garda Síochana and due to the nature of the investigation.

189 Note: For an example of such an identification, see: Ralph Riegel, “I’ve just done a very bad thing” - young man after mother killed in knife attack: Heroic neighbours disarm son as mother killed and dad stabbed” Irish Independent (Dublin, 24 November 2015) http://www.independent.ie/irish-news/i-e-just-done-a-very-bad-thing-young-man-after-mother-killed-in-knife-attack-34228171.html accessed 24 November 2015

The individual whose un-pixelated photograph was published with the above-mentioned article concerning his arrest for questioning had not been charged with a criminal offence at the time of publication and was not charged until the following day.

190 Data Protection (Amendment) Act 2003, s 2(a)(iv)


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front and rear photographs of a personalised Range Rover belonging to Tamara Ecclestone – a daughter of Bernie Ecclestone of Formula 1 fame. Although the registration plates were pixelated, the name “Tamara” was displayed on its bonnet and tailgate in the place normally occupied by the vehicle’s brand name.192

Occasionally also, photographs which have been obtained without a model release, are subsequently used in printed advertisements. In such cases, the model’s face will be pixelated or blurred so as to lazily get around the problem of not having a model release rather than shooting a model-released image for the advertisement. As shall be discussed below (in Section 3.2.1.10), in comparison to adults, children are afforded extra legal protection of their privacy rights due to their vulnerability and lack of maturity and for the protection of their security, safety and well-being. Children’s faces are frequently pixelated in published news-type photographs. For example, photographs of murdered Garda Adrian Donoghue’s wife and children at his funeral featured pixelated images of his children.193 While “celebrities” have in the past, quite rightly, been conscious of the need to protect the identity of their children from a safety point of view, some have also done so in an effort to garner publicity. However, it would appear that there is now a growing trend among some celebrities to intentionally show their children’s faces in published photographs, so as to create a motherly, fatherly or family-type image and effectively to use their children as a means of generating increased publicity for themselves or for personal brand development purposes. Examples include actresses Katie Holmes194 and Jennifer Lopez,195 and David and Victoria Beckham.196

3.2.1.10) Children and their Right to Privacy

As mentioned above, due to their vulnerability and lack of maturity and for the protection of their security, safety and well-being, children may be offered additional protection of their rights, and in particular their right to privacy, over and above that offered by the law to an adult. As detailed further below, children are afforded a statutory protection to their identity in specific circumstances, such as in court-related matters. Although the Constitution of Ireland guarantees that the ‘State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as is practicable, by its laws protect and vindicate those rights.’,197 it does not offer children a specific

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Note: As one commentator stated in the Comments Section below the article: ‘Why pixelate the number plate when the car has her name emblazoned on the front and back!!’

193 Sara Stack, ‘Bringing Adrian’s killers to justice will be difficult but we will find them, says garda chief’ Irish Independent (Dublin, 31 January 2013) <www.independent.ie/irish-news/bringing-adrians-killers-to-justice-will-be-difficult-but-we-will-find-them-says-garda-chief-29025452.html> accessed 31 January 2013

194 Ibid

195 Ibid


197 Constitution of Ireland (Art. 42A) (on Children)
protection to their right to privacy purely on the basis of their age. At an international level, the United Nations Convention on the Rights of the Child, 198 which has been ratified by Ireland, 199 offers a right of privacy to children. While not offering an absolute right, Article 16 of the Convention states:

‘(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

(2) The child has the right to the protection of the law against such interference or attacks.’ 200

Ireland has also ratified 201 the United Nations Optional Protocol to the Convention of the Rights of the Child on a Communications Procedure, 202 which provides a mechanism for the submission of a complaint on behalf of a child to the Committee on the Rights of the Child where it is claimed that a State party has violated that child’s rights under the Convention or its Optional Protocols. To-date only one such complaint has been submitted. It did not relate to a privacy issue and it was deemed inadmissible as it transpired that the complainant was not actually a minor. 203 At an E.U. level, the Charter of Fundamental Rights of the European Union 204 makes specific provision for the protection of children. Although it does not make reference to the privacy of children, Article 24 of the Charter states, among other things, ‘Children shall have the right to such protection and care as is necessary for their well-being.’ 205 Children, of course, also have a right to privacy under Article 7 of the ECHR. The protection of the privacy of children has been raised as an issue in a number of court cases which concerned the taking and publication of photographs. Not all court applications grounded on a claim to protect the privacy of a child will result in the granting of an order restraining publication. For such applications to succeed, the courts have taken a wide range of factors into consideration including whether the applicant (on the behalf of the child) has challenged the veracity of the proposed publication material; the expressed guarantee of freedom

of expression in the Constitution; the test of a reasonable expectation of privacy; the child’s age; the balancing of competing rights; the potential personal damage or harm resulting from its publication, and the safety of the child. The following sample cases illustrate each of these factors in turn.

**Veracity of the Allegations and the Constitutional Guarantee of Freedom of Expression**

In the Irish High Court case of *M.M. v Drury*, following an in-court application the plaintiff’s children were joined as parties to her application to the court for an interim injunction to prevent the publication of photographs and other material concerning her family life. The plaintiff claimed that such publication could potentially result in psychological damage to her children and that the Constitution entitled them to protection from such damage. In *M.M.*, O’Hanlon J pointed-out that the material in question actually concerned the plaintiff’s alleged extra-marital affair and not her marital life as claimed by her. O’Hanlon J stated that the plaintiff had not disputed the veracity of the allegations contained in the material to be published and taking into account the ‘strongly-expressed guarantees in favour of freedom of expression’ in the Constitution, he could not identify either legal precedent or a basis within the Constitution upon which he could, in such circumstances, grant the requested publication restraint for the purpose of preventing distress to the children. To do so, O’Hanlon J held, would ‘represent a new departure in our law’. Had the truth of the allegations contained in the material been challenged, O’Hanlon J stated that ‘…the courts would certainly intervene in an appropriate case to prevent publication pending trial, and the law of libel could be invoked in aid of the plaintiff’s claim.’ O’Hanlon J also stated that the Court was not shown that there was a fair case to be answered at trial and on the balance of convenience he refused to grant the requested injunction.

**Reasonable Expectation of Privacy**

In the English Court of Appeal in *Murray v Big Pictures*, Sir Anthony Clarke MR focussed on one of the key tests in a privacy action, namely a reasonable expectation of privacy, and in outlining that test’s integral elements, he stated:

‘…the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the

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206 *M.M. v Drury* ([1994] 2 IR 8
207 ibid 9
Note: This case pre-dated the amendment of the Constitution to insert Article 42A on Rights of Children.
208 ibid 14
209 ibid 17
210 ibid
211 ibid 36
212 ibid 17–18
213 *Murray (by his litigation friends Murray and Another) v Big Pictures (UK) Ltd.* [2008] EWCA Civ 446
Due to a child’s lack of appreciation that his privacy may be invaded by a photographer and the publication of a photograph, Clarke MR stated that there is a difference between a case concerning a child’s privacy and that of an adult. He went on to hold that just as the child of non-famous parents could reasonably expect that he would not be targeted by the press and have his photograph published, the child of a famous person could have an equal expectation to privacy. He stated that the focus in Murray should be on the publication of the photograph and not on the actual taking of it. In the absence of any distress caused to the child by the taking of a photograph, he stated that the ‘mere taking of a photograph in the street may well be entirely unobjectionable.’ Sir Anthony went on to state that a court having found that a child had a reasonable expectation of privacy must then balance that right with the competing right of freedom of expression. He concluded that the applicant had both a reasonable expectation of privacy and an arguable case and should be permitted to take his claim to trial.

The Child’s Age

The child applicant’s age was a central issue in the determination of the 2011 English High Court case of Spelman v Express Newspapers. Spelman concerned an application for the continuation of a pre-publication injunction by a 17 year old boy, who had played rugby for England until he was injured. Activities (detailed in a Closed Judgment) central to the injunction application occurred subsequent to that injury and were claimed to be of a private information nature. The Court had been told that a proposed newspaper article against which the injunction was being sought had not, as yet, been written. In Spelman, Tugendhat J stated that children do not have a general right to privacy purely on the basis of their age, but that ‘the law has always recognised that in particular circumstances children may be entitled to protection from publicity where an adult would not be.’ Tugendhat J differentiated Murray, which concerned an infant, from Spelman, which concerned ‘…a 17 year old with a personality and public profile of his own.’ As required by the Human Rights Act 1998, Tugendhat J referred to the then in-force Press Complaints

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214 ibid para 36
215 ibid para 37
216 ibid para 46
217 ibid para 54
218 ibid paras 57–58
219 ibid para 61
220 Spelman v Express Newspapers [2012] EWHC 355 (QB)
221 ibid para 79
222 ibid para 1
223 ibid para 2
224 ibid para 53
225 ibid para 55
226 Human Rights Act 1998, s 12(4)
Commission's Code of Practice and specifically to Clauses 6(i) and 6(vi) of the Code (Children) and to the permitted public interest exceptions to the Code. In refusing to grant a continuation of the injunction, Tugendhat J concluded that:

‘...the newspaper has a good prospect of establishing that if it were to publish some information of the kind that is sought to be prohibited, that would be in the public interest.’

Balancing Competing Rights

The 2011 English Court of Appeal case of ETK v News Group Newspapers Ltd. was one of a number of cases, which became known as “super-injunction” cases. In ETK, the appellant was a married man who had been in a sexual relationship with another married woman “X” with whom he worked in the entertainment industry. Having been confronted by his wife, the appellant admitted to the affair and agreed with his wife to end it so as to rebuild their marriage and for the sake of their teenage children. The applicant sought to restrain the News of the World newspaper from publishing information concerning the relationship. An injunction was refused on the ground that there was a public interest in the effect of adultery and that the defendant had intended to just report the fact of the affair. EDK appealed. In balancing the competing Article 8 and Article 10 rights, Ward LJ took into account Section 12 of the Human Rights Act 1998 and stated:

‘Regrettably I cannot agree that the harmful effect on the children cannot tip the balance where the adverse publicity arises because of the way the children's father has behaved.’

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228 Press Complaints Commission, Editors' Code of Practice clause 6(i)
229 Press Complaints Commission, Editors' Code of Practice
230 Spelman v Express Newspapers [2012] EWHC 355(QB), para 102
231 ETK v News Group Newspapers Ltd. [2011] EWCA Civ 439
232 Note: Definition of “Super-injunction”: ‘The term has been used to describe interim injunctions: which provide for party anonymity; which contain a prohibition on publishing or disclosing the fact of the substantive order and proceedings; which provide both for party anonymity, a prohibition on publishing or disclosing the fact of the substantive order and proceedings, as well as, for instance, restricting access to documents on the court file.’ Courts and Tribunals Judiciary, The Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, page 16 (London, 20 May 2011) <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf> accessed 15 March 2015
233 ETK v News Group Newspapers Ltd. [2011] EWCA Civ 439, para 1
234 ibid para 9
235 Note (1): Under S.12 of the Human Rights Act 1998, which incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of the United Kingdom, ‘If a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression...No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.’ Human Rights Act 1998, ss12(1) and 12(3)
Note (2): It is noted that the European Convention on Human Rights Act 2003, which transposed the Convention into domestic Irish law, does not contain a similar statutory protection of the right of freedom of expression when it is being balanced with the right to privacy.
236 ETK v News Group Newspapers Ltd. [2011] EWCA Civ, para 18
He further stated:

‘In my judgment the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play.’ 237

Potential Damage or Harm

The 2014 English High Court case of *Weller and Others v Associated Newspapers Ltd.* 238 resulted from the taking of photographs of musician Paul Weller’s children by a photographer without permission both prior to and after having been requested to refrain from doing so on a street in Santa Monica, California and the subsequent publication of the photographs on the Mail Online’s website. Through their father, the claimants sought damages for misuse of private information and breach of the Data Protection Act and an injunction. 239 In *Weller*, Dingemans J adopted the reasonable expectation of privacy test as defined in the above-mentioned case of *Murray v Big Pictures*. 239

As regards whether the publisher knew or ought to have known of the plaintiff’s reasonable expectation of privacy, Dingemans J stated that the broad *Murray* test and particularly its element concerning ‘the circumstances in which and the purposes for which the information came into the hands of the publisher’….‘allows the Court to assess what the publishers knew, and what they ought to have known.’ 240 The *Weller* case highlights the fact that a person’s previous history of posting personal photographs online may be taken into consideration by a court in determining a claimed breach of privacy. While balancing the competing right to privacy with the right of freedom of expression, Dingemans J examined the past publicity activities of the claimants’ father Paul Weller, his current wife and his older children including those from a former marriage and their history of posting photographs online. He described the applicant’s wife’s previous online postings as being ‘naïve’ and he stated that the applicant’s daughter has not given ‘any real thought’ to her online posting of photographs of her siblings. 241 In concluding that there had been a breach of both the Claimants’ privacy through a misuse of their private information and their rights under the Data Protection Act 1998, Dingemans J stated:

‘…the balance comes down in favour of finding that the article 8 rights override the article 10 rights engaged. These were photographs showing the expressions on faces of children, on a family afternoon out with their father. Publishing photographs of the children’s faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their article 8 rights, even though such a publication would have

237 para 22
238 *Weller and Others v Associated Newspapers Ltd.* [2014] EWHC 1163 (QB)
239 ibid paras 1–4
240 ibid paras 37–38
241 ibid paras 131–132
been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed.242

On appeal to the Court of Appeal, the Master of the Rolls upheld Dingemans J’s decision in *Weller*. In reaching such a determination, he stated that a court’s finding that a child has a reasonable expectation of privacy does not equate to a guarantee of privacy and as in cases concerning the privacy of an adult a balancing exercise must be undertaken in cases concerning a child’s privacy.243 He went on to state that the child’s right is not a ‘…trump card in the balancing exercise…’ but ‘the best interests of a child means that, where a child’s interests would be adversely affected, they must be given considerable weight.’244 On the harm to a child resulting from an invasion of his privacy through the publication of photographs, he stated that evidence of actual harm is not required by the Court and that it makes its own decision on such based on ‘…common sense and its own experience.’245 Finding that Dingemans J was right in determining that the claimants had a reasonable expectation to privacy and that the photographs should not be published,246 he implemented the above-mentioned *Von Hannover (No. 2)* six point text to balance competing rights and concluded that the claimants’ Art. 8 rights outweighed the defendant’s Art. 10 right.247

**Safety of the Child**

The safety of a child will be taken into account in privacy cases which involve either the taking or publication of photographs of a child. For example, the 2013 ECtHR case of *Soderman v Sweden*248 concerned the covert filming of a 14 year old child in a shower by her step-father. In *Soderman*, the Court stated:

‘The act in question violated the applicant’s integrity; and was aggravated by the fact that she was a minor, that the incident took place in her own home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust.’249

The Court held that there had been a violation of the claimant’s Article 8 right to privacy, as ‘…neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the violation of her personal integrity…’250

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242 ibid para 182
243 *Weller and Others v Associated Newspapers Limited* [2015] EWCA Civ 1176, para 39
244 ibid para 40
245 ibid para 41
246 ibid para 59
247 ibid paras 72–80
248 *Soderman v Sweden* (App No 5786/08) (ECHR November 2013)
249 ibid para 117
250 ibid
3.2.2) Personal Image Rights and Publicity Rights

Closely related to, and often confused with, privacy are two other types of rights, namely personal image and publicity rights. Personal image rights and publicity rights may be defined respectively as a right to control the use of one’s personal image and to command a controlling right over one’s own publicity. In the 2011 English Court of Appeal case of Proactive Sports Management v Wayne Rooney and Others, Arden LJ stated that the term “image rights” is used to describe rights that individuals have in their personality, which enables them to control the exploitation of their name and picture. Celebrities often obtain significant income by exploiting their image rights. She went on to state that the exploitation of image rights is almost always going to be an activity which is ancillary to another occupation. In comparing French law with that of the United Kingdom, Black proffers a useful definition by reference to French law. She explains that French law distinguishes between the right to one’s image, which is an “inherent part of the person”, and the right over one’s image, which is “a commodity to be exploited”. She continues: The consequence of this is that “a general personality right does not fit into French law”. Instead, protection is achieved through dual rights protecting material and subjective interests respectively. Furthermore, Black asserts ‘unlike the Continental European and American approaches, the English common law has traditionally been mistrustful of generalised rights. Instead, a pragmatic approach to litigation has seen a range of doctrines employed in the English courts, including passing-off, registered trade mark protection and privacy actions.

The Constitution of Ireland does not expressly guarantee such rights. In Ireland, as in the United Kingdom, these rights are not provided through legislation and they are not recognised by the courts, although, as mentioned below, some courts have made reference to them. In the absence of both image and publicity rights in Ireland, court cases concerning what are essentially claims to such rights have been taken under claims of passing-off through the use of photographs. (This topic will be examined below at Section 3.2.7). In the United Kingdom, the courts have differentiated between the existing legal right to privacy and the absence of a legal right over the use of one’s image and of a publicity right. They have also affirmed that image and publicity rights do not exist under English law. In the English Court of Appeal case of Douglas v Hello!, Keene LJ stated:

‘The claimants were by their security measures and by their agreements with the service companies seeking not so much to protect the privacy of the first two claimants but rather to control the form of publicity which ensued.’

251 Proactive Sports Management v Wayne Rooney and Others [2011] EWCA Civ 1444
252 ibid para 1
253 ibid para 94
254 Gillian Black, Publicity Rights and Image: Exploitation and Legal Control (Hart Publishing 2011) 18–19
255 ibid 19
256 ibid 21
258 Douglas and Others v Hello! Ltd. (No.1) [2001] 2 WLR 992
259 ibid para 169

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In deciding the case of Douglas v Hello!\(^{260}\) on appeal to the House of Lords, Hoffmann L stated:

‘There is in my opinion no question of creating an "image right" or any other unorthodox form of intellectual property. The information in this case was capable of being protected, not because it concerned the Douglases’ image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglases had sufficient control to enable them to impose an obligation of confidence.’\(^{261}\)

In essence, Hoffmann L was stating that by having control over information which had a commercial value, namely the personal images contained in the photographs, the appellants were able to impose an obligation of confidence, where neither an image nor a publicity right was legally available to them. One could take the view that Hoffman L was actually indirectly acknowledging the existence of an image or publicity right under the guise of an obligation of confidence. While it is frequently said that there is no such thing as bad publicity, one may be the subject of publicity, which one may prefer did not occur. Noting the interplay and cross-over between privacy and publicity and desired and undesired publicity, Black states:

‘…invasion of privacy can be viewed as unwanted “publicity”, not least because in some cases the individual in question has willingly sought the publication of the very same facts where such publication is done in a controlled, and lucrative, manner. While the media intrusion may result in a claim for breach of privacy, the exploitation is, on one interpretation, really a form of publicity.’\(^{262}\)

In the House of Lords case of Campbell v MGN,\(^{263}\) Hale B stated: ‘Unlike France and Quebec, in this country we do not recognise a right to one’s own image…’\(^{264}\) The 2015 English Court of Appeal case of Robyn Rihanna Fenty and Others v Arcadia Group Brands and Topshop\(^{265}\) re-affirmed the status of the law on image rights. In Fenty, Kitchin LJ stated:

‘There is in English law no "image right" or "character right" which allows a celebrity to control the use of his or her name or image.’\(^{266}\)

Technically, it may be possible to register a photograph as a trade mark, if it satisfies the criteria of S.6(1) of the Trade Marks Act 1996, as amended, and its contents are not prohibited from being registered under either S.8, S.9 or S.10 of the Act. A trade mark is defined by S.6(1) of the Act as ‘…any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings’\(^{267}\). Section 6(2) states ‘…a trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or

\(260\) Douglas and Others v Hello! Ltd. and Others [2007] UKHL 21
\(261\) ibid para 124
\(262\) Gillian Black, Publicity Rights and Image: Exploitation and Legal Control (Hart Publishing 2011) 25
\(263\) Campbell v MGN Ltd. [2004] 2 AC 457
\(264\) ibid para 154
\(265\) Robyn Rihanna Fenty and Others v Arcadia Group Brands and Topshop [2015] EWCA Civ 3
\(266\) ibid para 29
\(267\) ibid s 6(1)
the shape of goods or of their packaging.  From the perspective of an individual wishing to
protect his personal image by registering a portrait photograph of himself as a trade mark, it would
not generally be of any great benefit, as only the specific, registered photographic image would be
able to benefit from such trade mark protection. Any other images of that individual would not be
able to benefit from the protection afforded to the registered image. As stated by Walker L in the
House of Lords case of Douglas and Others v Hello! Ltd. and Others:

‘Although the position is different in other jurisdictions, under English law it is not possible
for a celebrity to claim a monopoly in his or her image, as if it were a trademark or
brand.’

In the United Kingdom, a number of photographs of people have been successfully registered as
trademarks. Michalos refers to photographs of, among others, the pop group Abba, soccer players
Alan Shearer and Eric Cantona and Formula One racing driver Damon Hill as examples of such.

While there have been such successful registrations, others have been refused. She also states
that an application by the executors of the will of Diana, Princess of Wales to register 26
photographs of the Princess as trademarks was refused by the Registrar.

The ECtHR recognises a personal image right as being an element of a personality right under
Article 8. In the 2009 ECtHR case of Reklos v Greece, the Court held:

‘A person's image constituted one of the chief attributes of his or her personality, as it
revealed the person’s unique characteristics and distinguished the person from his or her
peers. The right to the protection of one’s image was thus one of the essential components
of personal development and presupposed the right to control the use of that image.’

Rather than distinguishing between an image right and a personality right, the ECtHR regarded
and recognised a publicity right as being an element of an image right. In Reklos, the Court held:

‘While in most cases the right to control such use involved the possibility for an individual
to refuse publication of his or her image, it also covered the individual's right to object to
the recording, conservation and reproduction of the image by another person. As a
person's image was one of the characteristics attached to his or her personality, its
effective protection presupposed, in principle and in circumstances such as those of the
instant case, obtaining the consent of the person concerned at the time the picture was
taken and not simply if and when it was published. Otherwise an essential attribute of

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268 ibid s 6(2)
269 Douglas and Others v Hello! Ltd. and Others [2007] UKHL 21
270 ibid para 293
271 Christina Michalos, The Law of Photography and Digital Images (Sweet and Maxwell 2004) 208
272 ibid
273 Reklos and Another v Greece (2009) 27 BHRC (App No 1234/05)
274 ibid
personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.\(^{275}\)

Essentially, the Court in *Reklos* was granting individuals complete rights over photographs of them, including some of the rights which a photographer currently has under copyright law, such as reproduction rights. It was also finding that both a prior permission to take a photograph of an individual and a model release are necessary. In relation to the actual taking of the photograph and the necessity for a prior consent to such, the Court held:

‘…the applicants’ prior consent to the taking of their son’s picture was indispensable in order to establish the context of its use. The management of the clinic did not, however, seek the applicants’ consent and even allowed the photographer to enter the sterile unit, access to which was restricted to the clinic’s doctors and nurses, in order to take the pictures in question. In addition, the photographer was able to keep the negatives of the offending photographs, in spite of the express request of the applicants, who exercised parental authority, that the negatives be delivered up to them.\(^{276}\)

As a consequence, the Court determined that the national courts had not sufficiently guaranteed the applicant’s right to the protection of his private life in accordance with Article 8 of the Convention. In effect, the Court held that Article 8 extended a right of control over both the taking and any potential publication of a photograph of an individual. Courts in Ireland and the United Kingdom must take account of this decision of the ECtHR, when they are deciding cases concerning image rights. This is an important development by the Court in that it appears to expand the scope of Article 8.

The position in *Reklos* was further adopted by the ECtHR in the case of *Von Hannover v Germany (No. 2)*,\(^{277}\) in which the Court directly linked the right over one’s image with a right of publicity. In *Von Hannover*, the Court held:

‘Regarding photos, the Court has stated that a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.\(^{278}\)

A right to control the use of one’s image means that celebrities and others can decide which photographs to permit and which ones to object to in order to create a public profile of themselves which is either fabricated or at best one-sided. It is interesting to note, for instance, that

\(^{275}\) ibid page 422
\(^{276}\) ibid
\(^{277}\) *Von Hannover v Germany (No. 2)* (2012) 55 EHRR 15
\(^{278}\) ibid para 96
subsequent to the publication of topless photographs of the Duchess of Cambridge, Kate Middleton by “Closer” magazine in 2012, The Independent reported in February 2014 that Kensington Palace would not be objecting following the publication by Hello! magazine of photographs of the Duchess of Cambridge with her son Prince George. The newspaper stated:

‘Royal sources said Kensington Palace had not objected to the pictures – in which the Duchess is groomed and smiling – because they were taken “in a public place without any harassment or pursuit”. Yet only last week, the Palace had asked newspapers not to print photographs of a grumpy-looking Duke of Cambridge getting off a train at Cambridge station.’

Such cherry-picking is not new. In writing on celebrities playing games with the paparazzi, Darryn Lyons of Big Pictures Photo Agency fame stated:

‘A prime example of working the game was of course Diana, Princess of Wales. She was a hustler and I worked with her on many occasions – she even turned up on my doorstep once to complain that some shots I had taken weren’t suitably flattering.’

The implication for photographers and photograph publishers of the decision in Reklos, and as subsequently adopted in Von Hannover (No. 2), is that it would appear that individuals in Ireland and the United Kingdom could claim to have personal image and publicity rights. The ECtHR appears to have expanded the reach of the wording of the Article 8 right to privacy beyond any notion of privacy. While there is neither a constitutional nor statutory personal image right or publicity right in Ireland or the United Kingdom, Irish and English courts will have to take cognisance of this decision of the ECtHR when deciding such cases. If these rights were to be expanded further, such a situation could result in a disproportionate restriction on the right of freedom of expression.

3.2.3) Restrictions resulting from the Individual’s Right against Harassment, Voyeurism and Stalking

Individuals have a legal right not to be harassed. Harassment can have a variety of forms and it may be undertaken by, among others, photographers and publishers of photographs. Closely related to harassment are a range of other activities including voyeurism, stalking, and the publication of so-called revenge porn. This section of the thesis will examine these topics.

3.2.3.1) Harassment

One has a right not to be harassed. In Ireland, the harassment of an individual by another is a criminal offence under the Non-Fatal Offences Against the Persons Act 1997. Section 10(1) of the Act states:


280 Darryn Lyons, Mr. Paparazzi: My Life as the world’s most outrageous celebrity photographer (John Blake Publishing, 2008), 144
‘Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.’

While S.10 of the Act focussed on harassment through the use of a telephone, the inclusion of the words “by any means” would embrace harassment through the use of a camera. Also, through the use of the word “persistently” in S.10(1), it would appear, that a one-off incident could not be construed as harassment. There would need to be more than one incident for it to be persistent.

Section 10(2) of the Act defines “harassment” and states:

‘…a person harasses another where (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other, and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other’s peace and privacy or cause alarm, distress or harm to the other.’

In addition to the above-mentioned offence, the Defamation Act 2009, which provided for the recognition of an independent Press Council in Ireland, placed an onus on the Press Council to implement a code of standards for its members, which specifically would ensure, among other things, ‘…that intimidation and harassment of persons does not occur and that the privacy, integrity and dignity of the person is respected.’ The Editor’s Code of Practice of the Independent Press Standards Organisation in the United Kingdom also prohibits, subject to exemptions, the harassment of individuals by its members. In comparison to the statutory offence of harassment in Ireland, the English Protection from Harassment Act 1997 does not define the term “harassment”. However, in Dowson and Others v Chief Constable of Northumbria Police, Simon J stated that for a claim of harassment to succeed, the claimant must prove as a matter of law:

‘(1) There must be conduct which occurs on at least two occasions,
(2) which is targeted at the claimant,
(3) which is calculated in an objective sense to cause alarm or distress, and
(4) which is objectively judged to be oppressive and unacceptable.
(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.

281 Non-Fatal Offences Against the Persons Act 1997, s 10(1)
282 ibid s 10(2)
283 Defamation Act 2009, s 44 and sch 2, s 3
284 ibid sch 2, s 10
286 Protection from Harassment Act 1997
287 Dowson and Others v Chief Constable of Northumbria Police [2010] EWHC 2612 (QB)
(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: “torment” of the victim, “of an order which would sustain criminal liability”.288

The Irish Law Reform Commission’s 1998 Report on Privacy: Surveillance and the Interception of Communications recommended the creation of a tort of harassment modelled on the definition of harassment as contained within S.10 of the Non-Fatal Offences Against the Persons Act 1997 and that such a tort would be actionable without any proof of damage having been done.289 However, although both the Privacy Bill 2006290 and the Privacy Bill 2012291 contained such a provision, neither Bill was enacted.

In the Irish courts, claims of harassment against photographers are not a regular occurrence. In the Irish High Court case of Hickey v Sunday Newspapers,292 harassment featured indirectly through the claimant’s reliance on the case of Von Hannover v Germany.293 However, Kearns P stated that such reliance was of no benefit294 to the claimant, as in Von Hannover unlike in Hickey:

‘…the photographs in question were part of a campaign of harassment of a public figure…’295

A number of individuals have been convicted of the offence of harassment, however, by the lower Irish courts. For example, The Irish Times reported the conviction of Hugh O’Donnell in Galway District Court by Haughton J for breaching S.10(1) of the Act. The Court was told that O’Donnell had placed miniature video cameras in the ceilings of his tenants’ bedrooms and over a two to three year period 49 women and 14 men had been secretly recorded.296 Due to the absence of an offence of voyeurism in Ireland, it would appear that S.10(1) of the Non-Fatal Offences Against the Persons Act 1997 is used as a means of prosecuting cases such as the above-mentioned

288 Dowson and Others v Chief Constable of Northumbria Police [2010] EWHC 2812 (QB), para 142
292 Hickey v Sunday Newspapers [2011] 1 IR 228
293 Von Hannover v Germany [2004] ECHR 294
294 Hickey v Sunday Newspapers [2011] 1 IR 228, para 37
295 ibid

Note: In Von Hannover, the European Court of Human Rights stated: ‘Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.’ It went on to state: ‘…even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant’s knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded…’

Von Hannover v Germany [2004] ECHR 294, paras 59 and 68


O’Donnell case. In the United Kingdom, although they have been infrequent, a number of harassment cases involving photographers have resulted from the interaction of members of the paparazzi with celebrities and public figures. For example, the English High Court case of Ting Lan Hong and KLM v XYZ and Others, concerned a claim of harassment made by the mother of actor Hugh Grant’s new born daughter against a group of journalists and photographers, who were in situ outside her house, and were telephoning, photographing and following her over a period of a number of days. In Ting Lan Hong, based on the evidence presented, Tugendhat J stated that it was “…proportionate and necessary to grant the injunction sought.” In other court cases concerning harassment and photographs, other matters were the central issues, such as the harassment resulting from the unauthorised distribution of photographs of a claimant.

The English High Court case of AMP v Persons Unknown is an example of the distress and/or harassment, which may be caused to individuals through the unauthorised distribution of photographs of them over the internet and the difficulties which they may encounter in having them removed. AMP concerned an application for an injunction to restrain the publication of explicit sexual photographs of the applicant that had been on her mobile phone, which had either been lost or stolen. The photographs had been subsequently uploaded to a Facebook page and the applicant’s name and her own Facebook page was linked to that Facebook page. The Court report further stated:

‘…the Claimant was contacted on Facebook by someone who stated their name was Nils Henrik-Derimot. That person threatened to expose her identity and to post the images widely online and tell her friends about the images if she did not add him as a friend on Facebook. She deleted these Facebook messages and blocked the sender. At about the same time her father’s business public relations team were contacted and allegedly threatened and blackmailed about some images but it was not specified that the images were of her. On 2 November 2008 the images were uploaded to a Swedish website that

Note: In addition to the above-mentioned Galway District Court case of O’Donnell, see other similar District Court reports:


Note: For other case examples concerning harassment resulting from the publication of photographs see:

(1) XY v Facebook Ireland Limited [2012] NIQB 96
(2) CG v Facebook Ireland Limited and Joseph McCloskey 2015 NIQB 11

Note: For other examples see (1): AM v News Group Newspapers Ltd. and Persons Unknown [2012] EWHC 308 (QB)
(3) Stone and David Williams v WXY [2012] EWHC 3164 (QB)

Note: For other cases see (1): AM v Persons Unknown [2011] EWHC 3454 (TCC)
(2) ibid paras 1–5
hosts files known as "BitTorrent" files. The images have since been downloaded an unknown number of times by persons unknown. The images have been uploaded so that her name is appended to each of the images and can therefore readily be searched for when using online search engines. This has led to the link to the BitTorrent files being at the top of the list of search engine searches for her name. Her Solicitors have been able to have many of these links removed from those search engines using the Digital Millennium Copyright Act in the United States. By these proceedings the Claimant wishes to prevent the spread and indexing of the image files by preventing their storage and transmission within this jurisdiction.

Having considered the criteria necessary for a claim of harassment to succeed as laid down in the above-mentioned case of Dowson and Others v Chief Constable of Northumbria Police Ramsey J held:

‘...I consider that, on the current evidence, there has been conduct on at least two occasions; the conduct was targeted at the Claimant; it was calculated, in an objective sense, to cause alarm or distress; objectively judged it would be oppressive and unacceptable in the context in which it occurred and, in my judgment would cross the line and be conduct which amounts to harassment, alarm or distress. There is therefore a good arguable case that the conduct of disseminating the digital photographic images amounts to harassment of the Claimant under the Protection from Harassment Act 1997 and that this is a case where it is appropriate to grant an injunction.’

Dowson is a good example of the applicability in some circumstances of established legal principles to online and social media problems.

Harassment was a head of claim also in the English High Court case of Carina Trimingham v Associated Newspapers Limited, which arose following the media’s disclosure of an extra-marital affair, which the then Government Minister Christopher Huhne M.P., who had been married to his wife for over 25 years, was having with his press officer, who at the time was in a civil partnership with another woman. In refusing to grant an injunction, Tugendhat J stated that due to her professional work as a press officer for a leading politician, Ms. Trimingham was not a private individual. On the issue of the public’s trust of politicians and their press officers, he went on to state:

Note on “BitTorrent” files: ‘BitTorrent is a peer to peer file sharing protocol used for distributing large amounts of data over the internet. The BitTorrent protocol is used to download files quickly by reducing the server and network impact of distributing large files. Rather than downloading a file from a single source server, as is the case with the conventional HyperText Transfer Protocol (HTTP), the BitTorrent protocol allows users to join a “swarm” of users to download and upload from each other simultaneously.’

304 para 10
305 ibid paras 6–8
306 ibid paras 44–45
307 Carina Trimingham v Associated Newspapers Limited [2012] EWHC 1296 (QB)
308 ibid para 249
‘Press officers are not always trusted by the electorate. They are commonly referred to as spin doctors, as Ms Trimingham was in the article dated 22 June 2010. The public had an interest in knowing whether they could trust Mr Huhne and Ms Trimingham not to deceive them. Secondly, in her private capacity, she conducted a sexual relationship with Mr Huhne which he told her would lead to him leaving his wife. She did this in conditions of secrecy which she knew were likely to give rise to publicity, or in other words, to a political scandal....Ms Trimingham in her private capacity chose to take the risk of being mixed up in a political scandal, which her own conduct precipitated.’

Tugendhat J determined:

‘...discussion or criticism of sexual relations which arise within a pre-existing professional relationship, or of sexual relationships which involves the deception of a spouse, or a civil partner, or of others with a right not to be deceived, are matters which a reasonable person would not think would be conduct amounting to harassment, and would think was reasonable, unless there are some other circumstances which make it unreasonable.’

The English High Court case of *ABK v KDT and FGH* concerned the disclosure of photographs which, as one element of a range of activities, were claimed to constitute harassment. In *ABK*, the complainant was having an extra-marital affair with the second defendant *FGH*. At the same time, *FGH* was in another relationship with the first defendant *KDT*. The complainant wished to end the affair with *FGH*, whereas *FGH* did not. The claimant had taken photographs of herself, which she had sent to the second defendant *FGH* as part of text messages. The first defendant *KDT* obtained these images and, being annoyed over the affair, she sent them as email attachments to the claimant’s husband, two of her friends and a friend of her husband’s. The claimant stated that the second defendant *FGH* had been violent and threatening towards her while she was attempting to end the relationship, that he had attended without notice at the car park outside the claimant’s workplace and had attempted to speak to her against her will and that he subsequently attempted to telephone her at work. In granting a continuation of a non-disclosure order, Tugendhat J held:

‘I am satisfied that at any trial the Claimant would be more likely than not to establish that the photographs and the other private information the subject of the claim ought not to be disclosed to anyone, and that the conduct of the Defendants amounts to harassment.’

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309 ibid
310 ibid para 262
311 *ABK v KDT* [2013] EWHC 1192 (QB)
312 ibid para 1
313 ibid paras 3–4
314 ibid paras 7 and 10
315 ibid para 11
While a right against being harassed is not expressly conferred in the ECHR,³¹⁶ “harassment” has been raised in cases before the ECtHR. For example, although the 2004 case of Von Hannover v Germany³¹⁷ centred on a claim of a breach of privacy, the Court, in finding for the claimant, noted:

‘…photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.’³¹⁸

The Court further stated:

‘…the context in which these photos were taken – without the applicant’s knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded…’³¹⁹

The harassment of a subject by a photographer could have a bearing on whether or not a published image would be deemed by the ECtHR as a contributing factor to the violation of a person’s privacy rights. The applicants in the ECtHR case of Von Hannover v Germany (No. 2) had claimed that the photographs complained of had been taken ‘in a climate of general harassment with which they were constantly confronted.’³²⁰ However, the Court stated that the German Federal Court of Justice had concluded that the complainant had not complained that the photographs had been taken under conditions that were unfavourable to her.³²¹ Also, the Court stated ‘….the photos of the applicants in the middle of a street in St Moritz in winter were not in themselves offensive to the point of justifying their prohibition.’³²² Thus, it would appear that the ECtHR places a weight on whether or not published photographs of a complainant are offensive, when it is determining if they should be prohibited.

3.2.3.2) Voyeurism

Unlike the legal position in Ireland, in the United Kingdom, voyeurism is an offence under Section 67 of the Sexual Offences Act 2003, as amended.³²³ The Act states that a person commits an offence if:

‘(1) (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
(b) he knows that the other person does not consent to being observed for his sexual gratification.

³¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms
³¹⁷ Von Hannover v Germany [2004] ECHR 294
³¹⁸ ibid para 59
³¹⁹ ibid para 69
³²⁰ Von Hannover v Germany (No. 2) (2012) 55 EHRR 15, para 121
³²¹ ibid para 122
³²² ibid para 123
³²³ Sexual Offences Act 2003, s 67
(2) (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
(b) he knows that B does not consent to his operating equipment with that intention.
(3) (a) he records another person (B) doing a private act,
(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
(c) he knows that B does not consent to his recording the act with that intention.
(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1). 324

The Act goes on to state that for the purposes of that Section, a person is doing a “private act” if:
‘…the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and –
(a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,
(b) the person is using a lavatory, or
(c) the person is doing a sexual act that is not of a kind ordinarily done in public.’ 325

An example of a conviction for a S.67 offence is the Northern Ireland case of Colin McCarroll who, as reported by the Belfast Telegraph, was convicted by Trainor J at Newtownards Magistrate’s Court. McCarroll, who had been employed at the Ulster Folk and Transport Museum, had placed a spy-cam in the Museum’s toilets. 326

An offence of voyeurism should be introduced in Ireland rather than using the above-mentioned S.10 of the 1997 Act to prosecute what are essentially cases of voyeurism and not harassment. It is noted that the 2014 Report of the Internet Content Governance Advisory Group did not make any mention of voyeurism, nor did it make any legislative proposals in relation to online harassment. The Report stated:
‘The group agrees with the view that existing legislation is, for the most part, adequate to deal with offences of bullying and harassment. A review of the suitability of the Non-Fatal Offences Against the Person Act, 1997 in relation to cyberbullying is ultimately a matter for the Law Reform Commission.’ 327

324 ibid s 67(1)
325 ibid s 68
However, the Group's Report could have made some observations or recommendations, which might be of use to both the Law Reform Commission and the European Union in respect of their work on legislative proposals in the areas of harassment, voyeurism and online privacy.

3.2.3.3) Stalking

While stalking is not an offence in Ireland, two new offences of stalking has been created in the United Kingdom by the Protection of Freedoms Act 2012 through its insertion of new sections (S.2A and S.4A) in the Protection from Harassment Act 1997. These new offences are of relevance to photographers, particularly paparazzi style photographers, and to publishers of their photographs. Section 111(1) of the 2012 Act inserted a new S.2A in the 1997 Act.328 Section 2A(1) of the 1997 Act states:

‘A person is guilty of an offence if (a) the person pursues a course of conduct in breach of section 1(1), and (b) the course of conduct amounts to stalking.’329

S.2A(2) of the 1997 Act states:

‘For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person’s course of conduct amounts to stalking of another person if (a) it amounts to harassment of that person, (b) the acts or omissions involved are ones associated with stalking, and (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.330

While the Act does not define the term “stalking”, it does provide examples of the types of acts and omissions, which are associated with stalking. Such acts include “following”, “watching”, “spying” on a person and “publishing” material relating to a person. Section 2A(3) of the Act states:

‘The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking (a) following a person, (b) contacting, or attempting to contact, a person by any means, (c) publishing any statement or other material (i) relating or purporting to relate to a person, or (ii) purporting to originate from a person, (d) monitoring the use by a person of the internet, email or any other form of electronic communication, (e) loitering in any place (whether public or private), (f) interfering with any property in the possession of a person, (g) watching or spying on a person.’331

Section 4A of the Act deals with stalking which involves the additional element of the creation of fear of violence, serious alarm or distress within another person and it states:

‘A person (“A”) whose course of conduct (a) amounts to stalking, and (b) either (i) causes another (“B”) to fear, on at least two occasions, that violence will be used against B, or (ii)

328 Protection of Freedoms Act 2012, s 111(1)
329 Protection from Harassment Act 1997, s 2A(1)
330 Protection from Harassment Act 1997, s 2A(2)
331 Ibid s 2A(3)
causes B serious alarm or distress which has a substantial adverse effect on B’s usual
day-to-day activities, is guilty of an offence if A knows or ought to know that A’s course of
conduct will cause B so to fear on each of those occasions or (as the case may be) will
cause such alarm or distress.”

Therefore, for the “fear” element under S.4A of the Act to be engaged, such fear must be caused
on more than one occasion. Although infrequent, a number of individuals have been convicted of
stalking offences under the Act.

3.2.3.4) Revenge Porn

The Law Reform Commission’s 2014 “Issues Paper on Cyber-crime affecting safety, privacy and
reputation including cyber-bullying” raised a number of questions regarding the need to introduce
legislative changes in respect of a range of activities, including revenge porn, and on the adequacy
of the existing civil remedies to protect one’s right against such activities. What is colloquially
termed as “revenge porn”, is closely related to harassment. Revenge porn involves the
unauthorised publication of private, sexual photographs of individuals by their ex-partners on the
internet with the intention of either harassing or causing distress to such individuals. Due to the
widespread access to, and use of, the internet and a range of communications technologies,
including smart phones, and a lack of forethought and stupidity on the part of many individuals
allied with nastiness on the part of their ex-partners, revenge porn has become a current issue.

While virtually all victims of revenge porn would have consented to the taking of the images
concerned, they would not have consented to their publication either on the internet or elsewhere.
Also, the website “End Revenge Porn” stated that “…up to 80% of revenge porn victims took the
offending photographs themselves…” In such instances, the victims would be the copyright
holders to such images and they could seek a civil remedy against its infringement under copyright
legislation. However, while such a civil remedy may be available, its use would most likely
generate increased public awareness of the published images and cause further distress to the
victim. Also, it would not criminalise the offender. In an article on revenge porn, The Telegraph
stated:

‘A McAfee study (in the US) found that 36% of people have sent or intend to send intimate
content to their partners, and that one in ten ex-partners threatened to expose risqué
photos online – a threat carried out 60% of the time.’

332 ibid s 4A(1)
333 For example, see: Steve Morris, ‘Man jailed after using explicit images of ex-wife in £2m blackmail bid: James Casbolt posted sexually explicit
334 Law Reform Commission, Issues Paper on Cyber-crime affecting safety, privacy and reputation including cyber-bullying (LRC IP 6-2014) (Dublin,
335 End Revenge Porn, Resources <http://www.endrevengeporn.org/helpful-resources/> accessed 18 April 2015
336 David Barrett, ‘What is the law on revenge porn?:What is revenge porn and what is the law on it?’ The Telegraph (London, 13 April 2015)
Reporting on a recent seminar held by the Law Reform Commission on its above-mentioned 2014 Issues Paper and specifically on the topic of revenge porn, *The Irish Times* stated:

‘Det Sgt Jennifer Moloney of the new Children Protection and Human Exploitation Bureau believed the internet may need to be defined in legislation as a public place in order that laws dealing with harassment and threatening behaviour could be applied to online privacy.’

The internet is one of a number of means of mass communication, which includes among others, the printed media, radio, TV and the cinema. The suggestion that the internet should be defined as a public place is merely an attempt to re-define a medium of communication in order to make it subject to the existing provisions of the Non-Fatal Offences Against the Person Act 1997 in respect of revenge porn. Would the other means of mass communication also be defined as public places? So as to protect individuals’ privacy and to assist in preventing and/or reducing the cause of online harassment of, and distress to, individuals through revenge porn, it would be more appropriate to enact specific legislation dealing with revenge porn and also with privacy. Legislation relating to revenge porn should criminalise the activity itself, rather than attempting to do so in an around about way by imposing a false and illogical definition on the medium of communication through which such activity occurs in order to make it fit with, and be subject to, current offences under the 1997 Act.

Also, offences should be created in respect of (a) the unauthorised taking and/or publication of what are colloquially known as “up-skirt” and “down-blouse” photographs and (b) the publication of images of individuals without their permission on pornographic websites or with captions of a highly sexual or pornographic nature on social media sites with the intention of causing distress to the individuals featured in the published images. To deal with incidences of revenge porn in the United Kingdom, new offences have been created under Sections 33–35 of the English Criminal Justice and Courts Act 2015 in relation to the disclosure of private sexual photographs and films with the intent to cause distress. Under S.33(1) of the Act:

‘It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made (a) without the consent of an individual who appears in the photograph or film, and (b) with the intention of causing that individual distress.’

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338 Note (1): The Irish Non-Fatal Offences Against the Persons Act 1997 deals with harassment and threatening behaviour and Section 1 of the Act defines a “public place” as ‘…includes any street, seashore, park, land or field, highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise, and includes any train, vessel, aircraft or vehicle used for the carriage of persons for reward;’

Note (2): Section 3 of the Criminal Justice (Public Order) Act 1994 defines a “public place” as “(a) any highway, (b) any outdoor area to which at the material time members of the public have or are permitted to have access, whether as of right or by express or implied permission, or whether on payment or otherwise, and (c) any cemetery or churchyard, (d) any premises or other place to which at the material time members of the public have or are permitted to have access, whether as of right or by express or implied permission, or whether on payment or otherwise, and (e) any train, vessel or vehicle used for the carriage of persons for reward.”

339 Criminal Justice and Courts Act 2015, s 33(1)
The Act does provide a number of defences against a charge of such an offence including one that the disclosure was made in the course of the publication of journalistic material.\textsuperscript{340} Schedule 8 of the Act deals with the liability of information society service providers in respect of an offence committed under S.33 of the Act and the terms of the liability exemption available to them.\textsuperscript{341} Although few in number, there have been some convictions for this offence.\textsuperscript{342}

**3.2.4) Restrictions resulting from the Right to a Good Name**

All citizens have a right to a good name guaranteed under Article 40.3.2º of the Constitution of Ireland.\textsuperscript{343} This right, which may also be referred to as the right to one’s reputation, is primarily protected through the law of defamation, although other areas of both substantive and procedural law offer some protection in specific circumstances. The publication of photographs has the potential to infringe this right. Section 6(2) of the Defamation Act 2009 states that the tort of defamation consists of ‘the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person), and “defamation” shall be construed accordingly.’\textsuperscript{344} Under Section 6(3) of the Act, ‘A defamatory statement concerns a person if it could reasonably be understood as referring to him or her.’\textsuperscript{345} Section 2 of the Act defines a “defamatory statement” as ‘…a statement that tends to injure a person’s reputation in the eyes of reasonable members of society, and “defamatory” shall be construed accordingly.’\textsuperscript{346} This Section uses the term “reputation” rather than “good name”, although both terms refer to how others, namely reasonable members of society, view one. It should be noted that much of the earlier case law refers to “libel” rather than “defamation”. This is because of the common law distinction between the torts of “libel” (defamation in a lasting form) and “slander” (defamation in a spoken or transient form) prevailed until it was abolished in Ireland by the Defamation Act 2009.\textsuperscript{347}

While the word ‘photograph’ is not specifically used in the Act, photographs are covered by it through the use of the word ‘images’ in the Act’s definitions of both ‘statement’ and ‘electronic communication’. The Act defines a “statement” as including:

‘(a) a statement made orally or in writing,
(b) visual images, sounds, gestures and any other method of signifying meaning,
(c) a statement – (i) broadcast on the radio or television, or (ii) published on the internet, and
(d) an electronic communication.’\textsuperscript{348}

\textsuperscript{340} ibid s 33(4)
\textsuperscript{341} ibid sch 8
\textsuperscript{343} Constitution of Ireland (Art. 40.3.2º) (on Personal Rights)
\textsuperscript{344} Defamation Act 2009, s 6(2)
\textsuperscript{345} ibid s 6(3)
\textsuperscript{346} ibid s 2
\textsuperscript{347} ibid s 6(1)
\textsuperscript{348} ibid
Thus, since the introduction of the 2009 Act, the internet as a medium of communication has been specifically included with all the “traditional” forms of communications media in relation to the publication of defamatory statements. In respect of “Electronic communication”, the Act states that it includes “a communication of information in the form of data, text, images or sound (or any combination of these) by means of guided or unguided electromagnetic energy, or both;”\textsuperscript{349} Anyone who claims to be the subject of a statement, which he alleges to be defamatory may, as a remedy, seek a court order certifying that the statement is false or defamatory.\textsuperscript{350} However, a defamation action may not be brought after the expiration of one year or such longer period as a court may direct but not exceeding 2 years from the date on which the cause of action accrued.\textsuperscript{351} Where defamation has been proven, the court may award damages to the plaintiff.\textsuperscript{352} A court may also, subject to freedom of expression considerations, make an interim, interlocutory or permanent order prohibiting the publication or further publication of a statement if it believes that it is defamatory and the defendant has no defence “to an action that is likely to succeed.”\textsuperscript{353} The Act does offer a number of defences to a claim of defamation, namely: truth,\textsuperscript{354} absolute privilege,\textsuperscript{355} qualified privilege,\textsuperscript{356} honest opinion,\textsuperscript{357} offer to make amends,\textsuperscript{358} apology,\textsuperscript{359} consent to publish,\textsuperscript{360} fair and reasonable publication on a matter of public interest\textsuperscript{361} and innocent publication.\textsuperscript{362}

As regards the publication of photographs, liability for defamation may arise in a number of ways. Publishers may be sued for defamation as a result of their publication of articles, which include named, or reasonably identifiable, individuals and which are accompanied by photographs of other people, who are totally unrelated to, or not the subject of, the particular content that is claimed to be defamatory. Defamation actions may also arise from the publication of a photograph of a person, which is printed juxtaposed with another unrelated article.\textsuperscript{363} On viewing the photograph and article as printed, the reader might reasonably form the opinion that the individual featured in the photograph is involved in the activity detailed in the article. The decisions in the Irish High Court case of \textit{Patrick McGarth v Independent Newspapers (Ireland) Limited}\textsuperscript{364} and the English Court of Appeal case of \textit{Dwek v Macmillan Publishers Limited}\textsuperscript{365} are an interesting contrast,

\begin{itemize}
\item \textsuperscript{349} \textit{ibid}
\item \textsuperscript{350} \textit{ibid s 28(1)}
\item \textsuperscript{351} \textit{ibid s 38}
\item \textsuperscript{352} \textit{ibid ss 31–32}
\item \textsuperscript{353} \textit{ibid s 33(1)}
\item \textsuperscript{354} \textit{ibid s 16}
\item \textsuperscript{355} \textit{ibid s 17}
\item \textsuperscript{356} \textit{ibid s 18}
\item \textsuperscript{357} \textit{ibid s 20}
\item \textsuperscript{358} \textit{ibid s 22}
\item \textsuperscript{359} \textit{ibid s 24}
\item \textsuperscript{360} \textit{ibid s 25}
\item \textsuperscript{361} \textit{ibid s 26}
\item \textsuperscript{362} \textit{ibid s 27}
\item \textsuperscript{363} Note: See \textit{David Christie v TV3 Television Network Limited}[2015] IEHC 694 regarding a defamation case resulting from a miss-identification through a TV news report which showed an image of solely a defendant’s solicitor on his way to court accompanied with a voice-over on that solicitor’s client’s criminal case.
\item \textsuperscript{364} \textit{Patrick McGarth v Independent Newspapers (Ireland) Limited}[2004] IEHC 157
\item \textsuperscript{365} \textit{Dwek v Macmillan Publishers Limited}[1999] EWCA Civ J0729–11
\end{itemize}
although some allowance must be made for the different time period in which they were decided. *McGarth* coming some five years after *Dwek* concerned an alleged defamation through the publication by the defendant of a correction to a previous article in the *Evening Herald* newspaper. The correction, ‘which consisted of a photograph of “C.I.E. tradesman Pat McGarth who was described as a business man in Friday’s “Your Money”, borrowed to invest £9,600 in Eircom shares, not £50,000 as reported.”’ The photograph and correction statement were published under the heading for an article titled “big business linked to family of terrorist” and the plaintiff claimed that the defendant did not differentiate him from the contents of that article.\(^{367}\) In the trial of preliminary matters, Gilligan J stated:

‘In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what [a] person setting themselves to work to deduce some unusual meaning might extract from them.’\(^{368}\)

He concluded:

‘Accordingly, taking the article…, as a complete entity including the headline, the content of the article, the placing of the photograph of the plaintiff and the caption underneath the photograph and placing myself in the shoes of the ordinary reasonable fair minded reader, I take the view that the article…is not capable of meaning that the plaintiff was a terrorist or a criminal or was involved with persons who had terrorist or criminal involvement nor is the article capable of bearing any of the defamatory meanings pleaded…’\(^{369}\)

The English case of *Dwek*\(^{370}\) concerned a claimant who had brought three separate proceedings for libel against *Macmillan Publishers* and *Associated Newspapers* following the publication respectively of an incorrectly captioned and a cropped photograph in a book and in two newspapers.\(^{371}\) Judge LJ determined:

‘The defendants undoubtedly published a photograph of the claimant sitting beside a woman expressly identified as a prostitute. The object of publication was to reinforce or illuminate the accompanying textual assertion that Dodi Fayed was a close friend of and shared a relationship with this particular woman. People who had known the claimant for some years – and, indeed, perhaps only known him recently – and who bothered to give the photograph more than a cursory glance might very well have recognised him from the photograph and might very well have believed that it was he and not Dodi Fayed, or perhaps he as well as Dodi Fayed, who had associated with the prostitute. Even in

\(^{366}\) Patrick McGarth v Independent Newspapers (Ireland) Limited [2004] IEHC 157, 427

\(^{367}\) ibid

\(^{368}\) ibid 433–434

\(^{369}\) ibid 434


\(^{371}\) ibid
contemporary society, to assert that a man has associated with a known prostitute, at any
rate in the circumstances with which the accompanying text was concerned, is in my
judgment at least capable of being defamatory. I should certainly not be prepared to
conclude that it is not unless and until a jury so decided.’372

The 2001 Irish Supreme Court case of Hill v Cork Examiner Publications Limited373 concerned a
plaintiff, who had been imprisoned in Cork Jail following his conviction on a charge of occasioning
actual bodily harm. Subsequently, the defendant published an article on Cork Jail entitled “Isolation
of Cork Jail’s C Wing”. The story stated that the prisoners on C Wing were child molesters, sexual
offenders or were there for their own protection. The article was accompanied by a number of
photographs including one of the plaintiff in his cell.374 The plaintiff instituted defamation
proceedings at the High Court and claimed that the article and its accompanying photograph of
him ‘…meant, and were understood to mean that the Plaintiff was a sexual offender; a child
molester, rapist or otherwise that he was a person who was dissolve and of criminal character’.
The High Court jury awarded him £60,000 (€76,184) in damages. The Cork Examiner appealed
both the High Court’s finding of defamation and the amount of damages awarded.375 In rejecting
the appeal, Murphy J was:

‘….fully satisfied that the jury having considered the article as a whole were entitled to
conclude that a reasonable reader of the article would have been left with the impression
that the Plaintiff was at the time of the publication one of those incarcerated in that part of
Cork prison which was reserved for sex offenders, child molesters and offenders
segregated from the rest of the prison population in the interests of their own safety.376

On the matter of the level of damages, Murphy J acknowledged that the amount awarded by the
jury was a substantial sum, but he was not satisfied that the figure awarded was ‘so
disproportionate’ to the injury sustained that it should be set aside by the court.377

The Irish High Court case of McKeogh v John Doe 1 and Others378 embraced a number of related
issues relating to the right to one’s good name: the right not to be falsely accused of a crime; a
request for anonymity; photography and the internet. In McKeogh, a young man exited a taxi in
Dublin and failed to pay the taxi fare to the taxi driver. In an effort to identify the individual, the taxi
driver posted some video footage on YouTube, which showed the individual exiting the vehicle. A
third party internet user falsely identified the absconding, non-fare paying individual in the video
clip as being the plaintiff. This inaccurate identification and false accusation was subsequently
permeated throughout social media websites on the internet and was also reported upon in the

372 ibid
373 Hill v Cork Examiner Publications Limited [2001] IESC 95
374 Hill v Cork Examiner Publications Limited [2001] IESC 95
375 ibid
376 ibid
377 ibid
378 McKeogh v John Doe 1 and Others [2012] IEHC 95
print media.\textsuperscript{379} Peart J had previously heard an \textit{ex parte} application from the plaintiff, who sought a number of interim orders, which were granted. These orders related to the ‘immediate removal of video footage from YouTube, which had led to the plaintiff being defamed, as well as from any other sites on which it might be viewed’.\textsuperscript{380} The interim orders also restrained the named defendants and other parties with notice of the making of the orders from publishing material defamatory of the plaintiff on the internet or otherwise, including the video material in question.\textsuperscript{381} A key factor in the case was the fact that McKeogh’s passport provided incontrovertible evidence that he was in Japan at the time of the incident and could not have been the culprit.\textsuperscript{382} In respect of the defamatory element to the case, Peart J stated:

‘…the placing of the video on YouTube by the taxi driver did not of itself defame the plaintiff, though it certainly created a risk that a wrong identification might be made by somebody else. It was the wrong naming of the plaintiff by the person travelling under the pseudonym “Daithii4U” which has done the damage to the plaintiff’s reputation.’\textsuperscript{383}

In \textit{McKeogh}, the plaintiff had not initially sought anonymity, but subsequent to the granting of interim orders, he sought further orders including one to prevent named newspapers from ‘…publishing or republishing or in any way broadcasting or disseminating either on the internet, broadcast or in hard copy publication, material which would identify or tend to identify the plaintiff as the subject matter of the defamatory allegation that he was guilty of taxi fare evasion, theft or dishonesty pending the hearing of the substantive action.’\textsuperscript{384} The plaintiff submitted that the manner in which the named newspapers had reported on the court proceedings served to perpetuate the defamation and that they were in breach of the original interim orders.\textsuperscript{385} In refusing to grant a reporting restriction order, Peart J noted that the Defamation Act 2009 did not confer any power on the courts to hear defamation proceedings other than in public.\textsuperscript{386} In explaining his decision, Peart J stated:

‘…the mere reporting of proceedings in which the plaintiff claims against others that he has been defamed does not of itself constitute a repetition of that defamation, provided that it is fair and accurate, and in the event that a newspaper was to infringe that requirement, the plaintiff would have a cause of action in which he could again seek redress in the ordinary way.’\textsuperscript{387}

The issue of internet publication also arose in \textit{McKeogh}. Defamation law, as in the definition set out above, applies to all forms of publication, including the internet, although as the internet is a

\begin{footnotesize}
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\item \textsuperscript{379} ibid
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\item \textsuperscript{386} ibid
\item \textsuperscript{387} ibid
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global, online medium, there can be problems locating the source of the defamation and problems of appropriate jurisdiction for bringing a case to court. At an EU level, there are a number of Directives and court decisions dealing with such matters as those and inter alia with liability or exemption from liability. For instance, the European Communities Directive 2000/31/EC,\textsuperscript{388} which applies to civil actions including defamation, concerns certain legal aspects of information society services, particularly the internet. The Directive was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003.\textsuperscript{389} Regulation 3 of the Regulations offers a number of definitions, which are of relevance at this juncture. A “relevant service provider” is defined as ‘any natural or legal person providing a relevant service’ and a “relevant service” is defined as ‘an information society service within the meaning of Article 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service, other than a service specified in Schedule 1 to the Regulations;’\textsuperscript{390} The categories of services excluded from this definition under Schedule 1 include services that either are not provided at a distance or by electronic means and services that are not supplied at the individual request of a recipient of services.\textsuperscript{391} The Regulations define “caching” as ‘…the automatic intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information’s onward transmission to other users of the service upon their request…’\textsuperscript{392}

Under the Regulations, an exemption from liability for damages is available to relevant service providers and intermediary service providers in certain specified circumstances. If the provider of a website chatroom, forum or blog can prove that it is both a “relevant service provider” and an “intermediary service provider”, it may be able to benefit from this exemption in respect of claims for damages resulting from publication of alleged defamatory materials on such platforms. Regulation 15 states:

‘A provision of Regulation 16, 17 or 18 providing that a relevant service provider shall not be liable for a particular act shall be construed as a provision to the effect that the provider shall not (a) be liable in damages or, unless otherwise provided, be liable to be the subject of an order providing for any other form of relief, for infringing, by reason of that act, the legal rights of any natural or legal person or, by reason of that act, for breaching any duty, or (b) be liable to be subject to any proceedings (whether civil or criminal) by reason of that act constituting a contravention of any enactment or an infringement of any rule of law.’\textsuperscript{393}

\textsuperscript{389} European Communities (Directive 2000/31/EC) Regulations 2003, SI 2003/68
\textsuperscript{390} ibid regulation 3
\textsuperscript{391} ibid sch 1
\textsuperscript{392} ibid regulation 17
\textsuperscript{393} ibid regulation 15
Regulation 18 states:

‘An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if (a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or (b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.’

The Irish High Court case of Mulvaney and Others v The Sporting Exchange Ltd. trading as Betfair was a preliminary hearing resulting from a claim for defamation following the posting of comments in a chatroom, known as the “Betfair Forum”, which was hosted on Betfair’s website. Mulvaney dealt with the question of whether or not the defendant could meet the requirements of the above-mentioned Regulation 18 and thus be able to claim the exemption granted under Directive 2000/31/EC. Although Mulvaney did not involve the publication of photograph in the alleged defamatory material, it is of relevance to publishers of photographs on the “Comments” or “Forum” sections of websites and social media sites. In Mulvaney, Clarke J stated:

'It is clear, therefore, that if Betfair come within the provisions of Article 14/Regulation 18 [of Directive 200/31/EC], then there can be no liability for information stored provided it can be shown that Betfair:-

a) did not have actual knowledge of the unlawful activities, i.e. the allegedly defamatory comments posted on the Chatroom;

b) were not aware of the allegedly defamatory comments; and/or

c) on being made aware of the potentially defamatory comments, acted expeditiously to remove or disable access to the comments.'

Applying that test, Clarke J found in favour of Betfair. It must be noted, however, that more recent cases at European level have addressed this issue of third party comments on news portals (e.g. Delfi v Estonia in which the ECtHR found that the e-Commerce Directive did not apply. See further below). Also, the e-Commerce Directive is currently being updated.

Interestingly in light of the decision in Mulvaney, the United Kingdom’s Defamation Act 2013, (extends to England and Wales and some sections extend to Scotland), offers a specific defence to operators of websites in respect of statements posted on their websites. Under S.5(2) of the Act

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394 ibid regulation 18(1)
395 Mulvaney and Others v The Sporting Exchange Ltd. trading as Betfair [2009] IEHC 133
396 ibid para 1
397 ibid para 3.5
398 ibid para 5.14
399 Note: The requirement under Regulation 18 of a service provider having “actual knowledge of unlawful activity” was a central issue in the Northern Ireland High Court case of CG V Facebook Ireland Limited and Joseph McCloskey 2015 NIOB 11
400 Under Section 17 of the United Kingdom’s Defamation Act 2013, Sections 6, 7(9), 15, 16(5) and 17 of the Act extend to Scotland.
'It is a defence for the operator to show that it was not the operator who posted the statement on the website.' However, under s.5(3) of the Act this defence is defeated 'if the claimant shows that (a) it was not possible for the claimant to identify the person who posted the statement, (b) the claimant gave the operator a notice of complaint in relation to the statement, and (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.' A court, having found in favour of a claimant, may order the operator of a website to remove a defamatory statement. It is noted that the term “operators of websites” is not defined by the Act.

The European Court of Human Rights case of Delfi AS v Estonia arose from anonymous defamatory comments concerning SLK (AS Saaremaa Laevakompanii) – a ferry company, which were posted by viewers of a news portal website operated by Delfi. The Estonian Court of Appeal held that Delfi was not a technical intermediary in respect of the comments and that its activity was not of a merely technical, automatic and passive nature as it invited users to add comments. As a consequence, Delfi was held to be a provider of content services rather than of technical services and therefore could not claim an exclusion of liability. The Estonian Supreme Court upheld that decision. On application to the ECtHR for a determination of a claimed violation of Art.10, the Chamber held that the applicant’s rights under Art. 10 had not been violated and that the restriction of such rights was prescribed for in law and had been pursued with the ‘…legitimate aim of protecting the reputation and rights of others’. The Chamber also held that the restriction imposed on the applicant was proportionate to its aims and that consequently the applicant’s Art. 10 rights had not been violated. Delfi was subsequently referred to the Grand Chamber of the ECtHR. Of particular note is the Court’s differentiation between the applicant’s monitored type of news portal website and that of other online fora to which users may post comments. The Court emphasised that the Delfi case concerned the duties and responsibilities under Art.10(2) of:

‘…a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them’... and not…’other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum’s manager; or a social media platform where the platform provider does not offer

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401 Defamation Act 2013, s 5(2)
402 ibid s 5(3)
403 ibid s 13(1)(a)
404 Delfi AS v Estonia (Appl No 64569/09) (Grand Chamber ECHR, 16 June 2015)
405 ibid paras 12–13
406 ibid para 29
407 ibid para 31
408 ibid paras 62–63
409 ibid para 65
any content and where the content provider may be a private person running the website or a blog as a hobby.\textsuperscript{410}

The Court held that the interference imposed on the applicant’s Art.10 rights was prescribed for in law\textsuperscript{411} and that such legal provisions ‘made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type at issue in the present case, on its news portal.’\textsuperscript{412} In addition, the Court stated that the applicant had the ability to obtain legal advice on the associated legal risks and foreseeable consequences of its online activity.\textsuperscript{413} The parties also did not dispute that the restriction of the applicant’s freedom of expression had been pursued with the legitimate aim of protecting the reputation and rights of others and the Court saw no reason to hold otherwise.\textsuperscript{414} The unlawfulness of the posted comments was not disputed. After the comments were disclosed the applicant had failed to remove them of its own volition, but the applicant had removed them once it was notified about them.\textsuperscript{415} However, the Supreme Court held that such initial inaction was unlawful, as the applicant had not proven an ‘…absence of culpability’ under section 1050(1) of the Obligations Act…’.\textsuperscript{416} In determining whether such a Supreme Court decision was based on relevant and sufficient grounds and whether the interference with the applicant’s Art.10 rights was proportional, the Court examined the following elements:

‘…the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company’s liability, and the consequences of the domestic proceedings for the applicant company…’\textsuperscript{417}

Having done so, the Court determined that there had not been a violation of the applicant’s Art.10 rights. In reaching its decision, the Court stated:

‘…the domestic courts’ imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company’s right to freedom of expression.’\textsuperscript{418}

\textsuperscript{410} ibid paras 115–116
\textsuperscript{411} ibid para 128
\textsuperscript{412} ibid
\textsuperscript{413} Ibid para 129
\textsuperscript{414} ibid
\textsuperscript{415} ibid para 140
\textsuperscript{416} ibid para 141
\textsuperscript{417} ibid para 142
\textsuperscript{418} ibid para 162

Note (1): Delphi was the ECtHR’s first determination on the relatively new issue of commentary online by third parties.

Note (2): Another issue to emerge that is related to individuals’ right to a good name and their online privacy is an online activity colloquially called “fraping”. “The term “fraping” is a portmanteau of “Facebook” and “raping” and refers to when someone alters the profile or other contents on another person’s Facebook or a similar type of social media page without the latter’s consent. Fraping was the basis of a successful claim of defamation in the English High Court case of Applause Store Productions and Firsht v Raphael. [2008] EWCH
At a more technical level, publishers and their authors may have to defend defamation claims as a direct result of the former not possessing model releases in respect of any photographs of people included in their published works, such as books. For example, the Irish Circuit Court case of *Lyons v Ferriter and Irish Academic Press* involved a traditional musician who sued author Diarmaid Ferriter and his publisher Irish Academic Press for defamation through the misleading use of a photograph of him on the cover of Ferriter’s book “A Nation of Extremes – The Pioneers of Twentieth Century Ireland”. The photograph showed Lyons with two pints of stout in front of him. Keyes J refused to strike-out the proceedings against Ferriter on the basis of his assertion that he had no input into the book’s cover. In order to establish if a defence of “innocent publication” was available, Keyes J stated that a full hearing would be necessary. It was subsequently reported that the action had been settled on the day the hearing was due to take place.

### 3.2.5) Restrictions resulting from the Right to be Forgotten

As discussed above, the right to privacy concerns the protection of personal information that is not in the public domain from entering it without one’s authorisation. Conversely, the “right to be forgotten” signifies the right to have search engine results linked to one’s personal information, that has been in the public domain via the internet, removed. The basis of this right is the right to erasure and blocking of personal data and the right to object to the processing of personal data as respectively provided for under Art.12(b) and Art.14(b) of EC Directive 95/46, as amended. Publicity surrounding the 2014 Court of Justice of the European Union (hereinafter CJEU) case of *Google Spain SL and Google Inc. v Agencia Espanola de Protection de Datos and Gonzalez* brought the right to be forgotten to the attention of the public in general. This right applies to the internet and there is no equivalent right in respect of the deletion or removal of off-line sources of information, such as newspapers’ hardcopy archives or library collections. *Google Spain* resulted from a complaint by the second defendant Costeja González to the Spanish Data Protection Agency (A.E.P.D.), in which he sought the removal from the website of a Spanish newspaper *La Vanguardia* of information concerning a real estate auction related to attachment proceedings against him for the recovery of social security debts. He also sought the removal or concealment of such information in Google’s search engine results and links from them to the relevant webpages of *La Vanguardia*. The A.E.P.D. rejected the complaint against *La Vanguardia*, as the publication

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1781 (QB): In *Applause*, the defendant created a false Facebook profile, which contained false allegations regarding the complainant’s creditworthiness and his sexual preferences. The false Facebook profile also included a photograph of the claimant, who claimed defamation and misuse of private information. The photograph had been lifted by the defendant from the claimant’s Facebook profile and placed into the false Facebook profile.


420 ibid


423 Case C-131/12 Google Spain SL and Google Inc. v Agencia Espanola de Protection de Datos and Gonzalez [2014]
of the material was legally justified. However, it upheld the complaint against Google on the grounds that Google, as the operator of a search engine, was subject to data protection legislation. Thus, the A.E.P.D. had the power to ‘require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considered that the locating and dissemination of the data were liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense. This would also encompass the mere wish of the person concerned that such data not be known to third parties.’ Google Spain and Google Inc. appealed this decision to the Spanish High Court, which referred a number of questions to the CJEU relating to ‘…the territorial application of Directive 95/46 and Spanish data protection legislation; the activity of search engines as providers of content in relation to Directive 95/46, and the scope of the right of erasure and/or the right to object…’

In respect to the latter question, the Spanish High Court asked:
‘…must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?’

The CJEU held that a search engine was a data processor and that the operator of a search engine was a data controller within the meaning of Directive 95/46/EC, as amended. In relation to the territorial application of Directive 95/46 in respect to search engines, the Court held:
‘Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.’

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424 paras 14–17
425 ibid para 18
426 ibid para 20
427 ibid
428 ibid para 100
429 ibid
On a data subject’s right of access to his personal data under Art. 12 of Directive 95/46, his right to object to the processing of his data under Art. 14 of the Directive and the obligations of search engines to remove information from search results when requested to do so by a data subject, the Court held:

‘Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.’

Furthermore, the Court determined that one’s right to be forgotten overrides both the economic interests of a search engine operator and the interest of the general public in having access to the information that may be seeking to have deleted. The right to be forgotten is not absolute. The Court held the superiority of that right would not prevail ‘...if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.'

It could be argued that this decision by the CJEU is a step towards permitting a free-for-all type of censorship of the internet with obvious far-reaching implications for freedom of expression. On the other hand, it does assist in removing links to a variety of materials published on the internet such as revenge porn photographs and defamatory materials. But, it should also be noted that the CJEU’s finding in Google Spain does not also require the removal of any material from the original source websites, which were listed in the results of a search for such material via a search engine. From the perspective of a photographer who has had his images illegally copied from his or his clients’ websites and re-posted to other sites, the decision in Google Spain would be of benefit to him in having search engine links to those latter websites displaying the illegally-copied images removed from the internet.

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431 ibid art 14
432 Case C-131/12, Google Spain SL and Google Inc. v Agencia Espanola de Protection de Datos and Gonzalez [2014], para 100
433 ibid
434 ibid
435 Note: On the topic of the courts ordering the deletion of publications’ online and off-line archives, see: Wegrynnowski and Smolczewski v Poland [2013] ECHR 690. In Wegrynnowski, at para. 65, the Court stated: ‘The Court accepts that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations.’
The European Commission’s Article 29 Data Protection Working Party\(^{436}\) adopted a set of guidelines on the implementation of the Court’s decision.\(^{437}\) Among other matters, the Guidelines state that ‘Individuals are not obliged to contact the original site, either previously or simultaneously, in order to exercise their rights towards the search engines.’\(^{438}\) In reality, to impose such an obligation would be a complete waste of time. The associated issue of getting original material, which had been referenced by a search engine, removed from its original publisher website is a totally different matter. Such as task is not without its own problems, including tracing and obtaining usable contact details for the actual owners and operator of the websites and successfully getting him to either remove the infringing images or to pay a licence fee for their use online, without having to resort to initiating court proceedings. In many instances, court costs would totally out-way the licence fees involved.

Subsequent to the Google Spain case, the English High Court determined the case of Mosley v Google Inc. and Anor\(^{439}\) in which the claimant claimed damages and injunctive relief against Google Inc. and Google UK over the appearance in its search engine results of postings by persons other than Newsgroup of the images and video footage of him, which were central to the case of Mosley v Newsgroup Newspapers.\(^{440}\) The claimant stated that even though a number of websites containing the images were blocked from search engine results, some still appeared or reappeared in such results. The claimant described the task of getting the material removed as “Sisyphean”, i.e. a task that can never be completed.\(^{441}\) Having reviewed S.10 of the UK Data Protection Act 1998, which deals with the right to prevent the processing of data that is likely to cause damage or distress, Mitting J held:

‘…provided that the claimant proves that he has suffered or is suffering substantial unwarranted damage or distress as a result of the processing of his personal data by Google…and has given written notice to Google…and Google do not advance any reason for stating that the notice is unjustified, the claimant is entitled to ask the court to order Google to take such steps as it thinks fit to comply with the notice and the court is entitled so to order.’\(^{442}\)

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\(^{438}\) ibid part 1, para 11

\(^{439}\) Mosley v Google Inc. and Anor [2015] EWHC 59 (QB)

\(^{440}\) Mosley v Newsgroup Newspapers [2008] EWHC 1777 QB

Note: Subsequent to this case, Mosley claimed in the ECtHR case of Mosley v United Kingdom [2011] ECHR 774 that there had a violation of his Article 8 right to privacy due to the absence of a legal, pre-publication, notification requirement in the domestic law. However, the Court (at para. 132) held that Article 8 did not require a pre-notification of the applicant of any impending publications, which would have alerted him to a possible need to seek a pre-publication injunction.

\(^{441}\) Mosley v Google Inc. and Anor [2015] EWHC 59 (QB), paras 1–6

\(^{442}\) ibid para 24
The issues of general and specific monitoring by service providers, such as search engines, were central to Mosley. The defendants claimed that Article 15 of the E-Commerce Directive prohibited the making of the court orders sought because what the claimant required amounted to general monitoring as opposed to specific monitoring. From his analysis of the jurisprudence of the CJEU on the application of Art 15, Mitting J stated that it seemed to suggest that the CJEU held the view that Art. 15 did not prevent specific monitoring. On the blocking of individual images by search engines, he went on to state:

‘it is common ground that existing technology permits Google, without disproportionate effort or expense, to block access to individual images, as it can do with child sexual abuse imagery.’

Therefore, for photographers seeking the blocking of links from search engines to infringing copies of their images, it should not be an onerous task for search engines.

3.2.6) Restrictions resulting from the Property Rights of Others

The taking and publication of photographs are separate, but related, issues. The property rights of the owners of private property may restrict the rights of photographers to take photographs of their property while they are either on or outside such property and to publish the images. Also, the property rights attached to publicly-owned property may lead to similar restrictions. This section of the chapter will examine the extent to which those property rights may impact on photographers’ and photograph publishers’ rights.

3.2.6.1) Private Property Rights

The right to the ownership of private property is guaranteed under the Constitution and Article 43.1.1º states: ‘The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.’ Also, the ownership of private property is specified as one of the personal rights guaranteed under the Constitution. Article 40.3.2º states: ‘The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.’ In addition, Article 40.5 the Constitution guarantees the inviolability of the home and states: ‘The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with the law.’ Property rights are also enshrined in the Protocol to the ECHR. Article 1 of the Protocol states:

443 ibid paras 50–52
444 ibid para 54–55
445 Constitution of Ireland (Art. 34.1) (on Private Property)
446 ibid (Art. 40.3.2º) (on Personal Rights)
447 ibid (Art. 40.5) (on Personal Rights)
‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

Any restriction on a photographer’s rights should therefore be justified by reference to the public interest and be provided for by law. The issue of the legality of the taking of photographs of privately-owned property while not on such property was raised in a case stated to the Irish High Court for its view in [Atherton v DPP](https://www.iecourts.ie/cgi-bin/search.pl?iecourts.ie:iecourtsearch). Atherton concerned a complaint from a complainant that a neighbour (the “accused”) had cut his hedge without his permission and caused damage to it. In response, the complainant had arranged for a fixed video camera to be set-up in an upstairs front window of a house across the road from the complainant’s house, which was attached to the accused’s house. There was video evidence before the court that apart from the hedge there was incidental footage of the front of the accused’s house. Evidence from a garda stated ‘...everything that is seen on the video camera was capable of being seen from the street itself, albeit that one might have to stand up on a step-ladder to do so.’ There had not been any trespass on the accused’s property.

Peart J held that the video recording of the accused’s house and his next door neighbour’s hedge by the latter from an upstairs window of another neighbour’s property across the road did not breach the accused’s constitutional right to privacy attached to the right to the inviolability of his dwelling as contained in Article 40.5 of the Constitution. Peart J stated:

‘In my view there is no meaningful distinction between the evidence of what was happening to the hedge in the garden opposite that house being given in the form of video footage, and that very same evidence being given by the owner of the house opposite if he arranged things so that he was standing at the same window as the camera was set up at and observing himself what was happening. He would undoubtedly be permitted to give evidence viva voce of anything which he observed happening in the garden into which he was looking, and it could not possibly be seriously contended that if that person also saw the accused re-entering his house through the front door, and while the door was open saw also into the hallway, that in some way that person had breached the accused’s right to privacy by seeing what he saw. The camera has done no more and no less than that.’

In the earlier English case of [Bernstein of Leigh (Baron) v Skyviews and General Ltd.](https://www.bailii.org/ew/cases/EWHC/2012/862.html), Griffiths J had held that provided one does not cross the boundary from one piece of adjoining land to another, one may take a photograph of the exterior of a property, which is located on the latter

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Footnotes:

448 European Convention on Human Rights Act 2003, Schedule 2, Art. 1
449 Atherton v DPP [2005] IEHC 429
450 ibid
451 ibid
452 ibid
453 Bernstein of Leigh (Baron) v Skyviews and General Ltd. [1978] QB 479
adjoining land. The taking of photographs while on privately-owned property may be either prohibited or restricted by the owner of such property, even where one is granted access to the property by its owner. The basis of admission in business situations is essentially contractual and subject to stated terms and conditions. For example, members of the public are granted access to the Aviva Stadium in Dublin, subject to the Aviva Stadium Ground Rules/Regulations, which prohibit unauthorised photography within the Stadium. While photography by accredited photographers within the Stadium is permitted, all other photography is prohibited. Rule 16 of the Ground Rules/Regulations states:

‘With the exception of persons holding official accreditation or authorisation in writing from Aviva Stadium or the organising body, the taking of photographs, video photography, or other recordings inside the Stadium, whether by mobile phone or otherwise is prohibited.’

3.2.6.2) Restrictions on Photography on Publicly-Owned Property

In many instances, members of the public are permitted to have relatively unhindered access to publicly-owned properties and locations such as beaches, parks, open spaces, streets, airports, sea ports and harbours, railway systems and recreational playing fields. However, both commercial and amateur photographers proposing to undertake photography at these types of locations may be subject to restrictions or they may even be prohibited from undertaking any photography. In relation to publicly-owned properties, such restrictions and/or prohibitions are put in place through bye-laws. The following are a number of examples. Under the Local Government Act 2001, as amended, ‘a local authority may make a bye-law for or in relation to the use, operation, protection, regulation or management of any land, services, or any other matter provided by or under the control or management of the local authority, whether within or without its functional area or in relation to any connected matter’. A number of local authorities have implemented bye-laws which include a prohibition on commercial photography being undertaken without having obtained a licence from the local authority. For example, Dublin City Council controls commercial photography within its functional area through its Parks and Open Spaces Bye-Laws 2002. Section 4(13)(a) of these Bye-Laws states:

‘Save with the written permission of the Council and subject to the terms and conditions of such permission, no person shall sell, offer, expose for sale or distribute in any park or open space any commodity of any kind whatsoever or exhibit any sign, poster, handbill, or other notice in any park or open space or engage therein in the business of taking photographs for payment.’
Also, Section 4(13)(f) states:

‘No person shall in any park or open space use any type of camera for the purpose of business or with a view to gain, without the written permission of the Council and subject to the terms and conditions of such permission.’

The Bye-Laws define a “Park” as including ‘all parks and recreational playing grounds, owned, controlled by or in the occupation of Dublin City Council whether open or enclosed’ and they define an “Open Space” as including ‘all lands, open spaces, gardens, beaches vested in or under the control of the Council, and all land (which is open land) managed by the Council for the provision of facilities for games and recreation thereon.’ In accordance with the above-mentioned Bye-Laws, permits from Dublin City Council are required by anyone wishing to undertake commercial activities including, among others, ‘filming, photography, photo calls, fashion shoots, product launches…’ A permit fee exemption is offered in respect of registered charities, student projects (with accreditation from college), public health awareness bulletins, Dublin City or national tourism promotion and wedding photography. Wedding photography and fashion photography are two types of photography undertaken by commercial photographers. One would have to question why the former but not the latter may be undertaken in accordance with the above-mentioned Bye-Laws without having to pay any permit fee whatsoever? The Office of Public Works manages a number of national monuments and national historical properties throughout the State such as Dún Aonghasa on Inis Mór, Aran Islands and St. Stephen’s Green in Dublin. Permits are required for commercial photography at these locations. The Luas light railway system in Dublin comes under the Light Railway (Regulation of Travel and Use) Bye-Laws 2012, which state ‘a

Note: For an example of such now restricted photography, see: ‘Man on Bridge: The Story and Photos of Arthur Fields’ <www.manonbridge.ie> accessed 18 December 2015


461 ibid s 2(a)

462 ibid s 2(b)


Note: Dublin City Council’s permits for photography (as at 24 August 2015) cost €150.00 + 23% V.A.T. for the first hour and €100.00 + 23% V.A.T. for each subsequent hour, while the first hour for filming costs €200.00 + 23% V.A.T. and €100.00 + 23% V.A.T. for each subsequent hour: €1,200.00 + 23% V.A.T. (€1,045.50) for an 8 hour day photography permit is to say the least “steep”.


A medium-sized fashion photography shoot would require two to three days of photography at the current, average commercial photography daily rate of €800.00 + 23% V.A.T. From an economic and a photographic perspective, unless it was necessary to prominently feature recognisable landmarks in such a set of photographic images, one would be better off flying a crew of four people to a location such as Lanzarote for a few days for the equivalent of the daily cost of such a photography permit and in so doing be guaranteed clear blue skies and good, bright light.


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person shall not on a light rail vehicle or a light railway without permission given by or on behalf of an operator…(f) use any camera or video recorder or any form of equipment for recording sound or images so as to interfere with any other person’. Bye-laws may prohibit certain types of photography at airports. For example, the Shannon Airport Bye-Laws 2015 prohibit:

‘…monitoring air traffic control, or airport or airline operational frequencies in the State, with radio receiving or recording equipment or using television cameras or other photographic equipment, including the use of a mobile phone or similar handheld device, the use of which in the opinion of the airport authority or an authorised officer is likely to be contrary to the interests of security or safety where such opinion has been conveyed by or on behalf of the airport authority or ought reasonably to have been known by the person so monitoring;’

These Bye-Laws also prohibit the:

‘…using a camera, mobile telephone or similar handheld or other mobile device other than in accordance with signs or directions given by the airport authority or an authorised officer or in a manner which in the opinion of the airport authority or of an authorised officer is likely to be contrary to the interests of security or safety at the airport or the comfort of airport users where such opinion has been conveyed by or on behalf of the airport authority or any authorised officer or ought reasonably to have been known by the person so using it.’

Under Kerry County Council’s Playground Bye-Laws 2008, ‘No person, unless they are a family member, shall operate or use a camera, camera phone, video or any other video media device in a playground without the authorisation of the Council.’ In Co. Clare, photography is prohibited inside any burial ground that comes within the scope of Clare County Council’s Burial Ground Bye-Laws 2015 unless a prior consent as specified in the Bye-Laws has been obtained. Section 35 of the Bye-Laws states:

‘The use of photographic equipment including digital and video cameras or recording equipment of any kind or the playing of musical equipment or instruments within a burial ground is strictly prohibited unless prior consent is received as follows:

(1) during interment by the next of kin or undertaker acting on their behalf
(2) at any other time with the consent of the Council.’

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466 Light Railway (Regulation of Travel and Use) Bye-Laws 2015, SI 2015/322, s 6(1)(f) <www.luas.ie/luas-byelaws.html> accessed 14 August 2015
467 Shannon Airport Bye-Laws 2015, SI 2015/69, s 6(1)(21)
468 ibid s 6(1)(32)
471 ibid s 35
In relation to S.35(1), it is quite conceivable that a permission may not be forthcoming from a next of kin or there may not be any next of kin and thus a press photographer would be prevented by the Bye-Laws from legally photographing an interment from within a burial ground covered by them. Also, in accordance with S.35(2) a prior consent from the Council would be required for the photographing of, for example, a tower or a church ruins situated within any burial ground coming under the Bye Laws. Such a requirement is somewhat bureaucratic and lacks common sense. The Bye-Laws provide for the imposition of penalties for their contravention including a fixed fine of €75 or a fine of up to €1,905 upon prosecution and conviction.\(^{472}\)

\subsection{3.2.6.3) Photographers and Trespass and Nuisance}

Trespass to land comes within both criminal and tort law in Ireland. Under the Criminal Justice (Public Order) Act 1994, as amended, it is ‘an offence for a person, without reasonable excuse, to trespass on any building or the curtilage thereof in such a manner as causes or is likely to cause fear in another person.’\(^{473}\) A member of An Garda Síochána, with reasonable cause, may order a person found acting in such a manner to leave the vicinity of such a place.\(^{474}\) Also, the torts of trespass and nuisance may be applied against photographers. The tort of trespass comprises a number of individual torts, namely trespass to the person (battery, assault and false imprisonment), trespass to land and trespass to chattels.\(^{475}\) Of these different torts, trespass to land and chattels is the one most likely to be breached by journalists and reporters.\(^{476}\) If one enters another person’s land for an unlawful purpose or having been permitted to enter the land and then abuses that permission, one be will a trespasser \textit{ab initio}.\(^{477}\) The tort of trespass to land offers limited protections and remedies to landowners, but only those who are actually in possession of the land on which it is claimed that there has been a trespass may bring an action for trespass.\(^{478}\) One must actually enter upon the land concerned in order to commit a trespass. While a land/property owner may have a cause of action as a remedy in respect of a nuisance (see below) or a trespass, Warby et al assert:

‘…although these causes of action may cover a wider spectrum of objectionable intrusion in relation to the gathering, as opposed to the publication, of private information, they are likely to be of limited application since injunctions will not generally be granted to prevent a threatened nuisance or trespass.’\(^{479}\)

In reasoning that assertion, they go on to state:

\footnotesize
\begin{itemize}
  \item \(472\) ibid s 39
  \item \(473\) Criminal Justice (Public Order) Act 1994, s 13(1)
  \item \(474\) ibid s 13(2)(2)
  \item \(475\) Eoin Quill, \textit{Torts in Ireland} (Gill and Macmillan 1999) 147
  \item \(476\) See: Mark Warby, Nicole Moreham, Iain Christie and Michael Tugendhat, \textit{Tugendhat and Christie, The Law of Privacy and the Media} (2nd edn, Oxford University Press 2011) para 10.20
  \item \(477\) ibid para 10.21
  \item \(478\) ibid para 10.22
  \item \(479\) ibid para 13.26
\end{itemize}
‘The principle that “an Englishman's home is his castle has a strong basis in domestic law, but the requirement to show a proprietary interest and its inability to deal with the “fruits of the intrusions” limits the effectiveness of this remedy to all but the most obvious cases.”

If one enters property with permission and then undertakes photography thereon without permission one may have committed a trespass to the property. An example of such a trespass through the actions of a photographer is the Irish High Court case of Cogley v RTÉ and Aherne and Others v RTÉ. In Cogley, at the request of RTÉ, a care worker obtained employment at the Leas Cross Nursing Home and subsequently used a hidden camera to shoot footage inside the Home for a proposed programme on the standard of care provided to patients in nursing homes in general and specifically at Leas Cross. The Director of Nursing (Cogley) and the owners and occupier (Aherne) of Leas Cross sought an injunction to prevent the transmission of the programme – Cogley on a claim of defamation and Aherne on a claim of breach of privacy and trespass. Having viewed the contents of the proposed programme, Clarke J determined that the issues raised in the programme were ‘of the highest public interest and that, therefore, a very significant weight indeed needs to be attached to those matters in weighing the rights and values involved at this stage.’ Consequently, he refused to grant the prior restraint injunctions sought. In respect of the Aherne claim on the basis of trespass, however, Clarke J stated:

'It may be that RTÉ will be able to persuade a court at trial that there was a sufficient justification for their actions to be able to resist a claim in trespass. It might even be that RTÉ would be able to persuade the court that no trespass in fact occurred in all the circumstances of the case. However, it was clear that the plaintiffs in the Aherne proceedings have made out an arguable case that such trespass occurred. An injunction which would restrain future trespass would not have an effect equivalent to prior restraint.'

Therefore, based on the possibility that RTÉ might adopt a similar covert approach at a future date to carry-out further filming at Leas Cross, on the balance of convenience Clarke J granted an interlocutory injunction preventing RTÉ from undertaking any future trespass at the property. The tort of trespass may not be used to prevent the publication of photographic images obtained through a trespass to land as a means of protecting one’s good name. The English High Court case of Service Corporation International Plc and Another v Channel Four Television Corporation and Another concerned the secret filming of malpractices at a funeral home by an employee of

480 ibid
481 Cogley v RTÉ and Aherne and Others v RTÉ [2005] 6 JIC 0801
482 ibid
483 ibid
484 ibid

485 Service Corporation International Plc and Another v Channel Four Television Corporation and Another [1999] E.M.L.R. 83
the funeral home for a documentary to be aired by the defendant. In seeking an injunction against the publication of the filmed material, the plaintiff claimed breach of confidence, trespass and an equitable ownership to the copyright in the filmed material. In refusing to grant the injunction, Lightman J stated ‘Concern for the protection of the plaintiffs’ reputation and goodwill plainly underlies this application.’

A defamation claim would not have been open to the plaintiff because injunctions in defamation law are generally not granted, especially when the defendant intends to plea a defence of justification (truth), as Lightman J explained:

‘The reason that defamation is not and cannot be invoked is because no interlocutory injunction could be granted on this ground in view of the defendants’ plain and obvious intention to plead to any such claim the defence of justification. The invocation of other causes of action is necessary if there is to be any arguable claim to an interlocutory injunction. The rule prohibiting the grant of an injunction where the claim is in defamation does not extend to claims based on other causes of action despite the fact that a claim in defamation might also have been brought, but if the claim based on some other cause of action is in reality a claim brought to protect the plaintiffs’ reputation and the reliance on the other cause of action is merely a device to circumvent the rule, the overriding need to protect freedom of speech requires that the same rule be applied.’

In respect of the claimant’s ability to use a finding of trespass as a means of preventing the publication of the filmed images, Lightman J stated:

‘It is to the effect that Mr Anderson, having obtained access to the Salisbury Funeral Home to undertake covert filming by a trick, was a trespasser ab initio as from the moment of his entry and that he should not be permitted to profit from his trespass; but whether this is so or not, that cannot confer upon the plaintiffs the right to prevent the defendants showing the film.’

Lightman J determined that the plaintiff’s claim that the malpractices alleged in the film was a single incidence did not prevent there being a substantial public interest in the film’s revelations.

In addition to the tort of trespass, the tort of nuisance can provide some limited protection for landowners. The tort consists of two types of nuisance, namely private nuisance and public nuisance. As Shanley J stated in the Irish High Court case of Royal Dublin Society v Yates, a private nuisance consists of ‘...any interference without lawful justification with a person’s use and enjoyment of his property.’ A public nuisance on the other hand, as stated by Keane J in the Irish Supreme Court case of Convery v The County Council of the County of Dublin, consists of ‘...an

486 ibid para 89
487 ibid paras 89–90
488 ibid 90
489 ibid 91
490 Royal Dublin Society v Yates [1997] IEHC 144
491 ibid para 73
492 Convery v The County Council of the County of Dublin [1996] 3 IR 153
act or omission which causes injury to, or materially affects the reasonable comfort and
cconvenience of, the public, or a section of the public. It is, however, only actionable at the suit of an
individual, if he has suffered particular damage over and above that suffered by other members of
the public.'

On the invasion of one’s privacy from the skies, the case of Bernstein of Leigh (Baron) v Skyviews
and General Ltd. is usually regarded as being the English authority on this topic. While the
case concerned trespass and invasion of privacy through aerial photography, the court also looked
at the tort of nuisance. In Bernstein, Griffiths J stated:

‘It would be a dangerous extension of the law relating to trespass to say that a tort which
historically was regarded as sufficiently grave in itself to require no proof of special
damage, should now be enlarged in order to embrace the passage of aircraft taking aerial
photographs. If one wanted to make a film of a city it would be impossible to obtain every
occupier’s permission. An action in nuisance might be appropriate where damage is
inflicted by misbehaviour or buzzing of aircraft, but not where there is merely the passage
of aircraft at a considerable height doing no harm to anybody and in the course of which
an act of photography is taking place.’

As to whether the taking of a single photograph would constitute a nuisance, Griffiths J stated:

‘Nor would I wish this judgment to be understood as deciding that in no circumstances
could a successful action be brought against an aerial photographer to restrain his
activities. The present action is not founded in nuisance for no court would regard the
taking of a single photograph as an actionable nuisance. But if the circumstances were
such that a plaintiff was subjected to the harassment of constant surveillance of his house
from the air, accompanied by the photographing of his every activity, I am far from saying
that the court would not regard such a monstrous invasion of his privacy as an actionable
nuisance for which they would give relief.’

In conclusion, Griffiths J held:

‘On the facts of this case even if contrary to my view the defendants’ aircraft committed a
trespass at common law in flying over the plaintiff’s land, the plaintiff is prevented from
bringing any action in respect of that trespass by the terms of section 40(1) of the Civil
Aviation Act 1949.’

493 ibid 168
494 Bernstein of Leigh (Baron) v Skyviews and General Ltd. [1978] QB 479
495 See, for example, Bryan McMahon and William Binchy, Law of Torts (4th edn, Bloomsbury Professional 2013) 1408
496 Bernstein of Leigh (Baron) v Skyviews and General Ltd. [1978] QB 479, 481
497 ibid 489
498 ibid
Were one to consider taking a claim of either trespass or nuisance as a result of a person undertaking aerial photography of one's property in Ireland, the right to do so may be restricted by the Irish Air Navigation and Transport Act 1936, as amended. Under the Act:

‘No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of the flight, so long as the provisions of Part II of this Act and any order made under the said Part II and any regulations made by virtue of any such order are duly complied with.’

Michalos asserts that ‘It is arguable that a group of photographers engaged in surveillance from the highway outside a private premises amounts to a nuisance.’ Furthermore, on the use of photographs of the exteriors of buildings viewable from public places, Michalos asserts:

‘Generally in the UK, photographs of the exteriors of buildings that can be viewed from public places may be taken freely and do not require property release forms for use and publication. However, if the photograph is to be used commercially, particularly in advertising, a property release form would be advisable.’

Essentially, Michalos is differentiating between the purely commercial publication of such an image as opposed to it being part of a news story of public interest. However, a court could adopt a different view if the image was published as part of what are known as “advertorials” (hardcopy advertisements produced with the layout appearance of a news story) or a semi-commercial editorial. Thus, if the publication of an image has any semblance of it being for commercial purposes, both a prior permission to take the photograph and a property release are necessary. Photographing the interior of a building may be either prohibited or permitted subject to conditions laid down by the owner of the building, irrespective of whether the building is a publicly or privately-owned building to which the public may or may not have either paid or have free access. Again, it would be advisable to obtain a signed property release form prior to the publication or commercial usage of any such photographs. A similar word of caution would apply in respect of the photography of any movable property owned by third parties, if the intention is to use the created photographs for commercial purposes.

3.2.7) Passing-off: Misrepresentation through the use of Photographs

Advertisers and publishers may be the respondents to claims of passing-off through misrepresentation by the use of misleading photographs in their works. Legislative provisions and both statutorily-required and self-regulated, business sector codes of practice are used to regulate

499 Air Navigation and Transport Act 1936, s 55
Note: Section 40(1) of the United Kingdom’s Civil Aviation Act 1949, as amended, contains a similarly-worded provision
500 Christina Michalos, The Law of Photography and Digital Images (Sweet and Maxwell 2004) 311
501 ibid 372–373
the contents of advertising materials.\textsuperscript{502} While some legislative provisions are of a general application, others focus on specific industries, trades, products or services. For example, advertisements published through the broadcast media are covered under the Broadcasting Act 2009. Section 41(3) of the Act prohibits a broadcaster from broadcasting ‘an advertisement which is directed towards a political end or which has any relation to an industrial dispute’,\textsuperscript{503} while Section 41(4) of the Act prohibits the broadcasting of an advertisement ‘which addresses the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation.’\textsuperscript{504} The Act also places a statutory requirement on the Broadcasting Authority of Ireland to implement codes of standards and practice to be observed by broadcasters.\textsuperscript{505} The Authority operates and regularly updates a range of broadcasting codes of standards and practice, by which broadcasters and their advertisers must abide.\textsuperscript{506} A number of statutes contain provisions restricting advertising for certain products. These include the Misuse of Drugs Act 1984, as amended, which provides for offences relating to the advertising and promotion of controlled drugs,\textsuperscript{507} while the Criminal Justice (Psychoactive Substances) Act 2010 contains a prohibition on the advertising of psychoactive substances.\textsuperscript{508} However, under S.6 of the Act it is not an offence for certain specified types of people, such as registered general practitioners, dentists and pharmacists, to do so for the purpose of their profession.\textsuperscript{509} An example of trade specific statutory prohibition on advertising is the Taxi Regulation Act 2013, as amended, which prohibits the promotion and advertising of unlicensed small public service vehicle services.\textsuperscript{510} At a product specific level, the Public Health (Tobacco) Act 2002, as amended, prohibits the advertising of tobacco products.\textsuperscript{511} These and similar restrictions may affect photographers from the perspective of the contents of photographs used as elements of advertisements.

The misleading of an advertisement’s viewers through its contents is specifically provided for under the Consumer Protection Act 2007, as amended.\textsuperscript{512} The Act prohibits traders from engagement in misleading commercial practices.\textsuperscript{513} Also, the Act states that a commercial practice involving marketing or advertising is misleading if, it would be likely to cause the average consumer –

‘(a) to confuse –

(1) a competitor’s product with the trader’s product, or

\textsuperscript{502} Note: On codes of advertising practice, see Chapter (4), Section 4.8.5).
\textsuperscript{503} Broadcasting Act 2009, s 41(3)
\textsuperscript{504} ibid s 41(4)
\textsuperscript{505} Broadcasting Act 2009, s 42
\textsuperscript{506} Broadcasting Authority of Ireland, Codes and Standards <www.bai.ie/?page_id=1747> accessed 21 August 2015
\textsuperscript{507} Misuse of Drugs Act 1984, s 5(1)
\textsuperscript{508} Criminal Justice (Psychoactive Substances) Act 2010, s 5
\textsuperscript{509} ibid s 6
\textsuperscript{510} Taxi Regulation Act 2013, s 27(1)
\textsuperscript{511} Public Health (Tobacco) Act 2002, s 33
\textsuperscript{512} Consumer Protection Act 2007
\textsuperscript{513} ibid s 42(1)
(2) a competitor’s trade name, trade mark or some other distinguishing mark with
that of the trader, and

(b) to make a transactional decision that the average consumer would not make.”

Furthermore, Section 43(1) of the Act states that a commercial practice is misleading if ‘…it
includes the provision of false information in relation to any matter set out in subsection (3) and
that information would be likely to cause the average consumer to make a transactional decision
that the average consumer would not otherwise make.” Among the matters included as being
misleading under S.43(3) is ‘the main characteristics of a product’. The ‘benefits or fitness for
purpose’ of a product is included in S.43.(3) as one of the specified “main characteristics” of a
product. It is an offence for a trader to engage in a misleading commercial practice specified
under S.43 of the Act. In addition to the above-mentioned statutory prohibition on misleading
commercial practices involving advertisements, advertisers are also subject to the provisions of the
European Communities (Misleading and Comparative Communications) Regulations 2007.

Under the Regulations, ‘a trader shall not engage in a misleading marketing communication.”
The Regulations define a “marketing communication” as ‘any form of representation made by a trader
in connection with a trade, business or profession in order to promote the supply of a product’ and
a “representation” as, among other items, ‘any oral, written, visual, descriptive, or other
representation by a trader, including any commercial communication, marketing or
advertising…’ Regulations 3(2) and 4 of the Regulations specify the various circumstances
under which a marketing communication will be considered “misleading”.

Passing-off is a tort at common law. In explaining the three stage test which a claimant must prove
in order to establish a claim of passing-off, namely goodwill or reputation, misrepresentation and
consequential damage, Oliver J in the English House of Lords case of Reckitt & Coleman Products
Limited v Borden Inc. stated:

‘First, he must establish a goodwill or reputation attached to the goods or services which
he supplies in the mind of the purchasing public by association with the identifying “get-up”
(whether it consists simply of a brand name or a trade description, or the individual
features of labelling or packaging) under which his particular goods or services are offered
to the public, such that the get-up is recognised by the public as distinctive specifically of
the plaintiff’s goods or services.

514 ibid s 44(1)
515 ibid s 43(1)
516 ibid s 43(3)
517 ibid
518 ibid s 47(1)
519 European Communities (Misleading and Comparative Communications) Regulations 2007, SI 2007/774
520 ibid reg 3(1)
521 ibid reg 2(1)
522 ibid reg 3(2) and reg 4
523 Reckitt & Coleman Products Limited v Borden Inc [1990] RPC 341
Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff.

Thirdly, he must demonstrate that he suffers or, in a quia timet action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.\(^{524}\)

The \textit{Reckitt & Coleman} test was affirmed by MacMenamin J in the Irish Supreme Court case of \textit{McCambridge Limited v Joseph Brennan Bakeries}.\(^{525}\) Although claims for passing-off by misrepresentation through photographs have not featured frequently in cases in the Irish superior courts, they have in the lower courts. The following are examples of such cases determined by the courts in the United Kingdom and Ireland. In the English Court of Appeal case of \textit{Irvine v Talksport},\(^{526}\) the former Formula One racing driver Eddie Irvine claimed that a doctored photograph of him used on the front cover of the defendant's promotional literature without his consent, which would have led a viewer of the literature to conclude that he had endorsed \textit{Talksport}, when in fact he had not done so. Parker LJ accepted that, at the time of the alleged passing-off, the plaintiff had generated valuable goodwill and reputation in his name and his image, which he was entitled to protect from unauthorised misuse by third parties for commercial gain and which had been damaged by the defendant's actions. Parker LJ allowed the plaintiff's appeal and in giving reasons for his decision to increase the previously awarded damages of £2,000 for passing-off to £25,000, he stated:

‘In my judgment, the unchallenged evidence leads ineluctably to the conclusion that TSL would in all probability have had to pay at least £25,000 in order to enable it to do lawfully that which it did unlawfully, that is to say represent by means of the image appearing on the front of the leaflet that Mr. Irvine had endorsed Talk Radio.’\(^{527}\)

More recently, the English High Court case of \textit{Robyn Rihanna Fenty and Others v Arcadia Group Brands and Topshop}\(^{528}\) concerned a claim of passing-off resulting from the sale by Topshop of t-shirts, which featured a photograph of the pop star Rihanna without her approval. In \textit{Fenty}, Birss J implemented the above-mentioned, three stage \textit{Reckitt & Colman Products} test and went on to state:

\(^{524}\) ibid 406  
\(^{525}\) \textit{McCambridge Limited v Joseph Brennan Bakeries} [2012] IESC 46, para 19  
\(^{526}\) \textit{Irvine v Talksport} [2003] EWCA Civ 423  
\(^{527}\) ibid para 114  
\(^{528}\) \textit{Robyn Rihanna Fenty and Others v Arcadia Group Brands and Topshop} [2013] EWCH 2310 (ch)
‘Selling a garment with a recognisable image of a famous person is not, in and of itself, passing-off. To be passing-off, a false belief engendered in the mind of the potential purchaser must play a part in their decision to buy the product.’

Having considered all of the facts as presented in the case including the contents and styling of the actual image that was reproduced on the t-shirt and the previous joint marketing campaign between the claimant and Topshop to promote a shopping competition for a prize of a personal shopping appointment with Rihanna at Topshop’s flagship store in Oxford Street, London, Birss J held:

‘…Topshop’s sale of the Rihanna t-shirt without her approval was an act of passing-off.’

On appeal to the English Court of Appeal, Kitchin LJ, in dismissing the appeal, stated:

‘Topshop is in effect contending not for the absence of an image right, but rather for a positive right to market goods bearing an image even if the use of that image in particular circumstances to particular customers gives rise to a misrepresentation. To accede to that submission would be to sanction a trade which results in the deception of the public.’

The Irish Independent reported that the Irish High Court awarded entertainer Johnny McEvoy and his manager Darren Farrell €80,000 and €100,000 respectively for libel and the unauthorised use of McEvoy’s name and image on advertising materials published by a James McGarrity and his company JW Promotions to promote the “Best of Ireland” tour, which was scheduled to take place in June and July 2010. In January 2010, Farrell had advised McGarrity by email, that McEvoy would not be participating in the event. However, in March 2010 advertisements for the event were published, which included McEvoy’s name and image as one of the performers at the event without his consent.

The incorporation of altered photographs in advertisements may leave advertisers open to accusations of misrepresentation to, or the misleading of, viewers. The use of post-production software such as Adobe Photoshop to re-touch or alter a created image may be the basis of such a claim. Rather than initiating court proceedings, a claimant may opt to make a complaint to a relevant advertising standards authority – in Ireland the Advertising Standards Authority of Ireland and in the United Kingdom the Advertising Standards Authority. Sometimes complaints are lodged by business competitors. An example of such a complaint is that made by L’Oreal UK. Acting upon

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529 ibid para 36
530 ibid para 75
531 Robyn Rihanna Fenty and Others v Arcadia Group Brands and Topshop [2015] EWCA Civ 3, para 48
the complaint, the UK’s Advertising Standards Authority (ASA) investigated a print advertisement published by cosmetics firm Christian Dior.533 The advertisement for a Dior mascara product contained a photographic image of actress Natalie Portman. In the original image, Portman had not been wearing false eye lashes. Dior stated that Photoshop had been used in the post-production stage to digitally retouch her natural eye lashes in the image and specifically to ‘replace/fill a number of missing or damaged lashes; to increase the thickness and volume of a number of her natural lashes and, primarily, to stylistically lengthen and curve her lashes.’534 The ASA stated:

‘We noted that the ad had therefore used post-production retouching on an area (namely the eyelashes) which was directly relevant to the apparent performance of the mascara product being advertised.’535

It went on to state:

‘Despite this, we noted Dior’s view that the ad’s text did not contain any claims regarding the lengthening of lashes, we considered that the ad’s claims “Lash-multiplying effect volume and care mascara”, “... an unrivalled lash creator effect” and “delivers spectacular volume-multiplying effect, lash by lash”, particularly in conjunction with the image of Natalie Portman’s eyelashes, would be understood to mean that the mascara could lengthen the lashes, as well as separate them, increase their thickness and volume, and generally enhance lash appearance.’536

As the ASA had ‘...not seen evidence of the product’s effects on Natalie Portman’s lashes where there had not been any post-production retouching’,537 it determined, that the advertisement was likely to mislead as ‘we had not seen sufficient evidence to show that the post-production retouching on Natalie Portman’s lashes in the ad did not exaggerate the likely effects of the product...’.538 Dior was ordered by the ASA not to republish the advertisement in its current format.539

Occasionally, while incidences of misrepresentation through the publication of photographs may not result in a legal action, they may generate negative media coverage. For example, in 2013 The Irish Times reported on an instance of passing-off by the Irish political party Fine Gael during the 2013 Seanad Abolition Referendum. Fine Gael had used three photographs without authorisation as part of its Facebook campaign to promote a “Yes” vote in the Referendum. One of the photographs featured Swedish tennis star Bjorn Borg, who objected to having it used by Fine Gael.

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534 ibid
535 ibid
536 ibid
537 ibid
538 ibid
539 ibid
without his permission. The newspaper also reported, that a Fine Gael party spokeswoman had stated that permission had not been sought for the use of any of the three images. Such passing-off by Fine Gael (the main political party in the current Government) is not a shining example for others. In a similar vein, the Irish Independent reported that Dublin Labour Councillor and barrister Jane Horgan-Jones used a photograph showing rugby player Brian O’Driscoll and Dublin homeless campaigner Fr. Peter McVerry with her at a Freedom of the City event in Dublin in her election campaign literature during the May 2014 local elections without their prior permissions.

3.2.7.1) Photographic Models, Model Release Forms and Unauthorised Product Endorsement

Photographers and publishers of photographs, and in particular commercial photographs, owe a general duty of care to any models featured in such photographs to ensure that they are not portrayed in a negative, defamatory or a misrepresentative fashion or that they are not placed in any personal danger while participating in a photographic shoot or subsequently as a consequence of such participation. While it is not a legal requirement, it is prudent for a photographer to obtain signed model release forms prior to the commencement of the shoot, so as to protect both the photographer and the client from any possible future claims of for example misrepresentation or defamation, which may be made by the models. Model release forms should contain an explicit consent by the model being photographed and to the commercial usage of the created photograph.

Photographs of people are regarded as being “personal data” as defined by the Data Protection Acts 1988–2003 and as explained at Section 3.2.1.2 above. The Data Protection (Amendment) Act 2003 re-defined “personal data” as:

‘data 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’

With respect to the “processing of data” by photographers and publishers of photographers, S.2(a)(v) of the 2003 Act defines “processing of or in relation to information or data” as:

541 Melanie Finn, ‘BOD gets landed in a political scrum over election snap’ Irish Independent (Dublin, 13 May 2014) <www.independent.ie/irish-news/bod-gets-landed-in-a-political-scrum-over-election-snap-30269441.html> accessed 13 May 2014
543 Note: For an example of a misrepresentation through the publication of a stock photo library image in an advertisement without an appropriate model release, see: Peter Murtagh, ‘Couple denounce use of their image on NO campaign posters: Man and woman “completely” support same sex marriage’ The Irish Times (Dublin, 07 May 2015) <www.irishtimes.com/news/ireland/irish-news/couple-denounce-use-of-their-image-on-no-campaign-posters-1.2203515> accessed 10 June 2015
544 Data Protection (Amendment) Act 2003, s 2(a)(iv)
‘performing any operation or set of operations on the information or data, whether or not by automatic means, including – (a) obtaining, recording or keeping the information or data, (b) collecting, organising, storing, altering or adapting the information or data, (c) retrieving, consulting or using the information or data, (d) disclosing the information or data by transmitting, disseminating or otherwise making it available, or (e) aligning, combining, blocking, erasing or destroying the information or data’.546

As all created photographic images require some form of post-production work to be undertaken on them, varying from basic changes to brightness and contrast levels to extensive manipulation of an image, a model release form should also stipulate the model’s consent to such work being undertaken on the proviso that the model would not be negatively portrayed in the resulting image. If it is intended that the proposed photographs are to be used in relation to the promotion of a specific “sensitive” subject, which would come within the meaning of “sensitive personal data” as defined under S.2(a)(i) of the 2003 Act,547 then the model release form should contain details of such an intended use of the photographs and an explicit consent signed by the model approving such an intended use of the resulting photographic image. Also, when publishing such a photograph the published photograph should contain a caption stating that the person portrayed in the photograph is a model.

The Irish Independent reported the Irish Circuit Civil Court case of O’Connor and Willis v Moriarty Investments Ltd., which concerned image and performing rights. This was an appeal case against the award of €1,500 each to two actors – O’Connor and Willis by Clyne J in the District Court for the unauthorised use of photographs of them.547 The Court was told, that the two actors had been photographed while participating in a 2006 promotion for an hotel and that ‘an agreement between the hotel and the agency representing the actors had not included a release clause allowing the hotel to use photographs of the actors for future commercial purposes’.548 In 2011, a photograph of their 2006 act was used to promote Arthur’s Day at the Hotel. However, the Circuit Civil Court was advised that the matter had been settled.549

3.2.8) Contractual and Accreditation Restrictions
When photographers contract to undertake photography for clients, they are contractually bound by the terms of any agreed contracts. The extent to which a contract may or may not restrict the

545 ibid s 2(a)(v)
546 ibid s 2(a)(i)
548 ibid
549 ibid
photographer will largely depend upon the terms of the contract and particularly whether the photographer’s own contract or one drafted by the client is used. Normally, a commercial photographer would not include terms disadvantageous to him in either his own normal contract or in one drafted by him for a specific client’s proposed photographic work, unless he had to do so in order to obtain the work. However, if the contract is drafted by the client, it is quite likely that it will be on terms to his favour. In any event, if a contract includes terms dealing with, for example, exclusive usage rights to the created photographs or non-disclosure, the photographer is contract bound to honour such terms. In recent years, there has been an increase in the trend for clients’ contracts and tender request documentation to include terms under which the contracting photographer must transfer his copyright in any work created for the client under the contract to the client. Such terms restrict a photographer’s existing legal rights under copyright law including, among others, the right to reproduction, and moral rights (the paternity right, the integrity right and the right against false attribution). For example, if a photographer were to be contracted under such restrictive contract terms to either shoot fresh or to supply existing general urban landscape photographs as part of a package of photographs on a client’s property, he would not be able to use those images again for another client at a future date, when the urban landscape might have changed. So as not to be bound by such a restriction, it is quite possible that the photographer would have to forgo undertaking the proposed work under such restrictive terms.

Many photographer accreditation schemes are contractually based. The United Nations’ Human Rights Committee’s General Comment No. 34 of 2011 relates to Article 19 of the Covenant International Covenant on Civil and Political Rights, which concerns “freedom of expression”.

551 On accreditation schemes, the Comment states:

‘Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.’

In reality, the operation of accreditation schemes is often somewhat different to that aspired to in the above-mentioned General Comment. The organisers of events such as trade fairs, conferences, music concerts and sports events to which members of the public are admitted may either prohibit or restrict photography within the events’ venues. Such a prohibition or restriction will be stipulated as a term within the purchase contract for an admission ticket to the event. If an admission ticket is provided on a non-payment basis, it may state that admission to the venue is granted subject to one’s acceptance of such a prohibition or restriction on photography. Venues, event promoters, sports organisations and associations, performers and sports people may also

550 Note: See fn 633, Chapter 2 on Irish Department of Foreign Affairs’ photography tender request.
552 ibid para 44
wish to control and/or limit the admission of commercial and/or press photographers to their events and the reproduction of photographs taken at events. Accreditation of photographers is used to achieve such required control and limitation. Accreditation in respect of individual venues or events will differ. For example, in respect of a performance by an entertainer accreditation may be granted by the venue, the promoter, the performer’s management or by a combination of such groupings. The accreditation process may range from just simply presenting one’s credentials to signing a contract, which would detail what may and may not be photographed at the event, the manner in which any created photographs may or may not be published or used commercially, and whether or not any specified fees or royalties will be payable to the photographed performers or sports people by the photographer to either take and/or commercially use any created photographs.

Music performers often attempt to control media coverage of their personal images through the accreditation of commercial photographers. For example, the *Daily Mail* reported that the singer Beyoncé refused to grant accreditation to any commercial photographers for her Mrs. Carter Show World Tour. She made this decision following her Super Bowl show in February 2013, which resulted in unflattering and poor quality photographs of her being published. Instead of granting accreditation, she hired one photographer (Frank Micelotta) to cover her world tour and the *Daily Mail* also reported that only three to five pre-approved images from each of her shows would be released to the media for publication. However, the *Daily Mail* commented that such a ban could backfire and result in less quality media coverage for her and more poor quality images being taken by concert goers situated quite a distance away from the stage, which would then be “papped”.  

A more recent example is that of signer Taylor Swift. The *Irish Times* refused to take and publish photographs of her 2015 Dublin concerts due to the restrictive terms of her contract for photographers. Brenda Fitzsimons, Deputy Picture Editor of *The Irish Times* stated:

> ‘The terms and conditions of the contract are exceedingly restrictive and not just feasible for a working newspaper and website. The photographs may be used on a one-time only basis and by signing her contract we grant Swift perpetual, worldwide right to use the published photographs in any way she sees fit.’

Following similar refusals by other media organisations and freelance photographers to cover Taylor Swift’s concert tour, the USA-based National Press Photographers’ Association stated that it and a number of other media and photographer representative organisations had agreed a more

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553 See:  *Ashby Donald and Others v France* [2013] ECHR 28
Note: The colloquial term “papped”, means to take a photograph of a celebrity without prior permission and to subsequently sell it either through a photo agency or directly to a publisher for publication. Such photographs are normally, although not always, taken by “paparazzi” photographers.
acceptable photography contract with Taylor Swift.\textsuperscript{556} The accreditation of photographers may also be used at other types of events, such as sports events\textsuperscript{557} or at political and economic events, at which security may be a primary concern. Accreditation for such events would be granted by the event organiser in conjunction with An Garda Síochána. If overseas politicians are involved, other police forces may also be parties to the event’s accreditation process.

3.2.9) Restrictions resulting from the Rights of Copyright or Trade Mark Holders

As discussed in Chapter (2), copyright is an intellectual property right that protects an author’s creativity and skill employed in his created works. It also protects an author’s right to earn a living, which is one of the unspecified personal rights in Article 40.3.1\textsuperscript{º} of the Constitution. The Copyright and Related Rights Act 2000, as amended (hereinafter CRRA), as amended, grants the holders of the copyright in photographs a range of legal rights to their works. Aside from the authors of artistic works, which includes photographers, the Act also grants exclusive rights to the authors of other types of works. For example, under Sections 203 and 204 of the Act, performers are granted, among other rights, a range of exclusive rights relating to the recording and reproduction of either the whole or a “substantial” part of their qualifying performances.\textsuperscript{558} On the basis of the definition of the word “recording” in S.204 of the Act and of the words “photograph”, “film” and “fixation” in S.2 of the Act, while the unauthorised filming of a performance would be in breach of a performer’s rights under the Act, it is questionable whether the taking of still photographs of a performance would infringe these rights of a performer. Furthermore, the word “substantial” as used in Sections 203 and 204 of the Act, is not defined. Therefore, it is also questionable whether

\begin{itemize}
\item \textsuperscript{557} For an example of accreditation schemes for media access to football matches, see: Media Accreditation for English Premier League and Football League Matches: Football DataCo, Media Accreditation \hfill \hyperlink{http://www.football-dataco.com/media.html}{http://www.football-dataco.com/media.html} accessed 09 September 2015
\item \textsuperscript{558} Copyright and Related Rights Act 2000, s 203 and s 204
\item Note (1): The European Union (Terms of Protection of Copyright and Certain Related Rights) (Directive 2011/77/EU) Regulations 2013, SI 2013/411 amended the Act to extend the term of protection of performers’ rights from 50 to 70 years. The Regulations also introduced a number of provisions in relation to performers’ remunerations pertaining to sound recordings.
\item Note (2): The WIPO Beijing Treaty on Audiovisual Performances 2012, of which Ireland is a signatory, is of benefit to performers. It enhances performers rights by ensuring that the level of protection afforded to them in respect of their audiovisual performances is recognised at an international level and that they are fairly remunerated when audiovisual works containing their performances are exploited either online or offline in third countries. Article 2 of the Treaty defines an “audiovisual fixation” as ‘the embodiment of moving images, whether or not accompanied by sound or by representations thereof, from which they can be perceived, reproduced or communicated through a device’. \hfill \hyperlink{http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf}{http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf} accessed 18 February 2015
\item Section 202(4) of the Copyright and Related Rights Act 2000, as amended, defines a “recording” in relation to a performance as ‘any fixation (a) made directly or indirectly from the live performance, (b) made from a broadcast of, or cable programme including, the performance, or (c) made directly or indirectly from another recording of the performance.’
\item Section 2 of the Act contains the following definitions:
\begin{itemize}
\item "Photograph" means a recording of light, or any other radiation on any medium on which an image is produced, or from which an image may by any means be produced and which is not part of a film.
\item "Film" means a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device.
\item "Fixation" means ‘the embodiment of sounds or images or any combination of sounds or images, or the representation thereof, from which they can be perceived, reproduced or communicated through a device.’
\end{itemize}
the taking of a “single” still image of a performance would amount to a recording of a “substantial part of a qualifying performance”. However, it would be prudent for photographers and publishers of photographs proposing to either photograph performers during a performance and/or to publish such photographs for commercial purposes to seek the express, prior approval of any and all performers participating in a live performance prior to photographing it. In addition, the CRRA provides a range of “fair dealing” exemptions, within limitations, to a copyright holder’s rights. These exemptions, as previously discussed in Chapter (2) at Section 2.2.1.13, relate to uses of copyrighted works for research or private study; for purposes of criticism or review, or reporting of current events; incidental inclusion of a copyrighted material; educational, library and archive activities, and public administration. As discussed in Chapter (2), these exemptions are a restriction on copyright holders’ rights to fully earn an economic return on all reproductions of their published works.

The Trade Marks Act 1996, in Ireland, as amended, may also restrict the activities of photographers and publishers. A photographer may be prevented from publishing a photograph featuring a product that shows a legally-protected trademark, as to do so without authorisation may constitute an infringement of the trademark holder’s rights. A trade mark is defined by the Act as ‘…any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings’. Section 6(2) of the Act states: ‘…a trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or of their packaging.’ Section 14 of the Act covers the infringement of a trade mark and it specifies a range of activities, which if undertaken, would constitute an infringement of the rights of the holder of a registered trade mark. If a photographer is in doubt as to whether a product, which he proposes to photograph and to use the photograph for commercial purposes, is trade mark protected, it would be advisable for him to ask the product’s owner or producer prior to taking the photograph. Also, it is prudent to obtain a signed product release in respect of the inclusion of such products in the image and particularly if the design to such products is copyright protected as an artistic work or the product is trade mark protected.

to create a series of armchairs and sofas that have become iconic items of the 20th Century…The iconic objects are associated with the ideas of quality, comfort and luxury’. Stock photo agency Getty Images sold photographs featuring this furniture without the permission of the intellectual property rights holders of the furniture. The images were subsequently used in advertisements to promote other products. The holders of the intellectual property rights to the furniture objected to such a use of the furniture in the advertisements. The French Court of Appeal held that the furniture designers’ ‘…intellectual property should be protected, unless the objects were just accessories in the images sold’. Therefore, the matter of how incidental a trademarked product is featured in a published photograph may be a significant factor, when the courts are making determinations of this nature.

3.2.10) Restrictions on photographers resulting from the Right to Safety, Health and Welfare of Employees and Photo Shoot Participants

Through the duty of care owed by a photographer to his employees and his photo shoot participants in respect of their rights to safety, health and welfare at work, the activities of a photographer may be restricted. In Ireland, in respect of employees, under S.8(1) of the Safety, Health and Welfare at Work Act 2005, as amended, ‘Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.’ Section 2(1) of the Act defines an “employer” and states: “employer”, in relation to an employee – (a) means the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment, (b) includes a person (other than an employee of that person) under whose control and direction an employee works, and (c) includes where appropriate, the successor of the employer or an associated employer of the employer’. An “employee” is defined by S.2(1) of the Act as ‘a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and includes a fixed-term employee and a temporary employee and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer’. This duty of care owed by employers to employees also applies to fixed-term and temporary employees under S.8(3) of the Act. A “temporary employee” is defined by S.2(1) of the Act as ‘an employee who is assigned by a temporary employment business to work for and under the control of another undertaking availing of the employee’s services’. A “temporary
employment business” is defined by S.2(1) of the Act as ‘a business, including an employment agency within the meaning of the Employment Agency Act 1971, which provides temporary employees to other undertakings availing of the services of those employees’. Some model agencies operate under an employment agency licence granted by the Department of Jobs, Enterprise and Innovation under the Employment Agency Act 1971. For example, Dublin-based Assets Model Agency is one such agency. Any participants employed by a photographer on a photo shoot, including those contracted through a model agency licensed as an employment agency, would also be owed a duty of care by photographers in respect of their health, safety and welfare while on the photo shoot.

Depending upon the type of work undertaken by a photographer and whether or not he operates from a studio premises, he may be subject to the requirements of a range of other primary and secondary health and safety legislation, which is administered and enforced by the Health and Safety Authority. For example, a photographer may be subject to the Factories Act 1955, as amended, if any of the activities undertaken in his studio premises fall within the interpretation of a “factory” under S.3 of that Act. He may also be subject to the requirements of the Safety in Industry Act 1980, as amended, which provides for the safety, health and welfare of people at work.

Photographers are frequently requested by secondary schools to grant work experience to their pupils. While such work experience could be undertaken on the basis of the pupil becoming a “temporary employee”, more often than not such is not the case. In any event, the photographer would, in effect, be acting in loco parentis and would owe a person a general duty of care in respect of their safety, health and welfare while undertaking the work experience programme. Furthermore, insurance cover would also be an issue. The Protection of Young Persons (Employment) Act 1996, as amended, would be applicable to photographers, if they were to employ such individuals for the period of the work experience programme. Section 1(1) of the Act defines a “Young Person” as ‘a person who has reached 16 years of age or the school-leaving age (whichever is higher) but is less than 18 years of age’. Section 3 of the Act deals with the employment of children under the age of 16 years and S.3(6) of the Act makes specific mention of the employment of children over 14 years of age, who are full-time, secondary school pupils undertaking a work experience programme and the maximum number of hours of such

574 ibid
575 Department of Jobs, Enterprise and Innovation, Employment Agency Licensing <www.djei.ie/employment/agency> accessed 21 August 2013
576 Employment Agency Act 1971
579 Factories Act 1955, s 3
580 Safety in Industry Act 1980
581 Protection of Young Persons (Employment) Act 1996
582 ibid s 1(1)
583 ibid s 3(1)
employment. Such provisions could, in reality, restrict the operational activities of a photographer, for example his ability to undertake a long photo shoot with the presence of young people covered by the Act.

3.3) Brief Conclusions
None of the rights pertaining to the taking or publishing of photographs is absolute. Rather, they may be restricted in support of other interests, in particular the “private” rights of individuals. Chapter (3) examined the range of private rights of individuals that either may come into contention with the legal rights of photographers and publishers of photographs or restrict the latter’s rights, namely the individual’s right to privacy; personal image rights and publicity rights; rights against harassment, stalking, voyeurism and revenge porn; the right to a good name; the right to be forgotten; property rights; the rights of copyright and trademark holders and the safety, health and welfare rights of people working with photographers. In general, these private rights do not place onerous restrictions on photographers and photograph publishers, who act responsibly. However, some of these private rights, particularly the right to privacy, the right against harassment and the right to be forgotten, may be, and are being, invoked by individuals in an attempt to prevent personal information from becoming public knowledge. Such practice may result in a restriction on the rights of press photographers to report matters of public interest. Also, the right to privacy and the right against being harassed have been invoked by individuals, who want to create and manage a personal image right and a right to publicity, rather than actually wishing to protect their privacy. The courts place a significant weight on the freedom of expression rights of photographers and photograph publishers. Chapter (3) examined a number of tests that have been implemented by the courts when they are balancing these rights with any competing private rights of individuals. The Chapter raises a number of important issues, which could benefit from the enactment of legislation and Chapter (5) discusses a number of recommendations in this regard.
Chapter Four

Legal Restrictions on the Taking and Publishing of Photographs in support of Public Interests, through Statutory Provisions, on Public Morality Grounds and under Ethical Codes

4.1) Introduction

The restriction of the freedom of expression rights of photographers and photograph publishers as a consequence of the protection and enforcement of the private rights of individuals was discussed in Chapter (3). Photographers’ and photograph publishers’ rights may also be either restricted or prohibited in support of public interests, including the protection of public order, the security and defence of the State and the administration of justice. They may also be restricted as a consequence of miscellaneous statutory provisions or on public morality grounds. As a consequence of ethical codes of behaviour, restrictions may be imposed on certain classes of photographers and photograph publishers. The effect of the above-mentioned classes of restrictions may range from a limitation to a total prohibition, in certain circumstances, on the exercise of photographers and photograph publishers rights. Chapter (4) will examine these issues.

4.2) Restrictions on Photographers and Publishers on the basis of Public Order, Security and Defence of the State and Crime Prevention and Investigation

As mentioned in Chapter (1) at Section 1.3.5.1, the right of freedom of expression guaranteed by Article 40.6.1º(i) of the Constitution is not an absolute right and it is subject to public order and morality. Article 40.6.1º(i) states:

‘The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.’

Also, as mentioned in Chapter (1) at Section 1.3.2, the right of freedom of expression guaranteed under Article 10(1) of the ECHR is not an absolute right and, in accordance with Article 10(2), it may be subject to:

‘…such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection

1 Constitution of Ireland (Art. 40.6.1º) (on Personal Rights)
2 ibid
of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Statutes dealing with public order, the security and defence of the State and crime prevention and investigation contain provisions which may be used to either restrict or prohibit photographers from taking, possessing and/or publishing photographs. This section of the chapter will discuss such statutory restrictions and how they either do or could impinge on the rights of photographers and publishers of photographs, as set-out in Chapters (1) and (2). It will also discuss the statutory provisions that could be used by the police against journalists, including press photographers, in order to acquire possession of their journalistic materials.

4.2.1) Public Order
Members of An Garda Síochána have a range of powers under a number of statutes, which could be used against photographers in public places in order to prevent them from taking photographs in such places. A number of provisions under the Criminal Justice (Public Order) Act 1994, as amended, are of particular relevance to photographers. Section 3 of the Act defines a “public place” as including:

’a) any highway, (b) any outdoor area to which at the material time members of the public have or are permitted to have access, whether as of right or as a trespasser or otherwise, and which is used for public recreational purposes, (c) any cemetery or churchyard, (d) any premises or other place to which at the material time members of the public have or are permitted to have access, whether as of right or by express or implied permission, or whether on payment or otherwise, and (e) any train, vessel or vehicle used for the carriage of persons for reward.’

Under Section 6 of the Act:

’It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.’

Either “intention” or “recklessness” must be present in order to constitute an offence of breach of the peace and that would have to be proven in a court before someone could be convicted of a S.6 offence. The fault standard is high, intention and recklessness requiring a higher standard of proof than negligence, for example. Were a photographer to be in the process of taking photographs in a public place, for example on a street or a beach, and if a third party were to object, a potential breach of the peace could arise and become an issue for the photographer. Whether or not it was

4 Criminal Justice (Public Order) Act 1994
5 ibid s 6(1)
the action of the photographer or of the objecting third party that would be the cause of provoking a possible breach of the peace would depend upon the specific circumstances of the case and a court’s interpretation of the evidence presented relating to that event. Coverage of a lawful, peaceful protest or demonstrations that turned violent could be another example. The Act does not define what actually constitutes a breach of the peace. However, in the Irish Court of Criminal Appeal case of _The Attorney General v Cunningham_, O’Byrne J held:

‘In order to constitute a breach of the peace an act must be such as to cause reasonable alarm and apprehension to members of the public.’

A person’s dislike of or objection to either being photographed or seeing a photograph being taken in a public place, such as on a street, neither makes that activity illegal nor does it equate to “reasonable alarm and apprehension to members of the public”. On the photographing of people in public places, Lord Hope in the English House of Lords case of _Campbell v MGN Ltd._ stated:

‘The taking of photographs in a public street must, as Randerson J said in _Hosking v Running_ [2003] 3 NZLR 385, 415, para 138, “be taken to be one of the ordinary incidents of living in a free community”.’

Besides, the public interest in journalists and photographers covering public events on behalf of the public would be an important consideration. Were a member of An Garda Síochána to become involved in such a situation, it is quite possible he/she may attempt to encourage the photographer to desist from taking the photographs, which the photographer would have a legal right to take, in order to diffuse rather than to exacerbate the situation. From the photographer’s perspective, the importance of taking the photograph would have to be weighed against the possibility of exacerbating the on-street scene with the third party objector. Section 8(1) of the Act gives a member of An Garda Síochána the power to instruct a person to move away from a particular public

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6 _The Attorney General v Cunningham_ [1932] IR 28
7 ibid para 32
8 _Campbell v MGN Ltd._ [2004] 2 AC 457
9 ibid para 122
Note (4): Notes (1)–(3) above concerned a number of press photographers who were waiting in vicinity of the exterior of a polling station for Thomas “Slab” Murphy to emerge from it. Murphy was due to appear later that day in the Special Criminal Court for sentencing in relation to revenue offences. The photographers were reportedly ordered to leave the area by a garda, who claimed that they were interfering with the voting process. Section 147(1) of the Electoral Act 1992, as amended, states: ‘A person shall not interfere with or obstruct or impede an elector going to or coming from or in the vicinity of or in a polling station.’ In any court case concerning an incident involving a photographer at or near a polling station, the actual physical distance between the photographer and a person which the photographer might be alleged to have “interfered with, obstructed or impeded” would have to be taken into account by the court when it would be determining whether the photographer had actually committed an offence under S.147 of the Act.
place and under S.8(2) one’s failure to follow such an instruction is an offence. Section 8(1) of the Act states:

‘Where a member of the Garda Síochána finds a person in a public place and suspects, with reasonable cause, that such person (a) is or has been acting in a manner contrary to the provisions of section 4, 5, 6, 7 or 9, or (b) without lawful authority or reasonable excuse, is acting in a manner which consists of loitering in a public place in circumstances, which may include the company of other persons, that give rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace, the member may direct the person so suspected to do either or both of the following, that is to say: (i) desist from acting in such a manner, and (ii) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.’

It would be for the prosecution to prove that a photographer standing on a street was actually “loitering” – standing around with no apparent legal purpose and thus acting illegally. The 2014 European Court of Human Rights case of Pentikainen v Finland is of relevance to the above-mentioned powers of members of An Garda Síochána under S.8 of the Act. In Pentikainen, the applicant was a photographer and journalist for a weekly magazine and he had been photographing a demonstration, which turned into a riot. A separate area had been reserved for media representatives from which they could photograph the demonstration. The police had sealed-off the demonstration and ordered the area to be cleared. A number of people, including the applicant, remained in the sealed-off demonstration area until the demonstration ended and he was then arrested and detained by the police for failing to obey a police instruction to leave the demonstration area. The applicant was found guilty by Helsinki District Court of disobeying the police order. However, no penalty was imposed on him. The applicant had not informed the arresting officer that he was a journalist and the arresting officer was not aware that he was a journalist prior to the applicant’s arrest. The applicant appealed his conviction to the Helsinki Court of Appeal on the grounds that his arrest contravened his Article 10 rights of freedom of expression and that the District Court had not ‘…reasoned why his arrest and conviction were “necessary in a democratic society” and had thereby failed to justify the interference.’ The Court of Appeal dismissed his appeal without giving any reason. The Supreme Court refused the applicant leave to appeal. The ECtHR held that the applicant:

‘…was not as such prevented from exercising his freedom of expression and reporting the event. Moreover, he was offered the alternative to follow the demonstration from the secured area reserved to the press. His arrest and conviction only related to disobeying the police as he failed to obey their orders. As the Government pointed out, the fact that the

11 Criminal Justice (Public Order) Act 1994, s 8(1)
12 Pentikainen v Finland [2014] ECHR 106
13 ibid paras 8–12
14 ibid para 14
15 ibid para 15
16 ibid para 16
17 ibid para 17
applicant was a journalist did not give him a greater right to stay at the scene than the other people.”

The Court also held that:

‘…any interference with the applicant’s exercise of his journalistic freedom was only of limited extent, given the opportunities made available to him to cover the event adequately. The conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot.’

As to the necessity of the restriction placed upon the applicant, the ECtHR held:

‘…the demonstration was a matter of legitimate public interest, having regard in particular to its nature. From the point of view of the general public’s right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the event to the public. This was also acknowledged by the authorities and therefore a separate, secure area had been reserved for the press. The event attracted a lot of media attention and was closely followed.’

Furthermore, the ECtHR stated that the Helsinki District Court had ‘balanced the applicant’s freedom of expression against the State’s interests and found that there had been a pressing social need to take the impugned measures against the applicant.’ The Court noted that the District Court had not imposed a penalty on the applicant as:

‘…his act was considered excusable. He was considered, as a photographer and journalist, to be confronted with contradictory expectations, arising from obligations imposed on the one hand by the police and on the other hand by his employer. Moreover, the Court notes that, according to the domestic law, no entry of the conviction was made on the applicant’s criminal record as no penalty was imposed…’

In finding that there had not been a violation of the applicant’s Article 10 rights, the Court held that the reasons relied on by domestic courts were ‘relevant and sufficient for the purposes of Article 10 of the Convention.’ Furthermore, it held that the domestic courts struck a fair balance between the competing interests and that ‘they were entitled to decide that the interference complained of was “necessary in a democratic society”.’

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18 ibid para 47
19 ibid para 49
20 ibid para 51
21 ibid para 53
22 ibid para 54
23 ibid para 55
24 ibid para 56
Returning to Irish law, which provides for certain other related offences, Section 9 of the Criminal Justice (Public Order) Act 1994 deals with the offence of “wilful obstruction”:

‘Any person who, without lawful authority or reasonable excuse, wilfully prevents or interrupts the free passage of any person or vehicle in any public place shall be liable on summary conviction to a fine not exceeding £200 [€254].’

Depending upon the particular location and the circumstances in question, a member of An Garda Síochána could, under S.9 of the Act, instruct a photographer taking photographs on a street to desist from doing so and to leave the public place in question. The extent to which free passage may or may not be obstructed by a photographer would depend upon the ground area dimensions at any specific location. Quinn quite correctly notes that ‘…it can be difficult to pin down exactly what will amount to obstruction; simply standing on the pavement to take a photograph would usually not be, whereas a crowd of photographers blocking the road outside someone’s house probably would be, but there are clearly many situations in between these two extremes.’

Section 19 of the Act deals with “obstruction of a peace officer” and for the purposes of S.19, a “peace officer” is defined as “a member of the Garda Síochána, a prison officer or a member of the Defence Forces”. Under Section 19(3) of the Act:

‘Any person who resists or wilfully obstructs a peace officer acting in the execution of his duty or a person assisting a peace officer in the execution of his duty, knowing that he is or being reckless as to whether he is, a peace officer acting in the execution of his duty, shall be guilty of an offence.’

The Act does not define what would actually constitute an “obstruction” of a peace officer. If a photographer happened to be quietly photographing a peace officer exercising his duties from a distance of say 75 feet, such action by the photographer, if seen by the peace officer, could possibly be to the latter’s displeasure or even regarded by the latter as some type of a distraction. Peace officers performing their duties in public places are surrounded by all kinds of distractions on a daily basis. A distraction is not an obstruction. For such action by the photographer to constitute a “wilful” obstruction, the prosecution would have to prove that the photographer “intended” to “obstruct” the peace officer exercising his duties by taking the photographs. It is unlikely that a court could reasonably hold that the photographer in the above scenario was guilty of an offence under Section 19 of the Act. Also, under S.24 of the Act, where a member of An Garda Síochána finds a person committing an offence under a relevant provision of the Act, he may arrest such a person without a warrant. The Act’s definition of a “relevant provision” includes Sections 6, 8 and 19 of the Act, as

25 Criminal Justice (Public Order) Act 1994, s 9
Note: Under S.8(3) of the Fines Act 2010, this maximum fine upon summary conviction would now be a Class “E” fine of not greater than €346.
27 Criminal Justice (Public Order) Act 1994, s 19(6)
28 ibid s 19(3)
29 ibid s 24(1)
mentioned above.30 While the Criminal Justice (Public Order) Act 1994, as amended, is not frequently used against photographers, it could be. Two relatively recent S.8 public order cases in the Irish District Court dealt with, among other more central issues, the right to take photographs in public places and particularly of members of An Garda Síochána while they are making arrests in public places. In both cases, the District Judges were reported to have held that the defendants had been acting legally while taking such photographs.31

4.2.2) Security and Defence of the State

With regard to the security and defence of the State, a number of statutes, and in particular, the Official Secrets Act 1963, as amended; the Defence Act 1954, as amended, and the Offences Against the State Act 1939, as amended, contain provisions of relevance to photographers and publishers of photographs.

Of particular relevance to people working in the media, Section 4(3) of the Official Secrets Act 1963 states:

‘A person shall not obtain official information where he is aware or has reasonable grounds for believing that the communication of such information to him would be a contravention of subsection (1).’32

The Act defines an ‘official document’ as ‘any secret official code word or password, and any sketch, plan, model, article, note, document or information which is secret or confidential or is expressed to be either and which is or has been in the possession, custody or control of a holder of a public office, or to which he has or had access, by virtue of his office, and includes information recorded by film or magnetic tape or by any other recording medium’.33 Also, the Act defines a ‘sketch’ as including ‘a photograph or other mode of representing any place or thing’.34 Under the Act, it is an offence for a person to ‘retain any official document or anything which constitutes or contains official information when he has no right to retain it or when not required by his duty as the holder of a public office to retain it.’35 The Act also deals with the prevention of the communication of information, which may prejudice the safety or the preservation of the State. Section 9(1) states:

‘A person shall not, in any manner prejudicial to the safety or preservation of the State
(a) obtain, record, communicate to any other person or publish, or
(b) have in his possession or under his control any document containing, or other record whatsoever of, information relating to (i) the number, description, armament, equipment, disposition, movement or condition of any of the Defence Forces or of any of the vessels or aircraft belonging to the State, (ii) any operations or projected

30 ibid s 24 (5)
31 See Chapter (1), In 190–192
32 Official Secrets Act 1963, s 4(3)
Note: Section 4(1) of the Act concerns the ‘Disclosure of Official Information’.
33 ibid s 2(1)
34 ibid
35 ibid s 6(1)
operations of any of the Defence Forces or of the Garda Síochána or of any of the
vessels or aircraft belonging to the State, (iii) any measures for the defence or
fortification of any place on behalf of the State, (iv) munitions of war, or (v) any other
matter whatsoever information as to which would or might be prejudicial to the safety or
preservation of the State.\(^{36}\)

The inclusion of the words “any other matter whatsoever” in item (v) above is open to being infinitely
wide and all-embracing in its interpretation. So as to prevent a possible breach of the Act,
photographers and publishers should seek to obtain the appropriate prior authorisation, if they are
planning to photograph and/or publish photographs of any structure or any item of the type specified
under S.9(1) of the Act. However, it is quite possible that such permission would be refused. Court
cases concerning breaches of the Official Secrets Act are rare.\(^{37}\) In view of the fact that some of the
prohibited materials specified under Section 9(1) above, for example the number, description and
armament of the Irish Navy’s vessels, is published on its official website,\(^{38}\) it would be appropriate
that this Section of the Act would be repealed. The Freedom of Information Acts 1997–2014\(^{39}\)
considerably changed the culture of secrecy in Government and government agencies. The Acts
enable members of the public to access information in the possession of public bodies and other
specified bodies in keeping with the public interest. The 2014 Act, among other issues, amended the
Official Secrets Act 1963.\(^{40}\) The Act makes provision for the possible refusal to disclose certain
records\(^{41}\) likely to prejudice or impair law enforcement and public safety,\(^ {42}\) or that could reasonably
be expected to affect adversely security, defence and international relations.\(^ {43}\) Journalists are one of
the primary groups that use and benefit from the provisions of freedom of information legislation.
The Act does not have a restrictive application to photographers wishing to “take” photographs.
However, the above-mentioned grounds for refusing to disclose records, which may include
photographs, could be regarded as a restriction on the publication of existing photographs, held by
government agencies, that may be in the public interest. The Freedom of Information Act is

\(^{36}\) ibid s 9(1)

Note (1): The Official Secrets Act 1963 has been amended by a number of statutes including the Freedom of Information Act 2014, as discussed
further below.

\(^{37}\) Note: For an historical example of a prosecution under the Act, see:
— —, ‘Independent and journalist found guilty of breaching Official Secrets Act’ The Irish Times (Dublin, 16 December 1995)
accessed 20 June 2013


\(^{39}\) Note: The Freedom of Information Act 2014 entirely repealed the Freedom of Information Act 1997 and the Freedom of Information (Amendment)

\(^{40}\) Section 51 of the 2014 Act states:
'(1) A person who is, or reasonably believes that he or she is, authorised by this Act to communicate official information to another
person shall be deemed for the purposes of section 4 of the Official Secrets Act 1963 to be duly authorised to communicate this
information.

(2) In a prosecution for an offence under section 5 or 9 of that Act, it shall be a defence to prove that the act to which the charge of the
offence relates is authorised, or is reasonably believed by the person charged to be authorised, by this Act.’

Note (2): Section 5 of the Official Secrets Act 1963 concerns the disclosure of confidential information in official contracts.

\(^{41}\) Section 2 of the Freedom of Information Act 2014 contains a broad definition of the term “records” which includes “visual images”.

\(^{42}\) Freedom of Information Act 2014, s 32

\(^{43}\) ibid s 33
premised on the public’s right of access to official information (“records”) and there is a strong presumption that information will be released in the public interest.

Under the Defence Act 1954, as amended, it is an offence to make or attempt to make photographs, without lawful authority, of ‘any fort, battery, field work, fortification or any military work of defence, aerodrome, barracks, post, magazine, munition factory, stores depot or any other Government property occupied or partly occupied by the Defence Forces…’ 44 Any unauthorised photographs taken of such locations and any photographic equipment found in the possession of an offender are liable to be forfeited. 45 Thus, if a photographer proposes to create a photograph of any of the above-mentioned types of locations legally, prior authorisation would be required. It is also an offence if one approaches or enters, without authority, any of these types of locations with photographic equipment in one’s possession with the intention of committing an offence under S.268(1) and any photographic equipment found in one’s possession will be forfeited and may be disposed of. 46 Also, it is an offence for one to trespass on the above types of locations or on a military vessel. 47 Also, the State Group of Buildings on Dublin’s Merrion Street, which include, among others, Government Buildings, Leinster House, the National Arts and Antiquities Museum, the Natural Museum and the National Library, are occupied on a 24 hours basis for security and fire picket purposes by a permanent detachment of military personnel (Military Police). 48 From a photographer’s perspective, these buildings and also Portlaoise Prison at which the Defence Forces have a permanent security presence would come within the meaning of the above-mentioned S.268(1) of the Act.

Under the Offences Against the State Act 1939, as amended, it is not lawful ‘…for any person to have any treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control.’ 49

Section 2 of the Act defines a “document” as:

’a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet leaflet, circular, or advertisement’. 50

Section 5 of the Offences Against the State (Amendment) Act 1972 amended the Section 2 definition of a “document” through its inclusion, among other things, of all types of visual images and

44 Defence Act 1954, s 268(1)
45 ibid
46 ibid s 268(2)
47 ibid s 268(3)
49 Department of Defence and Defence Forces, Annual Report 2013 (Newbridge, 2014), 46
50 Offences Against the State Act 1939, s 12(1)
51 ibid s 2

Note: Section 2 also defines what individually constitute “treasonable”, “seditions” and “incriminating” documents.
specifically “photographs”. Furthermore, Section 8(1) of the Offences Against the State Act (Amendment) Act 1998, which deals with the unlawful collection of information, states:

'It shall be an offence for a person to collect, record or possess information which is of such a nature that it is likely to be useful in the commission by members of any unlawful organisation of serious offences generally or any particular kind of serious offence.’

However, Section 8(2) of the 1998 Act does offer a defence to such a charge and states:

'It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the information in question was not being collected or recorded by him or her, or in his or her possession, for the purpose of its being used in such commission of any serious offence or offences.’

The Offences Against the State Acts have rarely been invoked in recent times against journalists and, in particular, photographers. However, their provisions hang over them as a threat.

4.2.3) Unlawful Disclosure of Confidential Information by An Garda Síochána, and Retention of, and Access to, Communications Data

Journalists obtain information from a variety of sources, including members of An Garda Síochána. The Garda Síochána Act 2005, as amended, imposes a legal obligation on current and former members and on civilian employees of the force not to unlawfully disclose confidential information. Section 62(1) of the Act states:

'A person who is or was a member of the Garda Síochána or of its civilian staff or who is or was engaged under contract or other arrangement to work with or for the Garda Síochána shall not disclose, in or outside the State, any information obtained in the course of carrying out duties of that person’s office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect.’

Section 62(2) of the Act contains detailed specifics of what types of disclosures will or will not have a “harmful effect”. Also Section 62(4) of the Act contains a number of specified exceptions to the

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52 Offences Against the State Act (Amendment) Act 1972, s 5
53 Offences Against the State Act (Amendment) Act 1998, s8(1)
54 ibid s 8(2)
55 Note: In Nagla v Latvia [2013] ECHR 688, while discussing the concepts of a “journalistic source” and the “information identifying a source” the Court, at paras 32 and 81, referred to Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information. In defining the terms “journalist”, “information” and “sources”, Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers states that a “journalist” means: ‘any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication’. “Information” means ‘any statement of fact, opinion or idea in the form of text, sound and/or picture’. “Source” means: ‘any person who provides information to a journalist’. Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Strasbourg, 08 March 2000), Appendix.

56 Garda Síochána Act 2005, s 62(1)
57 ibid s 62(2)
above-mentioned S.61(1) prohibition, including for example disclosures made to the Director of Public Prosecutions or in a court. Journalists and photographers working on the production of news stories for the print media, television and radio stations rely on receiving information from a variety of sources including members of An Garda Síochána. It is without doubt that sources of information frequently disclose information to journalists to suit their own agendas. Some investigative journalists look upon S.62 of the Act as a gagging of their Garda Síochána sources of information. They also believe that sections within An Garda Síochána are more interested in identifying journalists’ sources of information within the force than in taking action against criminal gangs who have made personal threats to journalists’ lives following their publication of articles on such criminals. The 2005 Act, as amended, established the Garda Síochána Ombudsman Commission. It also provides that designated officers of the Commission who are investigating complaints against members of An Garda Síochána have the same ‘…powers, immunities and privileges…as a member of the Garda Síochána.’ The Ombudsman may ‘…if it appears desirable in the public interest to do so and without receiving a complaint, investigate any matter that appears to indicate that a member of the Garda Síochána may have – (a) committed an offence, or (b) behaved in a manner that would justify disciplinary proceedings.’ Also, under the S.102 of the Act, as amended by S.6 of the Garda Síochána Amendment Act 2015, it may do so even where ‘…(a) the identity of the member of the Garda Síochána concerned may not be known when the investigation is undertaken, or (b) the offence or behaviour concerned may also involve or have involved a person who is not a member of the Garda Síochána.’

Also of relevance to journalists in respect of the protection of their sources is the Communications (Retention of Data) Act 2011, as amended. Among other matters, this Act gives effect to the provisions of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and for the retention and access to certain data for the purposes of the prevention of serious offences, the safeguarding of the security of the State and the saving of human life.

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58 ibid s 62(4)
60 Garda Síochána Act 2005, s 64
61 ibid s 98(1)
62 ibid s 102(4)
63 ibid s 102(5A)
65 Communications (Retention of Data) Act 2011
Under Section 6(1) of the Act:

'A member of the Garda Síochána not below the rank of chief superintendent may request a service provider to disclose to that member data retained by the service provider in accordance with section 3 where the member is satisfied that the data are required for –

(a) the prevention, detection, investigation or prosecution of a serious offence,
(b) the safeguarding of the security of the State,
(c) the saving of human life.'

A “service provider” is defined by the Act as ‘…a person who is engaged in the provision of a publicly available electronic communications service or a public communications network by means of fixed line or mobile telephones or the Internet’. A service provider may not refuse to comply with an authorised request for communications data. Schedule 2 of the Act specifies the type of data, namely traffic and location data, to be retained by service providers in respect of fixed network and mobile telephony data and internet access, internet e-mail and internet telephony data. However, the Act does not apply to the content of communications made by users of such communications networks. The Irish Times reported that the text messages and call details of a number of journalists were accessed by An Garda Síochána while it investigated a possible unlawful disclosure of confidential information by a member of An Garda Síochána to members of the media. However, in that instance such data had been obtained by An Garda Síochána from the mobile phone of the Garda under investigation and not through its acquisition of the journalists’ communications data.

The investigatory powers under the Communications (Retention of Data) Act 2011 have been used by the Garda Síochána Ombudsman Commission (GSOC) to obtain the telephone communications data and possibly the email communications data of a number of journalists as part of a GSOC investigation. Such interception has been viewed by journalists as an interference with their

66 ibid s 6(1)
67 ibid s 1(1)
68 ibid s 7
69 ibid sch 2, part 1
70 ibid sch 2, part 2
71 ibid s 2
73 Note: See (1): Ralph Riegel and Tom Brady, ‘Revealed - GSOC in more controversy as it emerges State body has been snooping on journalists: The garda watchdog in surveillance of how reporters operate and been looking into their phone traffic’ Irish Independent (Dublin, 15 January 2016) <www.independent.ie/irish-news/news/revealed-gsoc-in-more-controversy-as-it-emerges-state-body-has-been-snooping-on-journalists-3436383.html> accessed 15 January 2016
(3): Shane Phelan, ‘Varadkar: snooping on journalist phone records is “a little bit odd and sinister”’ Irish Independent
freedom of expression rights and particularly their right to protect their sources.\textsuperscript{74} As a result of both media and political pressure, the Government announced the establishment of a review of the legislation used by statutory bodies including GSOC to access the communications data of journalists. This review will be limited to journalists’ communications data and will not cover the accessing by such State bodies of the wider populations’ communications data.\textsuperscript{75} Many people may be of the view that the scope of this review should not be thus limited.\textsuperscript{76} Also, at the time of writing, a Irish High Court challenge by Digital Rights Ireland to the legality of the data retention legislation is pending.

The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 was amended by the Garda Síochána (Amendment) Act 2015.\textsuperscript{77} For the purposes of a criminal investigation or for the protection of the security of the State, under the 1993 Act, as amended, the Commissioner of An Garda Síochána or the chairperson of the Garda Síochána Ombudsman Commission and the Chief of Staff of the Defence Forces may respectively apply to the Minister for Justice for an authorisation to intercept either a postal packet or a telecommunications message.\textsuperscript{78} An authorisation under the 1993 Act should not be decided by a politician.\textsuperscript{79} Access to anybody’s postal packets or telecommunications messages either the 1993 Act should only be permitted with the prior approval of an external, impartial third party, namely a High Court judge, and on a case by case basis. Where a judge would be considering an application for access to a journalist’s postal packets or telecommunications messages under the Act, it should be a requirement for the party seeking such access to prove to the satisfaction of the judge that there is an over-riding public interest in being granted such access for a specific and stated legal purpose and not as a fishing exercise.

In addition to the above-mentioned statutory provisions, the Criminal Justice (Surveillance) Act 2009, as amended by the Garda Síochána (Amendment) Act 2015,\textsuperscript{80} provides for a judge of the District Court to grant on an ex parte basis and otherwise than in public an authorisation for

\begin{itemize}
\item Karlin Lillington, ‘Journalists, this GSOC story isn’t all about you, you know: The Media didn’t bother to scrutinise what was happening when it was about everyone else – this story is still about everyone else’ The Irish Times (Dublin, 21 January 2016) <www.irishtimes.com/business/technology/journalists-this-gsoc-story-isn’t-all-about-you-you-know-1.2504162> accessed 21 January 2016
\item Garda Síochána (Amendment) Act 2015, s12
\item Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, s 6(1)
\item Note: See Kennedy and Arnold v Ireland[1987] IR 587 for an example of the misuse by government ministers of similar powers to authorise the interception of individuals’ telephone communications.
\item Garda Síochána (Amendment) Act 2015, s13
\end{itemize}
surveillance to a superior officer of either An Garda Síochána, the Garda Síochána Ombudsman Commission, the Defence Forces or the Revenue Commissioners for specified purposes including the investigation or prevention of arrestable offences, the security of the State and revenue offences.\footnote{Criminal Justice (Surveillance) Act 2009, s 4}{81} The Act states that an authorisation may not be issued if the judge is satisfied that the ‘…surveillance being sought to be authorised is likely to relate primarily to communications protected by privilege.’\footnote{ibid s 5(4)} However, the Act does not define what constitutes privileged communications and as applications are on an ex parte basis, the judge is at the mercy of the information provided to him by the applicant. Furthermore, Section 7 of the Act provides for the issuing of an authorisation by a superior officer rather than a judge in the case of an application of an urgent nature.\footnote{ibid s 7}{82} An over-riding public interest test should apply in respect of the granting of an authorisation under this Act for the surveillance of journalists. Surveillance authorisations should be granted by a high court and not by either a district court judge or a superior officer as defined by Section 1 of the Act.

In the United Kingdom, the Regulation of Investigatory Powers Act 2000 (RIPA), as amended, provides for both the interception\footnote{Regulation of Investigatory Powers Act 2000, part 1 ch 1}{84} and the accessing\footnote{ibid part 1 ch 2}{85} of communications data. A very wide grouping of designated State bodies ranging from the police to local authorities are granted such powers under the Act.\footnote{ibid sch 1}{86} Section 22(2) of the Act specifies the grounds for which communications data may be accessed and disclosed by a designated person. Such grounds include, among others, in the interest of national security, the prevention or detection of crime, in the interest of the economic well-being of the United Kingdom and the protection of public health.\footnote{ibid s 22(2)}{87} In February 2015, the Interception of Communications Commissioner’s Office (ICCO) published its report on its inquiry into the use of the Act by police forces in the United Kingdom to identify journalists’ sources.\footnote{Interception of Communications Commissioner’s Office, ‘IOCCO inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources’ (February 2015) <www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf> accessed 03 September 2015}{88} The inquiry dealt with the three year period prior to November 2014.\footnote{ibid Annex B}{89} Although the incidence of police seeking journalists’ communications data was low and not random,\footnote{ibid paras 8.2 and 8.3}{90} The Report was critical of police forces not giving:

\footnote{Note (1): Section 1 of the Act, as amended, defines “surveillance” as: ‘(a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or (b) monitoring or making a recording of places or things, by or with the assistance of surveillance devices;’}{81} Note (2): Section 13(d) of the Garda Síochána (Amendment) Act 2015 amended Section 4 of the Criminal Justice (Surveillance) Act 2009 and granted the right to seek a surveillance authorisation under the 2009 Act to a superior officer of the Garda Síochána Ombudsman Commission.
‘...the question of necessity, proportionality and collateral intrusion sufficient consideration in the applications that we examined as part of this inquiry. The applications focused on privacy considerations relevant to Article 8 of the Convention and did not give due consideration to Article 10 of the Convention.’\(^{91}\)

Consequently, the Report recommended that:

‘(1) Judicial authorisation must be obtained in cases where communications data is sought to determine the source of journalistic information.

(2) Where communications data is sought that does not relate to an investigation to determine the source of journalistic information (for example where the journalist is a victim of crime or is suspected of committing a crime unrelated to their occupation) Chapter 2 of Part 1 of the Act may be used so long as the designated person gives adequate consideration to the necessity, proportionality, collateral intrusion, including the possible unintended consequence of the conduct. The revised Code contains very little guidance concerning what these considerations should be and that absence needs to be addressed.’\(^{92}\)

Subsequent to the publication of the ICCO Report on RIPA, in March 2015 the United Kingdom’s Home Office published a new code of practice on the acquisition and disclosure of communications data under RIPA.\(^{93}\) The Code specifically excludes, on an interim basis, the use of RIPA for the acquisition of journalists’ communications data in order to identify their sources of journalistic information. Since the coming into operation of this new code of practice, the ICCO stated in its July 2015 half-yearly report that it had identified and was investigating two instances in which journalists’ communications data had been accessed under RIPA by the police without judicial approval.\(^{94}\)

\(^{91}\) ibid para 8.6

\(^{92}\) ibid para 8.9

Note: The “revised Code” referred to in paragraph 8.9 of the ICCO Report was a draft “Acquisition and Disclosure of Communications Data Code of Practice” which was published by the Home Office for public consultation in December 2014.

United Kingdom Home Office, ‘Acquisition and Disclosure of Communications Data: Code of Practice’ (Draft for Public Consultation) (December 2014)


Interception of Communications Commissioner’s Office, ‘IOCCO inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources’ (February 2015), para 6.17

<www.iocco-uk.info/docs/Iocco%20Communications%20Data%20Journalist%20Inquiry%20Report%20Feb15.pdf> accessed 03 September 2015

\(^{93}\) United Kingdom Home Office, ‘Acquisition and Disclosure of Communications Data: Code of Practice’ (March 2015)


Note: Under Principle 3.78 of this Code, a court order is required to permit access by law enforcement agencies with powers under the Police and Criminal Evidence Act 1984 (PACE) to communications data in order to identify journalists’ sources.

\(^{94}\) Interception of Communications Commissioner’s Office, ‘Half-yearly report of the Interception of Communications Commissioner’ (July 2015), paras 3.17–3.21

The Data Retention and Investigatory Powers Act 2014 (DRIPA) amended the Regulation of Investigatory Powers Act 2000. Section 1 of the 2014 Act made provision for the Secretary of State to require, by notice public, telecommunications operators to retain relevant communications data ‘if the Secretary of State considers that the requirement is necessary and proportionate for one or more purposes falling within paragraphs (a) to (h) of Section 22(2) of the Regulation of Investigatory Powers Act 2000’.95 The 2015 English High Court case of David Davis MP and Others v The Secretary of State for the Home Department96 concerned a challenge that DRIPA was in contravention of the Article 7 right to privacy and Article 8 right to protection of personal data in the EU Charter of Fundamental Rights. The Court referred to the decision of the CJEU in the case of Digital Rights Ireland v Minister for Communications and Others97 in which it held that Directive 2006/24/EC was invalid.98 In Davis, Bean LJ held that Section 1 of DRIPA was inconsistent with European Union law as:

‘(a) it does not lay down clear and precise rules providing for access to and use of communications data retained pursuant to a retention notice to be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating to such offences; and
(b) access to the data is not made dependent on a prior review by a court or an independent administrative body whose decision limits access to and use of the data to what is strictly necessary for the purpose of attaining the objective pursued.’99

While taking into account that the legislative provisions contained within DRIPA would expire on the 31st December 2016 in accordance with Section 8 of the Act,100 Bean LJ ordered that Section 1 of the Act be dis-applied after 31st March 2016 in so far as it was based on the above two grounds.101

Following the decision in Davis, the Secretary of State for the Home Department introduced the Investigatory Powers Bill 2015–2016 to Parliament. The purpose of this Bill is to ‘…bring together the existing powers available to law enforcement and the security and intelligence agencies to

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95 Data Retention and Investigatory Powers Act 2014, s 1(1)
96 David Davis MP and Others v The Secretary of State for the Home Department [2015] EWHC 2092 (Admin)
97 Case C-293/12 Digital Rights Ireland v Minister for Communications and Others [2014]
98 Note: In Digital Rights Ireland, at paras 65–66, the Court of Justice of the European Union held that Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC was invalid, as it ‘…does not lay down clear and precise rules governing the extent of interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter…so Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of data…Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to (i) the vast quantity of data whose retention is required by that directive, (ii) the sensitive nature of that data and (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.
99 David Davis MP and Others v The Secretary of State for the Home Department [2015] EWHC 2092 (Admin), paras 44–46
100 Data Retention and Investigatory Powers Act 2014, s 8
101 Davis MP and Others v The Secretary of State for the Home Department [2015] EWHC 2092 (Admin), para 122
obtain communications and data about communications’,\textsuperscript{102} to ‘…radically overhaul the way these powers are authorised and overseen,’\textsuperscript{103} and to ‘…make sure powers are fit for the digital age.’\textsuperscript{104} Section 68 of the Bill does offer a limited safeguard to journalists in respect of access by relevant public authorities to their communications data in that it requires a Judicial Commissioner to approve an authorisation for access to such data for ‘…the purpose of identifying or confirming a source of journalistic information, and… the authorisation is not necessary because of an imminent threat to life.’\textsuperscript{105} The protection of journalists’ sources in Ireland would be enhanced, if the State were to take the above-mentioned, proposed legislative developments into consideration and implement similar, statutory protections of journalists’ communications data.

4.2.4) Stop, Search and Seizure Powers of An Garda Síochána

In respect of An Garda Síochána’s responsibility to both prevent and investigate criminal offences, a number of statutes, particularly the Offences Against the State Act 1939, as amended, the Criminal Law Act 1976, as amended, and the Misuse of Drugs Act 1977, as amended, provide members of An Garda Síochána with stop, search and seizure powers in specific instances without the need for a court-issued warrant.\textsuperscript{106} Aside from such provisions, members of An Garda Síochána and also other authorised persons, such as members of the Defence Forces, may exercise search and seizures powers through their use of court-issued warrants granted under a range of other statutory provisions. For example, having entered a place named on a search warrant issued under S.29\textsuperscript{107} of the Offences Against the State Act 1939, as amended, a member of An Garda Síochána may under S.29(6)(c):

\textsuperscript{102} Investigatory Powers Bill 2015–2016, context para 3
accessed 09 November 2015

\textsuperscript{103} ibid

\textsuperscript{104} ibid

\textsuperscript{105} Investigatory Powers Bill 2015–2016, s 68

\textsuperscript{106} Note (1): Under Section 30 of the Offences Against the State Act 1939, as amended, ‘A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.’

Note (2): Section 8(2) of the Criminal Law Act 1976, as amended, gives a member of An Garda Síochána the power to stop and search vehicles and people in vehicles if he has a reasonable cause to suspect that ‘…an offence to which this section applies has been, is being or is about to be committed requires a person to stop a vehicle with a view to ascertaining whether – (a) any person in or accompanying the vehicle has committed, is committing or is about to commit the offence, or (b) evidence relating to the commission or intended commission of the offence by any person is in or on the vehicle or on any person in or accompanying it’.

Note (3): Section 23 of the Misuse of Drugs Act 1977, as amended by S.12 of the Misuse of Drugs Act 1984, permits a member of An Garda Síochána with reasonable cause to stop and search a person, vehicle, vessel or aircraft without a search warrant and to… examine (by opening or otherwise) and seize and detain anything found in the course of a search under this section which with such cause appears to him to be something which might be required as evidence in proceedings for an offence under this Act.’ Such evidence could, for example, include photographs of people using illegal drugs.

\textsuperscript{107} Note: Section 1 of the Criminal Justice (Search Warrants) Act 2012 inserted a new S.29 in the 1939 Act.
‘…seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an offence to which this section applies.’

Also, Section 16 of the Official Secrets Act 1963 provides for the issuing of search warrants to members of An Garda Síochána to authorise their entry to and search of any premises, place, vessel or aircraft named on the warrant and ‘…to seize any document or thing found therein or on such person which such member reasonably believes to be evidence of or to relate, directly or indirectly, to a contravention or intended contravention of section 9’.

The inclusion of the words “any thing” in the two, above-mentioned statutory provisions dealing with search and seizure gives An Garda Síochána very wide seizure powers. In the case of a search of a photographer’s premises, the result could mean the removal by An Garda Síochána of the photographer’s complete library of still film photographs, computers, hard disk drives, digital cameras and their memory cards for examination.

Under Section 9(1) of the Criminal Law Act 1976,

‘Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.’

Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 was amended by S.6 Criminal Justice Act 2006. It inserted a new S.10 in the 1997 Act which provides for the issuing of search warrants to members of An Garda Síochána in relation to arrestable offences. Under this new S.10 of the 1997 Act:

‘If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or

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108 Offences Against the State Act 1939, s 29(6)(c)
109 Official Secrets Act 1963, s 16(3)
110 Criminal Law Act 1976, s 9(1)
111 Criminal Justice (Miscellaneous Provisions) Act 1997, s 10
112 Criminal Justice Act 2006, s 6
relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.\textsuperscript{113}

Section 7 of the 2006 Act relates to the powers of An Garda Síochána to seize and retain evidence and under S.7(1) of the Act:

'Where a member of the Garda Síochána who is in:
(a) a public place, or
(b) any other place under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited or permitted to be,
finds or comes into possession of any thing, and he or she has reasonable grounds for believing that it is evidence of, or relating to, the commission of an arrestable offence, he or she may seize and retain the thing for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable, or if proceedings are commenced in which the thing seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act 1897\textsuperscript{114} shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.'\textsuperscript{115}

In relation to S.7(1)(a) of the Act as mentioned above, were a photographer to photograph either the commissioning of a crime or a crime scene in a public place, for example, and a member of An Garda Síochána either observed or became aware of such photography, a number of possible events could unfold. The member could ask the photographer to permit him to view the images stored in the camera’s memory card(s). If the photographer complied with such a request and in doing so he handed the camera to the member to view the images, the camera and its memory card(s) would then come into the member’s possession for the purposes of the above-mentioned S.7(1) of the 2006 Act. The member could then attempt to seize the camera and its memory card(s) as evidence and to retain them until the conclusion of any court proceedings. If the photographer were to refuse the member’s request to view the images stored in the camera memory card(s), the member could seek a search warrant to search the photographer’s home or business premises under S.6 of the 2006 Act and if the images were located under such a search, he could then seize them under S.7 of the Act. Alternatively, the member could seek a production order from the court in accordance with the Criminal Justice Act 2011, as amended.\textsuperscript{116} On an application made by a member of An Garda Síochána under S.15(1) of the 2011 Act, if a judge of the District Court is satisfied:

‘by information on oath of the member of the Garda Síochána making the application that:

\begin{itemize}
\item \textsuperscript{113} Criminal Justice (Miscellaneous Provisions) Act 1997, s 10(1)
\item \textsuperscript{114} Under Section 1 of the Police (Property) Act 1897, a person claiming to be the owner of property seized by An Garda Síochána may apply to the court for an order for its return.
\item \textsuperscript{115} Criminal Justice Act 2006, s 7(1)
\item \textsuperscript{116} Criminal Justice Act 2011, s 15
\end{itemize}
(a) there are reasonable grounds for suspecting that a person has possession or control of particular documents or documents of a particular description,
(b) there are reasonable grounds for believing that the documents are relevant to the investigation of the relevant offence concerned,
(c) there are reasonable grounds for suspecting that the documents (or some of them) may constitute evidence of or relating to the commission of that offence, and
(d) there are reasonable grounds for believing that the documents should be produced or that access to them should be given, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances,' he may order the person to:

'(1) produce the documents to a member of An Garda Síochána for the member to take away and, if the judge considers it appropriate, to identify and categorise the documents to be so produced in the particular manner (if any) sought in the application or in such other manner as the judge may direct and to produce the documents in that manner, or

(2) give such a member access to them,

either immediately or within such period as the order may specify.'

Thus, it is for the judge to be satisfied that the “reasonable grounds for suspecting” or “reasonable grounds for believing” exist and not for the member of An Garda Síochána, who is making the application for the S.15 order. However, the Act does not offer any indication as to what might constitute “reasonable grounds”. Section 15(2)(a) of the Act, as mentioned above, just refers to ‘particular documents or documents of a particular description’. So, in an application for a production order in relation to photographs, there is no requirement under S.15 that specific images must be stated in the order application. Thus, it would appear that a description such as “photographs taken at event X on date Y at Shop Street, Galway” could fulfil the requirement under S.15(2)(a) of the Act. Also, the Act does not specify any required level of evidential value in respect of material sought under a S.15 production order. Under S.15(2)(c) as mentioned above, the material sought does not need to be of “substantial value” either to an investigation or as evidence. Furthermore, it is not a requirement under S.15(2)(c) that only specified documents, for example specified photographic images, would be covered by a S.15 order. S.15(2)(c) only requires that the documents or “some” of the documents sought “may” constitute evidence. Such an investigative or evidential value level is extremely low. Coupled with the wide document description permitted on an order application, S.15 of the Act would facilitate An Garda Síochána by granting it access to photographic images which most likely would be of no investigative or evidential value to it and for An Garda Síochána to just undertake fishing expeditions at the expense of photographers. In effect, the provisions of the Act arguably are overly broad and could impact adversely on photographers’ rights.

Note: Section 2 of the Criminal Justice Act 2011 defines a “document” as including: ‘information recorded in any form and any thing on or in which information is recorded and from which information can be extracted’.

117 ibid s 15(2)
A court order granted under S.15 may also grant powers of entry to An Garda Síochána. Section 15(5) of the Act states:

‘An order under this section relating to documents in any place may, on the application of the member of the Garda Síochána concerned under subsection (1), require any person, being a person who appears to the judge of the District Court to be entitled to grant entry to the place, to allow a member of the Garda Síochána to enter it so as to obtain access to the documents.’

Under Section 15(7) of the Act, an order under S.15 also empowers a member of An Garda Síochána to make a copy of the required document and to take away such a copy. Also, Section 15(8)(a) of the Act states:

‘Where a document is, or may be, taken away by a member of the Garda Síochána pursuant to an order under this section, any person to whom the order relates, or who is affected by such an order, may request the member of the Garda Síochána to permit the person to retain the document, or to have it returned to the person, while the member takes or retains a copy of it.’

The decision to take away the original document sought or a copy of such a document is at the discretion of the member of An Garda Síochána. However, the member may only accede to a S.15(8)(a) request, if the undertakings and provisions specified in S.15(8)(b) of the Act are met. Any documents taken away by a member of An Garda Síochána pursuant to a S.15 order ‘…may be retained by the member for use as evidence in any criminal proceedings.’ The Act does not impose any limitation on the persistence of such a retention. If such a seizure and removal occurred in respect of a photographer’s images, he could apply to the District Court for their return. However, such a request may or may not be granted by the Court. Under S.15(14) of the Act:

‘A judge of the District Court may, on the application of any person who is affected by an order under this section whose request for the return of documents under subsection (8) has not been acceded to, make an order regarding the return of the documents concerned to that person if the judge considers it appropriate to do so subject to such conditions (if any) as the judge may direct.’

In February 2015, the Irish Examiner reported that Irish news photo agency Photocall Ireland had handed over photographs which it had taken at a water protest to An Garda Síochána after it had been served with a warrant, having previously refused to comply with such a request. Photocall Ireland stated that ‘…this was the third time the company had refused a request from gardaí, but the
first time that a warrant had been issued.'\textsuperscript{124} A spokesman for An Garda Síochána had stated that it was ‘…required to gather all available evidence in the course of criminal investigations’.\textsuperscript{125} In an interview with \textit{Newstalk 106–108FM}, Farrell stated that An Garda Síochána had sought material in relation to the protest outside the Department of Justice in Dublin, which \textit{Photocall} had not put into the public domain.\textsuperscript{126} In a statement issued through the National Union of Journalists (NUJ), Farrell stated:

‘This week our office was visited by two gardai (police) with a summons for two of our staff to appear in a court case which the gardai were taking against a protestor or protesters involved in an event outside the Department of Justice last year, which one of our photojournalists covered. One summons was for the journalist and the other for the office manager who had downloaded the images onto a CD for the gardai.’\textsuperscript{127}

Thus, not only were the agency’s images seized for use as potential prosecutorial evidence in court proceedings, members of its personnel were also to be used by the prosecution as witnesses in the court proceedings. In condemning the actions of An Garda Síochána, Séamus Doorley, Irish Secretary of the NUJ stated:

‘Just as reporters have a right to protect confidential sources of information photographers have a right to operate independently of the state. Photographers must always be free to operate on the basis that they capture editorial images for editing and publication, not as source material for the police. It is concerning that the agency was asked to hand over images which had not been published as well as those published. Photographs are taken on the spot by a photographer and selected for use on the basis of editorial merit. A picture taken out of context can be distorted and may not always be interpreted as evidence. In the case of a protest outside the Department of Justice, where there are a number of cameras, the gardai have ample ways of securing images without forcing visual journalists to cross the line between independent observer and collaborator. Independent journalists, reporters, photographers and videographers have a special status as observers at public events. If they are identified as being part of the apparatus of the State they lose that independence and may well be put at risk, especially at a time of tension in public demonstrations.’\textsuperscript{128}

\textsuperscript{124} --- ---, ‘Photography agency: Gardaí used warrant to seize pictures of water protests’ \textit{Irish Examiner} (Cork, 16 February 2015) \textless www.irishexaminer.com/breakingnews/ireland/photography-agency-gardaí-used-warrant-to-seize-pictures-of-water-protests-662466.html\textgreater accessed 24 July 2015
\textsuperscript{125} ibid
\textsuperscript{126} Sue Murphy, "‘They were looking for material which we had not put out into the public domain in relation to a protest”: The Photocall editor discussed a warrant issued by gardai for photos’ \textit{Newstalk 106–108FM} (Dublin, 18 February 2015) \textless www.newstalk.com/They-were-looking-for-material-which-we-had-not-put-out-into-the-public-domain-in-relation-to-a-protest\textgreater accessed 24 July 2015
\textsuperscript{128} ibid
The competing interests in the obtaining and retention of evidence for use in court cases have been addressed for centuries. In 1887, for example, in the Irish Exchequer Division court case of *Dillon v O’Brien and Davis*, Pallas CB stated:

‘But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form.’

In more recent times, this topic featured in the Irish Supreme Court case of *Braddish v DPP*, in which it was stated that members of An Garda Síochána are under a duty to seek-out and to retain seized evidence until the conclusion of any criminal proceedings. In *Braddish*, Hardiman J, having confirmed the above-mentioned decision of Pallas CB in *Dillon*, stated:

‘It is the duty of the Gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not.’

In the later Irish High Court case of *O’Sullivan and Others v DPP*, it was held that the obligation on members of An Garda Síochána to seek-out and retain evidence was not an absolute obligation. In *O’Sullivan*, Feeney J stated:

‘It is clear that there is a duty to preserve, disclose and seek out evidence. However, it is also clear that such obligation or duty is not absolute. There are many and varying factors that will impact on the obligation. For example, the obligation to preserve might be affected by the volatile or unstable nature of the item of evidence, or by a competing obligation to return property, either real or personal, to its lawful owner pending trial.’

Any search for, and seizure of, a photographer’s cameras and image storage devices by a member of An Garda Síochána must be in accordance with, and as prescribed for, in law. Of relevance to this point is the 2010 ECtHR case of *Sanoma Uitgevers BV v Netherlands*, which concerned a production order in respect of photographic images of an illegal street car race. Under Article 96a of the Netherlands’ Code of Criminal Procedure, the decision on whether or not material sought by the

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129  *Dillon v O’Brien and Davis* [1887] 20 LRIR 300
130  ibid 317
131  *Braddish v DPP* [2001] IESC 45
132  ibid
133  *O’Sullivan and Others v DPP* [2007] IEHC 137
134  ibid
135  *Sanoma Uitgevers BV v Netherlands* (App No 38224/03) (ECHR, 14 September 2010)
police was to be handed over was a matter for the public prosecutor rather than for an independent judge. In Sanoma, the Grand Chamber held that the public prosecutor:

‘...is a “party” defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of various competing interests.’

In conclusion, the Grand Chamber held that there had been a violation of the applicant’s rights under Article 10 of the Convention and it stated:

‘...the quality of law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There has accordingly been a violation of Article 10 of the convention in that the interference complained of was not “prescribed by law”.’

If An Garda Síochána were to seize or seek a production order for a photographer’s camera memory cards, computer hard drives and/or library of photographs for evidential examination and use in a criminal investigation or trial, the latter’s ability to undertake any photographic work could potentially grind to a halt and he most likely would have to seek a court order to have the seized equipment and/or photographic images returned to him. When a photograph is created by using a digital camera, the camera’s memory card is akin to photographic still film in that it would contain the original image as created, unless it had been manipulated in the camera following its creation. It would be possible for An Garda Síochána to determine from a seized memory card if an image contained on it had been doctored or manipulated following its creation. If a photographer were to format a digital camera’s memory card (delete its image file contents) prior to handing it over to An Garda Síochána, it is a likely possibility that the photographer could face a charge of perverting the course of justice as a result of his destroying potential evidence. The photographer could also face a charge of withholding information or of concealing facts disclosed by documents. In any event, it is possible that An Garda Síochána would be able to retrieve any deleted images either completely or partially intact from a formatted camera memory card or computer hard drive. However, it is questionable as to whether the photographer, if called to testify in a criminal trial, could honestly state that any such retrieved image was exactly the same as that, which he had shot.

4.2.5) Stop, Search and Seizure Powers of United Kingdom’s Police

In the United Kingdom members of the police may stop and search people in accordance with their powers under a range of statutes and principally under S.1 of the Police and Criminal Evidence Act
1984 (PACE), as amended.\footnote{141} However, Section 1 of the Act does not give a police constable ‘the power to search a person or vehicle or anything in or on a vehicle unless he has reasonable grounds for suspecting that he will find stolen or prohibited articles, any article to which subsection (8A) below applies or any firework to which subsection (8B) below applies.’\footnote{142} Section 8 of the Act provides for the issuing of warrants by justices of the peace to authorise the police to enter and search premises for material, which is likely to be of relevance to the investigation of an indictable offence, which has been committed.\footnote{143} A constable may seize and retain anything for which a search has been authorised under S.8.\footnote{144} However, for a S.8 warrant to be issued, such material may not include items subject to legal privilege, excluded material or special procedure material.\footnote{145} “Special procedure material” is defined by the Act as including, among other types of material, ‘journalistic material, other than excluded material’.\footnote{146} On journalistic material, the Act states:

‘(1) Subject to subsection (2) below, in this Act “journalistic material” means material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Act if it in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for that purposes.’\footnote{147}

“Excluded material” is defined by S.11 of the Act as including, among other things, ‘journalistic material which a person holds in confidence and which consists of documents or of records other than documents’.\footnote{148} The Act states a person holds journalistic material in confidence for the purposes of S.11 if:

‘(a) he holds it subject to such an undertaking, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.’\footnote{149}

A photographer’s photo library could consist of both journalistic and non-journalistic material. Depending upon the type of photographic material being sought, a police constable, who is investigating an indictable offence and reasonably believes that a photographer has images which would be of evidential value to his investigation, could seek to obtain either a S.8 search warrant or a S.9 search warrant (as mentioned below) in order to get possession of such images. It is noted,
that S.15 and S.16 of the Act do provide some safeguards in respect of the issuance and execution of search warrants.\(^{150}\) Under S.9(1) of the Act, a police constable may seek to obtain access to special procedure material or excluded material, which includes journalistic material, for the purposes of a criminal investigation by applying to the court for a production/access order under, and in accordance, with the detailed provisions of Schedule 1 of the Act.\(^{151}\) If a judge is satisfied that one of the two sets of access conditions specified in Schedule 1 has been fulfilled, he may grant the requested production/access order in accordance with paragraph 4 of Schedule 1 of the Act.\(^{152}\) For a judge to grant such an order he must be satisfied that, among other specified requirements, ‘there are reasonable grounds for believing that an indictable offence has been committed’, that the material sought is ‘likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made’ and that the material ‘is likely to be relevant evidence’.\(^{153}\) Should a production/access order not be complied with, a court may issue a search warrant to the police.\(^{154}\) Under Section 19 of the Act, a police constable, who is lawfully on any premises, may:

> 'seize anything which is on the premises if he has reasonable grounds for believing:

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed'.\(^{155}\)

A police constable’s power of seizure extends to computerised information.\(^{156}\) However, it does not extend to any item which the constable has reasonable grounds for believing is subject to legal privilege.\(^{157}\) The police also has the power to retain anything seized under either S.19 or S.20\(^{158}\) or under Schedule 1\(^{159}\) of the Act.\(^{160}\) However, nothing seized for use as evidence in a trial, for forensic examination or the investigation of an offence may be retained if a photograph or copy would suffice.\(^{161}\) Furthermore, a police constable may seize and retain anything for which a search had been authorised by a court in accordance with Paragraph 12 of Schedule 1.\(^{162}\) The police has been using the above-mentioned seizure and retention powers against photographers and television news film crews to obtain their film footage, particularly of riots and other public order disturbances. A recent example is the case of BSkyB & Others v Chelmsford Crown Court.\(^{163}\) In BSkyB, the police

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150 ibid ss 15–16
151 ibid s 9(1)
152 ibid sch 1, para 1
153 ibid sch 1, para 2
154 ibid sch 1, para 12
155 ibid s 19(3)
156 ibid s 20
157 ibid s 19(6)
158 ibid s 22
159 ibid sch 1, para 13
160 ibid s 22(1)
161 ibid s 22(4)
162 ibid sch 1, para 13
163 BSkyB & Others v Chelmsford Crown Court [2012] EWHC 1295 (Admin)
had obtained a production order from Chelmsford Crown Court in respect of television camera footage of Dale Farm in Essex, from which a group of travellers was evicted from an illegal encampment. Eady J stated:

‘This case is said to provide an example of where the production orders sought did not relate to specific indictable offences, alleged to have been committed at particular times and at particular places, but rather to “fishing” for any evidence there might be of such offences occurring over the many hours of visual recording.’

In allowing the appeal against the production order, he pointed to the tentative basis of the claim and lack of solid evidence:

‘The primary case advanced on behalf of the Essex Police appears to have been that the Claimants’ footage might show an unidentified suspect at some point revealed (presumably unmasked) in the hours after the violence had come to an end…There is no solid evidence to show that this did happen in any particular case.’

He identified the competing public interests that had not been considered:

‘There was a need to balance the competing public interest considerations in the context of journalistic material. It is difficult to dispute that there is a real public interest in tracing any of those persons who were involved in public disorder or violence, but that has to be set against the level of interference with the Claimants’ Article 10 rights inherent in the production orders made.’

Eady J referred to the fact that there was ‘…no evidence of “substantial value” and thus no basis for concluding that there was a pressing need to interfere with the Claimants’ rights under Article 10… Also,…the Claimants were denied a fair opportunity to demonstrate to the court why much, if not the totality, of their material was unlikely to be of any assistance…’ to the police. While disclosure orders may be of assistance to the police in identifying and tracing individuals involved in public order and other offences and therefore may serve the public interest, Eady J stated that ‘…disclosure orders against the media, intrusive as they are, can never be granted as a formality.’

In refusing to grant the requested disclosure order, Eady J outlined the evidential tests which must be met prior to such an order being granted, namely:

‘There must at least be cogent evidence as to (i) what the footage sought is likely to reveal, (ii) how important such evidence would be to carrying out the investigation and (iii) why it is necessary and proportionate to order the intrusion by reference to other potential sources of information.’

164 ibid para 6
165 ibid para 22
166 ibid para 24
167 ibid paras 27–29
168 ibid para 30
169 ibid para 30
In contrast to the decision in *BSkyB*, in a case involving freelance photographer Jason Parkinson, who was also a party to the *BSkyB* case, Greater Manchester Police succeeded in getting a production order against him to obtain his video footage of a 2010 Unite Against Fascism (UAF) counter protest to an English Defence League demonstration. Parkinson stated that unlike the “Dale Farm” case, the Greater Manchester Police did eventually disclose a specific offence in respect of which his video footage was being sought as evidence (a perversion of the course of justice charge against a police officer). Parkinson also stated that as a consequence of the disclosure of this information by the police, he had to comply with the production order or else he would have faced a contempt of court charge.

While the police has the power through PACE to seek to obtain journalists’ and photographers’ materials, it has similar powers under the Terrorism Act 2000, as amended. Under Schedule 5 of the Act, as amended, a police constable may apply to either a Circuit or a District judge for an access order in respect of either excluded material or special procedure material for the purposes of a terrorism investigation. Such an application must refer to ‘particular material or material of a particular description, which consists of or includes excluded material or special procedure material.’ However, for a judge of either court to grant such an order he must be satisfied:  

‘(a) that the material to which the application relates consists of or includes excluded material or special procedure material, 
(b) that it does not include items subject to legal privilege, and 
(c) that the conditions in sub-paragraphs (2) and (3) are satisfied in respect of that material.’

The conditions to be satisfied, as referred to in (c) above, are that:

‘(a) the order is sought for the purposes of a terrorist investigation, and 
(b) there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation.’

Furthermore, in respect of the condition (b) above, there must be reasonable grounds for believing ‘…that it is in the public interest that the material should be produced or that access to it should be given having regard –

(a) to the benefit likely to accrue to a terrorist investigation if the material is obtained, and

170 Jason Parkinson, Seven months just to force the Police to obey the law (14 May 2013) <www.jasonnparkinson.com/2013/05/14/seven-months-just-to-force-the-police-to-obey-the-law> accessed 20/07/2015
171 ibid
Note: Regarding contempt of court, see Section 4.5 below.
172 Terrorism Act 2000, sch 5, part 1, s 5
Note: Under S.4 of the Terrorism Act 2000, as amended, the terms “excluded material” and “special procedure material” are given the same meaning as that contained in S.14 of PACE, as mentioned above.
173 ibid s 5(2)
174 ibid s 6(1)
175 ibid s 6(2)
(b) to the circumstances under which the person concerned has any of the material in his possession, custody or power.\textsuperscript{176}

The Belfast Recorder’s Court case of \textit{BBC v PSNI}\textsuperscript{177} concerned an application by the Police Service of Northern Ireland (PSNI) under Schedule 5, Paragraph 5 of the Terrorism Act 2000 to require the \textit{BBC} “…to produce to the PSNI all journalistic material including broadcast, unbroadcast and unedited footage in respect of an incident supporting terrorism at Londonderry City Cemetery on 25 April 2011.”\textsuperscript{178} One could describe such a wide-sweeping application as a “fishing expedition”. In \textit{BBC}, Burgess J stated:

‘Since it is accepted this is a terrorist investigation, the first decision that has to be made by this court is whether or not the applicant has satisfied me that the material sought is likely to be of “substantial value”.’\textsuperscript{179}

Burgess J went on to state:

‘D/Constable Williamson was only able to say that when the original footage of the BBC was given to the experts they had “a quick look at it” before making the assertion that they would require the original since it would give greater clarity etc. But there is I believe a lacuna in the argument which has been put before me. I have been given no indication as to the specific purpose of the material as it relates to the work undertaken by these experts in any of the areas to which reference has been made. The court reminds itself that the test is not that the material either by itself or with other material might be beneficial – it is to be of substantial benefit.’\textsuperscript{180}

Burgess J went on to hold:

‘On the evidence presently before the court it cannot be satisfied that the condition of substantial value has been satisfied. That would require a more detailed examination by the court on a proper evidential basis in relation to the investigation undertaken to date, and could be undertaken; and the role, if any, [that] the footage of the BBC would play in that investigation – before turning to decide whether it would be of substantial value. Therefore on the basis of the evidence before the court at this stage the court has to refuse the application.’\textsuperscript{181}

However, it should be noted that Burgess J also stated ‘…if the court had been satisfied that the condition in regards to “substantial value” had been satisfied, it would have made an Order in the terms stated.’\textsuperscript{182}

\textsuperscript{176} ibid s 6(3)
\textsuperscript{177} \textit{BBC v PSNI} [2012] NIChy 1
\textsuperscript{178} ibid para 1
\textsuperscript{179} ibid para 16
\textsuperscript{180} ibid para 17
\textsuperscript{181} ibid para 18
\textsuperscript{182} ibid para 19
In December 2012, BBC reported, that McFarland J, the Recorder for Belfast ordered photo-
journalists Press Eye and Photopress to hand over their footage of the 12 July riots in Ardoyne,
Belfast to the PSNI, but that footage taken by cameras for BBC, UTV and Sky would not have to be
handed over. The latter had successfully argued that as their cameras ‘were not forward of police
lines or Police Service of Northern Ireland evidence-gathering cameras during the riot their pictures
would not be of more value than those shot by the police themselves’. However, as the photo-
journalists had been in front of the police lines, McFarland J held:
‘…they would have had unobstructed views and images…In the circumstances I am of the
view that this material could have a substantial value to the investigation.’

Regarding the risk to journalists, BBC also reported that McFarland J stated:
‘…he had to balance the public interest of identifying and prosecuting rioters against the
potential risk to journalists if seen to be assisting in the police investigation…There is no
evidence to support the proposition that journalists may become the targets of attack should
they be perceived to be evidence gathering for the police’.

As it would appear from the BBC’s report on the case, that as no evidence of possible attacks on
journalists as a result of they being perceived as evidence gatherers for the police had been
presented to the court, McFarland J was not influenced by such an assertion. However, attacks on
press photographers in Northern Ireland are not unknown. For example, within two weeks of the
BBC’s report on this case, the Belfast Telegraph reported that a pipe bomb had been placed against
the front door of a Co. Down based press photographer’s house.

In addition to the above-mentioned powers of the police under the Terrorism Act 2000, as amended,
the Act also provides the police with other powers to either prevent photographers from actually
taking photographs in public places and/or to seize photographs and camera equipment from
photographers. Sections 43, 44 and 45 of the Act have been used by the police to stop and search
people taking photographs in public places. Section 43 of the Act permits a constable:

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183  ibid.
184  ibid.
185  ibid.
186  “Pipe bomb attack on Northern Ireland photographer Mark Pearce’s home” Belfast Telegraph (Belfast, 14 December 2012)
187  Note (1): In relation to the Terrorism Act 2000, as amended, also of note is Schedule 7 of the Act which grants an examining officer (a police
constable, an immigration officer or a designated customs officer) at designated ports or within specified border areas the power to stop,
detain and search a specified class of individuals. An examining officer also has the power to examine goods either given to him in
accordance with the Schedule or as a result of a search in order to determine if ‘they have been used in the commission, preparation or
instigation of acts of terrorism’ and to seize such goods. The question of whether the power of an examining officer to question a person
under Sch 7, para 2(1) of the Act was repugnant to the right of freedom of expression under Article 10 of the Convention was one of the
central issues in the 2014 judicial review case of David Miranda v The Secretary of State for the Home Department and The
Commissioner of the Police of the Metropolis [2014] EWHC 255 (Admin). In Miranda, Laws LJ held that Schedule 7 of the Act did not
breach Article 10.
‘to stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist.’

Under Section 43(4) of the Act, a constable also has the power ‘…to seize and retain anything which he discovers in the course of a search of a person under subsection (1) or (2) and which he reasonably suspects may constitute evidence that the person is a terrorist.’

The Metropolitan Police’s “Photography Advice” makes specific mention of constables’ powers under S.43 of the Act in respect of their interaction with photographers in public places. It states:

‘Members of the public and the media do not need a permit to film or photograph in public places and police have no power to stop them filming or photographing incidents or police personnel…Officers have the power to view digital images contained in mobile telephones or cameras carried by a person searched under S43 of the Terrorism Act 2000 to discover whether the images constitute evidence that the person is involved in terrorism. Officers also have the power to seize and retain any article found during the search which the officer reasonably suspects may constitute evidence that the person is a terrorist. This includes any mobile telephone or camera containing such evidence. Officers do not have the power to delete digital images or destroy film at any point during a search. Deletion or destruction may only take place following seizure if there is a lawful power (such as a court order) that permits such deletion or destruction…If someone distressed or bereaved asks the police to stop the media recording them, the request can be passed on to the media, but not enforced.’

Section 44 of the Act, now repealed, dealt with the authorisation element of stop and searches. It did not require a police officer to hold a “reasonable suspicion” prior to stopping and searching someone. The 2010 ECtHR case of Gillan and Quinton v United Kingdom held that S.44 of the

Note (2): While commenting on the Miranda case in his 2014 Annual Report, David Anderson Q.C., the United Kingdom Government’s Independent Reviewer of Terrorism Legislation stated:

‘The true issue is not whether the police ought to have the power to stop someone on the basis of the sort of intelligence they were given on Mr Miranda (which surely they should, and arguably do), but whether it was lawful to use counter-terrorism law for that purpose. By validating that course, on the basis of orthodox principles of construction, the Divisional Court highlighted the remarkable (and some would say alarming) breadth of the UK’s current definition of terrorism.’


Note (3): In the Court of Appeal case of David Miranda v The Secretary of State for the Home Department and The Commissioner of the Police of the Metropolis [2016] EWCA Civ 6, the Master of the Rolls held that the exercise of the stop power granted under Sch. 7, para. 2(1) of the Terrorism Act 2000 as exercised against the appellant was lawful. (Para. 118). However, he also held that that stop power was ‘…incompatible with Art. 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise…’ (Para. 119).

188 Terrorism Act 2000, s 43(1)
189 ibid s 43(4)
190 Metropolitan Police, Photography Advice <http://content.met.police.uk/Site/photographyadvice> accessed 27 August 2015
191 Terrorism Act 2000, s 44
192 Gillan and Quinton v United Kingdom (2010) 50 EHRR 45, para 87
Act was in breach of the applicant’s right to a private life under Article 8(2) of the Convention, which requires that ‘there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law...’ In Gillan, the second applicant (a journalist) was stopped by the police in a public place who told her that she was being stopped and searched under S.44 and S.45 of the Act and that she was to stop filming. The Court held:

‘...that the powers of authorisation and confirmation as well as those of stop and search under ss.44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, “in accordance with the law” and it follows that there has been a violation of art. 8 of the Convention.’

As a consequence of Gillan, the stop and search powers under Sections 44–47(1) of the Act were repealed by S.2 of The Terrorism Act 2000 (Remedial Order 2011). Section 3 of the Remedial Order inserted a new S.47A in the 2000 Act dealing with the authorisation element of stop and searches in specified areas or places and it includes a requirement for a “reasonable suspicion” to be held. Subsequently, the Protection of Freedoms Act 2012 repealed S.44–S.47 of the 2000 Act and new powers to stop and search were inserted in the 2000 Act by the 2012 Act. Section 58 of The Terrorism Act 2000 deals with the collection and recording of information, which could be used for terrorist purposes and it includes “photographic record” under its definition of “recording”. Section 39 of the Counter-Terrorism Act 2008 amended S.58 of the 2000 Act and, among other things, it removed the defence of a “reasonable excuse” available under S.58(3) of the 2000 Act. Also, S.76 of the 2008 Act inserted a new S.58(A) in the Act, which states:

‘A person commits an offence who (a) elicits or attempts to elicit information about an individual who is or has been (i) a member of Her Majesty’s forces, (ii) a member of any of the intelligence services, or (iii) a constable, which is of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) publishes or communicates any such information.’

This new S.58(A) is extremely broad in its scope and it could have major implications for photographers (particularly those who specialise in press photography) and publishers, who wish to photograph and/or publish images of police constables or members of the armed forces – even of such participants in public parades. However, under S.76(2) of the 2008 Act, it is a defence for a

193 European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8
194 <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 May 2013
195 Gillan and Quinton v United Kingdom (2010) 50 EHRR 45, para 87
196 The Terrorism Act 2000 (Remedial Order 2011), SI 2011/631, s 2
197 ibid s 3
198 Protection of Freedoms Act 2012, s 59
199 ibid ss 60–61
200 The Terrorism Act 2000, s 58
201 Counter-Terrorism Act 2008, s 76(1)
person charged with an offence under this section to prove that they had a reasonable excuse for their action. Press photographers could possibly avail of such a defence. But, as Warby et al suggest:

‘The expanding scope of terrorism offences under these new provisions will no doubt have an increasing impact on the work of journalists and their ability to carry out and publish important research.’

On the use of S.58A by police constables in respect of photographers, the Metropolitan Police’s “Photography Advice” states:

‘Any officer making an arrest for an offence under Section 58A must be able to demonstrate a reasonable suspicion that the information was, by its very nature, designed to provide practical assistance to a person committing or preparing an act of terrorism. It would ordinarily be unlawful to use section 58A to arrest people photographing police officers in the course of normal policing activities, including protests because there would not normally be grounds for suspecting that the photographs were being taken to provide assistance to a terrorist. An arrest would only be lawful if an arresting officer had a reasonable suspicion that the photographs were being taken in order to provide practical assistance to a person committing or preparing an act of terrorism. There is nothing preventing officers asking questions of an individual who appears to be taking photographs of someone who is or has been a member of Her Majesty’s Forces (HMF), Intelligence Services or a constable so long as this is being done for a lawful purpose and is not being done in a way that prevents, dissuades or inhibits the individual from doing something which is not unlawful.’

Such advice guidelines, although not binding, can be extremely useful. In Ireland, interactions of a confrontational and negative nature between members of An Garda Síochána and photographers do not occur often. However, with a view to reducing the possibility of members of An Garda Síochána unlawfully attempting to prevent photographers from taking photographs in public places, it would be beneficial if An Garda Síochána were to publish a “photography advice” guideline for its members. Any such guideline should also be made available to members of the public for viewing.

4.3) Restrictions resulting from the Individual’s Right to a Fair Trial and Fair Court Procedures

The right to a fair trial is guaranteed by both the Constitution of Ireland and the European Convention. Article 34.1 of the Constitution provides for public or open justice:

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accessed 14 October 2015

203 Counter-Terrorism Act 2008, s 76(2)


205 Metropolitan Police, Photography Advice <http://content.met.police.uk/Site/photographyadvice> accessed 27 August 2015
Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.\textsuperscript{206}

The norm, therefore, is that both the public and the media, as the “eyes and ears” of the public, will be admitted to court and the media will be entitled to report on proceedings on behalf of the public. In relation to the trial of people charged with criminal offences, Article 38.1 of the Constitution states: ‘No person shall be tried on any criminal charge save in due course of law.’\textsuperscript{207} In addition, Article 6(1) of the ECHR states:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’\textsuperscript{208}

The guarantee of justice in public under Article 34.1 of the Constitution is not absolute and it may be restricted. The inclusion of the words “special and limited cases” in Article 34.1 in relation to the administration of justice provides the basis under which members of the media and/or the public may be excluded from court proceedings and/or court reporting restrictions may be imposed. Such exclusions and restrictions may be imposed, in accordance with prescribed laws, in order to safeguard the administration of justice, to protect the right to a fair trial and to ensure that the presumption of innocence is respected and maintained during a trial. They may also be imposed for a variety of other reasons, such as in family law cases. The topic of exclusions and restrictions from court proceedings will be discussed in Section 4.4 below.

The issue of balancing the right to a fair trial with the competing right of freedom of expression and particularly the right of the press to report on court proceedings has featured in a number of court cases. The Irish Supreme Court case of \textit{D v Director of Public Prosecutions}\textsuperscript{209} concerned an applicant who had been tried twice on a charge of indecent assault and in both instances the jury had been discharged and a retrial ordered. The second trial had been halted due to prejudicial reporting of it. Subsequent to the discharge of the jury in that trial, the \textit{Sunday Tribune} published an article which included an interview with the complainant on its front and inside pages. The front page article contained the heading “Rape: it began when I was 11”, and underneath “Girl tells of her five year ordeal of assaults, pregnancy, a child – and suspended sentences for three men”.\textsuperscript{210} Neither the complainant nor the applicant was named in the article, which included a rear-view drawing or photograph of a young girl with a child in her arms.\textsuperscript{211} The applicant obtained a High Court order prohibiting another retrial and that order was appealed.\textsuperscript{212} While the appeal was allowed, Finlay J, in

\textsuperscript{206} Constitution of Ireland (Art. 34.1) (on The Courts)
\textsuperscript{207} ibid, (Art. 38.1) (on Trial of Offences)
\textsuperscript{208} European Convention on Human Rights Act 2003, Schedule 1, Art. 6.1
\textsuperscript{209} D v Director of Public Prosecutions [1994] 2 IR 465
\textsuperscript{210} ibid 465
\textsuperscript{211} ibid 465 and 469
\textsuperscript{212} ibid 465
dissention, raised the important test, which is for the applicant to prove, of whether the published article and the accompanying drawing/photograph would influence a jury member’s opinion of the accused’s guilt or innocence and thus create a “real and substantial risk” of an unfair trial resulting from such external influence.\textsuperscript{213} In dealing with the hierarchy of constitutional rights relevant to this case, Denham J, who upheld the appeal, stated:

‘The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right. A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted.'\textsuperscript{214}

The implications of the above-mentioned findings of Finlay J and Denham J for photographers and publishers of photographs are that when they are reporting on court proceedings, they should ensure that their actions do not have the potential to cause a mistrial. Also, they would need to keep in mind that while freedom of expression is a constitutional right, in Denham J’s view, it does not outrank one’s constitutional right to a fair trial. The “real and substantial risk” test elaborated in \textit{D} was applied shortly after in the High Court case of \textit{Magee v O'Dea},\textsuperscript{215} in which the plaintiff was the subject of an extradition warrant to the United Kingdom in relation to the murder of a British army sergeant. The plaintiff claimed that he would not receive a fair trial in the United Kingdom due to previously published newspaper articles in both the \textit{Daily Star} and the \textit{Daily Mail} newspapers concerning the murder, which included sensational headlines, photographs of the plaintiff and the articles identified him as the murderer. In allowing the plaintiff's appeal, Flood J balanced the weight to be given to the various factors that pointed towards the “probability of a serious risk of an unfair trial” with the “fade factor” in the mind of individuals, who may have seen the newspapers’ articles and who may be potential jurors in the proposed trial of the applicant in England. In reaching his decision, Flood J stated:

‘As this is a fundamental constitutional right – the right to a fair trial and to fair procedures – strict construction is the appropriate form of construction to be applied by this court. The onus of proof is one of probability of a serious risk of an unfair trial. The point in time at which this risk is to be considered to exist is now – when the plaintiff on extradition would leave the protection of this court. I have carefully considered the weight to be given to the lurid and sensational newspaper coverage, the existence of the photograph in the said newspaper and the unvarnished assumption that the person shown in the photograph is guilty of murder, the extent of the newspaper coverage in the national newspapers and the

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\textsuperscript{213} ibid 467  \\
\textsuperscript{214} ibid  \\
\textsuperscript{215} Magee v O’Dea [1994] 1 IR 500
\end{flushright}
possibility that all or a great part of the foregoing would be rekindled in the mind of a jury trying the plaintiff and I have balanced that against the “fade factor” and what I accept would be a careful charge by a trial judge to the jury directing them not to permit themselves to be influenced by sensational and lurid newspaper coverage at the time or anything else other than what they hear by way of evidence in the court of trial. In my judgment, on the balance of probabilities, there is a serious risk of the type of unfairness contemplated by the Chief Justice.216 in his said judgment which I have already quoted in D v The Director of Public Prosecutions [1994] I.L.R.M. 435.217

The test in D was subsequently developed into a two stage test in the 1998 Irish Supreme Court case of The Irish Times Ltd. v Ireland218 concerning a ban on media reporting of a major drugs trial. In The Irish Times, Denham J stated that it was necessary for a judge to invoke a two stage test, namely:

(1) ‘Whether there is a real risk that the accused would not receive a fair trial if the trial was held in public.’

(2) ‘If it were determined on evidence that there was a real risk of a trial being unfair if it were held in public then the trial judge should consider whether the real risk can be avoided by appropriate rulings and directions.’219

That two stage test was, in turn, further developed by Clarke J in the 2006 High Court case of Independent Newspapers and Others v Anderson and Condell220 in which the doctrine of proportionality was added to the test.

The competing right of freedom of expression and the right to fair court procedures have also been considered by the ECtHR. For example, the ECtHR case of Egeland and Hanseid v Norway221 resulted from the conviction of two Norwegian journalists following the publication of a photograph in contravention of Norwegian law of a convicted triple murderer leaving a court building in a distraught state.222 The Court held that as there was an absence of a European consensus on the prohibition of photography at court buildings and the publication of such photographs States should be granted a wide margin of appreciation.223 The Court ranked the need to protect the convicted prisoner’s privacy rights with equal status to the State’s duty to safeguard due process:

Note: Finlay J who presided in D v Director of Public Prosecutions [1994] 2 IR 465 was later appointed Chief Justice

Note: Magee v O’Dea [1994] 1 IR 500, 513

Note: The Irish Times Ltd. v Ireland [1998] 1 IR 359

Note: ibid para 399

Note: Independent Newspapers and Others v Anderson and Condell [2006] IEHC 62, para 7.9

Note: Egeland and Hanseid v Norway (2010) 50 EHRR 2

Note: In Norway, under Section 131A of the Administration of Courts Act 1915 the photographing of an accused or convicted person on his or her way to or from a court hearing without his or her consent is prohibited. If special reasons exist for doing so, a court may make an exception to this prohibition. However, under the Act, prior to doing so, the parties to the case should be permitted to express their views. Egeland and Hanseid v Norway (2010) 50 EHRR 2, para 19

Note: While it is not an offence in Ireland to photograph and/or publish a photograph of any party to a court proceeding within the precincts of a court building, in England it is under the Criminal Justice Act 1925, s 41(1).
‘...the need to protect B’s privacy was equally important as that of safeguarding due process. While the Supreme Court attached more weight to the latter, for the European Court the former is predominant. However, when considered in the aggregate, both reasons corresponded to a pressing social need and were sufficient. The interests in restricting publication of the photographs outweighed those of the press in informing the public on a matter of public concern.’

Furthermore, the Court went on to hold that by prohibiting the taking and publication of the photographs of B on the way from the court building to an awaiting police car, the respondent State ‘acted within its margin of appreciation in assessing the need to protect her privacy and those of fair administration of justice.’ It was satisfied that the restrictions imposed on the editor’s freedom of expression rights was ‘...supported by reasons that were relevant and sufficient, and was proportionate to the legitimate aims pursued.’ Accordingly, the Court held that there had not been a violation of the Article 10 right of freedom of expression.

4.4) Restrictions on Court Reporting

Article 34.1 of the Constitution of Ireland states: ‘Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.’ In accordance with Article 34.1, statute law gives the courts the powers in certain circumstances to hold court proceedings in camera whereby members of the public, including the media, may be excluded from the proceedings and to issue publication prohibition orders in relation to such cases. A number of statutes give courts the power to clear members of the public from a court-room during particular parts of a court case and to issue orders which either restrict or prohibit the reporting of court proceedings. Other statutes make court reporting prohibition orders mandatory in respect of certain matters. On the above-mentioned constitutional requirement that justice be administered in public, Denham J in the 1998 Irish Supreme Court case of *The Irish Times Ltd. v Ireland* stated:

‘It is entirely impractical for all people to attend all courts. Nor is that required. What is required is that information of the hearings in court are in the public domain. In a modern democracy this information is brought into the public domain by many routes, but in reality most people learn of matters before the courts from the press. Thus any curtailment of the press must be viewed as a curtailment of the access of the people to the administration of justice and should be analysed accordingly.’

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224 ibid para 63
225 ibid para 65
226 ibid
227 Constitution of Ireland, (Art. 34.1) (On The Courts)
228 The Irish Times Ltd. v Ireland [1998] 1 IR 359
229 ibid para 398
Holman J made an interesting, pragmatic comment on the restricting by the courts of what accredited journalists may report in respect of court proceedings in the 2015 English High Court Family Law Division case of Ekaterina Fields v Richard Fields.\(^{230}\) In Fields he stated:

‘To permit the presence of accredited journalists, but then tightly to restrict what they can report, creates a mere illusion of transparency.’\(^{231}\)

The Courts (Supplemental Provisions) Act 1961, as amended, sets-out a number of areas where cases could be heard in private, either because of the urgency or sensitivities involved. Section 45(1) of the Act states:

‘Justice may be administered otherwise than in public in any of the following cases:

(a) applications of an urgent nature for relief by way of habeas corpus, bail, prohibition or injunction;
(b) matrimonial causes and matters;
(c) lunacy and minor matters;
(d) proceedings involving the disclosure of a secret manufacturing process.’\(^{232}\)

Section 45 of the 1961 Act, was amended by Section 40(2) of the Civil Liability and Courts Act 2004 (‘in so far as it relates to matrimonial causes or matters, or minor matters’). This was the first relaxation of the “in camera” rule. Section 40(3) of the 2004 Act states:

‘Nothing contained in a relevant enactment shall operate to prohibit:

(a) the preparation by a barrister at law or a solicitor or a person falling within any other class of persons specified in regulations made by the Minister and publication of a report of proceedings to which the relevant enactment relates, or
(b) the publication of the decision of the court in such proceedings, in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified and, accordingly, unless in the special circumstances of the matter the court, for reasons which shall be specified in the direction, otherwise directs, a person referred to in paragraph (a) may, for the purposes of preparing such a report, attend the proceedings subject to any directions the court may give in that behalf.’\(^{233}\)

Section 45(2) of the 1961 Act states ‘The cases prescribed by subsection (1) of this section shall be in addition to any other cases prescribed by any Act of the Oireachtas.’\(^{234}\) The Courts and Civil Law (Miscellaneous Provisions) Act 2013 relaxed the in camera rule in respect of family law and childcare proceedings, so as to permit the presence of accredited members of the press at such

\(^{230}\) Ekaterina Fields v Richard Fields [2015] EWHC 1670 (Fam)
\(^{231}\) ibid para 3
\(^{232}\) Courts (Supplemental Provisions) Act 1961, s 45(1)
\(^{233}\) Civil Liability and Courts Act 2004, s 40(2)
\(^{234}\) Courts (Supplemental Provisions) Act 1961, s 45(2)
proceedings, but with provisions to maintain the existing anonymity restrictions in respect of such court proceedings. Section 5 of the 2013 Act amended S.40 of the Civil Liability and Courts Act 2004 and inserted a new sub-section 3A in the Act and Section 3A(a) states:

‘Subject to paragraph (b), nothing contained in a relevant enactment shall operate to prohibit bona fide representatives of the Press from attending proceedings to which the relevant enactments relates.’

Section 4 of the 2013 Act specifies the range of relevant enactments, namely family law proceedings, referred to in S.3A(a) above. Attendance by bona fide representatives of the Press at court proceedings in accordance with Section 3A(a) of the Act is not an absolute right and it may be restricted or prohibited by a court under S.3A(b) of the Act. In deciding whether or not to make such a restriction order, a court must take into consideration a range of issues, duties and needs, mainly concerned with protecting the parties and particularly children, as specified in S.3(A)(c) and S.3(A)(d) of the Act. In relation to the reporting of such court proceedings, Section 6 of the 2013 Act inserted a new S.40A in the Courts and Civil Liability Act 2004, which is applicable to everybody and not just to members of the media. Section 40(A) prohibits and makes it an offence for “any” person or corporate body to publish or broadcast:

‘…any information about a matter which would be likely to lead members of the public to identify the parties to proceedings to which a relevant enactment relates or any child to whom those proceedings relate.’

In such cases where the identity of the parties is to be protected, photographs may not be published. It should be noted by photographers, that an intention to breach the in camera rule is not a pre-requisite for a finding by a court of a breach of it. Such was held by Birmingham J in the case stated to the Irish High Court in 2012 Health Service Executive v L.N. and Others.

4.4.1) Applications of an Urgent Nature

Turning in turn to the issues specified in Section 45(1) of the 1961 Act, as amended, the urgency of habeas corpus applications to challenge the legality of holding a person in depravation of his/her liberty is clear. In respect of applications for bail, the Bail Act 1997, as amended, allows for the holding of bail applications otherwise than in public. Under Section 4 of the Act, bona fide representatives of the press may attend and report on the proceedings. However, any published report of such proceedings may not include any evidence of a criminal record of any person applying

235 Courts and Civil Law (Miscellaneous Provisions) Act 2013, s 5
Note: Section 5 of the Act was commenced on 10 January 2014 by the Courts and Civil Law 2013 (Sections 3 to 12) (Commencement) Order 2014 SI 2014/5
236 ibid s 4
237 Civil Liability and Courts Act 2004, s 3(A)(b) as inserted by Section 5 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013
238 ibid
239 Health Service Executive v L.N. and Others [2012] IEHC 611, para 41
for bail. To do so is an offence. Injunction applications, to prevent an imminent publication, for example, may also be made to the courts at short notice. This could result in members of the media being, in effect, excluded from the proceedings, as they may not be aware that an application is being heard or that it is being held in camera. Such exclusions could potentially be problematic for members of the media by unknowingly breaching publication restriction orders.

4.4.2) Matrimonial Causes and Matters
Murphy and McGuinness, writing in 2011, prior to the changes in reporting family law cases brought in by the 2013 Act (see the details of the Act in Section 4.4 above) stated that the explicit reference to matrimonial matters being held otherwise than in public in Section 45 of the 1961 Act resulted in it being in many family law statutes so that it ‘…applied to virtually every kind of family proceedings. With varying forms of words, it applies to separations, divorces, maintenance applications, Family Home Protection Act applications, applications for protection and barring orders, the Adoption Acts, and where a party requested at least two applications for declarations of paternity.

4.4.3) Lunacy and Minors
The grouping of these two headings together in the Courts (Supplemental Provisions) Act 1961 is to say the least – strange. It is possible, that it resulted from the reference in the Act to the Lunacy Regulation (Ireland) Act 1871, which in turn makes reference to ‘the solicitor for lunatics and minors’. Also, while Section 9(4)(a) of the 1961 Act did make provision for the President of the High Court or such other Judge of the High Court as may be assigned by him under S.9 of the Act to ‘substitute such form of expression “ward of court” or such other similar expression as he thinks proper for the word “lunatic”…’ one would have to wonder why the Oireachtas did not do so itself, when it was debating and approving the Bill that became the 1961 Act. Under Order 67 of the Rules of the Superior Courts, any court hearing instituted under the Lunacy Regulation (Ireland) Act 1871 is to be held in camera. The Mental Health Act 2001 allows for ‘a patient to appeal to the Circuit Court against a decision of a tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder.’ Under Section 19(8) of the Act:

‘The Circuit Court shall exclude from the Court during the hearing of an appeal under this section all persons except officers of the Court, persons directly concerned in the hearing, bona fide representatives of the Press and such other persons (if any) as the Court may in its discretion permit to remain.

241 Bail Act 1997, s 4
242 Marie McGonagle, Media Law (2nd edn, Thompson Round Hall 2003) 239
243 Yvonne Murphy and Donal McGuinness, Journalists and the Law (3rd edn, Round Hall 2011) 36
244 Lunacy Regulation (Ireland) Act 1871, s 2
245 Courts (Supplemental Provisions) Act 1961, s 9(4)(a)
247 Mental Health Act 2001, s 19(1)
248 ibid s 19(8)
However, under Section 19(9) of the Act:

‘No matter likely to lead members of the public to identify a patient who is or has been the subject of proceedings under this section shall be published in a written publication available to the public or be broadcast.’

Section 19(9) of the Act prohibits any “matter” likely to lead members of the public to identify a patient from being published, however it does not define what that term embraces. A court would give it a broad interpretation and therefore photographs would come within the S.19 publication restriction. Notwithstanding the above-mentioned, legislative provisions concerning the attendance of bona fide members of the Press at, and their reporting on, court proceedings concerning the welfare of children under the Courts and Civil Law (Miscellaneous Provisions) Act 2013, there are separate legislative provisions that apply to family law and child law civil cases as well as criminal proceedings either against a child or in which a child is a witness. For example, where an application is made to a court for a declaration of parentage under S.35 of the Status of Children Act 1987, the court may, under S.36 of the Act, direct that the whole or part of such an application is to be heard otherwise than in public.

The Children Act 2001, as amended, defines a “child” as a person under 18 years of age. Section 252 of the Act provides for the anonymity of a child, who is either the subject of court proceedings or a witness in such proceedings. However, a court may dispense with such a requirement if it is satisfied to do so in the interests of the child. If a court makes such a decision, it must give its reason for doing so in an open court. Also, Section 139 of the Criminal Justice Act 2006 amended the 2001 Act by substituting the existing S.93 in the 2001 Act with a new S.93. This new S.93 deals with proceedings before a court concerning a child and it prohibits the publication of specified types of material, including photographs, which might result in the identification of such a child. In specified instances, such as to avoid injustice to the child, a court may dispense with such a restriction. If it does so, it must explain in open court its reasons for making such a decision.

Also, under the 2001 Act a court may exclude from a hearing of any proceedings before it:

all persons except: (a) officers of the Court, (b) the parents or guardian of the child concerned, (c) an adult relative of the child, or other adult who attends the Court pursuant to section 91(6), (d) persons directly concerned in the proceedings, (e) bona fide

Note (1): In the 2013 Irish High Court case of M.R. & Anor v AntÁrd Chláraitheoir & Ors [2013] IEHC 91, following an application by three newspapers, Abbott J (at paras 120–122) lifted a blanket reporting restriction on the proceedings. However, in doing so he imposed explicit reporting restrictions on the newspapers including a prohibition on contemporaneous social media reporting. M.R. and Anor was decided prior to the commencement of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

Note (2): M.R. and Anor was decided prior to the commencement of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.
representatives of the Press, and (f) such other persons (if any) as the Court may at its discretion permit to remain.256

Any decision or order made by the Court in such proceedings is to be announced in public.257 Where a child is a witness in proceedings for an offence, ‘…the court may exclude from the court during the taking of his or her evidence all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons (if any) as the court may in its discretion permit to remain’.258

4.4.4) Other Statutory Restrictions on Court Reporting

Aside from the above-mentioned statutory provisions, a wide range of other statutes, particularly those concerning criminal offences and specifically certain sexual offences,259 contain provisions which may result in either the restricting or prohibiting of court reporting. Some statutes, such as the Official Secrets Act 1963 (Section 12), provide for part(s) of a hearing to be held in camera on the ground that the publication of any evidence or statement to be given or made during any part of the hearing would be prejudicial, in this instance to the safety or preservation of the State.260 Court proceedings under the Proceeds of Crime Act 1996, as amended,261 may be held otherwise than in public.262 Also, the Court may, ‘…if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this Act, including information in relation to applications for, the making or refusal of and the contents of orders under this Act and the persons to whom they relate.’263 Section 19(2) of the Refugee Act 1996 provides for the protection of the identity of an asylum applicant and no matter likely to lead to the applicant’s identity may be published without the consent of the applicant and the Minister.264 The publication of information in contravention of S.19(2) is an offence.265

The Criminal Law (Human Trafficking) Act 2008 (Section 11), as amended, deals with the anonymity of victims of human trafficking:

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256 Children Act 2001, s94(1)
257 ibid s 94(2)
258 ibid s 257(1)
259 Criminal Law (Rape Amendment) Act 1981, ss 6, 7 and 8
Note: Section 8 of the Criminal Law (Rape) Act 1981 was amended by S.14 of the Criminal Law (Rape Amendment) Act 1990, which inserted a new S.6 in the 1981 Act. Sections 6, 7 and 8 of the 1981 Act respectively deal with the anonymity of complainants, anonymity of accused persons and the exclusion of the public from court hearings.
260 Official Secrets Act 1963, s 12
Note: Through the use of the word “shall” in S.12 of the Act, it would appear that a court would not have any discretion over the making or not of an in camera order. However, under Section 12 of the Act, the verdict and sentence (if any) in such an in camera court case shall be announced in public.
261 Note: Section 8 of the Proceeds of Crime Act 1996 was amended by Section 9 of the Proceeds of Crime (Amendment) Act 2005
262 Proceeds of Crime Act 1996, s 8(3)
263 ibid s 8(4)
264 Refugee Act 1996, s 19(2)
265 ibid s 19(3)
Where a person is charged with an offence under section 2 or 4, or section 3 (other than subsections (2A) and (2B)) of the Act of 1998, any person who publishes or broadcasts any information, including –

(a) any photograph of, or that includes a depiction of, the alleged victim of the offence, or

(b) any other representation of the physical likeness, or any representation that includes a depiction of the physical likeness, of the alleged victim of the offence, that is likely to enable the identification of the alleged victim of the offence, shall, subject to any direction under subsection (2), be guilty of an offence…\(^\text{266}\)

Section 11(5) of the Act states that “publishes” means ‘publishes to any person, and includes publishes on the internet’.\(^\text{267}\) Where a court is hearing a re-trial application under either S.8 or S.9\(^\text{268}\) of the Criminal Procedure Act 2010, if it deems it necessary in the interests of justice it may order the exclusion of members of the public or any person other than bona fide representatives of the press from the court.\(^\text{269}\) It may also make an order prohibiting the publication or broadcasting of any matter which is likely to identify the person who is the subject of the re-trial application or anybody else connected with the re-trial for which such an application order is being sought.\(^\text{270}\)

The Air Raid Precautions Act 1939,\(^\text{271}\) as amended, and the Factories Act 1955,\(^\text{272}\) as amended, make it an offence for one to unlawfully disclose a manufacturing process or a trade secret. Such disclosure could be undertaken through the publication of photographs. Also, under Section 212 of the Companies Act 2014, which concerns “protection for minorities”:

‘If in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part of them shall be in camera.’\(^\text{273}\)

A court could deem the protection of a manufacturing process or a trade secret as falling within the meaning of S.212 of the Act. Consequently, the publication of photographs of a manufacturing process or trade secret could be prohibited by any in camera ruling made in accordance with S.212.

\(^\text{266}\) Criminal Law (Human Trafficking) Act 2008, s 11(1)
\(^\text{267}\) ibid s 11(5)
\(^\text{268}\) Note: Sections 8 and 9 of the Criminal Procedure Act 2010 respectively concern applications by the Director of Public Prosecutions for a re-trial order where new and compelling evidence becomes available and where a previous acquittal was tainted.
\(^\text{269}\) Criminal Procedure Act 2010, s 12(2)
\(^\text{270}\) ibid s 12(3)
\(^\text{271}\) Air Raid Precautions Act 1939, ss 33(5) and 55(5)
\(^\text{272}\) Factories Act 1955, s 98(5)
\(^\text{273}\) Companies Act 2014, s 212(9)

Note (1): Section 212 of the Act on “Protection for minorities” concerns the protection of the interests of a member of a company ‘…who complains that the affairs of the company are being conducted or that the powers of the directors are being exercised – (a) in a manner oppressive to him or her or any of the members (including himself or herself) or (b) in disregard of his or her or their interests as members.’

Note (2): Sections 556, 788(9), 789(7) and 795(7) of the Act also contain provisions for the hearing of court proceedings otherwise than in public. It is noted that the Act uses both of the terms “otherwise than in public” and “in camera”.
In civil cases involving a person with a medical condition, a court may make a publication prohibition order under the Civil Law (Miscellaneous Provisions) Act 2008. While an application for such a court order may be brought at any stage during court proceedings under S.27(2) of the Act, S.27(3) of the Act provides that:

The court shall grant an order under this section only if it is satisfied that

(a) the relevant person concerned has a medical condition,
(b) his or her identification as a person with that condition would be likely to cause undue stress to him or her, and
(c) the order would not be prejudicial to the interests of justice.

Given that identification is an issue here, the provision would apply to the publication of photographs.

4.5) Court Reporting and Contempt of Court

The use of photographic or sound recording equipment to record court proceedings in Ireland is, in effect, not permitted. Murphy and McGuinness state that ‘In Ireland, the general tendency has been not to permit such things….There is no statutory law in this area and it is entirely a matter for the discretion of the individual judge or judges.’ The Rules of Court deal with the topic of the recording of court proceedings in the superior, circuit and district courts. Rule 8 of Order 123, as amended, of the Superior Court Rules states:

‘Unless

(a) otherwise permitted by and in accordance with this Order, or
(b) otherwise permitted by the Supreme Court, the Court of Appeal or the Court and, in that event, subject to and in accordance with any direction of such court, no person, other than the Courts Service or a person authorised by it on its behalf, shall make any record of proceedings otherwise than by written or shorthand notes.’

Rule 7 of Order 67A of the Circuit Court Rules contains a broadly similar wording as the above-mentioned Rule 8. Rule 1 of Order 67A defines a “record” as:

’a contemporaneous record of the proceedings concerned made by any one or more means, including, without limitation:
(a) any shorthand or other note, whether written, typed or printed, and
(b) any sound recording or other recording, capable of being reproduced in legible, audible or visual form, approved by the court;’

274 Civil Law (Miscellaneous Provisions) Act 2008, s27(1)
275 ibid s 27(2)
276 ibid s 27(3)
277 Murphy and McGuinness, Journalists and the Law (3rd edn, Round Hall 2011) 135–136
278 RSC Ord 123, r 8
279 RCC Ord 67A, r 7
280 RCC Ord 67A, r 1
Section 2 of the District Court (Recording of Proceedings) Rules 2013 amended the District Court Rules 1997 by inserting a new Order 12B in the 1997 Rules. Rule 4 of Order 12B contains a similarly worded provision to that of Rule 7 of Order 67A, as stated above. With the exclusion of the word “concerned” in Rule 1 of Order 67A, as mentioned above, Rule 1 of Order 12B offers a similarly worded definition of the term “record”. As photography would come within the meaning of “other recording” in paragraph (b) of the above-mentioned Rule 1 of Order 67A, the approval of the court would be required for its use as a means of recording court proceedings. The unapproved recording of court proceedings occurs very infrequently. For example, the Irish Examiner reported that at the Circuit Court in Trim, Co. Meath, Reynolds J imposed two weeks imprisonment on a Paul Coddington following his tape recording of the Court’s proceedings and his refusal to purge his contempt of court.

Rule 5 of Order 12B of the District Court Rules makes provision for any person to apply to the Court to be granted access to a record of a court proceeding held by the Court, while Order 14 of the Rules deals with the admission of the public to specified types of District Court criminal proceedings and the publication of such proceedings. Under Order 14:

‘In any criminal proceedings for an offence which is, in the opinion of the Court, of an indecent or obscene nature, the Court may, subject to sub-rule (2), exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may in its discretion permit to remain.’

Furthermore, Rule 2(2) of Order 14 states:

‘In any such proceedings where the accused is under eighteen years of age or where the offence is of an indecent or obscene nature and the person with or against whom it is alleged to have been committed is under that age or is a female, a parent of relative or friend of that person shall be entitled to remain in Court during the whole of the hearing.’

Rule 3 of Order 14 grants the Court exclusionary powers in relation to proceedings being conducted under either Part 1A of the Criminal Procedure Act 1967, as amended, or the Bail Act 1997, as

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281 District Court (Recording of Proceedings) Rules 2013, SI 2013/99, s 2
282 District Court Rules 1997, SI 1997/93
283 RDC Ord 12B, r 2 <www.courts.ie/rules.nsf/0c609d7abff72c1c80256d2b045bb64/4fcaca8e68b2f9e980257b470036a93?OpenDocument> accessed 28 July 2015
284 ibid r 4
285 ibid r 1
287 RDC Ord 12B, r 5 <www.courts.ie/rules.nsf/0c609d7abff72c1c80256d2b045bb64/4fcaca8e68b2f9e980257b470036a93?OpenDocument> accessed 28 July 2015
288 RDC Ord 14, r 2(1)
289 ibid r 2(2)
290 Note: Part 1A of the Criminal Procedure Act 1967 as inserted by Section 9 of the Criminal Justice Act 1999 concerns proceedings relating to indictable offences.
amended. Rule 4 of Order 14 concerns detention applications made to the Court under either Section 30(4) of the Offences Against the State Act 1939, as amended; Section 2(2) of the Criminal Justice (Drug Trafficking) Act 1996, as amended, or Section 50(3) of the Criminal Justice Act 2007, as amended. In instances of such applications and where the prescribed circumstances apply, a judge, either of his own motion or on the application of the officer of An Garda Síochána making the application may:

‘…direct that in the public interest, the particular evidence shall be given in the absence of every person, including the person to whom the application relates and any legal representative (whether of that person or the applicant), other than:

(1) the member or members of the Garda Síochána whose attendance is necessary for the purpose of giving the evidence to the Judge; and

(2) if the Judge deems it appropriate, such one or more of the Clerks of the Court as the Judge determines.

An exclusion order made under Rule 4 of Order 14 would therefore also apply to bona fide members of the press. Rules 5 of Order 14 concerns the publication of court proceedings initiated under the statutory provisions mentioned in Rule 4 above and it details the type of information which may or may not be published in respect of such proceedings. Where it is proposed to call a person, who has a medical condition, as a witness in a criminal proceeding, such a person may make an application to the District Court to prohibit the publication of any information relating to the proceedings, which would identify that person as being a person with such a medical condition. Where a judge of the District Court makes an order on foot of such an application, under Rule 7 of Order 14, such a person ‘may request the Judge to confirm the existence of such order on any occasion on which the proceedings to which the order relates are before the Court.’ Access to the records of court proceedings at the Superior, Circuit and District Court levels is also provided for under the Rules of Court. Such access may be granted to an interested party following the submission of the prescribed application to the relevant court.

While there is no statutory prohibition on the taking and/or publication of photographs of court proceedings or within the precinct of a court house in Ireland, to do such in the United Kingdom is an offence. Section 41(1) of the Criminal Justice Act 1925, as amended, states:

‘No person shall (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court,

291 RDC Ord 14, r 3
292 Note: Section 30(4) of the Offences Against the State Act 1939, Section 2(2) of the Criminal Justice (Drug Trafficking) Act 1996 and Section 50(3) of the Criminal Justice Act 2007 were respectively amended by Sections 21, 22 and 23 of the Criminal Justice (Amendment) Act 2009.
293 RDC Ord 14, r 4(2)
294 ibid r 5
295 Criminal Justice Act 2006, s 181
296 RDC Ord 14 r 7
297 RSC Ord 123 r 9, RCC Ord 67A r 8 and RDC Ord 12B r 5
whether civil or criminal; or (b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof.298

Furthermore, the Act states:

‘…a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court–room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court–room or any such building or precincts as aforesaid.’299

The Crime and Courts Act 2013 permits the Lord Chancellor to make an order to allow for the filming and broadcasting of specified court proceedings below the level of the Supreme Court.300 The provisions of the Court of Appeal (Recording and Broadcasting) Order 2013 specify the types of Court of Appeal proceedings which may be filmed and broadcast to the public and the conditions under which approved filming and broadcasting may be undertaken.301 As an example of a prosecution and conviction under S.41(1) of the 1925 Act, in July 2014 The Telegraph reported that a Joel Norris was convicted by Bournemouth Magistrates Court following his taking of a selfie photograph of himself and his co-defendants in the courtroom during their trial on other charges and his posting of the image on Twitter with the caption “Lads in the court box lol.”302 Commenting on the contrasting position from a statutory perspective in Ireland and the United Kingdom on the taking of photographs in courts, the Law Reform Commission stated in its 1994 Report on Contempt of Court:

‘The taking of photographs in court may be disruptive to a much greater extent than the use of sound recorders. The same could hardly be said of making portraits or sketches. We think there is something to be said for a statutory provision similar to that in the 1925 Act, but omitting the prohibition on the making of portraits or sketches.’303

Since the publication of that 1994 Report, such a statutory provision has not been enacted in Ireland. Rather than the current situation of not having a statutory provision, which would either permit or prohibit the taking of photographs in a court, but, in effect, having such a prohibition in place as a consequence of the courts’ non-granting of permission to take photographs in the courts through their powers under a number of Rules of Court, it would be preferable that this issue would be put on a statutory footing. One would have to question, however, the actual benefit and value to be derived from legislating for the permitting of the taking of photographs during court cases and their subsequent publication and their potential disruption of, and impact on, the fair administration of justice.

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298 Criminal Justice Act 1925, s 41(1)
299 ibid s 41(2)(c)
300 Crime and Courts Act 2013, s 32
301 The Court of Appeal (Recording and Broadcasting) Order 2013, SI 2013/2786
of justice, the court cases themselves and the parties, witnesses, jurors and others involved in court cases.

The photographing and/or publication of photographs of parties to court cases, their relatives and/or witnesses while they are either entering or leaving a court building is a related, but different, issue and is a common daily occurrence. In respect of such practice within the United Kingdom, Michalos states ‘...it is dangerous to assume that such photographs will not be subject to a S.41 prosecution’.304 Although not illegal in Ireland, such practice is criticised sometimes by the courts. For example, in its news report on the 2010 sentencing by the Irish Central Criminal Court of Eamonn Lillis for the manslaughter of his wife Celine Cawley, RTÉ reported:

‘Judge White called on the media to respect the privacy of the Cawley family, he said the case had attracted an extraordinary amount of media attention and he had observed on news reports a “scrum” of media outside the court. He described the behaviour as an affront to human dignity.’305

Whether such activity by press photographers is an “affront to human dignity” is questionable, as its impact on the individuals being photographed will vary from one person to another. The primary issue here is the need to balance the competing right of press photographers to exercise their right to create photographs of any parties to, or witnesses in, court proceedings, who are not the subject of statutory or court-imposed identification reporting restrictions or prohibitions, with the individual’s right to not feel unduly harassed or stressed by photographers while they walk in a public thoroughfare to or from a court building. It would be appropriate if “rules of engagement” relating to the photographing of such individuals were to be statutorily specified. The onus for marshalling the behaviour of photographers outside courts cannot be left to media outlets, as many published court photographs are, or may be, obtained from non-staff photographers and/or are published on online news sites, which are not subject to press ethical codes of practice. Also, in respect of the photographing of defendants in criminal cases entering or leaving court buildings, there should be a statutory prohibition on the publication of such images which show them wearing handcuffs. Such images have the potential to influence a viewer’s opinion that a handcuffed defendant featured in a published photograph is a dangerous individual and/or guilty of a serious criminal offence, when such may not be the case. Such a defendant could end-up being acquitted of any charges against him, yet the published image would remain in existence in either printed publication archives, on the internet or both.

The media’s reporting of court cases and the publication of articles on individuals and other matters either directly associated or not with such court cases can result in organs of the media being held in contempt of court. Sometimes when media outlets have been held to be in contempt of court, the

304 Christina Michalos, The Law of Photography and Digital Images (Sweet and Maxwell 2004) 239
publication of photographs has been a central issue. McGonagle argues that contempt of court is “…unique to common-law jurisdictions. It is unknown in civil-law countries, where specific offences set out in the penal code protect the independence and impartiality of the judiciary and the administration of justice.” Unlike the United Kingdom, which has a Contempt of Court statute, Ireland does not. However, contempt of court in both jurisdictions is becoming influenced by the principles of Article 10 of the ECHR.

Under the United Kingdom’s Contempt of Court Act 1981, as amended, “…conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of the intent to do so.” This strict liability rule applies to publications, which include “…any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.” However, it only applies to a publication which “…creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.” Also, such strict liability applies to publications “…only if the proceedings in question are active within the meaning of the section at the time of the publication.” Schedule 1 of the Act specifies the times at which proceedings become active and at which they cease to be active. The Act does offer a defence of innocent publication or distribution to a charge of contempt of court; however, the burden of proof lies on a person seeking to use such a defence. One is not guilty of contempt of court under the above-mentioned strict liability rule in respect of “…a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.” Where a court believes that the reporting of contemporaneous or of pending or imminent proceedings may prejudice the administration of justice, it may order “…that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.” Although the Act stipulates the commencement and concluding points of active proceedings, it offers neither a definition of nor timeline parameters in respect of what it refers to as “pending” and “imminent” proceedings. Also, under Section 11 of the Act, a court may prohibit the publication of matters, which it has exempted from disclosure to the public during court proceedings.
The Irish Law Reform Commission in its 1994 Report on Contempt of Court recommended that criminal proceedings should be regarded as being “active”…from the time an initial step has been taken until they are concluded.” Against much objection, it also proposed that the law be amended to extend liability to cover imminent proceedings. However, such a proposal has not been enacted by the Oireachtas. It is time for the Oireachtas to enact legislation, which would provide both legal clarity and certainty in respect of contempt of court. Such a legislative need and the potentially problematic issue of including “imminent” proceedings under contempt of court law was highlighted in the Irish High Court case of DPP v Independent Newspapers and Others.

In Independent Newspapers, Kelly J refused to extend the law on contempt of court to include publicity relating to “imminent” court proceedings. In adding his voice to the call for legislation and legal clarity on the topic of contempt of court, Kelly J stated:

‘With no legislation in place the applicant invited the court to bridge the gap by adopting his formula so as to extend the courts summary jurisdiction in order to punish publication contempt when proceedings are “imminent”. The adoption of such a formula by the court would give rise to huge uncertainty. (Would for example proceedings be “imminent” in circumstances where a person is arrested then released and a file sent to the Director of Public Prosecutions?) It could lead to the possible undue cramping of the media in their coverage of public affairs and newsworthy events thus improperly interfering with the freedom of the press. If publications of this type are to be treated as contempts of courts where they are made at a time when the persons against whom they are directed have not "entered the jurisdiction and protection” of the courts, such will have to be provided for by legislation.’

In Ireland, there are two types of contempt of court – civil contempt and criminal contempt. In the Irish Supreme Court case of Keegan v De Búrca, Ó Dálaigh CJ stated that civil contempt:

‘…usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made.’

Ó Dálaigh further stated that civil contempt:

‘…is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court…’

319 ibid 6.11
320 DPP v Independent Newspapers and Others [2003] 2 IR 367
321 ibid paras 384–385
322 Keegan v de Búrca [1973] 1 IR 223
323 ibid para 227
324 ibid
In relation to criminal contempt, Ó Dálaigh CJ stated that criminal contempt:

‘…is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive.’\(^{325}\)

While arguing that civil contempt is not an issue in respect of members of the media, unless they contravene a court order,\(^{326}\) McGonagle states that cases of contempt by the media are generally either exclusively criminal contempt or a mixture of civil and criminal contempt, such as for example breaching an injunction and then publishing a story based on the information obtained through such a breach.\(^{327}\) In the Irish Supreme Court case of \textit{The State (DPP) v Walsh and Conneely}\(^{328}\), O'Higgins CJ classified criminal contempt into three types, namely:

1. \textit{Contempt in Facie Curiae (in the Face of the Court)}:
   ‘…conduct which is obstructive or prejudicial to the course of justice, and which is committed during court proceedings.’\(^{329}\)

2. \textit{Constructive Contempt}:
   ‘…contempts committed outside court (known as constructive contempts) where pending proceedings may be interfered with or prejudiced by what is said or done.’\(^{330}\)

3. \textit{Scandalising the Court}
   ‘This form of contempt is committed where what is said or done is of such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice…Such contempt occurs where wild and baseless allegations of corruption or malpractice are made against a court…’\(^{331}\)

The distinction between civil and criminal contempt of court is not as rigid nowadays as it was historically and is becoming blurred. This development was central to the 2014 Irish Supreme Court case of \textit{Laois County Council v Hanrahan}.\(^{332}\) In \textit{Hanrahan}, Fennelly J outlined the court’s rationale for, and approach to, civil contempt and he also highlighted the High Court’s blurring of the distinction between civil and criminal contempt of court.\(^{333}\)

\(^{325}\) ibid
\(^{327}\) ibid
\(^{328}\) \textit{The State (DPP) v Walsh and Conneely} [1981] 1 IR 412
\(^{329}\) ibid para 421
\(^{330}\) ibid
\(^{331}\) \textit{The State (DPP) v Walsh and Conneely} [1981] 1 IR 412, para 421
\(^{332}\) \textit{Laois County Council v Hanrahan} [2014] IESC 38
\(^{333}\) ibid paras 59–61
4.5.1) Journalists and Contempt in the Face of the Court

In contrast to the legal position in Ireland, in the United Kingdom journalists including press photographers, have a qualified, statutory right to refuse to disclose their sources of information to a court. Except in specified instances, such a refusal is not a contempt of court. Under Section 10 of the Contempt of Court Act 1981:

‘No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.’

In Ireland, journalists have been held to be in contempt in the face of the court by refusing to answer questions during proceedings regarding their sources of information. For example, in the Irish Supreme Court case of Keegan v De Búrca, the Court held that the defendant had been in criminal contempt in the face of the court by refusing to answer a judge’s question during a civil action. While journalists have claimed to have a privilege over their sources, the courts have been slow to recognise its existence. As a consequence of the judgment of the ECtHR in Goodwin v United Kingdom, the Irish Courts have recognised the existence of such a privilege. But, it is not recognised by either the Irish Courts or the ECtHR as being an absolute privilege. In Goodwin, the Court in determining that the applicant’s rights under Article 10 of the Convention had been breached by the decision of the domestic court, stated:

‘…Protection of journalistic sources is one of the basic conditions for press freedom…Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest…Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).’

334 Contempt of Court Act 1981, s 10
335 Keegan v de Búrca [1973] 1 IR 223
336 ibid para 230
337 Goodwin v United Kingdom (1996) 22 EHRR 123
338 European Convention for the Protection of Human Rights and Fundamental Freedoms
<www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 27 May 2013
339 Goodwin v United Kingdom (1996) 22 EHRR 123, para 39
The Court further stated:

‘As a matter of general principle, the “necessity” for any restriction on freedom of expression must be convincingly established... In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.’

The ECtHR’s decision in Goodwin was re-iterated and accepted by Fennelly J in the 2009 Irish Supreme Court case of Mahon v Keena. However, while allowing the appellants’ claim of confidentiality of journalistic sources, Fennelly J stated:

‘Careful consideration needs, of course, to be given to the Goodwin case. The court must "take due account" of the principles it lays down. At this point, I raise the question as to whether it can truly be said to be in accord with the interests of a democratic society based on the rule of law that journalists, as a unique class, have the right to decide for themselves to withhold information from any and every public institution or court regardless of the existence of a compelling need, for example, for the production of evidence of the commission of a serious crime. While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted that such a case could arise. Who would decide whether the journalist’s source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law.’

Fennelly J went on to hold: ‘...an order compelling the defendants to answer questions for the purpose of identifying their source could only be "justified by an overriding requirement in the public interest".’

More recently, the issue of the protection of journalistic sources featured in the 2012 Irish High Court case of Cornec v Morrice & Ors. In Cornec, Hogan J refused to give effect to a letter rogatory from a court in the United States requiring an Irish print journalist and a blogger to give evidence that they claimed would involve revealing their sources. In doing so, he agreed to protect a journalist’s and a blogger’s sources. In reaching such a decision Hogan J stated:

‘While I have thus far loosely spoken of a journalistic privilege, there is, in fact, in strictness, no such thing. The protection is rather the high value which the law places on the dissemination of information and public debate. Journalists are central to that entire process, a point expressly recognised by Article 40.6.1º.i of the Constitution itself when it recognises

340 ibid para 40
341 Mahon v Keena [2009] IESC 64
342 ibid para 92
343 ibid para 100

Note: In Keena and Kennedy v Ireland App No 29864/10 (ECHR 30, September 2014), at paras 50–51, the Court held that there had not been an interference with the applicants’ right of freedom of expression through the Irish Supreme Court’s decision to award costs against them even though they had been successful in that case and it stated that the purpose of the Supreme Court’s decision was ‘...to signal that no party is above the law or beyond the lawful jurisdiction of the courts.’

344 Cornec v Morrice & Ors [2012] IEHC 376
“the rightful liberty of expression” on the part of the press, albeit counter-balanced by the stipulation that this rightful liberty shall not be used to undermine “public order or morality or the authority of the state.”...Irrespective, however, of the language used, the constitutional right in question would be meaningless if the law could not (or would not) protect the general right of journalists to protect their sources...”

Furthermore, Hogan J noted:

‘Yet the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information which is essential in a free society.’

Noting the breakdown in the traditional distinction between journalists and what the court described as lay-people such as internet bloggers, Hogan J held that Mr. Garde, a blogger who along with a journalist was named in the letter rogatory, should also not be compelled to disclose his sources. Hogan J stated:

‘Mr. Garde’s activities fall squarely within the “education of public opinion” envisaged by Article 40.6.1 [of the Irish Constitution]. A person who blogs on an internet site can just as readily constitute an “organ of public opinion” as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema. Since Mr. Garde’s activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected.’

As a consequence of the Supreme Court’s consideration of the decision in Goodwin while it reached its decision in Mahon v Keena and also of the High Court’s decision in Cornec v Morrice, it would appear that the Irish courts are now placing a greater weight on the protection of journalists’ sources of information. Such protection would apply equally to photographers. The Irish courts are also prepared to offer similar protection to “bloggers” – a recently-new class of individuals operating in the field of journalism.

4.5.2) Journalists and Constructive Contempt

Breach of the sub-judice (literally “under the judge”) rule is a form of constructive contempt of court. Journalists and photographers could find themselves in constructive contempt of court by, for example, prejudicing an accused’s right to a fair trial by publishing articles and/or photographs relating to court proceedings or the publication of matters discussed during a court case, including

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345 ibid paras 42–44
346 ibid para 46
347 Note: Mr. Garde was a director of a charity called “Dialogue Ireland” and “He has a particular interest in new religious movements, especially those where there is reason to suspect that undue psychological pressures or influence have been used over adherents.” ibid para 12
348 ibid paras 67–68
349 ibid pars 66
where the judge has asked the jury to temporarily leave the court for the duration of such a discussion. Publicity both prior to and during court cases has been raised as an issue in a number of court cases. For examples in the Irish High Court case of *Magee v O’Dea*, Flood J allowed an appeal against the granting of an extradition warrant on the grounds of prejudicial pre-trial publicity. Pre-trial articles had been published in the English editions of the *Daily Star* and the *Daily Mail* newspapers concerning the murder of a British army soldier. The articles included sensational headlines, photographs of the plaintiff and identified him as the murderer. The Irish Court of Criminal Appeal case of *DPP v Davis*, concerned an application for leave to appeal a murder conviction. One of the applicant’s grounds for the appeal was that his trial was prejudicial and that ‘the jury should have been discharged at the request of the defence after a number of photographs showing him heavily chained, and certain editorial comments, had been published in different newspapers.’ In dealing with the applicant’s prejudicial publicity ground, Hardiman J was extremely critical of the media in respect of the publicity surrounding the applicant’s criminal trial:

‘What is directly in issue here is the repeated publication of pictures of a prisoner under restraint, during his trial, and the apparent defiance of the trial judge’s earnest and repeated requests, supported by both prosecution and defence, that such publications should not occur…Such publications are, in the Court’s view, capable of amounting to contempt of Court. In the first place, they may tend to undermine the dignity and resolution of the accused; in the second place they are capable of conveying a prejudicial perception of him. These factors are quite sufficient to permit a trial judge, in the exercise of his inherent powers to ensure that the trial conducted before him is fairly conducted, to request or require that such publication, or further publications of this sort, do not occur. The fact that the learned trial judge’s repeated requests in this regard were ignored is a matter for regret.’

However, in the circumstances of the case the publications were not held to have interfered with the fairness of the trial.

Since the *Davis* case, new court buildings, such as the Courts of Criminal Justice in Dublin, have been designed so as to prevent press photographers from being in a position to photograph an accused person either entering or leaving the court.

4.5.3) Journalists and Scandalising the Court Contempt

Contempt of court cases concerning journalists scandalising the court are rare nowadays. It was a central issue in the Irish Supreme Court in the 1970s case of *In Re Kennedy and McCann*. In *In

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350 Magee v O’Dea [1994] 1 IR 500, 512–513
351 ibid 512
352 DPP v Davis [2000] 10 JIC 2303
353 ibid
354 ibid
355 ibid
356 In Re Kennedy and McCann [1976] IR 382
Re Kennedy, O'Higgins CJ stated that the offence of contempt by scandalising a court is committed when ‘...a false publication is made which intentionally or recklessly imputes base or improper motives or conduct to the judge or judges in question.357 More recently, in 2012 The Guardian reported that a charge against the former Northern Ireland Secretary of State Peter Hain of scandalising a judge was dropped by the Attorney General for Northern Ireland. In his autobiography, Hain had written on ‘Lord Justice Paul Girvan's handling of a judicial review of Hain's decision to appoint Bertha McDougall, the widow of a policeman, as an interim victims' commissioner for Northern Ireland when the Labour politician was secretary of state.'358 The Guardian also reported that in a letter to the Attorney General, Hain stated 'I simply disagreed with the way he dealt with the particular case' and that 'my words were never intended to, nor do I believe that they did, in any way undermine the administration of justice in Northern Ireland or the independence of the Northern Ireland judiciary...’359 The Belfast High Court was told by the Attorney General that 'he no longer believed that there was a risk to public confidence in the administration of justice'.360 Consequently, the charge was dropped.361 Both of the two above-mentioned cases highlight the fact that the publication of an article, which voices a journalist’s disagreement with a judge’s decision in a court case can be a delicate matter. It is interesting to note, following the publication of the United Kingdom’s Law Commission’s Report on Contempt of Court: Scandalising the Court,362 the Crime and Courts Act 2013 abolished the offence of scandalising the judiciary in England and Wales.363

4.6) Miscellaneous Statutory Restrictions

In addition to the above-mentioned statutory restrictions on photographers and photograph publishers, a number of other miscellaneous statutes contain provisions which may result either directly or indirectly in restricting the creation and publication of photographs. The following are examples of such statutory provisions.

4.6.1) Street Trading and Prohibition/Restriction of On-Street Photography

Under the Casual Trading Act 1995, as amended, ‘A person shall not engage in casual trading unless he is, or is the servant or agent acting as such of, a person who holds a casual trading licence that is for the time being in force and the casual trading is in accordance with the licence.’364

357 ibid para 387
359 ibid
360 ibid
361 ibid
Note: The Report concluded, among other issues, at para. 93, that ‘The offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification…The offence may be regarded as self-serving on the part of the judges;…The offence is no longer in keeping with current social attitudes, and is unlikely to influence the behaviour of publishers.’
363 Crime and Courts Act 2013, s 33
364 Casual Trading Act 1995, s 3(1)
Section 2(1) of the Act defines “casual trading” as ‘selling goods at a place (including a public road) to which the public have access as of right or at any other place that is a casual trading area.’

Under the Local Government Act 2001, as amended, local authorities may make bye-laws relating to the ‘use, operation, protection, regulation or management of any land, services, or any other matter provided by or under the control or management of the local authority…’ Local Authorities implement bye-laws, which cover casual trading in publicly-owned places. For example, Dublin City Council’s Parks and Open Spaces Bye-Laws 2002 (as discussed in Chapter (3) at Section 3.2.6.2) make specific reference to the taking of photographs for payment. Prosecutions of photographers under casual trading and street statutes are extremely rare in Ireland or the United Kingdom. An example is the Belfast High Court case of Belfast Corporation v Reilly. In Reilly, the defendant had been prosecuted for on-street photography in contravention of bye-laws made by Belfast Corporation under S.70 of the Belfast Corporation Act (Northern Ireland) 1930. Black LJ held that ‘since the Act of 1930 contained no definition of “street trading” the court in seeking a meaning of that term might have regard to the provisions of the Street Trading (Regulation) Act (Northern Ireland) 1929; and as the activities treated as street trading by this latter Act did not clearly include the activities of the defendant in the present case there was a substantial doubt, and accordingly the defendant was entitled to the benefit of that doubt and should not be convicted.’

In the Scottish High Court case of M’Pherson v Copeland (1956) JC 11, the appellant had been charged with contravening S.19(1) of the Dunoon Burgh Order Confirmation Act 1954, which stated:

‘a person shall not without the consent in writing of the Town Council in any street in the Burgh take any photograph by way of trade or business of any person or group of persons.’

The appellant had been standing in the grounds of an hotel, when he took a photograph of two police constables as they walked by the hotel on Victoria Parade. The question of law to be considered by the Court was ‘where an invitation to buy was delivered to a person using the public street, it was immaterial that the appellant with his camera was not on the street although his subject was?’ Clyde LJG held that such was immaterial and he upheld the conviction.

4.6.2) Aerial Photography

In Ireland, the responsibility for the management of Irish controlled airspace, the safety regulation of Irish civil aviation and the oversight of civil aviation security lies with the Irish Aviation Authority
Under the Irish Aviation Act 1993, as amended, both the Authority and the Minister for Transport, Energy and Communications have the legal power to make orders and regulations. Among other matters, such orders and regulations may designate areas as flight prohibited, restricted or danger areas. For example, a minimum flying height restriction may be imposed within a specified geographical area or an area may be designated for use by only military aircraft. Consequently, orders and regulations made by the IAA may therefore indirectly either restrict or prohibit photographers in undertaking aerial photography using aircraft within Irish controlled airspace. As an alternative to using piloted helicopters or aeroplanes to undertake aerial photography, in recent years some photographers have taken to using remotely-piloted, small, unmanned aircraft systems or “drones”, as they are more commonly known, with cameras fitted underneath.

The use of drones in Ireland is governed by the Irish Aviation Authority Small Unmanned Aircraft (Drones) and Rockets Order 2015. This Order defines a “small unmanned aircraft” as ‘an unmanned aircraft or a drone having a mass of 150 kilogram or less’ and it applies to all ‘small unmanned aircraft (including drones) with a maximum take-off mass of less than or equal to 150 kilograms including equipment installed in or attached to and including cargo’. All drones subject to the Order must be registered with the IAA. Those which weigh over 25kg are also subject to the Irish Aviation Authority (Nationality and Registration of Aircraft) Order 2015 and must be registered in a like manner to manned aircraft. Section 7 of the Small Unmanned Aircraft (Drones) and Rockets Order specifies the parameters under which a drone with a mass of less than 25kg may be flown without a special permission from the IAA, such as for example the maximum flight heights over ground or water, minimum flight distance from a person or a group of more than 12 people, a structure, a vehicle or a vessel not under the control of the drone operator, the drone’s maximum flight distance from its operator and flying within controlled or restricted airspaces. A person in charge of a drone weighing between 4kg and 25kg must not permit it to be flown unless he has undertaken a safety training course acceptable to the IAA. Also, a person may not permit a drone weighing between 25kg and 150kg to be flown without the permission of the IAA. Although permission from the IAA is not required if one wishes to fly a drone for commercial purposes, such

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374 Irish Aviation Authority Act 1993, s 14
375 ibid s 5, s 58(1) and s 59
376 ibid s 60(1)(h)
377 ibid s 60(1)(i)(1)
378 ibid s 60(1)(i)(2)
379 Irish Aviation Authority Small Unmanned Aircraft (Drones) and Rockets Order 2015, SI 2015/563
380 ibid s 2
381 ibid s 6(1)(a)
382 ibid s 7(1)
383 Irish Aviation Authority (Nationality and Registration of Aircraft) Order 2015, SI 2015/107
384 Irish Aviation Authority, Drone Registration <www.iaa.ie/ /general-aviation/drones/drone-registration> accessed 17 December 2015
385 Irish Aviation Authority Small Unmanned Aircraft (Drones) and Rockets Order 2015, SI 2015/563, s 7(5)
386 ibid s 7(6)
387 ibid s 7(8)
as commercial photography, a specific operating permit from the IAA is required if one wishes to operate a drone outside the limits prescribed in the 2015 Order.

Following the introduction of the above-mentioned Order on the use of drones, the Data Protection Commissioner published its Guidance on the Use of Drones. Under the heading “Proportionality – What data can be captured?”, this Guidance states ‘...a camera on a drone which serves to take aerial photographs of landscapes should not be used for recording faces or other personal information.’ On reading the Guidance, one could be forgiven for thinking that through it the Data Protection Commissioner is attempting to use Section 2 of the Data Protection Act, as quoted in the Guidance, to put people off using drones to take photographs of people in public places, such as on beaches, without their prior permission, when such a consent is not a legal requirement. In the United Kingdom, regulations in respect of the operation of unmanned aircraft systems (drones) are implemented by the Civil Aviation Authority. BBC News reported in 2010 that Merseyside Police was required to stop operating a remotely-controlled helicopter fitted with a CCTV camera, as it did not have a licence from the Civil Aviation Authority to operate it.

4.6.3) Wildlife Photography

The Wildlife Act 1976, as amended, details the specific species of wild birds and animals (including land and marine based mammals) and flora, which are protected from being disturbed. Under the Wildlife Acts 1976–2012, it an offence, in certain circumstances, to disturb protected wild birds, wild animals and flora. In relation to wild birds, subject to the exceptions specified in S.22(5) of the 1976 Act, S.22(4)(e) of the 1976 Act states that any person who ‘wilfully disturbs a protected wild bird on or near a nest containing eggs or unfledged young shall be guilty of an offence’. It is noted, that the Wildlife Acts 1976–2012 do not define the words “disturb” and “interfere”. Thus, such words could be given a wide meaning by a court. Section 23 of the 1976 Act deals with the protection of wild animals and under S.23(5)(d) any person who ‘wilfully interferes with or destroys the breeding place of any protected wild animal, shall be guilty of an offence’. With regard to protected flora, under S.21(3)(c) of the 1976 Act and subject to the exceptions specified in S.21(5), it is an offence

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389 ibid
390 Civil Aviation Authority, Unmanned Aircraft: Requirements for Operating in Airspace <www.caa.co.uk/Commercial-Industry/Aircraft/Unmanned-aircraft/Unmanned-Aircraft/> accessed 22 December 2015
391 BBC News accessed 28 July 2013
Note: See also (1): Charles Arthur, ‘UK’s first drone conviction will bankrupt me, says Cumbrian man’ The Guardian (London, 02 April 2014) <www.theguardian.com/world/2014/apr/02/uk-first-drone-conviction> accessed 12 May 2014
Note: This individual was prosecuted by the Civil Aviation Authority.
Note: This individual was prosecuted by the Crown Prosecution Service.
392 Wildlife Act 1976
393 ibid s 22(4)(e)
394 ibid s 23(5)(d)
for anyone to ‘wilfully alter, damage, destroy or interfere with the habitat or environment of any species of flora to which an order under this section for the time being applies’. Thus, intention or mens rea is an element of these offences.

The Wildlife (Amendment) Act 2000 introduced a number of amendments to the 1976 Act, which are of benefit to photographers, who would wish to legally photograph protected wildlife. Section 22(9) of the 1976 Act was amended by S.30 of the 2000 Act by the insertion of a new S.22(9)(f) under which ‘the Minister may grant a licence to a person ‘to take or make photographic, video or other pictures of a protected wild bird of a species specified in the licence on or near a nest containing eggs or unflown young’. Also, Section 31 of the 2000 Act amended S.23(6) of the 1976 Act by the insertion of a new S.23(6)(b) under which the Minister may grant a licence to a person ‘to take or make photographic, video or other pictures of a protected wild animal of a species so specified on or near the breeding place of such an animal’. Photography of any protected wild birds or wild animals may be undertaken legally following the acquisition of a photography licence from the National Parks and Wildlife Service’s Wildlife Licensing Unit.

4.6.4 Photographing and Reproducing Banknotes

It is common for firms to wish to reproduce banknotes in their advertising and promotional materials. However, the photography and reproduction of banknotes for use in advertisements and other promotional materials is restricted by law. In the case of Euro banknotes, the European Central Bank, which is the copyright holder to the Euro banknotes, does permit their reproduction for advertising purposes. But, any such reproduction must be undertaken in accordance with the reproduction rules stipulated by the Bank, so that such reproductions may not be mistaken for being genuine banknotes. Section 3 of Article 2 of the Decision of the European Central Bank of 20 March 2003 stipulates the minimum and maximum reproduction scale sizes permitted in respect of either a one sided or a two-sided reproduction of a Euro banknote. Under the Copyright and Related Rights Act 2000, the copyright in previously-issued Irish Pound banknotes, whether or not they were issued by either the Central Bank of Ireland or a consolidated bank, vests in the Central Bank of Ireland. Its prior approval must be sought in respect of any proposed reproductions. In the case of British Pound Sterling banknotes, under the Forgery and Counterfeiting Act 1981, as amended, ‘It is an offence for any person, unless the relevant authority has previously consented in writing, to reproduce on any substance whatsoever, and whether or not on the correct scale, any
British currency note or any part of a British currency note. The Bank of England owns the copyright to its banknotes and it does permit the reproduction of its banknotes under a licence from it. However, it does not permit the reproduction of novelty banknotes.

4.7) Restrictions on Ground of Public Morality

As it is human nature that one individual’s general set of principles will vary from that of another so too will their moral standards. Based on their own moral standards, photographers and photograph publishers will differ in their opinions not only on whether or not, but also on the circumstances under which a particular photograph should or should not be taken. They will also differ on whether or not a particular image should be published. In general, society will have an acceptable standard of public morals including, among other things, the types of photographic image contents which should or should not be published. Photographers and publishers must therefore be familiar with and understand the acceptable social norms. The moral standards of the people may be regulated and enforced by the State. While Article 40.6.1º.i of the Constitution guarantees freedom of expression subject to public order and morality, it goes on to state separately:

‘…the State shall endeavour to ensure that organs of public opinion…shall not be used to undermine…morality…’

As a consequence of Article 40.6.1º.i, the State has the legal power to introduce legislative measures on public morality grounds, which could result in restricting photographers’ and photograph publishers’ right of freedom of expression. Also, a number of common law restrictions exist. This section of the thesis will examine the legal basis of such restrictions and how the courts have adjudicated on such restrictions.

4.7.1) Censorship of Publications

Statutory provisions exist in Ireland in respect of the censorship of both publications and films. As the focus of this thesis is on still photography, this section of the thesis will not deal with the censorship of films. The contents of any printed publication are open to censorship on the grounds of public morals. The Censorship of Publications Acts 1929–1967, as amended, govern the censorship of books and periodical publications. The 1929 Act repealed the Obscene Publications Act 1857 and the 1946 Act, as amended, repealed and replaced much of the 1929 Act. The 1946 Act established the Censorship of Publications Board, which must examine any book or periodical publication referred to it by either an officer of Customs and Excise or any other person in order to determine its suitability for sale or distribution within Ireland. The 1946 Act defines a “book” as

403 Forgery and Counterfeiting Act 1981, s 18(1)
405 Constitution of Ireland (Art. 40.6.1º.i) (on Personal Rights)
407 Censorship of Films Act 1923, as amended, and the Video Recordings Act 1989
408 Censorship of Publications Acts 1929, s 19(3)
409 Censorship of Publications Act 1946, s 6 and s 9
'every printed publication which is not a periodical publication and, save where the context otherwise requires, includes every edition of a book'. It goes on to define a “periodical publication” as ‘a newspaper, magazine, journal or other printed publication which is published periodically or in parts or numbers, other than a publication published in parts or numbers at intervals which ordinarily exceed three months, and, save where the context otherwise requires, includes every edition and every issue of a periodical publication’. Although Censorship of Publication Acts 1929–1967 were enacted prior to the invention of the internet, it is feasible that a court could give a wide interpretation of the meaning of the words “printed publication” so as to bring online publications of books and periodicals within the scope of the Acts.

Section 12(3) of the Health (Family Planning) Act 1979, as amended, amended Section 7 of the Censorship of Publications Act 1946, which now states:

‘If the Censorship Board, having duly examined a book, are of opinion (a) that it is indecent or obscene, or (b) that it advocates the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such procurement, and that for any of the said reasons its sale and distribution in the State should be prohibited, they shall by order prohibit such sale and distribution.’

In relation to the examination of periodic publications, Section 9(1) of the 1946 Act was also amended by the 1979 Act and it now states:

‘The Censorship Board shall examine the issues recently theretofore published of every periodical publication in respect of which a complaint is made to them in the prescribed manner by any person, and if they are of opinion that the said issues (a) have usually or frequently been indecent or obscene, or (b) have advocated the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such procurement, or (c) have devoted an unduly large proportion of space to the publication of matter relating to crime, and that for any of the said reasons the sale and distribution in the State of the said issues and future issues of that periodical publication should be prohibited, they shall by order prohibit the sale and distribution thereof accordingly.

Under Section 14 of the 1946 Act, it is an offence for anybody to sell, offer, advertise or keep for sale or to distribute any prohibited book or periodical publication. Of specific relevance to publishers of photographs is Section 18 of the 1929 Act, which makes it an offence to “…sell or offer, expose, or keep for sale, or import for sale any indecent picture…” While neither the 1929 nor the 1946 Act define the word “obscene”, both Acts do state, that the word “indecent” includes

410 Censorship of Publications Act 1946, s 1
411 ibid
412 Censorship of Publications Act 1946, s 7
413 ibid s 9(1)
414 Censorship of Publications Act 1946, s 14(1) and s 14(2)
415 Censorship of Publications Act 1929, s 18(1)
suggestive of, or inciting to, sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave.\textsuperscript{416} The Censorship of Publications Board maintains a Register of Prohibited Publications in accordance with Section 16 of the 1946 Act. The Register comprises of two parts, namely (1) prohibited books and (2) prohibited periodical publications. Part (1) of the Register dealing with books is sub-divided into two sections – (1) books prohibited on the ground that they were indecent or obscene and (2) books prohibited on the ground(s) that they were indecent or obscene and/or that they advocate the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such procurement.\textsuperscript{417} The Censorship of Publications Board only meets when it is required to so do and between 2008 and 2014 it has not met.\textsuperscript{418}

The most recently published copy of the Register of Prohibited Publications (31\textsuperscript{st} December 2012) states no books were registered as being prohibited on the grounds that they were indecent or obscene. However, a number of books are listed as being prohibited on the grounds, that they advocate the procurement of abortion or miscarriage or the use of any method, treatment or appliance for the purpose of such procurement. A wide range of periodical publications, some of which have been deemed to be of a pornographic nature, are also listed as being prohibited. According to the 2102 edition of the Register, the most recent prohibition order published in Iris Oifigiúil (the State’s official bulletin) was in December 2003 in respect of the periodical “Fox”.\textsuperscript{419}

Following the receipt of a complaint in 2014 in respect of the publication of a novel by Alan Shatter, the then Minister for Justice, responsibility for the Board was transferred from the Minister for Justice to the Minister for Arts, Heritage and the Gaeltacht,\textsuperscript{420} who appointed a new Board to examine that complaint.\textsuperscript{421} Although that complaint was not upheld,\textsuperscript{422} more recently, on 8\textsuperscript{th} March 2016 the Board banned the book – “The Little Raped Runaway” by Jean Martin – on the grounds that it was “indecent or obscene”.\textsuperscript{423}

\begin{itemize}
\item [416] Censorship of Publications Act 1929, s 1 and Censorship of Publications Act 1946, s 1
\item [417] Department of Arts, Heritage and the Gaeltacht, Register of Prohibited Publications \(<www.ahg.gov.ie/en/media/Arts/List%20of%20Prohibited%20Publications%20please%20click%20HERE.pdf>\) accessed 20 August 2015
\item [419] Department of Arts, Heritage and the Gaeltacht, Register of Prohibited Publications \(<www.ahg.gov.ie/en/media/Arts/List%20of%20Prohibited%20Publications%20please%20click%20HERE.pdf>\) accessed 20 August 2015
\item [423] Iris Oifigiúil (11 March 2016), page 388
\end{itemize}
Photography of Children and Pornography

With respect to pornography, special statutory protection is afforded to children and specific statutory offences relating to child pornography have been enacted. Section 2(1) of the Child Trafficking and Pornography Act 1998, as amended, defines a ‘child’ as ‘a person under the age of 17 years.’ The Section also contains a very detailed definition of what constitutes ‘child pornography’ and states that it includes, among other things, a range of specified types of visual representations of children. A “visual representation” is defined by Section 2(1) of the Act as including ‘(a) any photographic, film or video representation, any accompanying sound or any document, (b) any copy of any such representation or document, and (c) any tape, computer disk or other thing on which the visual representation and any accompanying sound are recorded.’ The Section further states that a ‘photographic representation’ ‘includes the negative as well as the positive version.’ Under the Act, it is an offence for anybody to knowingly produce, distribute, sell, print or publish child pornography. Section 5(1) of the Act states ‘…any person who (a) knowingly produces, distributes, prints or publishes any child pornography, (b) knowingly imports, exports, sells or shows any child pornography, (c) knowingly publishes or distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, prints, publishes, imports, exports, sells or shows any child pornography, (d) encourages or knowingly causes or facilitates any activity mentioned in paragraph (a), (b) or (c), or (e) knowingly possesses any child pornography for the purpose of distributing, publishing, exporting, selling or showing it, shall be guilty of an offence…’ Knowingly possessing child pornography is an offence under S.6(1) of the Act. Section 6(3) of the Act offers a defence to a person accused of a S.6(1) offence and it is for an accused to prove that ‘he or she possessed the child pornography concerned for the purposes of bona fide research’. However, it would be extremely difficult for an accused, particularly a photographer, to succeed in proving such a defence.

For comparative purposes, in the United Kingdom the publication of obscene material comes within the scope of the Obscene Publications Act 1959, as amended. Under the 1959 Act, it is an offence for a person, whether for gain or not, to either publish or to possess for publication an obscene article. The Act defines an “article” as ‘any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures.’ The Act, as amended, does not specify the types of publication media covered by the

424 Child Trafficking and Pornography Act 1998, s 2(1)
425 ibid
426 ibid
427 ibid s 5(1)
428 ibid s 6(1)
429 ibid s 6(3)
430 Obscene Publications Act 1959, s 2
431 ibid s 1(2)
Act. Thus, it could be taken as to include online publications. In defining an "obscene article", the Act states:

‘...an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.’^432

The Obscene Publications Act 1964 amended the 1959 Act and made it an offence for one to possess negatives for the purpose of the production of obscene material.^433 The possession of extreme pornographic images is an offence under the Criminal Justice and Immigration Act 2008, as amended.^434 The Act states that an extreme pornographic image consists of an image which is both pornographic and of an extreme image.^435 Section 63(3) of the Act states that an image is “pornographic” “…if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.”^436 Furthermore, S.63(5A) of the Act, as inserted by the Criminal Justice and Courts Act 2015,^437 states that in relation to the possession of an extreme image in England or Wales, an “extreme image” is an image which:

‘(a) falls within subsection (7) or (7A), and
(b) is grossly offensive, disgusting or otherwise of an obscene character.’^438

For the purposes of the S.63 offence of possession of extreme pornographic images, Section 63(8) defines an “image” as ‘(a) a moving or still image (produced by any means) or (b) data (stored by any means) which is capable of conversion into an image within paragraph (a).’^439 Thus, Section 63 expressly includes still photographs, but it extends also to film and video. Section 63(7) of the Act specifies the types of acts portrayed in images, such as beastiality, that fall within Section 63 of the Act.^440 Section 63(7A) of the 2008 Act, as inserted by S.37 of the Criminal Justice and Courts Act 2015, deals with the possession of pornographic images of rape and assault by penetration.^441 A number of defences against a charge of possession of extremely pornographic images are offered by Section 65 of the 2008 Act including, namely:

‘(a) that the person had a legitimate reason for being in possession of the image concerned;
(b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image;
(c) that the person –
(1) was sent the image concerned without any prior request having been made by or on behalf of the person, and
(2) did not keep it for an unreasonable time.\textsuperscript{442}

The Coroners and Justice Act 2009 created the offence of the possession of a prohibited image of a child.\textsuperscript{443} The Act states that a prohibited image is an image which:

'(a) is pornographic,
(b) falls within subsection (6), and
(c) is grossly offensive, disgusting or otherwise of an obscene character.'\textsuperscript{444}

An image falls within Section 62(6) of the act if it:

(a) is an image which focuses solely or principally on a child's genitals or anal region, or
(b) portrays any of the acts mentioned in subsection (7).\textsuperscript{445}

The Act classifies an image as being a pornographic image ‘...if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.’\textsuperscript{446} A number of defences to a charge of an offence under S.62 of the Act are provided under S.64 of the Act. These defences are similar to those offered under the above-mentioned S.65(2) of the Criminal Justice and Immigration Act 2008.\textsuperscript{447} The above legislative provisions are of general application and in both the U.K. and Ireland there have been a number of convictions under the respective Acts.

\subsection*{4.7.2) Prohibition of Incitement to Hatred}

Incitement to hatred is an offence which is recognised in international treaties, such as the ICCPR,\textsuperscript{448} and in Irish law under the Prohibition of Incitement to Hatred Act 1989. Section 2(1) of the Act states:

'It shall be an offence for a person –
(a) to publish or distribute written material,
(b) to use words, behave or display written material (i) in any place other than inside a private residence, or (ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence, or

\textsuperscript{442} Criminal Justice and Immigration Act 2008, s 65(2)
\textsuperscript{443} Coroners and Justice Act 2009, s 62
\textsuperscript{444} ibid s 62(2)
\textsuperscript{445} ibid s 62(6)
\textsuperscript{446} ibid s 62(3)
\textsuperscript{447} ibid s 64(1)
\textsuperscript{448} International Covenant on Civil and Political Rights, art 20(2)  \texttt{<www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>} accessed 06 March 2015

\textsuperscript{Note:} Section 62(7) of the Act specifies a number of acts the portrayal of which in images is prohibited. For example, ‘the performance by a person of an act of intercourse or oral sex with or in the presence of a child’.

\textsuperscript{449} ibid s 64(1)
\textsuperscript{Note:} Article 20(2) states: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’
In accordance with S.2(1)(c) of the Act, a prosecution could be brought where there has been either an intention or a likelihood of hatred being stirred-up. The Act defines “hatred” as:

‘hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.”

The Act defines “hatred” as being against a “group” of persons. However, one may be convicted of incitement to hatred against an “individual” person. The Act defines “written material” as ‘any sign or other visual representation’. Thus, a photograph would come within the meaning of “written material”. The preparation or possession of material likely to stir up hatred is an offence under Section 4 of the Act. Also, the broadcasting of material likely to stir up hatred is an offence under S.3(1) of the Act and the wording of Principle 5 of the Broadcasting Authority of Ireland’s Code of Programme Standards is in keeping with S.3(1). Carolan and O’Neill state that ‘While the Act has potentially far-reaching consequences for freedom of expression, it has not led to a flood of prosecutions either for individuals or for the media...’ However, it is possible that the existence of this offence may act as a deterrent to potential violators. In 2011, the first prosecution taken under the Act in respect of online incitement to hatred was dismissed by Killarney District Court. The Irish Examiner reported that O’Connor J, in dismissing the case against a Patrick Kissane, who had created a Facebook page entitled “Promote the use of knacker babies as shark bait”, stated:

‘…there was reasonable doubt about an intent to incite hatred towards members of the Travelling community.”

The Irish Examiner also reported that O’Connor J further stated:

‘…the once-off insertion of material, while revolting and insulting, could not be deemed to be an incitement to hatred and he noted that apart from his initial comments, Mr Kissane had not added to or commented on the page until it was removed.’

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449 Prohibition of Incitement to Hatred Act 1989, s 2(1)
450 ibid s 1
452 Prohibition of Incitement to Hatred Act 1989, s 1
453 ibid s 4(1)
454 ibid s 3(1)
455 Broadcasting Authority of Ireland, Codes and Standards, Principle 5 <www.bai.ie/?page_id=1747> accessed 21 August 2015
456 Carolan and O’Neill, Media Law in Ireland (Bloomsbury Professional 2010) 67, para. 3.32
457 — —, ‘Man cleared of online hatred against Travellers’ Irish Examiner (Cork, 01 October 2011) <www.irishexaminer.com/ireland/man-cleared-of-online-hatred-against-travellers-169325.html> accessed 22 August 2015
458 ibid
In its *Issues Paper on Cyber-crime affecting personal safety, privacy and reputation including cyber-
bullying*, the Law Reform Commission stated that the above-mentioned Kissane case:
‘…illustrates the difficulties with online hate speech compared to its offline equivalents. Once 
an abusive comment is made it can spread very fast, be viewed by many people and remain 
accessible long after the content was posted.’\(^{459}\)

The Communications Regulation (Amendment) Act 2007\(^{460}\) inserted a new S.13(1) in the Post Office 
(Amendment) Act 1951, which now states:
‘Any person who –
(a) sends by telephone any message that is grossly offensive, or is indecent, obscene 
or menacing, or
(b) for the purpose of causing annoyance, inconvenience, or needless anxiety to 
another person –
(i) sends by telephone any message that the sender knows to be false, or 
(ii) persistently makes telephone calls to another person without reasonable cause, 
commits an offence.’\(^{461}\)

It has been suggested that S.13(1) of the Act does not take account of the use of modern 
telecommunications and computer equipment to publish online materials including photographs, 
which are designed to incite hatred. In his presentation to the Houses of the Oireachtas Joint 
Committee on Transport and Communications on “Addressing the Growth of Social Media and 
tackling Cyberbullying”, the then Minister for Communications, Energy and Natural Resources, Pat 
Rabbitte, T.D. in referring to the 2007 Act stated that the law did not ‘…extend to social media.’\(^{462}\) 
However, it may be possible that one could commit an offence under this Section by using either a 
modern smart phone or a telecoms-linked computer to send messages, including photographs, 
designed to incite hatred to either an internet or social media website. However, such is not an 
explicit offence under the Act and it may be difficult to prove. The Report of the Internet Content 
Governance Advisory Group recommended that Section 13 of the 2007 Act should be amended in 
order to ‘…include “electronic communications” within the definition of measures dealing with the 
“sending of messages which are grossly offensive, indecent, obscene or menacing”.’\(^{463}\) In agreeing

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\(^{460}\) Communications Regulation (Amendment) Act 2007, s 4 and sch 1 part 2

\(^{461}\) Post Office (Amendment) Act 1951, s 13(1)

\(^{462}\) Houses of the Oireachtas Joint Committee on Transport and Communications, Report: *Addressing the Growth of Social Media and tackling Cyberbullying* (31TC 007) (Dublin July 2013) 34

with the Advisory Group’s recommendation, the Law Reform Commission stated that such an amendment would “…catch once-off events where there is no persistence or where it would be difficult to prove."\textsuperscript{464} Any amendment to S.13 should also expressly include the sending of messages, including photographs, which are designed to incite hatred.

In the United Kingdom, the provisions of the Public Order Act 1986, as amended, which deal with incitement to hatred,\textsuperscript{465} are broadly similar to those contained in Ireland’s Prohibition of Incitement to Hatred Act 1989, which, as mentioned above, includes incitement on religious grounds. The 1986 Act was amended by the Racial and Religious Hatred Act 2006, which inserted a new Part 3A in the Act dealing with “hatred against persons on religious grounds”.\textsuperscript{466} “Religious hatred” is defined by the Act as “…hatred against a group of persons defined by reference to religious belief or lack of religious belief.”\textsuperscript{467} Under Part 3A, a person is guilty of an offence if he intends to stir-up religious hatred through the use of threatening words or behaviour or written material;\textsuperscript{468} the publication or distribution of threatening written material;\textsuperscript{469} the public performance of a play involving the use of threatening words or behaviour;\textsuperscript{470} the distribution, showing or playing of a recording or the broadcasting or inclusion in a programme of threatening visual images or sounds.\textsuperscript{471} Also, it is an offence to possess either written material or a recording of visual images or sounds that is or are threatening with a view to having it or them displayed, published, distributed or included in a broadcasted programme with the intention to stir up religious hatred.\textsuperscript{472} However, this new Part 3A of the Act goes on to offer a statutory protection of the right of freedom of expression:

‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’\textsuperscript{473}

Also, similarly to Section 5 of the Irish Prohibition of Incitement to Hatred Act 1989, it is provided, that Part 3A of the Act does not apply to the fair and accurate reporting of either parliamentary proceedings or of publicly-heard judicial proceedings.\textsuperscript{474}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{464} The Law Reform Commission, Issues Paper on Cyber-crime affecting personal safety, privacy and reputation including cyber-bullying (LRC IP 6–2014) (Dublin 2014) 2.08
\item \textsuperscript{465} Public Order Act 1986, Part 3
\item \textsuperscript{466} Racial and Religious Hatred Act 2006, sch
\item \textsuperscript{467} Public Order Act 1986, s 29(A)
\item \textsuperscript{468} ibid s 29(B)(1)
\item \textsuperscript{469} ibid s 29(C)(1)
\item \textsuperscript{470} ibid s 29(D)(1)
\item \textsuperscript{471} ibid s 29(E)(1) and s 29(F)(1)
\item \textsuperscript{472} ibid s 29(G)(1)
\item \textsuperscript{473} ibid s 29(J)
\item \textsuperscript{474} ibid s 29(K)
\end{itemize}
\end{footnotesize}
Photograph publishers need to take cognisance of the provisions of the above-mentioned statutory prohibitions against incitement to hatred, as they could find themselves in breach of the legislative provisions. Any proposed reform of the Irish Prohibition of Incitement to Hatred Act 1989 should consider the inclusion of a provision covering incitement to hatred against “individuals”.

4.7.3) Outraging Public Decency

Outraging public decency and conspiracy to outrage public decency are common law offences. The Law Reform Commission in its Report on Inchoate Offences\(^\text{475}\) recommended that the latter offence and the offences of conspiracy to corrupt public morals and conspiracy to effect a public mischief should be abolished. The Commission stated:

> ‘These offences pose serious difficulties in terms of legality. Not only do they have the extraordinary function of rendering criminal quite lawful activity merely because two or more agree to pursue it, there is also great uncertainty as to what constitutes, for example, the corruption of public morals. The Commission notes the two-fold vagueness here: uncertainty as to what “to corrupt” means and uncertainty regarding the ambit of “public morals” and the method for ascertaining public morals. Similar comments can be said about effecting a public mischief and outraging public decency.’\(^\text{476}\)

The common law offence of outraging public decency was mentioned in passing by Hogan J in the Irish High case of McInerney v Director of Public Prosecutions and Others.\(^\text{477}\) Previously, in the Irish High Court case of Douglas v Director of Public Prosecutions and Others\(^\text{478}\) Hogan J stated that the offence of outraging public decency comprised ‘…the performance of an act which is (i) lewd, obscene and disgusting; (ii) an outrage to public decency and (iii) in public.’\(^\text{479}\) In the 2007 English Court of Appeal case of R v Hamilton,\(^\text{480}\) Thomas LJ examined the constituent elements necessary to prove the offence. In Hamilton, the appellant, who was a practising barrister, had been convicted of a number of offences including outraging public decency following his taking of video footage up the skirts of adult women and a 14 year old girl at supermarket checkouts using a camera concealed in a rucksack.\(^\text{481}\) The appellant was granted leave to appeal his conviction for outraging public decency on a number of grounds including ‘Whether on the evidence adduced before the court an offence of outraging public decency had been committed, as no one other than the appellant was shown to be aware of what he was doing when [he] was filming.’\(^\text{482}\) In Hamilton, Thomas LJ held that for an offence of outraging public decency to be proved it is necessary to prove that:

> 1) The act was of such a lewd character as to outrage public decency; this element constituted the nature of the act which had to be proved before the offence could be


\(^{476}\) ibid 3.91

\(^{477}\) McInerney v Director of Public Prosecutions and Others [2014] IEHC 181, paras 55 and 57

\(^{478}\) Douglas v Director of Public Prosecutions and Others [2013] IEHC 343

\(^{479}\) ibid para 54

\(^{480}\) R v Hamilton [2007] EWCA Crim 2062

\(^{481}\) ibid paras 1–5

\(^{482}\) ibid para 4
established. ii) It took place in a public place and must have been capable of being seen by two or more persons who were actually present, even if they had not actually seen it. This constituted the public element of the offence which had to be proved'.

Thomas LJ further stated that it was necessary to prove ‘both that the act is of such a lewd, obscene or disgusting character that it outrages public decency.’ He went on to state:

‘An obscene act is an act which offends against recognised standards of propriety and which is at a higher level of impropriety than indecency. A disgusting act is one which fills the onlooker with loathing or extreme distaste or causes annoyance’. 

In relation to the public element of the offence, Thomas LJ held that it required that the act ‘…must have been done in a place to which the public has access or in a place,…where what is done is capable of public view.’ Thomas LJ also stated that ‘The public element is not, however, satisfied unless the act is capable of being seen by two or more persons who are actually present, even if they do not actually see it…’ Therefore, if the act was only capable of being seen by one person, the public element of the offence would not be satisfied.

4.7.4) Blasphemy

Blasphemy is an offence in Ireland and the offence has its roots in the common law. It is specified as an offence under the Constitution and it is a statutory offence under the Defamation Act 2009. While guaranteeing freedom of the press, Article 40.6.1º.i of the Constitution goes on to state separately:

‘The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.’

The publication of such specified matter is the sole offence created by the Constitution. However, Article 40.6.1º.i does not define what would constitute blasphemous, seditious or indecent matter. Although they were not enshrined in legislation, the common law offences of blasphemous libel, obscene libel and seditious libel had existed. The Defamation Act 1961, as repealed, had provided penalties for the printing and publication of blasphemous libels and obscene libels. The 1961 Act did not define what constituted either type of libel. The 1991 Law Reform Commission Report on the Crime of Libel made a number of recommendations in respect of blasphemy, principally including:

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483 ibid para 21
484 ibid para 30
485 ibid
486 ibid para 31
487 ibid

Note: Having concluded that the jury was entitled to convict the appellant, Thomas LJ dismissed the appeal on counts 11–15 (filming up-skirts of women).

488 Constitution of Ireland (Art. 40.6.1º.i) (on Personal Rights)
489 Defamation Act 1961, s 13
‘(1) that in any revision which may be undertaken by referendum of the Constitution, so much of Article 40.6.1.i which renders the publication or utterance of blasphemous matter an offence should [be] deleted;

(2) in the event of the foregoing recommendation not being accepted, the abolition of the common law offence of blasphemous libel and its replacement by a new offence entitled “publication of blasphemous matter”.

In relation to the common law offences of seditious libel and obscene libel, the Commission also recommended their abolition without replacement. In respect of obscene libel, it further recommended:

‘…that an examination should be undertaken of (a) legislation on obscene and indecent matter and (b) the various schemes of censorship in order to determine whether they are consistent with the requirements of the Constitution as to freedom of speech and are appropriate in modern conditions and to formulate, if necessary, changes to the existing law.’

No prosecutions for blasphemy had or have been taken for many years and attempts to have prosecutions brought were unsuccessful. The 1999 Irish Supreme Court case of *Corway v Independent Newspapers (Ireland) Limited* concerned an appeal against the High Court’s refusal to grant the applicant leave to institute a criminal prosecution for blasphemy against the respondents pursuant to S.8 of the Defamation Act 1961 following the latter’s publication of an article and a cartoon which featured a priest. In *Corway*, Barrington J stated that neither the Constitution nor any Act of the Oireachtas had defined the word “blasphemy”.

As to the offence of blasphemy under Article 40.6.1.i of the Constitution of Ireland, Barrington J stated:

‘There is no doubt that the crime of blasphemy exists as an offence in Irish Law because the Constitution says so. It says that the publication or utterance of blasphemous matter “is an offence which shall be punishable in accordance with the law”. Yet the researches of the Law Reform Commission would appear to indicate that the framers of the Constitution did

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491 *Corway v Independent Newspapers (Ireland) Limited* [1999] IESC 5, para 2
492 ibid para 11
493 Constitution of the Irish Free State (Saorstát Éireann) Act 1922, Sch 1
494 ibid para 2
495 ibid para 22
496 *Corway v Independent Newspapers (Ireland) Limited* [1999] IESC 5, para 30
not intend to create a new offence. This may explain why there is no statutory definition of blasphemy. The Censorship of Films Act, 1923 S.7 (2) and S.13 (1) of the Defamation Act, 1961 assume that the crime exists without defining it. It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern State which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion.\textsuperscript{498}

In refusing to grant the appeal, Barrington J held:

‘…in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists. As the Law Reform Commission has pointed out neither the \textit{actus reus} nor the \textit{mens rea} is clear. The task of defining the crime is one for the Legislature, not for the Courts. In the absence of legislation and in the present uncertain state of the law the Court could not see its way to authorising the institution of a criminal prosecution for blasphemy against the Respondents.’\textsuperscript{499}

The Defamation Act 2009\textsuperscript{500} repealed the 1961 Act and it abolished the common law offences of defamatory libel, obscene libel and seditious libel.\textsuperscript{501} The 2009 Act does not make reference to the abolition of a common law offence of blasphemous libel, as during the Select Committee Debate on the Defamation Bill 2006, the then Minister for Justice, Equality and Law Reform, Dermot Ahern, T.D., stated that the advice from the Attorney General was that ‘…given the Supreme Court decision in the Corway case, there are considerable doubt[s] as to whether such an offence in fact exists…’\textsuperscript{502} The advice was that because of the Constitutional reference to blasphemy, which could not be changed except by referendum, a void could not be left and so an offence of publication or utterance of blasphemous matter was inserted in the 2009 Act.\textsuperscript{503} The Minister admitted that the wording of the sections inserted ensured that the bar was raised so high that it is more than likely no prosecutions will be brought.\textsuperscript{504} Thus, it would appear that the inclusion of the offence of blasphemy under the 2009 Act was a stop-gap pending the removal of the now essentially redundant offence from the Constitution. While the Act does not provide a definition of the word “blasphemy”, it does state:

‘A person publishes or utters blasphemous matter if:

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\textsuperscript{498} ibid para 36
\textsuperscript{499} ibid para 38
\textsuperscript{500} Defamation Act 2009, s 4
\textsuperscript{501} ibid s 35

Note: In the United Kingdom, these common law offences were abolished by Section 73 of the Coroners and Justice Act 2009.

\textsuperscript{502} Select Committee on Justice, Equality, Defence and Women's Rights Deb 20 May 2009, 4
\textsuperscript{503} Select Committee on Justice, Equality, Defence and Women's Rights Deb 20 May 2009, 4
\textsuperscript{504} ibid

(a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and

(b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.\textsuperscript{505}

For a person to be found guilty of publishing or uttering blasphemous matter, it must be proven that such a person “intended” to cause “outrage” and such outrage must be held by “a substantial number of the adherents to a religion” and not just by one such adherent. Proving such intention could be extremely difficult and particularly because the Act does not specify how many people are required in order to constitute a “substantial” number of adherents. The Act does not define what type(s) of material(s) constitute the term “blasphemous matter”. However, Section 37 of the Act provides for the seizure of “copies of blasphemous statements” subsequent to a conviction under S.36 of the Act.\textsuperscript{506} The Act defines a “statement” as including ‘visual images’.\textsuperscript{507} It may be taken, that under the Act, a photograph may have the potential to be regarded as being blasphemous matter. Section 36(3) of the Act provides a defence against a charge of blasphemy, where the defendant can ‘prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates’.\textsuperscript{508} Organisations and cults whose primary objective ‘is the making of profit’ or which ‘employ oppressive psychological manipulation of its followers or for the purpose of gaining new followers’ are excluded from being classed as a “religion” under S.36 of the Act.\textsuperscript{509}

The matter of the constitutional provision on blasphemy was put to the government-appointed Convention on the Constitution, which recommended the removal of the offence of blasphemy from the Constitution and its replacement with an offence of “incitement to religious hatred”.\textsuperscript{510} However, it should be noted that the Prohibition of Incitement to Hatred Act 1989, as discussed above, prohibits incitement on account of “religious” orientation. While the recommendation to remove the offence of blasphemy from the Constitution is welcome, no date has been set for a referendum on this issue.\textsuperscript{511}

4.7.5) Restrictions on Contents of Advertising Materials and of Postal Packets

Photographs are frequently integral elements of advertising materials such as advertisements, printed promotional materials and displays. On a public morality basis, a number of statutes prescribe offences in respect of advertising materials and practices including the use of

\textsuperscript{505} Defamation Act 2009, s 36(2)
\textsuperscript{506} ibid s 37
\textsuperscript{507} ibid s 2
\textsuperscript{508} Defamation Act 2009, s 36(3)
\textsuperscript{509} ibid s 36(4)
photographs. The Statute Law Revision Act 2007⁵¹² retained the Indecent Advertisements Act 1889, as amended. Worded in keeping with the time period of the late 1800s, the Act prescribed penalties for the offence of public distribution or display of pictures or printed or written matter of an indecent or obscene nature.⁵¹³ Section 17(2) of the Censorship of Publications Act 1929, as amended, states: ‘Any person summarily convicted of an offence under section 3 of the Indecent Advertisements Act, 1889 shall, in lieu of the punishments mentioned in that section, be liable to a fine not exceeding ten pounds or, at the discretion of the court, to imprisonment for any term not exceeding three months.’⁵¹⁴ Section 17(1) of the Censorship of Publications Act 1929 amended Section 3 of the 1889 Act so as to prohibit the advertising of, among other things, contraceptives.⁵¹⁵ In turn, Section 17(1) was subsequently amended by the Health (Family Planning) Act 1979 in order to remove the prohibition on the advertising of contraceptives.⁵¹⁶ However, the 1979 Act states:

‘A person shall not take any part in, or procure, the publication of an advertisement or notice in relation to contraception or contraceptives, or display, or procure the display of, contraceptives, except to such extent as may be allowed by, and in accordance with, regulations for the purposes of this section.’⁵¹⁷

The Criminal Law Amendment Act 1935, as amended, also contained a prohibition on the advertising of contraceptives,⁵¹⁸ which was repealed by the 1979 Act. Section 7 of the Criminal Justice (Public Order) Act 1994, as amended, makes it an offence for any person in a public place:

‘…to distribute or display any writing, sign or visible representation which is threatening, abusive, insulting or obscene with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned’.⁵¹⁹

A “visible representation”, as mentioned in Section 7 of the Act above, could be taken to include a photograph.⁵²⁰

Under the Communications Regulation (Postal Services) Act 2011, as amended, it is an offence to send by post any postal packet which ‘encloses any article or thing whatsoever which is indecent, obscene, grossly offensive or menacing’.⁵²¹ Thus, it would be an offence for a photographer to send any indecent or obscene photographic images to a publisher for publication or for a publisher to
distribute such printed materials via a postal service provider. It is noted, that the Act does not define what actually constitutes “indecent, obscene, grossly offensive or menacing” articles.

4.8) Ethical Restrictions

While an individual may determine his own moral standards, the State may legislate on the standard of public morals which it requires to be observed and upheld within the State. Ethical standards are the behavioural standards set by groups within society, which must be observed and upheld by the members of such groups. In the business environment, ethical codes of behavioural standards are referred to variously as codes of standards and practice or as codes of conduct. While commercial and industry sector codes of standards and practice are primarily self-developed and self-regulated, such codes may also be required by specific sectors as a consequence of legislative provisions. For example the Defamation Act 2009 requires the Press Council to adopt and implement a code of standards to which its members must adhere\(^{522}\) and the Broadcasting Act 2009 requires the Broadcasting Authority of Ireland to implement codes of standards and practice to be observed by broadcasters.\(^ {523}\)

In recent years, primarily as a result of the publicity surrounding court cases concerning sexual assaults on children and the possession of child pornography, both the taking and publication of photographs of children has been brought into sharp focus in the minds of members of the public. Schools and virtually all organisations, which have a direct involvement with children, such as sports organisations, have written policies in place in respect of the photographing and publication of photographs of children within their care. For example, the G.A.A. publication Our Games Our Code, Code of Best Practice in Youth Sport when working with underage players contains a section entitled “Guidelines for Photographic/Recorded Images”.\(^ {524}\) In some instances, photographers and publishers of photographs may also have to abide by the code of practice of either a public or a private body. Examples of the codes of standards and practice of public bodies are the National Museum of Ireland’s “Image Safe Handbook”,\(^ {525}\) which cover the photography of children and young people at the Museum’s sites, and The Arts Council’s “Guidelines for taking and using images of children and young people in the arts sector”.\(^ {526}\) An example of a code of a private body relevant to photographers is the Dóchas “Code of Conduct on Images and Messages”.\(^ {527}\) Depending upon the type(s) of photographic work undertaken by them, their membership of photographer associations\(^ {528}\)

522 Defamation Act 2009, sch 2, para 10
523 Broadcasting Act 2009, s 42
524 G.A.A., Our Games Our Code: Code of Best Practice in Youth Sport when working with underage players, 54
Note: Dóchas is an Irish association of non-governmental development organisations. <www.dochas.ie/about-us> accessed 23 March 2015
528 Note: A wide range and number of photographers’ associations and clubs exist at international, national, regional, county and town levels. Their
and whether or not they work in the media and advertising sectors, photographers may be required either directly or indirectly to adhere to one or more code of standards and practice. Also, a number of codes of standards and practice are applicable to photograph publishers. The codes of standards and practice of the Press Council of Ireland, the Advertising Standards Authority of Ireland, the National Union of Journalists, the Irish Professional Photographers Association and the Broadcasting Authority of Ireland are of primary relevance to this thesis and will be examined below. For comparative purposes, the codes of the Independent Press Standards Organisation (U.K.) and the Advertising Standards Authority (U.K.) will also be examined.

4.8.1) Press Council of Ireland

Pursuant to the provisions of Section 44 of Defamation Act 2009, the Press Council of Ireland was given legal recognition as the Press Council for the purposes of the Act.\(^{529}\) Established on 1\(^{st}\) January, 2008\(^{530}\) and independent of both the government and the media, the Press Council of Ireland is responsible for overseeing the principles contained in the code of practice for its members – Irish newspapers, magazines and digital publications. It is also responsible for upholding the freedom of the press.\(^{531}\) The objectives of the Press Council are:

- To provide the public with an independent forum for resolving complaints about the press
- To resolve all complaints quickly, fairly and free of charge
- To defend the freedom of the press and the freedom of the public to be informed.\(^{532}\)

Newspapers, magazines and digital publications, that are members of the Press Council of Ireland, agree to abide by the Council’s Code of Practice. Anybody who feels that they have been wronged or damaged by material published by one of the member publications and who has not received satisfaction from an alleged offender may file a complaint with the Office of the Press Ombudsman and seek a resolution through either conciliation or a determination by the Ombudsman. Some of the complaints examined by the Press Council have concerned photographs published as elements of news stories by member organisations of the Press Council.\(^{533}\) In many instances, the published photographs were not the dominant element of those complaints.\(^{534}\)

The contents of the Press Council’s Code of Practice are in keeping with the principles of the Constitution of Ireland, the ECHR, decisions of the courts and with statute law. The Code embraces membership comprise of both professional and amateur photographers and they may or may not implement a members’ code of practice. Due to the number of such associations and clubs, this section of the thesis will be confined to the principal association for professional photographers in Ireland – the Irish Professional Photographers Association.

531 Press Council of Ireland <www.presscouncil.ie> accessed 21 November 2015
533 Note: To view decisions on complaints made to the Press Council involving the publication of photographs, see Complaints: ‘Resolved through Conciliation’ and ‘Decided by the Ombudsman’: <www.presscouncil.ie/cases-appeals.25.html> accessed 21 November 2015
534 Note: An examination of the complaints received and the determinations made by the Press Council of Ireland and the Independent Press Standards Organisation (IPSO) in the United Kingdom in relation to the publication of new stories featuring photographs would be an interesting topic for a Masters in Law by Research thesis. It could investigate whether such decisions of both press complaints bodies were adequate, proportionate and appropriate.
ten principles some of which make specific mention of photographs and/or images and photographers’ practices, namely Principles 1.2, 3.2, 3.3, 5.6 and 7.1. The publication of images would also be covered by the inclusion of the words “material” in Principle 8.1, which deals with “Prejudice”, and “information” in Principle 9.1, which relates to “Children”. The Code’s principles are:

**Principle 1 – Truth and Accuracy**

1.1) In reporting news and information, the press shall strive at all times for truth and accuracy.

1.2) When a significant inaccuracy, misleading statement or distorted report or picture has been published, it shall be corrected promptly and with due prominence.

1.3) When appropriate, a retraction, apology, clarification, explanation or response shall be published promptly and with due prominence.

**Principle 2 – Distinguishing Fact and Comment**

2.1) The press is entitled to advocate strongly its own views on topics.

2.2) Comment, conjecture, rumour and unconfirmed reports shall not be reported as if they were fact.

2.3) Readers are entitled to expect that the content of the press reflects the best judgment of editors and writers and has not been inappropriately influenced by undisclosed interests. Wherever relevant, any significant financial interest of an organization should be disclosed. Writers should disclose significant potential conflicts of interest to their editors.

**Principle 3 – Fairness and Honesty**

3.1) The press shall strive at all times for fairness and honesty in the procuring and publishing of news and information.

3.2) The press shall not obtain information, photographs or other material through misrepresentation or subterfuge, unless justified by the public interest.

3.3) Journalists and photographers must not obtain, or seek to obtain, information and photographs through harassment, unless their actions are justified in the public interest.

**Principle 4 – Respect for Rights**

Everyone has constitutional protection for his or her good name. The press shall not knowingly publish matter based on malicious misrepresentation or unfounded accusations, and must take reasonable care in checking facts before publication.

**Principle 5 – Privacy**

5.1) Privacy is a human right, protected as a personal right in the Irish Constitution and the European Convention on Human Rights, which is incorporated into Irish law. The private and family life, home and correspondence of everyone must be respected.
5.2) Readers are entitled to have news and comment presented with respect for the privacy and sensibilities of individuals. However, the right to privacy should not prevent publication of matters of public record or in the public interest.

5.3) Sympathy and discretion must be shown at all times in seeking information in situations of personal grief or shock. In publishing such information, the feelings of grieving families should be taken into account. This should not be interpreted as restricting the right to report judicial proceedings.

5.4) In the reporting of suicide, excessive detail of the means of suicide should be avoided.

5.5) Public persons are entitled to privacy. However, where people hold public office, deal with public affairs, follow a public career, or have sought or obtained publicity for his activities, publication of relevant details of his private life and circumstances may be justifiable where the information revealed relates to the validity of their conduct, the credibility of their public statements, the value of their publicly expressed views or is otherwise in the public interest.

5.6) Taking photographs of individuals in private places without their consent is not acceptable, unless justified by the public interest.

Principle 6 – Protection of Sources

6.1) Journalists shall protect confidential sources of information.

Principle 7 – Court Reporting

7.1) The press shall strive to ensure that court reports (including the use of images) are fair and accurate, are not prejudicial to the right to a fair trial and that the presumption of innocence is respected.

Principle 8 – Prejudice

8.1) The press shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.

Principle 9 – Children

9.1) The press shall take particular care in seeking and presenting information or comment about a child under the age of 16.

9.2) Journalists and editors should have regard for the vulnerability of children, and in all dealings with children should bear in mind the age of the child, whether parental or other adult consent has been obtained for such dealings, the sensitivity of the subject-matter, and what circumstances if any make the story one of public interest. Young people should be free to complete their time at school without
unnecessary intrusion. The fame, notoriety or position of a parent or guardian must not be used as sole justification for publishing details of a child’s private life.

**Principle 10 – Publication of the Decision of the Press Ombudsman/Press Council**

10.1) When requested or required by the Press Ombudsman and/or the Press Council to do so, the press shall publish the decision in relation to a complaint with due prominence.

10.2) The content of this Code will be reviewed at regular intervals.⁵³⁵

The Code permits that certain Principles need not be abided by if justified on public interest grounds. This public interest ground applies to Principles 3.2 and 3.3, which concern Fairness and Honesty, and Principles 5.2, 5.5 and 5.6, which concern Privacy. In relation to stories dealing with children, the Code, through Principle 9.2, places an onus on editors to justify the public interest, if any, in such stories being published. Interestingly, just 8.4% of the complaints received by the Press Council in 2014 related to privacy issues.⁵³⁶

**4.8.2) Press Self-Regulation in the United Kingdom**

As a result of the telephone tapping scandal with the Murdoch newspaper group, the Report of the Leveson Inquiry into the Culture, Practices and Ethics of the Press⁵³⁷ contained a wide range of recommendations. In his report, Leveson LJ stated inter alia:

‘From the outset, I have encouraged the industry to come together to create an independent regulatory regime that satisfies the need to provide public confidence. In my judgment, the proposals so far put forward by the industry do not do that. I have therefore set out a vision of a voluntary independent self-organised regulatory system that would provide an appropriate degree of independence from the industry, coupled with satisfactory powers to handle complaints, promote and enforce standards, and deal with dispute resolution.’⁵³⁸

As a consequence of these recommendations, a Royal Charter on self-regulation of the press was granted in 2013.⁵³⁹ The Charter specified the criteria to be met by any body seeking recognition as a press regulatory body.⁵⁴⁰ The Press Recognition Panel was established on the 3rd November, 2014 and its primary function is to approve applicants as recognised, independent, press regulatory bodies.⁵⁴¹ By its 1st anniversary, the Panel had not approved any such body.⁵⁴² A number of print media organisations opposed to the proposals resulting from the Leveson Inquiry Report established

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⁵³⁸ ibid vol 4, part K, chapter 7, paras 7(1)–7(4)
⁵⁴⁰ ibid sch 3
⁵⁴² ibid
the Independent Press Standards Organisation (IPSO) following the demise of the Press Complaints Commission, which had been heavily criticised – particularly during the Leveson Inquiry. At the time of writing, no press regulatory body had been recognised by the Press Recognition Panel. The Panel has stated that IPSO was the only press regulatory body operating in the United Kingdom and that IPSO had stated publicly that it would not apply to the Panel for recognition. Yet, at the same time the provisions of Section 34 of the Crime and Courts Act 2013 are in force. Under Section 34 of the Act, exemplary damages may not be awarded in a civil claim for either libel, slander, breach of confidence, misuse of private information, malicious falsehood or harassment against a defendant who at the material time was a member of an approved regulator.

4.8.2.1) Independent Press Standards Organisation

The Independent Press Standards Organisation (IPSO) was established in the United Kingdom in September 2014 and it is in operation although not officially recognised. IPSO has a code of practice – The Editor’s Code of Practice, which is in effect the code of practice of the former Press Complaints Commission.

As is the case with the Press Council of Ireland’s Code of Practice, a number of clauses in the IPSO Code place specific restrictions on both the manner in which photographs are acquired and on the publication of photographs, namely in Clauses 3, 4, 6) and 10) which respectively deal with matters concerning privacy, harassment, young children and clandestine devices and subterfuge. The most directly relevant clauses of the Code for photographers are:

Clause 3 Privacy

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.

ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.

iii) It is unacceptable to photograph individuals in private places without their consent.

Note – Private places are public or private property where there is a reasonable expectation of privacy.

Clause 4 Harassment

i) Journalists must not engage in intimidation, harassment or persistent pursuit.

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544 Note: In accordance with S.61(7) of the Act, Section 34 of the Act was commenced on the 1st anniversary of the establishment of the Press Recognition Panel, namely 3rd November 2015.

545 Crime and Courts Act 2013, s 34(2)

546 Independent Press Standards Organisation <www.ipso.co.uk> accessed 21 November 2015


ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.

iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

**Clause 6 Children**

i) Young people should be free to complete their time at school without unnecessary intrusion.

ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child’s welfare unless a custodial parent or similarly responsible adult consents.

iii) Pupils must not be approached or photographed at school without the permission of the school authorities.

iv) Minors must not be paid for material involving children’s welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child’s interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child’s private life.

**Clause 10 Clandestine devices and subterfuge**

(i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.

(ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.649

The Code provides for the making of exceptions to its provisions on “public interest” grounds and the above-mentioned clauses are covered by this exception. On the “public interest” exemption, the Code states:

‘1) The public interest includes, but is not confined to:
   i) Detecting or exposing crime or serious impropriety.
   ii) Protecting public health and safety.
   iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2) There is a public interest in freedom of expression itself.

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649 ibid
3) Whenever the public interest is invoked, the Regulator will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.

4) The Regulator will consider the extent to which material is already in the public domain, or will become so.

5) In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.\footnote{ibid}

Should a person believe that he has been wronged or damaged by material published by an IPSO member publications and that he has not received satisfaction from an alleged offender, he may make a complaint to IPSO and seek a determination.\footnote{ibid} Some of the complaints determined by IPSO have concerned photographs published by its members.\footnote{ibid}

4.8.3) National Union of Journalists

Founded in 1907, the National Union of Journalists (NUJ) is one of the biggest journalists’ unions in the world.\footnote{ibid} Although the largest proportion of its members are working journalists, many of its members are working press photographers.\footnote{ibid} The NUJ is headquartered in London and its branch in Dublin serves its Irish members.\footnote{ibid} The \textit{Code of Conduct} of the NUJ is applicable to all of its members irrespective of where they are based and all of the Code’s principles, and not just the photography specific Principle 11), apply to working press photographer members of the Union. The principles of the Code of Conduct state:

‘A journalist:

1) At all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed.

2) Strives to ensure that information disseminated is honestly conveyed, accurate and fair.

3) Does her/his utmost to correct harmful inaccuracies.

4) Differentiates between fact and opinion.

5) Obtains material by honest, straightforward and open means, with the exception of investigations that are both overwhelmingly in the public interest and which involve evidence that cannot be obtained by straightforward means.

6) Does nothing to intrude into anybody’s private life, grief or distress unless justified by overriding consideration of the public interest.
7) Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.

8) Resists threats or any other inducements to influence, distort or suppress information and takes no unfair personal advantage of information gained in the course of her/his duties before the information is public knowledge.

9) Produces no material likely to lead to hatred or discrimination on the grounds of a person’s age, gender, race, colour, creed, legal status, disability, marital status, or sexual orientation.

10) Does not by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of her/his own work or of the medium by which she/he is employed.

11) A journalist shall normally seek the consent of an appropriate adult when interviewing or photographing a child for a story about her/his welfare.

12) Avoids plagiarism.  

The Code also states that ‘The NUJ believes a journalist has the right to refuse an assignment or be identified as the author of editorial that would break the letter or spirit of the Code. The NUJ will fully support any journalist disciplined for asserting her/his right to act according to the Code. The NUJ will support journalists who act according to the code.’  

The NUJ does not operate a press regulator style function through which members of the public or others may lodge complaints in respect of material published by NUJ members which they believe has wronged or damaged them.

4.8.4) The Irish Professional Photographers’ Association

The Irish Professional Photographers’ Association (IPPA) is the representative organisation for professional photographers working in Ireland. The Association publishes two codes – “Code of Ethics” and “Best Business Practices”. Its Code of Ethics essentially requires its members to be courteous and helpful to clients and fellow photographers and to respect the internal working rules of the Association. It does not place any restrictions on its members as regards the manner or circumstances under which they either create or publish photographs as a consequence of the need to protect and enforce the rights of others. The IPPA’s Best Business Practices primarily deals with a mixture of standard best business practices, taxation and other legal requirements, which would be applicable to any type of business operating in Ireland. This Code does require its members to not break any laws and specifically the Copyright and Related Rights Act 2000, as amended, by copying another photographer’s work without written permission and to not pass-off another’s photographer’s work as one’s own. Save for the requirement that members do not

557 ibid
560 ibid code 8
561 ibid code 10
breach a client’s right to confidentiality, this Code does not place any other restrictions on its members’ practices on the basis of a requirement to respect any specified rights of other, non-photographer parties.

4.8.5) Regulation of Advertising and Marketing Communications Standards

The production and publication of advertisements and marketing communication materials in Ireland and the United Kingdom is subject to codes of the standards implemented respectively by the Advertising Standards Authority of Ireland and the United Kingdom’s Advertising Standards Authority. Both are members of the European Advertising Standards Alliance. In addition, broadcasted advertisements and marketing communication materials are subject to conformity with the codes of standards of either the Broadcasting Authority of Ireland or Ofcom.

4.8.5.1) Advertising Standards Authority of Ireland

The Advertising Standards Authority of Ireland (ASA) is an independent, self-regulating body, which was established and is financed by Ireland’s advertising industry. The ASA states that it ‘...is committed, in the public interest, to promoting the highest standards of marketing communications, that is, advertising, promotional marketing and direct marketing.’ Through the commitment and support of advertisers, advertising agencies and the media, it enforces such standards. The Authority’s Code of Standards for Advertising and Marketing Communications in Ireland is extremely detailed. On “advertising”, the Code states:

‘Advertising or advertisement includes, but is not limited to, a form of marketing communication carried by the media, usually in return for payment or other valuable consideration or in a space that would generally be provided for in return for payment.’

It also states that a “marketing communication”:

‘...includes, but is not limited to, advertising, as well as other techniques such as promotions, sponsorships and direct marketing, and should be interpreted broadly to mean any form of communication produced directly by, or on behalf of, advertisers intended primarily to promote products, to influence the behaviour of and/or to inform those to whom it is addressed.’

The scope of the Code covers marketing communications materials published through a variety of specified types of market communications media including for example, newspapers, magazines, promotional brochures, television and radio broadcasts and online. The Code also specifies the
types of marketing communications materials, such as press releases and other public relations materials, which do not come within the scope of the Code.\textsuperscript{569} The General Rules of the Code state, among other things, that marketing communications should:

- ‘…be legal, decent, honest and truthful.
- be prepared with a sense of responsibility both to the consumer and to society.
- conform to the principles of fair competition as generally accepted in business.’\textsuperscript{570}

Furthermore, the General Rules state that responsibility for observance of the Code is placed upon advertisers themselves and that others involved in the preparation and publication of marketing communications, such as service providers, are also obliged to abide by the Code.\textsuperscript{571} Photographers supplying photographic services for use in marketing communications would therefore come within the scope of the Code. In addition to its General Rules, the Code contains standards applicable to a number of specific product and business sectors, such as alcoholic drinks,\textsuperscript{572} gambling\textsuperscript{573} and the health and beauty sector.\textsuperscript{574} Noting that children lack maturity, knowledge and life experience and with the safety of children being kept to the fore, the Code specifies the standards which must be abided by advertisers when they are either directly or indirectly addressing their marketing communications to children or when children are featured in their marketing communications.\textsuperscript{575} The Code makes both indirect and direct references to the use of photographs in marketing communications and a direct requirement to obtain model, product and property releases.\textsuperscript{576} For example, Clause 3(27) of the General Rules states:

‘Subject to the exceptions referred to in 3(28) below, advertisers should have written permission in advance from living persons portrayed or referred to in a marketing communication. Permission is also required before any person’s house or other possessions can be featured in a manner which identifies the owner to the public.’\textsuperscript{577}

Clause 3(28) of the Code contains two exceptions to this requirement, namely:

‘(a) The use of crowd scenes or property depicted in general outdoor locations, or where the purpose of the marketing communication is to promote a product such as a book, newspaper article, broadcast programme or film of which the person concerned is a subject.

\textsuperscript{569} ibid clause 2(3)
\textsuperscript{570} ibid clauses 3(2)–3(4)
\textsuperscript{571} ibid clause 3(1)
\textsuperscript{572} ibid clause 9
\textsuperscript{573} ibid clause 10
\textsuperscript{574} ibid clause 11
\textsuperscript{575} ibid clause 7
\textsuperscript{576} Note: Throughout the Code, the terms ‘photographs’, ‘image’, ‘imagery’, ‘depict’, ‘depicted’, ‘depiction’, ‘portray’, ‘portrayal’ and ‘portrayed’ are variously used. However, the term ‘photographs’ is only used in Clause 11(7)(b) of the Code.
\textsuperscript{577} ibid clause 3(27)
(b) In the case of people with a public profile, references that accurately reflect the contents of books, newspaper articles, broadcast programmes, films or other electronic communications, etc.\(^{578}\)

Although there is no statutory requirement that a signed model, property or product release must be obtained prior to the use of a photographic portrayal of a person or their property in a marketing communications material, this stipulation within the Code is the nearest there is to such. In respect of the Health and Beauty Sector, the Code makes a direct reference to the use of photographs in marketing communications and states:

‘Marketing communications for individual treatments should take care not to minimise, trivialise or create unrealistic expectations, in particular in the use of photographs.’\(^ {579}\)

On misleading advertising, the Code states that marketing communications should not ‘…mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise.’\(^ {580}\) Any person or body may make a complaint to the ASAI that either a marketing communication or online behavioural advertising may be in breach of the Code.\(^ {581}\) The ASAI regularly publishes complaints bulletins, which detail the complaints received by it and its determinations on them.\(^ {582}\)

**4.8.5.2) Broadcasting Authority of Ireland**

Established by the Broadcasting Act 2009,\(^ {583}\) the functions of the Broadcasting Authority of Ireland (BAI) are to regulate the content of all broadcasting, to promote broadcasting services and to undertake the functions of the former Broadcasting Complaints Commission.\(^ {584}\) In accordance with the requirement under Section 42 of the 2009 Act,\(^ {585}\) the Authority operates and regularly updates a range of broadcasting codes of practice and standards by which broadcasters and their advertisers must abide. Relevant Codes include: BAI General Commercial Communications Code, Children’s Commercial Communications Code, Code of Programme Standards and Code of Fairness, Impartiality and Objectivity in News and Current Affairs.\(^ {586}\) Of particular relevance to this thesis is the General Commercial Communications Code. Clause 3(1)(1) of this Code states, among a range of other requirements, that all commercial communications:

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578 ibid clause 3(28)
579 ibid clause 11(7)(b)
580 ibid clause 4(1)
581 Advertising Standards Authority of Ireland, Make a Complaint <www.asai.ie/make-a-complaint/> accessed 21 November 2015
Note: Online behavioural advertising (targeted advertisements based on collected web viewer browser data) is governed by Clause 18 of the Code.
582 ibid Complaints Bulletins <www.asai.ie/complaints-bulletins/> accessed 21 November 2015
583 Broadcasting Act 2009, s 6
585 Broadcasting Act 2009, s 42
‘...shall be prepared with a sense of responsibility both to the individual and to society and
shall not prejudice the interests of either. All commercial communications shall be legal,
honest, decent, truthful and protect the interests of the audience.’

The BAI Codes neither make any specific reference to, or place any specific responsibilities upon,
still photographers. However, throughout the General Commercial Communications Code specific
mention is made of “images”. Where a still photograph (an image) is featured in either a
broadcasted programme or an advertisement, there is an onus on the programme or advertisement
maker to ensure that such a photograph meets the requirements of the BAI’s codes of practice and
standards. Any viewer or listener of a broadcasted programme or advertisement may make a
complaint directly to its broadcaster if dissatisfied with the manner in which a broadcaster is
complying with the BAI Codes. The BAI’s A Guide for Listeners & Viewers to the Complaints
Process & the Broadcasting Authority of Ireland 2014 states that complaints may be made under the
following headings:

a) Objectivity/Impartiality in News, Fairness, Objectivity & Impartiality in Current Affairs
b) Law and Order
c) Harm & Offence
d) Privacy of an Individual
e) Advertising, Teleshopping, Sponsorship, Product Placement & Commercial
Communications’.

Complaints may also be referred to the BAI under its Complaints Referral Procedure. In
accordance with the requirement under the Broadcasting Act 2009, the BAI also operates a Right
of Reply Scheme under which any viewer may seek a correction from a broadcaster if they believe
that incorrect, broadcasted information has impugned their honour or reputation. A refusal by a
broadcaster to such a request may be reviewed by the BAI.

Note: Clause 4(1) of the General Commercial Communications Code states: “The general principles and rules pertaining to all commercial communications shall apply to advertising and teleshopping.”
588 ibid
Note: In addition to the references made in the General Commercial Communications Code on the use of images in broadcasted programmes and advertisements, such references are made throughout the Children’s Commercial Communications Code; Code of Programme Standards; BAI Right of Reply Scheme; the BAI Rules on Advertising and Teleshopping (Daily and Hourly Limits) and the ODAS Code of Conduct for media service providers of on-demand audio-visual media services.
590 ibid
591 Broadcasting Act 2009, s 49(1)(3)
Note: Under Clause 3(1) of the Scheme, the format of a reply under this scheme will depend upon a number of matters including whether or not images were used in the broadcast of the incorrect information.
593 ibid clause 4(1)
4.8.5.3) Advertising Standards Authority (United Kingdom) and Ofcom

In the United Kingdom, the Advertising Standards Authority (ASA) is the independent regulator of advertising across all media. It is funded through levies on advertising space costs and on some direct mail. As mentioned above, while the scope of the ASAI’s Code of Standards for Advertising and Marketing Communications includes the medium of broadcast, the ASA differs from the ASAI in that is the regulatory authority for both non-broadcast and broadcast advertising. It self-regulates non-broadcast advertising and it co-regulates broadcast advertising. This dual regulatory role is a consequence of its contract with the Office of Communications (Ofcom), under which it regulates television and radio advertising. Ofcom separately implements The Ofcom Broadcasting Code, which regulates the contents of broadcasted programmes by its licensed broadcasters. Two codes of advertising standards written by the Committees of Advertising Practice are regulated by the ASA, namely The CAP Code: The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing and The BCAP Code: The UK Code of Broadcast Advertising. The scope and contents of these two Codes are broadly similar to those of the codes of the ASAI and the BAI.

4.8.5.4) Sanctions for Breaches of Advertising and Marketing Communications Codes of Practice

Both the ASAI and the ASA have powers to sanction advertisers which they deemed to be in breach of their respective codes of practice. They may, for example, request an advertiser to remove or amend an offending advertisement or marketing communications material. They may also request media members of their respective associations to refuse to continue publishing the offending material. However, they do not have any legal power to enforce financial sanctions on offenders and thus their sanctioning powers may be somewhat limited. Where a broadcasted advertisement breaches a BAI Code, Section 55 of the Broadcasting Authority Act 2009 provides for the imposition

595 ibid Funding <www.asa.org.uk/About-ASA/Funding.aspx> accessed 23 November 2015
Note (2): Ofcom was established by the Communications Act 2003, as amended, and under Sections 3(2)(e) and 3(2)(f) of the Act, Ofcom is obliged to implement standards in respect of television and radio services to protect the public from offensive and harmful material, unfair treatment in programmes and unwarranted infringements of privacy.

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of a financial sanction on the offending broadcaster in cases of serious or repeated breaches.\footnote{297} In the United Kingdom, the ASA may refer a complaint regarding a code-offending, broadcasted advertisement to Ofcom, which has the legal power to impose a variety of sanctions upon a code-breaching broadcaster licensed by it, if it determines that the broadcaster ‘…has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.’\footnote{603} Among the sanctions available to Ofcom, it may issue a direction to a broadcaster to not re-broadcast an offending programme or advertisement or it may impose a financial penalty on the broadcaster.\footnote{604}

4.9) Brief Conclusions

Chapter (4) examined the range of restrictions which may be imposed on either the taking or the publication of photographs in the interests of protecting public order, the security and defence of the State and the administration of justice. The Chapter also discussed a varied range of statutory provisions under which restrictions may be imposed on photographers and photograph publishers. Restrictions may also be imposed on them by the State on public morality grounds. In addition, certain classes of photographers, principally press photographers and those involved in the production of images for use in advertisements and marketing communications materials, may have restrictions imposed on them as a consequence of ethical codes of behaviour. Although ethical codes of behaviour contain restrictions on the activities of photographers and photograph publishers, in practical terms they do not constitute a major interference with the legal rights of photographers and photograph publishers who act responsibly towards others. Chapter (4) raised a number of issues which would benefit from the implementation of amendments to either statutory or constitutional law and a number of recommendations are discussed in Chapter (5).

\footnote{297} Broadcasting Authority Act 2009, s 55

Note: Section 52 of the Act defines a “breach” as “…a serious or repeated failure by a broadcaster to comply with a requirement referred to in section 53(1);”. The requirements specified in Section 53(1) of the Act include a “…breach of a broadcasting code or rule.”

\footnote{603} Ofcom, ‘Procedures for the consideration of statutory sanctions in breaches of broadcast licences’, para 1.10


Note: The power under which Ofcom may impose a sanction on an offending broadcaster will depend upon the type of broadcasting licence held by the broadcaster. Ofcom is granted such power under a number of statutory and other provisions, such as Section 40(1) of the Broadcasting Act 1990, as amended, and Section 236(6) of the Communications Act 2003, as amended, and Clause 94(1) of An Agreement Between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation (28 June 2006), as amended.

\footnote{604} ibid para 1.11
Chapter Five

Overall Conclusions and Recommendations

5.1) Introduction
This doctoral thesis investigated the legal rights of photographers and photograph publishers in Ireland to take and/or publish still photographs. For comparative purposes, an analysis of the applicable law in the United Kingdom was undertaken. Particular attention has been paid to developments in law and policy occurring at E.U. and Council of Europe levels.

The creation and publication of photographs are two distinct, but closely related, activities both in practical terms and also from a rights perspective. Photographers and photograph publishers enjoy a range of legal rights, which are derived both directly and indirectly from a number of sources at global, European, European Union and national levels. The relevant instruments include international treaties and conventions, the Constitution of Ireland, statutory legislation and the common law. The creation of a photograph is one of the methods and stages involved in the process through which a person may express and communicate his ideas, beliefs or other information with others. The right to take a photograph in a public place or in a place to which members of the public are admitted without any restrictions on the taking of photographs is founded in the common law. It is also founded in the legal right of freedom of expression and in particular its sub-set – the right of artistic expression. The right to publish a created photograph is founded upon the rights of freedom of expression, including its sub-sets of artistic and commercial expression, and freedom of communication. In practice, the primary vehicle for the implementation of photographers’ and photograph publishers’ over-arching right of freedom of expression is copyright law. The thesis identified and examined photographers’ rights under copyright law, how copyright law protects those rights and the remedies available under copyright law to the owners of the copyright in photographs against the infringement of those rights. It investigated whether, how and the extent to which photographers and publishers’ rights under copyright law are being eroded and diluted and whether those rights should be further protected and enforced.

Photographers’ and photograph publishers’ rights are not absolute and they may be restricted. The thesis investigated the types of restrictions which may be placed upon their legal rights. These legal restrictions exist due to a number of reasons including, among others, the legal requirement to protect and enforce the personal rights of others; the State’s duty to maintain public order, to protect the security and defence of the State, to prevent and/or to investigate crime and to protect public morals. Restrictions may also be imposed as a consequence of a variety of statutory provisions or through the terms of contracts for photographic services or of photographer accreditation systems.
Overall, the research suggests that the legal rights of photographers and photograph publishers in Ireland to take and/or publish photographs are appropriate and, in the main, they are adequate. However, a number of weaknesses have been identified, particularly in respect of the protection and enforcement of photographers’ rights under copyright law. Recommendations to address these weaknesses are suggested below.

Photographers’ and photograph publishers’ rights may be restricted in support of the “private” rights of individuals. In examining such various types of restrictions that may be imposed, the research highlighted a number of weaknesses in the protection of the private rights of individuals, such as the right against harassment and against voyeurism, and a number of recommendations are suggested.

Legal restrictions may also be imposed on photographers and photograph publishers by the State in order to fulfil its legal duty to protect public order, the security and defence of the State and the administration of justice. The State may also impose restrictions on public morality grounds. In addition, voluntary non-binding codes of behaviour may result in the imposition of restrictions on specific categories of photographers and/or on photograph publishers. The thesis offers some recommendations in respect of these types of restrictions. The main findings and recommendations are presented in order of priority, with the most urgent or important changes necessary being presented first.

5.2) Photographers’ Rights under Copyright Law

In Ireland, photographers’ rights under copyright law are broad in scope and, in general terms, the terms of protection offered to photographers are good. However, the exercise by photographers of these rights and their attainment of the protection afforded to them in their copyrighted works under copyright law is under attack by copyright infringers and vested interest groups. Existing rights under copyright law need to be actively enforced by the State. New legislation is required to permit the effective protection and enforcement of the copyright in photographs. EU Directives concerning copyright refer to copyright holders’ existing rights. These existing rights (the acts reserved to a copyright holder), which are legally recognised property rights, are being slowly eroded through an expansion of the types of permitted exceptions for the use of copyrighted works and also through the introduction of legislation dealing with orphaned works and extended collective licensing. At a national level, there has been little, if any, public debate on copyright and the use of copyrighted works. There has been absolutely no public call for legislation to permit the use of orphaned works. The latter has resulted from the calls at a European level from the vested interest groups covered by the Orphan Works Directive. If we were to have a similar erosion of existing rights in respect of other types of property, particularly real property, with an opt-out rather than an opt-in system being put in place, it is likely that there would be a great deal of public debate on, and opposition to, such a proposal.
If both the Irish State and the European Union were really concerned about protecting the interests of copyright holders, an opt-in rather than an opt-out copyright licensing system covering the use and/or the commercial and/or non-commercial exploitation of both copyrighted and orphaned artistic works should be created and enforced. Such a new opt-in system could be a licence to use as opposed to the current system of exceptions to copyright holders’ existing rights under the CRRA 2000 and the provisions of the Orphan Works and the Collective Management Directives. Also, both the EU and the State should review the current permitted use “exceptions” in the legislation in respect of all copyrighted works with the view to converting them into “licensed uses” of works under which the copyright holder would be remunerated at market rates. While not suggesting that copyright holders should be granted any additional rights, the above-suggested reversal at both EU and national levels would greatly assist copyright holders to both protect their existing rights and to financially benefit from their creations.

One of their biggest problems facing professional photographers on a daily basis is the unauthorised use of their copyrighted works by third parties – particularly online. The stripping-out of rights management information from photographers’ published images’ metadata files and the subsequent, unauthorised re-use of such works is widespread and out of control. This is both a national and an international problem and online copyright infringement does not respect national borders. In Ireland, although the removal or alteration of rights management information from a copyrighted work is a criminal offence under the CRRA, the prosecution of offences under Section 376 of the Act could not be classified as being one of the priorities of An Garda Síochána (police). It is the norm for professional photographers to insert rights management information in respect of their individual digital photographs in the images’ metadata files. However, the Act does not make specific mention of this type of data file and the illegality of the unauthorised removal of rights management information from such a file. Unauthorised metadata stripping from a photographic image’s data file should be made a specific, strict liability criminal offence. It should be prosecuted and such prosecutions should be highly publicised in the media, so as to promote a reduction of this practice. Although the focus of public commentary on copyright infringement and rights management information relating to photographs has been on digital photographs, a similar issue exists in respect of images created with photographic film (positive and negative) and also with photographic prints. Normally, frames of photographic film do not contain rights management information. Although commercial photographers are generally in the habit of putting rights management information on their photographic prints, it is only the extremely careful ones, who will put such information on the border of photographic film images. Photographers need to be more mindful of their rights in their photographic film images and photographic prints, as they may be copied easily without a copyright holder’s authorisation. Under the Constitution of Ireland, the State has a duty to protect citizens’ property rights from unjust attack. The State needs to actively prosecute copyright infringers. Also, photographers could benefit from access to a Small Claims Court within both the District and Circuit...

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1 Copyright and Related Rights Act 2000 s 376(1)
2 Constitution of Ireland (Art. 40.3.2º) (on Personal Property)
Courts,\(^3\) which would cater for relatively straight-forward copyright infringement claims up to the civil jurisdiction limits of both courts.

At an EU level, there is a need for the adoption of new legislation, which would tackle the problem of online copyright infringement of photographs. Websites that promote and/or facilitate the display and sharing of copyright infringing photographs should be held legally accountable for the uploading to and display by users of their websites of copyright infringing photographs. There is a need for EU legislation, which would place a specific duty on member states to (a) legislate for the prohibition of metadata stripping and online copyright infringement and (b) to actively prosecute identifiable, individual copyright infringers. Also, the automatic stripping of metadata from photographs by websites during the course of the uploading of photographs to them should be legally prohibited. Social media websites should be legally required to offer and use a “nopin” meta tag in order to prevent the unauthorised copying of copyright protected images from websites to social media websites.

Currently, registration of an artistic work is not a requirement for copyright to subsist in it. A legally-recognised, voluntary copyright registration system for both published and un-published copyrighted works could offer a greater level of protection to the owners of copyright in photographs than that which currently exists. However, such a registration system for photographs would have to be inexpensive for registrants. It is possible, that a registration fee of circa €15.00 – €20.00 for a bulk registration of 500 images would be acceptable to photographers. The proposed copyright registration system would have to be easy to use and search and be capable of exactly visually identifying one image from another. Under the CRRA, as amended, the Controller of the Irish Patents Office has a number of specific responsibilities in relation to copyright and licensing bodies. It now has a new role in respect of the use of orphan works. A re-branding of the Irish Patents Office as the Irish Intellectual Property Office and an expansion of its current role in relation to copyright by making it the Irish Copyright Authority would raise the status of copyright to a higher level. An expanded Intellectual Property Office could offer greater protection to copyright holders by administering a copyright registration system and by being given both prosecutorial and arbitration\(^4\) powers in respect of copyright infringements. Although the infringement of copyright in photographs is occurring both in Ireland and overseas, particularly through the use of the internet, a prosecutorial role for an Intellectual Property Office could assist in ameliorating the problem of copyright infringement for photographers operating within Ireland.


A number of measures, which would assist both in enforcing the protection of copyright holders' existing rights and in enhancing their rights, are recommended below. These measures relate to the creation of an Irish Intellectual Property Office with a role in the operation of a proposed voluntary image copyright registration system and in the prosecution of proposed new offences relating to the infringement of copyright in photographs; the expansion of the role of the Small Claims Court; the review of the use exceptions to copyright under the CRRA; the issue of the forced transfer of copyright and moral rights through contract terms, the extension of the duration of the moral right against false attribution in photographs and the creation of a legal requirement that website domain name registrars must disclose to copyright holders the names of the owners of copyright infringing websites and that website publishers must publish an imprint containing full contact details.

5.2.1) Recommendations

5.2.1.1) Irish Intellectual Property Office
The Irish Patents Office should be transformed into an Irish Intellectual Property Office (IIPO) with an expanded role in relation to copyright. It could operate a voluntary image copyright registration system. The IPPO should be granted both prosecutorial and arbitration powers in respect of copyright infringement.

Copyright Registration System
The registration of the copyright in a photograph is not a current requirement for it to subsist. A low-cost, voluntary, copyright registration system could actually assist in protecting the rights of copyright owners in photographs by establishing the author of a photograph as the recognised first owner of the copyright in such a work. In addition, additional damages for the infringement of the copyright in a registered work could be made available in proven civil cases.

New Offences relating to the Infringement of Copyright in Photographs
New offences relating to the infringement of copyright in photographs should be created and the IIPO should be granted prosecutorial powers in respect of such offences.

1) Create an offence of interference with metadata rights holders information contained within photograph files and impose a strict liability on website operators that display images from which metadata has been stripped by anybody other than the image's copyright owner.

2) Prohibit the automatic stripping of metadata from photographs as they are being uploaded to websites and make its contravention a strict liability offence for website operators undertaking or facilitating such practice.

3) A legal onus should be placed on all operators of websites (including social media sites) to ensure that they and/or any permitted users of their websites only publish copyright-cleared images on their websites. The use of a "nopin" type meta tagging system, as used by "Pinterest", should be a legal requirement on the operators of all websites, including
social media sites, so as to assist photographers in preventing their images from being pinned or uploaded to websites.

5.2.1.2) Small Claims Court
The role of the Small Claims Court should be expanded to encompass copyright infringement cases, thereby giving copyright holders a low cost access to a judicial remedy for copyright infringements. Where such a court would be assessing damages for copyright infringement, it should take cognisance of the photographer’s own scale of fees, if he is a practising commercial photographer. In other instances, the court should take cognisance of the National Union of Journalists’ London Freelance Branch’s Fees Guide for Photography,⁵ which is the most up-to-date and comprehensive scale of fees published and not the rates charged for “royalty free” images by online stock photo agencies. The latter bear no relationship to the actual fee one would have to pay to commission a professional photographer to create photographic images for commercial reproduction. The Small Claims Court could also have the ability to award additional damages in proven cases of copyright infringement, where the copyright in the images at issue had been registered with the IIPO.

5.2.1.3) Use Exceptions to Copyright under the CRRA
The use “exceptions” currently permitted under the CRRA in respect of stand-alone photographic works should be reviewed and all such “exceptions” should be converted into “licensed uses” under which the copyright holder would be remunerated at rates to be established and collected by a collections agency licensed by the IIPO.

5.2.1.4) Forced Transfer of Copyright and Moral Rights via Contract Terms
The forced transfer, via contract terms, of photographers’ copyright and moral rights in images created by them for clients should be legally prohibited. The assignment of these rights should only be legally permitted on a completely voluntary basis and should not be a condition of obtaining a contract for photographic services.

5.2.1.5) Duration of the Moral Right against False Attribution in Photographs
The duration of the moral right against false attribution in photographs should be made of an equal duration to that of the other moral rights specified under the CRRA, namely the lifetime of the work’s author and for 70 years after his death.

5.2.1.6) Website Domain Name Registrars and Website Imprint
Where a website infringes the copyright in a photograph by illegally reproducing it, that website’s domain name registrar (i.e. the person/organisation that registered the website’s domain name) should be legally required to supply, upon a direct request, the website owner’s full contact details to the image’s copyright owner.

A statutory measure should be introduced which would require all website owners and operators to publish a complete imprint (website owner’s and operator’s names, a valid postal address (non-post box) and a valid email address on their websites. At present, it can be extremely difficult to track-down the actual owner(s) and operator(s) of websites, who may or may not be the same person(s).

5.3) Legal Restrictions on Photographers resulting from the Protection and Enforcement of the Personal Rights of Others

While photographers and photograph publishers have legal rights to take and/or publish photographs, none of those rights is an absolute right. In practice, their rights may be restricted in support of other interests, in particular the “private” rights of individuals. Chapter (3) examined the range of private rights of individuals that either may come into contention with the legal rights of photographers and publishers of photographs or restrict the latter’s rights, namely the individual’s right to privacy; personal image rights and publicity rights; rights against harassment, stalking, voyeurism and revenge porn; the right to a good name; the right to be forgotten; property rights; the rights of copyright and trademark holders and the safety, health and welfare rights of people working with photographers. In general, these private rights do not place onerous restrictions on photographers and photograph publishers, who act responsibly. However, some of these private rights, particularly the right to privacy, the right against harassment and the right to be forgotten, may be, and are being, invoked by individuals in an attempt to prevent personal information from becoming public knowledge. Such practice may result in a restriction on the rights of press photographers to report matters of public interest. In addition, individuals have invoked their right to privacy and their right not to be harassed by photographers as a means to create and manage a personal image right and a right to publicity, rather than actually wishing to protect their privacy. The courts place a significant weight on the freedom of expression rights of photographers and photograph publishers. Chapter (3) examined a number of tests that have been implemented by the courts when they are balancing these rights with any competing private rights of individuals. The research undertaken for Chapter (3) raised a number of important issues, specifically in respect of the right to privacy, the right against being harassed, voyeurism, the unauthorised disclosure and/or publication of private sexual images, the anonymous posting of images on the internet, and take-down notices. A number of legislative changes are recommended in relation to these topics.

5.3.1) Recommendations

5.3.1.1) Statutory Right to Privacy

There is no general statutory right to privacy either online or off-line and the Data Protection Acts 1988–2003 have become a surrogate privacy statute. The number of internet users is vast. A great part of the problem in relation to breaches of privacy online is the mind-set of people using the internet and social media platforms. They believe that they can do or say anything online as they please without any legal consequences. The courts have had to adapt existing common law and statutory legislation when considering cases concerning the breach of privacy online. A general statutory right to privacy should be introduced. If such a statutory right were to be created, an
exemption for journalistic purposes “in the public interest” should also be created under that statute.

5.3.1.2) Model, Property and Product Releases
At present, model, product and property releases are not a legal requirement for the commercial publications of photographs. Release forms should be made a statutory requirement for the commercial publication, either off-line or online, of images that easily enable the identification of any individual(s) featured in them. A similar legal requirement should pertain to the publication of photographs of products and privately-owned properties. However, an exemption to the requirement for release forms should be specified in respect of photographs published for “journalistic purposes in the public interest”. The possession of a signed model release form should be a defence to a claim of either defamation or misrepresentation and if its wording covers the use in question, it should defeat such a claim. Due to the wide ranging methods through which photographs are published, varying from printed newspaper and magazine advertisements, through online publication to other uses such as on-vehicle promotional signage, it would impractical to create and impose standard, statutorily-expressed wordings of such release forms. However, the legislation could contain “model” wordings.

5.3.1.3) Image and Publicity Rights
In view of the above proposal concerning model releases, neither a personal image right nor a right of publicity should be created. Were a personal image right or a right of publicity to be made a legal right, the publication of photographs featuring individuals for journalistic purposes in the public interest would, in effect, grind to a halt. For example, the publication of photographs featuring crowd scenes or street scenes would become an impossibility, as the obtaining of clearances from all of the individuals featured in such images would not be feasible. In any event, it is most likely that such clearances would not be forthcoming.

5.3.1.4) Right against Harassment
Section 10(1) of the of the Non-Fatal Offences Against the Persons Act 1997, which concerns the harassment of individuals, makes use of the word “persistently” in relation to the “following, watching, pester, besetting or communicating” with individuals. Consequently, the Section does not cover a once-off incidence. Any review of Section 10 of the Act should pay particular attention to the use of this word. Also, the existing offence of harassment should be widened to specifically take account of harassment via the internet and social media sites.

5.3.1.5) Voyeurism
Rather than using the above-mentioned Section 10 of the 1997 Act to prosecute cases of voyeurism, a specific, statutorily-defined offence of voyeurism should be enacted.
5.3.1.6) **Unauthorised Disclosure or Publication of Private Sexual Photographs with Intent to Cause Distress**

The disclosure or publication of private, sexual photographs of individual(s) without their consent and with the intent to cause distress to the individual(s) featured in the images (colloquially termed “revenge porn”) should be made an offence. Also, offences should be created in respect of (a) the unauthorised taking and/or publication of what are colloquially known as “up-skirt” and “down-blouse” photographs and (b) the publication of images of individuals without their permission on pornographic websites or with captions of a highly sexual or pornographic nature on social media sites with the intention of causing distress to the individuals featured in the published images.

5.3.1.7) **Anonymous Online Postings and Defamation**

Principle 7 of the Council of Europe’s Declaration on freedom of communication on the Internet\(^6\) states:

> ‘In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity.…’

This principle dates from 2003 – a time when internet-based social media was still in its infancy and its number of users was miniscule in comparison to that of today. It does not take account of the increasing level of defamatory material, including photographs, being published on the internet and particularly on social media websites. There is a need for a review of the legal policy on the permitting of anonymous postings, including images, on the internet and of the liability of websites that permit anonymous postings on their websites.

5.3.1.8) **Liability of Website and Search Engine Operators**

Consideration should be given to the introduction of a prima facie statutory liability and duty of care for website operators and search engines in respect of all material published on their websites and search engines.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) provides an exemption from liability for online intermediaries. This Directive is currently being amended. Ideally, its amendment should either tighten or remove the liability exemption available to website and social media website operators and search engines under the Directive.

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\(^6\) Council of Europe, Committee of Ministers, *Declaration on freedom of communication on the Internet: (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies)*, principle 7 <https://wcd.coe.int/ViewDoc.jsp?id=37031> accessed 16 December 2015
5.4) Legal Restrictions on Photographers and Photograph Publishers in support of Public Interests, through Statutory Provisions, on Public Morality Grounds and under Ethical Codes

While Chapter (3) examined the range of restrictions, which may be imposed on photographers and photograph publishers in order to protect and enforce the personal rights of individuals, Chapter (4) went on to examine the restrictions which may be imposed on them by the State in fulfilling its legal duty to protect public order, the security and defence of the State and the administration of justice. The Chapter also discussed a varied range of statutory provisions under which restrictions may be imposed on photographers and photograph publishers. Restrictions may also be imposed on them by the State on public morality grounds. In addition, certain classes of photographers, principally press photographers and those involved in the production of images for use in advertisements and marketing communications materials, may have restrictions imposed on them as a consequence of ethical codes of behaviour. However, these latter types of restrictions do not overly interfere with or cause a major impediment to the legal rights of photographers and photograph publishers who act responsibly towards others. Chapter (4) raised a number of issues which would benefit from the implementation of amendments to either statutory or constitutional law as recommended below.

5.4.1) Recommendations

5.4.1.1) Official Secrets Act 1963

Court cases concerning breaches of the Irish Official Secrets Act 1963 are rare. In view of the fact that some of the prohibited materials specified under Section 9(1) of the Act, for example the number, description and armament of the Irish Navy’s vessels, is published on its official website, it would be appropriate that this Section of the Act would be repealed.

5.4.1.2) Access to Postal Packets, Telecommunications Messages and Communications Data

The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, as amended, and the Communications (Retention of Data) Act 2011 respectively provide for the authorisation to intercept either a postal packet or a telecommunications message and to obtain access to an individual’s communications data. At present, an authorisation under the 1993 Act may be granted by the Minister for Justice. It would be more appropriate that such authorisation would be decided by a judge and not by a politician.

Under the 2011 Act, authorisations for access to communications data may be granted by a Chief Superintendent of An Garda Síochána or by specified members of the Permanent Defence Force, officers of the Revenue Commissioners and members of the Competition and Consumer Protection Commission respectively in respect of the security of the State; the prevention, detection, investigation or prosecution of revenue offences and the prevention, detection, investigation or prosecution of competition offences. They are not granted by a judge. The legislation should be amended so that authorisations granted under the 2011 Act may only be granted by a High Court
judge. In addition, where a judge would be considering an application for access to a journalist's postal packets, telecommunications messages or communications data respectively under the 1993 or the 2011 Act, it should be a requirement for the party seeking such access to prove to the satisfaction of the judge that there is an over-riding public interest in being granted such access for a specific and stated legal purpose and not as a fishing exercise.

5.4.1.3) Surveillance of Journalists, including press photographers, by the State

The Criminal Justice (Surveillance) Act 2009, as amended, provides for a judge of the district court to grant on an ex parte basis and otherwise than in public an authorisation for surveillance to a superior officer of either An Garda Síochána, the Garda Síochána Ombudsman Commission, the Defence Forces or the Revenue Commissioners for specified purposes including the investigation or prevention of arrestable offences, the security of the State and revenue offences. The Act states that an authorisation may not be issued if the judge is satisfied that the ‘…surveillance being sought to be authorised is likely to relate primarily to communications protected by privilege.’ However, the Act does not define what constitutes privileged communications and as applications are on an ex parte basis, the judge is at the mercy of the information provided to him by the applicant. Furthermore, Section 7 of the Act provides for the issuing of an authorisation by a superior officer rather than a judge in the case of an application of an urgent nature. Surveillance authorisations granted under the 2009 Act should be granted by a high court judge and not by either a district court judge or a superior officer as defined by Section 1 of the Act. Also, an over-riding public interest test should apply in respect of the granting of an authorisation under this Act for the surveillance of journalists, including press photographers.

5.4.1.4) Protection of Journalists’, including Press Photographers’, Sources of Information

Journalists, including press photographers, should be granted a statutory right to refuse to either disclose or confirm their sources of information in court cases in order that they may protect both their sources and their rights of freedom of expression and of communication.

5.4.1.5) Production Orders in respect of Photographic Images

Under Section 15 of the Criminal Justice Act 2011, a member of An Garda Síochána may apply to the District Court for a production order in respect of a photographer's images. Section 15(2)(a) of the Act just refers to ‘particular documents or documents of a particular description’. There is no requirement under S.15 that specific images must be stated in the order application. The Act does not specify any required level of evidential value in respect of material sought under a S.15 production order. Under S.15(2)(c) of the Act, the material sought does not need to be of “substantial value” either to an investigation or as evidence. Furthermore, it is not a requirement under S.15(2)(c) that only specified documents, for example specific photographic images, would be covered by a S.15 order. Section15(2)(c) only requires that the documents or “some” of the

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7 Criminal Justice (Surveillance) Act 2009 s 5(4)
8 ibid s 7
documents sought “may” constitute evidence. Such an investigative or evidential value level is extremely low. Coupled with the wide document description permitted on an order application, S.15 of the Act would facilitate An Garda Síochána by granting it access to photographic images which most likely would be of no investigative or evidential value to it and for An Garda Síochána to just undertake fishing expeditions at the expense of photographers. The statutory provisions contained in Section 15 of the Act should be amended by requiring an applicant for a production order to specify the specific images being sought and the specific purpose for which they are being sought. Also, the use of production orders to facilitate fishing expeditions should be prohibited. Production orders should only be granted by a judge, if he is satisfied that the specific images sought under the production order application are of a demonstrated, high investigative or evidential value.

5.4.1.6) Garda Síochána Guidelines on their Interactions with Photographers taking Photographs in Public Places

Interactions of a confrontational nature between members of An Garda Síochána and photographers do not occur often. However, so as to minimise the possibility of members of An Garda Síochána unlawfully attempting to either prevent photographers from taking photographs in public places or to seize cameras/film or to erase images stored on a photographer’s camera, it would be beneficial if An Garda Síochána were to publish a “photography advice” guideline for its members. Such a guideline should also be made easily available for viewing by members of the public.

5.4.1.7) Taking of Photographs outside and inside Court Buildings

The restriction on the taking of photographs within court buildings in Ireland is currently governed by the Rules of Court. Save for Section 10 of the Criminal Law Act 1976, which concerns the possession of photographs of the exterior or interior of prisons, Garda stations and courthouses by specified classes of individuals, such as a person in lawful custody, there is no legal prohibition on the taking of photographs outside court buildings. It would be preferable if the issue of the taking of photographs both inside and outside court buildings were to be governed by a statutory provision. Such a statute could also contain “rules of engagement” outside of court buildings between photographers and parties to court cases, so that the latter would not feel that they are being overly harassed by photographers while either entering or leaving court buildings. Were such a statutory provision to be enacted by the Oireachtas, consideration should also be given to the issue of the taking and publication of photographs of defendants in criminal cases entering or leaving court buildings. There should be a statutory prohibition on the publication of images which show defendants wearing handcuffs. A published image of a handcuffed defendant has the potential to influence a viewer’s opinion that that individual is dangerous, aggressive and/or guilty of a serious criminal offence, whereas such may not be the reality.

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9 Criminal Law Act 1976, s 10
5.4.1.8) Offence of Contempt of Court
The offence of contempt of court should be put on a statutory footing and the offence of scandalising the court should be abolished. Also, any statute dealing with contempt of court should clearly define what specifically constitute “active” and “imminent” proceedings and whether imminent proceedings are also covered by such a statute. Clarity should be given as to whether such a statutory offence covers the reporting of both active and imminent proceedings.

5.4.1.9) Prohibition on Incitement to Hatred
Any proposed reform of the Prohibition of Incitement to Hatred Act 1989 should consider the inclusion of a provision covering incitement to hatred against “individuals” as opposed to the current position whereby “hatred” is defined by Section 2 of the Act as being hatred against a “group” of persons.

In addition, the Communications Regulation (Amendment) Act 2007 inserted a new S.13(1) in the Post Office (Amendment) Act 1951 concerning offences committed through the use of telephones. It has been suggested that S.13(1) of the Act does not take account of the use of modern telecommunications and computer equipment to publish online materials, including photographs, which are designed to incite hatred. Any amendment to S.13 should take account of the use of such technology.

5.4.1.10) Offence of Blasphemy
The Convention on the Constitution recommended the removal of the offence of blasphemy from the Constitution and its replacement with an offence of “incitement to religious hatred”. While its recommendation to remove the offence from the Constitution is welcomed, no date has been set for a referendum on this issue. As the Prohibition of Incitement to Hatred Act 1989 prohibits incitement on account of “religious” orientation, it is viewed that the Convention’s recommendation to replace the constitutional offence of blasphemy with an offence of incitement to religious hatred is not necessary.

5.4.1.11) Potential Thesis Topic for a Masters in Law by Research
A detailed examination of the complaints received and the determinations made by the Press Council of Ireland and the Independent Press Standards Organisation (IPSO) in the United Kingdom, in accordance with their codes of behaviour, in relation to the publication of news stories featuring photographs would be an interesting thesis topic for a Masters in Law by Research candidate. Such research could investigate the code principles under which complaints relating to the publication of photographs were made and whether the decisions of these regulatory bodies were adequate, proportionate and appropriate.
5.4.1.12) Conclusions on Recommendations

The above-mentioned recommendations offer a foundation for policy makers and legislators in the development of aspects of law, which are pertinent to photographers and photograph publishers, particularly in respect of the use of new technologies. Although the majority of the recommendations would require the enactment of legislation, in the medium to long term they have the potential to both individually and cumulatively address the current problems being faced by photographers and photograph publishers and also by members of the public, who either are or may be the subject matter of photographs.
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