



## TABS™ Update Technology And Brands

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### ISP copyright dispute continues...!

In a recent TABS Update, we reported on the settlement reached between EMI Records (Ireland) Ltd, Sony BMG Music Entertainment (Ireland) Ltd, Universal Music (Ireland) Ltd and Warner Music (Ireland) Ltd (“the Record Companies”) and Eircom (the largest broadband internet service provider (“ISP”) in Ireland).

As part of the settlement, the Record Companies will supply Eircom with the IP addresses of subscribers who illegally upload or download copyright protected works. Eircom will then contact the subscribers directly warning them about their activities, disconnecting those who ignore the warnings under a “3 strikes and you are out” policy. The Record Companies will also take steps to put similar agreements in place with other ISPs in Ireland.

It has been reported that the Record Companies’ solicitors have written to other ISPs to get them to agree to similar measures. In response, a statement was issued by the Internet Service Providers Association of Ireland (“ISPAI”) following consultation with its members. It states that ISPAI and its members “*have never condoned the use of its members’ service for theft of copyrighted works of any kind, and continue to operate within the existing legal framework which has provisions for taking action where appropriate*”. It refers to the fact that Irish copyright law provides an avenue for the pursuit of people breaching copyright through the courts and that its members will continue to co-operate fully within these existing legal parameters. ISPAI noted with disappointment that the “*great potential of the internet, to provide opportunities to connect with users in new ways and develop new business models, is being missed by the music recording industry*” but stated that it will “*continue to be open to working with content owners in an industry where innovative new services are rapidly developing*”.

An on-line campaign to protest against moves to block access to certain websites has recently been launched by a group of concerned Irish internet users. Blackout Ireland is encouraging Irish internet users to contact their service providers, TDs and the Minister for Communications, Energy & Natural Resources, Eamon Ryan TD to voice their oppositions to the planned restrictions. The campaign is inspired by a similar campaign in New Zealand where users protested against the introduction of a law that would see those accused of repeatedly infringing the copyright in a work being disconnected. The implementation of that law has since been abandoned.

Last week, the European Parliament adopted a report on strengthening security and fundamental freedoms on the Internet, wherein it recommended to the Council that the “*systematic monitoring and surveillance of all users’ activities on the Internet*” be prohibited and that penalties should be “*proportionate to the infringements committed*”.

The battle between copyright owners and ISPs is set to continue in Ireland. In the meantime, companies whose business model involves the uploading/downloading of music and other copyright material should review their operations to ensure that they do not infringe the intellectual property rights of third parties.

Artists and companies involved in the music or film industry or indeed any industry should also seek advice if their works are being used without their consent. As Commercial Court actions are expedited by the court, it means that intellectual property infringement disputes can be resolved quickly. In today’s global competitive environment, it is important for businesses to have an edge over their local and international rivals. Intellectual property rights help companies to achieve this. Therefore, if your intellectual property rights are being infringed, move swiftly and seek immediate legal advice. Contact us today.



## Copyright case settled

Companies should take note that not all materials on the internet can be used without consent. This was demonstrated by an action taken by Bua Training (“Bua”) against Jefferson Computer Ltd (“Jefferson Computer”) in the Circuit Court in Dublin which, it has been reported, has been settled.

Bua claimed copyright over content for an on-line computer training course (“the Work”). It alleged that material on a website operated by Jefferson Computer had been copied from Bua’s website, thereby infringing copyright in the Work. When Bua lodged a complaint, it claimed that a lot of the material was withdrawn from the website. Bua argued that it suffered unquantifiable losses as a consequence of the alleged infringing activity. Jefferson Computer disputed that the Work was copyright protected, making the argument that it was generic.

It has now been reported that the parties have settled the dispute, the terms of which have yet to be finalised and are confidential. However, TABS understands that the settlement has asserted Bua’s ownership of the Work.

The lesson for other companies is that they should ensure that their documents/materials do not infringe the intellectual property rights of third parties. Otherwise there will be financial (and legal) consequences. If in doubt, seek legal advice before it is too late.

## WIPO’s focus is Green...

On World Intellectual Property Day (Sunday 26<sup>th</sup> April 2009), the World Intellectual Property Organisation (“WIPO”) will be highlighting the contribution a balanced intellectual property system makes to stimulating the creation of clean technologies; promoting green design, aimed at creating products that are eco-friendly; to green branding, helping consumers make informed choices.

The objective of World Intellectual Property Day is to encourage everyone (particularly businesses) to think about the role intellectual property rights plays in stimulating and safeguarding innovation and creativity. Every business possesses intellectual property rights whether they are aware of it, or not. The rights vary from a company’s name to the logo that appears on company products and documents. These (intangible) assets are important as they can not only be financially exploited but also gives a company a competitive edge over its rivals.

It is often through lack of awareness that these valuable assets are not identified and protected. It is therefore extremely important that businesses ensure that the assets are not only protected but also that they have acquired ownership to the assets. Failure to do this have serious (and financial) repercussions. It is never too late for businesses to review and protect their intellectual property rights – there is no talk to lose, talk to your legal advisors now!



## Beware when using databases!

Companies should take note of the recent decision of the European Court of Justice (“the ECJ”) as it will impact on the manner in which they can use the content of a database that belongs to a third party.

The Bulgarian legal publisher, Apis-Hristovich EOOD (“Apis”) alleged that its competitor, Lakorda AD (“Lakorda”) copied its databases of laws and legal information. Lakorda had been set up by ex-employees of Apis. Lakorda denied infringement, claiming that it had made a substantial independent investment in its own database. It also claimed that its modules had a different structure than those of Apis. The Bulgarian National Court asked the ECJ to clarify a number of issues relating to database law. The Database Directive (enacted in Ireland by the Copyright and Related Rights Act 2000) gives legal protection to a database if there has been “*qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents*” of the database (“the database right”). The Directive protects against the “*extraction and/or re-utilisation of the whole or of a substantial part...of the contents of that database*”.

On the issue of extraction, the ECJ said that extraction occurs when all or part of the contents of the database are transferred (whether permanently or temporarily) and stored in a medium other than that of the original database. Extraction is however “*independent of the objective pursued by the perpetrator of the act at issue, of any modifications he may make to the contents of the materials thus transferred, and of any differences in the structural organisation of the databases concerned*”. The ECJ stated that the circumstances of a case can inform the decision of a national court about whether database rights have been infringed (for example, there exists common features between the protected database and the database made by another person).

Clarification was also sought about how the concept of extraction of a “*substantial part*” of the contents of a database was to be interpreted where the databases concerned are separate modules, constituting independent commercial products, within a body of materials. The ECJ said that any module was capable of being defined as a database. If a database is composed of separate modules and each module constitutes a database, it stated that the “*volume of materials allegedly extracted and/or re-utilised from the module concerned must be compared with the total contents solely of that module*”. If not, the “*comparison must be made between the volume of materials allegedly extracted and/or re-utilised from that module and any other modules, and the total content of that body of materials*”.

The ECJ also stated that the fact that the materials allegedly extracted and/or re-utilised were obtained from sources not accessible to the public may, depending on the level of human, technical and/or financial resources deployed by the database owner in collecting the materials, result in the materials being classified as a “substantial part” of the contents of the database concerned. Therefore, the more effort and investment involved in collating the materials extracted/re-utilised, the more likely it is that a substantial part has been extracted/re-utilised. The ECJ also said that the fact that the materials in a database were official and accessible to the public does not relieve the national court of an obligation to verify whether the (extracted and/or re-utilised) materials were a substantial part of the database.

The above decision will be welcomed by database owners as it indicates that the concept of extraction will be given a wide interpretation by national courts. The implications for companies that use the databases of third parties is that they should review the manner in which these databases are used, ensuring that their actions do not amount to infringement and seeking legal advice if in doubt.

Database owners themselves should monitor the manner in which their databases are used and should seek legal advice if all or a substantial part of the contents of their databases are extracted and/or re-utilised because in the current economic environment, it is imperative that intellectual property rights (including database rights) are protected and enforced.

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