



Sheehy  
Donnelly  
Solicitors



Blacknight Internet Solutions Limited  
Unit 12A  
Barrowside Business Park  
Sleaty Road  
Graiguecullen  
Carlow

63 Patrick Street  
Dun Laoghaire  
Co Dublin, Ireland  
DX 6008  
info@sheehydonnelly.com

13<sup>th</sup> February 2009

Our Ref: HS/IRMA01/21

Your Ref:

**Re: Illegal filesharing on the Blacknight network.**

Dear Sirs

We act for EMI Records (Ireland) Limited, Sony Music Entertainment Ireland Limited, Universal Music Ireland Limited and Warner Music Ireland Limited.

Pursuant to the Copyright and Related Rights Act, 2000 (the Act), our clients own, or have been exclusively licensed, the Irish copyright in the great majority of the modern sound recording repertoire and have by reason of the Act the exclusive right to make those sound recordings available to members of the public. In particular, section 40(1)(a) of the Act expressly entitles our clients, in respect of the sound recordings the copyright in which is owned by them or exclusively licensed to them, to prohibit the making available of copies of such sound recordings through the internet. Furthermore, section 40(4) of the Act provides that, whilst the provision by a person of facilities for enabling the making available of works over the internet shall not of itself constitute an act of making available, where that person is notified that those facilities are being used to infringe copyright and that person fails to remove the infringing material as soon as practicable thereafter that person shall also be liable for the infringement.

Irish and European Law in relation to the jurisdiction of the Courts to make injunctions requiring ISP's to take action in respect of infringement of copyright by means of their services makes it very clear that injunctive relief is available to a copyright owner against an ISP, requiring it to remove or disable access to infringing material and services made available through its electronic network. The "mere conduit" defence established by the Electronic Commerce Directive is expressly qualified in Article 12(3) of the Directive so as to preserve the jurisdiction of a Court to require an ISP to terminate or to prevent an infringement of copyright. These general provisions of European Law which are binding

phone +353-(0)1-2145484  
fax 2145485  
Helen Sheehy  
Maura Donnelly  
Barbara Cooney  
Marie-Clare Morrissey



on Ireland and its Courts were specifically amplified in the Copyright Directive of 2001 in respect of copyright protection law. That Directive, inter alia, acknowledged (at recital 59) that ISP's in many cases are "*best placed to bring.....infringing activities to an end*" and, accordingly, that copyright owners should be in a position to apply for injunctions "*against an intermediary who carries a third parties infringement of a protected work or other subject matter in a network*". This much is expressly provided for in Article 8 of the Copyright Directive and is restated in Article 11 of the EC Directive on the Enforcement of Intellectual Property Rights 2004.

The Supreme Court has held that it is a well established principle of European Community Law that the Courts of the Member States are under an obligation, when interpreting a national law introduced for the purpose of implementing a Directive, to interpret the national law in the light of the wording and purpose of the Directive in order to achieve the result to be achieved and that this principle applies to national laws, whether passed before or after the relevant Directive.

In this context, we are satisfied that our clients are entitled as a matter of Irish and European law, to injunctive relief requiring ISP's to remove and to prevent access to material infringing our clients copyright, in accordance with the principles of Irish Law relating to the granting of injunctions and related reliefs.

In attempting to protect its rights the record companies have in the past applied to the Courts for orders addressed to various ISP's directing them to divulge the names and addresses of those infringing the record companies' rights through peer to peer file sharing on their networks. Three such applications were made however as stated by Judge Kelly in a recent action which I refer to below "*as a logistic matter, they could only identify finite numbers of infringers while meanwhile the infringing activity was going on wholesale*". This remedy proved impractical, ineffectual and merely served to waste the time and resources of the Court system.

You will be aware of an action taken by our clients in the Commercial Division of the High Court in January of this year. The case was settled on the basis that eircom would work closely with the record industry to end the abuse of the internet by peer to peer copyright infringers.

The settlement agreement provides that our clients will supply eircom with the IP addresses of all persons who they detect illegally uploading or downloading copyright works and that eircom will, upon receipt of this information, implement a graduated response which will firstly inform its broadband subscriber that its subscribers IP address has been detected infringing copyright; will secondly warn the subscriber that unless the infringement ceases the subscriber will be disconnected and may take steps to throttle the subscribers broadband service; and finally in default of compliance will result in the disconnection of the subscriber. In addition to this eircom has agreed that it will not oppose any application our clients may make seeking the blocking of access from their network to the Pirate Bay websites or similar websites.



It is the position of our clients that by this agreement eircom has agreed to comply with its statutory duty under section 40(4) of the Act to remove the material infringing our client's copyright from its facilities.

Please confirm that Blacknight will also work with the record industry to end the abuse of the internet by peer to peer infringers and that it will, if it receives IP addresses from the record companies of persons that they detect illegally uploading or downloading copyright works, operate a similar graduated response and that it will disconnect the subscriber in default of compliance.

We should add by way of elaboration that it is not intended that there be any disclosure to our clients of the identity of the person(s) denoted by the IP addresses at the time in question.

In the event of a positive response to this letter, it is proposed to make practical arrangements with Blacknight of a like nature to those made with eircom.

In the event of a negative response to this letter, section 40(4) of the Act will be invoked against Blacknight and proceedings instituted.

We are writing to other ISPs in similar terms.

While we appreciate that this is a matter in respect of which you would wish to obtain legal advice, in the circumstances we must request a response within seven days of the date of this letter.

We look forward to hearing from you.

Yours faithfully,

Helen Sheehy  
**SHEEHY DONNELLY**

[hsheehy@sheehydonnelly.com](mailto:hsheehy@sheehydonnelly.com)