



1st February 2012

## **Real problems facing the Internet industry upon signing of the Statutory Instrument into law**

Stephen Donnelly TD last night concluded his contribution to the Dáil debate by stating that there are real individuals with real concerns about this Statutory Instrument. This is absolutely the case, but these real concerns tend to get lost among the squabbling and name calling of the more extreme contributors. It is, we think, important to reiterate these real legitimate concerns so that not only the technologically and legally literate can understand and appreciate them but also so that the individual citizens of Ireland can see that this cannot merely be written off as some form of anarchy by the “keyboard warriors”.

To list them clearly, these concerns are: legal uncertainty and business uncertainty; damage to Ireland’s reputation as a legally favourable climate to attract foreign businesses; the injunctions regime is open to abuse from supposed rightsholders; huge costs for businesses in implementing such injunctions; the possibility of spurious takedown notices being issued against businesses whose knee jerk reaction is to remove the content or run the risk of having an injunction taken against them; possibilities of an injunction being wrongly granted and the enjoined business being sued by those affected by the injunction; and the collateral damage to the fundamental rights of the individual Internet subscribers and the citizens of this country.

Minister Sherlock on the Six One news last night described the Statutory Instrument as a “balancing act”. The point that we have been making all along is that this SI is not in itself explicitly performing this balancing act, but rather leaves such balancing to the full discretion of the Courts. The broad wording of the SI in its current form would allow for injunctions to be granted against an entirely innocent intermediary without specifying the fundamentals as to how such an injunction should apply. This creates huge legal uncertainty for any Internet business currently operating in this jurisdiction, and deters any future Internet business from choosing Ireland as a favourable location to establish their commerce. The technology giants of the future for example, may be more attracted to a country where the laws in this area are more specific, taking with them their employment and economic opportunities.

The SI does not state what type of injunction might be granted or against whom specifically they may be granted. Furthermore it does not specify the criteria which must apply for the grant of such an injunction. This creates what we have already described above as business uncertainty but also such open-ended powers given to the High Court are open to abuse, as highlighted by TJ McIntyre in last night’s same news segment. This will put large corporations in the position where they may apply for injunctions against innocent small businesses which quite obviously cannot afford to defend such actions and are thus forced into a corner.

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Not only must an intermediary foot costs to defend an injunction application, significant costs may be incurred by them in implementing the injunction also. Such costs would be hugely burdensome to the smaller intermediaries and the SI wording in its current form does not provide any guidance as to who should bear the costs of such injunctions. Alternative Statutory Instrument wording was presented to Minister Sherlock yesterday by Stephen Donnelly TD and Catherine Murphy TD with added clauses stating that costs ought to be borne by the applicant. This makes sense in light of the ruling of the European Court of Justice in the Scarlet extended case where it was stated that the implementation of costly filtering software at its own expense was an interference with the ISP's freedom to conduct its business. The parallels are obvious here.

The downsides of web blocking have been communicated by us time and time again so we need not detail them here but blocking injunctions are more trouble than they are worth. They are a waste of resources because they can be so easily circumvented, as Ofcom recently concluded in its report on the matter. The financial impact on an intermediary that could result in the event of an injunction to wrongfully block an innocent site does not bear thinking. The current SI is silent on this issue.

What TJ McIntyre has described as the collateral damage which may occur includes the damage to lawful speech and freedom of expression online to name but a few. The shortcomings of this Statutory Instrument are quite obvious when listed in clear and unambiguous language. It would be regrettable for all of the citizens of Ireland and a disservice to the Department of Jobs, Enterprise and Innovation, whose work on the more general review of the 2000 Act is commendable, if it were introduced in its current form.

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