

Intellectual Property- Ireland

Eircom tells filesharers: “3 strikes and you’re out”

January 2009

Facts

Settlement

Comment

2008/1601P EMI Records Ireland Limited & Others v Eircom Limited

Facts

Copyright infringement proceedings taken by record companies EMI, Sony BMG, Universal Music and Warner Music against Eircom, Ireland’s largest internet service provider (ISP), have been settled. Eircom has agreed to a “three strikes and you’re out” policy against illegal peer-to-peer (P2P) uploaders and downloaders.

The action was taken in the Commercial Division of the High Court and was the first Irish case of its type aimed at ISPs rather than individual illegal downloaders and reflects growing unease within the music industry over the scale and cost of illegal downloading. While record companies had previously taken legal action against individuals to discourage piracy, these had proven expensive and time consuming and were ineffective in stopping illegal downloading on a grand scale.

The four companies sought orders under the Copyright and Related Rights Act 2000 restraining Eircom from infringing copyright in the sound recordings owned by them, or exclusively licensed to them, by making available on Eircom’s network copies of those sound recordings without the record companies’ consent. Eircom had previously refused requests to install filtering technology that would detect the unique “finger print” of copyrighted music files which were being illegally uploaded and downloaded on its network. Eircom had resisted this on technical grounds and on the basis that it would infringe subscribers’ privacy rights.

In its defence Eircom claimed that the record companies had failed to identify infringing material and, if they had identified such infringing material then Eircom could not remove it without damaging its systems and internet services. Eircom claimed that it was not on notice of specific illegal activity which infringed the rights of the record companies and that it had no legal obligation to monitor traffic on its network.

Settlement

On 28th January the settlement was announced to Justice Charleton after lengthy talks between the sides on the eighth day of the action which was listed to last for four weeks. Both parties agreed to work closely together on a joint approach aimed at ending “the abuse of the internet by P2P copyright infringers”. Under the settlement, once the record companies have supplied Eircom with the IP addresses of persons detected sharing files in breach of copyright, Eircom will initiate the “three strikes” procedure by taking the following steps:

- 1) Inform the subscriber that his IP address has been detected infringing copyright
- 2) Warn the subscriber that unless the infringement ceases the subscriber will be disconnected and
- 3) Disconnect the subscriber in default of compliance with the warning.

Comment

The four record companies had claimed that music piracy was costing them up to €14m a year. Arguably, the settlement with Eircom gives the record companies the firepower they need to combat music piracy, although clearly they would have preferred an outright win requiring all ISPs to filter network traffic thereby setting a precedent in a common law jurisdiction to match the decision of the Belgian Court of First Instance in *Sabam v. Scarlet (Tiscali)*. While the record companies have agreed to take all necessary steps to put similar arrangements in place with other Irish ISPs, it remains to be seen whether such arrangements can in fact be agreed.

From Eircom's perspective the settlement means that it will not be forced to submit details of any of its subscribers suspected of copyright infringement to the record companies. Had it been forced to do so, significant privacy and data protection issues would have arisen.

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