

Copyright and Innovation: a consultation paper

Response from the Library Association of Ireland

Introduction

The Library Association of Ireland (LAI) is the professional association for librarians in Ireland. The association represents librarians in all sectors- academic, corporate, health, public, research, schools and voluntary. The Association is a founding (1992) member of the European Bureau for Library, Information and Documentation (EBLIDA) which represents libraries and librarians especially in the area of copyright and intellectual property. The Association is a long-standing member of the International Federation of Library Associations and Institutions (IFLA).

The Association welcomes the opportunity to contribute to the consultation paper developed as part of the current Copyright Review.

We do not propose to answer each question in Appendix 3. Rather, we will confine our answers and remarks to those areas where we have expertise and interest.

Chapter 2: Intersection of Copyright and Innovation

Q 3

Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

Yes. We would agree that a single piece of legislation consolidating all of the post-2000 amendments to CRRA would be useful.

Chapter 3: Copyright Council of Ireland

Q 9

Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?

A Copyright Council certainly should not represent only the interests of rights holders and collecting societies. It should be more broadly based. In practice it may be difficult to ensure that its

composition fairly represents all facets of the copyright community, and in particular, it may be difficult to engage members who represent various groups of end-users (who are, in fact, everyone) as distinct from the rights holder / agency sector. This could be a particular problem if the Council were to have any role in adjudicating between end users and collecting societies, or were to regulate the activities of collecting societies (a role that might be better assigned to the Controller of Patents, who currently licenses such societies).

Chapter 4: Rights-holders

Q 24

Is there, in particular, any evidence on how current Irish copyright law in fact encourages or discourages innovation and on how changes could encourage innovation?

The recent Infopaq case seems to represent a real threat to the work of library and information professionals (who have no vested interest, but merely a professional objective of facilitating access to information), to researchers of all kinds, and to innovators, by placing a question-mark over indexing, citing of headlines and titles etc., and linking to sources.¹

Q 27

Should the sound track accompanying a film be treated as part of that film?

We submit that there may be an issue in relation to whether particular sound tracks are original sound tracks or a compilation/re-use of an already published piece.

Q 28

Should section 24(1) CRRA be amended to remove an unintended perpetual copyright in certain unpublished works?

Yes. We would agree that section 24, CRRA needs to be addressed. An amendment would give clarity, especially for digitisation projects.

Q 37

Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?

¹ http://ec.europa.eu/dgs/legal_service/arrets/08c005_en.pdf

Placing a levy on copying and storage unfairly taxes all such activities, regardless of whether the material being copied or stored is public domain, public sector information, in-house material etc.

Chapter 5: Collecting Societies

Q 38

If the copyright community does not establish a Council, or if it is not to be in a position to resolve issues relating to copyright licensing and collecting societies, what other practical mechanisms might resolve those issues?

This is a complex area, but there is certainly a need for an independent, preferably State-managed, body to regulate collecting societies (the Controller of Patents, whose office licenses such collecting societies, with the Department of Jobs, Enterprise and Innovation, would seem to be the obvious choice) and to resolve disputes relating to collecting societies. Indeed, an accessible, affordable forum (be it Alternative Dispute Resolution/ Arbitration or the Lower Courts) is needed for resolving other issues (for example, the Act of 2000 states that Technological Protection Measures (TPMs) may not be used to block the lawful use of material as permitted by the Act). However, if it is necessary to force the party that imposes the TPM to remove it, there is no affordable forum for doing so (such as the Circuit Court).

Q 39

Are there any issues relating to copyright licensing and collecting societies which were not addressed in chapter 2 but which can be resolved by amendments to CRRA?

There are serious concerns among the library community about the lack of regulation of collecting societies. Further details can be provided on request. In particular, some licensing agencies have:

- Created the impression that any copying of copyright material is unlawful unless done under the regime of a licence from a collecting society
- Demanded a signed declaration that no copying will be done, unless the body in question takes out a licence with the collecting society
- Claimed to have collected money on behalf of bodies that have *not* mandated them to do so, including public sector bodies that wish to make their information generally available
- The current legislation allows for rigid schemes to be registered with the Controller of Patents, but does not cater for more flexible negotiation, where smaller amounts of copying are required or where existing lawful use limits the need for licensed copying under the schemes of collecting societies
- It is unclear how money collected by collecting societies is distributed among rights holders. A fair and transparent system of linking copies to the relevant rights holders is necessary to ensure the distribution of income is fair and is seen to be fair.

This Association is of the opinion that EU developments on this matter need to be considered.

Chapter 6: Intermediaries

Q 45

Is there any good reason why a link to copyright material, of itself and without more, ought to constitute either a primary or a secondary infringement of that copyright?

No. As is mentioned in the consultation paper, linking is central to the architecture of the web. Therefore, we are of the opinion that linking should be facilitated and should not be considered as either a primary or a secondary infringement of the linked material. Merely directing someone to a source (by linking) should not constitute an infringement of copyright where the link is not misleading as to the authorship of the source (e.g., by embedding the linked content within a frame of the body creating the link). Restricting linking to material that is otherwise lawfully available can only restrict research, learning and innovation.

Q 46

If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?

Irish law should recognise the reality of the web and provide that linking, *per se*, will not constitute an infringement.

In relation to Q45 and Q 46, we would refer to the current review of the Directive 2003/98/CE of the Reuse of Public Sector Information (PSI) Directive (http://ec.europa.eu/information_society/policy/psi/index_en.htm)

The review is being undertaken at the request of the European Commission and libraries will come within the scope of the revised Directive. Any link to the reuse of public information should not be frustrated by Irish law.

Q 47

If so, should it be a stand-alone provision, or should it be immunity alongside the existing conduit, caching and hosting?

Yes, a stand-alone provision, ideally also protecting indexing, and citing of headlines and contents pages. This is so important that, if necessary, the Committee should recommend that the government lobby at EU level to incorporate these principles in the EU Directive. Without indexing, citing and linking, there can be no research and little or no innovation.

Chapter 7: Users

Q 55

Should the definition of “fair dealing” in section 50(4) and section 221(2) CRRA be amended by replacing “means” with “includes”?

Yes. We would agree that section 50(4), CRRA be amended from

In this Part, “fair dealing” means etc

to read:

In this Part, “fair dealing” includes etc

This slight change makes section 50(4) more capable of including various formats.

We would also agree that section 221(2), CRRA be amended in the same way.

Q 56

Should all of the exceptions permitted by EUCD be incorporated into Irish law, including

- (a) reproduction on paper for private use**
- (b) reproduction for format-shifting or backing-up for private use**
- (c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research**
- (d) reproduction for persons with disabilities**
- (e) reporting administrative, parliamentary or judicial proceedings**
- (f) religious or official celebrations**
- (g) advertising the exhibition or sale of artistic works,**
- (h) demonstration or repair of equipment, and**
- (i) fair dealing for the purposes of caricature, parody, pastiche, or satire, or for similar purposes?**

Yes. We would agree that all the exceptions permitted by the EUCD should be incorporated in Irish law. At the moment, Irish users, libraries and innovators are not enjoying the benefits of exceptions contained in the EUCD. These exceptions were not permitted without carefully weighing all considerations, including those of rights holders, end users, and the common good, and all should be made available under Irish law.

Q 57

Should CRRR references to “research and private study” be extended to include “education”?

Yes.

Q 58

Yes. We believe that an amended Act should take cognisance of the reality and extend the education exception to (a) the provision of distance learning and (b) the utilisation of work available through the internet.

Q 62

Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRR?

Yes, it currently does so, but this can be circumvented if the contract makes the law of another jurisdiction the governing law of the contract.

Chapter 9: Heritage Institutions

Q 67

Should there be an exception permitting format-shifting for archival purposes for heritage institutions?

Yes. We also believe that there should be an exception for private use (as suggested elsewhere in the consultation paper). It is hard to see why format shifting should not be permitted in all circumstances, since it merely transfers the content from one (possibly obsolete) medium to another (for archiving purposes, or for continued use). Salutary reminders are commonplace, whether they are examples from everyday life (video tapes, vinyl or tape-cassettes, 5¼ inch floppy disks) or more substantial incidents (e.g. census material of nations becoming inaccessible because of obsolescence of hardware or software).

Q 68

Should the occasions in section 66(1) CRRA on which a librarian or archivist may make a copy of a work in the permanent collection without infringing any copyright in the work be extended to permit publication of such a copy in a catalogue relating to an exhibition?

Yes (if “compiling or preparing a catalogue” does not already permit this).

Q 69

Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collection of a heritage institution?

Yes.

Q 70

Should the fair dealing provisions of CRRA be extended to permit the brief and limited display of a reproduction of an artistic work during a public lecture in a heritage institution?

Yes.

Q 71

How, if at all, should legal deposit obligations extend to digital publications?

We believe that legal deposit obligations should extend to digital publications. We also believe that it should be on a mandatory basis. Section 199 of the CRRA 2000 has not been commenced. This section needs to be re-written as many of the formats listed are already obsolete.

Sections 198 and 199 of CRRA 2000 demonstrate the need to future –proof terminology. We recommend that these sections be amended to allow for emerging technologies and emerging formats. Therefore, the terminology should be format neutral. Format neutral terminology would allow the Legal Deposit libraries capture web content.

Q 72

Would the good offices of a Copyright Council be sufficient to move towards a resolution of the difficult orphan works issue, or is there something more that can and should be done from a legislative perspective?

The solution to the Orphan Works problem is beyond the scope of one country. Since the start of the Review process and the publication of the Consultation paper, work has progressed in relation to Orphan Works. Within the last month, the European Parliament and the European Council have agreed on an Orphan Works Directive.² At a later date, this will need to be transposed into Irish law.

While the Association has not had time to consider the proposed Directive in detail, we note that it will give an exception to copyright for cultural and educational uses. This will enable the designated cultural institutions and other libraries to digitise their collections. We also note that the exception will apply throughout the European Union. In terms of innovation, this will allow for cultural heritage treasures to be seen and made accessible.

In addition, a **Memorandum of Understanding on Out-of-Commerce Works** was signed in September 2011 by representative associations of authors, publishers, booksellers and librarians.³

Much work has been done at European level by EBLIDA and LIBER and at international level by IFLA and WIPO.

Q 73

Should there be a presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself, unless the contrary is expressly stated?

A common problem for heritage institutions is that items (notably photographs) are often donated, but without the copyright in those items the institutions can do almost nothing with them (e.g., publish on the web or in hardcopy photographs that may still be in copyright). It would be highly desirable that there be a presumption in law (rebuttable by explicit statement) that when a physical work is donated or bequeathed (or sold) to a cultural institution, the copyright in the work is also given, though not the exclusive right (i.e., the original owner of the copyright in the work could still make copies etc.). Whether such a presumption should apply in cases of gifts, bequests, donations in cases other than heritage institutions is more problematic (e.g., where an individual gives a photo to another individual without indicating that he/she intends to pass on the copyright as well, or where a work of art is sold to a private individual but without expressly selling the copyright in it as well).

Chapter 11: Conclusion

Q 84

Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?

² http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/06/20120606_en.htm

³ http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

Yes.

Q 86

What have we missed?

A. The obligation on Prescribed Libraries and Archives to charge for copies made under the exemptions in the CRRA 2000 (an obligation imposed only by Statutory Instrument 427 of 2000) should be removed.

The CRRA 2000 imposes no obligation on prescribed libraries or archives to charge for copies made under the relevant library/archive exemptions. This was introduced by the Statutory Instrument intended to elaborate on other conditions that were required by the Act. Libraries are entitled to charge for copies if they wish (though it is useful that the Statutory Instrument implicitly makes clear that charging for the cost of the copies plus a contribution to the running costs of the library/archive does not make the institution one that is “conducted for profit” and therefore unable to avail of the exemptions). However, in many cases it is not desirable that the library charge for copies (e.g. a library that serves only its own parent body). In correspondence with librarians in September 2001, the Minister responsible for the CRRA 2000 and for the SI in question agreed to remove the obligation to charge when a suitable opportunity arose, but it has not yet been removed.

B. Copyright-analogous balances in licensed digital content

Much information that is essential is now accessible in digital form (e.g., from online databases), and this access is governed by licence (contractual agreement). While copyright provides reasonable exemptions from the rights it accords to rights holders, there is no general provision providing a similar set of checks and balances, for the common good, in the area of contractual licences for use of publications in the digital environment, so crucial to modern research and innovation. There is uncertainty about the extent to which copyright principles carry over into publications that are accessed lawfully in digital format under contractual arrangements – and therefore uncertainty about the extent to which s.2 (10) can prevent those contractual arrangements from excluding accepted copyright exemptions. Furthermore, even if it were clear that copyright principles extend into digital access, it can be difficult to identify equivalence between the traditional copyright-governed activities and use of digital content.

Where a library subscribes to a journal in hard copy, that journal is owned (in perpetuity) by the library, may be consulted by anybody the library caters for, and may be copied within the reasonably well-defined limits of copyright law. By contrast if the same journal is accessed electronically, typically access will be for a limited period of time (for example, one year based on yearly subscriptions), it may be consulted only by parties specified in the licence contract (staff, students of the subscribing library), and the activities are tightly restricted (displaying on screen in certain conditions, printing within contractually defined limits, downloading in defined quantities and often for limited periods such as 30 days, etc.). While copyright law provided carefully considered checks and balances between the legitimate exploitation of copyright material by the rights holders and the

legitimate use of that material in acceptable, limited, ways by end-users, such balances seem to be lacking in the digital environment, where so much research, innovation (and indeed, archiving for future heritage purposes) is now centred.

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