

**SUBMISSION FROM THE DEPARTMENT OF ARTS, HERITAGE AND THE
GAELTACHT REGARDING THE COPYRIGHT LEGISLATION REVIEW**

**1. PROPOSED LEGISLATIVE LANGUAGE
REGARDING CERTAIN UNPUBLISHED MATERIALS HELD BY THE
NATIONAL CULTURAL INSTITUTIONS**

The following proposed legislative language, drafted for inclusion in the Copyright and Related Rights Act, 2000 (“CRRA 2000”), is intended to address a question of copyright duration that is not expressly dealt with in CRRA 2000, and to provide clarity for the public and for cultural institutions which on behalf of the Irish people hold materials of a certain vintage that could benefit the public if the institutions were able to reproduce, adapt, and make the materials available without fear of liability for copyright infringement.

Sections 24 and 33 of CRRA 2000, on their face, may reasonably be read to say that copyrights in various types of unpublished works terminate in the Republic of Ireland, and that copyrights in unpublished works created by individual authors terminate, like works that are published or otherwise made available, after a period of seventy (70) years following the death of the author. But this is not stated explicitly in CRRA 2000, and it is possible to read Regulation 15 of the European Communities (Term of Protection of Copyright) Regulations 1995, together with Section 9, First Schedule Part 1 (Transitional Provisions and Savings), as preserving a perpetual copyright in certain unpublished writings, to the extent that such writings may have enjoyed perpetual copyright under the 1963 Irish Copyright Act.

This appears to have been an oversight. It is inconsistent with provisions for other types of unpublished works for which CRRA 2000 plainly establishes a limited term of copyright, such as films (sections 25 and 33), sound recordings (sections 26 and 33), broadcasts and cable programmes (section 33), and anonymous and pseudonymous works (section 33). No less an authority than Professor Robert Clark of University College Dublin School of Law has criticized CRRA 2000 as potentially inconsistent with the EU harmonizing directive which “*intended*,” *he writes*, “*to extinguish [perpetual] rights.*” *Although Regulation 3 of the European Communities (Term of Protection of Copyright) Regulations 1995 “purported to do this,” he continues, “[the regulation] did not expressly extinguish copyright in an unpublished work.*” Clark, Smyth & Hall, *Intellectual Property Law in Ireland* § 10.36, at 246 (3rd ed. 2010).

This lack of statutory guidance is unfortunate in light of the many benefits that could be conferred on the Irish people if there were express statutory authorization that such materials could be reproduced, adapted, and made available upon expiration of the ample period of

copyright protection—70 years *post mortem auctoris*—that CRRA 2000 recognizes for most works. If important materials, collected and maintained by cultural institutions at the expense and on behalf of the Irish people, are not made available by the copyright owner within 70 years after the author’s death, it is entirely fitting and proper that cultural institutions or others should be statutorily permitted to do so after that lengthy period, without fear of copyright liability.

The most direct and universally beneficial approach would be to amend section 24(1) of CRRA 2000. Currently the provision reads:

“The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public.”

This could be amended to:

“The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective of whether the work is ever made available to the public.”

This proposal draws upon a very similar proposal advanced by Professor Clark in *Intellectual Property Law in Ireland* § 10.36, at 246 n.82. It would have to be made clear that such language, if adopted, clarifies and overrules inconsistent language in Regulations 3 and 15 and any pertinent transitional provisions.

Short of the foregoing solution, however, and entirely consistent with it, would be a statutory addition addressing the problem specifically with respect to cultural institutions. The following language is therefore proposed to be included in CRRA 2000, perhaps in Chapter 3 under “Duration of Copyright” (currently sections 24-36), or perhaps in Chapter 6 under “Libraries and Archives” (sections 59-70) or in some other appropriate place.

PROPOSED TEXT

“Where, at a time more than seventy years from the end of the year in which the author or authors of a work died—

(a) the work has not been lawfully made available to the public, and

(b) the work, or a copy thereof, is kept in a library, archive or other institution to which (subject to any provisions regulating the library, archive or other institution in question) members of the public have access,

the copyright in the work is not infringed by any act of reproduction, adaptation or making available to the public of the work by the library, archive or other institution, or by any other person subject to any rules or policies established by such library, archive or other institution.

This language is modeled generally on Section 12(6) of the 1963 Irish Copyright Act, which was evidently intended to address the similar situation of unpublished materials held by national cultural institutions. Section 12(6) was slightly more complex because it was apparently meant to deal with copyrights in unpublished materials that could be perpetual under the 1963 Act. The proposed language above is somewhat different: it simply keys the non-infringing acts to the expiration of the 70-years *post mortem auctoris* term without further discussion of that term.

It is hoped that this proposed exemption from liability, if adopted, would make important unpublished materials held by Irish cultural institutions available to the public in a variety of forms after the copyright owner has had the opportunity for the author's life plus 70 years to make that material available. If the copyright owner has not acted within that period, or authorized others so to act, it seems only proper that the cultural institution that has acquired the material by gift or purchase, and has maintained it, should be able to play the role of facilitator.

It is to be noted that the proposed language makes the cultural institution the gatekeeper in that, while other persons may publish or make available the materials held by the institution, they may do so only subject to any rules or policies established by the cultural institution. In one sense, this shifts control of the materials from the copyright owner to the cultural institution after 70 years *post mortem auctoris*. Yet this is reasonable in view of the institution's mission to make materials available to the public and the investments the institution has made and continues to make in acquiring and conserving valuable materials.

2. PROPOSED LEGISLATIVE LANGUAGE REGARDING CERTAIN MATERIALS DONATED OR BEQUEATHED TO IRISH CULTURAL INSTITUTIONS

The following proposed legislative language, drafted for inclusion in the Copyright and Related Rights Act 2000 ("CRRA 2000"), is intended to clarify the ownership of copyrights in certain materials that have been donated or bequeathed to a library, archive, museum or other institution to which members of the public have access. This provision establishes, as a default rule, that where certain physical materials were donated or bequeathed to such an institution, the copyrights in the materials were also donated or bequeathed. This simplifies the often vexed question of copyright ownership in such materials, and provides clarity for cultural institutions which on behalf of the Irish people own materials of various types that could benefit the public if the institutions were able to reproduce, adapt, or make the materials available, or authorize those acts, without fear of liability for copyright infringement.

The following language is therefore proposed to be included in CRRA 2000, perhaps in Chapter 6 under "Libraries and Archives" (sections 59-70) or in some other appropriate place.

PROPOSED TEXT

“Where under a donation or bequest (whether general or specific) to a library, archive, museum or other institution to which members of the public have access, such library, archive or institution is entitled to a work which was not made available to the public before the death of the author thereof, the donation or bequest shall, unless a contrary intention is expressed in writing by the donor or testator when making the donation or bequest, be construed as including the copyright in the work in so far as the donor or testator was the owner thereof at the time of making the donation or bequest.”

This language is modeled generally on section 93 of the UK 1988 Copyright, Designs and Patent Act. While CRRRA 2000 contemplated the use of section 93 in existing section 123 and transitional provision 22, this proposed language would supplement and clarify section 123 and transitional provision 22 for the benefit of cultural institutions, specifically by expressly referring to such institutions (instead of simply to “persons”) and by adding the word “donation” to the existing word “bequest.” This would cover the two chief methods by which cultural institutions receive gratuitous transfers of materials.

3. Legal deposit legislation in the digital age

Legal deposit is the term used to describe the statutory obligation which requires that any organization, commercial or public, and any individual producing any type of documentation in multiple copies, must deposit one or more copies with a recognized national institution. In most countries it is an important instrument of national cultural policy for which there is legislative provision in order to ensure the comprehensiveness of the national deposit collection.

Effective operation of legal deposit should guarantee to citizens and researchers, within the country and abroad, permanent access to a research collection of the country's published material. Legal deposit also supports the compilation of a national bibliography.

In Ireland, legal deposit legislation (section 198 of the Copyright and Related Rights Act 2000, with additional provision in the succeeding section of the Act) obliges all publishers in the State to supply one copy of each publication to the National Library (and certain other libraries in Ireland and the UK) within one month of publication. (The situation in Ireland is somewhat unusual in that, for various reasons, the National Library of Ireland (NLI) is just one of 13 legal deposit libraries for Ireland, 5 of which are outside the State and based in the UK.)

WHY A CHANGE IN CURRENT LEGISLATIVE PROVISION IS NECESSARY:

- (i) There is widespread international recognition of the risk to our digital heritage. This is embodied in the UNESCO draft charter on the preservation of the digital heritage (see: <http://unesdoc.unesco.org/images/0013/001300/130071e.pdf>) which states that ‘*Many of these [digital] resources have lasting value and significance, and therefore constitute a heritage that should be protected and preserved for current and future generations*’. In this context it is worth noting that recent publication by the US Council on Library and Information Resources entitled

‘Digital Forensics and Born Digital Content in Cultural Heritage collections’ estimates that 90% of all records are now born-digital. See: <http://www.clir.org/pubs/abstract/pub149abst.html>).

- (ii) The creative and intellectual record of Ireland is being lost on a daily basis. We now need to collect both fixed content on the web (newspapers, journals etc.) along with new types of interactive content found on social media and gaming websites, the latter being of particular interest in an Irish context.
- (iii) The terminology/definitions embodied in the current legislative provision for legal deposit (ss.198 and 199 of the Copyright Act, 2000) including ‘book’, and ‘publisher’, for example, can no longer be considered fit for purpose in light of developments such as the internet. They require redefining to ensure collection of digital information, which in turn will facilitate future access.

WHAT IS REQUIRED:

To ensure the preservation of Irish digital heritage, legislative provision for legal deposit must permit the collection, preservation and provision of access to the printed and digital output of the nation, and enable the National Library of Ireland to fulfill its role as a national memory institution

With regard to the specific role of the National Library in this regard, we accept that no single library or collecting institution can do the work of comprehensively collecting and preserving Irish digital heritage but it is our strongly held view that legislation which recognizes the particular role of national libraries in this regard (and, in this instance, the NLI) is important in facilitating the development of a national framework for the effective distribution of responsibility for digital preservation in Ireland.

The key objective of any revised legislative provision should be to facilitate the continued collection of, and access to, the documentary and intellectual record of the life of Ireland while recognizing the fact that much content is now digital, and future-proofing legislation against further technology shift in as far as this is possible.

B. RELATED CONCERNS

THE TWO AREAS LISTED BELOW RELATE TO LEGAL PROVISIONS CURRENTLY COMPREHENDED WITHIN COPYRIGHT LEGISLATION THAT ARE OF RELEVANCE TO LEGAL DEPOSIT

(I) DIGITAL PRESERVATION

In terms of digital heritage, obsolescence is a persistent concern. The most basic preservation action for any digital object is to convert it into a media neutral format. This is typically done by creating an image of the original media – an exact, bit-by-bit replica of the original. Any provision for legal deposit should embody provision for digital preservation of the object so acquired. (Note in this regard that the Library and Archives provisions (ss. 59-70) of the 2000 Act provide for the making of exempt copies for certain specific purposes, including for the purpose of preservation of a library copy. This principle is of particular significance in relation to digital objects and the legislation needs to be amended to encompass digital objects.)

WHAT IS REQUIRED

If the collection of e-materials is to be meaningful in terms of (a) preservation of intellectual and cultural heritage and (b) access into the future, then provision must be made for the National Library (or its agents) to make preservation copies of digital objects.

(II) ACCESS

The purpose of preserving our digital heritage is to ensure that it remains accessible to the public. As stated in the draft UNESCO Charter on the preservation of digital objects, access to this digital heritage will offer broadened opportunities for creation, communication and sharing of knowledge among all peoples. In an Irish context this could mean access for the Irish Diaspora to the published output of the nation regardless of where they are. It would also facilitate increased creativity and opportunities for innovation using digital information by all sectors of society from students, researchers, gamers, genealogists, to the general public

WHAT IS REQUIRED

Legislative provision for access to digital heritage which embodies “[a] fair balance between the legitimate rights of creators and other rights holders and the interests of the public to access digital heritage materials” (UNESCO draft charter on the preservation of digital heritage)

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