

SUBMISSION BY THE
NATIONAL LIBRARY OF IRELAND
IN RESPONSE TO
COPYRIGHT AND INNOVATION: A CONSULTATION PAPER
PREPARED FOR THE
DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION
BY THE
COPYRIGHT REVIEW COMMITTEE

JUNE 2012



The National Library of Ireland (NLI) is grateful for this opportunity to make a further submission to the Copyright Review Committee in response to their report *Copyright and Innovation: A Consultation Paper*, prepared on behalf of the Department of Jobs, Enterprise and Innovation. We greatly appreciate the Committee's careful consideration of the wide range of submissions received in response to its initial call and the Chairman's assurances, at the open meeting in TCD in March 2012, of the Committee's openness with regard to further submissions.

We note again the focus in the Committee's Terms of Reference on the possible barriers to innovation created by Irish copyright law and in this regard we draw the Committee's attention to the foreword to the NLI's recently published *Strategic Plan 2012-2014* in which the Chairman of the Library Board makes specific reference to innovation and our cultural heritage as follows:

The creativity and capacity for innovation of the Irish people has long been a source of national pride. The darkest hours of our history have been brightened by the work of our poets, dramatists, novelists, and writers of all hues. When our playwrights conquer Broadway and our screenwriters bring home Oscars they are delivering a clear message internationally of a vibrant country with a rich heritage.

Our cultural heritage has the power to move us, inspire us, cheer us, and much more. Its value transcends mere finance; it is literally priceless.

It can also make a valuable economic contribution. Our vast store of literary, photographic and genealogical material is a veritable treasure trove of content for industry sectors such as film, computer gaming, tourism, commercial exploitation and education.¹

The NLI is one of the heritage institutions described in the introduction to chapter 9 of *Copyright and Innovation*. It is the national cultural institution charged with responsibility for collecting 'library material' for and on behalf of the State.² Its collections include books, newspapers and journals along with manuscripts, photographs, prints, drawings, maps and ephemera. More recently the NLI has begun to acquire born-digital objects such as websites and blogs. As noted in our submission of July 2011, for many of its diverse community of users the NLI is the only publicly accessible library in which they may consult relevant research material. The NLI also collects and preserves its holdings on behalf of a community whose needs can only be anticipated – NLI users of the future.

¹ Foreword by David Harvey, Chairman of the NLI to "*Building a Future for our Past: National Library of Ireland Strategic Plan 2012-2014*". It may be viewed on the NLI website via: <http://www.nli.ie/en/udlist/reports-and-policy-documents.aspx>

² The mandate of the NLI is set out in section 12(1) of National Cultural Institutions Act, 1997 as follows: "*The principal functions of the Board of the Library shall be to conserve, restore, maintain and enlarge the library material in the collection of the Library for the benefit of the public and to establish and maintain a record of library material (including material relating to the Irish language) in relation to Ireland and to contribute to the provision of access by members of the public to material relating to other countries.*"

The delivery of library services has been transformed by technology. Digitisation of collections is now a central element of library access strategy. One of the NLI's key goals is to maximise the availability of its collections by providing the full choice of access from personal visits to digital platforms. We aim to set and achieve new targets for the digitisation of the rare and unique material in our care. This rare and unique material ranges from the archives of the former landed estates to political papers of Irish politicians from across the political spectrum, from business records to the literary papers of many of the great figures in Irish literature. Any uncertainty with regard to the duration of copyright in this vast resource of unpublished material places an extraordinary impediment in the way of all engaged in research across a range of disciplines in Ireland.

In tandem with planning towards greater access to historic collections, libraries are faced with the very particular challenge of putting in place processes to ensure the collection and preservation of the vast volume of new material which is increasingly 'born digital'. As with our July 2011 submission, a particular focus of this submission is the extension of legal deposit provision to off line publications and digital publications. We consider it essential that the distinction between these two be acknowledged and that separate provision be made for each. Our proposals with regard to sections 198 and 198A are submitted with this distinction in mind.

The NLI's response to *Copyright and Innovation* focuses upon a number of issues of particular concern. We have also contributed to the Consortium of National and University Libraries (CONUL) submission on issues of library interest, including those of particular relevance to academic libraries.

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

We note the Committee’s view that perpetual copyright in unpublished works is an ‘unintended consequence of the enactment of CRRA’ and particularly welcome the view that it must be addressed. We are especially concerned that Irish researchers should be disadvantaged with regard to their work as a result of the inaccessibility of primary source material and that the pursuit of Irish studies worldwide might be severely restricted by an ‘unintended consequence’ of legislation in this jurisdiction.

While we note the Committee’s proposal for Section 24, we suggest the following amendment to section 24(1) CRRA which draws on a similar proposal advanced by Clark, Smyth & Hall in “*Intellectual Property Law in Ireland*”, paragraph 10.37, page 246, footnote 82:

(1) 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.

Furthermore, and for the avoidance of confusion and any inconsistency in approach, we respectfully submit that the above amendment should have retrospective effect.

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

Yes. The NLI supports this amendment which, we understand, would have the effect of bringing Irish law into line with common law developments elsewhere.

(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. Irish researchers should have the full benefit of the exceptions available to their counterparts in other EU jurisdictions.

(57) Should CRRA references to “research and private study” be extended to include “education”?

Yes.

(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 CRRA?

Yes.

(67) Should there be an exception permitting format shifting for archival purposes for heritage institutions?

Yes. An exception permitting format shifting for archival purposes is critical to allowing the NLI meet its statutory obligations with regard to the preservation and making available of Irish documentary heritage. In this regard, we draw the Committee’s attention to the following extract from the British Library’s submission to the Hargreaves review:

Digital preservation requires the creation of multiple copies through the practice of “normalising” content for ingest onto a server, format shifting to address future obsolescence, the use of emulators to render digital works where the software is obsolete and the creation of backup copies on mirror servers.

Without the ability to effectively preserve important content one part of the innovation chain may be broken as without the ability to preserve material for future generations downstream, innovation may become impossible

In making this submission, we take full account of the commercial and other concerns of content creators and ask that the Committee note that our core objectives in this regard are preservation and assured access over time. For this reason, we would restate the view set out in the CONUL submission that there should be clear statutory provision permitting format shifting for archival purposes for heritage institutions. While we support the Committee’s proposed wording for section 69, we respectfully submit that it should be possible for heritage institutions to make reproductions in various formats for preservation and archival purposes. Therefore, we suggest that section 69 read as follows:

- (1) *It is not an infringement of the rights conferred by this Part if -*
 - (a) *a heritage institute*
 - (i) *being the owner or lawful user of a work, makes reproductions of that work in different formats or medium*
 - Or
 - (ii) *makes or causes to be made digital reproductions of a work*
 - (b) *the heritage institute owns or is a lawful user of the medium or device on which the reproductions are reproduced,*
 - (c) *the reproductions are made for archival and preservation purposes, and*
 - (d) *the reproductions are made for purposes that are neither directly nor indirectly commercial.*
- (2) *Subsection (1) shall not apply if*
 - (a) *the work being reproduced is an infringing copy, and*
 - (b) *the heritage institution making the reproductions did not have reasonable ground to believe that the work was not an infringing copy.*

In light of the above, it would also be appropriate to amend the proposed section 65 in order to permit heritage institutions to make multiple copies for preservation purposes. For this reason, we suggest that the proposed section 65 be amended so that it reads as follows:

(1) *A heritage institution may, where the prescribed conditions are complied with, make or cause to be made a copy or copies of a work in the permanent collection of the institution in order –*

- (a) to preserve or replace that work by placing the copy or copies in the permanent collection of that library or archive in addition to or in place of that work, or*
- (b) to replace in the permanent collection of another heritage institution a work which has been lost, destroyed or damaged,*

without infringing the copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

(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?

We welcome the retention of the provision at section 66(1)(c) CRRA of an exception for copying for the purposes of compiling or preparing a catalogue. We support the additional provision for the publication of a copy in a catalogue relating to an exhibition and note that this additional provision arises from a concern that section 66 CRRA is ambiguously narrow and that there is uncertainty as to whether the section permits publication of a copy made under the provisions of this section. However, we would welcome if the proposed section 66(1)(f) covered not only catalogues relating to an exhibition but also, generally to catalogues published by heritage institutions.

(69) Should the fair dealing provisions of CRRA be extended to permit the display of dedicated terminals of reproductions of works in the permanent collections of a heritage institution?

We welcome any provision which will allow the NLI to provide a greater degree of access to the public collections in our care.

(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?

We welcome the extension of the fair dealing provisions of CRRA to permit the display of a protected image for the purpose of making a presentation to students or others attending an educational event in the NLI or other heritage institution. We would be concerned, however, at any potential limitation imposed upon libraries and archives by the use of the term ‘artistic work’. Libraries and archives are charged with the keeping of documentary material of varying provenance including, for example, records of administration, correspondence, business records and accounts, etc. Little of this material could be described as ‘artistic’ but each item and collection has its value as documentary record and might be selected for use in a presentation or to illustrate a lecture.

By limiting this exception to ‘artistic works’, the NLI would be concerned that it would be limited in terms of its use of archival material at educational events in the Library. We therefore recommend the following wording for section 69A(2):

The brief and limited display of a reproduction of a work, during the public lecture in a heritage institution shall constitute “fair dealing” for the purposes of section 50(1).

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

In common with other national libraries, the NLI exercises its legal deposit right with the key aim of ensuring the preservation of and access to the nation’s intellectual and cultural heritage over time. Effective operation of legal deposit should also guarantee to citizens and researchers, within the country and abroad, access to a research collection of the country’s published material.

We note the Committee’s recognition, in paragraph 9.5 of *Copyright and Innovation*, of the importance of legal deposit as an instrument of national cultural policy. As set out in our previous submission, the NLI is of the view that the provisions of sections 198 and 199 CRRA are neither adequate (section 198) nor applicable (section 199) to the legal deposit of Irish digital heritage.

We welcome the Committee’s view that CRRA needs to be amended. In this regard, we note the Committee’s direct reference to UK legislation. The UK legislation offers a useful approach as do recent examples from New Zealand and Canada. The consultation process in Australia has just ended and we await the outcome of this process with interest.

The NLI submits that a key requirement is to acknowledge the distinction between (a) books and off line publications and (b) digital publications. Off line publications are non-print works which are not accessed or delivered by means of the internet and are recorded in a physical form. They include CD ROMs, DVDs and microform (film and fiche). Arrangements for delivery of these items under legal deposit are similar to those already in place for print publications. Our definition of ‘off line publication’, which is set out in our proposed amendment to section 198(10) is drawn from that in use in the UK³. In contrast, the term ‘digital publication’ relates to content made available to the public by means of any electronic retrieval system or software system. In order that appropriate provision be made for both off line publications and digital publications, we propose (i) that section 198 CRRA be amended to provide not only for books but also for off line publications and (ii) that section 198A CRRA sets out provisions specific to digital publications. With regard to (ii), we set out below our suggested revision of the proposed new section.

(i) Amendment of section 198 CRRA:

- Replace the terms ‘book’ and ‘books’ by ‘book and off line publication’ and ‘books and off line publications’ respectively throughout section 198.
- Amend section 198(9) by increasing the fine attributable on summary conviction as the NLI believes that the current fine is not sufficiently high to deter non-compliance.
- Amend section 198(10) to include a definition for ‘off line publication’ as follows:

³ See: <http://www.culture.gov.uk/images/publications/Cons-non-print-legal-deposit-2011.pdf>

For the purposes of this section, “off line publication” means any non-printed work which is not accessed or delivered by means of the internet and is recorded in a physical form (including without limitation microform, CD ROM, DVD, hard drive, diskette, magnetic tape, memory cards, USB and variants of same).

- Amend section 198(7) as follows:

A copy of a book and off line publication delivered to the authority having control of the National Library of Ireland or the Board of the British Library pursuant to this section shall be a copy of the whole book and off line publication with all maps and illustrations belonging to that book and off line publication and, subject to subsection (4), finished in the same manner as the copy in that form which is superior in quality to any other copy in that form of the book and off line publication available and shall be a copy free of any and all technical or rights protection, measures which prevents or hinders access.

- Amend section 198(12) as follows:

For the purposes of this section, “publication” includes the issue of copies to the public, and related expressions shall be construed accordingly.

Where a publication made available as a book and/or off line publication is also made available as a digital publication we respectfully submit that the legal deposit copy shall be that specified in section 198, unless a demand is issued pursuant to section 198A(2) below. We therefore suggest that the following subsection be added to section 198:

(13) Where substantially the same work is published in a form to which this section applies and also in a form to which section 198A applies, both sections shall be deemed to apply until agreement with regard to the most appropriate medium of delivery is reached between the publisher and the Board or authority specified in section 198(1).

Finally, in light of the above amendments, section 2(1)(b) of the Heritage Fund Act 2001 should be amended so that the reference to ‘book’ is replaced by the term ‘book and off line publication’.

(ii) Provision for legal deposit of ‘digital publications’ in a new section 198A

We note the Committee’s proposal for a new section 198A which we have revised as follows. The complete section 198A proposed by NLI is set out in Schedule A.

(1) It is not an infringement of the rights conferred by this Act if a Board or authority referred to in section 198(1) copies or reproduces a digital publication that is made available in the State through the internet.

The proposed 198A(2) below is based on the obligation to deposit digital publications only upon demand being made by the relevant library. This, we submit, is an important distinction which recognises and takes account of the fact that no library can manage to capture all digital publishing. In allowing for demand based deposit, this provision presupposes that a library will have put in place all relevant digital preservation and access requirements.

- (2) *The publisher of any digital publication first made available in the State after the commencement of this section or, in the case of the authority specified in section 198(1)(a), the publisher of any digital publication made available in the State, shall, where demand is made by the Boards or authorities specified in section 198(1) whether in writing, electronic or other means (including without limitation web harvesting software), deliver within one month after receipt of that demand or, where the demand was so made before the digital publication was made available, within one month after publication, deliver, at his or her own expense, copies of the digital publication to the Boards or authorities referred to in section 198(1).*
- (3) *The Boards and authorities referred to in section 198(1) taking delivery of a digital publication under subsection (2) shall give receipt for every digital publication delivered to them under that subsection.*
- (4) *The Minister may, on an application of a Board or authority referred to in section 198(1), make regulations exempting from subsection (2) in respect of the Board or authorities making the application, any class of work as may be specified in those regulations, and it shall not be necessary for the publisher of any publication so excepted to deliver the digital publication to that Board or authority or for such Board or authority to give a receipt unless as respects any particular digital publication a demand for the delivery of that digital publication is made by the Board or authority concerned.*
- (5) *The Boards or authorities referred to in section 198(1) may before delivery of a digital publication is made under subsection (2), require that a digital publication be delivered in a particular format, being one of the formats in which the digital publication is made available and the publisher shall deliver it in the format required.*
- (6) *The publisher of any digital publication first made available in the State after the commencement of this section shall, where a demand is made in writing, electronic or other means by the authority having control of each of the libraries referred to in section 198(5), before the expiration of 12 months after the digital publication is made available, deliver within one month after receipt of that demand or, where the demand was so made before the digital publication was made available, within one month after publication, to an address in Dublin named in the demand a copy of that digital publication for, or in accordance with the directions of, that authority.*
- (7) *In the case of a digital publication made available in a series of numbers or parts, the demand referred to in subsections (2) and (6) may include all numbers or parts of the digital publication which may subsequently be made available.*
- (8) *A copy of a digital publication delivered to the authority having control of the National Library of Ireland or the Board of the British Library pursuant to this section shall be a copy of the whole digital publication.*

For the NLI, as for national libraries throughout the world, our core responsibilities include preserving the record of Ireland's intellectual output so that it may, in the future, be made available to inform and inspire researchers and innovators of the future. We recognise that the commercial value to many publishers of their output requires the imposition of technology protection measures ('TPM's') but we also recognise that this commercial value diminishes over time. We are anxious to maintain the balance between long term preservation (and therefore access to) of the legal deposit collection (the published output of the nation) and the commercial value of this material to publishers. We recommend the delivery of an unencumbered TPM free copy of digital material for long term preservation purposes. We are happy to work with publishers in relation to the phased provision of access to this material (and there are various international national library models to facilitate this) in a way that has minimal impact on their commercial activities.

Without this preservation copy, users and more importantly future users could face a situation where ensuring long term preservation (and hence long term access) to this material, would require the NLI to devote substantial financial and other resources to the continual migration and technical development of the 'computer program and any information necessary in order to access the digital information'. Failure to do so will result in permanently inaccessible material where we have been unable to migrate the TPM's delivered as part of the digital publication. For this reason, we suggest that subsection (9) read as follows:

(9) A copy of a digital publication delivered pursuant to this section to any of the Boards or authorities referred to in section 198(1) and section 198(5), shall be in the format specified by the Board or authority and shall be a copy free of any and all technical or rights protection measures which prevents or hinders access to the digital publication.

In relation to subsection (10) below, we suggest that the fine on summary conviction which is currently set at a fee not exceeding €750 be increased as the current limit is unlikely to deter non-compliance:

(10) Where a publisher fails to comply with this section he or she shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €750 and in addition the person shall be liable to be ordered to comply with this section.

In subsection (11) below, we propose a definition of 'digital publication' which covers electronic books and in subsection (12), we define 'made available in the State', as follows:

(11) For the purposes of this section, "digital publication" means any content whether paid-for or free, and whether subject to public-access restrictions or not, made available to the public by means of any electronic retrieval system or software system (including without limitation a copy of a book in an electronic form as well as the whole or part of a website) but does not include a work consisting solely of a sound recording or film or both.

(12) For the purpose of this section, a digital publication shall be treated as made available in the State where:-
(a) it is made available to the public from a website with a domain name which relates to the State or to a place within the State;
or
(b) it is made available to the public by a person and any of that person's activities relating to the creation or the publication of the digital publication takes place within the State;
or
(c) where the digital publication is published on the internet, the publication of that work or a person publishing it is connected with the State.

(13) The Minister may make regulations to implement and administer this section.

In the event that the proposed Section 198(9) above is unacceptable, we suggest that European Communities (Copyright and Related Rights) Regulations 2000 (SI No. 16/2004) be amended. In today's difficult economic environment, many beneficiaries cannot afford to issue legal proceedings in the High Court to resolve disputes with rights holders. It would be preferable in the event of any dispute that the beneficiary could proceed to mediation or arbitration, not the courts. We therefore recommend that Section 374(2) of the Copyright and Related Rights Act (as amended by Regulation 5(2) of SI No. 16/2004) be amended to facilitate the resolution of dispute through mediation or arbitration.

We have a concern that access to documents that are available freely on the internet prior to delivery to the legal deposit collection not be inadvertently restricted. In a legal deposit consultation paper prepared by the National Library of Australia, the Library articulates this concern referring to the fact that it would run contrary to the public interest to have greater restrictions placed on access to this material than were in place when it was collected. We note also that in New Zealand, section 34(4) of their national legislation⁴ provides that:

If a deposited document is made publically available on the Internet by the publisher without a restriction on its access or use by members of the public, the National Librarian may make the document available for access and use by members of the public on the Internet...

We urge the Committee to ensure provision be made to safeguard continued access without restriction to digital publications of this nature.

⁴ http://www.legislation.govt.nz/act/public/2003/0019/latest/viewpdf.aspx?search=ts_act_NATIONAL+LIBRARY_rese

SCHEDULE A
Proposed section 198A

- 1) *It is not an infringement of the rights conferred by this Act if a Board or authority referred to in section 198(1) copies or reproduces a digital publication that is made available in the State through the internet.*
- 2) *The publisher of any digital publication first made available in the State after the commencement of this section or, in the case of the authority specified in section 198(1)(a), the publisher of any digital publication made available in the State, shall, where demand is made by the Boards or authorities specified in section 198(1) whether in writing, electronic or other means (including without limitation web harvesting software), deliver within one month after receipt of that demand or, where the demand was so made before the digital publication was made available, within one month after publication, deliver, at his or her own expense, copies of the digital publication to the Boards or authorities referred to in section 198(1).*
- 3) *The Boards and authorities referred to in section 198(1) taking delivery of a digital publication under subsection (2) shall give receipt for every digital publication delivered to them under that subsection.*
- 4) *The Minister may, on an application of a Board or authority referred to in section 198(1), make regulations exempting from subsection (2) in respect of the Board or authorities making the application, any class of work as may be specified in those regulations, and it shall not be necessary for the publisher of any publication so excepted to deliver the digital publication to that Board or authority or for such Board or authority to give a receipt unless as respects any particular digital publication a demand for the delivery of that digital publication is made by the Board or authority concerned.*
- 5) *The Boards or authorities referred to in section 198(1) may before delivery of a digital publication is made under subsection (2), require that a digital publication be delivered in a particular format, being one of the formats in which the digital publication is made available and the publisher shall deliver it in the format required.*
- 6) *The publisher of any digital publication first made available in the State after the commencement of this section shall, where a demand is made in writing, electronic or other means by the authority having control of each of the libraries referred to in section 198(5), before the expiration of 12 months after the digital publication is made available, deliver within one month after receipt of that demand or, where the demand was so made before the digital publication was made available, within one month after publication, to an address in Dublin named in the demand a copy of that digital publication for, or in accordance with the directions of, that authority.*
- 7) *In the case of a digital publication made available in a series of numbers or parts, the demand referred to in subsections (2) and (6) may include all numbers or parts of the digital publication which may subsequently be made available.*
- 8) *A copy of a digital publication delivered to the authority having control of the National Library of Ireland or the Board of the British Library pursuant to this section shall be a copy of the whole digital publication.*
- 9) *A copy of a digital publication delivered pursuant to this section to any of the Boards or authorities referred to in section 198(1) and section 198(5), shall be in the format specified by the Board or authority and shall be a copy free of any and all technical or rights protection measures which prevents or hinders access to the digital publication.*

- 10) *Where a publisher fails to comply with this section he or she shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €750 and in addition the person shall be liable to be ordered to comply with this section.*
- 11) *For the purposes of this section, “digital publication” means any content whether paid-for or free, and whether subject to public-access restrictions or not, made available to the public by means of any electronic retrieval system or software system (including without limitation a copy of a book in an electronic form as well as the whole or part of a website) but does not include a work consisting solely of a sound recording or film or both.*
- 12) *For the purpose of this section, a digital publication shall be treated as made available in the State where:-*
- (a) it is made available to the public from a website with a domain name which relates to the State or to a place within the State;*
 - or*
 - (b) it is made available to the public by a person and any of that person’s activities relating to the creation or the publication of the digital publication takes place within the State;*
 - or*
 - (c) where the digital publication is published on the internet, the publication of that work or a person publishing it is connected with the State.*
- 13) *The Minister may make regulations to implement and administer this section.*