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DEPARTMENT OF JOBS,
ENTERPRISE AND INNOVATION

COPYRIGHT REVIEW
COMMITTEE

A SUBMISSION

BY THE CONSORTIUM OF
NATIONAL
AND UNIVERSITY LIBRARIES

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CONSORTIUM OF NATIONAL & UNIVERSITY LIBRARIES

Recommendations

1. Introduction
2. Heritage capture, preservation and use
3. Exceptions for education and libraries
4. Licensing and regulation

RECOMMENDATIONS

- 1.** Amendments to copyright legislation for economic objectives should be evidence driven with balanced weighting given to social, educational and cultural goals and with regard to the unique role of libraries as repositories of our intellectual heritage in all forms.
- 2.** The legal deposit provisions need to be expressed in format neutral terminology and to be future proofed to enable the legitimate capture, preservation and making available of all published and unpublished intellectual property, especially digital objects and orphan works, to facilitate creative uses of our cultural heritage.
- 3.** The loss of web content and born digital documents in all areas of public life makes it urgent that legal deposit libraries are empowered to legitimately harvest and preserve these materials for future researchers.
- 4.** Legal deposit of born digital objects needs to be commenced under revised provisions. Publishers and producers should be required to supply legal deposit libraries with all requisite access technologies for digital objects, unencumbered by rights protection measures, and those libraries should be empowered to format shift items within their collections for long term preservation and access purposes.
- 5.** Fair dealing, education and library exemptions must be expressed in all sections of the legislation as independent of current formats and technologies for all categories of works and these exceptions must be preserved against the imbalances of contract law which threaten innovation in education and research.
- 6.** The licensing and collection system needs reform and regulation so that potential users, especially small firms and educational institutions, can access and broker copyright permissions and solutions in equitable ways that will further creative uses and which will be congruent with open European markets.

1. INTRODUCTION

It is generally recognized that the effectiveness of the copyright system is seriously challenged by the rapid growth of digital technologies and by the Internet as a means of access and distribution of copyrighted works. Industries built on intellectual property such as film, recorded music, software (and including electronic newspapers, books and games) perceive the access provided by search engines and unauthorized file sharing as a major threat to their ability to obtain and safeguard financial returns in this environment.

With the transition to digital publishing, libraries of all types have become increasingly involved in the debates around copyright protections and the digital environment. Libraries are seeking to widen access to content through digitization and exposure of their collections, while also seeking to negotiate sustainable business models with publishers for access to commercially published digital content. Existing copyright legislation allows the digitization of out-of-copyright works, but libraries wish to open up the environment to allow the controlled digitization of in-copyright publications such as orphan works and out of print works and to break free from the print-on-paper model of current copyright legislation with balanced rights for all new technologies.

The Hargreaves Report published in May 2011 in the United Kingdom made 10 major recommendations to free up copyright and intellectual property law which “obstruct innovation and economic growth in the UK”. Among his observations, Professor Hargreaves points out that the UK “does not allow its great libraries to archive all digital copyright material, with the result that much of it is rotting away”. One of the major recommendations is the establishment of a centralised *Intellectual Property Clearing House* which would act as a one-stop-shop for clearing the use of copyright content while ensuring the interests of content producers are protected. Notably, the Hargreaves Report rejected calls for the adoption of US style ‘fair use’ rules on copyrighted material.¹

2. IRELAND’S HERITAGE: CAPTURE, PRESERVATION AND USE.

2.1. Research at Risk

In Ireland, the lack of an effective legal deposit legislative framework for collection and archiving of the nation’s published record in digital and other non-print formats presents an enormous risk - not only to the historical record but also to research and innovation. Countless documents published on the Internet have undoubtedly already disappeared or changed beyond recognition. Although many of these publications may be seen as ephemeral or unimportant, their exclusion from legal deposit means that any claim asserted on behalf of legal deposit to mirror faithfully the intellectual record of the life of a country is becoming less and less credible. In an article in the *Observer* newspaper, Lynn Brindley, Director of the British Library, emphasized the terrifying speed at which we are losing our digital memory and the very real danger of creating “a black hole for future historians and writers”.

“The task of capturing our online intellectual heritage and preserving it for the long term falls, quite rightly, to the same libraries and archives that have over centuries systematically collected books, periodicals, newspapers and recordings and which remain available in perpetuity, thanks to these institutions.” – Dame Lynn Brindley²

¹ I. Hargreaves (2011) Digital Opportunity – a review of intellectual property and growth
<http://www.ipa.gov.uk/ipreview-finalreport.pdf>

² We’re in danger of losing our memories, Dame Lynn Brindley, *The Observer*, Sunday 25th January 2009

2.2. Works and Formats

The legislation has used the term ‘book’ as a defining concept necessitating secondary amendments to cover new media and formats as they appear. This approach risks obsolescence as the digital age advances by continual innovation and by the development and convergence of information and communication technologies. There now exist static content digital objects such as electronic books, journals and compendia. There is an ever increasing range of dynamically changing content in digital objects such as websites and databases. New digital content is also interactively created between users and providers in activities such as group gaming, blogging and social media. Dynamically changing digital content may constitute multiple new objects over time. These new contexts pose new challenges to the concepts ‘work’, ‘publisher’, ‘published’ and ‘publication’.

Other jurisdictions have found it necessary to redefine copyright terminology in broad terms to enable ownership, control and capture of fluid formats. All revisions to the legislation need to redefine works and publishing in format neutral terminology (‘object’, ‘item’, ‘matter’ ‘any medium’, ‘any form’) in order to reduce the necessity for continual revision of primary legislation. Terminology defining actions and ‘making available’ needs to distinguish between digital content proper and the mutable interface technologies that might be used to access the content.

2.3. Legal Deposit

The current legal deposit legislative framework is unwieldy and lacking in clarity. Legal deposit in Ireland has been restricted to publications on paper and was not extended during the 20th century to include non-print formats. The exclusion of non-print formats from legal deposit continues to be a major impediment to the ability of the legal deposit libraries, especially the National Library of Ireland, to create a truly comprehensive collection for Ireland.

The legal deposit provisions set out in S.198 and S.199 of the *Copyright Act, 2000* together represent an attempt to address the growing vacuum in the national archive of digital publications. S.198 of the *Copyright and Related Act, 2000* largely reproduces, with some updating, the terms enshrined in the 1963 Copyright Act while attempting to provide a level of recognition of the emergence of publishing in formats other than print. The need to extend the legal deposit provisions to emerging electronic formats is clear. S.199 deals with extending legal deposit to works published in non-print formats for deposit with the National Library of Ireland. Formats covered by the terms of S.199 are listed in detail, many of which are already obsolete or nearing obsolescence. The enumeration of formats cannot meet the need to future proof the legislation to encompass other formats that may emerge. More generic definitions of ‘works’ and ‘formats’ throughout the Act are essential, therefore, in order to make the legislation workable for legal deposit.

An examination of countries in the process of extending legal deposit to emerging formats clearly demonstrates that a mandatory approach based on a sound legislative framework has the best chance of success. Current Irish legislation lacks clarity in identifying the rights and responsibilities of both publishers in new formats and the deposit libraries. It is silent for example on whether access may be provided to this content and on the re-use of the content. In order to ensure a robust framework underpinning the collection and preservation of the public record of the nation’s intellectual and published heritage into the future, new legal deposit legislation is required.

Key provisions of S.198 are unclear and open to varying interpretations. For example, there was no definition of the expression ‘publication’ in the 1963 Act and that given at S.198 (12) is untested. The definition is firmly rooted in the print environment and it is unclear whether ‘born digital’ documents are covered or merely alternate formats. The repeated use of the term ‘book’ is unhelpful in this section. S.199, which has not yet been commenced, provides for the further extension of legal deposit

privilege to non-print and other media, some of which are defined in the legislation and others not. There are specific provisions necessary to ensure deposited digital objects can be accessed (by the supply of associated software for instance) and that rights protection measures on legal deposit objects are disabled.

2.4. Web Harvesting

Current EU Community legislation on intellectual property rights, in particular the Directive 2001/29 and Articles 9 and 5.2 (c) therein, provides for the preservation of web-content. A High Level Group noted that it is essential that Member States address web harvesting as a priority issue, because an increasing amount of material is created and updated only in electronic form as web-content. The obligation to preserve web-content by specially mandated organisations is a matter for legal deposit legislation.^{3,4} The National Library of Ireland (NLI) has harvested the *.ie* web domain on the basis of best peer practice but it is not enabled to make available that harvested content. The innovation benefit from revision of legal deposit and web harvesting is that in capturing and making available all recorded intellectual activity in all media, Ireland will continue to provide the most comprehensive possible cultural resource to the creative arts and industries which will in turn provide a stimulus to the development of new products and services.

2.5. Publications by Government

The black hole in the national record that has opened up under our feet can be illustrated clearly by what is happening with the publishing output originating from government departments and publically funded agencies. An increasing number of official publications are being published on-line only and are therefore not received under legal deposit. Where publications are issued only in on-line format, their long-term preservation is an urgent concern. Information of significant value to us as Irish citizens, to policy makers, to the media and to future researchers is in danger of being irretrievably lost.

The websites of Government departments and agencies are to some extent a paradox. While making access to information much easier initially, at the same time the long-term availability of that information is placed in jeopardy. 'Out of date' information is routinely deleted when replaced by the updated version and that snapshot in time is lost. Information is also lost when websites are tidied up or with changes or mergers of Government departments and agencies.

In 2009, the CONUL Sub-Committee on Copyright and Regulatory Matters carried out a survey of 257 government departments and agencies - with a 37% response rate. Findings of the survey showed that all respondents had a web presence but 85% reported that their organizations have no stated policy for the archiving and preservation of 'born' digital publications. That unknown amounts of web published information in all domains of public life, available to the

³ i2010: Digital Libraries High Level Expert Group – Copyright Subgroup Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works 2008 p10
http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

public in the past, are being lost and are no longer available for analysis and reuse is a potentially significant barrier to social and economic research.

2.6. Orphan Works

'Orphan works' are defined as copyright works where the rights holders cannot be identified or traced after due diligence. Re-use of uniquely Irish orphaned content is precluded and Irish legislative provisions and licensing solutions need to move towards the proposed framework for permissions management that have been tabled at European level.^{5,6, 7} Nordic countries have made extensive use of extended collective licensing models to enable the digitization and making available of unique heritage collections.⁸

In Ireland, the designated cultural and educational institutions should have an exception to enable them to digitize and make available orphan works in order to fulfil preservation and dissemination remits - with appropriate provision for withdrawal and/or remuneration if the rights holder reappears. The innovation benefit would be to unlock and make accessible for legitimate re-use an enormous body of orphaned intellectual and cultural work in all formats.

3 EXCEPTIONS FOR RESEARCH, EDUCATION AND LIBRARIES: S50-S70

3.1. Exceptions: Fair Dealing and Education

Libraries in higher education capture, conserve and make available scientific, cultural and heritage property in all works and all formats. However, the attempted enumeration in legislation of all permitted actions relative to all possible works can never capture what is a constantly evolving and innovating field of content. It is important in the public interest that all existing use exceptions are preserved and that they are future proofed to continue to maintain a balance between education, users and rights holders.

There needs to be clarity that fair dealing covers all types of works in all formats, published and unpublished. Fair dealing in the use of works is essential to engender new creative derivations and applications in scientific domains and in creative media industries.

3.2. Exceptions: Libraries

⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain permitted uses of orphan works COM(2011) 289 final 2011/0136 (COD)
http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf

⁶ i2010: Digital Libraries High Level Expert Group – Copyright Subgroup Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works 2008
http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

⁷ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain permitted uses of orphan works Brussels, 24.5.2011 COM(2011) 289 final 2011/0136 (COD)
http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf

⁸ Riis, T and Schovsbo, J, Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon? (January 12, 2010). Columbia Journal of Law and the Arts, Vol. 33, Issue IV. Available at SSRN:
<http://ssrn.com/abstract=1535230>

Libraries face challenges measured over centuries in preserving and making available works. This challenge has become critical in the digital era when content is made available in a multiplicity of formats and combinations of formats, including databases. Designated libraries must be legislatively enabled to future proof public archives by format shifting in first and subsequent generation copies of works. It is necessary to define what is meant by 'a permanent collection' in s.65(1) and to include digital works. With appropriate provisions, this will also ensure that the moral rights of rights holders will be fully preserved within collections and within permissions management systems. It is essential to fair dealing, archiving and preservation that libraries receive items with proprietary *Technological Protection Measures* disabled and with *Rights Protection Information* intact.

A flexible access, preservation and curation regime for the digital era is essential to making scientific and cultural objects legitimately available as resources for innovation and creativity.

3.3. Contract Law as a Barrier to Innovation

The bulk of learning and research resources in higher education are now electronic products subject to licence conditions and contract law. Increasingly, libraries do not have a 'permanent collection' anymore - so the exceptions allowing fair dealing are negated and the balance has shifted too far to rights holders. Almost 95% of contracted resources in higher education are published outside of Ireland and the growth of e-books and e-journals means libraries will be leasing an ever higher proportion of material. Library users will be increasingly unable to exercise legitimate uses that are permitted for printed books and journals.

There needs to be an explicit extension to all works and formats of the database fair dealing provision:

- a user is entitled to extract or re-utilise insubstantial parts of the contents for any purpose s.327(1)
- any condition in a database use agreement shall not prevent this s.327(2)
- a database which has been re-utilised is not infringed by fair dealing with a substantial part of its contents s.329(1)

Contract restrictions which prevent the use of leased collections of electronic journals and datasets for secondary research and data mining in non-commercial settings must be overridden. Hargreaves, for example, cites the negative impact on current biomedical research where data from published sources on malaria cannot be text mined for non-commercial research purposes.⁹ Scientific discovery demands the lawful ability to extract facts and data from heterogeneous academic sources for legitimate specified purposes leading to clear innovation benefits.

4. LICENSING AND REGULATION

4.1. Licensing

The current licensing regime with multiple collection agencies is perceived as fragmented, high cost, unaccountable and not consistent with efficient open markets. Much content and many potential new

⁹ I. Hargreaves (2011) Digital Opportunity – a review of intellectual property and growth (Section 5.21 Malaria) <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

uses are not provided for in the licensing schemes. Permission seeking is onerous and costly, especially for small enterprises and for non-commercial educational purposes. That Ireland is such a small market and that so much content consumed in Ireland originates outside the country would suggest that co-ordinated cross border solutions are needed. The Hargreaves proposal (Recommendation 3) to establish a cross sectoral digital copyright exchange would also seem to be a prerequisite for Ireland to participate in European solutions to streamline and converge permissions management.

The current system needs reform and alignment with EU proposals for the creation of a legal framework for the collective cross border management of licensing.¹⁰ Transitional steps are needed to ensure appropriate governance and control mechanisms are put in place to regulate the licensing and collection bodies and to facilitate convergence with emerging European solutions. Innovative use and reuse of copyright content in the educational sector and the creative industries is being choked by a licensing regime not fit for purpose and which is a barrier to legitimate rights seekers.

4.2. Adjudication and Control to Facilitate Innovative Uses

Currently there is no avenue for redress or resolution on minor copyright disputes beyond litigation. This is a major barrier for small scale creative and digital content enterprises and for educational users. *Dir 2004/48/EC Enforcement of Intellectual Property Rights* provides that the measures, procedures and remedies to ensure the enforcement of relevant intellectual property rights "... shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." Art. 3(1)¹¹

There is a need for a statutory *Intellectual Property Office* or *Tribunal* role to ensure that the Irish market can respond more quickly to issues arising from new product development, market demand and technological change and that it can be informed by evidence based policy on copyright matters - policy that promotes innovation through open markets.

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MEMBERS

¹⁰ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe May 2011 Section 3.3.1
http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf

¹¹ Dir 2004/48/EC Enforcement of Intellectual Property Rights
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:EN:PDF>

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CONUL: Consortium of National and University Libraries

CONUL represents Ireland's major research libraries: the seven Universities, the National Library of Ireland, Royal Irish Academy, Royal College of Surgeons in Ireland and Dublin Institute of Technology.

Founded in 1971, CONUL aims to develop the library and information services of its member institutions, for the benefit of their users and for the benefit of researchers in the state generally.

Irish Copyright legislation is of direct interest to CONUL members. They felt it imperative, therefore, that their views be submitted to the *Copyright Review Committee* in order to ensure that the concerns of researchers are considered fully by the Committee during its deliberations.

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