



National
Gallery *of*
I R E L A N D

COPYRIGHT AND INNOVATION, A *Consultation Paper*

RESPONSE OF THE NATIONAL GALLERY OF IRELAND

28 June 2012

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Introduction

The National Gallery of Ireland (“the NGI”) welcomes the publication of “Copyright and Innovation, A Consultation Paper” by the Copyright Review Committee, and the opportunity to respond to the proposals contained in the document.

As explained in our earlier submission, cultural sector institutions such as the NGI are both users of copyright material and owners of the copyright in protected works. We stand therefore in the space between the legitimate interest of the right holder in controlling the use of the protected work, and the wider societal interest in the preservation and provision of access to objects of cultural value. In pursuit of our mission, we have to find a point of balance which incorporates respect for the right holder on the one hand, and the duty of the institution to make the collection available to the public, on the other.

We operate a specialist unit within the Gallery for the management of copyright and IPR of the collection in both the academic and commercial context. We carry out a considerable amount of groundwork in tracing copyright and ensuring copyright compliance both within and outside the institution, through IP audits; development of an IP policy and preparation of educational material for staff.

We are acutely aware of the need for a copyright regime that facilitates the conduct of our mission.

We preface our detailed responses to the questions in the Consultation Paper by drawing attention to the issues of most importance to us, most of which are included in the Consultation Paper. In some cases we suggest modifications to the proposals. The issues are:

- The need for development of the framework for collective licensing.
- Access to low-cost mechanisms for resolution of copyright disputes, including licensing disputes.
- The removal of unintended potentially perpetual copyright in material unpublished at the author’s death.
- Clarification that the “right of first publication” can only be acquired either by or with the consent of the owner of the physical material in which the work is embodied.
- Better protection for technological protection measures and rights management information.
- Amendment to Section 94(1) CRRA to permit making available a work for the purpose advertising a public exhibition, with a further addition to permit advertising *the inclusion of the work in a publicly accessible archive*.

- A new format shifting exception to the reproduction right for heritage institutions, for archiving, preservation *and management* of the collection.
- The existing library and archive exceptions in Sections 59-70 CRRA ideally to be thoroughly reviewed, but at least that it be clarified that the uses permitted by those sections include digital uses.
- Section 66 CRRA to be extended to permit the inclusion of works in exhibition catalogues.
- Section 123 CRRA to be amended to provide that where works are donated or bequeathed (in particular to a heritage institution, if not more broadly) the copyright in the works will be deemed to pass, in the absence of an expression to the contrary by the donor.
- The ability to display works on dedicated computer terminals on the premises, and to illustrate public lectures.

Our more detailed comments follow. We confine our responses to the points of direct interest to us.

Chapter 2 – 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?

We would welcome a piece of consolidating legislation

Chapter 3 – Copyright Council

Q. 7. Should a Copyright Council of Ireland (Council) be established?

We are in favour in principle of a Copyright Council or some other entity to supply the functions allocated to the Council in the Consultation Paper. We believe that the Paper correctly identifies a number of areas in which the copyright infrastructure is deficient. However we have reservations about whether the governance model proposed is a workable one, in that it seeks to reconcile the conflicting interests of a broad range of stakeholders. We also suggest that to the extent that the functions allocated to the Council involve copyright policy, this is a matter which is properly the responsibility of government and ought not to be allocated to a non-governmental body, particularly one which seeks to represent such diverse interests.

Q13. Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?

A number of the activities of the NGI depend on the availability of copyright licences. We are aware therefore of the fact that licensing is under-developed in Ireland, the licensing of visual works in particular. We are in favour of any developments which will improve the licensing framework. An Irish Digital Copyright Exchange would however require substantial

investment and it is not clear where that investment would come from. It also seems an impractical proposition to attempt unilaterally to develop a local project, when a feasibility study into the establishment of a DCE is being conducted in the UK, and when European and global solutions are being developed through initiatives such as ARROW and the Global Music Repertoire Database. The awaited Proposal for a Directive on Collective Management, which it is hoped will promote multi-territory licensing, may also influence the position.

We would hope that pending these developments, Irish collecting societies might be encouraged to work on developing ways of linking to external systems, and meanwhile to improve, perhaps through a communal portal, a single point of information about their services.

Q. 14. What other practical and legislative changes are necessary to Irish copyright licensing under CRRA?

The modus operandi of the Irish collecting societies is not sufficiently transparent. It is unclear precisely what rights are licensed by each of the societies. Their processes can be cumbersome and labour intensive and their charges expensive. We submit that this is one of the most important problems in the Irish system.

A particular point that concerns us is that there is no effective forum for resolution of licensing disputes. The Controller of Patents has a role which appears to be both limited and obscure. Decisions of the Controller are not published. We suggest that this is not a system that is working effectively and that it hinders the development of licensing in Ireland. We note that the authors of *Intellectual Property in Ireland*,¹ are of the view that “the current situation is entirely unsatisfactory and raises grave doubts about whether Irish law meets the requirements of art 49 of TRIPS and the need for administrative procedures to meet certain standards in respect of the costs and speediness of remedies.” We understand that Ireland is unique in common law countries in not having a Copyright Tribunal to deal with licensing disputes. We believe that the provision of a Copyright Tribunal would provide a more accessible and transparent forum for the resolution of disputes and that this would in turn promote the development of licensing in Ireland. We would urge the Review Committee to give it serious consideration.

Q. 15. Should the Council include the establishment of a Copyright Alternative Dispute Resolution Service (ADR Service)?

We are very much in favour of the provision of an ADR service for the resolution of copyright disputes. It would need to be provided by a trusted independent agency. We would not see this as a role for a Copyright Council. It could be established under the auspices of the Office of the Controller of Patents (as it is by the Intellectual Property Office in the UK).

¹*Intellectual Property Law in Ireland*, Clark, Smith & Hall, Bloomsbury Professional, at par 15.55

Q. 16. Given the wide range of intellectual property functions exercised by the Controller, should that office be renamed, and what should the powers of that office be?

We are in favour of expansion of the role of the Office of the Controller of Patents to include a broader remit in relation to the provision of information about copyright. We note, by way of comparison, that the UK Intellectual Property Office conducts an extensive programme of educational events, as well as publishing very detailed information on its website.

We agree that it would be appropriate to re-name the Office of the Controller.

Q. 17. Should the statutory licence in section 38 CRRA be amended to cover categories of work other than "sound recordings"?

While we do not identify the need to extend compulsory licensing to include categories of work other than sound recordings, we are in favour of broadening the licensing system to include, for example, the licensing of orphan works. As currently drafted, the EU Proposal for a Directive on Orphan Works excludes artistic works and so will not alleviate the problems of the NGI in making orphan works available to the public. We are aware that a system of extended collective licensing for this purpose is under consideration in the UK in the context of the current copyright consultation taking place there. We would urge the Review Committee to examine the UK report on this issue, when available.

Q. 20. Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

We are very much in favour of a small claims jurisdiction in the court system for intellectual property matters.

Q.21. Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

We are in favour of the provision of either a specialised court or the development of specialised expertise in the Circuit Court. It is beyond the scope of this response to identify the necessary changes to the legislation.

Chapter 4 – Rights-holders

Q.26. From the perspective of innovation, should the definition of "originality" be amended to protect only works which are the author's own intellectual creation?

We are not in favour of a definition of the term "original" in Irish legislation. We are aware that the meaning of the term is being elaborated by the EU Court of Justice, in cases such

as the *Eva-Maria Painer* case which concerned originality in photographs.² We would wish Irish law to remain open to such developments.

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

This is a point of particular importance to the NGI, and one on which we made detailed representations in our earlier submission. We welcome the fact that the Review Committee has addressed it in the Consultation Paper, and proposes to recommend an amendment to the CRRA to clarify the position. The NGI has a considerable quantity of valuable material in its archives which was unpublished at the author's death and which cannot now be used without the permission of the copyright owner. In many cases it is impossible for us to locate the right holder. An amendment to the legislation would release this material for publication.

However we do not believe that the proposed amendment will necessarily correct the problem. We are advised that an amendment to the Transitional Provisions is required. The following provision at Section 9 of the Transitional Provisions overrides anything contained in the Act (which would include the proposed amendment). This will need to be corrected:

"Nothing in this Act shall affect the duration of copyright in works in which copyright subsists on or before the commencement of Part 11 of this Act and the duration of copyright in those works shall be determined, where applicable, in accordance with the European Communities (Term of Protection of Copyright) Regulations 1995 (S.I. No. 158 of 1995, notwithstanding the revocation of those Regulations.)" [emphasis added].

The right of first publication

A related problem not raised previously by the NGI concerns the "right of first publication" at Section 34 CRRA. This provides that any person who, after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously made so available, shall benefit from a 25-year term of protection equivalent to the economic rights of the author. This implements Article 4 of the EU Term Directive.

. Section 34 in its present form is open to an interpretation which may allow a scholar or researcher who is given access to scholarly material, to publish this immediately it comes out of copyright without the consent of the owner of the material, thereby securing the 25 year term and preventing the owner of the material from publishing the work. This clearly has the potential to cause enormous difficulty for the national cultural institutions.

We suggest that it is imperative that it is clarified that the term "lawfully makes available", means that the consent of the owner of the physical object in which the work is embodied is required. This is the case under UK law, where the position is governed by Regulations 16 & 17 of the Copyright and Related Rights Regulations 1996. In relation to the acquisition of the right, Regulation 16(3) provides that "no account shall be taken for this purpose of any unauthorised act" and further, that "...an unauthorised act means an act done without the

² Case C-145/10

consent of the owners of the physical medium in which the work is embodied or on which it is recorded”

We would ask the Review Committee to give this matter its particular attention.

Q. 30 Are any other changes necessary to make CRRA platform-neutral, medium-neutral or technology-neutral?

This is another very significant question for the NGI. The library/archive exemptions at Sections 59-70 CRRA are not sufficiently format or technology neutral. While we are pleased to note that the Consultation Paper proposes a specific amendment to Section 69 CRRA to permit format shifting for archival and preservation purposes, the need is broader. When our library makes a copy of a work available to a researcher for research or private study on foot of one of the exceptions at Sections 61, 62 or 67, or to another library or archive under Sections 64 or 65, it is unclear that the work may be scanned for the purpose and supplied electronically. We suggest that a general provision is needed to make it clear that where the library and archive exceptions, at sections 59-70 CRRA refer to “a copy” that this includes a digital copy.

Q. 32. Is there any evidence that it is necessary to modify remedies (such as by extending criminal sanctions or graduating civil sanctions) to support innovation?

We suggest that there are no effective remedies for online infringement and we cannot see that the position would be improved by the proposals made in the Consultation Paper. We believe that a piece of primary legislation is needed to deal with infringement in the online environment and to amplify and clarify the Statutory Instrument recently adopted to fully implement Article 8(3) of the EU CD. It should provide specific workable procedures and remedies which take account of the legal rights of stakeholders as well as the fundamental rights of users and appropriate limits to the liability of intermediaries. Innovation will be better served by a clear and enforceable set of rules for online dissemination.

Q. 33. Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation.

We suggest that this is certainly the case that these provisions need to be strengthened.

We are concerned that existing protection for technological measures and rights management information is not sufficiently robust to protect visual works placed online. The NGI is making a substantial investment in innovative technology to make works in our collection available to the public in the manner most consistent with our role in providing access to this material, while at the same time observing copyright restrictions where works are in copyright. When works are out of copyright we may make them available online but are still concerned to protect them from degradation, alteration and infringement (where applicable) of NGI copyright in the photography of the works.

- (i) Technological protection measures.

We have already submitted that the legislation, at Sections 370-374 CRRA, has shortcomings, and specifically that:

- there is no prohibition of the act of circumvention,
- the act of circumvention is not actionable at the suit of the right holder
- the act of circumvention is not actionable *per se*, independently of an underlying infringement.

We suggest that an amendment to the legislation might be based on a provision along the lines of the following³:

(a) It shall be deemed to be an infringement of the copyright in a work to remove from the work or to circumvent any rights protection measures which have been applied to the work, without the permission of the copyright owner.

(b) It shall be deemed to be an infringement of the copyright in a work to make available to the public the work, knowing that an act described in sub-section (a) has occurred.

(ii) Rights management information

The position relating to rights management information is even more critical. The stripping of metadata from images is commonplace. It is the practice, for example, of a number of the social media platforms to strip metadata from images provided by users. We believe that it is not generally understood that this is an offence under Section 376 CRRA.

The removal of metadata has a number of problematic effects:

- It results in “orphaning” of the work.
- It constitutes an infringement of the moral right of paternity.
- It exposes the work to on-going infringement.
- It removes valuable information about the provenance of the work often added by cultural institutions by way of metadata when placing works online.

Visual works are truly impoverished when their metadata is removed. Unfortunately the technology to prevent metadata stripping is not sufficiently advanced to effectively prevent it, and so it is all the more important that the legal provisions be effective.

We submit that the legislation is not adequate. While Section 376 provides that the removal of rights management information from a protected work is an offence, this remedy is not an effective one, in that it depends on the bringing of a prosecution by An Garda Síochána. Section 375 provides the same remedy to the person who applies rights management information as a right holder would have in the event of an infringement. The removal of the

³ While we propose a simple manner of strengthening the provisions relating to both technological protection measures and rights management information, we recognise that some qualifications to the provisions would be needed. Our suggestions are merely a starting point. We are advised that there are precedents for a number of different approaches in the legislation of other EU Member States which do not exhibit the shortcomings of the Irish legislation. The US Copyright Code, at Chapter 12, sections 1201-1205 also contains a comprehensive set of effective measures.

rights management information is not actionable at the suit of the right owner, and does not exist independently of an infringement of copyright. There is a variety of ways in which the position could be remedied. We suggest that a provision along the following lines would be effective:

- (a) *It shall be deemed to be an infringement of the copyright in a work to remove or alter rights management information without the authorisation of the rightsowner.*
- (b) *It shall be deemed to be an infringement of the copyright in a work to make available to the public the work knowing that rights management information has been removed from the work.*

We are also concerned to ensure that consent to the removal of metadata should not be secured by way of standard terms and conditions of use buried in dense legal language on internet platforms. In that regard, see our comments in response to Q.54 below. If neither technological protection measures nor rights management are effectively protected, it certainly inhibits innovation which depends upon such protection.

Q. 35. Should the special position for photographs in section 51 (2) CRRA be retained?

Yes, the special position for press photographs in Section 51(2) CRRA should be retained.

Q. 36. If so, should a similar exemption for photographs be provided for in any new copyright exceptions which might be introduced into Irish law on foot of the present Review?

Yes, where we refer to below to instances in which visual works should be treated as exceptions to certain proposals. We believe that it is to Ireland's economic advantage that we do not have a system of private copying levies.

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?

We believe that it is to Ireland's economic advantage that we do not have a system of private copying levies. We are not in favour of the introduction of such a system, but we note that the European Commission is examining the issue as part of the work programme of the current Commission described in its Intellectual Property Strategy, published in May 2011.⁴

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?

⁴ A Single Market for Intellectual Property Rights, 24.5.2011 COM (2011) 287 final

The existing licensing services provided by the Irish collecting societies are problematic in a number of respects. Issues of accountability and transparency of CMOs will hopefully be addressed in the forthcoming EU Proposal for a Directive on collective management. The European Commission also aims to provide conditions for the development of multi-territory licensing in the same instrument. These developments can only be beneficial to licensing in Ireland. However the proposals will need to be implemented within a national framework. They will presumably require some oversight. We note also that it is proposed in the UK to take a lead in Europe in establishing codes of practice for CMOs, without waiting for an outcome to the process in Europe. We submit that we should have an infrastructure in place to accommodate both the European proposals and to consider measures similar to those proposed in the UK. As mentioned at Q. 14 above, we believe that Ireland should have a Copyright Tribunal, and suggest that its remit might incorporate oversight of codes of practice for CMOs.

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?

Another issue which concerns licensing is the extent to which Ireland can provide a system of licensing orphan works. This is of particular interest to the NGI. The NGI is also interested in possible use of extended collective licensing, to enhance available offerings by collecting societies. The current consultation in the UK is examining both of these issues. We would urge the Review Group to recommend close examination of recommendations arising out of that process.

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?

We agree that the mere provision of a link on an internet page should not incur a liability for copyright infringement on the site represented by the link. However we believe that this is already sufficiently established without the need to amend the CRRA. We are fearful that the proposed amendment is overly simplistic. All search engine and directory services depend on linking. However their services are diverse and while some of their activities are copyright-neutral, others are not. We believe that the proposal requires careful examination. We are not in favour of it, as drafted.

Q.48. Does copyright law inhibit the work of innovation intermediaries?

We believe that copyright law ought not to inhibit the work of innovation intermediaries. We are not aware of any significant evidence that it does.

Q. 49. Should there be an exception for photographs in any revised and expanded section 51 (2) CRRA?

The position concerning photographs should remain unchanged.

Q. 54. Does copyright law pose other problems for intermediaries' emerging business models?

In certain respects the reverse is true. We are concerned that it has become the practice of certain internet platforms to bury copyright authorisations and disclaimers in dense legal language in very lengthy terms and conditions of use which are not read or understood by users. We are concerned, for example, at the possibility that such terms and conditions can be used to justify removal of metadata from images. We are concerned also that internet users are unclear as to the extent to which it is possible to block the taking of images from websites by search engines and aggregators, and the subsequent publication of them online either as thumbnails or better resolution images. We believe that internet intermediaries should be required to make more transparent the activities in which they engage in terms of copying material on websites, and search engines should be obliged to provide prominent information on the manner in which their reproduction of information can be blocked by website owners. In such a technical environment we suggest that there is an onus on intermediaries to take positive steps to assist right owners with protection of their works. The development of industry codes of practice for intermediaries dealing with these issues would be a welcome initiative.

Chapter 7 – Users

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

We have reservations about the proposal at (a) for the reason that we find it unclear. The comparable EUCD provision, on which it is based, was designed to facilitate reprography. This provision seems not to be for that purpose. Certain conditions are attached, which we find difficult to understand.

In relation to both proposed exceptions, we draw the attention of the Review Committee to the consultation on copyright currently being conducted in the UK. It is indicated in the Consultation Paper that the UK Government does not plan to introduce an unrestricted private copying exception. It favours a narrow exception permitting copying of legally-owned content for personal use for format shifting, backup and use on different devices, possibly expressly limited to circumstances in which harm to the right holder is minimal. There is no proposal to introduce an exemption for reproductions on paper. It is suggested that this approach would be preferable.

- (c) reproduction or communication for the sole purpose of illustration for education, teaching or scientific research

We are not opposed to the proposed amendment concerning “illustration for education, teaching or scientific research”, but do have difficulty with the general inclusion of “education” in the fair dealing provision – see below.

(e) reporting administrative, parliamentary or judicial proceedings

It is not possible to estimate the effect of this provision without a definition of the term “administrative”.

(g) advertising the exhibition or sale of artistic works,

While we are very much in favour of the proposed addition to Section 94(1), to allow for the making available of an artistic work for the purposes of advertising the public exhibition of the work, we wish to suggest an addition to the proposed amendment, as follows:

“It is not an infringement of the copyright in an artistic work to copy it, or to make it available to the public copies of it for the purpose of advertising the sale or public exhibition of the work, or the inclusion of the work in a publicly accessible archive.”

While it would be a significant benefit to us to be able to use a work to advertise an exhibition, this would not enable us to advertise, for example, the material we hold in the Yeats or other archive collections unless they were the subject of a particular exhibition.

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

We suggest that the blunt inclusion of “education” in the fair dealing exemption as well as in Sections 92, 229, 234, 245 and 329, is too broad. As drafted, all education providers would benefit, including commercial providers, whereas the provision in the EUCD is clearly confined to non-commercial activity. Many enterprises can stretch the description of their services to include some educational element, and could thus come within the protection of the section.

We suggest that any such exception should be confined to “educational establishments” as defined in the CRRA.

Q. 58. Should the education exceptions extend to the (a) provision of distance learning, and the (b) utilisation of work available through the internet?

(a) With regard to the distance learning provision, in order to stay within the ambit of EUCD, the material would have to be communicated to registered students via a closed system with access controls. This should be specified. The exception should also be confined to non-commercial purposes.

(b) We are entirely opposed to the proposal to exempt any “work that is available through the internet” by educational establishments. It is far too broad. The provisions relating to knowledge and the clearly visible notice would be unworkable, in that it would be impossible for either the educational establishment or an aggrieved party to establish after the event that the conditions had been complied with.

We are advised that there this exception falls well outside the international Three-Step Test. Even though the benefit of the exception is confined to educational establishments, the extension of it to all works available through the internet must remove it from the category of “special cases”. Where the EUCD is concerned, there is no apparent basis on which it can be justified.

Q. 61. Should there be a specific exception for non-commercial user-generated content?

This proposed provision is extraordinarily broad. We are advised that it falls outside the parameters of what is permitted by Article 5 EUCD. We understand in any event that the European Commission intends to address the issue of user-generated content as part of its IP Strategy published May 2011⁵. We suggest that it is prudent to await developments in Europe.

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 CRRRA?

We believe the status quo should be retained.

Chapter 8 – Entrepreneurs

Q. 66 Should there be a specialist copyright exception for innovation? In particular, are there examples of business models which could take advantage of any such exception?

As to the specific proposal for a new exception for “innovation”:

- We are advised that this proposal could not comply with the international Three-Step Test. “Innovation” could not be regarded as a “special case”.
- As an exception, it appears outside the limits prescribed by the EUCD.
- As drafted it has the problem that the new use can be defeated *after* the investment has been committed to the creation of the new work. This makes it impractical from a user’s perspective.

Chapter 9 – Heritage Institutions

While we welcome very much a number of the proposals in this chapter, they do not in our opinion sufficiently address the fact that the “library and archive” exceptions at Sections 59-70 CRRRA are in need of radical overhaul. They were based on out-moded provisions of the UK CDPA. The language is not technology-neutral and librarians and archivists are continually in doubt as to how to interpret them in a digital context.

⁵ Op cit. at p. 12

Q. 67 Should there be an exception permitting format-shifting for archival purposes for heritage institutions?

We are very much in favour of the proposal to introduce an exception for format-shifting for archival and preservation purposes. We ask the Review Committee however to propose that the draft provision be extended to include the word “management”. There are a number of internal curatorial purposes which are essential to the proper administration of the collection but which would not be adequately covered by the words “archiving” or “preservation”, nor by the existing provisions of Section 66 CRRA.

This would mean that the proposed Section 69(1)(c) would perhaps read:

(c) The reproduction is made for archival or presentation purposes, or for the purposes of the prudent management of the collection of the heritage institution

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?

We very much welcome this proposal. When read with the proposed amendment to Section 94(1) CRRA, it appears give us the latitude we need in relation to catalogues for exhibitions.

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? and

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?

We welcome these two proposed additions to Section 69 CRRA. We suggest however that it should not be necessary to encumber either of them with the trapping of fair dealing. We see no reason why the display on dedicated terminals should not be a stand-alone provision, as it appears fully sanctioned by Article 5(3)(n) EUCD. The brief display of a work during a public lecture is surely a case of minor importance sanctioned by Article 5(3)(o).

We also submit that it is not necessary to add the proposed sub-section (4) in the proposed draft. A charge might well be made for attendance at a public lecture. It is not clear whether this would render the use commercial.

Q. 71. How, if at all, should legal deposit obligations extend to digital publications?

We are concerned that the proposed new Section 198A relating to digital deposit is impracticably wide. It appears to all works and to any form of digital publication. There is no definition of “publisher”. The NGI publishes a wide range of material, in both digital and analogue formats. It includes images as well as text publications. We would find it impossible to work with the section, as drafted. We suggest that some limiting language is required, perhaps “works placed on the market for sale in digital format”. There should be exclusions, such as artistic works and fixations of performances.

We suggest also that the format should be that in which the publication was published, rather than, as suggested, a format determined by the Board or Authority.

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?

We are in favour of a broad system of licensing of orphan works. We note that on 6 June, the Danish Presidency of the EU announced that agreement has been reached on a revised Proposal for an EU Directive on orphan works. While this has been negotiated, it will be subject to approval by the European Parliament, the Commission and the Council. The Directive will obviously dictate the approach which will need to be taken in Ireland. Meanwhile we are interested in the proposals under consideration in the UK, and urge the Committee to recommend in its report that the recommendations of the UK Consultation be considered for implementation in Ireland, subject of course to the provisions of the EU Directive.

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?

This is another point of particular concern to the NGI. We have some material in the primary collection which qualifies as “orphan works” but considerably more in the NGI Archive which was donated or bequeathed to us and which cannot be used without the permission of the copyright owner. In many instances, despite extensive searching, we cannot locate the copyright heir(s).

While we welcome the approach adopted in the Consultation Paper, we have some concerns about the specific proposal to amend Section 123 for the purpose. These are as follows:

- We believe it would be an error to include “any transfer” in the exception. The ownership of copyright is separate to the ownership of the physical object in which it is embodied. If any transfer of the physical ownership of the work were to carry with it the copyright, it would, for example, pass the copyright on the sale of all original art works.
- In the original Section 123 CRRA it is the definition of the word “fixation” in Section 2 that is the problem (in addition to the fact that its effect is confined to unpublished material). We suggest the following:

123 (a) Where, under a bequest (whether specific or general) a person becomes entitled beneficially or otherwise to a work, the bequest shall be construed as including the copyright in the work, in so far as the person making the bequest was the owner of the copyright at the time of his or her death, unless a contrary intention is indicated in the will or the testator or in a codicil to that will.

(b) Where, under a donation to a heritage institution, the institution becomes entitled, beneficially or otherwise to a work, the donation shall be construed as including the copyright in the work, in so far as the donor was the copyright owner at

the time of making the donation, unless the donor specifies in writing a contrary intention at the time of making the donation.

Q.74. *Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?*

We take a cautious view of this proposal. There is a general view that the potential for these techniques is unclear, and equally the affect they might have on copyright. We note that the UK Consultation Paper refers to unforeseen risks and the need for further research. We would urge the Copyright Review Committee to take the same approach.

Chapter 10 – Fair Use

The NCI is dubious of the value of the introduction in Ireland of a fair use exemption. We believe it is unrealistic to suggest that the Irish copyright regime would benefit from the introduction of a concept that depends so heavily on litigation. We believe however that the question is in any event an academic one, as it is an issue that would have to be determined at European level.

Q84. *Should the post-2000 amendments to CRRRA which are still in force be consolidated into our proposed Bill?*

We would welcome a piece of consolidated legislation.

Q.88. *What have we missed?*

We commend the Review Committee on the comprehensive and detailed nature of the Consultation Paper. We hope that our response will help to inform its final report.