



NUI Galway

**CENTRE *for* DISABILITY
LAW & POLICY**

Submission to Copyright Review Committee in Response to Copyright and Innovation: A Consultation Paper

The Centre for Disability Law and Policy (CDLP), welcomes the opportunity to make this submission on the Consultation Paper produced by the Copyright Review Committee. The CDLP was formally established in 2008 at the National University of Ireland Galway. Its' work is dedicated to producing research that informs national and international disability law reform. The CDLP has developed an expertise in disability law and policy, and welcomes the opportunity to share its insights on innovation and access to content in a disability context.

1. Executive Summary

The Centre for Disability Law and Policy (CDLP) welcomes the opportunity to make a submission in response to the Consultation Paper published by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation. The Terms of Reference for the copyright review committee are focused on perceived barriers to innovation created by the current copyright regime in Ireland. This submission will be primarily focused on the most fundamental barrier of all, lack of access to work protected by copyright. Without the ability to access the work, it is absolutely impossible to build upon what has come before.

The underlying principle of this submission is that access to content is essential for innovation. As Ireland prepares to ratify the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), it must look at copyright legislation in light of the human rights principles articulated in the UNCRPD. Article 30(3) of the UNCRPD requires that state parties “take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”¹ The Copyright Review Committee has an opportunity to make recommendations for legislation that will serve two purposes, increasing innovation by bringing new minds to the innovative drawing board and bringing Irish copyright law in line with the UNCRPD.

This submission will focus on two solution streams; one based in the proposed Copyright Council of Ireland, the other on exceptions and their role in creating access to content for persons with disabilities. This submission will answer questions contained in Appendix 3, about the scope of the proposed Copyright Council of Ireland. Both streams are necessary to alleviate the book famine experienced by disabled users of copyright work. While increasing flexibility in the exception to copyright for persons with disabilities will increase the number of accessible works available, the translation of works into accessible format under that exception will still be primarily accomplished by non-profit agencies working with limited funds. The creation of a market will, hopefully, begin to close the gap left by those non-profits.

The CDLP believes this Council could serve several important functions, including bringing the voice of users with disabilities to the dialogue about copyright, streamlining licensing procedure so that businesses and non-profits interested in engaging in accessible publishing would be able to identify and negotiate with copyright holders and their representatives, and, possibly, serve as a national repository for digital accessible works created under exceptions by authorized bodies. The Council could also engage in European and international

¹ Convention on the Rights of Persons with Disabilities, art. 30(3), G.A. Res 61/106, U.N. Doc. A/RES/61/106. (Jan. 24, 2007) [UNCRPD]

level discussion of digital publishing standards, with an eye towards encouraging a more accessible publishing world.

Clearly defined exceptions are crucial to access for persons with disabilities at the present time. This submission will build upon the draft legislation contained in Appendix 4 of the Consultation Paper, with an eye towards clarity and simplification. The CDLP firmly believes that Ireland must make the most of the exception for persons with disabilities contained in Article 5(3)(b) of the EUCD,² and that in order to comply with the UNCRPD; the exception contained in the CRRA must be more flexible.

This submission focuses primarily on questions 1,7-11, 13, 56d and 62 of Appendix 3 and the Draft Legislation of CRRA Section 104.

2. Introduction

The CDLP believes that access to content is an essential building block for innovation. Accessible publishing for disabled persons has traditionally been accomplished by non-profit organizations working under exceptions to copyright. Organizations involved in translating copyright work into accessible formats are only able to do so for 5%³ of all books published annually in the world's wealthiest nations. This low number is primarily the result of the budget constraints experienced by charitable and non-profit institutions. Translating print material into accessible formats is an expensive and arduous operation, complicated further by copyright concerns. Licensing is difficult, and frequently publishers will not respond to Disabled Persons Organizations' requests for digital master files from which to make an accessible copy of a book.

While it is unlikely that the need for exceptions to copyright to benefit disabled persons will ever fully disappear, the rise of digital technologies has opened up the possibility of engaging disabled persons in the market economy as consumers of copyright material. eBooks represent a significant shift in how the general public consumes material protected by copyright. It also offers the opportunity for accessibility on a level never before experienced by users with disabilities.

A Copyright Council of Ireland could bring the voice of disabled users to the dialogue over copyright as a part of the council itself. It could also streamline the licensing of work protected by copyright, which could in turn make the production of accessible format books simpler and more cost effective. A Copyright Council

² 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. Art. 5(3)(b).

³ World Intellectual Prop. Org. [WIPO], Standing Comm. on Copyright and Related Rights [SCCR], Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons, 19th Sess., SCCR/19/13 (Dec. 14-18, 2009).

could also facilitate a national repository for accessible digital files reducing the need for non-profit entities to reproduce work already accomplished by another organization.

In order to optimize innovation by users with disabilities, Ireland should amend its copyright legislation to expand the exception for users with disabilities, taking full advantage of the flexibilities contained in Article 5(3)(b) of the EUCD. Further, the language of the exception should be simplified to encourage more organizations to take on accessible publishing as a mission. Ireland can, and must, increase annual accessible publishing beyond a measly 5%.

3. A Copyright Council of Ireland

A. Copyright Council as Stakeholders Forum

The proposed Copyright Council of Ireland should be a forum for different stakeholders to have a voice in shaping the future of copyright legislation in Ireland. It is essential to bring the voice of users and intermediaries to the debate over how copyright is protected. The composition of this council should be as broad as possible, and should include disabled persons organizations, such as the National Council for the Blind in Ireland (NCBI). The Council should allow for representatives of everyone affected by copyright legislation in Ireland to adapt to the rapidly changing world of intellectual property.

B. Copyright Council as Standards Setting Organization

Digital technology represents a shift in the way books are produced and marketed. It also means that production of accessible works is simpler than ever before. No longer must each book be painstakingly translated into hardcopy Braille books, or recreated as an analogue audio file. Digital master files from publishers require very little work on the part of organizations that publish accessible versions of copyright work for disabled persons. Refreshable Braille readers working from digital files and navigable digital audio files make accessible publishing much simpler, as long as the original digital file is available. If publishers were to collaborate with accessible publishers, the costs incurred by these non-profit agencies would decline significantly.

In 2007, Judith Sullivan, a consultant on Copyright and Government Affairs for WIPO⁴ presented a study to the Standing Committee on Copyright and Related Rights (SCCR) on Copyright Limitations and Exceptions for the Visually Impaired.⁵ After the conclusion of her study, she offers several recommendations, including alternatives to exceptions that would facilitate publication of accessible works. Those recommendations are excerpted below:

⁴ World Intellectual Property Organization

⁵ WIPO, SCCR, Study on Copyright Limitations and Exceptions for the Visually Impaired, 12, 15th Sess., SCCR/15/17 (Sep. 11-13, 2006) [Sullivan Study].

Alternatives to exceptions to facilitate non-profit accessible format production...

(n) Legislative changes should support and encourage licensing arrangements generally as these can deliver additional benefits such as access to publishers' e-files. However this is more likely to occur if trust and mutual understanding can be developed. Collective licensing societies such as RROs can have a useful role as intermediaries trusted by all stakeholders.

(o) The development of standard permission requests and standard license agreements could help even where there is no collective licensing...⁶

A Copyright Council of Ireland could facilitate these types of licensing agreements as part of its Irish Digital Copyright Exchange. It could create a standard license agreement with the input of stakeholders as members of the Council itself, which would streamline the process of acquiring a license to publish a work not commercially available in an accessible format. It could also foster an environment of trust between the standard format publishers and accessible publishers. That trust, as Ms. Sullivan points out, is essential to the standard format publishers sharing their master e-files.

Ms. Sullivan goes on to recommend that publishers should be encouraged to build new business models with the needs of the disabled community in mind.⁷

The Council would also be able to engage the copyright community abroad on issues of format standardization and regulation. There has been both EU wide and International discussion of accessible publishing formats. These discussions should be fostered to encourage growth of the accessible publishing market in Ireland, and worldwide.

C. Copyright Council Encouraging Market Growth

In its Consultation Paper, the Copyright Review Committee writes “our analysis is directed towards outcomes that can confer a competitive advantage upon the Irish economy.” eBooks will account for more and more of the English language publishing world and Ireland should be a part of this revolution. Irish eBook publishing is nowhere near the mark set by other English language markets.⁸ Irish people are buying eBooks. The Copyright Council could encourage eBook publishing in Ireland by creating simple eBook standards and supporting publishers as they transition into digital format books. The Copyright Council as a standards setting organization could also create an opportunity for previously

⁶ *Id* at p. 135.

⁷ *Id.*

⁸ Irish Publishing News *Friday Comment: Irish Booksellers are Missing Out on Digital Sales.* <http://www.irishpublishingnews.com/tag/market-share/> (last accessed 25/06/2012).

excluded people to enter the market for the first time. Setting standards like the International Digital Publishing Forum's (IDPF) EPUB 3,⁹ which has accessible functions built into the standard would open the door to a universally designed marketplace for copyright protected work.

While Ms. Sullivan was really addressing facilitating non-profit accessible publishing, the massive uptick¹⁰ in eBook publishing since she authored her study makes the idea of for-profit publishing of accessible format books seem more and more possible. There is no reason why Irish publishers could not become world leaders in the creation of a market that does not exclude persons with disabilities. As the population of Ireland ages, more and more people will need alternative formats to access books. If this number is added to persons with print disabilities¹¹ such as blindness or dyslexia it represents a substantial market segment, one that could represent a stream of previously inaccessible revenue.

D. Copyright Council Facilitating Digital Accessible Library

The Copyright Council could, in the process of facilitating accessible publishing regulate that any time an accessible format work is adapted under an exception to copyright, the master file should be registered and "deposited" in a National Accessible Digital Library. This National Accessible Digital Library, perhaps in conjunction with NCBI, could act as custodian to these digital files, which could then be distributed to organizations upon request, reducing the need for reproduction of effort by various organizations involved in accessible publishing.

This National Accessible Digital Library could then become involved with the World Intellectual Property Organization (WIPO) TIGAR initiative¹² as a Trusted Intermediary. The TIGAR initiative is designed to allow for the international transfer of accessible digital files within language groupings, so that an organization in the UK would be able to send the master digital file they have produced to an organization within Ireland. This reduces the need for multiple digital master files, and frees up valuable resources for the production of further titles.

4. Responses to Appendix 3

1. Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this review?

⁹ <http://idpf.org/epub> (last accessed 27/06/2012).

¹⁰ eBooks are projected to account for 17.6% of the global book market in 2016, from 4.6% in 2011. PriceWaterhouseCooper Study *Global Entertainment and Media Outlook 2012-2016* <http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/consumer-and-educational-book-publishing.jhtml> (last accessed 26/6/2012).

¹¹ For the purposes of this submission, the term print disabled will encompass any person who cannot access standard print text material, but who does not need substantive adaptation of the content of the work in order to access it.

¹² <http://www.visionip.org/tigar/en/>

Yes, but these issues must also be framed by human rights concerns. In Ireland, access to content protected by copyright is still far lower than it should be. As Ireland prepares to ratify the UNCRPD, intellectual property law must come in line with the requirement contained in Article 30(3). Right now, the exception in CRRA 104 does not conform to the principles outlined therein.

Further, through promulgating regulation framed in these human rights concerns, the market in digital copyright work could grow to encompass participants who had previously been excluded, due to the difficult nature of creating accessible analogue copies of works. The inclusion of persons with disabilities will grow the share of users able to consume works and contribute economically to the growth of this market. Human rights can spark innovation and economic growth.

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

Yes, the Council has the potential to allow Ireland to keep abreast of a rapidly changing technological world. It would create a forum that could respond to issues as they arise, as well as provide support to both the users and copyright holders.

8. If so, should it be an entirely private entity, or should it be recognized in some way by the state, or should it be a public body?

This should be a public body. There is too much possibility of domination by rights holder organizations for it to be a private body. In order to perform the proposed functions this Council must be impartial and have safeguards in place to protect the voice of users and intermediaries.

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

The Council should be composed of a broad spectrum of stakeholders; it should encompass everyone from the ordinary user to rights-holders, including NGOs and Intermediaries. It should function as a stakeholders platform and a place where competing interests can come together to collaborate on the future of copyright in Ireland, as well as air their grievances. Particularly, the NCBI or similar organizations should be a part of the Council.

10. What should the composition of its board be?

The board should be comprised of representatives of the membership of the council. The board composition should be controlled by statute, and ensure equality of all viewpoints involved in the copyright debate. It is particularly important that users be involved as part of the board. Rights-holders tend to dominate the discussion where copyright is concerned. As above, it is important that there be representatives from the disability community involved at the board

level, In order to effectively legislate to meet the needs of disabled persons, disabled persons must be included in the debate.

11. What should its principal objects and its primary functions be?

The principal object of the Council should be to respond to the rapidly changing world of copyright law and to make recommendations to adapt Irish law to maximize innovation and access to copyright protected work while protecting the rights of authors and innovators. The Council should strive to achieve the balance that is frequently discussed in copyright circles.

The Council should also strive to encourage access for persons with disabilities, through the Digital Copyright Exchange and standards setting for accessible publishing. This should also extend to the international sphere where the Council should engage with the EU and WIPO to discuss norms in digital format. Lastly the Council should work towards creating a National Digital Accessible Library that will protect the rights of copyright holders as well as creating access for persons who must have an alternative formats in order to access copyright protected works.

13. Should the Council include the establishment of an Irish Digital Copyright Exchange?

Yes. The establishment of an Irish Digital Copyright Exchange would serve many purposes, but particularly of interest is the creation of standard licensing agreements. These would be extremely helpful for the publishers of accessible format works. The broad mix of representatives on the Council could ensure that user and rights holders interests were respected. Getting master digital files to accessible publishers in a reasonable time saves time and money, which can then go to the creation of more accessible works.

56.d. Should all of the exceptions permitted by EUCD be incorporated into Irish law including (d) reproduction for persons with disabilities?

Yes. The exception contained in CRRA 104 is more restrictive than is ideal. In order for Ireland to comply with UNCRPD Article 30(3) this exception must be more flexible. In the following section, the we propose legislative language, building upon that contained in the Consultation Paper, which will make use of the flexibilities permitted by EUCD.

62. Should section 2(10) be strengthened by rendering void any term or condition in an agreement that purports to prohibit or restrict an act permitted by CRRA?

Yes. Contracting around exceptions disrupts the balance of copyright, and thus should be against public policy.

5. Copyright Exceptions to Benefit Persons with Disabilities

The draft legislation contained in Appendix is an important first step in towards making full use of the flexibility of EUCD. There are also some issues that should be addressed.

- A. “Reasonable time” is a vague term. For instance, in 104(3)(b), the intent is to make sure that the copy produced under the exception isn’t preempting the copyright owner’s right to benefit from their work, but without a more definite limiting terms, it creates confusion to those using the exception. It would be possible to solve this by creating a definite time limitation in which the copyright owner has the opportunity to publish the work accessibly before the exception may be used. This could be further limited by requiring that no further accessible copies be made if the author decides to offer an accessible version for a reasonable price, to safeguard the interests of the right holder.
- B. “Sufficient acknowledgement” is another vague term that could lead to confusion in how to use the exception. Clearly defining what constitutes sufficient acknowledgement, for instance, author attribution, publisher and date of publication could solve this.
- C. Throughout the draft legislation for Section 104, the beneficiary group is referred to as visually impaired. There is nothing in EUCD that requires the exception be limited to those with blindness or visual impairment, and in fact, it does not specify any type of disability. Persons with disabilities should be able to access work on an equal basis to those without disabilities.

It would be better to define the beneficiary group as persons with print disability. This would broaden the class of persons who may make use of the exception. Print disability can encompass any person who cannot access standard print text material, but who does not need substantive adaptation of the content of the work in order to access it.

It would be better still to leave the class open to any person with a disability that makes a work protected by copyright inaccessible. This would make full use of the EUCD exception and maximize the number of Irish people who are able to access work protected by copyright.

- D. Section 104(A)(10) is confusing since this section deals with multiple copies for persons with a disability. It would be clearer to state that transmission of an accessible copy of a work protected by copyright to a person not of the beneficiary class is considered an infringement. Simply saying the “public” means that organizations that run accessible libraries for persons with disabilities may actually be infringing when they lend their work to their clients.

- E. Section 104(A)(11) defines “designated body” as “an educational establishment” or “a body designated for the purposes of this section by order of the Minister who shall not designate a body unless he or she is satisfied that the body is not conducted for profit.” This limits those who can engage in accessible publishing under the statute to a very small number of organizations.

The language could be changed to “a body designated for the purposes of this section by order of the Minister, who shall not designate a body unless the Minister is satisfied that the body is not engaged in publishing work produced under this section for profit.” This would allow organizations that have other, for-profit, ventures to engage in publishing under the exception. For instance, if Amazon wished to use some of its resources to publish accessible format books under this exception, specifically for persons with disabilities, supplying them on a non-profit basis to persons with disabilities in Ireland.

- F. Section 104(C)(1) is unclear. It would be simpler to write:

1. Section 104A does not apply to the making of an accessible copy in a particular form if -
 - a. A licensing scheme is in force, which licenses the making and distribution of accessible copies of the work in that format
 - b. The scheme is not unreasonably restrictive
 - c. The Council has been notified of the scheme by the licensing body.

- G. In order to show respect to persons with disabilities, the language in section 104(E) should be changed to the following:

(1) For the purposes of sections 104-104(D):

- a. A copy of a work protected by copyright (other than an accessible copy made under section 104(A) or 104(B)) may only be modified so far as is necessary to ensure accessibility equal to that of a person without a disability.
- b. “accessible copy,” in relation to a work protected by copyright, means a copy that provides access to the work on an equal basis as to a person without a disability.
- c. An accessible copy may include facilities for navigating through the work but may not include-
 - i. Changes not necessary to ensure equal access to that work; or
 - ii. Changes that infringe the integrity right provided by section 109.
- d. “disability” means physical, intellectual or psychosocial disability, and includes the meanings ascribed to it in section 2 of the Equal Status Act, 2000 and Section 2 of the Disability Act, 2004.

6. Conclusion

This Consultation paper comes at a moment of great upheaval in the world of intellectual property. The digital revolution has left rights holders nervous, intermediaries are unsure of their legal obligations and users are pushing back against the expansion of copyright. It is the perfect time for the creation of a Copyright Council where these interests can engage each other collaboratively to forge the future of copyright in Ireland. Creating a digital copyright exchange to streamline licensing of copyright protected work will allow interests from various areas of copyright to redirect the costs previously associated with licensing into other ventures.

It is obvious that innovation is crucial in the information economy, and it is obvious that Ireland has the capacity to be a leader in this economy. One of the ways it can do this is to facilitate access for persons with disabilities. It is impossible to innovate if one cannot access what has come before. Further, digital technology opens the market to persons with disabilities when they have previously been excluded.

Lastly, Ireland is preparing to ratify the UNCRPD. In order to do this, it must bring its national legislation in line with the human rights principles articulated by the UNCRPD. The expansion of the copyright exception in section 104 is an important step in this process. A broad exception with a great deal of flexibility is the only way, at the present time, to ensure that intellectual property does not constitute an “unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”¹³ Hopefully, as a market develops, and persons with disabilities become engaged in it, the need for this exception will diminish.

The CDLP looks forward to continued engagement with the Copyright Review Committee as it continues to develop new proposed copyright legislation. We commend the Copyright Review Committee on its responsiveness to the needs of persons with disabilities.

¹³ UNCRPD Article 30(3)