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CONSORTIUM OF NATIONAL & UNIVERSITY LIBRARIES

Submission by CONUL

In response to

Copyright and Innovation: A Consultation Paper

prepared by the

Copyright Review Committee

For the

Department of Jobs, Enterprise and Innovation

INTRODUCTION

The Consortium of National and University Libraries (CONUL) welcomes the opportunity to make a submission to the Copyright Review Committee in response to Copyright and Innovation: A Consultation Paper which they prepared on behalf of the Department of Jobs, Enterprise and Innovation. The paper addresses the important challenge of establishing a legislative framework in Ireland that balances protection of the rights of copyright holders without constructing insurmountable barriers to innovation and creativity in a rapidly evolving technical 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, on one hand, digitization and exposure of their collections, while on the other 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 would like 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.

While recognising the constraints that their terms of reference place on the Copyright Review Committee, CONUL sees this paper as a valuable step towards the establishing a fair and equitable copyright framework in which creativity and innovation can flourish

In its submission CONUL has followed the layout of the Consultation Paper and made responses to issues raised in following chapters

Chapter 3 – Copyright Council of Ireland

Chapter 4 – Rights Holders

Chapter 5 – Collecting Societies

Chapter 7 – Users

Chapter 9 – Heritage Institutions

Chapter 10 – Fair Use

CHAPTER 3 – COPYRIGHT COUNCIL OF IRELAND

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

A Copyright Council is a necessity to further progress the copyright agenda. There needs to be a forum representative of all stakeholders and that forum should modelled on best practice in other countries as cited in Consultation Paper Section 3.2. A Council is the only viable means of bringing the community together to action copyright matters. A Council is also the vehicle to collectively address issues of standard setting and evidence gathering and to co-ordinate solutions towards issues such as orphan works.

(8) If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?

If a Copyright Council is established as a private body this would invariably lead to it being a lobbying group for dominant rights holder and commercial interests. Consumer, user and public policy and service interests need to be represented and protected before a Council could be afforded State recognition. It has to be independent of the constituent commercial interests and to operate to the highest ethical standards in the public interest. It is CONUL's view that the Council be established as a public body in the first instance and CONUL supports the draft statutory provisions in 3.12.

(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? A Copyright Council must be broadly based and must be composed of a balanced membership. The Council needs to emulate the membership framework of analogous bodies in other jurisdictions if it is to evolve into a regulatory and a problem solving role between rights holders, collection agencies and users.

(10) What should the composition of its Board be?

The Council should be composed of members from the interests identified in Consultation Paper Section 2.4: rights holders, collection societies, intermediaries, users, entrepreneurs and both public service and heritage institutions. The office of the Controller needs to be a key member of the Council.

(11) What should its principal objects and its primary function be?

The necessary functions of a Council are:

- act as a consultation body
- set standards
- conduct research
- formulate codes of best practice
- establish methods of permissions management and exchange
- regulate collection societies

- establish arbitration mechanisms

(12) How should it be funded?

Funding should be by a combination of levies on collection societies and a public funding element to ensure independence.

(13) Should the Council include the establishment of an Irish Digital Copyright xchange?

Convergence towards integrated, efficient and cost effective licensing and rights management is a prerequisite for innovation. A Digital Copyright Exchange is one of the essential tools in achieving such an outcome and a statutory Council would provide the logical framework within such a solution would be enabled.

(14) What other practical and legislative changes are necessary to Irish copyright licensing under the CRRA?

The question of future legislative developments should be addressed by a Council insofar as a Council would be a major player in advising Government on legislative renewal.

(15) Should the Council include the establishment of a Copyright Alternative Dispute Resolution service?

An ADR is imperative given that there is no affordable service dispute resolution at present and a Council would be the appropriate to oversee the policy and operational needs of such a service.

(16) How much of the Council/Exchange/ADR Service architecture should be legislatively prescribed?

To the extent as recommended in the draft statutory proposals in CP Section 3.12

(17) 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?

As is evident from the current deficits in regulation and control, the office of the Controller needs to be strengthened significantly to undertake effective action across all the functions in its remit. A new framework, incorporating a public body Council with an ADR service and an exchange with then empower the Controller to deliver solutions to many of the current issues.

(18) Should the statutory licence in S 38 CRRA be amended to cover categories of work other than "sound recordings"*?*

It should be broadened to include all composites of sound and audio performances or recordings.

(19) Furthermore what should the inter-relationship between the Controller and the ADR service be?

The Controller should discharge his responsibilities through the offices of a statutory Council.

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

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

(22) Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?

CONUL is of the opinion while in principle access to lower cost judicial redress is desirable, it carries the risk of multiple case law decisions. A regulated arbitration process is much more suitable for public service, heritage and educational institutions.

As an overarching ethos, CONUL would advocate that it is possible to recognise the importance of fair use in an educational context with respecting the economics rights of copyright owners. CONUL would suggest that the ability of those involved in education to have access to a breadth of material is central to innovation and the perpetuation of a smart economy and a flourishing 'Irish innovation ecosystem' (Consultation Paper p. 6)

(23) Is there any economic evidence that the basic structures of current Irish copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?

From a library and education perspective, Irish copyright law seems to be superseded by the licences signed with licensing agencies. These can be more restrictive than the fair dealing which is afforded through copyright and they also carry a considerable financial burden which can be beyond the reach of some public and educational bodies involved both at second and third level education.

(24) Is there, in particular, any evidence on how current Irish copyright law in fact encourages or discourages innovation and on how changes could encourage innovation?

Greater latitude is needed in terms of platforms such as Academic Virtual Learning Environments. Further clarification as regards 'originality' would also be welcome.

(25) Is there, more specifically, any evidence that copyright law either over- or under-compensates rights holders, especially in the digital environment, thereby stifling innovation either way?

A classic example in this regard is that of region specific DVDs where the user has paid for content but may not be able to access it. Another example is the licensing restrictions imposed on a digital item which may come with a book – the library can lend the book, but the digital content can only be viewed by one individual. Again the content has been paid for, but may not be accessible. This will also have an impact in the area of bespoke 'teaching packs' which can be of central importance to a successful educational environment. The ability to harness digital technology and content (for educational purposes) is invaluable in this regard and should not be impeded.

(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?

Yes, but in such a way that recognises and accommodates the economic rights of the creator. Examples here would include mash-ups or open access data. From a library point of view, the more our data is exposed (linked data, open web catalogues etc.) the more freedom other parties will have to manipulate it and create something new. It would be counter intuitive to impede this, but again recognising the difference between whether or not end use is for commercial or non-commercial gain would be of importance here.

(27) Should the sound track accompanying a film be treated as part of that film?

Ideally the one stop shop model of a Copyright Council and Digital Copyright Exchange (noted earlier) would be of assistance in this area, allowing for efficient and effective use of material, while respecting economic rights.

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

CONUL agrees with the removal of unintended perpetual copyright.

(29) Should the definition of "broadcast" in section 2 CRRA (as amended by section 183(a) of the Broadcasting Act, 2009) be amended to become platform-neutral?

Not applicable

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

It is necessary to strike a balance between language which is sufficiently open as to encompass developments in technology, but sufficiently unambiguous so as to avoid being constantly contested. CONUL's submission has highlighted when and where these changes are necessary, with particular reference to ss.59-70 (library and archive exemptions and s.198 (delivery of certain material).

Fair use should endeavour to transcend technological issues also.

CONUL welcomes the emphasis in the Consultation Paper on ensuring that copyright law be as 'technology-neutral' (p. 6) as possible

(31) Should sections 103 and 251 CRRA be retained in their current form, confined only to cable operators in the strict sense, extended to web-based streaming services, or amended in some other way?

Not applicable

(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?

CONUL supports the idea of 'graduated remedies' as noted in the CRC review (p 38) which would ensure that 'minor or unintentional infringements' (incidental copying for example) would not warrant the same sanction as a more serious, intended infraction.

(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?

CONUL strongly recommend that the Department of Enterprise produce a Regulatory Impact Assessment of the measure.

(34) How can infringements of copyright in photographs be prevented in the first place and properly remedied if they occur?

CONUL asserts that non-commercial, educational based usage is something very different from commercial or exploitative practices in the area of photographs generally and this principle should inform all other questions in this area.

The use of appropriate technologies could be harnessed to facilitate the former while preventing the latter. It is worth noting that EU directive on Orphan Works omits photographs altogether.

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

(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?

(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?

CONUL suggests that the introduction of private copying levies would, if anything stifle innovation.

References

http://www.djei.ie/science/ipr/crc_submissions.htm (assorted)

http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html

http://www.law.berkeley.edu/files/IntroductiontotheCopyrightReformAct.pdf

http://www.irishtimes.com/newspaper/opinion/2012/0201/1224311045064.html

CHAPTER 5 –COLLECTING SOCIETIES

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

(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?

The need to progress towards much improved levels of regulation, accountability and dispute resolution relating to collection agencies in particular is a forceful imperative for a Council to the degree that if a solution does not emerge by consensus consideration should be given to the imposition of a Council funded by contributing stakeholders.

(39) Are there any issues relating to copyrighting licensing and collecting societies which were not addressed in Chapter 2 but which can be resolved by amendments to CRRA?

There needs to be a much greater degree of control and accountability across the full range of licensing issues and the activities of collection societies.

(55) Should the definition of "fair dealing" in section 50(4) and section221(2) CRRA be amended by replacing "means" with "includes"?

Yes, CONUL welcomes this amendment.

i. This would bring Irish law into line with common law developments elsewhere – which would be advantageous, among other things, in developing a common international understanding of 'Fair Dealing' issues.

ii. It is inclusive and facilitates formats which may not be currently available, even if through litigation

iii. CONUL notes recent developments in Canadian law to expand the scope of fair dealing to include new purposes: education, parody or satire.

(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, CONUL welcomes these changes.

These exemptions would modernise and bring Irish law into line with EUCD.

Based on the definition of the 'lawful user' the proposed amendments provide clarity for library staff and users. Questions (a) – (d) are of immediate interest.

(a)This exemption facilitates modern technological processes for copying

The Committee does not favour 'private copying levies' for fair compensation – depending on the mechanism this could be very cumbersome if libraries were to be involved in any way.

(b) The proposal gives clarity and is inclusive of forms other than computer programmes

(c)This exemption is consistent with the need to widen access, engage with modern ideas & technology as well as the 'creative process of exploiting new ideas' [1]

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

Yes. Education, research and private study' is more inclusive and egalitarian. CONUL notes recent developments in Canadian law to expand the scope of fair dealing to include new purposes: education, parody or satire.

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

Yes, CONUL welcomes this extension.

58(a) and (b) Although the business of educational establishments this proposal is consistent with the proposal in Question 57.In addition it clarifies the situation for libraries in educational establishments.

(59) Should broadcasters be able to permit archival recordings to be done by other persons acting on the broadcasters' behalf?

CONUL welcomes this proposal, which would seem to be consistent with other proposals of the committee.

(60) Should the exceptions for social institutions be repealed, retained or extended?

CONUL welcomes an extension to this exception to include broadcasts.

(61) Should there be a specific exception for non-commercial user-generated content?

Yes, CONUL welcomes this exception.

This would remove a barrier to innovation amongst individuals in the university community wishing to generate content for non-commercial purposes.

(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. CONUL welcomes this proposal.

References

[1]INNOVATION IN IRELAND (Department of Enterprise, Trade and Innovation, 2008) p2 (see http://www.djei.ie/publications/science/innovationpolicystatement.pdf).

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

Yes, CONUL asserts the importance of Libraries and other heritage institution being permitted format shift for archival purposes**.**

BL response to Hargreaves[1]:
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 become impossible.

The CRC consultation paper (p.97) suggests that the existing language may be sufficiently technology neutral but CONUL would argue that there should be clear statutory permissions to allow heritage institutions undertake format shifting.

Regarding the CRC proposed inclusion of a new Section 69 (as original section 69 repealed)

(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?

Yes, **CONUL** Libraries exhibiting would wish to be enabled to do this. **(69) Format-shifting by heritage institutions.**

Regarding S69 1(a)

- Many agencies find it appropriate to store multiple digital formats for preservation. One format is used to preserve the content for reuse while another is used to preserve the original layout and presentation. E.g. Jpeg and Tiff. A multi-format approach is more likely to support migration to more robust formats in the future.

  CONUL would argue that the langue in section above should allow for this for this multi-format approach

[1] Response from the British Library to the Independent Review of Intellectual Property and Growth March, 2011

http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=887

Regarding S69 1 (b)

- In certain instances CONUL Libraries may need to "contract out" some of the digitisation/reproduction work to specialist companies – particularly if a work may be fragile or requiring specialist attention.

CONUL would ask that section b is reframed to allow this e.g. b) the heritage institution owns or is a lawful user of the medium or device on which the reproduction is reproduced or **has mandated a third party to undertake this work on their behalf.**

(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?

The Information Society Directive, states in article 5(3)(n) 'use by communication or making available for the purposes of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections'

The argument for the extension of the fair dealing provisions of CRRA includes the fact that such provisions are already provided for in the Information Society Directive, and that the importance of this extension is reflected in the fact that it will facilitate institutions such as the National Gallery in the provision of access to a greater proportion of its collection (as it can only display a specified number of items at any one time), aswell as minimising wear and tear in the handling of fragile items.

(70) Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproduction of an artistic work during a public lecture in a heritage institution?

Section 55 of Copyright 2000 permits the following

—(1) The performance of a literary, dramatic or musical work before an audience limited to persons who are teachers in or pupils in attendance at an educational establishment or other persons directly connected with the activities of that establishment—

And

(2) The playing or showing of a sound recording, film broadcast or cable programme at an educational establishment before an audience referred to in *subsection (1)* for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of copyright.

The inclusion of artistic works in this section, where display is solely for educational purposes as outlined in s.55 seems appropriate, in particular bearing in mind the burden of clearing copyright of each image with the rights holder every time such an image is part of any presentation/lecture.

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

CONUL welcome the proposal by the Copyright Review Committee to insert an additional section into the Copyright and Related Rights Act, 2000 (CRRA) in order to address the legal deposit of Irish digital publications.

Why should legal deposit be obligations be extended to digital publications?

Since the middle of the 16th century legal deposit has been internationally recognised as the means of ensuring the collection, preservation and on-going access to the intellectual, cultural and social published record of a nation. The collections of libraries, from the small to the great, have been a rich source of inspiration to creative and innovative minds throughout the centuries. The explosion in information sharing; immediacy and ubiquity of the internet presents enormous and evolving challenges to countries wishing to maintain a comprehensive record of their nation's intellectual output. The very accessibility and immediacy of the internet has a corollary in the equally rapid transformation or disappearance of content from the Web. national libraries & other legal deposit libraries, academics, commentators, creators, and researchers are very conscious of the reality of a 'digital black hole' opening up in the published record of nations – in fact vast quantities of information have already been lost irrevocably and continue to be lost daily.

It is of particular concern that the published record of government, its departments and agencies are at particular risk of loss.

Legal deposit for non-print formats is now widespread internationally with Ireland lagging behind much of Europe, Canada, New Zealand and other countries in collecting online material. An international survey of national libraries, carried out by the British Library in spring 2011, found that more than 40% of countries had already implemented legislation for archiving on line publications. This figure was predicted to rise to 55% by April 2012.

For Ireland, the proposal to bring forward legislation to extend legal deposit to non-print formats is an affirmation of the importance of the country's digital future. Such legislation will provide for a continuity of heritage with those printed works held in the care of the National Library of Ireland and other legal deposit libraries while recognising the national significance and vulnerability of the Ireland's digital heritage, and so the need to protect it for the enlightenment of generations to come.

Legal deposit legislation is of critical importance to the public good, in order to:

- Ensure that the country's intellectual record is saved for the nation and future generations of researchers
- Prevent a digital 'black hole' in the archive of published output
- Build an archive which underpins Ireland's creativity and competitiveness
- Enable a digital Ireland and ensure digital inclusion

Legislative issues

In the last decade a significant number of countries have introduced legislation to extend legal deposit provisions to digital and other non-print formats. Some countries have adopted the approach of bringing forward specific legislations dealing exclusively with national and legal deposit libraries including Germany, Canada, New Zealand and the UK, which on occasion have unintended consequences such as the potential to create perpetual copyright in works

deposited. Other countries such as France have retained legal deposit within the copyright legislative framework while extending legal deposit to cover non-print formats.

Drafting legislation to provide a legal framework to ensure the collection, description, preservation and continued access to digital content presents challenges not met in the analogue world. In print publishing, terms such as *book', serial issue, published*, are well understood by authors, publishers and librarians, but such terms are either meaningless or so stretched as to have very different meanings in the online environment. The very concept of 'place of publication' which is the cornerstone to determining whether a work is liable for legal deposit in one country as opposed to another has little relevance in the virtual environment

In considering the proposed S.198A CONUL highlights a number of issues that we consider critical to the provision of a legislative framework for e-legal deposit that will be fit for purpose, sustainable into the future and balance the rights of different stakeholder groups. In such a rapidly evolving situation the legal deposit libraries are conscious of the importance in drafting legislation of avoiding wording and definitions that will rapidly date. We welcome the inclusion of provision for ministerial regulation (CRRA S.198A (13)) which contributes to flexibility and future proofing in the proposed legislation.

CONUL recognises that it will require the cooperation of other stakeholders such as publishers and creators in partnership with the legal deposit libraries to secure Ireland's digital heritage. S.198 is silent on the responsibility of stakeholders in relation to the collection, preservation and use of the content collected. We advocate that in drafting S.198A or any resulting Regulations that the nature and extent of these responsibilities is specified.

CONUL has identified the following issues as of specific concern in the drafting of the new section of the CRRA

CRRA S.198A (1 – 2) In the online environment the concept of "*first made available in the State"* is challenging to define in a way that captures the relationship to the Irish state.

(I) The draft Legal Deposit Libraries (Non-print works) Regulations 2013 which is currently under consideration in the UK provides a clear and workable definition of when a work is to be treated as being published within a jurisdiction. The option of a work qualifying under either 23(1)a or 23(1)b of the draft Regulations provides flexibility which will allow UK legal deposit libraries to implement efficient methods of copying from the internet by automating the web harvester process for a high proportion of works.

An online work will be treated as published in in the United Kingdom if

Online work: published in the United Kingdom[2]

23 - (1) Subject to sub-paragraph (2) below a work published online shall be treated as published in the United Kingdom if-

(a) It is made available to the public from a website with a domain name which relates to the United Kingdom or to a place within the United Kingdom; or

(b) It is made available to the public by a person and any of that person's activities in relation to the creation or publication of the work take place in the United Kingdom.

(2) A work published online shall not be treated as published in the United Kingdom if access to the work is denied to persons within the United Kingdom.

[2] UK Draft Statutory Instrument: The Legal Deposit Libraries (Non-print works) Regulations 2013

(3) Where work is published on the internet and the publication of that work or a person publishing it there is connected with the United Kingdom in the manner prescribed in paragraph (1) and (2) above that manner of connection with the United Kingdom is also prescribed for the purposes of Section 10(5)(b) of the 2003 Act."

German legislation provides another definition of territoriality from the S.14 clause 2 of BNDG which is the Act relating to the National Library

"Depositors shall deposit single copies of media works of the kind specified in § 2(1)(b) in accordance with the first sentence of § 16, should any holder of the original right of distribution have their legal domicile, any business premises or their principle residence in Germany."

(II) The legal deposit model in the analogue world places responsibility for depositing or delivering relevant material to the legal deposit library on the publisher. The proposed wording in the draft for S198A (1) describes the publishers' obligation to deliver material to the legal deposit libraries, and while this is a suitable mechanism for collection for some digitally published materials, it is not efficient or possible for all. CONUL advises that the wording of the proposed S198A should provide for delivery (push) of content by publishers but should also clearly mandate the Legal Deposit Libraries to use active collection methods such as web harvesting (pull) of content.

CRRA S.198A (3) – CONUL welcomes the Committee's recognition that it may not be possible (or judged necessary) for the legal deposit libraries to collect and preserve all classes of digital works. We feel that this clause could be of practical help in the transition from the collection and archiving of publications in print format to the collection and archiving of publications in digital formats.

CRRA S. 198A (4) – CONUL welcomes this provision that allows the legal deposit libraries to determine the format to be included in the archive. This provision underpins the long-term preservation of digital publications by mandating the legal deposit libraries to require the deposit of the work in the format most suitable for preservation.

CRRA S.198A (6) **–**We recognise the validity of the intention of Committee in drafting this clause, but feel the wording of the clause relates to the print publication model and illustrates the challenges in finding format neutral language**.**

CRRA S.198A (7 - 8)

i. One of the key aims of legal deposit is to ensure the preservation of an archive of the nation's published works and thus it is important that the copy of the work deposited must be of a quality most suitable for preservation purposes. CONUL welcomes the principle articulated in the clause that the legal deposit libraries should determine the quality and format of the work archived. Preservation of digital materials requires copies to be made, either identical copies or modified copies to allow for changes in format. There may be a necessity to create an exception to intellectual property law to allow for the copying of copyrighted material for this purpose.

ii. While a huge volume of material is open to web crawlers to harvest a significant percentage of material made available via the Web is held behind technical barriers such as pay walls or login/password barrier. CONUL welcomes the clear statement of responsibility on publishers/producers to provide the legal deposit libraries with necessary computer program or any information such as passwords or means of circumventing technical protection barriers to acquiring and accessing this material either through collection (harvesting) or deposit (submission).

iii. In the case of offline digital publications with physical carriers (e.g. dvd. USB key etc.) we advocate that the wording of this section be strengthened to necessitate the delivery an unencumbered freely accessible copy of digital publication for the purposes of long term digital preservation or require the removal of any TPMs present prior to delivery.

iv. Implementation of collection and archiving of digital publications under legal deposit legislation in other countries demonstrates that collection of digital works involves a number of strands which may include but not be restricted to-

- Whole domain harvesting where a snapshot of the web domain (e.g. ".ie") is taken at a fixed point in time and repeated at regular intervals (e.g. annually). This gives a picture in time of the superficial or free web but does not allow for collection of data from the 'deep' or 'protected' web.

- Harvesting of websites: Accepting that websites cannot be harvested comprehensively or that legal deposit libraries may wish to archive some websites in more depth than others then some national libraries identify sites of national importance and harvest them more regularly on a selective basis. An extension of this approach is to harvest websites on a thematic basis e.g. presidential election 2011.

- Harvesting of publications on websites: Individual publications are harvested by the legal deposit library or deposited by publishers, described in the libraries' catalogues, stored and preserved in a digital archive (e.g. individual reports, e-journal parts etc.)

CRRA S.199A (10) – CONUL accepts the proposal that a work be delivered in either print or another format but not in both. We endorse the proposal that the legal deposit libraries should decide the form or format for delivery and consider that this provision will underpin transition from print to digital deposit.

A 198A (11) CONUL strongly endorse the principle laid out in this clause that digital copying is not prohibited under the proposed legislation in that it is not an infringement to reproduce a work that is made available in the State through the internet.

CRRA 198A (12) - A major concern for the legal deposit libraries is the importance of avoiding wording and definitions that will rapidly date any new provisions. In order to provide future proofing, the definition of what an electronic/digital work might be should be broad, flexible and independent of any precise format (e.g. e-book, web-site). Definitions long familiar in print publishing are largely irrelevant in the digital environment, hence the terms *book, map, serial issue, published,* etc. have little applicability in the online world.

The UK Legal Deposit Libraries Act, 2003[3] takes print as the starting point and distinguishes other formats from it

> *"In the case of a work published in a medium other than print, this Act applies to a work of a prescribed description"*

As also does also Canadian legislation[4]

> *"in order to make a publication and its contents that uses a medium other than paper accessible to the Librarian and Archivist, the publisher shall…"*

The French DAVI Act focuses in its definition on content communicated by electronic means rather than format

> *" …also subject to legal deposit are signs, signals, writings, images, sounds or messages of any kind communicated to the public by electronic means"*

These definitions are phrased deliberately in general terms in order to avoid limiting the legislation to specific technologies which may become obsolete in the future.

New Zealand[5] has developed the concept of 'public documents' encompassing both analogue and digital formats and provides pragmatic definitions and interpretations of meanings in relation to both.

The Committee may or may not see a requirement in defining digital publications to distinguish between digital publications with a physical carrier (e.g. dvd, memory stick etc.) and those published online. The Consultation paper on the extension of legal deposit from the Attorney General's Department of Australia notes that "A reason for making a distinction between the two classes of electronic format is that this recognises the difference between materials in a physical form and tailors the deposit requirements accordingly."

As offline digital formats are published via a physical carrier they more closely resemble the physical artefact of the print publication and therefore fit more comfortably into the conditions for print legal deposit. We think it critical in the case of off-line publications that it is made explicit in the legislation that they must be delivered TPM free (as also for online content) in order to ensure access and long-term preservation.

While the articulated objective of extending legal deposit legislation to cover digitally published content is to secure preservation of the Irish national published heritage – intellectual cultural and social. - It is also important to recognise that there may be 'works' that it might not be appropriate to collect, such as-

- a private work that has not been published or made available to the public
- a work that is shared by means of the internet via private network such as an intranet
- a work which contains personal data and is restricted to a defined group of people (e.g. restricted area of Facebook).

Historically many countries have incrementally extended legal deposit to new formats as they emerged – audio, photographic, film- but that has not been the case in Ireland, nor have robust

[3] UK Legal Deposit Libraries Act, 2003
[4] DEPOSIT - NON-PAPER PUBLICATIONS REMISE DE PUBLICATIONS NON DISPONIBLES SUR SUPPORT PAPIER. "Canada – S2, Legal Deposit of Publications Regulations, SOR/2006-337
[5] National Library of New Zealand Act (Te Puna Mātauranga o Aotearoa) Act 200.3, Part4; 29

voluntary schemes been established to collect and preserve this content. With the exception of the provisions of S.199 (not yet commenced) the CRRA focuses on text and does not cover the legal deposit of audio-visual content either as part of a larger work or as primarily an audio-visual work such as audio file or streamed movie on the internet. In the 1990s when CRRA was being formulated, few people could have foreseen the explosion of mixed media content and the widespread inclusion of video clips and other recordings within web pages and other online content. The clear distinction that may have existed over ten years ago between text and image based publications as opposed to an audio and video publication is now more blurred. We advocate that the new legislation includes all material published digitally rather than creating an artificial distinction.

S.199 of CRRA significantly broadened the range of formats (some of which are now obsolete) liable for deposit with the National Library of Ireland and we strongly recommend that the terms of this section are reviewed and updated with a view to early commencement or incorporation into the proposed section 198A of the CRRA.

Other Issues in relation to extending legal deposit obligations to digital formats.

Access

As legal deposit provisions are within the framework of the CRRA 2000, access and use of legal deposit content is governed by copyright and the Act is silent on any specific conditions for the use of born digital content. Consideration should be given as to whether specific provisions should be made within Section 198A for conditions of access or whatever it should be comprehended within an exception (CRRA 59-70).

In the interest of the public good we strongly endorse the principle that freely available websites archived under legal deposit legislation be made freely available online, as the US-based Internet Archive already is. It is in the interest of the public good that the benefits of the collection should be made as widely available as possible, but we also recognise the importance of ensuring that the interests of publishers and other rights holders are respected and their concerns reflected in the legislation.

Discovery

Core metadata is needed for bibliographic records in order to find, identify, select and obtain content. However, functionally rich metadata has an intrinsic value of its own and may also be subject to separate, and potentially different, intellectual property right from the content it describes. Legal deposit libraries would wish to ensure that basic descriptive metadata can be published online so that users may discover the content of the archive; we would therefore recommend that metadata however rich is not considered relevant material in its own right.

Conclusion

Finally, the extension of the legal deposit provisions will present significant challenges to the Irish legal deposit libraries in addressing digital collection, preservation and access responsibilities. Significant investment will be required in a digital archive and preservation management solution to enable expansion of capacity in digital archiving and digital preservation, for not only legal deposit content but also the collection of unpublished born

digital content and the outputs of digitisation programmes of unpublished and published materials. Ireland's documentary heritage is not merely at risk of loss but already a significant gap has appeared in the national digital record which we are unlikely to recover.

We feel it is important that legal deposit is retained within the framework of copyright legislation.

(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?

Orphan Works: Definition and Problem

An orphan work is one which is subject to copyright but whose copyright holders cannot be identified, traced or otherwise located. Users of the information, institutional and private, cannot obtain permission to use these works in ways that might involve copying or distributing the work.

Where uses of copyrighted works are not covered by fair dealing and library exemptions currently in the CRRA, libraries and users who seek to copy, distribute and make other uses of orphan works must to seek permission from the rights holder, this clearly is not possible.

Given the current legislative framework, any use of an orphan work any use of a work that is considered to be 'orphan' runs the risk that a copyright owner may come forward later, and take legal action for unauthorised use of their work.

Works can become orphaned for many reasons; publishers can cease to exist, authors die without a clear ownership trail or authors simply cannot be traced.

It has also been observed that the proliferation in use of new digital technologies may be creating more orphan works than ever before as creators often lack a full understanding of copyright.

The Association of Research Libraries (ARL) has recently sai[6] that it can be assumed that a significant proportion of the collections of academic libraries and heritage/cultural institutions fall into the category of orphan works.

As libraries are increasingly embarking on large-scale digitisation projects and wish to make their resources discoverable and accessible the issue of orphan works is becoming more problematic.

A recent study conducted by John Wilkin of the Haithi Trust[7] for the Council on Library and Information Resources (CLIR) suggests as much as 55% of books held in research libraries are likely to be orphans.

He further found that foreign works and older works are more likely to be orphaned abut that with the growth in publishing over the last century orphan works will remain high into the future.[8]

[6] http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf
[7] http://www.hathitrust.org/
[8] http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html

The Hargreaves Report describes the problem of orphan works as the "starkest failure" of the copyright framework to adapt, stating that the current copyright system is locking away millions of works in this category.

An ARROW study found recently an orphaning rate of 40 per cent in some EU archives.

A recent Research Information Network Report[9] identified copyright restrictions and the orphan works issue as a direct impediment to gaining access to information relevant to their work and thereby to their research output and to innovation.

International Approaches to Orphan Works

EU –The proposal for a Directive of the European Parliament and of the Council on Certain Permitted Users of Orphan Works was introduced in the European Parliament in May 2011.

The Commission's proposal, which takes the form of an EU Directive contains three essential elements:

I. The Directive sets out a framework of rules on how to identify orphan works and requires that the user conduct a "diligent search" in order to find the copyright holder. One mechanism suggested for search is ARROW, the Accessible Registry of Rights Information and Orphan Works.

II. Should the "diligent search" not prove successful, the work shall be recognised as an orphan work. The assumption will then obtain that the status of the work shall then, by virtue of mutual recognition, be valid across the European Union. Ultimately it is hoped that if implemented the Directive will result in an internationally accessible record of all recognised orphan works.

III. The third element aims to define the uses that can be made of works that are designated "orphan" and the conditions associated with such uses.

However, the proposal has met with considerable opposition particularly around the need for libraries and cultural institutions to carry out a diligent search and the extent of such a requirement.

Institutions argue that the effect of such a burdensome obligation may prove a barrier to digitisations, and as a consequence, to innovation.

From the rights holders' perspective the proposal is seen as granting an additional "exemption" to libraries and cultural institutions and this is being vigorously opposed.

UK – The Hargreaves Report[10] published in May 2011 made 10 major recommendations to free up copyright and intellectual copyright laws which "obstruct innovation and economic growth

[9] http://www.rin.ac.uk/our-work/using-and-accessing-information-resources/overcoming-barriers-access-research-information

[10] I. Hargreaves (2011) Digital Opportunity – a review of intellectual property and growth http://www.ipo.gov.uk/ipreview-finalreport.pdf

in the UK". Professor Hargreaves observed 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".

In relation to orphan works the report recommended that UK copyright law be updated to permit access to orphan works where the copyright owner cannot be traced and thereby "release for use the vast treasure trove of copyright works which are effectively unavailable and to which access is in practice barred ".

Among its recommendations Hargreaves specifically recommended that the UK Government should legislate to enable the mass licensing of orphan works through the use of extended collective licensing.

A work should only be treated as an orphan if it cannot be found by search of the databases involved in a proposed Digital Copyright Exchange. It is proposed that the DCE would be a network of interoperable databases providing a common platform for licensing arrangements and diligence searching. Such an exchange would be a "one-stop shop" to facilitate rights clearance.

The Report has been welcomed in terms of its explicit recommendations around orphan works but again concern has been expressed around the diligence searching proving administratively onerous to implement.

US - Congress has explored orphan works legislation. The Shawn Bentley Orphan Works Act of 2008, passed the US Senate but not the House of Representatives. The proposal would have reduced the risk of using orphan works but would have required an onerous search process that would have proved unworkable for users.

It is believed that US legislation in this area is unlikely as any exception to copyright for orphan works is likely to be encumbered by unworkable administrative requirements demanded by rights holder

CONUL Recommendation

In an earlier submission to the Copyright Review Committee CONUL recommended that Irish legislative provisions and licensing solutions need to move towards the proposed framework for permissions management that have been tabled at European level[11].

Nordic countries have made extensive use of extended collective licensing models to enable the digitisation and making available of unique heritage collections with a consequent and significant innovation benefit.

In Ireland the designated cultural and educational institutions should have an exception to enable them to digitise and make available orphan works in order to fulfil preservation and dissemination remits with appropriate provision for withdrawal and/or remedy if the rights holder comes forward.

Following the subsequent request to submit to the exercise CONUL makes an augmented response on the issue of orphan works: CONUL believes that notwithstanding the benefits of establishing a Copyright Council to act in an advisory role and to potentially co-ordinate solutions around orphan works, legislative change is necessary.

[11] 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)

The Australian Copyright Council demonstrates the ability of such an agency to provide education, advice and guidance to rights holders and users. However, they too are advocating legislative reform precisely to provide clarity around exemptions for libraries and cultural institutions and to provide for the establishment of a framework for defining the status and agreeing the uses of orphan works.

CONUL believes that even if the searching and any subsequent licensing of orphan works was devolved to a Copyright Council that legislative change would still be required to establish a framework within which this could happen.

Within the current CRRA it would seem there are legally intractable barriers to creating licensing schemes for orphan works through any agency. Section 45 CRRA provides for the definition of secondary infringing acts where a person infringes the copyright in a work where he or she acts without the licence of the copyright owner. By definition it is not possible to obtain the licence of the owner of an orphan work; therefore any such copies would be infringing copies.

While CONUL believes that any system that is overly regulated will not result in the stimulation of innovation, a balance needs to be struck so that legitimate access to and use of orphan works can be facilitated without imposing requirements that would be administratively cumbersome and counterproductive,

The provision of legislation on orphan works would have the benefit of providing a robust framework to safeguard libraries and cultural institutions against claims of copyright infringement.

Legislation would allow for remedies to be defined for awards in infringement actions where the infringing user can show that a "reasonably diligent" search for the copyright owner was undertaken.

Legislation would by definition provide a level of legal certainty around legitimate use and acceptable due diligence.

From the rights holders' perspective, legislation can provide clear methods of redress through which a rights holder can assert their copyright and thereby end the orphan work status.

In terms of existing library exemptions in the CRRA it could be argued that orphan works are covered by the current legislation in terms of library exemptions and fair dealing, S50, 53, 60-69 however expressly defining uses and exemptions would remove this ambiguity and associated risk. An additional exemption to permit digitisation of and provide access to orphan works would also be required.

There is insufficient clarity around the definition, status and permitted uses for orphan works in Irish Copyright law.

There is insufficient clarity about the definition, status and permitted use of orphan works in Irish Copyright law. The law does not expressly address orphan works.

It has been suggested that libraries and cultural institutions take a risk management approach to dealing with copyright in their use of orphan works, however, many institutions would be reluctant to take this risk.

Searching for copyright owners can be resource and time intensive exercise and frequently the solution is not to proceed rendering this material unused.

CONUL recommends that the legislation be examined with the objective of amending it so that the practical restrictions that impede the use of orphan works would be removed.

(73) Should there be a presumption that where the physical work is donated or bequeathed, the copyright in that work passes with physical work itself, unless the contrary is expressly stated?

There needs to be balance between protecting the interests of rights holders and the public interest.

As this clause refers specifically to heritage institutions, CONUL is of the opinion that this provision would allow works for which no specific conditions of use or property rights have been asserted to come under the responsibility of the holding institution in the management of copyright in the work so that access and research opportunities may be maximised.

(74)Should there be exceptions to enable scientific and other researchers to use modern text and data mining techniques?

Yes, **CONUL** asserts that exceptions should exist which allow for modern text and data mining techniques.

It is acknowledged that such techniques do offer potential to speed up innovation and that the enactment of exceptions which would allow these techniques could remove a potential barrier to innovation.

It is important also to ensure that any such limitation and exceptions of this nature do not subsequently become undermined by contract law.

(75) Should there be related exceptions to permit security assessments?

Yes **CONUL** is in agreement with the inclusion of an exception to permit security assessments.

(76) What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?

Fair Use as a statutory and common law exception to copyright has been variously mooted as 'the fairest of them all' in non-US jurisdictions and regarded in some quarters as superior to the British doctrine of fair dealing, which has been transposed into the legal framework of most former British possessions, including Ireland. Fair Use and Fair Dealing, whilst ideologically similar, are diverse and not obviously transplantable as and between legal jurisdictions. Fair Use was developed in the 19th Century by the US Courts and the Courts accepted that a person could borrow significant parts of an original work provided that the use was 'fair and reasonable' and passed a four prong test viz:-

(1) the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Harper & Row Publishers Inc v Nation Enterprises* the US Supreme Court made clear that the four factors were not to be "treated in isolation, from one another…[but] to be explored, and the results weighed together, in light of the purposes of copyright'[12].

Since the 1800s courts in various jurisdictions have conventionally understood copyright as a system of reward and regulation rather than property as such, and this led the British and American courts to separately develop exceptions to the monopoly of the copyright holder. The articulators of the US doctrine sought to balance the copyright holder's limited monopoly with the wider public interest to the dissemination of information, and whilst the UK courts had a broadly similar purpose when developing fair dealing, different constitutional principles have underpinned the judicial acceptance of exceptions to copyright in the legal systems of the UK and the US. The US doctrine of Fair Use grew in part out of the principle of freedom of speech enshrined in the US constitution, whereas the British constitution never adopted any explicit guarantee to free speech and free speech has not necessarily enjoyed the same level of reverence in the United Kingdom, at least not until the enactment of the British Human Rights Act in 1998[13].

Copyright in the US is explicitly protected in Article 1, Section 8, Clause 8 of the American constitution, which clause defines copyright as a thing to 'to promote the Progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive Right to their respective writings and discoveries'. Historically the US courts interpreted this section liberally and concluded that its purpose was to stimulate the development of the works it protected and not to inhibited progress, thereby encouraging the production of creative works

[12] see Goldstein, Copyright, Patent, Trademark, and Related State Doctrines (New York: Foundation Press, 2002), pp 685–717

[13] Seán O'Donnell 'Fair Use in the UK, Fair Use in the USA … No Future, No Future' in HLJ 2007 7(1) 57

for the public benefit. The Courts justified the exception of fair use on the basis that the interests of the public were primary over the interests of the author when the two were in conflict. In *Harper & Row, Publishers, Inc. v. Nation Enterprises* the US Supreme Court made clear that it regarded copyright law as substantively constitutional, and that the First Amendment did not shield speech that infringes another's copyright. However the Court also said that Copyright was itself an 'engine of free expression' because it 'supplies the economic incentive to create and disseminate ideas'[14]. Inherently, therefore, the US legal position recognises innovation and the right to adapt of copyrighted material towards the creation of new works.

Exceptions to the monopoly of the copyright holder in Ireland are found in the fair dealing provisions of sections 50-51, 221 and 329 of the 2000 Act and they are far more prescribed than the US doctrine of fair use. As noted in the consultation paper the particular drafting of section 50(4) of the Act has limited the ability of the Irish courts to keep pace with developments in other non-US common law jurisdictions in expanding fair dealing. This is a great disadvantage and indeed recent developments in Canada have greatly expanded fair dealing. In the recent CCH case the Canadian Supreme Court appears to have adapted and expanded the doctrine of fair dealing in a manner more attuned to modern needs than the US doctrine of Fair use, one consequence of which was to reverse the standard burden of proof in the British exception of fair dealing from the plaintiff to the defendant, requiring the injured party to show that the defendant's use negatively affected its market[15].

Fair dealing has been widely characterized as restrictive as it is based on an exhaustive list of exceptions, whereas fair use has been seen as a more robust vehicle for users in that it allows any use of a work to be fair provided that it is consistent with the set of factors that aid in the decision making process[16]. However in itself this presents difficulties as the Fair use exception is a broad defence without any clear set boundaries. In Iowa State Research Foundation inc v. American Broadcasting Co. the court emphasized the importance of an examination of the facts presented in each case that seeks to use the fair use defence and apply the four prong fair use test[17]. This has made the law rather uncertain in the US and has led to a rather litigious environment, as every case has had to be considered on its own merits, and the courts and legislature have struggled to find an adequate balance between rights of the copyright holder and the broader public interest in the modern technological environment. Fair use therefore, despite codification in the 1970s, remains very much a fluid and developing doctrine, and one struggling to keep pace with technological change. Hence the transposition and grafting of Fair Use into Irish statute law is fraught with difficulty and some commentators have pointed out that Singapore, in adopting US Fair Use, has cherry picked the US doctrine and demonstrated a reluctance to embrace it fully at the risk of causing undue confusion, as a full adoption presumes that you must transplant US jurisprudence into national law[18]. This also rings true for Ireland and the adoption of a liberal Fair use environment here would probably require a generous shift of emphasis in the Irish courts in regard to the constitutional protection accorded to property. The US constitution, whilst explicitly recognising copyright as a property right, limits its scope.

[14] Lemley and Volokh 'Freedom of Speech and Injunctions in Intellectual Property Cases' in The Duke Law Journal vol.48, November 1998, no. 2

[15] Giuseppina D'Agostino 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' McGill L. J. 309 (2008) at 325

[16] Ibid 314

[17] Stephana Colbert & Oren Griffin 'The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?' in 62 Alb. L. Rev 451

[18] Giuseppina D'Agostino 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' McGill L. J. 309 (2008) at 359

The situation in Ireland is not quite so clear cut and copyright has been implicitly recognised with constitutional protection by virtue of Articles 41 and 43 of the Constitution and therefore attracts a strong presumption in favour of the property holder against infringement and a consequent right to adequate compensation for any loss incurred. Article 43.2 does allow for the delimiting of property rights for 'the exigencies of the common good' however a significant majority of constitutional challenges in regard to property rights have failed on this defence. This has potential to make challenges to the rights of copyright holders under an Irish style fair use defence extremely complex, protracted and expensive and perhaps opens an unwelcome avenue of litigation in Irish copyright law.

The Hargreaves Report in the UK recognised the difficulties of importing foreign legal principles into domestic law and concluded that the adoption of a US Fair Use defence in the UK could bring massive legal uncertainty because of its roots in American case law, and indeed, an American style proliferation of high cost litigation leading to a further round of confusion for suppliers and purchasers of copyright goods'. The UK government has rejected joining with the Irish Government in lobbying the EU to amend EU legislation to adopt fair use on the basis that it would involve 'a very protracted political negotiation, against a highly uncertain legal background'. The recent Gower Review also recommended against amending fair dealing and recommended the continuation of carving out specific exceptions, adding several new exceptions, including parody and format shifting.

The Canadian courts seem to have taken the lead in this and have recently liberally re-interpreted the doctrine of fair dealing in a case directly relevant to the supply of library information. In CCH Canadian Ltd. V Law Society of Upper Canada the Supreme Court of Canada recently concluded that the Library of the Law Society of Upper Canada did not infringe copyright in providing a legal information service to users, and that it's great library request based reproduction services fell squarely within the allowances of fair dealing. At issue were single copies of reported judgments, case summaries, statutes, regulations and text selections reproduced in their access policy providing lawyers and other persons with copies of works to assist them in their work. The legal situation in Canada was much like that pertaining in other common law jurisdictions with exceptions to copyright grounded in a fair dealing approach. The Canadian Copyright, Designs and Patents Act 1988 incorporated fair dealing in Sections 29 and 30 which, much like the Irish provisions, incorporated exceptions to copyright for Research or private study (for a non-commercial purpose), criticism or review and reporting current events, provided the dealing was fair under the Hubbard v. Vosper test and there was sufficient acknowledgement of the source. The Canadian Supreme Court looked again at fair dealing and in adapting it drew from both the US and UK approaches and endorsed factors relevant in future fair dealing cases acknowledging that other unnamed factors could be used to assess the fairness of a dealing and it articulated 6 factors to be considered:-

i. The purpose (and commercial nature of the dealing)

ii. The character of the dealing

iii. The amount of the deal

iv. Alternatives to the dealing

v. The nature of the work

vi. The effect of the dealing on the work including, inter alia, the market[19]

As a result of this judgment some commentators argue that there is now little potential difference between fair dealing and fair use and the real difference between Canada, the UK and US ultimately lies in the policy preoccupations of their respective courts, with Canada's top court alone concerned with championing user rights above all other rights, or at the very least with not championing owner's rights above all others, which has strengthened it but also created uncertainty about its scope[20].

Whether the Irish courts could adopt the Canadian precedent is uncertain, particularly in the light of section 50(4) of the 2000 Act, however whether it is desirable to do so, or introduce a simple replication of the US fair Use provision is another question.

CONUL is unable to express any opinion whether an extension of the exemptions in fair dealing, or the adoption of US style fair use, would be of any useful benefit to the provision of library services in Ireland, other than to comment that fair use appears to offer little certainty, and indeed foster an increasingly litigious environment, resulting in the continual extension of licensing. In itself the adoption of fair use would not be a bad thing, but whether it can be adapted to purpose, considering the constitutional protection accorded to copyright, and the difficulties involved in grafting different legal principles onto Irish law is an open question.

(82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

It has been argued that while a broad fair use doctrine might introduce flexibility into the UK system, an apparent measure of flexibility already exists in the UK, and though judges may be confined to specific exceptions they have exercised a great deal of discretion within these parameters when necessary. If a broader doctrine was introduced, there is always the possibility that the outcome of cases may be incongruent, without specific guidelines[21]. This may indeed hold true as well in Ireland, though the current legislative and constitutional situation in regard to fair dealing currently constrains the Irish courts from extending the boundaries of fair dealing.

From the perspectives of library information supply there can be little objection to the adoption of US style fair use into Irish law. The greatest objection from this sector is that it could create great legal uncertainty, however US universities and Libraries have adapted to the legal uncertainty surrounding fair use by adopting user guidelines or surrendering to voluntary codes. However in jurisdictions with a fair dealing exception the existence of user guidelines has also been vital and in the Canadian CCH case the Supreme Court deemed of great importance, in its expansion of the fair dealing defence, the existence of such guidelines in the Library of the Law Society of Upper Canada . Perhaps there is therefore an imperative upon CONUL Libraries to adopt and agree a model set of user guidelines in relation to copyright use for Irish libraries regardless of any change in the legislative environment.

[19] Ibid 321
[20] Ibid 315
[21] Seán O'Donnell 'Fair Use in the UK, Fair Use in the USA … No Future, No Future' in HLJ 2007 7(1) 57

On a positive note to date no publically funded university or library information service in the US has been sued for breach of copyright and fair use has not been called upon as a defence by this sector. In the early 1970s a number of University libraries drew up a voluntary code called the Classroom Guidelines which sought to give guidance to users within the non-profit educational environment on what constitutes proper use for research and teaching purposes. These guidelines were examined by Congress and approved in a Congress House report on the 1976 Act as demonstrating the 'minimum standards', although they did not form part of the statute[22].

It seems clear, in the US environment at least, that educational uses under the fair use doctrine will be permissible. However it is noteworthy that a case was taken against New York University in the early 1980s which was settled without any decision being reached. Some commentators have pointed out that in the absence of litigation against educational institutions rights holders have tacitly accepted the fair use defence for educational uses, and some universities encourage teachers to rely on the fair use doctrine for one-time or first uses of copyright material. However many university and educational libraries remain fearful and continue to establish best practices in an uncertain legal environment. In 1982, against the background of the New York case, the American Library Association adopted a 'Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve'. This model policy was widely distributed while the lawsuit was pending against New York University. A rival Wisconsin policy was also drawn up, which was endorsed by the US Copyright Office[23]. A number of individual examples of guidelines may be found on the web, including the following:-

1. The American Distance Education Consortium http://www.adec.edu/admin/papers/fair10-17.html
2. Standford University Library **http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-b.html**
3. University of Columbia http://copyright.columbia.edu/copyright/fair-use/what-is-fair-use/

The arrival of electronic resources in the early 1990s has challenged prevailing wisdom, and an ever increasing abundance of technologies with format shifting ability has created much uncertainty, particularly for the library sector. The US courts have met new technologies with inconsistent judgments and in Sony Corp. Of America v. Universal City Studios the US Supreme Court concluded that time shifting was a non-commercial use and fell within the defence of fair use[24]. Recent attempts by internet music pioneers Napster and MP3.com to extend Sony into the internet age have both failed. These cases, and many others, highlight the uncertainty of fair use, especially in the context of new technology and a federal Information Infrastructure Task Force, set up in 1993, to examine public access to electronic information. A sub-Committee of this taskforce published an interim report in 1997 and proposed guidelines on distance education,

[22] Stephana Colbert & Oren Griffin 'The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?' in 62 Alb. L. Rev 440

[23] KD CREWS COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION (UNIVERSITY OF CHICAGO PRESS, 1993) AT 51

[24] Mark Stefik 'Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing' in 12 Berkeley Tech. L.J. 137 (1997) at 8

educational multimedia and visual images[25], however industry partners would not agree to the report.

One of the greatest concerns of the publishing industry and rights holders is that in the absence of copy controls digital libraries could amount to free distribution centres. This is something that has occupied the minds of librarians and in the last 10 years publishers, court decisions and technology have modified the fair use landscape, with publishers now extracting greater profits by developing licensing markets for all copyright works[26]. Advances in technology have enabled publishers to conveniently license materials as well as place restrictions on their use. In the US the copyright Clearance centre has evolved to facilitate the copyright approval process and there are similar developments in Ireland with licensing societies. Therefore licensing and technology have reduced the scope of fair use in the educational setting[27].

On this basis the adoption of fair use in Ireland is questionable, unless something can be done to tackle the strong arm of the collection societies and extending reach of licensing. There can be no objection to it as such, however it is perhaps not quite the panacea to innovation as many might suppose. At the very least CONUL libraries should prepare for it by adopting adequate guidelines, which should perhaps be incorporated into secondary legislation by Ministerial statutory instrument. Fair use would certainly expand the range and potentially the amount of material that could be used in an educational setting and on this basis it is welcome. However consideration should also be made for extending exemptions to profit making educational institutions as well as those not for profit.

(77) (a) What EU law considerations apply?

(b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?

As noted in the consultation document the Dutch government is interested in introducing a fair use doctrine into the legislative framework of the Netherlands, and has confirmed its commitment to initiating a discussion on this matter at European level. The UK government has rejected a joint approach regarding existing EU and domestic law as adequate for purpose. Direct EU2001/29/EC, the European Union Copyright Directive, currently makes no provision for fair use as a defence to copyright infringement. However it does not appear preclude the national law in member states from expanding the circumstances and range of exceptions to copyright. In most member States exceptions for making private copy or other private use, parody, quotation, use of a work for scientific or teaching purposes, news reporting, library privileges, and the administration of justice and public policy needs are provided for.

In Article 6, Paragraph 4 of the Directive it states that 'in the absence of voluntary measures taken by right holders' the Member States should 'ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law ... that the beneficiary has legal access to the protected work or subject-matter concerned'. This seems a rather wide test and sufficient for any changes in legislation proposed.

Other than this CONUL has no comment to make

[25] Ibid 442
[26] Carol Silberberg 'Preserving Educational Fair Use in the Twenty-First Century' in 74 S. Cal. L. Rev. 617 (2001) 617
[27] Ibid 618

(78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?

The proposed legislation is far more complex than the US Act, and it is acknowledged that the courts will play a constructive role in fleshing out an Irish version of fair dealing, which may prove problematic as they attempt to reconcile Irish law with an American model, with a different jurisprudential origin. As to the drafting of the proposed statute, CONUL would not feel able to comment as such.

Specifically as to how this fair use would encourage innovation is difficult to ascertain without looking at the US experience. The Consultation document notes from the Hargreaves report that Fair Use, arguably, 'might provide a legal mechanism that can rule a new technology or application of technology (like shifting music from a CD to a personal computer) as legitimate and not needing to be regulated, so opening the way to a market for products and services which use it'. This is the ideal, however in practical terms it might not prove the case as publishers and copyright holders attempt to find new ways around reformatting and other technologies. Certainly the US courts and Congress have struggled to keep pace with the rate of technological change in an increasingly litigious environment.

Technology has also led to an increasing trend of commercialising material that was formerly freely available to third level institutions under both fair use and fair dealing, allowing publishers to freely place restrictions on conveniently licensed materials. It has been argued that if current licensing trends continue it will eventually eliminate fair use for schools, colleges and universities who cannot afford to pay a fee[28]. Smaller schools increasingly lack the resources to subscribe to licensed works as they are unable to comply with DRM requirements imposed by copyright holders and as a result schools with fewer resources are prohibited from accessing content[29]. In the US the Technology, Education and Copyright Harmonization Act of 2001 (TEACH) promised to update the educational use exemptions in the light of technological developments, but has not delivered. The TEACH was the product of compromise with publishers and has proved unworkable and while it deals with online learning it specifically also stipulated what may be used without permission. An institution must also be accredited and not for profit in order to benefit and the user must employ technological protection measures, which may be costly[30].

Some commentators have described fair use as 'sick' and incapable of keeping pace with the current pace of technological change. CONUL has no comment to make on this. It would broadly welcome the measure into Irish law as another safeguard to copyright exemptions, however whether it can foster a culture of innovation is uncertain, particularly when the introduction of fair use into Ireland might only serve to increase costly litigation. Certainly the courts in Ireland would have to adopt a more open view in regard to the property provisions of the constitution.

[28] Carol Silberberg 'Preserving Educational Fair Use in the Twenty-First Century' in 74 S. Cal. L. Rev. 617 (2001)
[29] Giuseppina D'Agostino 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use' McGill L. J. 309 (2008) at 354
[30] Ibid 354

(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, either subvert the interests of rights holders or accommodate the interests of other parties?

In theory, from a library information perspective, there is nothing in fair use that can subvert the interests of rights holders as such. One of the concerns about digital libraries is that in the absence of copy controls, digital libraries would amount to free distribution centres. This is something that is worrying for academic libraries and it is nearly impossible for libraries to police mass downloading of journal articles or database materials and their free distribution. The fair use guidelines as adapted by US institutions can provide the basis for guidance for users and a well mooted and advertised code is advantageous.

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?

This has been broadly discussed above. Fair Use is demonstrably struggling to keep pace with current technological changes in the US and its enactment into Irish law would not, it is submitted, provide much by way of clarity and indeed could foster a more aggressive approach from the publishing industry in regard to litigation: something the educational sector would not welcome. This is certainly borne out in comments mentioned in the consultation paper that its detractors described it as 'little better than parasitic larceny, allowing a user to take unfair commercial advantage of a rights holder's work'. Nevertheless from the perspective of CONUL and information libraries in general, there can be no objection per se, and we would broadly agree with the assertion by its proponents that it ' is better to be bold than to be timid' in regard to copyright. However the increasing trend of licensing restricts the ability of information libraries to be bold.

Submission compiled on behalf of the Consortium of National and University Libraries by the CONUL Sub-Committee for Copyright and Regulatory Matters

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