

DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

CONSULTATION ON THE REVIEW OF COPYRIGHT AND RELATED RIGHTS ACT 2000

SUBMISSION OF THE NATIONAL LIBRARY OF IRELAND

TO THE COPYRIGHT REVIEW COMMITTEE

14 July 2011



LEGAL DEPOSIT

1. EXECUTIVE SUMMARY

1.1 Legal deposit legislation is an important instrument in national cultural policy. In most countries, it is relied upon to ensure that the published output of the nation is collected and preserved by one or more prescribed institutions so that citizens and researchers, within the country and abroad, are guaranteed permanent access to the intellectual and cultural memory of the nation.

1.2 Technological advances have dramatically altered the publishing environment. Current statutory provision for legal deposit as set out in sections 198 and 199 of the Copyright Act and Related Rights Act, 2000 (“the 2000 Act”) is either untested (section 198) or not yet commenced (section 199) and it is unclear (or at least we are not confident) that either section is sufficient to assure the protection of Ireland’s digital heritage.

1.3 It is essential to the preservation of Ireland’s cultural and intellectual heritage that legal deposit legislation enables the collection and protection of all published information regardless of format.

1.4 For the purpose of this submission the term ‘Digital Content’ comprehends any content made available, including but not limited to e-publications, websites and social media.

1.5 Legislation should be revised to facilitate the continued collection of, and access to, the documentary and intellectual record of the life of Ireland and, in so doing, taking due account of the fact that much content is now digital.

1.6 In so far as is possible, future-proofing of the legal deposit provision against further technological developments should also be a key object of any revision. Therefore, any revision of the provision to maintain and extend legal deposit privilege should be broad enough to enable collection of existing formats while providing for future technological developments.

1.7 The facility to regulate the operational details of deposit by means of secondary legislation is of considerable importance.

1.8 Enabling the National Library of Ireland to capture Digital Content will ensure that Irish researchers and innovators are not disadvantaged by being denied access to the ideas and information comprehended in current (and future) digital output, ideas and information which are critical to fostering creativity and innovation.

1.9 Our ability to preserve and provide access to Digital Content as well as print content will ensure the completeness and comprehensiveness of the national deposit collection and should guarantee permanent access to a research collection of the country’s published material.

1.10 In order to facilitate the preservation of, and persistent access to, published information regardless of format the Library and Archives exemptions of the 2000 Act (sections 59-70) must be amended.

2. CONTEXT

2.1 DIGITAL HERITAGE – CAPTURE, PRESERVATION AND ACCESS

2.1.1 The UNESCO draft charter on *Preservation of the Digital Heritage* (hereafter ‘UNESCO Digital Heritage Charter’) states that ‘resources of information and creative expression are increasingly produced, distributed, accessed and maintained in digital form, creating a new legacy – the digital heritage.’¹

2.1.2 Books, journals, newspapers and all manner of internet publications are available online. In January, Amazon announced that it sells 115 e-books for every 100 print books.² The British Library in its policy document *2020 Vision* estimates that, 75% of all titles worldwide will be published in digital form only, or in both digital and print by 2020.³ A 2009 report by CONUL (Consortium for National and University Libraries) on publishing by State bodies in Ireland found that only 5.4% of respondents issued print-only versions of their publications. In other words, 94.6% of respondents issue annual reports, policy documents, and research reports in print and e-format or e-format only. There are now over 163,000 .IE domain names registered to use Irish web space. Registrations reached a new high at over 4,000 for the month of May 2011.⁴

2.1.3 Access to Digital Content in depository libraries such as the National Library of Ireland can provide legitimate new and innovative uses to which Digital Content can be put, from which innovation benefits can flow. Technological advances allows for the widespread dissemination of Digital Content, increasing participation levels across all strata of society. This of itself can lead to increased levels of digital literacy for the nation and increased levels of interaction with Digital Content in new and creative ways.

2.1.4 The UNESCO Digital Heritage Charter also confirms the importance of use of a legal instrument in capturing this Digital Content stating ‘As a key element of national preservation policy, archive legislation and legal or voluntary deposit in libraries, archives, museums and other public repositories should embrace the digital heritage’.

2.1.5 Digital preservation is expensive and requires specific skills and technical infrastructure. Individual publishers would have difficulties in developing the relevant resources required for long term digital preservation. An International Federation of Library Associations (IFLA) publication states that ‘since publishers have no

¹ <http://unesdoc.unesco.org/images/0013/001311/131178e.pdf>

² See: <http://irishpublishingnews.com/2011/01/28/ebooks-outselling-paperbacks-hardback-at-amazon/>

³ 2020 Vision, The British Library (September 2010). See: <http://www.bl.uk/2020vision>

⁴ See Ireland’s Domain Registry (IEDR) website at: <http://www.domainregistry.ie/index.php/component/content/article/50/273>

economic incentive to develop an expensive infrastructure to preserve electronic material on a long term basis, it is much better to let the deposit library play the role of a last resort source for publications that for economic reasons would otherwise not be preserved'.⁵

2.1.6 The National Library of Ireland should be enabled to preserve Digital Content representing the cultural and intellectual output of the nation that would otherwise be lost, and would furthermore be able to provide access to that content long after the publishers could.

2.2 THE NATIONAL LIBRARY OF IRELAND

2.2.1 The National Library of Ireland (“the Library”) is the national cultural institution charged with collecting ‘library material’ for and on behalf of the State.

2.2.2 The mandate of the Board of the National Library of Ireland is set out in section 12(1) of National Cultural Institutions Act, 1997 (‘Cultural Institutions Act’) as follows:

“The principal functions of the Board of the Library shall be to conserve, restore, maintain and enlarge the library material in the collection of the Library for the benefit of the public and to establish and maintain a record of library material (including material relating to the Irish language) in relation to Ireland and to contribute to the provision of access by members of the public to material relating to other countries.”

2.2.3 Section 12(2) of the Cultural Institutions Act lists a wide range of powers which the Board has been given to enable it perform its functions.

2.2.4 The mission of the Library gives expression to its statutory responsibilities as follows:

“[The mission of the Library is] to collect, preserve, promote and make accessible the documentary and intellectual record of the life of Ireland and to contribute to the provision of access to the larger universe of recorded knowledge.”

2.2.5 For many of its diverse community of users the Library is the only publicly accessible library in which they may consult relevant research material. The Library also collects and preserves its holdings on behalf of a community whose needs can only be anticipated – Library users of the future.

2.3 OPERATION OF LEGAL DEPOSIT IN THE NATIONAL LIBRARY OF IRELAND

2.3.1 Legal deposit is the term used to describe the statutory obligation which requires that any organisation, commercial or public, and any individual producing any type of documentation in multiple copies, must deposit one or more copies with a recognised national institution. It is seen in most countries as an important instrument of national cultural policy and, as a result, most countries rely on a legal instrument of some sort in order to ensure the comprehensiveness of the national deposit collection.

⁵ <http://archive.ifla.org/VII/s1/chap6.htm>

2.3.2 Since 1927, when it was first granted the privilege (in respect of publications issued within the State) legal deposit has been the primary mechanism through which the modern Irish book collection, the modern Irish newspaper collection and the modern Irish serials collection in the National Library have been built.⁶

2.3.3 In common with other national libraries, the National Library of Ireland exercises its legal deposit privilege with the aim of ensuring the continuing preservation of and access to a key aspect of the nation's intellectual and cultural heritage over time.

2.3.4 The intellectual and cultural record of Ireland is increasingly digital and, as a result, much is lost on a daily basis and much else endangered. Unfortunately, much Digital Content has already been lost.⁷

2.3.5 It is not clear, or certainly we are not confident, that current legislation adequately provides for legal deposit of Irish digital heritage. To ensure the preservation of Irish digital heritage, legislative provision for legal deposit must permit the collection, preservation and provision of access to the printed and digital output of the nation, and enable the National Library of Ireland to fulfil its role as a national memory institution.

2.3.6 Enabling the National Library of Ireland to capture Digital Content through legal deposit will ensure that we can continue to collect and provide access to the documentary and intellectual record of the life of Ireland, providing a firm basis for the creative industries to innovate now and in the future.

3. ENSURING THE PRESERVATION OF IRISH DIGITAL HERITAGE

3.1 FORMAT NEUTRAL TERMINOLOGY

3.1.1. The operation of legal deposit in Ireland is centred upon the library materials comprehended by the term 'book'. Section 198 of the 2000 Act provides for the delivery of books, when first published in the State, to the thirteen copyright libraries under various conditions. Section 198(6) defines 'book' as including '*encyclopaedia, newspaper, review, magazine or work published in a series of numbers or parts.....which may subsequently be published.*' Section 198(10) further states that "[for] the purposes of this section, "book" includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, plans, prints or other engravings belonging thereto."

⁶ Under current legal deposit provisions, the Library receives upwards of 17,000 issues of newspapers per annum, over 10,000 single issues of printed periodicals, and approximately 2,000 printed monographs.

⁷ Dame Lynne Brindley, Chief Executive Officer of the British Library, has referred in the past to the 'digital black hole' [into which so much of digital heritage has already disappeared]. (*Guardian* newspaper, Feb 5, 2010). These comments equally apply to the position in Ireland.

3.1.2 Provision for the extension of legal deposit privilege to non-print and other media is set out in section 199 of the 2000 Act. This section, which amended section 65 of the National Cultural Institutions Act, 1997, has not been commenced. The exhaustive list of formats to which the section is intended to apply is problematic. Some of the formats described are already obsolete and others would not normally fall within the ambit of legal deposit.

3.1.3 No definition or understanding of ‘book’ captures the dynamic interactive nature of the web. Digital Content comprehends static information, such as that presented by an e-book or e-journal article, as well as the deposit of dynamic information such as news websites where content can change many times over a 24-hour period. Trends in Digital Content are now moving towards interactive content where consumers can now participate in online Digital Content creation whilst interacting with that content and with each other⁸. This can occur with interactive gaming⁹, blogging and social media sites such as Twitter and FaceBook. Public domain content such as this now constitutes a significant record of the cultural and intellectual output of the nation. Web harvesting activities by national libraries are now commonplace as ‘[an] increasing amount of material [is] created and updated only in electronic form as web content. The obligation to preserve web-content by specially mandated organisations is a matter for legal deposit legislation.’¹⁰

3.1.4 We recommend that the statutory legal deposit provision in Ireland be revised. This would offer an important opportunity to extend legal deposit to reflect the evolving situation. In other countries that have already legislated for the extension of legal deposit, broad terminology has been used to describe the nature of material that they wish to capture. This has a future proofing effect, aiming to ensure, in so far as possible, that future changes in the nature of ‘publishing’ and what constitutes a ‘document’ or similar item will not necessarily require changes in primary legislation. The following international models are worth noting in this regard:

South Africa (Legal Deposit Act, no. 54 of 1997, section 1)

‘any object which is intended to store or convey information in textual, graphic, visual, auditory or other intelligible format ...’

‘any version or edition of a document which is significantly different from that document in respect of its information content, intelligibility or physical presentation, is considered to be a separate document’

Canada (Library and Archives Act, 2004, section 2)

‘any library matter that is made available in multiple copies or at multiple locations ... Publications may be made available through any medium and may be in any form, including printed material, on-line items or recordings’

⁸ See for example *The web is shrinking* <http://allthingsd.com/20110623/the-web-is-shrinking-now-what/>

⁹ Ireland is a significant contributor to the gaming industry.

¹⁰ See *i2010: Digital Libraries High level Expert Group, "Digital Libraries: Recommendations and Challenges for the Future"* p.6

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/hlg_final_report09.pdf

New Zealand (National Library of New Zealand Act, 2003, section 29 (2))

‘For the avoidance of doubt, a public document that has been made available on the Internet is the document at a particular time and, if that document is changed in any respect, it becomes a different public document for the purposes of this part.’

Recommendation

That section 198 of the 2000 Act be amended to include format neutral terminology to facilitate the capture of all published information regardless of format. This is to incorporate Digital Content such as e-book, e-journal etc. and also internet content. That terms such as ‘publisher’, ‘publication’ and ‘published’ be re-defined within the legislation in broader terms to reflect the evolving nature of publishing. Or, as an alternative, that a new provision dealing with the legal deposit of Digital Content be introduced.

3.1.5 The volume of material that could be collected under legal deposit in the digital world is exponential in comparison to print output and is increasing constantly. While the National Library seeks to be enabled to collect all Digital Content, it requires the right to select only that content judged to be of continuing value to the documentary and intellectual output of the nation, in line with agreed criteria including its Collection Development Policy, and subject to on-going review.

Recommendation

That legislation governing the legal deposit of Digital Content should permit the selection of such content by the depository library.

3.2 RECOGNITION OF TECHNOLOGY AS AN INTERFACE

3.2.1 Digital Content presumes an interface between consumer and content. This interface is normally computer software and hardware. Any legislation that allows for the deposit of Digital Content must therefore also allow for the deposit of any hardware or software necessary to interpret that content. This is particularly important in terms of general immediate access but more important in terms of long term access (where computer hardware and software can become obsolete very quickly). Long term access is of major concern to the National Library.

3.2.2 With regard to this potential barrier to preservation it is worth noting the legislative provision in the UK and Canada: UK legal deposit legislation (Legal Deposit Libraries Act 2003, section 6.2.b) provides that regulations may be made by the Secretary of State obliging that, for non-print publications, the creator of a work must deposit ‘with the copy of the work, a copy of any computer program and any information necessary in order to access the work, and a copy of any manual and other material that accompanies the work and is made available to the public’;

Canadian legislation (Library and Archives Act, 2004, section 10.2.b) provides that the Minister may make regulations “[for] any measures that must be taken to make the publications that use a medium other than paper and their contents accessible to the Librarian and Archivist”.

3.3 COST/ENCRYPTION

3.3.1 As with the deposit of print materials cost should not be a barrier to deposit, and nor should any technical tools used to limit access to digital information in the public domain such as encryption tools.

Recommendation

That section 198 be amended to make appropriate provision for the delivery of any hardware or software necessary to the collection and understanding of Digital Content, and permit the depository library to circumvent any other technical barriers pursuant to its legal deposit obligations. Costs associated with the delivery of content, including Digital Content, should not accrue to the depository library.

3.4 PROVISION FOR ENSURING PRESERVATION AND ACCESS

3.4.1 The purpose of any legal deposit provision is to build a national collection of the published documentary and intellectual output of the nation. Effective operation of legal deposit should guarantee to citizens and researchers, within the country and abroad, permanent or persistent access to a research collection of the country’s published material.

3.4.2 Within copyright legislation there are certain exemptions specific to certain prescribed libraries and archives which allow for the making of, and making available of, lawful copies of print content held at the institutions in question. Broadly speaking this allows for the making of copies where permission has been given, or where access to material in copyright is given through exception or fair dealing clauses due to the use to which the material is being put, such as for private study or research.

3.4.3 The National Library of Ireland is the national cultural institution charged with statutory responsibility for preserving Irish publications. Its mandate under section 12(1) of the National Cultural Institutions Act 1997 requires that it establish and maintain a record of library material. Long term preservation of material (with corresponding implicit provision of long term access) is one of our core functions.

3.4.4 We must be enabled to provide access to legal deposit to Digital Content in whatever format. This may require format shifting and the making of multiple copies for preservation purposes.

3.4.5 Exceptions within the 2000 Act (sections 59-70) relating to certain prescribed libraries and archives, provide for preservation copying of print content, and are of particular use in relation to fragile content, exhibition of content, copying for other libraries etc.

3.4.6 It is generally accepted that some digital formats are more secure than others in terms of their ability to preserve information securely for longer. The current legislation must be amended to allow for format shifting for preservation purposes, and the making of multiple copies if necessary for curatorial purposes including for the purposes of preservation. This may mean continual format shifting as newer and safer technologies emerge.¹¹

Recommendation

That amendments to sections 59-70 of the 2000 Act incorporate format neutral terminology and take account of the need to preserve all content regardless of format, and preserve it in such a way that facilitates long term access and long term preservation, in line with emerging best practice, and in keeping with rights holders requirements. These amendments must refer to the need to format shift material for preservation and access, and the need for multiple copies if necessary.

3.4.7 Implicit in content use within the cultural and education fields is the understanding that this access to content has the potential to lead to the use/re-use of content for creative purposes and potential opportunities to innovate. The findings of a recent UK report on *Digital Opportunity* are worth reviewing in this regard including a specific example which highlights the significance of emerging content interrogation techniques for the purposes of innovative research.¹²

Recommendation

That an additional exception be included to permit use of any new and emerging content interrogation techniques where end use is of a non-commercial basis.

4. SUMMARY OF LEGAL DEPOSIT RECOMMENDATIONS

4.1 That section 198 of the 2000 Act be amended to include format neutral terminology to facilitate the capture of all published information regardless of format. This is to incorporate Digital Content such as e-book, e-journal etc. and also internet content. That terms such as ‘publisher’, ‘publication’ and ‘published’ be re-defined within the legislation in broader terms to reflect the evolving nature of publishing. Or, as an alternative, that a new provision dealing with the legal deposit of Digital Content, incorporating the above recommendations, be introduced.

4.2 That legislation governing the legal deposit of Digital Content should permit the selection of such content by the depository library.

4.3 That section 198 make appropriate provision for the delivery of any hardware or software necessary to the collection and understanding of Digital Content, and allow

¹¹ UNESCO article 5 ‘Long term preservation of digital heritage begins with the design of reliable systems and procedures which will produce authentic and stable digital objects’

¹² *Digital Opportunity, A Review of Intellectual Property and Growth*. An independent review by Professor Ian Hargreaves. (May 2011). See <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

for the circumvention of any other technical barriers to the legal deposit of Digital Content. Costs associated with the delivery of content, including Digital Content, should not accrue to the depository library.

4.4 That amendments to sections 59-70 of the 2000 Act incorporate format neutral terminology and take account of the need to preserve all content regardless of format, and preserve it in such a way that facilitates long term access and long term preservation, in line with emerging best practice, and in keeping with rights holders requirements. These amendments must refer to the need to format shift material for preservation and access, and the need for multiple copies if necessary

4.5 That an additional exception be included to permit use of any new and emerging content interrogation techniques where end use is of a non-commercial basis.

