Consultation and Innovation: a consultation paper
by the Copyright Review Committee

with invitation to respond to issues identified
and to specific questions

Joint Response

by the
British & Irish Association of Law Librarians (BIALL)
Irish Group
Copyright sub-committee

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In July 2011, two separate submissions were sent by an **Ad Hoc Group of Concerned Librarians on Copyright-Related Issues** (drafted by Mary Doyle) and by a Copyright sub-committee of the **British & Irish Association of Law Librarians (BIALL) Irish Group** (drafted by Jennefer Aston).

Following the publication of the Copyright and Innovation consultation paper, with its invitation to respond to particular issues and specific questions, those two groups have drafted this joint response.

The numbers in brackets in the following pages are the Question numbers from the Consultation Paper.

(3) Should any amendments to CRRA arising out of this Review be included in a single piece of legislation consolidating all of the post-2000 amendments to CRRA?

Response: Yes

(4) Is the classification of the submissions into six categories – (i) rights-holders; (ii) collection societies; (iii) intermediaries; (iv) users; (v) entrepreneurs; and (vi) heritage institutions – appropriate?

Response: Yes

(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?

Response: It should be more broadly based but in practise we think it would be difficult to engage end users in the process to a meaningful extent. That being so, it would be extremely important that no particular interested group become dominant on the Council, and there be proper regulation of collecting societies.

(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?

Response: Yes. Recent developments (Infopaq case) seem to suggest that providing access to information through indexing, citing and linking could amount to an infringement of copyright, and this could seriously hamper all forms of research and innovation. See response below under Questions 46 and 47.

(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?

Response: Yes, in the digital environment there is a noticeable lack of end-user exemptions analogous to the accepted copyright exemptions to allow innovators and other researchers / information-users to use content beyond those uses permitted by expensive and restrictive licences. Copyright law strikes a balance between protecting the rights holder and permitting exceptions to that monopoly in order to foster further use, research and

innovation. However, there is uncertainty about the extent to which copyright principles apply to digital content made available under contractual licence.

As more content is marketed in digital format, sometimes exclusively so, contract terms restrict the use of the content (who may read, how much may be downloaded and for how long, to whom it may be displayed, the duration of access etc.). These terms are imposed in a marketplace in which the vendor usually enjoys a copyright-related monopoly over the service, but without the checks and balances of copyright. The terms are often extremely restrictive, and subject to confidentiality clauses. Prices reflect corporate subscriptions, but with use often restricted to a single user (in some cases a journal that formerly appeared as loose parts with later cumulating bound volume has changed to online updates plus bound volume, but with access to the online version being restricted to one person, whereas the loose parts could be read by anyone permitted by the library to use it).

S.2(10) of the CRRA 2000 includes a provision that any contractual term that purports to limit the exemptions given under the Act is void. However, it is far from clear to what extent this could impinge upon contractual terms in a licence for digital access; nor is it clear how copyright exemptions that are clear in the context of hard-copy can be translated into the digital environment.

Recommendation
A similar provision to s.2(10) is required for the digital environment, to ensure that certain limited uses of material obtained legally in digital format are permitted.

(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?

Response: Such a system is inherently unfair and arbitrary and taxes even those who wish to store their own material.

(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?

Response: We are not convinced that a Council would be the best body to regulate licensing and collecting societies, or to resolve disputes (see Q.39 below).

An affordable and convenient mechanism of dispute resolution generally is required (in some cases perhaps Alternative Dispute Resolution or resort to the Circuit Court). For example, the CRRA 2000 provides that where a Technological Protection Measure (TPM) blocks the lawful use of material,

the TPM may be circumvented. However, in the absence of the technological know-how to achieve this, an avenue to have this carried out, other than recourse to the High Court, is needed.

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

Response: In our previous submission we referred to concerns with the lack of regulation of licensing agencies and problems encountered, without going into a great deal of detail. We would now like to do so as, in our view, the proposed Copyright Council of Ireland would not be the appropriate means to deal with these problems, though a Council might serve some useful purposes. The Copyright Review Committee in its recent consultation paper stressed the lack of real evidence presented to underpin arguments. We hope to rectify this now.

All reference to licensing agencies in this submission refer to those agencies covering publications as that is the area where we have encountered these problems. The problems referred to are problems that have been encountered by organisations outside the public library and educational sectors, though some of the issues may be relevant to those sectors also.

The problems with the current legislation in relation to licensing agencies and the solutions proposed in the Consultation paper are threefold:

1There is insufficient regulation in the legislation governing the activities of the licensing agencies.
2The regulations that are laid down (registration and lodgement of schemes) are not, in our view, appropriate to current publishing practices.
3In our view a Copyright Council without powers granted by legislation and with a probable strong membership bias in favour of rights holders would not be able to deal with these issues fairly.

It is particularly important that these problems be addressed as, like the rights holders, the licensing agencies are effectively in a monopoly position.

Problems

A. Registration of schemes

In our view while schemes as such may be suitable for some organisations, they are not appropriate for current publishing practices, especially the lodgement of fixed, detailed schemes that include pre-set charges. For this reason we are concerned that the concept of a scheme or schemes is enshrined in the legislation, especially in relation to educational exemptions,

which do not apply if there is a scheme in existence, whether or not that scheme reflects the need of the educational institution.

While it is not very clear from the actual wording of the licences on offer, background documentation would suggest they are designed for organisations engaging in making multiple copies of extracts, rather than providing a licence to make a single copy of a single article that exceeds an exemption in the legislation e.g. more issues from a journal volume than is permitted. This is reflected in the level of charges, with the result that the schemes are not usually viable for small scale multiple copying and do not provide any mechanism for one-off non-multiple copying.

Furthermore the prices incorporated in the schemes have not changed in a manner that would reflect the payments and licences many organisations now have direct with publishers for organisation-wide digital access to publications they have subscribed to. As these payments and licences will generally cover the core subject publications required by an organisation there is now far less need for multiple copying for which a licence from a licensing agency would be required.

Recent discussions with the office of the Controller in relation to these schemes confirmed the impression that under the current legislation the Controller has very little power in relation to the licensing agencies, including the schemes. The agencies have to send the information required to the Controller and it is then held on a register. The Controller has no power except to accept the information. He cannot comment on the rightness or wrongness of the scheme or the scale of charges. The Controller cannot refuse to issue or renew the registration unless the agency doesn't supply the prescribed information in time. However, the fact that the Controller accepts the information does not mean the scheme has the Controller's imprimatur. We therefore think the licensing agencies should be registered but not specific schemes.

Recommendation:
Licensing agencies should be required to register but the concept of schemes should not be embedded in the legislation, so that licences could be more easily negotiated on the basis of what is actually required and is billed accordingly.

This would have the advantage that
- The end-user would only pay for material not covered by legislation, licences etc.
- Money collected could more easily be properly assigned to the rights holders.

C. Publisher mandates

There are also several problems in relation to publications covered by licensing agencies.

Taking as an example the Irish Copyright Licensing Agency:

Except in the case of the USA there is no list of publishers that have mandated the licensing agencies to collect money on their behalf.

There is also no list of the countries with which the ICLA has reciprocal arrangements on its website, though this may be supplied as part of a licensing contract.

The ICLA website lists 3 categories

- Irish excluded publishers or publications
- UK excluded publishers or publications
- US participating publishers.

It also states that it has reciprocal arrangements with other countries but does not list these countries.

Even these lists are not reliable. The Irish excluded list does not include any public service organisations even though we know at least some of these have *not* mandated the ICLA, as stated by the ICLA itself in letters to the organisations in question.

In 2008 there seems to have been a concerted effort to target public service organisations inviting them to take out a licence. In the same year a number of public service organisations received unsolicited cheques for money collected by licensing agencies in Ireland and abroad for copies made of material published by the organisation. In some cases the accompanying letter stated:

"We note that you have not yet signed a mandate with us. We are enclosing a copy of our publisher mandate and digital extension together with an EFT form to facilitate electronic payments. We would be grateful if you could sign and return these as soon as possible to facilitate future royalty payments."

Many of these public sector organisations comply with the regulations on the Re-Use of Public Sector Information or otherwise encourage the re-use without charge of the information that they produce. To the best of our knowledge many of these organisations did not cash the cheques and did not sign a mandate, while at least one requested that any money collected should be returned to those from whom it had been collected. This is not reflected in the list of excluded publishers on the ICLA website.

When these issues were discussed with the Office of the Controller it was confirmed that the provisions in the legislation are not as extensive, detailed or prescriptive as would allow the Controller to regulate the agencies' activities.

The UK CLA website is a little more informative, though it also fails to list all the relevant publishers that have mandated it to collect on their behalf. It does at least provide a list of all the countries with which it has reciprocal arrangements. These are likely to be the same countries with which the ICLA has reciprocal arrangements and there are many omissions, which would again suggest that the information provided by the ICLA is misleading or, at the very least, incomplete.

We would like to stress that we are using the ICLA and NLI merely as examples to illustrate some of the problems. The problems discussed are not necessarily exclusive to those licensing agencies.

Recommendation:

Licensing Agencies should be required to list all the rights holders that have actually **mandated** them to collect money. It should be an offence for a Licensing Body to collect money on behalf of a rights holder that has not mandated it to do so.

Controller

In our view the Controller, as an independent body, is the appropriate body to regulate the activities of licensing agencies.

Recommendation:

The Controller should be the regulator of the licensing agencies and should be given the necessary powers to properly regulate them. The legislation should specify certain requirements to be met, to include the following:

- Licensing agencies should be required to register with the Controller as at present, but should not be required to register specific schemes.
- The licensing agencies should be required to renew their registration annually, subject to their having acted acceptably (including not having supplied misleading information when approaching potential customers).
- Licensing agencies should be required to list all publishers or rights holders whether in Ireland or in countries with which they have a reciprocal agreement that have signed a mandate to collect money on their behalf.
- It should be an offence for licensing agencies to collect money they have not been mandated to collect.
- Licensing agencies should not have exclusive rights, in particular, rights holders should be able to maintain their rights simultaneously with the licensing agencies.
- Licensing agencies should be required to include comprehensive details of

existing exemptions relevant to the material for which they are offering a licence in simple terms and absolute clarity in all information documentation and, in particular, at time of first approach or renewal of licences.
- Details of registered licensing agencies should be made available on the website of the Controller.
- There should be a transparent system governing the duty of licensing agencies to pass on money collected to the parties on whose behalf it was collected.

The Controller should be given all necessary powers to regulate the activities of the licensing agencies, including the power to refuse registration or renewal of registration to any agency in breach of the regulations.

It is unclear how payments to rights holders can be fairly and transparently assigned.
There seem to be 2 ways of doing this currently:
- All copying for a specific period is recorded by the organisation;
- All copying for a specific period is monitored by survey.

In either case this would not be an accurate list of what is copied by the organisation.

It could depend for example
- In the educational sector on which part of the course is being studied at that particular time;
- The sudden rapid spread of an infectious disease;
- Any topic that is of particular interest during that period.

All of these could generate a high demand for copying of relevant material during that period that would not be used again in that year, or perhaps not even for several years. It would exclude other material that might be heavily used at other times.

In a pre-CRRA business pack there is a note which suggests flexibility in relation to charges (an accompanying sheet).
"*Sampling to determine copy pages*
The licence fee is determined initially by a set rate per employee of the company. Once a sampling system has been established within your company's industry, this fee is revised according to the results of a survey of your industry's copying practices".
Note, this relates not to your organisation but your industry's average.

Recording all copying liable to a charge would obviously be the best method (i.e. all copying, not just during a specific period). This would be relatively easy for a library to do. However it would be more difficult in a non-library setting. This is not without problems, but it would ensure that the correct rights holder received payment for use of their work.

Titles, Headlines, Contents Pages, Linking to original source, Opening online works on screen

(45) Is there any good reason why a link to copyright material, of itself without more, ought to constitute either a primary or a secondary infringement of that copyright?

Response: No. Merely drawing attention to copyright material should not be viewed as a copyright infringement. In addition, if the material is available online it is presumably intended to be used. If it is to be used by a restricted audience it can be password protected. In the case of newspapers and indeed many other websites the more traffic that is directed to the website the greater the potential for advertising revenue, and other economic advantages. Treating indexing, citing of titles and contents, and linking to content, as potential copyright infringements could represent one of the greatest threats to all forms of research and innovation.

(46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?

Response: Yes.

(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting?

Response: Yes, a stand-alone provision.

Furthermore there should be a standalone provision that provides an exception for titles, headlines, and contents pages. Without such an exception it will be impossible to usefully index material, thus preventing access to valuable material required to foster innovation. In our view such an exemption would not unreasonably prejudice the owner of the copyright. Indeed, as indicated above, ~~it~~ it would benefit the rights holder.

In view of the decision in the Infopaq case we would ask the Committee to recommend to the government that it lobby the relevant international authorities with a view to amending the EU Directive accordingly.

(55) Should the definition of “fair dealing” in section 50(4) and section 221(2) CRRA be amended by replacing “means” with “includes”?

Response: Yes

(56) Should all of the exceptions permitted by EUCD be incorporated In to 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?

Response: Yes. All these exceptions should be available to Irish users. They were agreed after lobbying by rights holders' groups and following rigorous discussion and consideration.

Contracts limiting exemptions

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

Response: Yes
As the use of digital material, in particular, is often subject to licence terms, which also make the licence subject to the jurisdiction of the publisher rather than the end user, the supplier can circumvent section 2(10).

Recommendation
Extend 2(10) as follows or other appropriate wording:

(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.
"Insofar as any user of a work in the territory of this State [/ or the EU], or of any work made available for sale in the territory of this State [/ or the EU], may be contractually bound by the law of a jurisdiction outside of the territory of this State [/ or EU], this shall not have the effect of removing the effect of this subsection"

We would ask the Committee to recommend to the government that it lobby the relevant international authorities with a view to amending the EU Directive to include a section similar to 2(10) which would include our suggested amendment to extend it to the territory of the EU.

See also the answer above to Question **25** on the desirability of having a provision analogous to s.2(10) for contracts governing access to digital content.

We would suggest recommending to the government that it lobby at international level to have relevant international conventions amended to include an article on invalidity of contractual provisions that remove lawful exemptions, similar to that provided in the Montreal Convention on air carrier liability. This would greatly simplify the problem of trying to find appropriate wording where both parties are not governed by the law of our jurisdiction.

Article 26 of the Montreal Convention:
"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention."

A similar Article in Berne, etc would solve the problem of contracts being used to override exemptions.

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

Response: Yes, but it should apply, as suggested below, to all owners of legally acquired copyright works. See below at Question **86**.

(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?

Response: Yes. It may be that the current wording "compiling or preparing a catalogue" already permits the publication of a copy in a catalogue.

(69) Should the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collection of a heritage institution?

Response: Yes

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

Response: Yes

(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?

Response: We support the EBLIDA position and the principles outlined in the Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works.

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

Response: Yes, though only where donated / bequeathed to a heritage institution.
However, the presumed transfer of copyright should not be exclusive, unless explicitly stated.

A non-exclusive right to copy, display, etc. should be presumed to be passed to a receiving heritage institution, e.g., where photographs are donated to a museum. However, that right should not be exclusive (e.g., it should not deprive the original rights holder of the right to use the item). It is also questionable whether this presumption should apply to private gifts (e.g. where an individual gives a photographic print to another individual, it would be unfair if that gift resulted in a presumption that the recipient received the exclusive copyright, and in such non-heritage donations it may be unfair to presume *any* passing of copyright).

Should the presumption apply only to gifts and bequests? Might it not be desirable also in cases of sale to heritage institutions (e.g. where a collection of photos is sold to a museum)?

84 Should the post-2000 amendments to CRRA which are still in force be consolidated into our proposed Bill?

Response: Yes

(86) What have we missed?

Response:

A. Implied permission to copy:
Under fair dealing provisions add:
(...) If a right holder gives permission to make a copy of a work, whether that permission is explicit or implied, the making of a copy of that material shall not infringe any copyright in the work, provided it is to an extent and for a purpose that will not unreasonably prejudice the interests of the owner of the copyright.
For the purpose of this section, implied permission shall include a print or download option on a website that is not made subject to specific conditions.

B. First ownership of copyright (employer or commissioner)

Many organisations do not own the copyright in reports and books they have commissioned and for which they have paid an often substantial fee, as it does not occur to them to build it into the contract.

Recommendation
Expand as follows:

23.-(1) The author of a work shall be the first owner of the copyright unless -

(*a*) the work is made by an employee in the course of employment,
in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary,

( ) the work is commissioned in return for a fee, in which case the person or organisation commissioning the work is the first owner of any copyright in the work, subject to any agreement to the contrary.

This would still allow professional photographers or writers to explicitly retain copyright if this was important to them.

C. Length of Protection

We would like to raise the question of the length of protection afforded to rights holders. We note we are not alone in querying this issue, as several earlier submissions also referred to it.

In general we would suggest a conservative, rather than an extended, period of protection beyond the death of the author. The period has already been extended from 50 years to 70, and this is no longer benefiting merely close family members, but more distant relatives or, more likely, corporate rights holders.

It is anomalous that scientific publications should be protected for such a long period and that protection should be granted for a period longer than that provided by patent protection. Quite apart from the fact that the research is protected for a much longer period than the product of the research, in many cases the research has been publicly funded.

We realise that this is an issue which the Review Committee will not be in a position to propose for inclusion in any immediate revision of the CRRA as the length of protection afforded by copyright to rights holder is subject to international conventions. We would ask the Committee to consider recommending to the government that it lobby the relevant international authorities with a view to amending the length of protection.

D. Format shifting – general

We are very pleased to see a proposal for format-shifting in Question 67 (archiving in heritage institutions) and proposed s.106B in Appendix 4 (private and domestic use by lawful user)

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106B. ***Format-shifting for private use.***

(1) It is not an infringement of the rights conferred by this Part if-
(a) the owner or lawful user of a work makes or causes to be made a reproduction of that work in a different format,
(b) he or she owns or is a lawful user of the medium or device on which the reproduction is reproduced,
(c) the reproduction is made for his or her private and domestic use, and
(d) the reproduction is made for purposes that are neither directly nor indirectly commercial.

However we do not think format-shifting should be restricted to heritage archiving or the lawful owner's private and domestic use, unless the Committee envisages that “private” would incorporate the private use of an organisation that is the lawful owner of the work. However, the use of “his or her” would suggest that this is not the case, as would the wording of Article 5(2)(b) EUCD. As pointed out in our earlier submissions it is the content not the format that is protected by copyright and any lawful user should be entitled to reproduce the work in a different format for private use to protect against obsolescence. If the Committee is of the opinion that such an interpretation of “private” would not be permitted by Article 5(2)(b) EUCD we would ask the Committee to recommend to the government that it lobby the relevant international authorities with a view to amending the article

accordingly.

Recommendation
If necessary recommend to the government that it lobby the relevant international authorities with a view to amending the article accordingly.

E. Removal of obligation on Prescribed Libraries and Archives under SI.427 /2000 to charge for copies made under certain exemptions.

The CRRA 2000 provides a number of exemptions under which prescribed libraries and archives may make copies. These are subject to a number of conditions, elaborated in Statutory Instrument 427 of 2000. However, that S.I. also introduced a new condition, not referred to at all in the parent Act, namely an obligation on the library or archive to charge for copies made under these exemptions. In many cases this would cause unnecessary bureaucratic complications (the library of an organisation such as a government department charging another part of the same body for copies) while libraries that choose to charge for copies can do so without special statutory permission. In the course of correspondence with Mr Kitt, the Minister responsible for the CRRA 2000, the Minister indicated that the provision on charging had been introduced merely to benefit libraries, and that it could be removed when a suitable opportunity arose (see letter of 28 September 2001 from Mr Kitt to Jennefer Aston, Ref: 01.0574/MLA).

Recommendation
S.I. 427 of 2000 should be amended to remove the obligation to charge for copies as a condition for making copies under the statutory exemptions (which make no reference to this condition) while clarifying (as the current S.I. does) that a charge to cover the cost of copies and a contribution to the general costs of the library or archive does not put that library or archive into the category of “conducted for profit”

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