Consultation on the Review of the

Copyright and Related Rights Act 2000:

Barriers to innovation and the development of new business models

Submission

to the Department of Jobs, Enterprise and Innovation

copyrightreview@djei.ie

by the

British & Irish Association of Law Librarians (BIALL)
Irish Group

Copyright sub-committee
jennefera@gmail.com

Drafted for the British & Irish Association of Law Librarians, Irish Group
by Jennefer Aston

July 2011

Current Convenor of BIALL Irish Group:
Sinead.Curtin@mccannfitzgerald.ie

BIALL (the British and Irish Association of Law Librarians) is the representative organization for law librarians in these islands, and has an active Irish group with law librarians working in the state, academic and commercial sectors. BIALL aims to promote professionalism among managers of legal information (both hard-copy and digital), and to provide a voice for the profession. We welcome the opportunity to highlight issues that are of concern to us in the use of information in legal areas, be they academic, state, or practicing lawyers.

A Fair Balance

Our interest as librarians is in optimising the use of information while at the same time respecting the interests of those who create the information, by advocating a fair balance for both producers & consumers. *As librarians, we do not stand to make any personal financial gain* in how the competing legal rights are balanced, but we have a purely *professional* interest in seeing that the work of creators, publishers and vendors is fairly rewarded while also ensuring that the scholarly, research and commercial activities that we support are not unreasonably hampered. Genius is rare, creativity is common.

1. Research Supporting Commercial Activity

Many members of BIALL manage legal information in the commercial sector (for example in law firms), and other librarians / information managers support the work of various commercial activities essential to innovation and business. It has always been an objective of copyright law to protect and foster creative works in order to make this work available to fuel *further* activities in research, leisure and business. The Library Exemptions in the Copyright Act 2000 are not available to libraries within bodies that are "conducted for profit" (S.I. No. 427 of 2000). However, Irish law (unlike UK legislation) does not restrict the Fair Dealing exemption for end-users to non-commercial research (fair dealing, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright, is permitted for "research and private study"). It is essential that such a "reasonable" reuse of information continue to be permitted for commercial activities, if the long-term benefits of innovation, business and the economy are not to be paralysed for the short-term gain of making every re-use that is for the purpose of commercial activity subject to permission, licensing or payment. While direct re-use of substantial quantities of copyright material for direct financial gain (e.g., re-publishing the works of others) must of course be subject to permission and fair remuneration), Fair Dealing (or Fair Use) must continue to permit re-use that is reasonable (in purpose and extent) in as well as non-commercial contexts. Genius is rare; creativity is common. Much of creativity involves synthesizing new products from existing raw materials.

Recommendation:

- Whether Fair Dealing, or Fair Use, or a combination, is applied to exemptions, resist pressure to confine exemptions to non-commercial uses. Provided the use is reasonable in purpose and quantity, an obligation to obtain permission and to pay a fee should not be triggered as if the material were being re-published for gain.

2. Removal of Inflexible Obligation on Libraries to Charge for all Copying

In those libraries for which the library exemptions of sections 59 to 70 (and 227 to 236) of the Copyright Act 2000 are available, a source of confusion and ambiguity is an apparent obligation to charge for all copies made by library staff under those library exemptions (S.I. 427 of 2000, sections 4(b), 5(b) and 6(b)). This obligation was not mentioned in the parent Act but was added in the statutory instrument, along with other conditions that had been provided for in the Act, and questions have been raised as to whether it was *ultra vires*. Where libraries wish to charge for copies made for readers, they can do so without special statutory provisions, though the wording in the S.I. is useful because it makes clear that charging "a sum not less than the cost (including contribution to the general expenses of the library) of production" does not disqualify a library from the library exemptions by making it a library that is "conducted for profit". However, this condition imposes an obligation on libraries to charge for copies made, even in cases where this serves no purpose other than to create a bureaucratic obstacle to the provision of information. For example, on the face of it the statutory instrument seems to state that a librarian in a government body is obliged to charge a staff member within that same body for the provision of even a single photocopied page. This is an example of unnecessary red tape in the provision of information that is allowed under the reasonable exemptions permitted by the Act. As the Hargreaves Report put it (pages 51 and 99), "Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators." Following representation to the then Minister, Mr Kitt, the Minister stated (see letter of 28 September 2001 from Mr Kitt to Jennefer Aston, Ref: 01.0574/MLA) that the provision had been intended to benefit libraries, and he agreed to remove the obligation when an opportunity arose. Current changes to the legislation offer just such an opportunity to remove all references in S.I. 427/2000 to the obligation to charge for the provision of copies. Simply changing the wording to "may" in the relevant sections would remove the obligation to charge for copies while still making clear that a library is not deemed a profit-making body and so lose the library exemptions merely by charging for copies (cost of copies and contribution to the running of the library).

Recommendation:

- In sections 4(b), 5(b) and 6(b) of S.I. 427 of 2000, change "is required to pay" or "shall be required to pay" to "may be required to pay".

3. Adaptations for the Disabled

Potential innovators and entrepreneurs may labour under disabilities, such as impaired vision. The Copyright Act 2000 makes welcome provision for copies to be made as adaptations for the disabled (e.g., large-print or speaking books), but only by "prescribed organisations" (S.I.406 of 2000). We are of the opinion that a disabled person would also be entitled to make such an adaptation for himself or herself under the ordinary Fair Dealing provision. However, these two rights (copy by prescribed organization or making a copy for one's self) are each seriously limited. First, there is no reason to

restrict the making of adaptations to "prescribed organisations". The right to make a copy, or to have a copy made for that disabled person, for the purpose of overcoming the disability, should attach to the disabled person and not to specified organisations. In order to foster the independence and equality of opportunity of the disabled, they should be permitted to use adaptive technology wherever that technology may be available to them. Second, the Fair Dealing exemption that permits making of copies by the disabled person himself would only apply in cases of "research or private study" – there seems to be no provision that would allow a disabled person to make a copy of a work for other purposes (e.g., fiction for leisure).

Recommendation:

- The right to make a copy, or to have a copy made, for the purpose of overcoming a disability, should attach to the disabled person in addition to prescribed organizations.

4. Format Shifting

There is a strong argument in favour of an explicit permission to copy for the purpose of format-shifting, e.g., transferring data or software from one computer storage medium to another (to permit content on 5¼ inch floppies to be copied to 3½ inch floppies or to CD-ROM or to USB) or from one storage format to another (e.g., to transfer a vinyl record to tape, CD or MP3). The principle is recognized in section 80 on copying software:
"80.- (1) It is not an infringement of the copyright in a computer program for a lawful user of a copy of the computer program to make a backup copy of it which it is necessary for him or her to have for the purposes of his or her lawful use." This principle is as important in industry as it is in private activities, to counter obsolescence of hardware and software, and to avoid the unnecessary expense of re-purchasing legally acquired copyright content, simply because the technology used to store or access it has changed, and to avoid cases where valuable information is lost because the hardware or software necessary to its use has become obsolete.

Recommendation:

- Statutory provision to the effect that a copy may be made for the purpose of adapting a work that is lawfully being used to another format or storage medium etc.

5. Technological Protection Measures

The Act already acknowledges that technological protection measures (TPMs) should not limit any uses or exemptions allowed under copyright law, and makes provision for circumvention, where that is possible (Copyright Act 2000, section 374). However, in practice the user seeking to circumvent the unlawful restrictions imposed by a TPM may not have the technical ability to circumvent the TPM (as allowed by the Act) or the financial resources to take the other party to the High Court. To implement Art 6.4 of the Copyright Directive 2001/29/EC, what is required in addition to these two provisions is a

mechanism whereby the body applying the technological protection measures can be required to make the means of circumvention available where necessary, and, secondly, a means of resolution where the body refuses to do so, perhaps by referral to the Controller of Patents Designs and Trademarks, or by making such unwarranted Technological Protection Measures "actionable as a breach of statutory duty owed to the beneficiary of a permitted act" and by providing that "Such a beneficiary may apply to the appropriate court for damages or other relief" (see wording in s.308 and s.319). However the "actionable breach of a statutory duty" raises the practical problem of the expense of a Court action.

Recommendations:

- To the existing section 374 add:

  Where such act of circumvention is beyond the technical means of the beneficiary of a permitted act, the person or body applying the rights protection measures shall be obliged to provide the appropriate means to circumvent them within a timeframe appropriate to the needs of the beneficiary of a permitted act. Failure to do so may be referred to the Controller by the rightsowner, by the beneficiary of a permitted act or any organization claiming to be representative of those beneficiaries.

- To permit the Controller of Patents to adjudicate, amend s.362 so that jurisdiction of the controller is not limited to disputes between licensing bodies and persons requiring licences. S.362 would then read as follows:

  362.—It shall be a function of the Controller pursuant to references or applications under this Act to determine, within a reasonable period of time, disputes arising under this Act between-

  (a) licensing bodies and persons requiring licences or organisations claiming to be representative of those persons, and

  (b) persons or bodies applying technological rights protection measures and rightsowners or those who claim their legal entitlements are being infringed by those measures or organisations claiming to be representative of those person.

- Give consideration to the possibility of making unwarranted Technological Protection Measures "actionable as a breach of statutory duty owed to the beneficiary of a permitted act. Such a beneficiary may apply to the appropriate court for damages or other relief".

6. Address contractual and other means of circumventing Copyright provisions

The Copyright Act 2000 contains the very useful section 2 (10), providing that that exemptions given in the Act may not be restricted by contractual terms. Since information and data are not restricted by political boundaries in a digital world, it would be useful to have such a provision throughout EU law. It is somewhat unclear to what extent licensing terms for electronic services such as online databases can exclude rights

which would otherwise be available under general copyright provisions. Likewise, Terms of Use on websites seem to be making incursions into copyright exemptions.

Recommendations

- Promote the idea of having provisions such as Ireland's s.2(10) applied more generally in Europe so that contracts governed by the laws of other countries cannot reduce rights that general law of copyright gives the consumer. This also exists in Portuguese and Belgian law and has been recommended in the UK by The Libraries & Archives Copyright Alliance in their response to Hargreaves (8.6).

- Examine the issue of ways in which website Terms of Use etc. are restricting or preventing uses which would be permitted if the same information were published in print.

- Give consideration to the principle of have a general provision in EU law, similar to those in the Montreal Convention on International Carriage by Air saying that any contractual term that purports to limit the rights of consumers under the copyright law of the country in which the work is being used (including an EU-wide s.2(10) type provision) shall be null and void. See Articles 26, 34, 47 and 49 of the Montreal Convention.

7. Continue to allow indexing, citing of material, retrieval of search terms and provision of hyperlinks

It is absolutely essential to all forms of research – academic, cultural, commercial – that Irish law and EU law must not treat as a breach of copyright the indexing of material (which of necessity involves copying titles of books, journals, journal-articles, etc.), the citing of works (whether in printed citators or electronic retrieval systems), the display of search terms and "hits" retrieved by such searches (which may involve "keyword-in-context" citations where the search term is displayed with a short extract from the retrieved work to show the context in which the search term is found) and the provision of hyperlinks to materials that are lawfully available. In the limited time available for research, the small copyright subcommittee of BIALL-Irish found no indication that Irish law is currently lacking in this regard. However, concerns have been raised by the recent English case of *Newspaper Licensing Agency* v. *Meltwater Holding B.V.* [2010] EWHC 3099 (Ch) which purports to apply the European Court of Justice case Case C-5/08 *Infopaq International* v. *Danske Dagblades Forening* [2010] FSR 495. A trend towards affording mere article titles and search-retrieved quotations from articles and linking to material with hyperlinks would not only endanger essential electronic information tools (both commercial and free) but could also cripple the most basic of hard-copy references necessary to scholarly, as well as commercial, research. There may be complications in some areas, for example hyperlinks that do not show the original provenance of works (e.g., deep-linking where the material is then displayed in a frame that does not show the original site of the work - if necessary, such links could be excluded from exemptions) or in providing links to works that are available only for sale, but in general it must be made clear in law that titles, short extracts, and downloading via hyperlinks (*cf* s.87 of the

Copyright Act on caching) do not infringe copyright. This is something that must be addressed at EU level if necessary, for the sake of all types of scholarly activity.

Recommendation:

- Investigate possible consequences of *NLA* v. *Meltwater* and *Infopaq* cases and highlight danger to scholarly research and communication as well as to business research and commercial information services. We would suggest an amendment to EU law to say that titles of books, journals, and journal-articles, as well as newspaper headlines, tables of contents, short extracts of text, and hyperlinks should be specifically excluded from Copyright breaches, to avoid a situation where indexing and citing, the bedrock of all research, would be restricted.

8. Protect the current Library Exemptions

Irish law now has some excellent provisions for copying by libraries. These keep beaurocracy to a minimum while fostering the exchange of information and research. Irish librarians made a detailed submission when the Copyright Act 2000 was being debated as a Bill (Submission by Librarians on the Copyright Bill to the Select Dáil Committee on Enterprise and Small Business). The proposed amendments were accepted because the exemptions were shown to be for the benefit of research generally and reasoned arguments were presented. The submission highlighted the practical effects of provisions in every day information work. For example, instead of having a provision permitting the copying of one article per issue of a periodical, the Act of 2000 allows for the copying of as many articles from a journal volume as there are issues in the volume; in other words, it is still an average of one article per issue, but is more flexible as to the actual location of those articles within the issues of a volume. These useful, but often complex, provisions within the sections dealing with libraries, sections 59 to 70 in Part II of the Act (and 227 to 236 in Part III) were carefully drafted following consultation. It would be regrettable if their provisions were inadvertently affected by any changes. Librarians would welcome an opportunity to discuss any amendments that are likely to affect these provisions.

Recommendation:

- Consult this subcommittee of BIALL or other library representatives for advice or discussion if library provisions are to be amended, or if the possible impact on libraries needs to be clarified.

9. Fair Use

In the time available it was not possible for this sub-committee to consider adequately the pros and cons of a US-style "Fair Use" set of exemptions (as distinct from the current "Fair Dealing" exemption for end-users and the closely related exemptions for librarians acting on for researchers). However, this option may offer some additional flexibility (for example in the area of library archiving as distinct from solely supplying requested copies in reaction to specific requests, as under current Library Exemptions) and,

provided it is adequately defined, it may well merit the consideration, which we have not been able to give it here. In the interests of promoting research and the flow of information which is vital to innovation, scholarship and industry, it may be that a combination of features from Fair Dealing and Fair Use may be desirable. Librarians would be interested in seeing how such a "Fair Use" system might be defined in order to offer any insights we might have as to how it might influence the progress of research, when the Consultation Paper appears. For now, the BIALL-Irish subcommittee would simply like to flag the fact that if the current "Fair Dealing" exemptions for end-users were to be changed (e.g., by introducing Fair Use), any knock-on effect on the exemptions for Libraries should be considered. In particular, we would be concerned that the library exemptions should not be made any narrower than they are under the Act of 2000, nor should the exemptions for librarians acting on behalf of end-users be any narrower than the exemptions for the end-users themselves. It would be undesirable to have an exemption that allows a researcher / library end-user to copy to a defined level, and yet have a librarian who is copying on his or her behalf restricted to a narrower degree.

Recommendation:

- Hear submissions on, and examine the usefulness of, a set of exemptions modeled on the Fair Use doctrine, but also consider how this may require a commensurate broadening of the library exemptions so that libraries can continue to support research activities that are themselves legally permitted. Beware of (perhaps unintentional) restrictions on the activities of libraries and the categories of libraries to which reasonable exemptions are made available.

Drafted for the *British & Irish Association of Law Librarians (Irish Group)* by
Jennefer Aston