

# The Digital Repository of Ireland's Response to the Copyright and Innovation Consultation Paper

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## **Executive Summary**

Whilst we in the Digital Repository of Ireland support the concept of copyright, we believe that societal, educational and economic benefits may be possible with changes in the current legislation to allow more open access. In this response we highlight the issues that are important to us and provide some specific feedback to the Review Committee following their position paper.

## **Digital Repository of Ireland**

The Digital Repository of Ireland is building a national trusted digital repository for the humanities and social sciences. It will provide the digital infrastructure that links together and preserves the rich and varied cultural, historical, and qualitative social science data held by Irish Institutions, and provides a central access point and multimedia tools to research and interact with archived data. DRI will allow the public, students and scholars to access and research the history, cultural heritage and social life of Ireland in ways never possible before.

The Digital Repository of Ireland is funded by the Irish Government's HEA PRTLI cycle 5 for €5.2M over four years, and started in September 2011. DRI funded partners are the Royal Irish Academy (RIA, lead institute), National University of Ireland Maynooth (NUIM), Trinity College Dublin (TCD), Dublin Institute of Technology (DIT), National University of Ireland Galway (NUIG), and National College of Art and Design (NCAD).

DRI is working with the community to build national voluntary guidelines for digital preservation of cultural and social data, which we hope will achieve wide-scale adoption and form the basis of a national policy for digital preservation. One of our overall aims is to preserve and provide access to online cultural heritage because of the educational, social and economic benefits it stimulates. It is within this context that we will frame our responses to the questions posed by the Copyright Review Committee, and demonstrate ways in which some elements of the current legislative framework restrict Higher Education and Cultural institutions' contribution to innovation.

One of the key strands of the Digital Repository of Ireland involves a national programme of requirements interviews with stakeholders, including cultural institutions, social data organizations, libraries, archives, and researchers. Another strand involves the development of Demonstrator Projects that will stress-test both the digital infrastructure and the policies generated by the project in addition to being interesting research in the humanities and social sciences in and of themselves. Through the interview processing and the demonstrator

project planning it has become clear that stakeholders are experiencing frustrations in relation to ways in which current copyright legislation restricts how they can access and use data and information. They are uncertain about rights to format shift copyright materials to assist research, or for preservation purposes, and copyright permissions to use material and data for research purposes is difficult and often expensive or impossible to obtain.

### Specific Feedback for Consultation Paper

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

DRI, in support of accessible information, would recommend that a new, complete bill be enacted rather than further amending legislation.

*(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?*

*(5) In particular, is this classification unnecessarily over-inclusive, or is there another category or interest where copyright and innovation intersect?*

It should be accepted that some submissions, and classes of copyright users, may span more than one of these categories. For instance, we would contend that DRI acts as an intermediary and a heritage institution but that we may also be rights-holders, users, and entrepreneurs at different times.

*(6) What is the proper balance to be struck between the categories from the perspective of encouraging innovation?*

To encourage innovation, intermediaries and entrepreneurs should be the beneficiaries of any changes in the status quo as they are the ones most likely to innovate in this space. However, DRI notes that a primary focus of knowledge preservation, dissemination and scholarship is equally as important as an innovation agenda.

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

Without answering any of the further questions on the Council, DRI is broadly in favour of the formation of the Council. We would suggest that it is vital that the Council have substantial representation from the user community as well as the traditional agents (right's holders, societies etc).

*(40) Has the case for the caching, hosting and conduit immunities been strengthened or weakened by technological advances, including in particular the emerging architecture of the mobile internet?*

*(41) If there is a case for such immunities, has technology developed to such an extent that other technological processes should qualify for similar immunities?*

*(42) If there is a case for such immunities, to which remedies should the immunities provide defences?*

Modern content delivery systems rely on a complex collection of derivative works to server the user in an efficient and timely manner. This may be through wholesale replication of the datasets using a system such as Akamai to geographically disparate locations, the use of local caching systems such as varnish and memcache on the primary site, or the use of tools such as zoomify to provide different resolution views of data. Sites that use such tools for legitimate purposes to enhance the user experience should not be seen as breaching copyright even if the original license to use the data does not include such surrogate data.

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

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

DRI supports the position that merely linking to an item, that may or may not infringe copyright, should not itself be an infringement. Material that infringes in one country may not infringe in another due to the different regimes that operate worldwide. One should work from the assumption that material posted online is not in violation in the location that it has been posted and that therefore links to this material could not infringe. Even if the source material infringes, the remedy is for the rights holder to engage with the infringer, not a third party. It should also be noted that in the modern era, websites are often hosted in multiple jurisdictions and so it is unclear as to which set of laws might apply to any particular instance of the website.

*(48) Does copyright law inhibit the work of innovation intermediaries?*

By definition, the existence of a regulation places a restriction on the activities of individuals. Therefore copyright must inhibit the work of some innovation intermediaries. The difficult issue is quantifying these intermediaries and weighing the benefits they provide against the wishes of the rights holders.

*(51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?*

*(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?*

*(53) If so, what exactly should it provide?*

Noting that we have skipped the substantive issue in (50), we would submit that legislating by exception may not be the best solution. As technology changes, the exceptions may become obsolete or all encompassing.

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

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

One of DRI's primary aims is the dissemination of knowledge through online resources for the purposes of education and scholarship. This learning may be undertaken in both a private and a formal setting and so we would support the extension of the references to cover education and distance/online dissemination.

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

Many items held by heritage institutions should be covered by a license agreed between the institution and the copyright holder that permits format shifting and other activities. However, there may be occasions where the license pre-dates the digital age or the original copyright holder is either unknown or uncontactable. A heritage institution, acting in the public interest by making surrogate digital copies of material for archival and preservation purposes, should have an exception in copyright law.

DRI would argue that format-shifting should be a requirement for heritage institutions that are serious about long term preservation of their digital collections. Any exemption for heritage institutions for archival and preservation purposes should be as broad as possible. Often the best plan for future proofing a digital object may not be known and so multiple strategies are followed in parallel with time proving which the correct choice is. Heritage

institutions should be free to make as many surrogate copies of data for archival and preservation purposes as necessary. This is also advocated in the findings of the recently published EU Council conclusions on the digitisation and online accessibility of cultural material and digital preservation.

*(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?*

*(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?*

While it is unlikely that DRI will be arranging exhibitions and catalogues in the traditional sense, it could be argued that an online repository complete with metadata searching and thumbnail images and previews is the modern equivalent. Again, while most of the material managed by DRI will be subject to a depositor license, which explicitly permits its use in this manner, clarity on this issue would be appreciated.

DRI is an online repository and has neither premises nor dedicated terminals for dissemination of information. The internet is our premises and each user's web browser acts as our terminal. We would contend that the fair dealing provisions be extended in some manner to permit online reproduction for education, scholarship and personal use.

*(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?*

*(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?*

The significant numbers of works for which the rights holders cannot be traced or are unknown (orphan works) and the lack of suitable exceptions, in Irish Law, for the use of these works also pose significant problems for educational and cultural institutions. Searching for copyright owners can be resource and time intensive exercise and frequently the solution is not to proceed rendering this material unused. Orphan works, currently estimated to be in excess of 50 million works across the public sector in a recent UK study, are likely to include a large body of works, such as documentary photographs, sound recording and unpublished text based works, which were created without any commercial intent. Although these works are immensely valuable in terms of their cultural and academic contribution, their commercial value is likely to be very low if not negligible. Orphan works are of particular concern to DRI, given that many of the Demonstrator Projects, and future content to be ingested post 2015 will include photographic material, ephemera, and oral history recordings from the twentieth century, all of which are likely to fall into this difficult category.

Above all we feel that legislation to allow the use of orphan works needs to be implemented. We recommend that Irish legislative provisions and licensing solutions should move towards the proposed framework for permissions management that have been tabled in the Directive of the European Parliament and of the Council on Certain Permitted Users of Orphan Works which was introduced in the European Parliament in May 2011. Irish legislation should go further than the EU Directive in relation to the works covered, i.e. it should include, music, and photographs in addition to textual materials and audiovisual works. It should also include both published and unpublished works (diaries, letters etc.). While we are most concerned that the legislation provides access to users included in the Heritage Institutions category, and permits all associated uses (non-commercial), we also

feel the scope should be broadened to include other categories highlighted in the review, namely Users and Entrepreneurs.

While establishing a Copyright Council would have many benefits, including provision of advice and guidance to rights holders and users, and co-ordination of solutions in relation to orphan works, implementation of the legislative framework is essential. In order for the Copyright Council to act as the body authorising use of orphan works, membership of the Council should be “broadly-based and collaborative” (as stated in section 3.2 of the Consultation Paper) but importantly membership should be balanced and include representatives from the user community. We would also raise the need for some form of auditing to take place to ensure policy objectives are being adhered to, for e.g. to protect against instances where there was a refusal to authorise in cases where authorisation should have been permitted.

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

Text and data mining for non-commercial and academic purposes should be permitted by right. If the results of the data mining are to be used for commercial purposes then a license should be required to use the original data and any exception should not apply in this case.

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

Yes, subject to the sorts of constraints outlined in the draft section.