

Submission to the Copyright Review:

Publishing Ireland



Part 1:

Profile of the Irish publishing sector

The book publishing sector in Ireland is currently worth approximately €200m. This shows a decline of 8% in value in the last 12 months. Indigenous Irish publishers have about 22% of market share. Some genres have declined substantially over the past two years, with as much as a 30% drop in trade in hardback fiction, for example. The past two years have seen bookshops and publishers reduce staff, and in some occasions, cease trading.

Irish publishers recognise the importance of digital publishing and many have developed firm digital strategies to help enhance their business models. We have given examples of what some publishers are doing in the area of digital publishing below.

The importance of copyright

The copyright framework is fundamental to the viability and continued economic growth of Ireland's publishing sector.

The contribution of secondary licence fee income to publishers' profits is equivalent to a turnover of some ten times its face value. This income is distributed across a very wide range of publishers of all sizes.

The significance of this contribution is of particular value to educational and academic publishers for whom the knowledge that reliable secondary licensing schemes are in place, provides the comfort they need to invest in and develop innovative products. As profit levels in publishers' primary markets have declined in recent years, secondary licence fee income has grown in importance for incentivising publishers to invest in developing their businesses.

Access to copyright material can be complex and simplification is needed wherever possible. Licensing provides a balanced means of access and needs to be fully supported to enable it to continue to evolve and adapt to new business models rather than making changes to the underlying copyright framework.

A sound secondary licensing sector is a sign of a serious and robust copyright environment which encourages investment in innovative products.

Innovation in publishing – development of digital publishing: digital products and electronic distribution.

Digital publishing and ebooks in Ireland, although still in their infancy, are at an exciting time. Many publishers, particularly educational and business publishers, are continuously developing and innovating new digital products, including apps, ebooks and special digital editions of books for various platforms. We have selected a few companies to showcase what some of our members are doing in the area of digital and ebooks.

Case study 1: Gill & Macmillan

Gill & Macmillan produces online support materials for many second-level and third level books. The online materials include extra questions, solutions and optional extra content.

G&M also offer an online assessment tool called *eTest* for most textbooks. This allows students to test their own comprehension of a chapter and for the teacher to set online assessment as homework. Teachers can also create their own classes and set their own questions.

In addition G&M produces digital editions of textbooks called *FlipBooks*.

The *Digital FlipBooks*, are available for sale to students (on an annual subscription basis) as well as being provided free of cost to teachers who adopt a particular text for their class. Initially, the *FlipBooks* will serve as a teaching tool for teachers but it is possible that sales to students will grow as more schools become equipped with devices for student use (Laptops, netbooks, iPads etc).

The *FlipBooks* are similar in appearance to the printed textbook. The book opens up on screen, pages can be turned, and particular chapters can be accessed from the table of contents or by inserting the relevant page number.

There are some added features:

- Certain selected images or diagrams can be 'hotspots' which enlarge automatically when the cursor is clicked on them. This can be used for any diagrams or photos that would be particularly useful to the teacher when the FlipBook is used on a digital projector in the classroom.
- The FlipBook also has the facility for notes to be made and bookmarks added by the teacher/user. These notes and bookmarks remain in place to be utilised whenever the FlipBook is used. They serve to personalise the teaching from the FlipBook for the teacher.

Case study 2: CJ Fallon.

CJF are very active on digital. For starters, it has localised Riverdeep (Destination Maths) for the Irish maths curriculum. It also represents another international maths online sensation, namely Mathletics, which it has also localised for Ireland.

In terms of its own range, CJF has over 1,800 interactive elements on its website, providing teaching support for use with interactive whiteboards across their entire range.

In addition, all of their books are provided as ebooks.

Case study 3: Management Briefs

From the early days of Management Briefs, they believed that it was a strategic imperative for them to enter the Digital area and thus:

- They have, in collaboration with Direct eBooks in Cork, succeeded in having all of their books now available in epub versions on all of the major world-wide portals and on all of the major on-line epub bookstores across the world.
- Also, in collaboration with Ossidian Technologies, they have created their first App (HR Kit) and within the next month all of their existing titles will be available via the App Store and also in versions suitable for android systems.

In the near future, they will publish in all three formats simultaneously – hard copy, ebook and App.

Case study 4: Maverick House Publishers

A trade publisher of non-fiction, Maverick House has been using digital technology such as print-on-demand and epublishing as a way to expand its reach into new territories without incurring the traditional costs associated with distributing hard copies of books. They have developed a digital strategy, which includes converting their back list into ebooks, whilst simultaneously publishing new titles in several formats across all digital platforms.

Current challenges to Publishing.

- As the digital environment evolves and more Irish readers move to ereaders, the danger of digital piracy will increase in line with existing international experience. This makes the maintenance of a fair and balanced copyright regime with effective enforcement even more important than in the past.
- VAT on ebooks is currently charged at the full rate; 21%. Publishing Ireland believes this will slow down the growth of ebooks as it creates a higher price point for the consumer. International experience has demonstrated that reduced rates of VAT stimulate reading and increase sales of books and digital products alike.

Part 2

1. The terms of reference of the Copyright Review

Publishing Ireland notes that the primary focus of the Review is on the identification of barriers to innovation. We would make the preliminary point that, with the desire expressed by Government to promote growth in the “digital sector”, there is a danger that the more traditional rights owners, including publishers, may be viewed as being in opposition to digital creators and service providers. In fact, publishers are digital content providers and are consistently seeking to expand their engagement with innovative media forms. Publishing is an industry that is investing and innovating to add digital and online services to its more traditional offerings, as well as seeking to develop new products and services for the digital economy.

2. *The existing copyright regime.*

Existing copyright legislation, in the form of the Copyright and Related Rights Act 2000 (as amended) ("the CRRA") expresses an appropriate balance between right holder and user which has been established over a very long period. Publishing Ireland believes that it would be economically destabilising to the publishing industry to disrupt this balance in any fundamental way.

This is not to say that the Irish copyright regime is perfectly satisfactory: it is not.

Irish publishers share the concerns of publishers everywhere about infringement of copyright in the online environment. In recent litigation Irish law has been shown to fall short of the standard prescribed by EU Directives.¹ It is imperative, against the background of increasing internet infringement, that Ireland adopt the best international legislative standard, and at very least implement fully all relevant EU Directives and international agreements in a timely way.

Enforcement is an issue in another respect: an affordable form of dispute resolution is needed in the Irish system. It is virtually impossible for Irish publishers to litigate, or to defend legal proceedings, due to the high costs of litigation. Publishers are not alone in this. This means that in many cases of infringement, there is no legal redress. It also means that the party with greater economic strength has an unfair advantage. Yet another effect is that there are so few reported copyright cases in the Irish courts that there is no precedent base of any worth to assist in interpretation of the legislation.

The lack of ready access to affordable licences to use protected material exacerbates the enforcement problem. This problem is not unique to Ireland, but it is certainly the case that the Irish licensing framework needs to be simpler, more transparent and more user-friendly.

3. *Barriers to innovation*

The terms of reference for the Copyright Review include an examination of present national legislation to identify any areas that are perceived to create barriers to innovation.

Publishing Ireland identifies the following issues in relation to the CRRA which affect publishers' interests, and which we consider to have a negative impact on innovation in the publishing sector.

3.1 *Potentially perpetual copyright in unpublished material*

Section 24 CRRA states: "The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public".

Section 33 CRRA states: "Where the term of copyright in a work is not calculated from the death of the author or authors and the work is not lawfully made available to the public within 70 years of its creation, the copyright in that work shall expire on the expiration of that period of 70 years."

¹ EMI Records & ORS v Eircom [2010] IECH 108

Publishing Ireland's submission to the Copyright Review.

However, Section 9 of the Transitional Provisions, First Schedule, Part 1 CRRA appears to preserve the *status quo ex ante* with regard to the term of protection of works in which copyright subsisted at the commencement of the Act. In so far as literary, dramatic and musical works unpublished during the lifetime of the author are concerned, the term runs from creation until 50 years from the date of publication. If publication does not occur, the copyright never expires.

There are frequent opportunities for publishers to publish for the first time the work of a deceased author. When the normal copyright term has expired, a publisher will tend to assume that it is in the public domain and is free of copyright restriction. However, this appears not to be the case, by virtue of the transitional provision cited above. In many cases the material is "orphan", in that the author either is unknown or cannot be located. We comment below on the EU proposal for a directive on orphan works. It is noted however that the proposal will not alleviate the publisher's problem with this provision of the 2000 Act.

A provision which restricts the making available of valuable unpublished material is clearly a barrier to innovation.

3.2 *The right of first publication*

Section 35 of the CRRA provides for a "right of first publication", with a 25 year term of protection, for anyone who, after the expiration of the copyright in a work, lawfully makes it available to the public for the first time.

The purpose of this provision was to stimulate the publication of unpublished works. The purpose is defeated entirely in the case of works which are unpublished 70 years after the author's death, but which are caught by the effect of the provision referred to above.

4. **Exceptions and limitations**

As mentioned above, Publishing Ireland believes that the current balance of rights and exceptions, as reflected in the CRRA, is in general appropriate. We believe it is important, in circumstances in which online infringement is a major challenge to publishing that Government should attempt to retain stability in the copyright system, while keeping it appropriately aligned with EU law.

We submit however that there are some changes to existing legislation that are needed, either for compliance with EU law, or to clarify the meaning of an existing CRRA provision. These are as follows:

4.1 Fair dealing for "research"

We refer here to the provisions of section 50 CRRA. Section 50(1) and (2) permit fair dealing with specific works, including both literary works and typographical arrangements of published editions for the purpose of "research or private study".

In failing to confine this exemption to non-commercial purposes, this provision materially over-reaches what is permitted by Directive 2001/29/EC ("the Information Society Directive"). The Directive provides a closed list of potential exemptions. It contains no such broad or

unqualified exemption for research. Such exemptions as permit the use of works for research purposes are limited in every instance to non-commercial purposes.²

This fact has been recognised in the UK, where the comparable exemption in the Copyright Designs and Patents Act 1988 was altered in 2003 so as to bring the legislation into compliance with the Information Society Directive³. The UK Act now provides:

“Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.”⁴

Irish publishers are finding it impossible to establish secondary licensing of works for commercial purposes (which is done through the Irish Copyright Licensing Agency) because they are constantly meeting the claim that clear commercial uses are made for the purpose of “research”. Both publishers and authors are suffering continued loss of income on this account. We are currently preparing to bring a complaint to the European Commission on the failure of the Irish Government to implement the terms of the Information Society Directive.

The failure to properly implement this aspect of the EU Directive not only causes loss to publishers. It also results in confusion amongst users and degrades the value of licences on offer. This exacerbates existing problems relating to licensing.

It is clear that an amendment to Sections 50(1) and (2) CRRA is required, to bring the Act into alignment with the Information Society Directive.

4.2. Library and archive exceptions

Publishing Ireland would welcome amendments to this group of exceptions, to clarify the digital uses permitted by the libraries and archives. It is submitted that permitted digital uses should be confined to those which are curatorial in nature, and which serve the public interest mission of the institutions. In line with the Information Society Directive, they should not permit dissemination online.⁵

5. Potential new exceptions:

5.1 Parody

Publishing Ireland would support a new exemption to copyright to permit use for the purpose of “caricature, parody or pastiche” consistent with the limitations of the 3-Step test. This is within the specific frame of Article 5(k) of the Information Society Directive. Such an exemption exists in many jurisdictions. The lack of a parody defence in the Irish system inhibits the publication of works that quite clearly do not compete with the original work, but which cannot be fitted into the fair dealing defence for criticism or review. We believe that the Irish regime would be improved by such an exemption and that it would contribute to innovation in expanding publishing opportunities, both in the online and offline environments.

²Principally, Article 5(3)(a) of the Directive

³SI 2003/2498

⁴Section 29(1) CDPA

⁵A Directive on Orphan Works may alter the position under the Information Society Directive. We comment on the Proposal for a Directive on Orphan Works, below.

5..2 Fair use

Contributors to the Copyright Review are invited to state a position on the introduction of a US style "fair use" exemption in Irish/ EU law. In fact the Information Society Directive precludes the introduction of such an exemption under Irish law, and so the discussion can only be conducted meaningfully in relation to the possible adoption of such an exemption at European level.

The fair use exemption is particular to US law. It developed within a specific legal, cultural and economic context. European publishing houses which publish in the US have no difficulty in working with the provision in a US context. We believe however that there are significant difficulties with the doctrine which militate against its adoption in Europe. These include:

Lack of certainty

"Fair use" is defined in Section 107 of the US Copyright Act of 1976. The section provides a number of specific contexts for the application of the doctrine (criticism, comment, news reporting, teaching, and so forth) but these are not exhaustive. The specific contexts are illustrative only, leaving it open to the court to apply the doctrine to a range of uses for other purposes. The US courts have done so over the years, finding parody for example, to be fair use, and more recently making similar findings in relation to certain "transformative uses" of protected works. While the fair use doctrine allows for flexibility, the disadvantage is that the evolution of the doctrine depends on litigation. The introduction of such an uncertain provision in Ireland/Europe would cause confusion and uncertainty for users and would have a chilling effect on innovative publishing, with publishers afraid to run the risk of a fair use action.

"A troublesome doctrine"

Case law in the US suggests that fair use is far from being a settled, widely understood doctrine. The number of reported cases (over 300 since 1976), and the controversy that surrounds it suggests that it is, in the words of the judge in the case of *Dellar v Samuel Goldwyn, 1939*, "one of the most troublesome doctrines in the whole law of copyright."⁶

Cost

Fair use litigation is generally lengthy and expensive. In a 2007 report by the American Intellectual Property Law Association, it was estimated that the average cost of a fair use action was approximately \$1 million.⁷ The action initiated by US book publishers against Google for unauthorised digitization and online dissemination of books, to which Google mounted a fair use defence, is estimated to have thus far cost in excess of \$30 million.

We submit that the proper approach in relation to the "fair use issue" is to examine the precise uses which the doctrine facilitates in the US and which are not permitted in Europe

⁶ See the Publishers Association Submission to the Independent Review of Intellectual Property and Growth

⁷ Ibid

because they fall outside the ambit of the permitted exemptions of the Information Society Directive. Having identified the particular uses, it would then be possible to conduct a debate in real terms about whether or not it would be desirable to exempt these uses in a European context. We submit that the proper role for the Irish Government in this regard is to actively participate in policy-making at European level, and to press for resolution of the questions identified in the recently published Intellectual Property Strategy document⁸. The strategy includes, for example, the proposal to explore a possible exemption for user-generated content to take account of the development of social networking and social media sites. The European forum is the appropriate context for examining whether there are aspects to the fair use doctrine that might usefully be imported into European systems without destabilising the long-established copyright balance.

6. Licensing of orphan works

Contemporaneously with the publication of the Intellectual Property Strategy, the European Commission published a Proposal for a Directive on certain permitted uses of orphan works.

The inability to make orphan works available to the public is something that has been of concern to the European Commission for some time. Irish publishers are active participants in the ARROW project, sponsored by the Commission, which is engaged in the creation of a database of rights information about orphan works. Irish publishers are keenly aware of the need for such information. The ability to publish orphan material provides a means of access to important cultural material which cannot currently be digitised and made available online. Equally importantly, if the appropriate framework is provided, it also has the potential to create a new market in orphan material.

In a recommendation of 2006, the European Commission encouraged Member States to implement orphan works legislation. As noted in the Explanatory Memorandum to the proposed Directive, "Despite the Recommendation, only a handful of Member States have implemented orphan works legislation. The few existing national solutions are circumscribed by the fact that they limit online access to citizens resident in their national territories."

The Commission now proposes to introduce an effective exemption for certain publicly accessible libraries, educational establishments, museums, and by archives, film heritage institutions and public service broadcasting organisations. The exemption will permit the designated institutions, after conducting a diligent search to establish that a work is truly orphan, to digitise and make the work available online. The exemption may only be availed of when the institution is carrying out its "public service mission". Member States may permit uses outside the public service mission, but subject to a claim for remuneration by the right holder, if he or she comes forward within a certain period.

Publishing Ireland is currently studying the Proposal and evaluating its potential effect on publishing in Ireland. It is too soon for us to express a considered opinion on the details of the Proposal. However we believe that it is important to point out that the Proposal addresses only part of the problem. It provides no framework for the licensing of orphan

⁸ A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe.

material to those, other than the designated institutions, who seek to use the material. We would urge the Irish Government to provide an appropriate legal structure in Ireland for the licensing of orphan material. We identify this as a potentially significant economic opportunity.

7. Conclusion

This submission is made, and the Copyright Review takes place, very soon after the publication of the two important European Commission documents referred to above. The Intellectual Property Strategy sets out the programme for the lifetime of the current Commission. It involves an ambitious programme of action. Of direct interest to publishers, in tandem with the Proposed Directive on Orphan Works, the Commission is developing proposals to promote collective licensing schemes for "out of commerce works". A draft directive on collective management is expected before end 2011. There is a commitment to continue working with Member States to develop viable solutions to tackle the "book famine" endured by millions of visually impaired people. A range of further actions includes a review of the Enforcement Directive, with enforcement in the online environment a priority.

It is a time when copyright policy is undergoing intense re-evaluation. While the current review of Irish legislation is timely, it cannot be regarded as a single opportunity to update Irish law. It is submitted that, to serve innovation in the Irish economy, Government should ensure that it has the *capacity* to conduct such studies and surveys as may be necessary, continue to pro-actively *consult* with interested parties, *engage* with the European process of decision-making and bring forward such *legislation* as may be appropriate in a *timely* fashion. In this way, it should be possible to ensure that that the Irish copyright regime both serves its domestic stakeholders well, and can be seen to be at the forefront of European policy-making.