

Submission to the Copyright Review
Committee in response to
Copyright and Innovation: A
Consultation Paper

12th June 2012

Introduction

As a member library of the Consortium of National and University Libraries, Trinity College Library (TCD) has contributed to the submission made by CONUL to the Copyright Review Committee in response to its Consultation Paper entitled Copyright and Innovation.

Trinity College Library is making a separate submission in response to Question 71 on legal deposit.

(71) How, if at all, should legal deposit obligations extend to digital publications?

Trinity College Dublin welcomes the proposal by the Review Committee to insert an additional section into the Copyright and Related Rights Act, 2000 (CRRRA) to address the legal deposit of Irish digital publications.

Why should legal deposit obligations extend to digital publications?

Trinity College Dublin has benefitted from legal deposit provisions under British law since 1801 and since 1927 under Irish law. Legal deposit has contributed hugely to the building up of the TCD's collections of more than six million volumes, in addition to significant holdings of maps, printed music and manuscripts. These collections are available, not only to students and academic community of Trinity College, but also to nearly 10,000 registered external readers from across the third level sector, the professions, individual national and international scholars who have access to the Library to consult its collections. Legal deposit is sometimes mistakenly characterised as means of collecting 'free books', but for a legal deposit library like TCD, the commitment of resources to collecting, physically processing, describing, storing, preserving and providing access is significant. The strategic view for Legal deposit libraries is not in terms of years, decades but of centuries. Such libraries are a well of knowledge; preserving not only the mainstream publications but the ephemeral and the rare to provide inspiration to creative and innovative minds into the future. We have learned that it is not possible for one generation to predict accurately what will be important to subsequent generations and sometimes it is the work that is insignificant or that goes unnoticed at the time of its creation that has the greatest impact.

The explosion in information sharing; immediacy and ubiquity of the internet presents enormous and evolving challenges to countries wishing to maintain a comprehensive record of their nation's intellectual output. The very accessibility and immediacy of the internet has a corollary in the equally rapid transformation or

disappearance of content from the Web. In a recent article in the ¹*New Statesman* blog Dame Lynne Brindley, CEO of the British Library states that the average life span of a web-site is 75 days. Librarians, archivists, historians, commentators, creators, and researchers are very conscious of the reality of 'digital black hole' in the published record– in fact vast quantities of information have already been lost irrevocably and continue to be lost daily. It is a matter of serious concern that Irish researchers and innovators are disadvantaged by the lack of a legislative framework to ensure that today's ideas and information in digital formats are available to the research, creative and innovative process in the future.

It is of particular concern that the published record of government, its departments and agencies are at particular risk of loss. Kieran Fagan's recent article 'When the server becomes the master'² in the Innovation Section of the *Irish Times* highlights the issues in relation to the State's records and the scale of the problem that has developed in relation to the memory of Ireland's official business. In addition to the records of the State, Government and its agencies are the largest publishers in Ireland. For many reasons, not least the current economic climate, government bodies increasingly publish only electronically if possible. For example, a recent sample by TCD Library of the National Asset Management Agency (NAMA) website revealed 78 documents, not one of which had been deposited as print publications with TCD or presumably any other legal deposit library. Most government publications are hosted on websites with no long-term access guarantee, and as Kieran Fagan's article points out there is no centralised records of government nor is there a repository for government publications, though there are a small number of repositories, such as the Oireachtas *eDocuments Laid*, HSE *LENUS*, or Marine Institute *OAR*, but these are limited in scope.

The drafters of S.198 of the Copyright and Related Rights Act,2000 showed considerable forethought in recognising the potential importance of publishing in electronic formats, but could not have not have anticipated the absolute dominance that the internet would come to have in communication, publishing, information exchange, and social interaction. This section of the Act remained un-commenced until 2007 and the meaning of some of its clauses is opaque. Section 199 which provided for the National Library of Ireland and other Libraries if the Minister so determined to collect and preserve a wide range of non-print formats remains un-commenced.

Provision for the legal deposit for non-print formats is now widespread internationally with Ireland lagging behind much of Europe, Canada, New Zealand and other countries in collecting and preserving online material. An international survey of national libraries, carried out by the British Library in spring 2011, found

¹ The memory of a nation in a digital world/ Lynne Brindley – *New Statesman* , 25th May 2012 (<http://newstatesman.com/blogs/cultural-capital/2012/05/memory-nation-digital>)

² When the server becomes the master / Kieran Fagan – p.5 Business Section, *Irish Times*, Monday, May 21, 2012 9 (<http://www.irishtimes.com/newspaper/finance/2012/0521/1224316444655.html>)

that more than 40% of countries had already implemented legislation for archiving on line publications. This figure was predicted to rise to 55% by April 2012.

For Ireland, the proposal to bring forward legislation to extend legal deposit to non-print formats is an affirmation of the importance of the country's digital future. Such legislation will provide for a continuity of heritage with those printed works held in the care of the National Library of Ireland, Trinity College Dublin and other legal deposit libraries while recognising the national significance and vulnerability of the Ireland's digital heritage, and so the need to protect it for the enlightenment of generations to come.

Legal deposit legislation is of critical importance to the public good, in order to:

- Ensure that the country's intellectual record is saved for the nation and future generations of researchers
- Prevent a digital 'black hole' of irretrievable material in the archive of published output
- Build an archive which underpins Ireland's creativity and competitiveness
- Enable a digital Ireland and ensure digital inclusion

Legislative issues

In the twelve years since the passing of the Copyright and Related Rights Act, 2000, a significant number of countries have introduced legislation to extend legal deposit provisions to digital and other non-print formats. Some countries have adopted the approach of bringing forward specific legislations dealing exclusively with national and legal deposit libraries including Germany, Canada, New Zealand and the UK, which on occasion have unintended consequences such as the potential to create perpetual copyright in works deposited. Other countries such as France have retained legal deposit within the copyright legislative framework while extending legal deposit to cover non-print formats.

Drafting legislation to provide a legal framework to ensure the collection, description, preservation and access to digital content presents challenges not met in the analogue world. In print publishing, terms such as 'book', 'serial issue', 'published', are well understood by authors, publishers and librarians, but such terms are either meaningless or have very different meanings in the online environment. The very concept of 'place of publication', which is the cornerstone to determining whether a work is liable for legal deposit in one country as opposed to another has little relevance in the virtual environment

TCD has worked closely over the last decade with the British Library and other UK legal deposit libraries in working towards the implementation of legal deposit for non-print formats in that jurisdiction. The process has been lengthy but has given both the legal deposit libraries and other stakeholders the opportunity to consider in depth a wide range of issues arising from the challenge of extending legal deposit to non-print formats.

In considering the proposed S.198A, there are a number of issues that we consider critical to the provision of a legislative framework for e-legal deposit that will be effective, sustainable and balance the interests of different stakeholder groups. In such a rapidly evolving situation the legal deposit libraries are conscious of the importance in drafting legislation of avoiding wording and definitions that will rapidly date. We welcome the inclusion of provision for ministerial regulation (CRRA S.198A (13)) which contributes to flexibility and future proofing in the proposed legislation. Having reviewed the legislative provisions of a number of countries, it is TCD Library's opinion that Ireland would be best served by retaining legal deposit within the framework of the Copyright Act (CRRA).

It will require the cooperation of stakeholders such as publishers and creators working in partnership with the legal deposit libraries to secure Ireland's digital heritage. S.198 is silent on the responsibility of stakeholders in relation to the collection, preservation and use of the content collected. We advocate that in drafting S.198A or any resulting Regulations that the nature and extent of these responsibilities is specified.

TCD has identified the following issues as of specific concern in the drafting of the new section of the CRRA:

CRRA S.198A (1 – 2)

In the online environment the concept of "*first made available in the State*" is challenging to define in a way that captures the relationship to the Irish state.

- (i) The draft *Legal Deposit Libraries (Non-print works) Regulations 2013* which is currently under consideration in the UK provides a clear workable definition of when a work can be treated as being published within a jurisdiction. The option of a work qualifying under either 23(1)a or 23(1)b of the draft Regulations provides flexibility which will allow UK legal deposit libraries to implement efficient methods of copying from the internet by automating the web harvester process for a high proportion of works.

An online work will be treated as published in in the United Kingdom if

"Online work: published in the United Kingdom

23 - (1) Subject to sub-paragraph (2) below a work published online shall be treated as published in the United Kingdom if-

- (a) It is made available to the public from a website with a domain name which relates to the United Kingdom or to a place within the United Kingdom; or*
 - (b) It is made available to the public by a person and any of that person's activities in relation to the creation or publication of the work take place in the United Kingdom.*
- (2) A work published online shall not be treated as published in the United Kingdom if access to the work is denied to persons within the United Kingdom.*
- (3) Where work is published on the internet and the publication of that work or a person publishing it there is connected with the United Kingdom in the manner*

prescribed in paragraph (1) and (2) above that manner of connection with the United Kingdom is also prescribed for the purposes of Section 10(5)(b) of the 2003 Act.”

German legislation provides another definition of territoriality from the S.14 clause 2 of BNDG which is the Act relating to the National Library

“Depositors shall deposit single copies of media works of the kind specified in § 2(1)(b) in accordance with the first sentence of § 16, should any holder of the original right of distribution have their legal domicile, any business premises or their principle residence in Germany.”

- (II) The legal deposit model in the analogue world places responsibility on the publisher for depositing or delivering relevant material to the legal deposit library. The proposed wording in the draft for S198A (1) describes the publishers’ obligation to deliver material to the legal deposit libraries, and while this is a suitable mechanism for collection for some digitally published materials, it is not efficient or possible for all. The wording of the proposed S198A should provide for delivery (push) of content by publishers but should also clearly mandate the Legal Deposit Libraries to use active collection methods such as web harvesting (pull) content.

CRRA S.198A (3) –The intention in this clause not quite clear, but as we understand it we welcome the Committee’s recognition that it may not be possible (or judged necessary) for the legal deposit libraries to collect and preserve all classes of digital works. If this is the intention, then this clause could be of practical help in the transition from the collecting and archiving of publications in print format to the collection and archiving of publications in digital formats.

CRRA S. 198A (4) –TCD welcomes this provision that provides for the legal deposit libraries to determine the format to be included in the archive. This provision underpins the long-term preservation of digital publications by mandating the legal deposit libraries to require the deposit of the work in the format most suitable for preservation.

CRRA S.198A (5) – TCD welcomes the continued commitment to reciprocity between the UK and Ireland in ensuring that the intellectual, cultural and social records are preserved and made available to the benefit of both nations. The specific requirement to deliver content to an address in Dublin is an anachronism in the online world. We suggest that the Committee consider wording that would mandate the legal deposit libraries benefitting under Irish legislation and located in the UK to harvest or have submitted to them digital content falling within the terms of Irish legal deposit legislation. We further suggest that the wording of this clause makes it clear that notification by a web-harvester is construed as fulfilling the requirement of a written request.

It should also be noted that under the proposed rewording of Section 59 – Regulations relating to copying by libraries and archives heritage institutions, that

the Committee may not be aware that under proposed *sub-clause C* that the British Library is included in the bodies listed in S.198(1).

CRRA S198A (6)

CRRA S.198A (7 - 8)

- (I) One of the key aims of legal deposit is to ensure the preservation of an archive of the nation's published works and thus it is important that the copy of the work deposited must be of a quality most suitable for preservation purposes. TCD welcomes the principle articulated in the clause that the legal deposit libraries should determine the quality and format of the work archived. Preservation of digital materials requires copies to be made, either identical copies or modified copies to allow for changes in format. There may be a necessity to create an exception to intellectual property law to allow for the copying of copyrighted material for this purpose.
- (II) While a huge volume of material is open to web crawlers to harvest, a significant percentage of material made available via the Web is held behind technical barriers such as pay walls or login/password barrier. TCD welcomes the clear statement of responsibility on publishers/producers to provide the libraries with necessary computer program or any information such as passwords or means of satisfying technical protection barriers to acquiring and accessing this material either through collection (harvesting) or deposit (submission).
- (III) In the case of offline digital publications with physical carriers (e.g. dvd, USB key etc.) we advocate that the wording be strengthened to necessitate the delivery an unencumbered freely accessible copy of digital publication for the purposes of long term digital preservation or require the removal of any TPMs present prior to delivery.
- (IV) Implementation of collection and archiving of digital publications under legal deposit legislation in other countries demonstrates that collection of digital works involves a number of strands which may include but not be restricted to-
 - Whole domain harvesting where a snapshot of the web domain (e.g. **“.ie”**) is taken at a fixed point in time and repeated at regular intervals (e.g. annually). This gives a snapshot in time of the superficial or free web but does not allow for collection of data from the 'deep' or 'protected' web.
 - Harvesting of websites: Accepting that all websites cannot be harvested comprehensively or frequently, some national libraries identify sites of national importance and harvest them more regularly on a selective basis. An extension of this approach is to harvest websites on a thematic basis e.g. the presidential election 2011 or forthcoming celebrations of national significance.

- Harvesting of publications on websites. Publications are harvested by the legal deposit library(ies) or deposited by publishers, described in the libraries' catalogues, stored and preserved in a digital archive (e.g. individual reports, e-journal parts etc.)

CRRA S.198A (9)

CRRA S.199A (10) –TCD accepts the proposal that work be delivered in either print or another format but not in both as equitable. We endorse that proposal that the legal deposit libraries should decide the form or format for delivery and consider that this provision will underpin practical transition from print to digital deposit.

A 198A (11) We strongly endorse the principle laid out in this clause that digital copying from the internet archive is not prohibited under the proposed legislation while accepting that legal deposit libraries will need to demonstrate systems for controlling digital copies, in order to give confidence to publishers that their rights will not be jeopardised.

CRRA 198A (12) - A major concern for the legal deposit libraries is the importance of avoiding wording and definitions that will rapidly date any new provisions. In order to provide future proofing, the definition of what an electronic/digital work might be should be broad, flexible and independent of any precise format (e.g. e-book, website). Definitions long familiar in print publishing are largely irrelevant in the digital environment, hence the terms *book*, *map*, *serial issue*, *published*, etc. have little applicability in the online world.

The UK Legal Deposit Libraries Act, 2003³ takes print as the starting point and distinguishes other formats from it

"In the case of a work published in a medium other than print, this Act applies to a work of a prescribed description"

As also does also Canadian legislation⁴

"in order to make a publication and its contents that uses a medium other than paper accessible to the Librarian and Archivist, the publisher shall..."

The French DAVI Act focuses in its definition on content communicated by electronic means rather than format

"...also subject to legal deposit are signs, signals, writings, images, sounds or messages of any kind communicated to the public by electronic means"

These definitions are phrased deliberately in general terms in order to avoid limiting the legislation to specific technologies which may become obsolete in the future.

³ UK Legal Deposit Libraries Act, 2003

⁴ DEPOSIT - NON-PAPER PUBLICATIONS REMISE DE PUBLICATIONS NON DISPONIBLES SUR SUPPORT PAPIER. "Canada - S2, Legal Deposit of Publications Regulations, SOR/2006-337

ⁱⁱNew Zealand has developed the concept of ‘public documents’ encompassing both analogue and digital formats and provides pragmatic definitions and interpretations of meanings in relation to both.

The Committee may or may not see a requirement in defining digital publications to distinguish between digital publications with a physical carrier (e.g. dvd, memory stick etc.) and those published online. The Consultation paper on the extension of legal deposit from the Attorney General’s Department of Australia notes that “A reason for making a distinction between the two classes of electronic format is that this recognises the difference between materials in a physical form and tailors the deposit requirements accordingly.”

As offline digital formats are published via a physical carrier they more closely resemble the physical artefact of the print publication and therefore fit more comfortably into the conditions for print legal deposit. The Copyright Review Committee may consider revising S.198 to encompass offline digital formats and craft S.198A for online formats exclusively. We think it important in the case of off-line publications that it is made explicit in the legislation that they must be delivered TPM (technological protection measure) free, as also for online content, in order to ensure access and long-term preservation.

While the articulated objective of extending legal deposit legislation to cover digitally published content is to secure preservation of the Irish national published heritage – intellectual cultural and social. - it is also important to recognise that there may be ‘works’ that it might not be appropriate to collect, such as-

- a private work that has not been published or made available to the public
- a work that is shared by means of the internet via private network such as an intranet
- a work which contains personal data and is restricted to a defined group of people (e.g. restricted area of Facebook).

Many countries have incrementally extended legal deposit to new formats as they emerged – audio, photographic, film- but that has not been the case in Ireland, nor have robust voluntary schemes been established to collect and preserve this content. With the exception of the provisions of S.199 (not yet commenced) the CRRRA focuses on text and does not cover the legal deposit of audio-visual content either as part of a larger work or as primarily an audio-visual work. In the 1990s when CRRRA was being formulated, few people could have foreseen the explosion of mixed media content and the widespread inclusion of video clips and other recordings within web pages and other online content. The clear distinction that may have existed over ten years ago between text and image based publications or an audio and video publication is now more blurred. We advocate that the new legislation includes all material published digitally rather than creating an artificial distinction.

S.199 of CRRA significantly broadened the range of formats liable for deposit with the National Library of Ireland and we strongly recommend that the terms of this section are reviewed and updated with a view to early commencement or incorporation into the proposed section 198A of the CRRA.

OTHER ISSUES

Access

As legal deposit provisions fall within the framework of the CRRA 2000, access and use of legal deposit content is governed by copyright and the Act is silent on any specific conditions for the use of born digital content. Consideration should be given as to whether specific provisions should be made within Section 198A for conditions of access or whatever it should be comprehended within an exception (CRRA 59-70).

In the interest of the public good we strongly endorse the principle that freely available websites archived under legal deposit legislation be made freely available online, as is the case for the US-based Internet Archive. It is in the interest of the public good that the benefits of the collection should be made as widely available as possible, but we also recognise the importance of ensuring that the interests of publishers and other rights holders are respected and their concerns reflected in the legislation.

Under German legal deposit law, when a depositor submits an object (publication) the depositor can indicate which distribution rights are granted to the legal deposit library. The rights range from: end-user access only in the library's reading-room; access over the internet for registered users, to worldwide unlimited access for any user. This model offers protection to the interests of commercial publishers but allows flexibility to widen access if permission is given by the rights holder.

Similarly the National Library of Canada offers publishers a choice of two types of access level for their online publications: open access and restricted access. Publishers are required to select one of these access levels. With open access anyone can view and download the publication through the Internet. The Library encourages publishers to select the open access option. In cases of restricted access (usually for commercial publications) publications are viewable by the public only at selected terminals at the Canadian National Library's main building in Ottawa. It is not possible to print, download, or transfer files from these restricted access terminals.

Discovery

Core metadata is needed for bibliographic records in order to find, identify, select and access content. . However, functionally rich metadata has an intrinsic value of its own and may also be subject to separate, and potentially different, intellectual property right from the content it describes. Legal deposit libraries would wish to ensure that basic descriptive metadata can be published online so that users may discover the content of the archive; we would therefore recommend that metadata is not considered relevant material in its own right.

Conclusion

The extension of the legal deposit provisions will present significant challenges to the Irish legal deposit libraries in addressing digital collection, preservation and access responsibilities. Investment will be required in a digital archive and preservation management solution to enable expansion of capacity in digital archiving and digital preservation for legal deposit content. Ireland's documentary heritage is not merely at risk of loss but already a significant gap has appeared in the national digital record which we are unlikely to recover.

We welcome this initiative by the Department of Jobs, Enterprise and Innovation and feel it is important that legal deposit is retained within the framework of copyright legislation.

TCD recognises that publishers and other rights holders may have concerns about the implications of extending legal deposit to digital and other formats. These concerns may relate to potential impact on commercial interests of publishers and other rights holders if restrictions are not placed on the use that may be made of the archived content. Legislation in countries such as New Zealand and Germany have balanced the interests of the rights holders and the public good by providing for different levels of access dependent on the publisher's permission .

Rights Holders may also have concerns about the potential cost of compliance if legal deposit is extended to digital publications. If legislation is framed to mandate the legal deposit libraries to collect (i.e. copy or harvest) content as appropriate to the format in addition to placing the obligation on the publisher to submit content then archiving can be carried out in the most cost effective way for both libraries and content creators. We suggest that consideration be given in the drafting of legal deposit provisions to provide for a streamlined approach whereby libraries collaborate in collection and archiving so that a publisher deposits content once, rather than multiple times, with access to the archived content provided to all entitled libraries.

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ⁱ UK Draft Statutory Instrument Libraries: The Legal Deposit Libraries (Non-print works) Regulations 2013

ⁱⁱ National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, Part 4; S29