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|  | **[CONUL - Consortium of National and University Libraries](http://www.conul.ie/)**  Regulatory Affairs Sub-Committee |

Response

To

**Modernising Copyright:**

The Report of the Copyright Review Committee

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# Introduction

The [[1]](#footnote-1)Consortium of National and University Libraries (CONUL) welcomes the opportunity to respond to the Copyright Review Committee’s final report entitled *Modernising Copyright*. The Report and draft Bill address the important challenge of establishing a legislative framework in Ireland that balances protection of the rights of copyright holders without constructing insurmountable barriers to innovation and creativity in a rapidly evolving technical environment.

With the transition to digital publishing, libraries of all types have become increasingly involved in the debates around copyright protections and the digital environment. Libraries are seeking to widen access to content through, on one hand, digitization and exposure of their collections, while on the other seeking to negotiate sustainable business models with publishers for access to commercially published digital content.

Recognising the constraints that their terms of reference placed on the Copyright Review Committee, CONUL sees their recommendations as a valuable step towards the establishing a fair and equitable copyright framework in which creativity and innovation can flourish

In its submission CONUL has followed the layout of Modernising Copyright and made responses to issues raised in the following chapters.

* Copyright Council of Ireland
* Rights owners
* Users
* Heritage Institutions
* Fair Use

# Copyright Council of Ireland

Overall CONUL welcomes the Copyright Review Committee’s recommendation that a Copyright Council of Ireland be established with statutory backing, along the model of the Press Council of Ireland (new schedule 4 CRRA) as a “limited company” in compliance with the criteria set out in the schedule 4 of the Bill and provides the revision to Copyright and Related Rights Act (CRRA) necessary to permit the Minister to recognise it as the Copyright Council of Ireland.

We endorse the establishment of a structure as laid out in the schedule to ensure the Council’s independence from Government from State Agencies and from any one category or group of stakeholders (p.17, Report).

**Schedule4 para 5.1G**

**Membership:** We concur with the Review Committee’s recommendation that the Copyright Council be a broadly-based entity with the objective of encouraging dialogue between different groups or categories of stakeholders in the Irish Copyright Community. (p.17, Report)

**Board**: Given the broad-based nature of the membership of the Council, the composition of the Board should be broad-based as well. The Review Committee recommends “*that the membership of the board should more closely track the various categories or groups of stakeholders … modified to take account of the”* fact that many of them “*may wear more than one hat at a time…”* (p. 18 – 19, Report)

* Looking at the Schedule on S.3, it seems that the Committee has tried its best to strike a balance in the make-up of the Board of Directors. However we are unclear about the use of the terminology “providers of information society services” in 5(1)(d) as it has not been clarified either in the body of the Bill or in the Report itself.
* CONUL has reservations about having only 2 Directors to the Board who are completely neutral, with no economic interests in mind; see 5(1) (g) & (h).
* We welcome the uncoupling of libraries and educational institutions from the heritage institutions. However CONUL is concerned that only one Director is appointed representing the interests of “libraries or educational establishments”, as the interests of academics and librarians are somewhat different. CONUL would argue that the interests of libraries are to represent the end user while the education sector may also represent the interests of creators and copyright holders. We would therefore like to see library representation distinct **from** the education sector. Further there are distinctly different areas of interest between the public library sector and the university and research libraries. We would urge that consideration be given to nominating a representative of CONUL to the Board of Directors.
* As drafted there is no stipulation that the position holder representing educational institutions or libraries should possess some technological expertise to be able to meaningfully contribute to the principal objectives of the Council.
* We note in p.19 that the Review Committee stated: *“…it will obviously be open to the Board to form sub-groups to deal with relevant issues”*. But does that answer the issue of striking a balance when discussing formulation of codes of best practice?
* 5(1)(e) & (j) can be construed as whichever way one wants to define it; consumers/general public can become rights holders at any point.
* We have some questions regarding the selection procedure as stated in 5(1) (4). The objective as stated is for the panel to be “independent of the interests referred to in section 5(1) (a) – (i). While aiming for transparency the selection process seems very complicated and unlikely to identify completely impartial selectors. We endorse the principle of seeking to ensure that there is no undue influence from any one interest group in the selection of Directors. As proposed it potentially leaves us with TDs, Politicians, Bankers, Builders & top civil servants.
* Also in regard to the Panel, the use of the terms “in the opinion of the Minister” and “…the Minister considers to be sufficient” makes the process quite subjective. (p.162, Report)

**Principle objects and primary functions of the Copyright Council**

The necessary functions of a Council are:

* act as a consultation body
* set standards
* conduct research
* formulate codes of best practice
* establish methods of permissions management and exchange
* regulate collection societies
* establish arbitration mechanisms

The Review Report does not openly state that the Council will “act as a consultation body”; but looking at the principal objectives of the Council in p. 21-22 of the Report, it seems to us that it is implicit.

The final 3 bullet points are dealt with in the following pages of the report. If it is a “consultation body” then how can the Council establish or regulate any other facets as it is only consultative? It would seem to us that the Controller regulates as suggested under (11) below.

**Services:**

Broadly CONUL believes that the Committee has rightly identified a range of services that would greatly improve the operation of IPR within the State (i.e. establishment of Digital Copyright Exchange, alternative dispute resolution, regulation of licensing agencies and clearance of orphan works). However these regulatory functions are not captured clearly in the statement of principle objectives for the Council. Page 9, Introduction refers to clear legislative structures, but it is not clear from the section on the Council the nature of the body to be established.

The Review Committee has identified a portfolio of services for the Council to provide which if the Council were to embrace all the functions, we are of the opinion that their management would require the establishment of considerable organisational structure to administer it. Are we to understand that the power to appoint staff is covered by S1 of the 4th Schedule that states that the Council should be a company limited by guarantee? If all the services proposed were established under the aegis of the Copyright Council, then it would be a considerably larger organisation than the Press Council. Are there other comparator organisations currently operating within the State which would give an indication of how such a diverse range of services might be delivered?

**1. Digital Copyright Exchange**

* Irish Digital Copyright Exchange: CONUL is disappointed that while the Report accepts the fact that an Irish Digital Copyright Exchange is a good idea, it stopped short of recommending it as a necessity. Convergence towards integrated, efficient and cost effective licensing and rights management is a prerequisite for innovation. A Digital Copyright Exchange is one of the essential tools in achieving such an outcome and a statutory Council would provide the logical framework within such a solution would be enabled.
* There is ambiguity on what the remit of the Digital Copyright Exchange should be. If the Exchange is intended to be “*a mechanism to expand and simplify the collective administration of copyright and licences”*, then it doesn’t sit with the “principal objects” of the Council.

According to the Hargreaves report in UK, as mentioned by the Review Committee, the definition of a DCE is as follows:

**“***A digital copyright exchange is defined as an automated online web-based computer system that allows licensors to offer their rights and allows licensees/rights users to license them. The DCE has six functions which allow rights users to:*

***1.****Look for different types of content across the range of media types* ***2.*** *Define and agree what uses they wish to make of the chosen content with the licensors* ***3.*** *Be quoted a price by the licensor for those uses of the specified content that the system is programmed to offer* ***4.*** *Pay for the rights online within the normal e-commerce framework* ***5.*** *Have the content delivered to them in the appropriate format* ***6.*** *Account back to the licensor as to what content was actually used so that the right creators can be paid their shares.****”***

* CONUL would endorse a less ambiguous approach to this section, especially in view of “orphan works.”
* CONUL would like to see an unequivocal recommendation from the Committee to the Minister to establish a Digital Copyright Exchange as a matter of urgency.

**Funding:** The Committee’s recommendation states that*“whilst the Council should in the main be funded out of subscriptions, it should be able to charge fees for its services, and accept gifts and donations, as well as exchequer funding, National Lottery funds and EU funding.”* (p.21, Report)

Given the size of the country, is a funding model through subscription sufficient and stable for the Council to carry out its functions; and secondly could high subscription rates be discriminatory through exclusion of individuals and bodies unable to afford them? CONUL would like to see assurances that the funding structures will ensure that Council is sufficiently representative and has the capacity to fulfil its mission.

**2. Alternative Dispute Resolution service?**

An Alternative Dispute Resolution mechanism is imperative given that there is no affordable dispute resolution service at present**.** CONUL welcomes the Review Committee’s recommendation *“that the Council should establish a voluntary, independent, neutral, impartial and expeditious ADR service ;”*(p.24, Report)

P 164 Bill - S8 (1)- describes the arbitration principles, but the process is not detailed. It would be helpful to know if the Committee had a model in mind. One approach would be to appoint a neutral independent arbitrator to chair a panel of arbitrators drawn from a balanced representation of the membership of the Council.

CONUL welcomes the establishment of a voluntary arbitration process as part of the framework for dispute resolution.

**3. Specialist Courts:**

CONUL is of the opinion that while in principle access to lower cost judicial redress is desirable, it carries the risk of multiple case law decisions. CONUL considers that a regulated arbitration process is much more suitable for public service, heritage and educational institutions.

* **District Court**

However given that there is no affordable recourse for disputes at present, CONUL welcomes the Committee recommendation (p.25) to add Intellectual Property claims to District Court’s jurisdictions up to the value of €15,000. S2 of the proposed Bill adds a definition of IP claim to s2 CRRA; s4 of the Bill adds a new s16A CRRA providing jurisdiction.

* **Circuit Court**

The Committee recommends adding a new section 16B CRRA through s.4 of the Bill.

“It may be that Government will subsume any such jurisdiction within the Circuit Commercial Court promised in the *Programme for Government*, but we recommend that, in the meantime, a specialist intellectual property court be established in the Circuit Court.” (p.27)

**4. Orphan Works**

The status of Orphan Works is a huge and growing issue in IPR.Convergence towards integrated, efficient and cost effective licensing and rights management is a prerequisite for innovation. A fair and efficient mechanism for dealing with the issue of Orphan Works is one of the essential tools in achieving such an outcome and a statutory Council would provide the logical framework within which such a solution would be enabled. CONUL is disappointed that while the Report accepts the fact that an Irish Orphan Works Licensing Agency is a good idea, it stopped short of recommending it as a necessity. Instead leaving its establishment to the discretion of the Copyright .Council to make a recommendation to the Minister

**Restatement of Copyright Legislation**

CONUL welcomes the Review Committee decision to *“recommend that the Council should be able to propose restatements of Irish copyright legislation to the Attorney General for certification under the 2002 Act, and section 12 of the Schedule provides for this.”* (p.28, Report)

**Controller of Patents, Designs and Trademarks:** As is evident from the current deficits in regulation and control, the Office of the Controller needs to be strengthened significantly to take effective action across all the functions in its remit. We endorse the proposal to rename the Office and title of the Controller to more accurately represent the scope of responsibilities. As proposed by the Committee the powers include implementation of policies as set out in the Act/Statute by the Minister. CONUL would draw attention to the implications that if the regulatory functions remain with the Controller, then, by extension, the functions of the Digital Copyright Exchange and the Alternative Dispute Resolution should come under its remit as well. In that case the Copyright Council would work in an advisory role as laid out in p.30 of the Review Report. In that case should the Digital Copyright Exchange and the Alternative Dispute Resolution process come under the auspices of the Council at all in the first place? (See the Principal objects of the Council in p.21-22)

# RIGHTSowners

CONUL welcomes the clear intention of the Copyright Review Committee to balance the interests of all parties (creators, intermediaries, and users) for the common good. CONUL considers that the ability of those involved in education to have access to a breadth of material is central to innovation and the perpetuation of a smart economy and a flourishing ‘Irish innovation ecosystem’

From a library and education perspective, it has been our experience, when dealing with licence holders for large e-resource packages, that Irish copyright law seems to be superseded by the licences signed with licensing agencies. These can be more restrictive than the ‘fair dealing’ which is afforded through copyright and they also carry a considerable financial burden which can be beyond the reach of some public and educational bodies involved both at second and third level education.

CONUL welcomes the acceptance in the Review Report of the Unfair Contract Terms Directive (p.68) and recommendation amending S.2 (10) CRRA by analogy. S.19 of the Bill provides that if a “term” in the contract infringes any of the rights conferred by the Act, then that term shall be void (p.138). However, s.19 (10) (b) states: *“Whether a term is unfair shall depend on all of the circumstances of the case”.*

It has been the experience of CONUL members during IReL[[2]](#footnote-2) negotiations, that while it can be possible to negotiate on the price being charged, many licensors do not want to change/negotiate any part of the licence terms and conditions.

P138, S (19) –The provisions of 10(a) are welcome. We would like to see disputes arising from this provision being dealt with through the proposed arbitration process.

**Originality:** Greater latitude is needed in terms of platforms such as Academic Virtual Learning Environments. In the previous consultation CONUL sought clarification to what is defined by the term ‘originality’. We are disappointed that the Copyright Review Committee is of the opinion that there is no requirement to provide clarification on the term ‘originality’.

***“****We are persuaded that there is no reason to amend section 17, either in principle or specifically from the perspective of our Terms of Reference, and we consider that any developments in this area should be left to the case-law of the CJEU.”* (p.34)

**Authors:** The Committee does not consider the existing definition of ‘author’ in sections 21-23 CRRA to be a barrier to innovation or that an amendment or repeal would promote innovation. However in the final paragraph of the section on ‘Authors’ the report suggests that the Copyright Council “*might be able to examine this issue*”.

We welcome the clarification on copyright of the soundtrack of film through the recommendation that section 17 of CRRA be amended to clarify that the sound track accompanying a film will be treated as part of the film which is provided for in Section 6 of the Bill.

**Unpublished Works**

CONUL welcomes the recommendations from the Committee amending the CRRA to clarify the term of protection for works unpublished at the date of the death of the author (70 years).

The report suggests amending S.9 CRRA. *“All of these amendments are included in section 7 of the Bill.”* (p.36)

**Remedies**

CONUL welcomes the recommendation of the Committee of ‘graduated remedies’ which would ensure that ‘minor or unintentional infringements’ (incidental copying for example) would not warrant the same sanction as a more serious, intended infraction.

It seems sensible as recommended by the Committee that the same range of remedies should be applicable for infringement of copyright, performer’s rights and recording rights.

**Levies on devices or storage media that facilitate copying**

In its submission to Copyright Review Committee,CONUL suggested that the introduction of private copying levies would, if anything stifles innovation.

The Review Committee recommends that any developments in this area should be left to case law of CJEU. The Government should engage with the Vitorino report published in January 2013 which looked at possible new approaches to levies.

**Photographs and photographers**

CONUL is supportive of the Committee‘s intention to strengthen the position of photographers’ rights in relation to reproduction. However, we are concerned about the proposed amendments for metadata incorporated in the work. The proposal that tampering or removal of metadata constitutes an infringement of copyright may unintentionally cause problems for libraries. The definition of metadata defined in s.2 (2) of the Bill is very broad. Is the objective of the Committee’s recommendation to create a blanket provision as a means to protect the rights of photographers, or will the legislation be framed more narrowly? Even if its application is restricted to purely digital photographs, this could be problematic for libraries as some cataloguing techniques involve embedding metadata within the image itself. Libraries operate in an environment where metadata is constantly shared, recycled and repurposed. It is of the highest importance in the digital environment that metadata be open and linkable.

**Technological Protection Measures and Rights Management Information**

In its submission to the Copyright Review Committee, CONUL strongly recommended that the Department of Enterprise produce a Regulatory Impact Assessment of the measure and are disappointed that this approach has not been adopted.

CONUL is disappointed that instead the Committee has recommended amendments to the existing CRRA. (p.40-42) Also see S.10 of the proposed Bill.

**Broadcasting**

CONUL welcomes the emphasis in the Consultation Paper on ensuring that copyright law be as ‘technology-neutral’ (p. 6) as possible

CONUL welcomes the Committee’s recommendations in this area. The approach adopted by the Review Committee recommends that broadcasting for copyright purposes be defined simply as an ‘electronic transmission’ of information is pragmatic. Excluding internet broadcasts from the definition is in line with UK legislation and the extension of the rights broadcasters to make permitted copies is welcome.

**Streaming**

CONUL welcomes this clarification to the effect that internet transmissions are exempt from the provisions of the CRRA that enable cable programme service to receive and retransmit broadcasts without infringing copyright.

**Computer Programs**

EU Directive as implemented by CRRA provides a separate regime that exclusively determines the exemptions to the exclusive rights applicable to computer programs. Exceptions outside the scope of the directive should not be applied to computer programs.

# USERS:

CONUL welcomes the Committee’s approach to addressing the interests of ‘users’

In particular we welcome the introduction of the concept of fair dealing and the range of exceptions that it will allow. These exceptions appear to be both sensible and pragmatic. CONUL welcomes as positive the proposal that the concept of fair dealing is not limited to the exceptions listed as this will, as the Reports notes, allow for some flexibility and adaptability.

The allowances regarding copying and format shifting will give both individuals and institutions confidence and clarity when dealing with these matters that did not previously exist. The recommendations which specifically relate to education are suitably broad and importantly take into account current developments in education which is increasingly taking place online and through non-traditional means such as distance education. The definition of education is interesting and has been revised following submissions.

“education” means education, instruction, lectures, study, research, teaching or training either in an educational establishment or by any person acting under the authority of an educational establishment, and includes all activities necessary or expedient for or ancillary to such a programme, and “educational purposes” and similar or related phrases shall be construed accordingly;”

It is very clear that education exceptions around copying must be non-commercial and refers to the non-commercial sector. There is a tension here between the Government’s often stated ambitions for universities to be become more closely alignedwith industry and to commercialise research and the Report’s definition of education use as non-commercial.

There is also some tension between the ability to reproduce content for teaching or research purposes and licensing restrictions. The report goes as far as to say that if a license “which purports to limit or restrict the proportion of a work which may be reproduced or communicated (whether on payment or free of charge) to less than that which would be permitted pursuant to sections 57, 61 and 62, or which has that effect, shall be void.” This was the subject of some discussion at the public forum on the report and we assume it is something which will be challenged by publishers who are using DRM as a key element of their offerings (e.g: e-book publishers and platforms).

Finally, the exceptions which allow multiple copies to be produced for use by people with disabilities will be positive for disability services in the education sector.

# Intermediaries:

**Transient & Incidental Copies**

CONUL welcomes the clarification on the position of intermediaries in relation to transient and incidental copies. Section 13 of the Bill relates to Transient and Incidental Copies. Sections 87 and 244 have been amended to reflect change of emphasis in the Court of Justice of the European Union’s (CJEU) approach which allows greater flexibility in making temporary copies (with safeguards) .

**Secondary liability: conduit, caching and hosting immunities**

The issue of infringement by hosts is discussed in the Report. We appreciate the view taken by the Committee that Irish law should await EU proposals on this.

The key points made are that the issues around secondary liability cover a much broader area than copyright and it would (a) imbalance this Bill to try to include the general immunities and (b) to exclude copyright from the general regime of secondary infringement would not make sense and therefore, conduit immunities etc. are excluded from the Bill.

We can concur that there may be a role for the Copyright Council in developing codes of best practice. The Council could also monitor EU proposals or developmentsand then might propose Irish legislative immunities.

**Secondary Liability: further immunities**

The Committee’s recommendations are pragmatic and they address the argument for immunity for search engines and for web browsers pointing to websites and insubstantial reproduction, including cloud computing.

The view taken by the Committee is that Irish legislation should await proposals from EU consultation.

Also, as infringement would tend to be secondary, the concept of Fair Use might be brought into play.

**Linking**

As research libraries we welcome the approach of the Committee to ensure that linking doesn’t infringe copyright.

‘Links simply convey that something exists; but they do not, by themselves, publish, reproduce or communicate its content.’

The Committee recommends the Copyright and Related Rights Act be amended by new sections 87A (1) and 244A (1) in the Bill to clarify that linking does not breach copyright except where the provider of the link knowingly links to an infringing copy.

**Marshalling – indexing, syndication etc.**

The Committee defines marshalling as covering activities such as indexing, syndication, aggregation and duration of online content. The central case is marshalling of news. The Committee sees marshalling as a development of linking in as much as the marshalled text provides a context for the linked work. Although the issue of the extent of allowable content has not been resolved at EU level, the Committee goes on to recommend that such links may be accompanied by an extract, “where the text extract is no more than 2½ per cent of the total number of words in the work, or no more than 160 characters and no more than 40 words”.

Bill, Section 14 applies. Allows for small snippet of work to be appended – defined as up to 160 characters or 40 words.

From the point of view of research libraries this approach seems sensible, though publishers have issues.

**News**

CONUL fully endorses the Review’s recommendation that the full range of European Union Copyright Directive exceptions be implemented.

# Heritage Institutions

The Copyright Review Committee recommends that references to “libraries and archives” be replaced with a more generic reference to “heritage institutions”. This amendment is provided for in section 22(1) of the Bill (p142).

CONUL notes the Committee’s clarification with regard to the bodies for which provision was formerly made under the library and archives exemptions. We are uncertain as to the implications of this approach for the libraries and archives sector, which has particular responsibility for to the access to information – collection of content, archiving and access.

**Accessibility**: The definition of heritage institution could also be applied in the context of designated bodies making accessible copies for persons with a disability in order to allow, not just educational establishments, but also copyright deposit institutions to be so designated. The legal deposit libraries or Copyright Deposit Institutions (CDI) designated under clause 1 of S.198 could use electronic copies of works deposited under legal deposit for the benefit of a person with disability.

Sections 18 (disability), section 22 (heritage) and sections 25-26 (copyright deposit) are designed to interoperate with each other.

From our reading, there does not seem to be an implication that there is an obligation on Copyright Deposit Institutions (CDIs) to supply accessible copies to the general population. However publishers should be made aware that there is no impediment to CDI Libraries providing accessible copies to deposited content.

## Possible new exceptions Proposed for Heritage Institutions

**Exception 1: Format shifting**

* Format shifting by heritage institutions for archival or preservation purposes. A possible new section 69 proposed on format shifting requiring amendment to section 59 (2) of CRRA, 2000.

CONUL asserts the importance of libraries and other heritage institution being permitted to format shift for archival purposes**.** We welcome the recommendation of the Committee on format shifting. However it should be noted that heritage institutions have a wide constituency of users, many of whom are involved in research that potentially has commercial aspects. Therefore it might create a barrier to such institutions supporting innovative development if S69 (1)(d) the term “indirectly” interpreted very narrowly. CONUL would welcome guidance on the scope of the term and whether a declaration by the end user as to the non-commercial purpose of the reproduction is sufficient meet the test of this clause?

**Exception 2: Display**

* The Committee propose that the fair dealing provisions of CRRA be extended to permit the display on dedicated terminals of reproductions of works in the permanent collections of a heritage institution**.**

We feel that the wording of this exception does not reflect contemporary means of communication, and requires updating to reflect current expectations for communication and display.

The concept and terminology used appears outdated. We assume that by terminal is meant any piece of hardware for displaying digital content, rather than a specific reference to a dumb visual display unit.

The concept of dedicated (i.e. tied down) hardware physically restricted to the premises of an institution is outdated; contrary to the open access mission of research libraries and heritage institutions and the public good.

**Exception 3: Lectures**

* It is proposed to insert a possible new section 69A (2). 69A (2) will deal with lectures in heritage in heritage institutions.

CONUL welcomes this recommendation as practical and pragmatic approach,

**Exception 4: Catalogues**

This exception has implications for both ‘Users’ and Heritage Institutions.

We would welcome a distinction being made between published exhibition catalogues and library catalogues i.e. metadata of library collections often with images attached. In line with researcher requirements, libraries are concerned that we be permitted to include images at low resolution at collection or item level metadata in our online catalogues. In the event of publishing a catalogue for sale, mandatory practice would be to clear all rights in advance of publication. We cannot see the immediate applicability of this Exception

**Donations**

The Copyright Review Committee rowed back on the proposal in *Copyright and Innovation* that there is a presumption that where a physical work is donated or bequeathed that the copyright in that work passes with the physical work itself, unless the contrary is expressly stated. Submissions raised concerns that the draft seemed to have a retrospective effect (with the potential to disturb or affect existing transfers), the language was too stark and that it was tilted the balance the other way. The Copyright Review Committee accepted this point.

CONUL welcomes the Committee’s recommendations on donations as a pragmatic and fair approach to dealing with the copyright issues around donations.

## Digital Deposit

CONUL welcomes the proposal by the Copyright Review Committee to insert an additional section into the Copyright and Related Rights Act, 2000 (CRRA) in order to address the growing gap in the national record by extension of legal deposit provisions to digital formats.

In the *draft* **Copyright and Related Rights (Innovation) (Amendment) Bill 2013**,(CRRIAB) the Committee proposes a new section modelled on s.198 of the CRRA, revised to apply to digital works with some additional provisions based on the UK LDL Act, 2003. The Committee revised the initial draft S.198A, fairly heavily from its interim report, *Copyright and Innovation*. The Committee recognises that this is an area of rapid technological change and has drafted accordingly.

In its final Report, the Committee alludes to the fact that publishers made no submissions on this section of the Bill and therefore provides for further consultation on the provisions of S.198A in the future.

To some extent, s.198A might be characterised as ‘enabling legislation’ as power is devolved to the Minister to make regulations in a number of significant areas, including

(17) make regulations for additional permitted acts other than those allowed for under CRRA

(23) make regulations to determine that (21) & (22) [i.e. deposit of a digital publication pursuant to the section is not a breach of contract; an infringement of IPR or an infringement of the Defamation Act] shall not apply

(24) make regulations to implement and administer s.198A of the Act in consultation with the CDIs and publishing community

**Additional Definitions**

**The Committee proposes new definitions for ‘digital publication’ and ‘publisher’ to mirror the digital environment**

* The definition of digital publication is inserted into the existing definition of “work” in section 2 of the principle Act. This is the key definition on which 198A is constructed.

CONUL welcomes the Committee’s definition of digital publication but is of the opinion that the reference to print should be expanded to ensure clarity. Suggested wording might be …other than print **on a physical carrier e.g. paper or microfilm.**

* The Committee propose a new definition of publisher in S 2(1) of the principal Act is provided in the Bill 2(2) of the Bill as follows “*publisher” includes a person who issues or disseminates or otherwise makes available or causes to be made available, to the public, works in any form or format; and “publication” and other related expressions shall be construed accordingly”*

**S.198A – Summary of Provisions**

* In addition to the Copyright Deposit Institutions (CDIs) named in S.198 (1) & (5) of CRRA, the Bill empowers the Minister to specify other Boards and Authorities with the privilege to collect digital content under s.198A. The Committee appears to envisage a multi-institutional approach to capturing and preserving Ireland’s digital record.
* As CONUL suggested in its 2012 submission, the definition of the term “made available in the State” is based on the definition in the UK [[3]](#endnote-1)*the Legal Deposit Libraries (Non-Print Works) Regulations 2013*, S.18 clauses (1) & (2).
* Every CDI is entitled to every digital publication made available in the State after the commencement of the legislation. CONUL welcomes the provision for the NLI to have the right to collect retrospectively The CDIs have discretion in what they wish to collect or not collect.
* As recommended by CONUL in its 2012 submission, the Committee provides for a range of methods for collecting content - the delivery of content by publishers to the CDIs or the downloading or harvesting of content by the CDIs.
* The Committee gives the authority to CDIs to determine the most appropriate format in which content is delivered/collected. This will support preservation of the content in the long-term. Preservation of digital materials requires copies to be made, either identical copies or modified copies to allow for migration/changes in format. There may be a requirement for an exception to IPR to allow the copying of copyrighted materials for this purpose.
* CONUL welcomes the provision that publishers be responsible for providing the CDIs with metadata, necessary computer programs or any information such as passwords or means of circumventing technical protection barriers.
* CONUL strongly endorses the Committee’s approach to the reproduction and access to material freely published on the Web as representing the interests of the common good. The approach permits CDIs to collect, archive and make freely available content from the free Web
* The principle is that where a work exists in multiple formats it shall be liable for deposit in only one of those formats. While s.198 (11) says that where a copy of a book is delivered in a form other than an electronic form then the Board may request in addition to that copy the copy in electronic format, S198A (5) (b) implies that the supply of the digital publication shall discharge the obligation to deliver a book pursuant to s.198.
* S.198A provides some limit on the liability of the publisher in depositing content. Legal deposit by a publisher under this section is not a breach of contract or an infringement of IPR or a breach of relevant sections of the Defamation Act.
* CONUL welcomes the restatement of reciprocity between the UK and Ireland for both print and digital content.
* CONUL welcomes the updating of sanctions for non-compliance to reflect current monetary values. The option for the Minister at his/her discretion to impose a higher level of fine provides flexibility.
* Sections 198A (14), (16) and (17) allow the Minister to impose some conditions on certain uses by CDIs of digital publications pursuant to the Section. In terms of permitted acts the focus is on use/reproduction as laid out in CRRA rather than on any restriction on access to the content.
* The Committee noted in its Report that there was no publisher submission on this issue, but it is clear that publishers do have an interest. In order to accommodate this, specifically in terms of use of the content (s.198A (14)), the Committee recommends that the Minister have the power to make Regulations should the need arise.
* In regard to the provisions of S.198A, amendments required to S.198 are provided in Section 25 of the Bill

## CRRA S.199

S.199 of the CRRA remains un-commenced, so there is no mandate for film and audio to be collected under copyright deposit and preserved for future generations and no provision has been made in the draft Bill. CONUL requests that serious consideration is given to addressing this gap in the national record.

## Content Mining

Research libraries such as those represented by CONUL membership are at the centre of the data deluge. Research libraries are investing heavily in preserving born-digital content, digitising cultural heritage and in facilitating data sharing. Libraries are campaigning for freedom to apply Text Data Mining to this data because they know that doing so will maximise the return on investment of public money. A copyright exception for Content Mining as proposed by the Copyright Review Committee will enable libraries and their users to contribute greatly to an innovative and competitive Ireland.

The vision of the Committee is a step forward as at the moment, researchers are hugely discouraged by a lack of clarity around copyright and ownership of derived works, as well as the complexity of negotiating licences. A copyright exception will allow them to use text and data mining methods to speed the pace of their research and to make new discoveries by analysing massive amounts of data with increasingly faster and more powerful technology.

# Fair Use

Terms of Reference of the Copyright Review included:

3. Examine the US style ‘fair use’ doctrine to see if it would be appropriate in an Irish/EU context.

**Introduction**

Fair use is considered by the Copyright Review Committee to be a “controversial” topic. The intention of the draft Bill is to take account of legitimate concerns and propose a narrowly defined Irish fair use exception. In opting for a fair use proposal the CRC considers that the position of rights holders has been strengthened by many recommendations in the Report and considers the “tightly drawn” fair use exception to be an a suitable “quid pro quo” for this strengthening.

The CRC noted that the doctrine of fair use is not unique to the US and that many other jurisdictions have adopted versions.

Despite submissions to the contrary, the Committee did not accept that member states introducing fair use legislation would be incompatible with EU law.

A compelling argument in favour of the introduction of a fair use exception is, according to the CRC, the inability to predict how the technological innovations of cloud computing and 3D printing are going to develop and the resulting impossibility to draft “ex ante” legal responses.

This exception will, the Committee believes, provide the Irish economy with a competitive advantage in Europe.

1. The report recommends the introduction of “tightly drafted exceptions for innovation and fair use”.

2. Innovation Exception – the Committee recommends that it not be an infringement to derive an original which either substantially differs from or substantially transforms the initial work (S.21)

3. In recognition of the significance of this change it is recommended that

- these sections come into effect on a graduated basis.

- The minister will determine the date/s on which these terms will come into effect.

4. Fair Use Exception – the Committee explicitly state that the proposed fair use exception is differs substantially from the US doctrine and is deliberately “circumspect”.

5. The Committee recommends that all existing exceptions should be regarded as examples of fair use and they must be fully exhausted before the question of fair use analysis arises.

6. Should the question of fair use arise eight separate factors must be applied.

The Committee noted that the Consultation Paper did not generate significant debate on the substantive proposed draft. Neither the first nor second round of submissions engaged fully with the rationale of the form of fair use being proposed. Critics of the fair use doctrine argued against the US model without recognising the Irish proposal was substantially different.

It was noted by the Review Committee that the doctrine of fair use is not unique to the US and that many other jurisdictions have adopted versions. The original Paper considered that there was scope under EU law for member states to adopt a fair use doctrine and the proposed exception is an attempt to achieve an appropriate balance consistent with EU law. This view was rebutted in submissions but again the Committee were of the view that there no substantial argument was raised to suggest that the proposal was incompatible with EU law. Nor does the Committee accept that a fair use doctrine is incompatible with the Berne three-step test; again there was nothing substantial in the submissions to rebut this analysis.

The Committee commented that in weighing up the benefits or otherwise of fair use the submissions tended to be anecdotal and lacked “determinative evidence”.

1. US fair use application recognises innovation and the right to adapt copyrighted material towards the creation of new works.

2. Copyright in the US is explicitly protected in constitution – defined as a thing to promote the progress of science and useful arts. Historically US courts have interpreted this liberally and concluded that its purpose was to stimulate the development of the works it protected and not to inhibit progress. Courts justified the fair use exception on the basis that interests of public were primary over interests of rights holder when the two were in conflict.

3. Fair dealing has been characterised as restrictive as it is based on an exhaustive list of exceptions whereas fair use has been seen as a more robust option for users in that it allows potentially any use of a work to be fair provided that it is consistent with the set of decision-making factors.

4. Has created a litigious environment as cases are decided on their own merits.

5. Courts have struggled to find an adequate balance between competing rights in the modern technological environment.

6. We observed that transposing fair use into Irish statute law is fraught with difficulty. The Review Committee emphasises they are not recommending a US form of fair use rather a specifically Irish version more akin to fair dealing in its expansion of the exemptions and the requirement to fully exhaust these before proceeding with a claim of fair use.

7. Adoption of fair use would require a shift in emphasis with regard to constitutional protection accorded to property. US constitution recognises copyright as a property right but limits its scope for public good. Not so clear in Ireland, Articles 41 and 43 give a strong presumption in favour of the property holder and a consequent right to adequate compensation – 43.2 does allow for limiting property rights for the common good but this hasn’t proved a successful defence.

Therefore this has the potential to make challenges under an Irish fair use extremely complex and expensive – opens up unwelcome litigation scenario.

8. CONUL was unable to express an opinion on the effects of introduction of fair use or extension of fair dealing exemptions would be of any useful benefit to provision of library services in Ireland other than to say while not necessarily a bad thing - it would create uncertainty and potentially lead to a more litigious environment.

9. US universities and libraries have adapted to the legal uncertainty of fair use by adopting user guidelines – also where fair dealing is in place e.g. in Canada guidelines have also proved necessary. CONUL may need to agree a model set of guidelines in relation to copyright and libraries.

10. We observed that for educational settings licenses and technology have reduced the scope of fair use. But fair use would potentially expand the range and amount of material that could be used in an educational setting and in this sense would be welcome.

11. EU law EUCD currently makes no provision for fair use as a defence to copyright infringement – however it does not appear to preclude the national law in member states from expanding the exceptions to copyright. The Committee considered there is scope under EU law for member states to adopt a fair use doctrine and believes the EUCD doesn’t necessarily preclude it but somewhat hesitant in its language. CONUL had no view in its response.

12. CONUL was unable to comment on the drafting of the proposed statute. We also felt it was difficult to ascertain how fair use would encourage innovation. It is the view of the Committee that the draft section 49A takes into account the legitimate concerns of rights owners and also provides sufficient space for innovation.

13. CONUL felt that in theory there was nothing in fair use that could subvert the interests of rights holders. We felt there were issues for digital libraries in the absence of controls digital libraries could amount to free distribution centres, Again it was felt fair use guidelines would be especially helpful.

14. A compelling argument in favour of the introduction of a fair use exception is, according to the Review Committee, the inability to predict how the technological innovations of cloud computing and 3D printing are going to develop and the resulting impossibility to draft “ex ante” legal responses.

18. CONUL had no objection to introduction of fair use other than fear of increased litigiousness from publishing industry.

The Review Committee appears lukewarm and ambivalent in its language in introducing fair use exception, almost as if expecting opposition.

The eight factors make it quite broad and they aren’t that clearly defined in the Report.

Commentators have suggested the giving the minister authority to determine what was fair use in certain conditions would give the minister the ability to override courts decisions without clarifying why.

CONUL would ask the question why legislate for something that may put us at odds with Europe – again CRC not very clear on potential conflict here.

The Review Committee believe the reforms should be based on three considerations: the statutory text should take full account of the legitimate concerns raised by critics of fair use; it should be tied as closely as possible to, and informed as much as possible by, the existing exceptions; and it should be based on, and take advantage of, the experience of other jurisdictions not just the US.

49A Fair Use

(1) The fair use of a work is not an infringement of the rights conferred by this Part.

(2) The other acts permitted by this Part shall be regarded as examples of fair use, and, in any particular case, the court shall not consider whether a use constitutes a fair use without first considering whether that use amounts to another act permitted by this Part.

(3) For the purposes of this section, the court shall, in determining whether the use made of a work in any particular case is a fair use, take into account such matters as the court considers relevant, including any or some or all of the following –

(a) the extent to which the use in question is analogically similar or related to the other acts permitted by this Part,

(b) the purpose and character of the use in question, including in particular whether

(i) it is incidental, non-commercial, non-consumptive, personal or transformative in nature, or

(ii) if the use were not a fair use within the meaning of section, it would otherwise have constituted a secondary infringement of the right conferred by this Part.

(c) the nature of the work, including in particular whether there is a public benefit or interest in its dissemination through the use in question,

(d) the amount and substantiality of the portion used, quantitatively and qualitively, in relation to the work as a whole,

(e) the impact of the use upon the normal commercial exploitation of the work, having regard to matters such as its age, value and potential market,

(f) the possibility of obtaining the work, or sufficient rights therein, within a reasonable time at an ordinary commercial price, such that the use in question is not necessary in all the circumstances of the case,

(g) whether the legitimate interests of the owner of the rights in the work are unreasonably prejudiced by the use in question, and

(h) whether the use in question is accompanied by a sufficient acknowledgement , unless to do so would be unreasonable or inappropriate or impossible for reasons of practicality or otherwise.

(4) The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding would otherwise be made pursuant to this section.

(5) The Minister may, by order, make regulations for the purposes of this section –

(a) prescribing what constitutes a fair use in particular cases, and

(b) fixing the day on which this section shall come into operation.

The order in which the above paragraphs have been arranged is deliberate in order to give some guidance to courts on the extent to which these factors pull in favour of (paras (a) to (c)) or against (paras (f) to (h)) a fair use finding.

It is the view of the Review Committee that the draft section 49A takes into account the legitimate concerns of rights-owners and also provides sufficient space for innovation.

The Committee considers that subsection 2 and subsection 3(a) tightly bind the fair use exception to the other CRRA exceptions and hold that the clear definition of factors (a) to (h) removes ambiguity and promotes certainty in their application

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| **CONUL Regulatory Affairs Committee**  5th March 2014 |

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| Membership  Margaret Flood, TCD, Convenor  Marie Burke, UCD  Miriam Corcoran, DCU  Siobhan Fitzpatrick, RIA | Eoin McCarney, UCD  Colette O’Flaherty, NLI  Anita Wilcox, UCC |

1. CONUL is a consortium of Ireland's main research libraries.  Its mission is to develop and improve the library and information services of the CONUL members through the exchange of experience and the organisation of cooperative activities." [<http://www.conul.ie/>]  
     
    [↑](#footnote-ref-1)
2. IReL – The Irish Research eLibrary is a Consortium of Higher Education institutions to support research and innovation in Ireland and funded by the HEA & DJEI to purchase electronic resources for research in higher education. [↑](#footnote-ref-2)
3. The Legal Deposit Libraries (Non-Print Works) Regulations 2013

   1. [**No. 777**](http://www.legislation.gov.uk/uksi/2013/777/made); [**PART 3**](http://www.legislation.gov.uk/uksi/2013/777/part/3/made) **;**
   2. **Regulation 18**

   **On line work: published in the United Kingdom**

   **18.**  (1)  Subject to paragraph (2), a work published on line 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 relating to the creation or the publication of the work take place within the United Kingdom.

   (2) A work published on line shall not be treated as published in the United Kingdom if access to the work is only made available to persons outside 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 paragraphs (1) and (2), that manner of connection with the United Kingdom is also prescribed for the purposes of section 10(5)(b) of the Act. [↑](#endnote-ref-1)