



**An Bille Cóipchirt agus Ceart Gaolmhar (Nuálaíocht)
(Leasú), 2015**
**Copyright and Related Rights (Innovation)
(Amendment) Bill 2015**

Meabhrán Mínitheach
Explanatory Memorandum



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EXPLANATORY MEMORANDUM

Background

The Copyright Review Committee (the Committee) was established on 9 May 2011 by the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton (TD). To widespread acclaim, after an extensive consultation process, the Committee's Report, dated 1 October 2013, was published by the Minister on 29 October 2013. Entitled *Modernising Copyright*, the Report contained an extensive draft Copyright and Related Rights (Innovation) (Amendment) Bill 2013 to implement its recommendations. As is the fate of many fine reports, *Modernising Copyright* has since languished in the Minister's in-tray. Meanwhile, debates about copyright reform have moved centre stage in the European Union. The recommendations in the Report have much to contribute to these debates. As a consequence, the present Bill seeks to enact the draft Bill provided by the Copyright Review Committee's Report on *Modernising Copyright*. And this explanatory memorandum is drawn from the text of the Report.

The current Bill differs from that drafted by the Committee in three respects. First, the current Bill updates the Committee's Bill to incorporate the European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 (S.I. No. 490 of 2014). Second, the exception which the Committee's Bill described as "fair use" is in this Bill described as "reasonable dealing". And, third, the Bill is amended to include a scheme of private copying levies.

Summary of Recommendations

The centerpiece recommendations of the Bill relate to the establishment of a Copyright Council of Ireland and specialist intellectual property tracks in the District and Circuit Courts, and to the introduction of tightly-drawn exceptions for innovation, reasonable dealing, and very small snippets of text in the context of online links.

The position of rights owners will be improved by the Bill, by recommendations to extend remedies, technological protection measures, and rights management information. Furthermore, photographers in particular will benefit from the recommendation that copyright protection for metadata be strengthened.

The position of copyright users will also be improved by the Bill, by recommendations to introduce the full range of exceptions permitted by EU law, including format-shifting, parody, education, disability, and heritage, as well as related exceptions for non-commercial user-generated

content and content mining. Furthermore, copyright deposit libraries, in particular, will benefit from the recommendation that the existing legal copyright deposit provisions be extended to digital publications. Finally, all users will benefit from a comprehensive recommendation that any contract term which unfairly purports to restrict an exception permitted by the Act should be void.

Copyright Council of Ireland

The Bill establishes a Copyright Council of Ireland, as an independent self-funding organisation, created by the Irish copyright community, recognised by the Minister, and supported and underpinned by clear legislative structures provided (*section 3* of Bill; and the Schedule). It will be analogous in some respects to the Press Council recognized pursuant to section 44 of the Defamation Act 2009. The Council will be based on principal objects that ensure the protection of copyright and the general public interest as well as encouraging innovation; and it will have a broad subscribing membership and a Board drawn widely from the Irish copyright community. It will provide education and advice on copyright issues, advocate both nationally and internationally for developments in copyright policies or procedures, and work towards solutions on difficult copyright issues. It will be able to establish a Digital Copyright Exchange (to expand and simplify the collective administration of copyrights and licences), a voluntary alternative dispute resolution service (to meet the need for an expeditious dispute resolution service outside the court system), and an Irish Orphan Works Licensing Agency (to provide a solution to the problem of orphan works that are not within the European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 (S.I. No. 490 of 2014)).

It is crucial that the Council be independent in the performance of its functions (*section 11* of the Schedule). The wide variety of its functions, its broadly-based subscribing membership, and its widely-representative 13-member Board, will assure its independence from Government, state agencies and any one category or group of stakeholders. The Minister or the Controller will not be represented on the Board of the Council. And the Council will, in the main, be funded out of subscriptions paid by its members based on a transparent scale of subscription fees and membership categories. However, it will be able to charge fees for its services, and to accept gifts and donations as well as to receive exchequer funding, National Lottery funding, and EU funding, if required. And, in line with international best practice, by which a percentage is deducted from private copying levies for social and cultural purposes, the Council will receive a percentage of the private copying levies introduced in this Bill.

Digital Copyright Exchange

The Council will be able to decide whether to establish a voluntary Digital Copyright Exchange aimed at providing a mechanism to expand and simplify the collective administration of copyrights and licences. In particular, the Council will be able to decide whether to press ahead with a Digital Copyright Exchange immediately, or to wait and seek to reap the benefit of emerging experience in the UK and elsewhere, particularly at EU level.

Participation in the Exchange will, initially at least, be on a voluntary basis, with rightsowners deciding whether to engage with the initiative. In order to cover the overheads associated with setting up the digital exchange, the possibility to charge licensors a small fee for registration is envisaged.

Alternative Dispute Resolution and Specialist Courts

The Council will be able to establish a voluntary Alternative Dispute Resolution (ADR) service. This service will be voluntary, independent, neutral, impartial and expeditious in nature. It will be able to provide a wide variety of mediation options, including telephone assistance and possibly, online services. And it will be able to develop and make available standard form ADR clauses and contracts that could be used globally.

In parallel with the ADR service, the Small Claims procedure in the District Court will be extended to include intellectual property claims up to the value of the standard limit of the District Court's jurisdiction, and a specialist intellectual property court will be established in the Circuit Court to include intellectual property claims up to the value of €75,000 (*section 4* of the Bill). The Controller of Patents, Designs and Trade Marks will be renamed the Controller of Intellectual Property, to more accurately reflect the Controller's role and functions (*section 5* of the Bill). The Controller will continue to regulate copyright licensing bodies. However, in the event of the rejection by the Controller of a licence application, an appeal before the newly-created Intellectual Property Court of the Circuit Court will be possible.

Of course, these new Courts and the Controller's Office should be properly resourced. If they are not, all of this new architecture will be for naught. Moreover, in these new structures, it will still be for the Minister to make policy, for the Controller to implement that policy and to regulate and administer the State's formal intellectual property infrastructure, for the Council to provide education and advice and to run its various services, and for the Courts to provide ultimate resolution of disputes.

Innovation and Reasonable Dealing

The Bill introduces tightly-drafted and balanced exceptions for innovation and reasonable dealing. These are crucial, since the forthcoming EU copyright proposals will not now address questions of copyright exceptions and balance. Given the significant nature of these changes, the Minister's general power to determine the date on which they come into operation is expressly reiterated in these sections, so that they may come into effect on a graduated basis at appropriate times.

The essence of innovation is a substantial development or innovation that creates new value. A tightly drafted and balanced exception to encourage innovation means that it will not be an infringement of copyright to derive an original work which either substantially differs from, or substantially transforms, the initial work (*section 21* of the Bill).

The reasonable dealing exception is very circumspect. The existing exceptions will be regarded as examples of reasonable dealing, they must be exhausted before analysis reaches the question of reasonable dealing, and the question of whether a dealing is reasonable on any given set of facts turns on the application of up to eight separate factors (*section 29* of the Bill).

The reasonable dealing exception was described as a fair use exception in the Copyright Review Committee's Report and Bill. This is probably because the Committee's Terms of Reference directed them to "examine the US style 'fair use' doctrine". However, the exception in their Bill differs so substantially from the US fair use doctrine that describing it in those terms is misleading. Instead, it is described here a reasonable dealing exception. Reasonableness is a familiar standard in a great many aspects of Irish law; and dealing is a familiar standard in Irish copyright law. Together, they better capture the essence of the defence provided in *section 29* of the present Bill.

Linking

Interconnectedness by linking is at the very heart of the internet, so this Bill will ensure that linking does not infringe copyright, except where the provider of the link knew or ought to have been aware that it connects with an infringing copy. The Bill will also ensure that, with regard to marshalling activities such as indexing, syndication, aggregation and curation of online content, it will not be an infringement of copyright to reproduce a very small snippet of the linked work reasonably adjacent to the link. In the context of literary works, a very small snippet will consist of no more than either 160 characters or 2.5% of the work, subject to a cap of 40 words. This is all provided for in *section 14* of the Bill.

Since the publication of the Copyright Review Committee's Report and Bill in 2013, the Court of Justice of the European Union (CJEU) has decided several cases which have confirmed that linking does not amount to an infringement of copyright. *Section 14* of the present Bill gives effect to these decisions in Irish law.

Remedies

A key means by which copyright drives innovation is by incentivising rightsowners and content creators to produce copyright works. *Section 8* of the Bill therefore provides for a full range of graduated and proportionate civil remedies, for infringement of copyright, of performers' rights, and of recording rights. Hence, at one end of the scale, unintentional breaches are not met with significant awards of damages, and that, at the other end of the scale, the most serious breaches can be appropriately dealt with by the award of restitutionary, exemplary or punitive damages.

Photographers

The Bill will provide for explicit protection for digital watermarks and other metadata applied to photographs. A definition of metadata is provided in *section 2(2)* of the Bill. *Section 9* of the Bill extends copyright protection to metadata, and provides that its removal will amount to an infringement of copyright.

Technological Protection Measures

The Bill provides various ways by which the legal rules underpinning technological measures for the protection of copyright or for the management of copyright information will be strengthened. In particular, rightsowners will be able to seek remedies for infringements of rights protection measures even where the work has been licensed, and circumvention of a technological protection measure will be actionable at the behest of the rightsowner as though it were an infringement of copyright (*section 10* of the Bill).

On the other hand, users will have an effective remedy where the technological protection measures prevent a user from performing an act permitted by the exceptions provided in the legislation (*section 10* of the Bill).

Intermediaries

Statutory provisions relating to transient and incidental copies will be amended to come more closely into line with the approach being taken by the CJEU (*section 13* of the Bill).

Users and Consumers

Innovation is increasingly an iterative and interactive process in which users play increasingly important roles, especially online, where technology is making it increasingly easier for users to innovate. To facilitate this, the definition of fair dealing will be amended to allow Irish law to reconnect

with developments on fair dealing elsewhere in the common law world (*section 16* of the Bill). Moreover, the full range of exceptions permitted by EU law will be introduced. If Ireland is not to be at a competitive disadvantage to countries such as the UK, which has transposed the full range of EU exceptions and limitations, we will need to do likewise.

Five of these exceptions relate to private use: reproductions on paper for private use; format-shifting; back-ups; parody; and non-commercial user-generated content (all in *section 16* of the Bill). The main argument in favour of private copying exceptions relates to users' reasonable assumptions and basic expectations. Users now commonly assume and expect that, if they buy content for personal (as opposed to commercial) use, they should be able to access it in various formats and across multiple devices. As a consequence, many users routinely make copies for private use, and do not believe that this is or should be against the law. Failure to acknowledge this would diminish respect for the system of copyright and undermine the credibility of copyright legislation. Accommodating basic and genuine user expectations in *section 16*, alongside the legitimate interests of rightsowners, makes copyright law stable and sustainable, thereby contributing generally to cultural and economic development and innovation.

Other exceptions relate to news (*section 15* of the Bill), religious or official celebrations (*section 16(3)(b)* of the Bill), and public administration (*section 20* of the Bill).

Finally, all users and consumers will benefit from a comprehensive recommendation that any contract term which *unfairly* purports to restrict an exception permitted by the Act should be void (*section 19* of the Bill).

Since the publication of the Committee's Report and Bill in 2013, judgments of the CJEU and of the High Court in London have confirmed that EU law provides that private copying exceptions require fair compensation in the form of levies. Hence, in an amendment to the Committee's Bill, and drawing on international best practice, the new *section 30* of this Bill provides for a comprehensive, balanced and workable levy scheme.

Education and Research

To incorporate the range of exceptions in respect of education permitted by EU law, the existing education exceptions relating to "research or private study" will be amended to cover "education, research or private study", the existing exceptions relating to "instruction and examination" will be amended to cover "education and examination", and these exceptions will extend to distance learning and the use of material available online (*section 17* of the Bill). These developments will be subject to a licence over-ride, and they will be balanced by a definition of "education" which explicitly confines these exceptions to formal education in the non-commercial sector (*section 2(2)* of the Bill).

Similarly, given the potential for new discoveries from existing data, very significant social benefits stand to be gained from content-mining, so exceptions relating to content-mining (*section 27* of the Bill) and to digital research and computer security (*section 28* of the Bill) will be introduced.

Disability

To incorporate the full width of the exception in respect of disability permitted by EU law, the existing exception for accessible personal copies for persons with a disability will (subject to a licence over-ride) be extended to permit multiple accessible copies for persons with a disability to be made by designated bodies. Furthermore, the Minister may provide that publishers should be given an anticipatory duty to retain intermediate

electronic versions of works for the purpose of creating accessible copies (*section 18*).

Heritage

The Bill will help to underpin Ireland's strong cultural heritage and traditions in art, music and literature. References in the current legislation to "libraries and archives" will be replaced with a more generic reference to "heritage institutions" (as defined in *section 22(2)* of the Bill), such institutions will be able to format-shift works in their collections for archival or preservation purposes, to display such works on terminals in the institutions, and to use them in public lectures and in catalogues relating to exhibitions (*sections 22 and 23* of the Bill).

There will be a rebuttable presumption that where a physical work is donated or bequeathed, the copyright in that work passes with the physical work itself (*section 24*).

In keeping with the digital focus of much of the Bill, the existing provisions relating to legal copyright deposit will be extended to digital publications, so that copyright deposit institutions will be able to decide which digital publications they wish to claim and how they wish to claim them, in a process that is as similar as possible as the existing provisions. Such institutions will be able to make copies of our online digital heritage by reproducing any work that is made available in the State through the internet (*section 26* of the Bill provides for digital deposit; *section 25* of the Bill provides for parallel changes to the existing provisions).

Furthermore the Heritage Fund Act, 2001 will be amended to include digital publications, thereby potentially unlocking a significant source of funding for heritage institutions.

Other Recommendations

There will be a new, technology-neutral, definition of "broadcast" for copyright purposes, and (for the avoidance of doubt) that the existing cable programme exceptions should not capture internet transmissions (*section 11* of the Bill). The sound track accompanying a film will be treated as part of the film (*section 6* of the Bill). It will be clarified that copyright exceptions do not apply to computer programs, as they are subject to their own regime (*section 12* of the Bill). An anomaly in the current legislation, by which certain unpublished works might gain a perpetual copyright, will be removed (*section 7* of the Bill).

To ensure that there is a single authoritative statement of all Irish copyright legislation, the Copyright Council should be able to propose such restatements to the Attorney General (*section 12* of the Schedule). And there will be a review of the operation of the changes made by the Bill five years or so after it comes into force (*section 31* of the Bill).

*Senator Sean Barrett,
Nollaig, 2015.*