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December 4, 2019

To: Copyright Directive Consultation
Consultation Number 3
Copyright Section
Intellectual Property Unit
Department of Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
D02 TD30
Republic of Ireland

by e-mail: copyright@dbei.gov.ie

The National Writers Union (NWU) welcomes the opportunity to submit the comments below in response to your Consultation Paper No. 3, "Consultation on the transposition of Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC", as published at <https://dbei.gov.ie/en/Consultations/Public-consultation-transposition-of-Directive-EU-2019-790-Paper-No-3.html> and <https://dbei.gov.ie/en/Consultations/Consultations-files/Consultation-on-the-transposition-of-the-Copyright-Directive-EU-2019-790-Articles-8%E2%80%9312.pdf>.

Our answers to those of your questions to which we have responses are as follows. We express no opinion with respect to your other questions.

1. Name (and contact details if you wish):

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2. Are you: a rightsholder; an organisation representing the rights of rightsholders (including authors and publishers).

The NWU is an organization of authors, many of whom are also publishers as self-publishers of some or all of their works. We are also the holder of some or all rights to various works published in the name of the NWU, including books such as our "Freelance Writers' Guide" and our Web site, nwu.org.

3. If you are providing a submission on behalf of an organisation, who does your organisation represent?

The NWU is a national labor union in the USA that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union, Local 1981, of the United Auto Workers, AFL-CIO.

4. Do articles 8-12 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

Yes, as a rightsholder the NWU is directly impacted.

7. Is it necessary to specify in Irish legislation who should have responsibility for monitoring compliance with the licensing of out-of-commerce works as set out in Article 8? If so, what information is necessary to ensure that there is compliance with the Directive in this regard?

For the NWU and our members as non-EU rightsholders, the most important aspects of compliance with the directive are (a) the criteria and methodology for determining that a work is "out of commerce", and (b) the opt-out procedures. Sufficient information must be available to enable rightsholders to assess whether these criteria, methodologies, and procedures comply with the Directive.

Whatever entity has responsibility for monitoring compliance with the Directive should be one that accepts complaints and has redress procedures available to rightsholders, including impacted non-EU rightsholders.

8. What are your views on whether Irish legislation should specify the requirements for determining whether a work or set of works is out of commerce? What should those requirements be, e.g., a certain period of time to have elapsed since the work was first made commercially available or a cut-off date?

We do not believe that it is reasonable to assume that a work, or all works in a collection of works, are "out of commerce" merely because a certain amount of time has passed since the publication of an edition including the work. Many writers are exploiting rights to their personal backlists of older works.

"Customary channels of commerce" for written works must be explicitly recognized as including new self-published digital formats such as Web pages, mobile apps, and e-mail newsletters which may have different formats, structures, and titles than print versions; give no internal indication that they include works previously published in books, magazines, or newspapers; have no ISBNs or identifiers; are listed in no bibliographic or other database; for which there is no search engine; and of which the publisher(s) of the print edition(s) containing the work are typically unaware.

It should not be assumed that it is possible to determine from a copy of a print edition of a book, newspaper, magazine, or other publication in what country the works included were first published, or the nationalities of the authors.

10. What do you consider to be "reasonable effort" when determining if a work is out-of-commerce?

The only way to determine whether a work included in the print holdings of a library is available through customary channels of commerce is to ask the author.

11. In general, do you have any other views on the operation of the proposed licensing mechanism?

The Directive requires that any rightsholder be able to to, "at any time, easily and effectively" exclude any or all of their works from:

(a) licensing pursuant to Article 8, Paragraph 1;
(b) exception or limitation pursuant to Article 8, Paragraph 2; and/or
(c) Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c)

An "opt-out" requirement is a formality prohibited by the Berne Convention. The more burdensome the opt-out process, the more clearly it constitutes a prohibited formality.

The Directive requires that opt-out be "easy" and "effective". These requirements should be strictly observed in implementation of the Directive, both by the EUIPO and EU member states – of which Ireland is among the most important for US and other non-EU writers in the English language.

After Brexit, Ireland will of course be the most significant EU member state where English is a national language, and the EU member state where works by US writers are most likely to be found in libraries' print and digital holdings. Many works published in the US are also published in Ireland, often without any explicit indication of which edition was published first or of the existence of other editions.

For opt-out to be easy and available at any time and for all works of a rightsholder, it must be possible for a rightsholder, before any of her works have been deemed "out of commerce", to exclude all of her works (without having to itemize them, which would rarely be easy and in many cases would be impossible) from any or all of these licensing mechanisms or exceptions, in all EU member states, through a single, one-time exclusion request through the EUIPO portal, effective in all member states.

A system that requires a rightsholder to opt out separately in each member state would be neither "easy" nor "effective", and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to itemize her works would be neither "easy" nor "effective", and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to wait until certain of her works have been identified as "out of commerce" before she can exclude them (and which thus requires her to make searches for each of her works, at regular intervals, in some database of works so identified) would be neither "easy" nor "effective", and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to opt out separately from each type of default licensing or exception would be neither "easy" nor "effective", and would not comply with the Directive or the Berne Convention.

13. What are your views on whether additional publicity measures are necessary to increase awareness for rightsholders about the use of their works under this mechanism? If so, what should those additional publicity measures be?

It would never occur to most US writers that their works could be copied and distributed by an Irish library without notice to them or their permission. US writers who are directly exploiting their own worldwide rights, and are not seeking distributors in Ireland or other countries, are especially unlikely to pay any attention to information about Irish or other non-US licensing schemes.

It is essential to provide notice to non-EU authors that their work can be included in these exceptions and limitations, without any attempt to determine the nationality of the author or place of first publication, if it is included in a collection (such as a typical Irish library collection) containing a majority of EU works.

It is essential to provide notice to all rightsholders, including non-EU authors, of their right to "easily" and "effectively" exclude their works. When a work is determined to be "out of commerce", a reasonable effort should be made to notify the author of that determination and of her right to exclude her works.

15. Do you think that collective licensing with extended effect should be provided for in Irish legislation, and if so, why?

In general the NWU opposes extended collective licensing (ECL) of digital rights.1 We have explained the basis for this position in detail, most recently in a joint submission to the US Copyright Office in response to the request of that office for comments concerning possible legislation to authorize a pilot program ECL for mass digitization in the US.[1] (After consideration of the public comments, the Copyright Office decided to recommend against any such legislation.[2])

As we said in our most recent comments to the US Copyright Office on ECL for digital rights, "Our primary concern is that any 'extended collective licensing' (ECL) for mass digitization of library or archival holdings will, regardless of any attempted limitations on the included works or authorized uses and any 'opt-out' provisions or nominal 'royalty' payments, inevitably result in the granting of licenses for new digital editions that will compete unfairly with, and cannibalize larger potential revenues from, our own digital editions of our work."[3]

Our objection is *not* to collective licensing in general, or to ECL in general.

As we said in our most recent comments to the US Copyright Office, "The NWU and SFWA have supported collective licensing systems, and certain secondary uses of many NWU and SFWA members' work are available for licensing through the [Copyright Clearance Center] or other such agencies…. The NWU, SFWA, and many of our members receive money from … ECL schemes for photocopying in foreign countries of books, articles, etc. by US writers."[4]

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1 Comments of the NWU and the Science Fiction and Fantasy Writers of America, Inc. (SFWA), "Mass Digitization Pilot Program", October 9, 2015, available at <https://nwu.org/wp-content/uploads/2015/10/NWU-SFWA-ECL-9OCT2015.pdf>.

2 Letters to the Chair and Ranking Member of the Committees on the Judiciary of the U.S. Senate and House of Representatives, September 29, 2017, available at <https://www.copyright.gov/policy/massdigitization/senate-letter.pdf> and <https://www.copyright.gov/policy/massdigitization/house-letter.pdf>.

3 Comments of the NWU and SFWA, October 9, 2015, p. 4.

4 Comments of the NWU and SFWA, October 9, 2015, pp 7,9.

Our objection is specifically to *extended* collective licensing for *digital* rights. To reiterate the explanation we provided to the US Copyright Office:

"The test for the legality of these ECL schemes is whether they interfere with the normal commercial exploitation of writers' rights to our "backlist" works. Very few US writers are actively exploiting the rights to photocopying in foreign countries of editions of their work that were previously published in books, periodicals, or journals. And photocopies made in foreign countries are unlikely to make their way back into the US to compete with other editions of the same works. So ECL revenues for foreign photocopying are typically secondary and incremental. They add to, rather than detracting from, whatever revenues US writers are earning from new (perhaps self-published) US print or e-book editions of our previously published works, or from ads on our personal websites where we have posted our older work.

"On the other hand, ECL schemes for digitization, rather than photocopying, fail the same test. Digital copies made under ECL licenses directly compete with, and divert readers and revenues from, other authorized digital editions.

"Many writers are actively exploiting our digital rights, including our rights to works previously published on paper in books, periodicals, or ephemera, and potentially held by libraries or archives in these formats. The primary source of continuing revenues from the rights to most 'backlist' written works previously published in books, printed journals, ephemera, or other printed formats, and included in library or archival collections, is not photocopying or the publication of new hardcopy editions but the distribution of new digital editions. These new digital editions, often self-published, take the form of e-books, paid PDF downloads of digital 'offprints', content on our own revenue-generating websites, smartphone app content, etc.

"Someone who reads a digital copy of one of our previously-published works made under an ECL scheme doesn't pay to download a PDF offprint or self-published new e-book edition, and doesn't click on any of the ads on the pages of our website on which we have republished all or parts of the work (or of a new edition of it).

"In a world where most revenues for Web publishing come from advertising, clickstream diversion deprives writers of revenues and interferes directly with the normal commercial exploitation of digital rights.

"Extended collective licensing for digitization would, in this way, deprive writers of income and violate the Berne Convention. ECL may be appropriate for photocopying and perhaps some other secondary rights, but not for digital copying or digital format conversion (scanning) rights — the primary and most valuable rights to most backlist works."[5]

5 Comments of the NWU and SFWA, October 9, 2015, pp 9-10.

Most writers need publishers, distributors of physical copies, and/or collective licensing agencies to exploit our rights to physical copying and making available of our works abroad in hardcopy formats. Not so much, if at all, with respect to rights to digital copies, which we can distribute directly worldwide.

By enabling writers to distribute our work directly to readers abroad, and to generate revenues from that distribution, the Internet makes it unnecessary, in most cases, for us to rely on collective licensing agencies to exploit our digital rights.

Many writers, of course, would prefer to assign the exploitation of these digital rights to a collective licensing agency, just as many writers would prefer to assign the exploitation of print rights to a publisher. Those who wish to do so can. But many writers would choose to exploit these rights ourselves, and this is a choice to which we are equally entitled.[6] Writers must be free to make this choice for ourselves. It should not be imposed on us by law or regulation.

We do not intend or consider this submission to be confidential. We authorize the public disclosure of these comments.

Respectfully submitted,

_____/s/_____

Larry Goldbetter, President

Edward Hasbrouck, Co-Chair, Book Division

6 The "NWU Guide to Book Contracts", as most recently updated, recommends that in negotiating contracts for print publication, writers should reserve digital rights so that they can be exercised or assigned separately from print rights, unless they are convinced that the print publisher will most effectively exploit those digital rights.