

COPYRIGHT ISSUES IN COMMUNITY DIGITAL ARCHIVES

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This paper will examine some of the legal issues arising in developing a community digital history archive. It will explore the potential conflict between protecting copyright and the right and need for communities, particularly excluded and marginalised communities, to have access to historical community archives. Given the recent expansion of Digital Humanities and of community digital projects this is an important and timely exploration of these potentially conflicting rights. To date this is an area that has been under researched, particularly in the Irish context. I will use my own work as a case study to explore these issues.

I am developing a Cork LGBT (Lesbian, Gay, Bisexual, Transgender) Digital Archive that seeks to make available information and artefacts in relation to the history of the LGBT communities in Cork. The digital archive will contain digitised copies of various items produced by LGBT activists and organisations, many of which are contained in a personal collection (the Arthur Leahy Collection) to which I have been given access and permission to use and digitise. Given the nature of this work, it is important to give some consideration to copyright issues that may be relevant to this work.¹

In Ireland Copyright and Intellectual Property rights are covered by the 2000 Copyright and Related Rights Act and the 2012 Statutory Instrument that updated the 2000 Act.

Section 17 (1) (Ireland. *Copyright And Related Rights Act 2000*) defines copyright.

“17. (1) Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description.

¹ I am grateful to Dr. Louise Crowley, Law Department, University College Cork for advice in relation to these issues. <http://publish.ucc.ie/researchprofiles/B012/lcrowley/>

- 17 (2) Copyright subsists, in accordance with this Act, in
- (a) original literary, dramatic, musical or artistic works,
 - (b) sound recordings, films, broadcasts or cable programmes,
 - (c) the typographical arrangement of published editions, and
 - (d) original databases.”

Section 21 (Ireland. *Copyright And Related Rights Act 2000*) defines the author:

“21. – In this Act, “author” means the person who creates a work and includes:

- (a) in the case of a sound recording, the producer;
- (b) in the case of a film, the producer and the principal director;
- (c) in the case of a broadcast, the person making the broadcast or in the case of a broadcast which relays another broadcast by reception and immediate retransmission, without alteration, the person making that other broadcast;
- (d) in the case of a cable programme, the person providing the cable programme service in which the programme is included;
- (e) in the case of a typographical arrangement of a published edition, the publisher;
- (f) in the case of a work which is computer-generated, the person by who the arrangements necessary for the creation of the work are undertaken;
- (g) in the case of an original database, the individual or group of individuals who made the database; and
- (h) in the case of a photograph, the photographer.

The “author” of a work is seen as the first owner of copyright for that work. (Ireland. *Copyright And Related Rights Act 2000*)

The prime focus of the legislation is on the protection of ownership and any accruing economic rights and benefits. People can pay the author or copyright owner for the right to use, reproduce or distribute their work. Section 38, (Ireland. *Copyright And Related Rights Act 2000*) for example, discusses this in relation to paying to play sound recordings.

The main focus then is on protecting ownership and economic rights and benefits. This emphasis can also be seen in the case law in the area, where most file sharing copyright cases in Ireland have been

taken by record companies who have been trying to get Internet Service Providers (ISPs) to intervene to prevent illegal (and free) downloading of music.²

The question arises then as to how well this legislation can apply to not-for-profit community activities and organisations, where there is no clear economic benefits to be gained from works produced?

The Cork LGBT Digital Archive that I am developing is a community-based and community-motivated project whose aim is to make the history of this community more visible and accessible and to acknowledge the community's contribution to social and political change in Ireland. The organisations whose materials I am digitising and sharing have a similar altruistic motivation and purpose i.e. to improve the experiences of LGBT people through service provision, political activism and community formation. It is challenging to fit this work into a legislative framework that is primarily designed to cover private ownership of profitable products. If there is no profit to be made, what is being protected?

As copyright arises automatically, and does not have to be applied for, it must be assumed that there is copyright attaching to all the data and documents in the Arthur Leahy collection and other materials which will be included in the Digital Archive. Who owns this copyright, and where it rightly resides, is complex and unclear, given the nature of materials and how they were produced.

Part II of the Irish 2000 Copyright and Related Rights Act deals with Copyright. Chapter 6 of Part II covers Acts Permitted in Relation to Works Protected by Copyright. Section 50, subsection 4 of this Chapter is of particular relevance for my work (Ireland. *Copyright And Related Rights Act 2000*). It states:

(4) In this Part, “fair dealing” means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.

² For example *EMI Records (Irl) Ltd and others v Eircom Ltd and another* (2005) IEHC 233 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IEHC/2005/H233.html&query=EMI+and+v+and+Eircom&method=boolean> Accessed 30/01/2015 and *EMI v UPC* (2013) IEHC 204 (2013) IEHC 274 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IEHC/2013/H274.html&query=EMI+and+v+and+Eircom&method=boolean> Accessed 30/01/2015

The emphasis here is on use which “will not unreasonably prejudice the interests of the owner of the copyright.”

The Cork LGBT Digital Archive seeks to digitise, display and disseminate information in relation to the history of the Cork LGBT community. This includes a wide range of data and documents, including posters, leaflets, newsletters etc. produced by various LGBT activists and organisations over the years. These items were explicitly designed to be in the public domain, to highlight issues of concern to the LGBT community and to inform the public about activities and campaigns. They were produced through collective endeavour with the explicit intention of creating community works. They were not intended to be individual products produced for personal financial gain.

The posters, newsletters, leaflets etc. were produced to provide public information and to increase awareness. It is abundantly clear that there was never any intention by those who produced them, and therefore own the copyright, to prevent public access or to prevent the public dissemination of the information containing within.

I would argue therefore that enabling public access to these documents and artefacts, through inclusion in the LGBT Digital Archive, is *fair dealing* and *reasonable use* as it does not in any way “unreasonably prejudice the interests of the owner of the copyright.” By facilitating public access and the dissemination of information about the Cork LGBT community, through the Cork LGBT Digital Archive, my actions are in keeping with the ethos in which the artefacts were produced. My work can be seen as a continuation of the same ethos and agenda of the individuals and organisations that produced the materials I am digitising and disseminating.

It should also be noted that, in digitising the materials, I am not modifying the content, only changing how it is displayed and made available.

Digitising these community resources in a publicly accessible digital archive can be seen as fair dealing and reasonable use of these materials and in keeping with the ethos and purpose with which they were produced.

Notwithstanding this I am also striving to take all reasonable steps to seek consent to use these materials, in as far as it is possible to do so.

Section 37 (1) of the 2000 Copyright and Related Rights Act states that the copyright holder has the right to grant the right to others to use the works:

“the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of the following acts, namely:

(a) to copy the work;

(b) to make available to the public the work;

(c) to make an adaptation of the work or to undertake either of the acts referred to in *paragraph (a) or (b) in relation to an adaptation*”

The Digital Repository of Ireland (www.dri.ie 2014) discusses the option of obtaining a license from the copyright holder to use works:

“Licensing allows copyright owners to permit approved use and reuse of their work, without waiving their copyrights fully. Licensing can permit both commercial and non-commercial reuse of a work, depending on the terms of the licence, and licences may last in perpetuity or for a specified period, or cover certain geographic locations.”

Establishing who owns the copyright in relation to the archival material is not a straightforward matter. I plan to follow a number of different paths in trying to establish ownership and obtain appropriate permission to digitise and disseminate.

I plan to use a permissions-based model, similar to that adopted by the Digital Library of the Caribbean (dLOC) (www.dloc.com) :

“dLOC relies on a permissions-based model. In this model, dLOC members request permissions as the primary method for ensuring compliance with copyright, moral rights, and other applicable rights. Using a permissions model allows dLOC to provide equitable support for rights-holders and the public good.

This is especially helpful for dLOC as an international collaborative, with different rights protected and understood in different countries and institutions. The permissions model supports discussing rights as a collaborative opportunity. The permissions-based model complements the process of reviewing materials for their status under copyright or within the public domain.”

In addition to seeking permission to use the materials, I would seek to attach proper accreditation for those who produced the works. This is what the dLOC (www.dloc.com) refers to as respect for moral

rights, which differs from copyright. “ dLOC supports moral rights by ensuring proper attribution is included for materials, for their creators and the partner institution that contributing materials.”

The prime source of materials for the digital archive I am creating is a private collection, the Arthur Leahy Collection, created over a 30 year period by an individual who realised the value of saving and boxing copies of posters, newsletters and other ephemera in relation to the activities of the Cork LGBT community and other linked organisations. The collector himself was centrally involved in most of the organisations and campaigns whose materials he has gathered.

The owner of the collection has granted me the right to digitise, store and disseminate copies of the materials contained in his collection. Can he legally be seen as the ‘owner’ of this collection and of the copyright associated with it? Can obtaining his permission be seen as compliant with Section 37 of the 2000 CRRA (Ireland. *Copyright and Related Rights Act. 2000*) whereby “the copyright holder has the right to grant the right to others to use the works.”

The challenge here is trying to establish if he ‘owns’ the items in the collection and has the right to grant the right to use them. As he was involved in the production of these items, through his involvement in the organisations that produced them, he could be seen as one of the people able to grant the right to use them. Arthur Leahy has signed a Consent Form granting me the right to digitise and disseminate the information in the archive.

In addition to obtaining the permission of the owner of the Arthur Leahy Collection, I am seeking permission from the LGBT organisations that produced some of the materials in the collection. Two different paths are to be taken here, depending on whether the organisation still exists or not.

A number of Cork LGBT organisations established in the 1980s are still in existence today. These include the Cork Lesbian Line, Gay Information Cork, the Quay Co-op and the UCC Gay Soc (now called UCC LGBT Society). In these situations I am seeking the permission of the current members of these groups to digitise and disseminate documents and artefacts in relation to their organisations. In the cases of the Cork Lesbian Line and Gay Information Cork I am conscious that these organisations provide a confidential service and I am including a clause agreeing not to disclose any confidential information about people using the helplines.

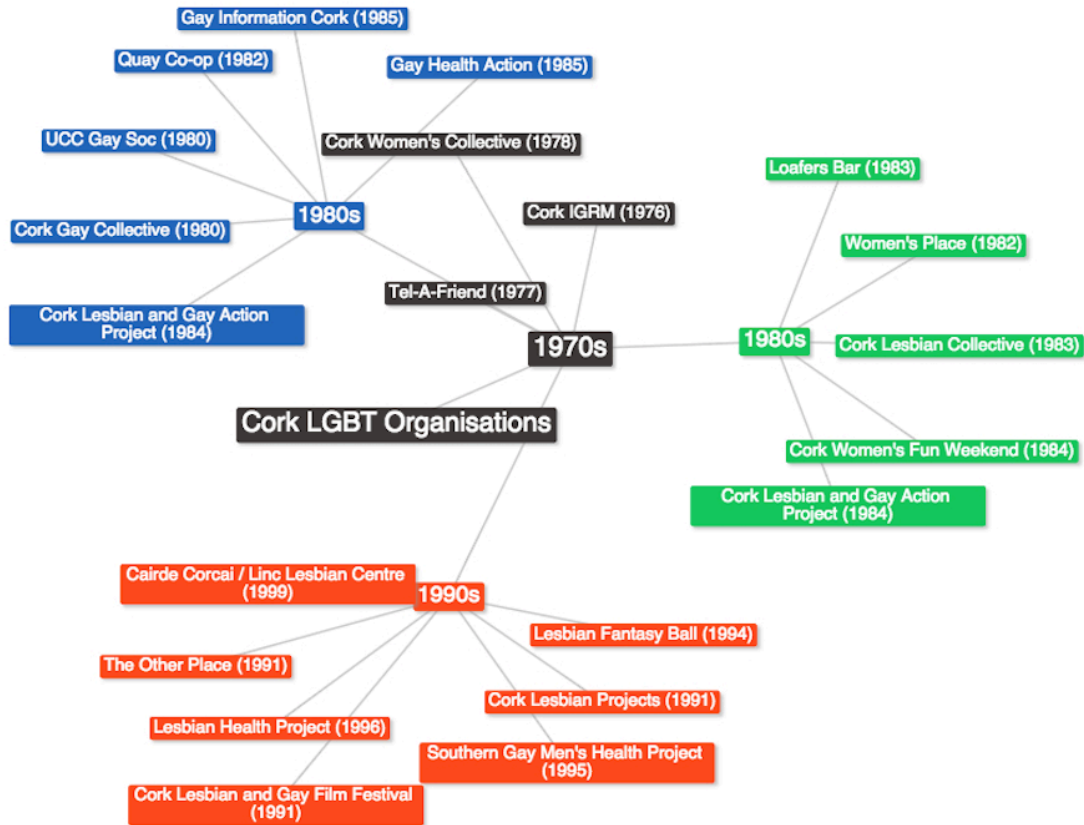


Figure 1 Cork LGBT Organisations 1970s-1990s Orla Egan 2015

A number of Cork LGBT organisations established in the 1970s, 1980s and 1990s no longer exist, so it is not possible to take the same approach as that taken with the still existing organisations. Where possible I will seek permission from people who were involved in these organisations. I am also taking an approach of establishing a lineage between these organisations and current LGBT organisations in Cork. I would argue that there is a clear line of continuity, development and sometimes overlap between the earlier organisations and the current LGBT organisations.

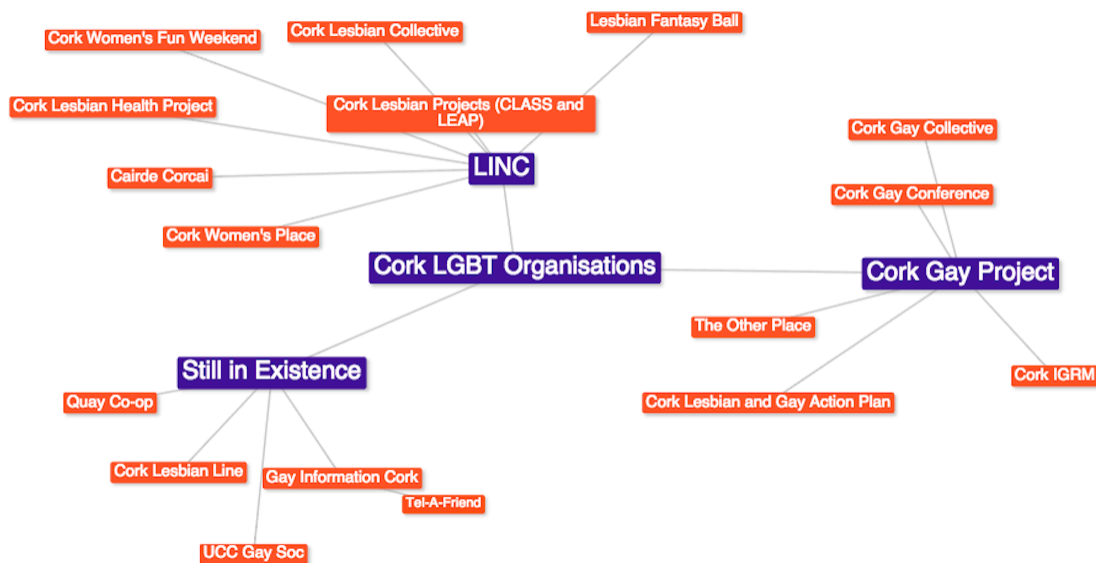


Figure 2 Lineage of Cork LGBT Organisations Orla Egan 2015

Some of the same people can be traced through the various organisations as they emerged and are still actively involved with the current organisations, lending weight to the argument that a lineage can be traced through to the current LGBT organisations. Having established the linkages and lineage from earlier Cork LGBT organisations to current Cork LGBT organisations, I have sought permission from the current organisations to use the materials relating to the earlier organisations.

Obtaining permission from current LGBT organisations will give me the right to digitise and display materials from Cork LGBT organisations, for example newsletters produced by those organisations. Where possible I will also seek the permission of individuals who contributed articles to these newsletters. I will seek the permission of individuals where possible and deemed necessary

I am using the Arthur Leahy Collection as the starting point for the development of the Cork LGBT Digital Archive. However I would envisage that the archive, as it develops, will hold a much wider range of items from a variety of sources. Individuals and organisations will be encouraged to donate items to be digitised and displayed in the archive, and will be asked to sign permission forms granting permission to use these items. Similarly consent forms will be signed enabling the archive to store and display audio and video recordings of oral histories gathered as part of this work. In some cases

people may want some time restrictions placed on when the materials are to be made available, for example after their death, and this will be accommodated in the consent forms.

In working on developing appropriate templates for permission and consent forms for individuals and organisations, I investigated a number of consent and donor forms in use by other digital archives (e.g. www.dloc.com) . I then proceeded to develop appropriate consent forms to be signed by individuals and organisations, granting me permission, in so far as they legally can, to use materials they produced or were involved in producing.

Exploring copyright issues in relation to such a community based and motivated project is complex. It is often unclear as to who owns the copyright in relation to the various items to be included in the digital archive. It can be strongly argued that there is no need to seek permission from the copyright holders as the inclusion of these items in the digital archive can be seen as fair dealing and reasonable use, as outlined above. Despite this, however, I have taken all reasonable steps to ensure that I have the right to use, digitise, display and disseminate this important information in relation to the rich and vibrant history of the Cork LGBT community.

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