

# Adobe Systems Incorporated

## Response to the Copyright and Innovation Consultation paper for the Department of Jobs, Enterprise and Innovation

### **About Adobe Systems Incorporated**

Adobe is the global leader in digital marketing and digital media solutions. Our tools and services enable our customers to create groundbreaking digital content, deploy it across media and devices, measure and optimize it over time, and achieve greater business success. We help our customers make, manage, measure and monetize their digital content across every channel and screen.

Ireland is a critical hub for Adobe's corporate operations in Europe. In addition, EU-based customers of our recently launched Creative Cloud offering – which will bring our design tools to an entirely new audience via a subscription pricing model - will have their data hosted on servers based in Ireland.

### **Introduction**

Adobe welcomes the Consultation on Copyright and Innovation currently being undertaken by the Irish government. As both a rightsholder and a provider of hosted services, Adobe is currently reflecting on many of the same issues captured in the Consultation.

It is critical that the legal framework not just of Ireland, but of the EU and beyond, can find ways of balancing the need to protect our rights (through strong rules on IPR enforcement that help to make copyright infringement unattractive) with rules that allow platforms to flourish and innovate.

As a rightsholder, we believe that any changes to the CRRA should take into account the specific protections afforded to software under the EU Computer Programmes Directive. We note that the Consultation document appears to refer to all forms of copyrighted material in its scope, and even to suggest some changes in the copyright regime for software, without taking account of the specific legal framework developed for software at the EU level. This important Directive recognizes the specific nature of software, and no compelling evidence has been provided to suggest that these protections should be revoked.

As a sometime host for user generated content, Adobe believes that the notice-and-takedown provisions of the US Digital Millennium Copyright Act have had a positive effect on internet innovation, and provide a useful model for understanding how the concept of fair use might be interpreted in the EU. The DMCA's notice and takedown mechanisms strike an appropriate balance between the rights of copyright owners while providing appropriate protection for Internet providers that act in good faith and remove infringing

content promptly, upon notice. In short, the DMCA allows rights holders to protect themselves, while offering relief from liability to intermediaries that act in good faith and take prompt action.

## Detailed answers

### **1. Is there sufficient clarity about the basic principles of Irish copyright law in CRRA and EUCD?**

We welcome the overall discussion that looks at copyright alongside wider issues relating to intermediary liability. However we are cautious about the relevance of the proposed copyright amendments to software as distinct to other forms of content.

The legal terms of reference for this discussion are not defined exclusively by the Irish CRRA and the EUCD. If the Consultation is to reflect accurately on the situation with respect to software, then the provisions of the EU Computer Programmes Directive should also be taken into consideration. The exceptions to the Restricted Acts defined in Article 5 make very clear that there is no natural re-use right for software in the EU, and that only limited exceptions to copyright apply. Recital 15 of the EU Computer Programmes Directive makes clear that acts of reproduction and translation may take place in limited circumstances only, and not in a way "which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program."

It is not clear that this distinction is recognized by this Consultation which comments broadly on all forms of copyrighted content. This is regrettable, particularly when the consultation addresses concepts such as fair use and changes to licensing terms, the application of which to software would be particularly problematic. We would therefore welcome clarification that the Irish government does not intend, as part of its review, to also seek changes to the basic tenets of the EU Computer Programmes Directive.

### **7. Should a Copyright Council of Ireland (Council) be established?**

Many of the functions which it is suggested could be within the remit of a Copyright Council are not likely to be of direct relevance to Adobe as a software company. We do, however, take a keen interest in the development of Notice and Take Down guidelines. In our view such matters are best handled at a European level, however, and we would be skeptical of guidelines that are of application only in Ireland. As a provider of international platforms to which rights holders could provide notice, and a rights holder that itself provides notice to certain intermediaries, purely national solutions lack scalability and increase rather than simplify the complexity of NATD discussions.

### **23. Is there any economic evidence that the basic structures of current Irish copyright law fail to get the balance right as between the monopoly afforded to rights-holders and the public interest in diversity?**

The balance referred to is not simply a matter for copyright law. As already stated, the software Directive (2009/24/EC) defines essential limits to the legal re-use of software programmes. Another key element is the the IPR Enforcement Directive ( 2004/48/EC ), which allows for exemplary damages for copyright infringement. This is particularly important in the software sector, as it provides a meaningful incentive to customers to ensure that their licenses are valid. (Absent exemplary damages, infringers – if caught – might only be required to pay for the software they are already using). Collectively this framework means that Ireland is routinely held up as a model to other jurisdictions.

### **33. Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation?**

In the software sector, technological protection measures (TPMs) are critical for both copy control and access control.

TPMs for copy control, commonly known as “product activation,” is widely used in the software industry. It allows software companies to enforce the use rights specified in the license agreement (which a user would have accepted prior to use of the software) via technological means. Product activation is transparent to legitimate users, and allows honest users to avoid inadvertent over-installation of a piece of software. There is no evidence that Adobe is aware of that product activation harms legitimate users of software who adhere to the licensed number of installations. Indeed, software companies have a strong incentive not to inconvenience their legitimate users, given the competition in the software sector and the low barriers to entry thanks to app stores on both mobile and desktop platforms (all of which make use of TPMs, incidentally, to combat piracy of apps).

For Adobe, as we continue to roll out subscription-based services alongside perpetual license models, the access control function of TPMs is becoming ever more critical. Subscription-based services – including the Adobe Creative Cloud which (for EU subscribers) is hosted on servers based in Ireland – rely on TPMs to validate the identity and validity of a subscriber using our software. Removing legal protection for TPMs would therefore undermine that business model by facilitating circumvention of the access controls that we have put in place.

It should be noted that one of the purposes of a subscription model for software is to encourage take up by a wider range of non-corporate customers for whom price is particularly sensitive. However enterprise-level subscriptions are also available. Corporate-scale fraud is no less possible via a subscription model than via a perpetual license model. For this reason criminal penalties should continue to be available for commercial scale violations of TPMs.

Finally, it should be noted that TPMs must be protected under Ireland’s treaty obligations under the WIPO Copyright Treaty of 1996 (the anti-circumvention provisions).

### **40. Has the case for the caching, hosting and conduit immunities been strengthened or weakened by technological advances, including in particular the emerging architecture of the mobile internet?**

Technological advances are changing the context where these immunities might be exercised in a number of ways:

- Available fingerprinting technologies are less effective in detecting copyright-infringing software content than they are at detecting infringing video or audio content. This means that automated processes for notifying intermediaries of software-related copyright infringements are less effective, and needs to be taken into consideration when designing well-functioning of notice and take down procedures.
- Many intermediaries such as locker sites or videostreaming sites that provide links are based in jurisdictions with weaker copyright protections than the EU or the US. Such offshore or rogue sites can allow infringing content to be immediately replaced upon takedown by the SAME user or broader community effectively rendering the takedown action completely ineffective. Greater focus is therefore needed on harmonizing rules and enforcement at international level. We would be wary of any changes in Irish legislation which could set a precedent or make enforcement more difficult outside Ireland.
- Technology does not permit rightsholders to know for sure in every circumstance that content which is the subject of a notice to an intermediary is infringing. This may occur when the posting is purposely deceitful, or it happens to match commonly-deceitful patterns by coincidence. This is important to bear in mind when deciding on the relevant burden of proof which should be imposed on rightsholders.

All of these developments mean that more focus is needed on developing workable notice and take down procedures at EU level that can address the different forms of copyrighted content. Such procedures should address, inter alia, the speed at which requests are processed by intermediaries; the conditions for use of automated notification procedures; and the burden of proof to be imposed on rightsholders.

**45. Is there any good reason why a link to copyright material, of itself and without more, ought to constitute either a primary or a secondary infringement of that copyright?**

As a company whose rights are infringed by such links, and whose platforms could be used to make such links available, we believe that making the link itself subject to copyright infringement would have a chilling effect on innovation, and prove unworkable in practice. The desired outcome is that the offending content is removed from the web, and the appropriate mechanism for addressing this is notice and take down rather than copyright legislation.

**62. Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict than an act permitted by CRRA?**

The Consultation queries whether language in the CRRA around contractual terms should be reinforced. We believe there are insufficient grounds for making the proposed changes and it is not safe to assume that changes to copyright law could, on their own, drive innovation. Indeed, the freedom of two parties to contract is arguably a more fundamental condition for facilitating innovation. Much more evidence and impact assessment would be needed to justify any measure that subordinates contractual provisions to copyright law. At present contracting parties are able to come to a wide range of agreements that ensures

that different business models thrive, and that different kinds of content can become available in different ways. Copyright law could provide a useful fall back where such matters are not specifically dealt with in contracts. We would not welcome contractual matters relating to software, for example, ever being addressed under a non-judicial alternative dispute resolution mechanism, one of the mooted functions of a new Irish Copyright Council.

**66. Should there be a specialist copyright exception for innovation? In particular, are there examples of business models which could take advantage of any such exception?**

No. Copyright is, in fact, one of the ways society rewards innovation and allows innovators and creators to profit from their work. A real concern with any innovation exception is the specificity of the proposed legal tests. They will not provide legal clarity to all parties. The proposed tests ("substantial transformation" / "unreasonably prejudice") do not appear to provide sufficient clarity. It is likely that such a new exception would give rise to substantial legal uncertainty and litigation initially, with a consequent increased burden on the judicial system.

In any case, such an exception would not apply to software, which remains protected by the EU Computer Programmes Directive. Article 6(2)c makes clear that the decompilation exception should not "be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright".

**75. Should there be related exceptions to permit computer security assessments?**

We do not believe there are any grounds for introducing a systematic derogation from existing copyright protections for computer programmes for security purposes. Article 5(3) under the EU Computer Programmes Directive already provides for the user of a programme "to observe, study or test the functioning of the program". Adobe believes conclusive evidence of need must be presented before there should be any widening of the existing security research exception in the Computer Programmes Directive.

**76. What is the experience of other countries in relation to the fair use doctrine and how is it relevant to Ireland?**

US experience with fair use doctrine (codified into federal law) is highly positive, as the doctrine leaves a great deal of room for educational, personal or transformative uses while considering the impact on the rights owner's market. That said, because it is a balancing test and not a hard and fast rule, the doctrine is expensive in terms of litigation costs arising from a dispute over balance of the equities. This is particularly the case where the exact issue at hand hasn't been resolved in prior reported litigation or binding case law. Should Ireland go down this route, then the burden on the court system needs to be taken into consideration. If this can be done then the experience of the US shows that is likely to make Ireland an attractive destination for innovation around copyrighted material.

