

ICOMP Submission to Ireland's Consultation Paper on Copyright and Innovation

ICOMP, the Initiative for a Competitive Online Marketplace, welcomes the opportunity to respond to Ireland's *Consultation Paper on Copyright and Innovation* (the "Consultation"). ICOMP, an organisation that brings together stakeholders from across the internet, has long believed that a balanced, fair IP framework promotes innovation and competition online. In our view, a copyright system that rewards creators should not be seen as a barrier to Ireland's digital economy, but rather as an essential ingredient of its growth.

Introduction

1. ICOMP draws from a broad and diverse membership of over 70 companies and organisations, among them content owners, ISPs, search engines and other online intermediaries, technology companies, advertisers and publishers. We have small start-ups, large multinationals, and a great variety in between in our membership — including companies with deep and longstanding ties to the Irish market.
2. ICOMP members share the common conviction that we are all better off if the internet is a vibrant and diverse platform for innovation, creativity and commerce. We seek to advance core principles that we believe are essential to achieving a healthy, competitive internet – among them transparency, privacy, competition and respect for intellectual property rights. Intellectual property rights foster creativity and innovation, including in the online environment, by enabling firms and individuals to enjoy the commercial fruits of their efforts. Accordingly, ICOMP encourages all internet stakeholders to respect the rights of authors and publishers while encouraging investments in innovation and the emergence of legitimate, sustainable online business models.
3. Strong copyright protections are particularly important to the success of the internet. By allowing firms and individuals to realise the commercial value of their work, copyright encourages investment in the creation of compelling, high quality content. This content is the true heart of the internet. Whether an online company produces and distributes content, helps users find it, advertises or sells advertising around it, or provides the "pipes" over which it travels, all depend on compelling online content to survive and thrive on the Internet.
4. Of course, copyright protections must be fair and balanced in ways that incentivise creativity while at the same time encouraging and enabling follow-on innovation. We believe that Ireland's current copyright regime largely strikes this balance. Indeed, Ireland's copyright regime was reformed significantly in 2000 to address technology-related issues. Since that time, Ireland's copyright law has served as a model for third countries, while at the same time fostering a vibrant domestic market for technology, creativity, innovation and growth.
5. The effectiveness of Ireland's copyright law is confirmed by Ireland's status as a hub for creators and innovators. Ireland's arts, culture and creative sectors were reported by the Department of Arts, Heritage and the Gaeltacht in 2009 to account for 170,000 jobs (almost 9% of total domestic employment) and €11.8 billion of total GNP. Ireland's ICT sector has been similarly successful, with a number of the world's most innovative ICT firms engaging in product and service development, manufacture and distribution in the market.

6. Reforms at the margins of Ireland’s successful copyright regime may make sense -- such as measures to facilitate the digitisation and dissemination of orphan works, which in turn will unleash new online opportunities. But we are deeply concerned that certain of the more radical proposals in the Consultation will hinder rather than promote creativity and innovation online. This is particularly true with regard to the introduction of a range of new and potentially sweeping exceptions to copyright. We are aware of no evidence to suggest that such reforms are needed or will be beneficial to the Irish economy or Irish consumers.
7. We are equally concerned that some of the proposed exceptions might have the unintended effect of entrenching the market power of certain online companies and thus frustrate the emergence of a more healthy and competitive internet ecosystem in Ireland. This reinforcing of market concentration would run directly counter to the goal of the Consultation: a copyright framework that is optimally oriented to create new internet-based opportunities for rights holders, online intermediaries and other stakeholders.

ICOMP Response to Consultation Questions

8. Rather than respond to each of the questions raised in the Consultation, we have limited our comments to two specific areas: (i) orphan works, and (ii) new exceptions.
9. **Orphan works.** We agree that measures to address orphan works -- and, in particular, to allow heritage institutions to scan and provide access to such works -- merit further consideration (recognising that the European Union is currently reviewing a proposal that would offer pan-EU recognition of orphan works status for certain works). If the Irish Government chooses to move forward here, we recommend that any reform be based on four key principles:
 - First, a work should be considered an “orphan” only if the rights holder in fact cannot be identified and located following a diligent search. A work for which the rights holder can be identified and located, but refuses to authorise use or does not respond to a request for permission to use, should not be considered an “orphan” work.
 - Second, to make the diligent search process less burdensome, and to encourage owners of orphan works to come forward, any arrangement to promote digitisation of orphan works should be implemented in tandem with reliable orphan works registries.
 - Third, if the rights holder subsequently comes forward after an orphan work has been digitised and used online, there should be a mechanism for providing reasonable remuneration for uses that already have been made of the work. However, good-faith use of orphan works should excuse a party from liability for monetary damages.
 - Finally, online databases should be required to allow third parties to access digitised copies of orphan works under fair, reasonable, and non-discriminatory (FRAND) terms. This element is particularly important in light of past efforts by certain companies to engage in unauthorised mass digitisation of books, including orphan works. Recent experiences of such large-scale book scanning projects, and the risk these carry of solidifying or even increasing barriers to market competition in authorised online access to books, demonstrate that such FRAND access should be a fundamental principle in relation to orphan works and an essential safeguard for online competition. Without a requirement

that access be provided on FRAND terms, Ireland could find that a single company has de facto monopoly control over online access to orphan works.

10. **Exceptions.** The Consultation also proposes a range of new exceptions to copyright, ostensibly intended to promote online innovation. While we see merit in considering an orphan works regime, we are aware of no empirical data that demonstrates that these new exceptions would benefit Irish creators, consumers, or economic growth in the long run. On the contrary, many of these proposals risk both destabilising the balance of interests online and increasing the market power of certain dominant players. For example,

- **Linking.** The Consultation proposes an exception to copyright infringement liability for linking to infringing content. Under this exception, providing a link to copyright materials, “without more” would not constitute primary or secondary infringement of that copyright.

While the ability to link to content is essential to the effective functioning of the internet, we do not believe that the proposed approach strikes the proper balance between promoting new online services and encouraging creativity. As drafted, for example, the exception could allow an online services provider to knowingly link to -- and presumably even advertise -- infringing material, effectively allowing companies to build businesses on the back of unauthorised third party content. In the case of service providers who are unaware that they are linking to unauthorised content, the proposed exception would mean that they have no obligation to remove such links once put on notice. We would recommend instead that any rules on linking be premised on a “safe harbour” approach that offers online intermediaries a shield from liability, but only when they behave responsibly -- as exemplified in the EU’s E-Commerce Directive and in many other laws around the world, such as the U.S. Digital Millennium Copyright Act.

- **“Marshalling.”** The Consultation also explores whether greater leeway is necessary to permit the “marshalling” (i.e. aggregation) of third party news and other content. The Consultation suggests that to facilitate such marshalling, a compulsory license regime, fair use doctrine, or specific marshalling “immunity” may be appropriate.

News aggregation services undoubtedly generate social value by providing a single access point for high-quality content from multiple sources. Yet it is also clear that those who invest in creating the content should retain the exclusive rights in that content granted to them by copyright. As the Consultation properly notes, current copyright rules (including the Berne Convention, the EU Copyright Directive and Ireland’s Copyright and Related Rights Act (CRRA)) seek to strike a balance between these interests, permitting aggregation in certain circumstances. Individual licensing arrangements between news publishers and news aggregator sites have also enabled the development of mutually sustainable business models. The Consultation presents no evidence as to why it is necessary to supplement these mechanisms, which appear to be working in practice -- or why news publishers should not be given a means to “opt out” of a news aggregator’s site without fear of reprisal (*e.g.*, through the demotion or exclusion of a site from search results), at least to the extent that content published on the site would be infringing but for the publisher’s authorisation.

- **User-generated content (UGC).** Another provision proposes “a specific exception for non-commercial user-generated content.” Sites for sharing UGC content have given voice to

consumer-artists who might never have been heard in the past. Unfortunately, in addition to providing an outline for creativity, some of these sites have also become platforms for pirated content. While certain UGC sites and IP owners have worked collaboratively to reduce the prevalence of piracy on these sites (*see, e.g.*, the [User Generated Content Principles](#)), concerns remain--most recently evidenced in a decision by a U.S. Court of Appeals to allow Viacom's copyright infringement case against Google's YouTube service to go forward. The broad exception for UGC proposed in the Consultation could make piracy on these sites easier by creating a loophole that allows would-be pirates to copy valuable content, "tweak" it slightly, and then make it available to third parties with impunity. Again, we do not believe this strikes the proper balance between fostering innovation and incentivising authors.

➤ **Innovation.** The Consultation proposes a "specialist exception in favour of innovation," which would exempt users from liability for infringement where they derive a sufficiently "innovative work" from the original. Ireland's existing law already includes flexibilities that allow for certain types of follow-on innovation, such as the exception for fair dealing for purposes of research and private study or the exception for reverse engineering of computer programs. We are aware of no evidence that would justify broader exceptions than already exist under Irish law. More generally, we are concerned that an exception that broadly allows unauthorised, otherwise-infringing uses of a copyrighted work so long as that use produces a work "substantially different from the initial work" could have the primary effect of discouraging the innovation and investment that gave rise to the original work.

11. We also believe that, in addition to skewing the delicate balance of interests online, the proposed exceptions outlined above would have the effect of reinforcing the existing lack of vibrant competition in certain key online sectors.
12. The proposed exception for follow-on innovation is a prime example of a reform that could frustrate, rather than promote, competition. As the drafters explain, that exception is intended in part to permit search engines to quote substantial parts of copyrighted materials from a range of sources without incurring liability--regardless of the impact such use has on the original creator or the commercial value of the work. The drafters also note that an exception would help facilitate targeted online advertising, "such as Google ads."
13. Search and other online advertising are unquestionably critical to success on the internet for virtually all online businesses. Search is the principal means by which many web publishers and other content owners today are found on the internet. In parallel, many content owners depend at least in part upon the sale of online advertising to support their presence online. But although we agree that driving innovation and growth in these markets is key, we have yet to see any evidence that copyright protections are impeding innovation in search and/or online advertising, or that new exceptions to copyright will drive innovation in these markets to an extent that would outweigh the substantial harms that such an exception invariably would inflict on copyright owners and incentives for the creation of original works of authorship.
14. ICOMP believes that innovation in search and online advertising can better be driven through measures that foster greater competition in both of those markets. Today, a single company holds an overwhelmingly dominant position in both search and search advertising, with market shares

in excess of 90 percent in several European markets.

See Vice President Almunia's Statement on a Google case (21 May 2012).

Competition to sell online advertising space on web publishers' behalf also is on the decline, with publishers often forced to rely upon a single intermediary between them and advertisers -- making it impossible for them to negotiate competitive terms for the sale of advertisements on their sites. In the 20th Century, it would have been unthinkable for European newspapers to rely upon a single ad agency for all of the newspaper's advertisements. Yet that is the scenario faced by many online publishers today.

15. The marshalling exception similarly threatens to frustrate competition and reinforce online monopolies. This exception potentially would allow online intermediaries to appropriate valuable third-party content -- including but not limited to news -- from sites and use it as the foundation for their own services. At least where the company engaging in such unauthorised use also holds a dominant position, this conduct could violate EU competition law. Commissioner Almunia recently identified precisely this practice in announcing the Commission's preliminary findings on abusive practices in search. *See id.*

Other proposed exceptions, such as the proposed exception for links to third party content and for UGC, are also likely to inordinately benefit dominant providers while doing nothing to promote competition or consumer welfare.

16. Where competition is weak, innovation often suffers. Accordingly, efforts to promote a more dynamic internet economy *must* include measures that ensure that all internet stakeholders can compete effectively online.

Conclusion

17. ICOMP members support measures that promote innovation so long as such measures do not undermine incentives for the creation of original content. The Consultation's proposals regarding orphan works would do so, subject to the criteria set forth above. We are not convinced, however, that efforts to drive innovation by weakening copyright -- and thereby imperilling the ability of right holders to monetise and profit from their content -- are good policy. Reducing copyright protections is likely to benefit a few companies (or even a single dominant company) at great cost to the creative industries and the many companies that offer services and devices to deliver creative works. We encourage Ireland to instead look for alternative ways to increase competition in new and developing markets, such as online search, mobile search and search advertising, and to ensure that a fair and level playing field exists for internet intermediaries in Ireland.