



Submission on the Copyright Review Committee's Consultation Paper - *Copyright and Innovation*

27 June 2012

Introduction

Facebook welcomes the opportunity to provide a submission on the Copyright Review Committee's *Copyright and Innovation* consultation paper.

The Internet has made and continues to make enormous contributions to the global, European and Irish economies. It is a proven engine for innovation. Innovators in the online space drive investment, create jobs, improve the lives of consumers, and increase the efficiency and reach of businesses. Ireland is at the forefront of Europe in encouraging online entrepreneurial activity and is in a unique position to lead the public discourse regarding a balanced copyright regime in Europe.

About Facebook

Facebook was founded in February 2004. It is an online social networking service that helps people communicate more efficiently with their friends, family and colleagues. The company develops technologies that facilitate the sharing by individuals of their information through 'the social graph' - the digital mapping of people's real-world social connections. Facebook does not itself produce the content that is shared¹ via its service; rather, it is the platform on which that sharing occurs.

Facebook operates both as a service that is delivered directly to users, and as a platform on which others can build their own services. In relation to the former, Facebook has over 900 million active users globally. In relation to the latter, as a development platform Facebook enables companies and developers to utilise Facebook developer tools to gain access to millions of potential users through the social graph. A recent study from Deloitte² found that Facebook added more than €15 billion in value in the European Union in 2011, supporting more than 230,000 jobs. Deloitte estimated that in Ireland Facebook has helped create 4,500 jobs, and added approximately €400m in value to the economy.³

Many businesses have been developed successfully using the platform. These include innovative, new social gaming companies such as Zynga (<http://www.facebook.com/RewardVille>), as well as established content companies using the platform to support their digital strategies, such as The Guardian (<http://www.facebook.com/theguardian>). In Ireland, there are a growing number of businesses being built around the Facebook platform; Betapond (<http://www.facebook.com/betapond>) is an example of a developer, which helps brands develop social applications and insights. A large number of private and public sector organisations in Europe use the Facebook service for communicating with their communities of interest. For example, Facebook partnered with the UK

¹ Content shared on Facebook must comply with our terms of service, known as our Statement of Rights and Responsibilities, which can be found at <https://www.facebook.com/legal/terms>, and other terms such as the Developer Terms at <http://developers.facebook.com/policy/>.

² Deloitte 'Measuring Facebook's economic impact in Europe: Final Report', January 2012.

<http://tinyurl.com/7ndhuce>.

³ *Ibid.* at page 41.

Electoral Commission in the run-up to the 2010 General Election to encourage young people to register to vote.

Facebook employs more than 3,500 employees worldwide, including several hundred in Ireland. Facebook's international (non-US) headquarters is in Dublin. Our global headquarters is in Menlo Park, California.

With respect to copyright, Facebook works with rights-holders in two significant ways. First, we enable copyright holders to develop new ways for consumers to engage with their content, and second, we do so while quickly and fairly addressing allegations of copyright infringement. As provided in more detail below, both users and developers on our platform benefit from balanced and predictable copyright enforcement mechanisms.

Reforming the Irish copyright regime

Facebook believes that certain changes can be made to the current Irish copyright regime that would enhance flexibility and facilitate innovation, while still ensuring that rights-holders are rewarded for their own innovations. Our comments on the topics raised in the Consultation Paper fall into the following four categories:

- Does the current regime inhibit innovation?
- Is there a case for a wider set of exceptions?
- In particular, is there a case for a general fair use/fair dealing exception?
- Is there a role for a Copyright Council of Ireland and Irish Digital Copyright Exchange?

We deal in turn with the specific questions in the Consultation Paper that relate to each of those topics below.

RESPONSES TO QUESTIONS

We have not sought to answer all of the questions posed in the Consultation Paper, and have instead focused on areas of particular relevance to developers on our platform, to our users, and to our relationship with rights owners. Where there were multiple questions in the Consultation Paper referring to the same issue we have grouped our response to those questions together and tried to draw out common themes.

A. Does the current regime inhibit innovation?

For the reasons that follow, Facebook believes that innovative businesses in Ireland would substantially benefit from an amended Irish copyright regime.

(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?

(24) Is there, in particular, any evidence on how current Irish copyright law in fact encourages or discourages innovation and on how changes could encourage innovation?

Although Facebook's investments, operations and ability to innovate in Ireland have not been materially inhibited by Irish copyright law to-date, we believe policymakers should seek to make the

regime more flexible and innovation-friendly to encourage future digital entrepreneurs and cultivate an ecosystem of Irish innovation.

Clear evidence of the benefits of flexibility and predictability can be seen in the United States, where Facebook was founded. The combination of the US's general copyright law and the Digital Millennium Copyright Act ("**DMCA**") provide a broad framework which allows innovation and new services to develop, whilst providing robust protections for rights-holders. The following features are essential to a copyright regime that is strong enough to protect rights-holders and flexible enough to encourage innovation:

- “safe harbour” provisions that protect service providers from liability based on content posted by their users, including clear rules around notice, take-down and counter-notice; and
- flexible fair dealing/fair use rules which can evolve over time as technology and business models develop.

(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?

(41) If there is a case for such immunities, has technology developed to such an extent that other technological processes should qualify for similar immunities?

(42) If there is a case for such immunities, to which remedies should the immunities provide defences?

(43) Does the definition of intermediary (a provider of a "relevant service", as defined in section 2 of the E-Commerce Regulations, and referring to a definition in an earlier - 1998 - Directive) capture the full range of modern intermediaries, and is it sufficiently technology-neutral to be reasonably future-proof?

(44) If the answers to these questions should lead to possible amendments to the CRRA, are they required or precluded by the ECommerce Directive, EUCD, or some other applicable principle of EU law?

(48) Does copyright law inhibit the work of innovation intermediaries?

Internet intermediaries, like Facebook, are at the forefront of digital innovation, and yet increasingly some intermediaries find themselves the targets of copyright complaints arising from the acts of their users. We understand and appreciate the challenges faced by rights-holders from online piracy and we work with right-holders on a daily basis to address related issues in constructive ways. However, a truly innovation- and growth-driven copyright regime needs to not only protect IP but also recognise the value that online intermediaries create. The existing regime encourages rights-holders to overreach in their claims against intermediaries, often seeking to make intermediaries police private rights or seeking to obtain a share of the value generated by intermediary innovation (in technology or business model) over and above the value of the content created/owned by the rights-holder.

As technology and business models continue to evolve, the case for the caching, hosting and conduit immunities has in our view only been strengthened. These immunities need to be flexible to evolve with technology and business models. The current immunities enshrined in Irish law could be improved. For example, they do not on their face cover standard search technology, a feature fundamental to the proper functioning of the Internet and any platform on it. By way of further example, the current regime does not easily deal with cloud services other than the most simple, bit-for-bit cloud locker services. As cloud technology evolves, Ireland's copyright regime should aspire to evolve with it.

The definition of an "information society service" could also be improved. While relatively broad in terms, the definition contains a requirement that it be a "service normally provided for remuneration". Some argue that this has the perverse consequence that it excludes not-for-profit services which are provided to end users for free, or those services which only generate indirect revenues,

notwithstanding the public benefit that those services generate. In addition, the definition as currently drafted only applies to services which are either mere conduits, or which are hosting or caching, and this closed definition fails to take account of the full range of "intermediary" service providers that exist now (and will undoubtedly exist in the future). This leads to uncertainty in relation to those intermediaries which do not easily fit within the mere conduit, hosting or caching definition or which have multi-faceted business models that include both intermediary and non-intermediary aspects.

A flexible and growth-driven copyright regime will incorporate a mechanism to determine where the appropriate balance between rights-holders and intermediaries lies in such circumstances. The closed definition approach in the existing Irish regime could inhibit a principled, doctrine-led approach to defining the balance (which is in turn essential to the cultivation of an Irish ecosystem of innovation).

While some of the reform required will require action at a European level, Facebook agrees with the conclusion of the Consultation Paper that some of the proposals are possible within the bounds of existing European law.

B. Is there a case for a wider set of exceptions?

For the reasons that follow, Facebook believes that there is a case for a wider set of exceptions. In particular, the scope of the existing intermediary exceptions could be made more flexible and clarified and the Irish regime would also benefit from the introduction of a general fair use exception to infringement.

(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?
(46) If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?
(47) If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?

These questions raise two important issues:

- Whether an Internet user should be exposed to liability for linking; and
- Whether an intermediary should be exposed to liability for a user's linking.

The answer to the former question is, in our view, dependent on the context and facts of each case. As a starting point, though, linking forms part of the architecture of the Internet and should not drive liability *in and of itself*.

The latter question is more straightforward. If an intermediary is entitled to benefit from the mere conduit, caching or hosting exception in respect of user conduct, it is hard to see any principled argument why an intermediary should not be so entitled in respect of linking. The principles justifying the existing intermediary exceptions in Irish law argue clearly in favour of it being made express that user linking falls squarely within the intermediary safe-harbour.

(50) Is there a case that there would be a net gain in innovation if the marshalling of news and other content were not to be an infringement of copyright?
(51) If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?
(52) In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?

News and general content marshalling are examples of services that allow the public to locate legitimate content on the Internet. The ability to surface legitimate content is essential to the architecture of the Internet and the ability to drive traffic to the source of that content for the benefit of the content owner. The starting point for a flexible and robust copyright regime should be acknowledgment that activities that enable legitimate content to be found more easily not be regarded as infringing copyright.

(55) Should the definition of "fair dealing" in section 50(4) and section 221(2) CRRA be amended by replacing "means" with "includes"?

Facebook believes that the existing fair dealing provisions should be broadened to ensure they facilitate innovation within a balanced intellectual property framework. Altering sections 50(4) and 221(2) of the CRRA so that the word "means" is replaced by "includes" would make the definition of fair dealing non-exhaustive that would, in turn, allow more innovative use of existing content whilst not unfairly prejudicing the legitimate interests of rights-holders. A non-exhaustive list would transform the fair dealing provisions into a more flexible exception, which could drive development of new kinds of content and new developer business models.

(56) Should all of the exceptions permitted by EUCD be incorporated into Irish law, including:

...

(b) reproduction for format-shifting or backing-up for private use

Turning to format shifting in particular, the Internet is a fertile ground for user-driven innovation. However, current restrictions on format shifting are stifling that innovation. The fact that many countries have private use exceptions is evidence of the public interest that exists in them. We support an exception that would allow users to make back-up copies of works and format shift, ideally as part of a general fair use exception. A reasonable user would expect that if they buy content once, they should be able to access it on multiple devices. We note that the recent UK copyright consultation by Professor Ian Hargreaves⁴ echoes these views by stating that such an exception would correspond to "what consumers are already doing" and would, if proportionate, "not entail a loss for right holders"⁵.

(61) Should there be a specific exception for non-commercial user generated content?

There should be an exception for non-commercial user-generated content, in particular one that would allow transformative uses of works and facilitate the creation of new content. User-generated content is becoming increasingly commonplace online. Exceptions for non-commercial user-generated content enable creativity and bring great benefit to the public, all the while fuelling greater innovation. Such an exception could be incorporated into a general "fair use" exception (see further below). This would allow the creation of user-generated content where such content does not unfairly prejudice the legitimate rights of the content owner.

⁴ 'Digital Opportunity, A Review of Intellectual Property and Growth' (<http://www.ipo.gov.uk/ipreview-finalreport.pdf>).

⁵ *Ibid.*, page 53.

C. Is there a case for a general fair use/fair dealing exception?

For the reasons that follow, Facebook believes that there is a strong case for a general fair use exception to infringement. Experience in the US shows that such an exception can and does sit comfortably alongside the successful exploitation of copyright by rights-holders.

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

(77) (a) What EU law considerations apply?

(b) In particular, should the Irish government join with either the UK government or the Dutch government in lobbying at EU level, either for a new EUCD exception for non-consumptive uses or more broadly for a fair use doctrine?

(78) How, if at all, can fair use, either in the abstract or in the draft section 48A CRRA above, encourage innovation?

(79) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, either subvert the interests of rights holders or accommodate the interests of other parties?

(80) How, in fact, does fair use, either in the abstract or in the draft section 48A CRRA above, amount either to an unclear (and thus unwelcome) doctrine or to a flexible (and thus welcome) one?

(82) What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

If it is to adapt to changing technologies and remain relevant as content development and distribution models evolve, the exceptions provided for in the Irish copyright regime should be more flexible. Facebook users (such as application developers and other users of our platform) would be encouraged to innovate more in Ireland if the system provided for a general exception for fair use.

A fair use exception would bring many benefits and a large number of these are noted in the Consultation Paper already. We have particular experience of the US copyright system, an example of a long-established fair use regime. This exception has allowed the US to accommodate new technologies. A recent report from the Computer and Communications Industry Association (CCIA) highlights these benefits⁶. According to the report, fair use industries (i.e. industries that make use of the fair use exception) generated an estimated USD 4.4 trillion in revenue, accounting for one-sixth of total US gross domestic product, and employing more than 17 million workers, between 2002-2006, with 2008 and 2009 figures showing further increases⁷. These fair use industries are very important to the US's sizeable technology sector - they generate profits, create jobs and make technology accessible to the public, and the US fair use exception sits alongside the world's largest creative sector, showing the innovation and creative industries can co-exist.

Indeed, certain technologies could not have developed in the US in the way that they have, were it not for the doctrinal approach to fair use that exists in US law, together with other aspects of the US copyright regime that are designed to encourage innovation in the digital space. In particular, sufficient predictability of outcome, within a framework which does not grant absolute and pre-emptive rights to rights-holders so as to close off new developments, has meant that technology start-ups are able to attract critical investment at the early stages while their technology and business models evolve.

⁶ *Fair Use in the U.S. Economy 2011*, T. Rogers and A. Szamoszszegi, <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/File/000000000354/fair-use-study-final.pdf>.

⁷ *Ibid.*, at page 4 and 6

Ireland should consider the US's experience when deciding how to fuel its growing technology sector. It is impossible to predict future technological developments, and a fixed set of copyright exceptions, as reflected in the current system, is always going to struggle to adapt to innovation.

We broadly support the wording of the draft fair use exception included in the Consultation and we agree that there should be no closed list of factors to consider when deciding whether a use is fair. This will ensure a balanced, flexible IP system can develop. We question whether the requirement for a sufficient acknowledgment should be listed and we note that this limb is not included in the US or Israeli fair use clauses cited in the Consultation⁸. In many situations, such an acknowledgment is not practical or possible (for example, when electronically indexing articles or reverse engineering programmes).

(37) Is it to Ireland's economic advantage that it does not have a system of private copying levies; and, if not, should such a system be introduced?

While Facebook is not directly impacted by copyright levies, we believe that as a general proposition they are inflexible and blunt instruments, which penalise consumers and stymie innovation.

D. Is there a role for a Copyright Council of Ireland and Irish Digital Copyright Exchange?

Facebook welcomes any institutional initiatives that encourage transparency and dialogue amongst all stakeholders in the copyright debate.

*(7) Should a Copyright Council of Ireland (Council) be established?
(9) Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?
(11) What should its principal objects and its primary functions be?*

We are amenable to the proposal that a Copyright Council of Ireland be established, but only if its subscribing membership is open to the full range of Irish stakeholders, including intermediaries, user groups and digital entrepreneurs, as well as rights-holders and collecting societies.

We see a role for the Council in co-ordinating the development of standards both for "notice-and-take-down" procedures and for "counter-notice and-put-back" procedures. We also see a role for the Council to consider the benefits of adopting "Good Samaritan" provisions which ensure that intermediaries who voluntarily take pro-active steps do not jeopardize their safe harbour immunities.

With respect to notice/counter-notice, we believe Ireland would benefit from a system similar to the US's DMCA notice/counter-notice regime. This system has the benefit of clarity - the service provider knows what it has to take down, standardisation - all service providers will accept the same form of notice, and protection against over-reaching requests by allowing those accused of infringement to defend themselves, while reasonably protecting the platform provider during the process.

The absence of such a regime in Ireland provides an opportunity for over-reaching by rights-holders. Certain other Member States recognise this and have more developed regimes. For example, Finland has codified a complete and well-defined notice-and-take-down regime, which includes a mandatory counter-notice and-put-back procedure, and Hungary has implemented a regime which closely

⁸ *Copyright and Innovation, A Consultation Paper*, pages 112 and 114.

follows the US DMCA procedure. We encourage Ireland to adopt a system more akin to the US's DMCA notice/counter-notice regime, in order to better facilitate the sharing of ideas and information online, which in turn will encourage further innovation.

We also agree that the Council would be ideally placed to engage with the EU Commission regarding its plans to adopt a horizontal initiative on notice and action procedures.

(13) Should the Council include the establishment of an Irish Digital Copyright Exchange (Exchange)?

While not a user of such rights itself, certain third party developers on Facebook are users and we are informed that their experience of rights licensing is often challenging. Developers on Facebook are both licensors and licensees and so we see the issue from both sides. We agree that an Exchange should be established to centralise copyright licensing and facilitate the speedy, effective and comprehensive licensing of copyright in Ireland. This would encourage transparency and address the inefficiencies and disparities in the current licensing system, which, in turn, would drive innovation.

We are aware of exchange initiatives in the UK, at WIPO, and at an EU level. In addition, there are industry and commercial initiatives developing as well. While supportive of the concept of an Exchange, we encourage Ireland not to "go it alone" but to work towards, at last, a practical European solution. Fragmented, national solutions may actively confuse an already problematic landscape.

We hope the Committee finds Facebook's submission on these matters useful.

For all any queries, please contact:

Simon Milner
Policy Director, UK and Ireland
(contact details supplied)