

Submission to the Copyright Review Committee

Journal Media Limited

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1. About TheJournal.ie

TheJournal.ie is an Irish online news company, which commenced operations in 2010 and operates in the nascent industry of online news production and distribution. The company was formed by brothers Eamonn and Brian Fallon, who were responsible for the creation and/or management of websites such as Daft.ie, Boards.ie, Adverts.ie and BoardsDeals.ie which together employ 80 people.

TheJournal.ie has a team of more than 20 involved in creating and distributing text, video, pictorial and other content of interest to an Irish audience. This content is available through multiple online platforms (PC, mobile, tablet) and promoted through search engines, social media and a range of other channels.

TheJournal.ie is responsible for publishing up to 100 stories per day through a combination of:

- Researching and originating stories, in a similar fashion to a conventional newsroom
- Publishing stories from syndicators such as Associated Press and Business Insider
- Sourcing photographs, video and other user generated content (UGC) from site users; editing and presenting this content
- Choosing, editing and packaging multimedia content from across the internet, attributing and linking where possible to the sources of such content
- Encouraging interaction with users, through comments and polls

Traffic for the site has far exceeded forecasted projections. TheJournal.ie is now the fourth most visited news website in Ireland.¹ Also, the TheJournal.ie's app is regularly the most popular news app in Ireland in Apple's App Store and in the Android Marketplace. The site attracts more than 1,500 comments from users every day.

2. Nature of this submission

The Copyright Review Committee's (CRC) consultation paper is an extensive document, providing an excellent framework to seek feedback on the reform of Irish copyright legislation. In drawing up this submission, TheJournal.ie intends to focus only on those areas that are of direct relevance to our business, as well as to the broader economic environment for the development of innovative, internet-based companies within Ireland. Consequently, not all the questions posed in the consultation paper are answered.

¹ After Independent.ie, IrishTimes.com and RTE.ie/news, according to ComScore April 2012 (unique visitors)

As requested in the overview to the consultation paper, this submission provides examples and evidence, where available, to support our contention that fundamental reforms to copyright legislation are required. Where relevant, examples of obstacles and challenges are given that militate against Ireland's exploitation of the economic opportunities presented by developments in digital technologies and practices.

In summary this submission is restricted to some or all of the parts of the following sections in the consultation paper:

- Section 2: The intersection of innovation and copyright
- Section 3: Copyright Council of Ireland
- Section 6: Intermediaries
- Section 7: Users
- Section 7: Entrepreneurs
- Section 10: Fair use

To put some of these points in context, TheJournal.ie believes it is important for members of the CRC to understand the evolution of news and news distribution. Section 4 of this document describes the evolution of the news market and barriers to innovation arising from copyright legislation. Section 5 covers user generated content and issues that cover both copyright and defamation.

3. Key points

In summary, these are the main points which TheJournal.ie wishes the CRC to consider:

1. Ireland's current copyright law presents barriers to innovation for internet businesses such as TheJournal.ie. Along with other Irish-based sites, we are prevented from developing our content offering and exploiting business opportunities because of current copyright law.
2. Copyright law needs to be reformed to take account of consumers' changing media behaviours and to enable internet businesses to exploit the opportunities presented by digital communications technologies, resulting in substantial benefits for the Irish economy.

3. Hyperlinking – the basis on which the internet operates and through which online content distribution works – is not supported by Irish copyright law. The consequence is that internet brands such as Pinterest, Reddit, LinkedIn News and many others could not operate from Ireland without encountering serious risks. This reduces Ireland’s appeal as a foreign direct investment (FDI) location and runs counter to government and IDA Ireland policy.
4. Content distribution services, such as search engines and social media, work in the best interest of content producers – traditional publishers as well as online-only publishers such as TheJournal.ie – by increasing the traffic to their sites and therefore offering more monetisation opportunities. However a legal basis for hyperlinking is necessary for all to flourish.
5. The US-style fair use doctrine is the most sensible way to redress the shortcomings in Irish copyright law.
6. It is impossible for online publishers to put in place processes to police copyright infringements in user-generated content because such processes could expose publishers to defamation actions.

4. The online content market

TheJournal.ie feels that it is necessary to preface the answers to questions posed in the CRC Consultation Paper with the following background. The answers which are found in section 6 regularly refer back to this section.

The internet has transformed consumers’ media habits and the business of news distribution. Newspaper purchasing is in decline, as audiences get their news from multiple online platforms such as the web, mobile, apps, RSS and Twitter. Reading news online is one of the top internet activities among Irish consumers, with 48% saying that they visit news websites.² Increasingly, mobile devices – smartphones and tablets – are becoming major channels for news. Fifty per cent of Irish online consumers who have smartphones say they use them to read news.³

The internet has proven to be a disruptive force in news distribution, spawning new businesses and services such as Google News, Reddit, Twitter and Digg. Internationally, legacy news companies are changing their business models towards multi-platform journalism and some are succeeding in

² IAB Ireland / Amárach / Aegis Research, February 2012

³ Our Mobile Planet, research commissioned by Google and conducted by IPSOS MediaCT, published May 2012

compensating for the loss of traditional readers and advertisers with digital subscribers and new online revenue streams. Examples include the New York Times, the Financial Times, the Daily Mail and the Guardian.

As an indicator of the impact of the internet, the UK body that promotes newspapers has been rebranded to remove the word 'newspapers' from its title. The Newspaper Marketing Agency is now to be called simply Newsworks, in recognition of the move by its members to multiple platforms.

Opportunities are opening up in international and local markets, both for established and new players. TheJournal.ie's focus is on a local market (Ireland). Relative to other digital markets, the news market has a high profile, as it is relevant to most consumers and the changes are featured prominently in the media, both new and legacy.

4.1 Definitions

In its consultation paper, the commission uses the term 'marshalling' to *"include indexers (such as specialised search engines), syndicators (such as web feeds), aggregators (which organise the material, often in quite sophisticated ways), or curators (which routinely edit and add content and value)."*

While acknowledging the importance of using neutral language, we do not feel that the term 'marshalling' is the best overarching term for all the operators in the market. Instead, we believe it is best to divide the news market into three broad groups:

- **Content producers:** These are legacy players like newspapers and TV production companies as well as online-only publishers. Such producers are involved in originating content and publishing them to single or multiple platforms.
- **Content distributors:** Search engines, syndicators and aggregators play a significant role in increasing the online audiences for producers' content. TheJournal.ie is a publisher of original content and relies on an increasingly large number of third-party content distribution services to get our content to the right audiences.
- **Content curators:** They are involved in selecting, validating and editing content. An example is Storyful, founded by former RTÉ presenter Mark Little, which does not originate content. Instead, it reviews and tests the authenticity of user-generated video content for use by both traditional and online content producers, such as TV channels and online-only publishers.

There are some grey areas between the three activities, as some websites perform a combination of these functions. An example is Gawker, which is a content producer but also a significant curator.

In the case of TheJournal.ie, we are primarily a content producer as we originate most of the content we publish. We feel that current copyright legislation adequately protects our rights as a producer. However, the legislative limitations in terms of hyperlinking do not work in the best interest of content producers like TheJournal.ie, given our reliance on content distributors to deliver high volumes of traffic. Current copyright law does not favour content distributors. We do not believe that any new legislation is required for content curators.

4.2 The age of infinite content

The primary reason that legacy content producers are struggling in the current digital environment is that the availability of content is tending towards infinity. Rather than being limited by a set number of articles to scan or read in a printed newspaper on a given day, consumers can now inform and entertain themselves in novel ways online. The gamut of what they can read on a given day has exploded far beyond news. A consumer can now fill a moment's downtime by reading what their friends are doing on Facebook, talking directly with their favourite celebrities on Twitter or simply finding out more about an obscure hobby on a niche blog.

The phenomenon of infinite content applies not only to news but increasingly to all media: television, magazines, books and music. Irrespective of whether a content producer decides to charge or not, the biggest challenge is to attract audiences - firstly to find their content in this sea of choice and then, secondly, to read, watch, listen and/or interact with such content.

The choice will get bigger, especially as affordable technologies have enabled any consumer to become a content producer. But how can consumers find the content most relevant to them at any given time? This is where content distributors come in.

From a consumer's perspective, content distributors give them a way of finding content that best matches their needs. For example:

- **Netflix**, a paid-for feature film service, produces links and information from Facebook about films that a consumer's friends have 'liked' or watched so as to make personalised recommendations on films he/she might like to watch.
- **Digg**, a free-to-use community news aggregator, pulls together headlines and excerpts from news websites around the world and enables its users to 'bubble' the best stories to the top by allowing them to vote stories up or down.
- **Flipboard**, a free-to-download smartphone app, allows users to build a custom magazine based on the sites they like and the news sources their friends are referring to on social media. It blurs the line between professional and amateur content – depending on who a user follows, updates from friends may appear alongside long-standing publishers.

- **Paper.li**, a similar free service, enables users to publish daily online newspapers based on their chosen topics. It describes itself as a “content curation service” and is driven largely by electronically gathering and presenting Twitter feeds, links and hashtags on selected themes.

4.3 Content production and distribution: the symbiotic relationship

Content producers like TheJournal.ie, as well as legacy producers such as TV players and newspapers, attract traffic to their websites in many ways. The most obvious one is through direct visits, whereby users type the site’s URL into a browser or use a bookmark. However, direct visits make up a surprisingly small percentage of the overall traffic to a typical news website.

Content producers’ websites rely on third party content distributors such as Google and Facebook as well as links from other sites, such as blogs or Wikipedia, for a substantial percentage of their traffic. In the case of TheJournal.ie, more than 70% of our traffic comes from these sources.

No publisher interested in maintaining or building their audience, and monetising that audience through advertising or subscriptions, would seek to block traffic that comes from content distributors, although this is possible at a technical level. Therefore, content producers and content distributors find themselves in a symbiotic relationship whereby each one is essential to the other’s development.

Legacy content producers may not be happy that they no longer control an end-to-end experience. However, content producers that embrace numerous content distribution services find they can reach new audiences and therefore potential new revenue opportunities.

Distribution services also benefit content producers by bringing audiences to particular content that they wouldn’t otherwise find. Niche audiences always find uses for existing pieces of content that wouldn’t exist for the mass market.

For example, on TheJournal.ie, old content often becomes the most popular on a particular day as it becomes relevant to a particular niche. One example was an opinion piece which TheJournal.ie published from a business owner, on how he tried to market his company through Facebook. The article was of interest to entrepreneurs. It was picked up by a US technology blog, Y Combinator, which linked to TheJournal.ie. The traffic results were staggering – more than 30,000 additional views in a couple of days.

Distribution services give niche content an economic viability that might not otherwise be possible, thanks to the ability for publishers to gain access to audiences interested in that niche. Many books, music artists and even TV shows have been made possible by niche audiences online. Examples include:

- **Balcony TV** (www.balconyTV.com) showcases new music acts who perform on balconies and whose performances are promoted virally through distribution services like social media sites and search engines. This innovative Irish start-up, and the acts it promotes, reach global audiences through content distributors.
- **TheStory.ie** (www.thestory.ie) is a site “dedicated to sharing documents, combing and combining data and promoting transparency in public life”. Founded by well-known blogger Gavin Sheridan, the documents and other content it publishes reaches local and international audiences through content distributors.
- **Kennys Bookshop** (www.kennys.ie) in Galway has developed a niche online marketplace for antiquarian books internationally, with content distributors (search engines, aggregators etc) succeeding in promoting its online catalogue to niche audiences.

Such services reward content producers for quality. Content that is the most interesting or most relevant to a particular audience has the ability to bubble to the top and be seen by those to whom it is relevant.

One example is Kony 2012, the short film created by Invisible Children, an NGO which has been campaigning against the Ugandan indicted war criminal, Joseph Kony. The video was the fastest ever to reach 100 million views on YouTube,⁴ more than the trailer for the latest Harry Potter movie, and this was made possible through use of a range of content distributors, notably Twitter and Facebook. This resulted in record views on both YouTube and Vimeo, and so much traffic was driven to the site that it crashed.

Consequently, content distribution services are important for society and democracy as they enable smaller groups of interest or view points to exist and to spread their content.

4.4 Content distribution and copyright law

The role of content distributors is not to reproduce significant portions of existing content. Instead, it is to reproduce enough content to inform consumers as to the nature of the content (such as headlines, excerpts, stills and thumbnails) and to incentivise them to visit the producer's website to experience that content in full.

As a content producer, TheJournal.ie relies on content distribution services to bring visitors to our website. New services are regularly created that help us reach new audiences, such as Tumblr and Pinterest. It is disappointing to see that companies providing useful services to both consumers and publishers would not be able to operate under Irish law, because of copyright impediments.

⁴ Source: The Guardian <http://www.guardian.co.uk/news/datablog/2012/apr/20/kony-2012-facts-numbers?newsfeed=true>

A provision needs to be made in new copyright legislation to enable companies that distribute content to prosper; not to impede their development, as is currently the case. At present such content distributors face restrictions in Irish copyright legislation, and in its interpretation by the courts, that prevent linking and aggregating content.

It is important that the copyright provision allows only for sufficient reproduction – tasters like headlines or thumbnails - to drive traffic to a website. If users wish to consume a piece of content, it is essential that they ultimately consume such content on the producer's site, otherwise the economic incentive to produce such content will be diminished.

4.5 Hyperlinking

TheJournal.ie sees the absence of provisions about hyperlinking in copyright law as a serious barrier to innovation. The ability to link from one document to the other gave birth to the world wide web as we know it – trillions of pages, publicly accessible online, all linked to and from one another. Links are essential to the content distribution business.

Many of the services that consumers rely on every day provide links from one webpage to another: Google, Facebook, Twitter and even email. The idea that the simple everyday act of sending someone a link via email is 'making available' that content, and therefore a breach of copyright, is absurd.

Deep links

It has been argued that deep links (links to pages other than the home page) infringe copyright as the user is bypassing the home page. This fundamentally misrepresents how visitors access websites. As already stated, typically only a very small proportion of a website's traffic arrives directly to the home page. To argue that deep links subvert the normal path of a visitor is illogical – most visitors arrive at a page deep in a site via a search engine or through another content distributor. Publishers can use technical means to block visitors that arrive via deep links (or even redirect them to the home page) but in practice doing so is only likely to alienate visitors and result in a loss of traffic.

Hyperlinks and Term & Conditions of Use

It is important that any legal provision made for hyperlinks has a no-waiver clause so that it cannot be contracted out of by a website's Terms and Conditions of Use. Having terms and conditions that carry a legal responsibility to linking makes any kind of service that carries automated linking, such as a search engine or user generated content platform with links (like a discussion board), open to unreasonable legal action.

For instance, Twitter could be interpreted as using a link commercially in the following scenario. A user's post on a user-generated content forum can be 'bubbled' up to the top algorithmically or manually. In the case of Twitter, this could be photographs and links that appear in its 'Trending

Now' section. This shows user-submitted links to sites but they are being highlighted by Twitter as a link of particular value.

We note that the CRC consultation paper itself uses links extensively to reference sources and that the terms and conditions of such target sites do not prevent linking. We believe it is wholly impractical, and a barrier to innovation, for content creators and distributors – be they professional or amateur – to check the terms and conditions of every website to which they wish to link.

4.6 Examples of content distributors at risk of action under Irish law

Below are some examples of content distributors that started in the US but that could not be established in Ireland due to our copyright regime. Although the goal of these sites is to send visitors to webpages they wouldn't otherwise visit, the reproduction of headlines and thumbnails could be seen as copyright infringement under current Irish copyright law. Furthermore, the fact that they are providing links to sites that they have no knowledge of could mean that they are infringing copyright by the very act of linking and, also, possibly by breaching site terms and conditions.

Pinterest www.pinterest.com: Pinterest is currently one of the fastest-growing social networks. It enables consumers to find content relating to their interests. Users of the service can 'pin' content, - such as articles, photographs and video that they find around the web - to their profile. The service itself is particularly visual and when a piece of content is pinned, a large thumbnail along with other metadata such as headline or title is reproduced on the Pinterest site.

LinkedIn News www.linkedin.com: This is a service from LinkedIn whereby the social network matches news stories to users based on their professional interests or business sectors. It is an innovative way of discovering news that is highly relevant but would not necessarily appear on mainstream news sites or periodicals.

Reddit www.reddit.com: Reddit is a news website which describes itself as the 'front page of the internet' and where users submit content in the form of either a link or a text 'self' post. Rankings of stories on the site's home and other pages are based on how users vote submissions 'up' or 'down.'

Bleacher Report www.bleacherreport.com: Bleacher Report is a sports news site where fans can sign up for a newsletter based on the sports team that they follow. The email comprises links to a selection of stories on the team in question from around the web.

Other examples, such as **Google, Facebook** and **Twitter**, need little introduction. There are also a host of start-ups targeting various segments of the news market, a sector that is considered

attractive by venture capitalists because of the opportunities that arise from changes in the news consumption. Examples include:

Pickie www.pickie.com: Pickie is a personalised shopping magazine which scours multiple retail and brand sites to produce a regularly updated, visually appealing iPad shopping magazine. It aggregates social, editorial and product information, from descriptions of the items to costs. It allows users to purchase as well as view these items. Pickie uses social networks to show each user his or her own magazine based on what it 'thinks' they'll like. It reviews recommendations from friends and professionals on sites like Pinterest and Facebook before displaying the items.

RebelMouse www.rebelmouse.com: RebelMouse gives users “a social front page”. It aggregates all content that users share on their social networks and presents it on a single page. This enables users to share just that URL to give others access to content that they like or have liked in the past. The service is receiving much attention as many of the team originally involved in starting HuffingtonPost.com are involved.

Percolate www.percolate.com: Percolate is a service enabling brands to curate content from around the web that would be relevant to their audiences. It indexes stories from thousands of sources and presents a brand’s editor with suggestions of stories that would be relevant to that particular brand. The editor can then add comment or context to a particular story to make it more relevant to the audience.

Signalnoi.se www.signalnoi.se: Signalnoi.se is an analytics service designed for use by journalists in digital newsrooms to make editorial decisions. It indexes news stories across thousands of websites and enables journalists to see which stories are trending with particular audiences. The data can then be used to make decisions on what content to produce or highlight on a news website.

These examples are designed to highlight a wide range of applications or services relating to news that would fall foul of Irish copyright law. There are many more mainstream examples such as FlipBoard, BuzzFeed, Tumblr, Digg, Stumble Upon, News.me and Instapaper.

User-generated content, defamation and copyright

TheJournal.ie believes that reform of Irish copyright legislation cannot be pursued in isolation and that other legal impediments to online publishing must also to be addressed. User generated content (UGC) is an increasingly important feature of online publishing and one for which existing legislation does not provide, with attendant risks for intermediaries and for individuals who are defamed through UGC. This also has implications for copyright protection which, in our view, mean that it is within the remit of this review process.

There have been an increasing number of defamation actions in Ireland by individuals who allege they have been defamed through UGC postings. Intermediaries, such as publishers and social media sites like Facebook, have been enjoined in these proceedings. In the absence of specific provisions in the Defamation Act 2009, case law is determining how publishers moderate UGC.

Currently, some websites post-moderate comments, which gives them a legal defence in a defamation action that the offending comments were not vetted in advance. However, the process by which comments are moderated can be used by the plaintiff in these actions to support their position that the publisher should hold responsibility for the offending comment(s). For instance, it could be argued that if a moderation process is in place it was not as exhaustive as it should have been.

Currently there is a disincentive to websites to moderate comments in any form. A publisher has a better legal standing by not monitoring UGC. That said, a publisher has a legal obligation to take down offending material once notified that it may be defamatory or in breach of copyright. If content is not moderated, for both defamation risk and copyright abuse, there is a higher risk that copyright breaches will occur on sites which carry UGC. Not only does this work against the principles of defamation law – the right of the individual to his/her good name – but it also exposes copyright risks for rights holders.

Although the Defamation Act 2009 brought about many welcome changes to Irish defamation law, there is a need to:

- Protect intermediaries from undue risk and so promote innovation
- Provide an incentive to sites that invite UGC to moderate comments
- Provide a quick and less costly process to resolve defamation actions through UGC

Given that online discussions are often filled with offensive material or even hateful language, this makes normal discourse through UGC difficult. The liability placed on intermediaries also has a chilling effect on freedom of expression. This is best exemplified with the leading travel website, TripAdvisor. It would be unable to base itself in Ireland, as a hotel owner who was unhappy with consumer reviews and who would prefer that none of the reviews appeared online could simply inform TripAdvisor that all the bad reviews were libellous. TripAdvisor, unable for practical reasons to verify the reviews, would have to delete all of them.

The recent findings of the Joint Committee on the Draft Defamation Bill⁵ in the UK, where defamation law in UGC is similar to our own, found that the existing regime was “contrary to the public interest”. It said that the legislation placed undue burden and risk on intermediaries and limited freedom of expression by requiring intermediaries to delete perceived risky content that they became aware of, whether or not such content was libellous.

⁵ British Parliament committee. Full report on <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>

The Committee made a series of recommendations on modifications to UK law relating to intermediaries and defamation. TheJournal.ie believes similar changes are needed in Ireland to safeguard intermediaries, streamline the online publishing process, protect the good names of individuals who are the subject of offensive or defamatory comments on UGC and also prevent breaches of copyright law.

The Committee said that contributions published on the internet can be divided into those that are identifiable, in terms of authorship, and those that are unidentified. In respect of identified contributions, it recommended a regime based upon the following key provisions:

- Where a complaint is received about allegedly defamatory material that is written by an identifiable author, the host or service provider must publish promptly a notice of complaint alongside that material. If the host or provider does not do so, it can only rely on the standard defences available to a primary publisher, if sued for defamation. The notice reduces the sting of the alleged libel but protects free speech by not requiring the host or service provider to remove what has been said.
- If the complainant wishes, the complainant may apply to a court for a take-down order. The host or service provider should inform the author about the application and both sides should be able to submit brief paper-based submissions. A judge will then read the submissions and make a decision promptly. Any order for take-down must then be implemented by the host or service provider immediately, or they risk facing a defamation claim as the publisher of the relevant statement. The timescale would be short and the costs for the complainant would be modest.
- Any material written by an unidentified person should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves, in which case a notice of complaint should be attached. If the internet service provider believes that there are significant reasons of public interest that justify publishing the unidentified material — for example, if a whistle-blower is the source it should have the right to apply to a judge for an exemption from the take-down procedure and secure a “leave-up” order. The Committee did not believe that the host or service provider should be liable for anonymous material provided it has complied with the above requirements.

A mechanism such as the one proposed in the UK for intermediaries would have a number of benefits were it be implemented in Ireland. For content producers, it would ensure more monitoring of UGC for breaches of copyright. For intermediaries, it would enable them to put processes in place to monitor UGC for both defamation and copyright. For individuals who feel that they have been defamed, it would ensure greater monitoring of UGC as intermediaries would have more of an incentive to do so. In summary, we believe such changes promote innovation and that that there is a sufficient basis for this matter to be within the remit of the CRC review process.

5. Responses to questions posed by CRC

As stated in Section 2, TheJournal.ie has decided only to address the issues of relevance to its business and to the broader environment for the creation and sustainability of internet businesses in Ireland. Consequently, not all questions posed by the CRC are addressed.

The intersection of innovation and copyright

1. *Is our broad focus upon the economic and technological aspects of entrepreneurship and innovation the right one for this Review?*

Yes. Innovative, internet-based businesses will be a driver of Irish economic growth if Ireland can prove to be an attractive location for foreign direct investment in the digital sector and if innovation among Irish entrepreneurs to develop digital technologies and offers can be encouraged.

It is in Ireland's economic interest to ensure that there is a legal environment that is in tune with technological developments. As currently framed, Irish copyright law was designed for a different era, one in which electronic distribution and sharing of content and links by email, social media and a routine range of sites did not exist.

The news market is a specific market niche within the overall digital economic marketplace but it is one that carries a great deal of attention, in local and international media. It is, in a sense, an indicator of how open and contemporary a country is to innovation. The recent controversy over the statutory instrument, irrespective of the arguments on either side, did little to enhance Ireland's international reputation for supporting digital businesses.

Copyright legislation is a significant barrier to innovation for leading international digital innovators, such as Reddit, Pinterest and Stumbleupon, whose business models are based on content distribution, as well as innovative local companies such as TheJournal.ie. *See Section 4 for further details.*

Copyright reform cannot be pursued in isolation and needs to be viewed in a broader context. Current defamation law for user generated content also acts as a barrier to innovation due to the large risks associated with intermediaries being enjoined in lengthy proceedings and in potential large awards for damages. *See Section 5 for further details.*

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

No. There are significant deficiencies in relation to hyperlinking. *See Section 4.5*

Copyright Council of Ireland

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

Yes. However, we have concerns about the proposed constitution of such a council as set out in the CRC consultation paper. As proposed, it would primarily represent the interests of large copyright holders. Consumers would have no economic interest in being involved in such a body and therefore their views are likely to be under-represented. Giving the Copyright Council responsibility to advise government on future copyright amendment, as suggested in the consultation paper, is likely to drive only the perspective of rights holders. Also, we would have concerns about objectivity in terms of how such a body would moderate disputes.

We feel that unless the Copyright Council is a publicly-funded body with true independence, it will simply become a lobby group for large rights holders and one which is enshrined in law. This would further stifle innovation. The terms of reference need to be explicit in terms of membership and impartiality.

7. *If so, should it be an entirely private entity, or should it be recognised in some way by the State, or should it be a public body?*

We believe that it should be a public body, with an independent chair and sufficient qualified members to ensure that all stakeholders' issues are addressed. Given the importance to Ireland's economic development, we believe it should fall under the remit of the appropriate government policy division or State body, such as Forfás.

8. *Should its subscribing membership be rights-holders and collecting societies; or should it be more broadly-based, extending to the full Irish copyright community?*

It should be more broadly based. The body should be publicly funded and operate in a similar fashion to the US Copyright Office. Otherwise, there is a potential for such a body to only represent the viewpoints of industry members. This is a reasonable conclusion if industry members are the funders.

9. *What should the composition of its board be?*

It should be representative of all stakeholders and ensure that there is a correct balance between rights-holders and other interested parties. The chair should be independent and have academic or legal qualifications in copyright and/or dispute resolution.

12. How should it be funded?

It should be publicly-funded, given the importance to Irish economic development and the need to ensure it is truly independent.

20. Should there be a small claims copyright (or even intellectual property) jurisdiction in the District Court, and what legislative changes would be necessary to bring this about?

Yes, the Small Claims Court model has proven effective for the resolution of minor disputes in the commercial sector.

21. Should there be a specialist copyright (or even intellectual property) jurisdiction in the Circuit Court, and what legislative changes would be necessary to bring this about?

Yes, expertise and a process at Circuit Court level would be welcome.

22. Whatever the answer to the previous questions, what reforms are necessary to encourage routine copyright claims to be brought in the Circuit Court, and what legislative changes would be necessary to bring this about?

The overall legal framework to resolve copyright disputes needs to be simplified. Cases need to be fast tracked through an ADR system and through courts. Ultimately, the resolution of copyright disputes should not be as costly or cumbersome as is currently the case.

Intermediaries

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?

Yes.

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?

No. See Sections 4.5 on hyperlinking.

46. If not, should Irish law provide that linking, of itself and without more, does not constitute an infringement of copyright?

Yes. See Section 4.5 and 4.6.

47. If so, should it be a stand-alone provision, or should it be an immunity alongside the existing conduit, caching and hosting exceptions?

The exemption needs to be covered by an anti-waiver provision so that it is not possible to contract out of it through website terms of use. This would not clarify the issues or promote innovation.

The purpose of a linking exemption would be to categorically make it clear to those building innovative new products or services that they can do so on a large scale without having to review terms of use for every service to which they link. To do otherwise would be highly impractical and a barrier to innovation - if a search engine such as Google had to read the terms and conditions of every site it indexed, search engines would not exist.

If a publisher does not want others to link to a page on their site, they can easily block it, or redirect to another page, such as the homepage, using the information contained in the HTTP Referrer. The HTTP Referrer is sent to a server every time a page is requested and gives the URL of the page that linked to the one that is requested.

Also, this immunity needs to be available to everyone not just entities covered in the eCommerce directive such as Information Society Service Providers.

Recently there was an issue involving a charity, Women's Aid, whereby the licensing body representing newspapers, National Licensing Ireland (NLI), sought payment from it for the right to link to NLI members' websites.⁶ The charity is neither an intermediary nor an ISP, as defined by the eCommerce directive, but was still being pursued for payment to link to newspaper sites.

The NLI issued a rate card to Women's Aid which showed the following "bundle/annual fee" based on the volume of links:

1-5 / €300

6-10 / €500

11-15 / €700

⁶ <http://www.mcgarraolicitors.ie/2012/05/10/newspaper-licencing-ireland-ltd-asks-womens-aid-for-money-to-link-to-newspaper-websites/>

16-25 / €950

26-50 / €1,250

50+ / Negotiable

No law exists which states that entities such as Women's Aid should pay. Women's Aid could easily circumvent this problem by linking to its article via a third party such as Google. The story about Women's Aid being pursued for these fees caused controversy in Ireland and was also picked up internationally on high-traffic websites, such as TechCrunch.⁷

It is highly likely that other parties, who are neither ISPs nor intermediaries, and who receive similar requests from the NLI, may have decided to pay such fees because they are unsure of their legal standing. Also, the prohibitive legal costs of challenging the NLI are likely to act as a significant disincentive to any party which does not accept that they need to pay.

48. Does copyright law inhibit the work of innovation intermediaries?

Yes. See Section 4

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?

Yes. See Section 4.3 on the market need for content distribution services from both a consumer and content producer perspective. It follows that if there is a market need, then entrepreneurs will innovate to fill that need, assuming that the law allows them.

51. If so, what is the best blend of responses to the questions raised about the compatibility of marshalling of content with copyright law?

(i) *First, are the suggested modifications to 51 (2) CRRA welcome?*

The modifications are welcome except for the clause 2 (a) (i), "such use is not expressly reserved". The addition of this clause would limit innovation more than the current legislation. Given that a publisher could place the text reserving such use on any part of their website, even within the terms and conditions, content distribution services would have no automatic way of knowing if they could carry content from any given site.

⁷ <http://techcrunch.com/2012/05/29/doing-it-wrong-irish-newspaper-licensing-organization-asks-womens-charity-to-pay-for-links/>

Take the example of LinkedIn News (a service that provides links to business news stories that relate to users' professions or business sectors). This service automatically indexes news stories from around the web and then matches them to relevant users. It would be impossible to provide this service if a manual process was required to read websites' terms and conditions to see if the use was allowed.

Also, giving publishers the ability to allow use by some and not other content distributors would further stifle innovation. Google News, for instance, has gained such a strong market position that no publisher would like to see themselves removed from the service and therefore would surely endorse such use. However, they might not grant the same use to any new market entrants in content distribution. Finally, given the importance of content distribution services to the future of media consumption, we feel that an unconditional exception would be the appropriate path to encourage innovation.

(ii) Second, does the provision "in substantial part" provide enough cover for marshalling sites?

No. Current law could be interpreted so that simple metadata (headline, excerpts, thumbnails) used to give users sufficient information to decide whether to consume a piece of content or not is an infringement.

(iii) Third, is there room for marshalling sites to pay content licences?

No. Content distributors, as we prefer to call them, do not enable the user to consume the content on their platforms. Instead they send users to consume the content on the content producer's site. This differs from the example of video-sharing sites and music video licences, as the music video is consumed in full on the video-sharing site. Content licences would only be applicable to a content distribution site if it was reproducing content for the purposes of it being consumed on the content distributor's site. If this was the case, as with the example of video sharing sites, this would be a matter of a contractual arrangement between parties and there would be no need for new legislation.

Content curators sometimes look to reproduce another original work in full on their site. If they want to do so, they should look to license the content from the originator. However this would be a matter of a contractual arrangement between parties and there would be no need for new legislation.

(iv) Compulsory licensing?

Given our view above that content distribution sites do not reproduce the content, a compulsory licence would not be needed for this type of business activity.

(v) *Fifth, is there a net gain in innovation by providing for innovation and if so, what actual provisions should be put in place?*

See answer 52 below.

52. In particular, should Irish law provide for a specific marshalling immunity alongside the existing conduit, caching and hosting exceptions?

If there is no fair use regime or innovation exception that protects the activities of content distributors, a specific marshalling exception would be of long-term benefit to both content producers and consumers. *See Section 4.3*

53. If so, what exactly should it provide?

In principle, the marshalling exception should be worded so as to allow a content distributor to copy a portion of the content to enable a visitor to get an understanding of the content being linked to - such as headlines, first paragraph and thumbnails in the case of news, or title and some stills in the case of a video.

The distribution service should not be allowed to copy a substantial portion of content so as to conflict with the normal exploitation of the initial work, or unreasonably prejudice the legitimate interests of the owner of the rights in the initial work.

54. Does copyright law pose other problems for intermediaries' emerging business models?

No.

Users

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

Consumers are using the Internet to communicate in new ways. Using derivative works – memes, GIFs, mashups etc - people can express themselves and communicate messages in ways not imagined by the works' original creator. So long as these works are carried out in accordance with the section in the CRC consultation paper entitled "106D. *Non-commercial user-generated content*"

we believe that this will promote innovation by allowing new communication platforms to flourish with appropriate protections in law.

The current laws around defamation are also of concern from a user perspective (see section 5). The right to freedom of expression is at risk due to the liability for UGC content being placed on the intermediary without any recognised remedial process. Also, there are knock-on issues in relation to copyright protection.

Entrepreneurs

64. When, if ever, is innovation a sufficient public policy to require that there should nevertheless be exceptions for certain uses, even where works are protected by copyright?

See Section 4 and points on innovation.

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?

If for whatever reason a fair use regime was deemed to be inappropriate for Ireland, a specialist exception for innovation would be needed to ensure that services such as those offered by the companies listed in Section 4.6 could exist. However, we have a number of concerns about the wording of the innovation exception in the consultation paper.

1. In the event of a disagreement between parties, whereby one party was relying on the copyright exception, adjudication would be needed on both:
 - a. whether or not an innovation was sufficiently transformative and
 - b. whether or not it unreasonably prejudiced the interests of the rights holder.

Given that these are two of the four criteria that would be used in a US fair use judgement, we feel that it would be far more favourable to also include the other two criteria in the legislation. The benefit of this would be the possibility of reference to international judgements when determining if a particular start-up might benefit from an innovation exception.

Also, given our view that an industry-funded copyright council would likely favour the views of rights holders over others, using such a council rather than a court to adjudicate such matters would not suffice.

2. The exception regarding similar exploitation endeavours (see excerpt below) would in our opinion expose start-ups who avail of the innovation exception to legal action in the event that their start-up became successful. The original rights holder, jealous of the success of the start-up, could make arguments that the start-up has embarked on a similar endeavour to theirs. In the technology space there is often little difference between the endeavour that is hugely successful and the one that isn't.

Just because the original rights holder embarked on an endeavour does not mean that it will succeed. While it is easy to have an idea, it is much more difficult to actually do something with the idea and even harder again to make it successful. Start-ups should be free to compete in a space without fear of being penalised for success.

Excerpt from CRC Consultation Paper:

6. Subsection (1) shall not apply if, or to the extent that, the owner of the rights in the initial work can establish by clear and convincing evidence that, within a reasonable time after first publication of the work, he or she had embarked upon a process to derive from it a work to which the innovative work is substantially similar.

Fair use

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

See the list of companies in section 4.6 that were established in the US but would not be able to exist in Ireland. Examples include Twitter, LinkedIn News, Pinterest, Reddit and a host of new start-ups. It is difficult to make a causal relationship between fair use and results but from TheJournal.ie's perspective as a startup, the legal environment certainly has been an impediment.

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

By providing the legal basis for companies to innovate and a means for a court to adjudicate on whether or not an innovation legitimately exploited a work. Having legislation that explicitly allows for content distribution services and linking would be a welcome result of this process, but what happens with the next technologies? Waiting until a clear pattern of behaviour is established among users in other markets is not the ideal way to legislate for innovation. See section 4.6 for businesses that cannot exist in Ireland at present.

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?

Fair use in the draft section would be preferable to either the introduction of an innovation exception or a marshalling exception as there would be greater clarity about what exactly is allowed or not. Take for example a marshalling exception. Would it specify the maximum size of a thumbnail? What happens then in future as screen resolutions increase, or services like Pinterest are launched that are far more visual? A framework such as fair use means that it is not necessary to continually revisit exceptions every few years, while leaving innovators guessing.

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?

See answer above.

81. Is the ground covered by the fair use doctrine, either in the abstract or in the draft section 48A CRRA above, sufficiently covered by the CRRA and EUCD exceptions?

No, adding in the exceptions still would not enable any of the businesses in sections 3 or 4 to exist. See response to question 76.

Conclusion

86. What have we missed?

The relationship between defamation law and copyright law, from a publishing perspective. See Section 5.