



## **ICOMP Submission to the Independent Review of Intellectual Property and Growth**

ICOMP, the Initiative for a Competitive Online Market-Place, welcomes this opportunity to respond to the Call for Evidence in the Independent Review of Intellectual Property and Growth (the “Independent Review”). Intellectual property protection is one of ICOMP’s key priorities, and we see a balanced, fair IP framework as key to the continued growth of the Internet as an engine of the economy. In these comments, we set out several principles that in our view should guide IP policy in the UK towards a sustainable framework promoting both technological innovation and the availability of compelling content online.

### **I. About ICOMP**

ICOMP has a broad and diverse membership of 50 companies and organisations brought together by our common interest in sustainable growth of the Internet. Our membership includes content owners, ISPs, search 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, here in the UK, the Premier League, the online news navigator OneNewsPage, and the vertical search and price comparison service Foundem, among other UK businesses. We seek to advance core principles that we believe are essential to such growth, including transparency, privacy, competition, and respect for intellectual property rights.

Since its founding in 2007, ICOMP has devoted considerable resources to exploring the role of IP rights in promoting a sustainable and competitive Internet. Most recently, we authored a white paper on *Intellectual Property on the Internet: The Search for Sustainable Business Practices*, a copy of which is attached to this submission.

ICOMP is funded by member contributions as well as sponsorship from Microsoft. Burson-Marsteller acts as the secretariat. For further information please visit our website – [www.i-comp.org](http://www.i-comp.org).

### **II. Guiding Principles**

Intellectual property is one of the core assets of the Internet. The availability of compelling, high-quality content online has fuelled consumer interest in ever-faster broadband connections and in services, such as search, that help them quickly find the content and services they are looking for. In many ways, these developments have been mutually reinforcing, as online services such as Dailymotion.com and Flickr.com have opened exciting avenues for creators to reach new audiences.

Yet in other respects, the content industries increasingly express concern that certain online business practices and market dynamics threaten to devalue their IP rights and undermine their business. Many creators contend that the business models, and in some cases the businesses, that have come to dominate the Internet threaten the very existence of the content industry online. Publishers in the UK

and elsewhere in Europe increasingly complain that current market conditions — particularly in search and online advertising — are imperilling their ability to monetise and profit from their content online.

Amidst this tension, the Independent Review will need to distil a workable, sustainable vision for IP rights in the 21st Century — one that is based not on a particular industry segment’s perspective or a company’s short-term revenue interests, but rather upon the long-term interests of the Internet as a medium for creative expression and innovation. To that end, we submit that the Independent Review should be guided by certain core principles and outcomes against which all proposals should be measured.

**First, the IP system should promote the creation and availability of quality content, without which the Internet could not survive.**

To provide the incentives and means for investment in high-quality content and services, creators should be able to realise the commercial value of their efforts. An IP system that rewards creators should not be seen as a “barrier” to our digital economy but rather a key ingredient of its growth.

In particular, piracy of both physical and digitised goods remains a core concern for the health of the innovation economy in Europe. Although “traditional” methods of online piracy such as peer-to-peer file sharing and illegal download websites continue to plague rights holders, they also increasingly confront a “next generation” of online piracy. A key distinction is that these new methods of piracy often occur through seemingly legitimate, ad-funded websites. Consider the following two examples:

- User-generated content sites. Sites for sharing user-generated content (UGC) have given voice to consumer-artists who might never have been heard in the past. Unfortunately, some UGC sites also have become havens for pirated content. For example, concerns about rampant piracy of televised football games on YouTube led the Premier League to file a lawsuit premised in part on the slow takedown of infringing content by YouTube. Some UGC sites and IP owners, however, have worked collaboratively in an attempt to reduce the prevalence of piracy on these sites — creating, for example, the “User Generated Content Principles” as a set of collaborative principles among several of the world’s leading Internet and media companies.<sup>1</sup>
- Illegal Streaming Websites. As content producers make ever-more compelling and sophisticated content available online, illegal streaming websites emerge to pirate and exhibit that content without permission. Sport content is particularly vulnerable to piracy, with cricket seeing around 1,000 different websites illegally hosting pirated coverage of its live events. Many of these sites are supported by online advertisements served by the leading online ad network owned and operated by Google, and over 200 of these sites are even operating as subscription channels. Producers of these events have called for a strong response to these and other new trends in digital piracy.

Some key online actors are exacerbating the problems described above by consistently taking IP-hostile positions and arguing that online content “wants to be free.” As long-time publisher Peter Osnos has noted, “The notion that ‘information wants to be free’ is absurd when the delivery mechanism is making

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<sup>1</sup> The User Generated Content Principles are available at <http://www.ugcprinciples.com/>

a fortune and the creators are getting what amounts to zilch.”<sup>2</sup> In short, the incentives to creation that have been embodied in the UK since it created the world’s first copyright law — the Statute of Anne — remain as important today as they were over 300 years ago in encouraging creativity and rewarding those who deepen our cultural heritage.

Furthermore, consideration should be afforded to the economic importance of the creative industries and content creators, and the contribution they make to the UK economy as a whole. The 2008 *Creative Britain, New Talents for the New Economy* paper, published jointly by the Department for Culture, Media and Sport, Business, Enterprise and Regulatory Reform and the Department for Innovation, Universities and Skills, concluded that the creative industries account for 7.3% of UK GDP, employing 2 million people in Britain and contributing £60billion per year to the Economy.<sup>3</sup>

**Second, the IP framework should support the “virtuous cycle” of the Internet that benefits creators, online services and intermediaries, infrastructure providers, and consumers alike.**

When reviewing proposed changes in the UK’s IP framework, a key question is whether a particular proposal would make money only for one type of stakeholder while depriving other stakeholders of the ability to make a living.

One area of particular concern is the state of competition in online search. Search is the principal means by which many web publishers and other content owners today are found on the Internet. As Ofcom has observed, “The main way that consumers discover content on the web is via search engines.”<sup>4</sup> This role makes search the gateway between consumers, on the one hand, and web publishers, content creators and brand owners, on the other hand. Creators and publishers therefore carefully design their sites to increase the likelihood that they will receive favourable rankings in response to key search terms. A senior executive of Google’s European operations has explained the relationship between search and survival in succinct but accurate terms: “Search is critical. If you are not found, the rest cannot follow.”<sup>5</sup>

Given the importance of search to the ability of creators and other IP rights holders to sustain their businesses online, it is noteworthy that in the UK and many other markets around the world, a single company holds a dominant position in search and search advertising. As EC Competition Commissioner

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<sup>2</sup> Peter Osnos, *The Platform: Google’s Coming Monopoly and the News*, The Century Foundation (3 Feb. 2009), <http://www.tcf.org/list.asp?type=NC&pubid=2205>.

<sup>3</sup> Department for Culture, Media and Sport, *Creative Britain, New Talents for the New Economy* (2008) <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf>

<sup>4</sup> Ofcom, Communications Market Report (2010), at 266, <http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/UK-internet.pdf>

<sup>5</sup> Kevin J. O’Brien and Eric Pfanner, Europe Divided on Google Book Deal, *New York Times* (23 Aug. 2009), <http://www.nytimes.com/2009/08/24/technology/internet/24iht-books.html>.

Joaquín Almunia explained in his keynote address at University College London's 2010 Jevons Institute conference, "The most important search engine in Europe benefits from a 95% market share."<sup>6</sup>

The European Commission recently underscored the importance of search by launching an antitrust investigation into allegations that the dominant search provider abuses its market power, including by favouring its own content and services in search results over those of competitors.<sup>7</sup> Just as at one time policymakers worried, for example, about the market power of dominant cable providers to distort the supply of news and entertainment, in the Internet era, policymakers are working to ensure that that lack of competition in search does not distort how consumers and businesses find creative content and other services online, and does not unfairly limit the opportunities for content owners to monetise their content online.

Relatedly, many content owners depend at least in part upon the sale of online advertising to support their presence online. Yet competition to sell online advertising space on web publishers' behalf also is on the decline, with publishers often forced to rely upon a single middleman between them and advertisers. Publishers and other content owners are concerned about how market dominance in this area may undermine their ability to receive fair terms for the sale of advertisements on their sites — advertising which is critical to sustain the creation of new content.

In particular, Google controls over 80 percent of revenues from the single largest form of advertising in Europe, keyword-based advertising.<sup>8</sup> With the field dominated by one company, many online publishers have little or no ability to negotiate the share of revenues they receive for displaying keyword-based ads 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 European online publishers today. Any change in the current IP framework must not exacerbate the current lack of competition in online search and online advertising, as doing so would make it that even more challenging for IP owners to monetise their content — and thus survive — online.

**Third, given the inherently cross-border nature of the Internet and online commerce, the UK should maintain an IP framework that is harmonised with other EU member states.**

It is important that in reviewing its IP framework, the UK does not remove protections for IP rights holders that are available in other EU member states. Such action would put content creators and other rights holders in the UK at a distinct disadvantage to their peers throughout Europe.

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<sup>6</sup> Remarks of Joaquín Almunia, Vice President of the European Commission responsible for competition policy, *Competition in Digital Media and the Internet* (7 July 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/365>

<sup>7</sup> See European Commission Press Release, *Antitrust: Commission Probes Allegations of Antitrust Violations by Google*, IP/10/1624 (30 Nov. 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>8</sup> European Commission, Merger Procedure Article 6(1)(b) Decision, Case No. COMP/M.5727 - Microsoft/Yahoo! Search Business, at ¶ 114 (18 Feb. 2010), [http://ec.europa.eu/competition/mergers/cases/decisions/M5727\\_20100218\\_20310\\_261202\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf)

Indeed, harmonisation of IP enforcement in Europe is especially important as was recognised in the Directive on the Enforcement of Intellectual Property Rights in 2004:

[W]ithout effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property . . . is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the internal market.<sup>9</sup>

We emphasise, however, that our call for continued harmony in the UK IP framework and that of other EU member states should not be confused with the question of whether to impose mandatory “multi-territorial” licensing. While private negotiations between copyright owners and online sites frequently result in a multi-territorial licences, the question of whether mandatory multi-territory rights licensing is advisable is clearly open to debate, at least with respect to certain forms of content. Caution is warranted particularly in light of the unstable and challenging environment for rights holders online. There is a strong argument to suggest that the current arrangement, whereby licence holders are able to negotiate deals which reflect demand for the product in a given territory, should be maintained. Forcing cross-border licensing on rights holders is likely to hinder not help competition and limit the scope for innovation in business models.

### III. Conclusion

Intellectual property rights form the basis for much of the compelling content that is made available by authors, publishers, broadcasters, designers, musicians, artists and other creators online. These creators in turn benefit from the unparalleled opportunities that the Internet provides to have their content distributed and discovered. Given the crucial role of IP in the online ecosystem, this submission has sought to highlight trends that have put the protection and monetisation of IP rights online under strain.

In particular, IP owners today face not only the conventional forms of digital piracy, but also diminishing competition in many key online markets that undermine their ability to commercialise their content online. The Independent Review should bear these challenges in mind and ensure that any proposed revisions in the UK IP framework, at a minimum, do not further diminish incentives for the creation of compelling content and services online.

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<sup>9</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, at ¶ 3, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:EN:PDF>.