



# INTELLECTUAL PROPERTY ON THE INTERNET: The search for sustainable business practices

A white paper exploring how policymakers and industry can work together to preserve incentives for creativity and commerce online



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# Foreword

By Lord Alan Watson, Chairman of ICOMP

The Internet has fueled an outburst of innovation while unleashing tremendous new opportunities for creativity and expression. In many ways, these developments have been mutually reinforcing. Online services such as Facebook.com and Flickr.com have opened exciting avenues for creators to reach new audiences, while the explosion in high-quality online content – from sports events and films to books and newspapers – has helped fuel billions in investment and even spawned whole new industries.

Yet in other respects, the Internet and content industries appear increasingly at odds. Hardly a day goes by without a creator – whether an author, artist, broadcaster, photographer, journalist, brand owner, musician, film maker, song writer, software or video game developer, or actor – asserting that an Internet company’s practices are devaluing their intellectual property rights (IPRs) or undermining their business. More fundamentally, they 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.

ICOMP’s founding principles assert that “[a]ll stakeholders should fully respect the rights of authors and publishers while encouraging investments in innovation and the emergence of legitimate, sustainable online business models.”<sup>1</sup> The goal of this, the second in a series of ICOMP white papers<sup>2</sup>, is to explore this issue and the extent to which the business models and practices that today dominate the Internet can indeed sustain the creation and dissemination of compelling content over the long term.

Although this question has been debated for years, it has been brought into sharp focus recently by a number of different but potentially game-changing events. These include the strong opposition by European authors, publishers and even national European governments to a proposed private agreement in the U.S. that would allow a single company to scan and sell the world’s copyrighted books; the appearance of the “Pirate Party” on the European political scene; evolving threats to the way rights owners sell and subsequently protect their rights, whether they be in the sport, music, film, or other sectors; and the increasingly perilous plight of newspapers, in Europe and globally, in the face of new business models and diminishing competition in the online advertising industry.

As Lisbeth Kirk, editor-in-chief of EUobserver, stated in a November 2009 ICOMP blog posting, “Managing creative content online will be one of the major policy challenges for the new European Commission and European Parliament over the

<sup>1</sup>See ICOMP, Imperatives for a Healthy Internet (6 Oct. 2009), at <http://www.i-comp.org/~icomppsb/email/HealthyInternet.pdf>

<sup>2</sup>The first ICOMP white paper, Openness and the Internet: The Role of Transparency in Online Search and Search Advertising, takes a critical look at the extent to which the operation of the search advertising marketplace is open and transparent to advertisers and publishers. See <http://www.i-comp.org/~icomppsb/email/OpennessInternet.pdf>



next five years.”<sup>3</sup> Ms. Kirk went on to note the symbolic timing of these issues, with the 300th anniversary of the world’s first copyright law – the British Statute of Anne – upon us. IPRs remain as important today as they were 300 years ago in encouraging creativity and rewarding those who deepen our cultural heritage.

Since its founding in 2007, ICOMP has devoted considerable resources to exploring the role of IPRs in promoting a sustainable and competitive Internet. These efforts have included the convening of a conference in October 2008 in Brussels, *Intellectual Property Issues and their Impact on Internet Commerce*, and a February 2009 symposium in Berlin on copyright and intellectual property (IP) issues. More recently, ICOMP noted the central role of IP in the online marketplace in its *Imperatives for a Healthy, Secure, and Competitive Internet*.

This white paper continues and deepens this line of inquiry by exploring several categories of challenges facing IPR owners on the Internet today. It seeks to highlight some of the most controversial practices that are being challenged by content creators, brand owners, and other IPR owners. It concludes with a series of questions about the steps that regulators and industry might take to promote more competitive, sustainable online business practices.

Our analysis is informed by what we learnt from industry at these events, from our members, and in countless meetings between ICOMP and rights holders from across the spectrum of the content and Internet industries. Contributors include ICOMP members, but also reflect the perspectives of leading online publishers, authors, artists and technology companies that are not ICOMP members. Some of these viewpoints are presented as box out case studies or citations to publicly available sources.



<sup>3</sup>Lisbeth Kirk, *The EUObserver: Creative Rights and Content Online – ICOMP Voices* (5 Nov. 2009), at <http://www.i-comp.org/blog/?p=75>.



## About ICOMP

ICOMP, the Initiative for a Competitive Online Marketplace, is an industry initiative for businesses and organisations involved in Internet commerce. Its overall objective is the sustainable growth of the Internet and key goals are to encourage competition, transparency, data privacy and respect for intellectual property protection as well as the adoption of best practices to promote online creativity, innovation, safety and trust.

As an organisation concerned with the Internet, ICOMP brings together companies operating in the online marketplace across content, infrastructure and services sectors to identify and promote best practices. ICOMP helps to educate and inform stakeholders and decision-makers on how the online marketplace functions and the challenges being faced by those who operate within it.

50 companies, trade associations and individuals are members of ICOMP and have endorsed ICOMP's principles, including a number of national and international associations which represent a further 1,670 members between them. These members represent 15 countries, from Europe and around the world. ICOMP is funded by member contributions as well as sponsorship from Microsoft. Burson-Marsteller acts as its secretariat and Lord Alan Watson is ICOMP's first Chairman.



# 1

## Overview

Intellectual property is one of the core assets of the Internet ecosystem. Search engines, for example, depend on access to high-quality online content to attract users. Content aggregation services, online shopping sites, and various Internet portals similarly require access to high-quality content and information in order to survive. Without great content, these services would serve no purpose.

This relationship goes both ways. Online publishers, for instance, rely on search engines to “find” users and draw traffic to their sites. Many online publishers also provide their own variations of online services, seeking to engage users more deeply while leveraging user-generated content or other third-party work. All of these efforts share a common goal—to attract user traffic. Increased traffic allows online publishers to sell more advertising and thereby monetise their content more effectively. This, in turn, helps fund the creation of more content and in turn draws more users.

This is sometimes described as the virtuous cycle of online publishing, because it can sustain incentives for investment by both creators and technology companies. It can also bring immense benefits to consumers. These include lower prices for accessing great content, expanded access to content, as well as new technologies that empower consumers themselves to become content creators.

At the same time, new online technologies and services can present significant challenges for IPR owners. For instance, some IPR owners argue that certain online services unfairly appropriate their content for financial gain in ways that deprive them of revenue that they believe they rightfully should receive. Some web publishers are concerned that certain online services are systematically driving a wedge between content creators and their audiences and advertisers, and in the process are turning high-quality content into a commodity. Sports licensors point to illegal Internet streaming of live sporting events, which threatens to undermine value in media rights and thereby depress investment in sport at every level.

These challenges have made intellectual property a focal point for some of the most important debates over the future of the Internet. At stake is much of what makes the Internet such a vibrant tool for information, communication and commerce. Recent examples of the challenges facing IP owners on the Internet include:

- As noted in the Staff Working Document accompanying the European Commission’s Consultation on Creative Content Online in the Single Market, “Piracy and unauthorised up- and downloading of copyrighted content remains a central concern.”<sup>4</sup> Increasingly, the locus of piracy has moved from dispersed peer-to-peer networks to centralised databases and video streaming websites run by companies that often employ inadequate screening for copyrighted

<sup>4</sup>Commission Staff Working Document accompanying the Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market at 28 (3 Jan. 2008), at [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_swp\\_en.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_swp_en.pdf).



content. Particularly with many parties committing infringement through misuse of otherwise beneficial sites for user-generated content, rights owners today face daunting challenges.

- Commercial publishers increasingly complain that certain news aggregation services are using their growing market power to appropriate third-party content in ways that undermine newspapers' long-term viability. As expressed in the *Hamburg Declaration regarding intellectual property rights*, signed by members of the European Publishers Council on 25 June 2009: "Numerous providers are using the work of authors, publishers and broadcasters without paying for it. Over the long term, this threatens the production of high-quality content and the existence of independent journalism."<sup>5</sup> Yet online publishers also recognise that news aggregation services can also help draw new readers to their sites.
- While online advertising can be an excellent vehicle through which companies, especially small and medium enterprises, raise consumer awareness of their brands, business practices by certain ad networks are raising the costs to brand owners of protecting their brands online. For example, the leading keyword ad network has a policy against investigating claims that companies are bidding on competitors' trademarked brands in order to divert traffic to their own sites when a user enters a brand name as a search query. The practical result is that brand owners are forced to pay substantial sums simply to protect their own brands as keywords on that network.
- For the past decade a lively policy debate has taken place both in Europe and the United States on how to unlock access to orphan works (works that are within their term of copyright protection but for which the relevant copyright owner cannot be located) and how to build truly open public digital libraries. Europeana is one example of such efforts.<sup>6</sup> While many parties have been working to find a comprehensive solution to the orphan works issues, a private court case in the United States may result in a single American company gaining exclusive rights to digitise virtually any book ever published in the U.S. and several other English-speaking countries – a move that many fear will foreclose competition and diminish the ability of book authors and publishers in other countries to experiment with new online business models.

A common variable in each of these examples is the growing impact of online search engines and advertising networks on IPR owners' ability to commercialise their content online. That search and online advertising are key factors in the health of IPRs online is not surprising: search serves as the gateway to online content for most users, and online advertising – which increasingly is served through ad

<sup>5</sup>*Hamburg Declaration Regarding Intellectual Property Rights* (25 Jun 2009), at [http://www.epceurope.org/issues/Hamburg\\_Declaration\\_on\\_Intellectual\\_Property\\_Rights.pdf](http://www.epceurope.org/issues/Hamburg_Declaration_on_Intellectual_Property_Rights.pdf). Some news aggregation sites have adopted approaches that seek to minimise the impact on the publisher's ability to monetise its content. Consider, for example, ICOMP member One News Page, a UK-based news aggregator. As One News Page explains: "All news content is displayed on the Website as published by the respective publisher and owner, and is in its nature restricted to a brief headline and, if so provided, a description of the underlying news article – all of which is published using the RSS feed mechanism by the publisher." One News Page, at <http://www.onenewspage.com/tc.php#accreditation>.

<sup>6</sup>Europeana provides a platform for searching and accessing European cultural content online, including digitised books, paintings, films, and archives. Europeana can be accessed at <http://www.europeana.eu/portal/>.



networks – is how most IPR owners today monetise their content online. Increasing market dominance in search and online advertising, however, has corresponded to a growing fear among IPR owners that the Internet is developing in ways that prevent them from recouping the value of their IPRs and are not sustainable over the long term.

While rogue websites and peer-to-peer networks are still a huge threat to IPR owners, market dominance in search, online advertising, and related markets is now also part of IPR owner concerns. This paper accordingly pays particular attention to: (i) the nexus between online publishing and online search and advertising, especially with respect to the ways in which diminishing competition in these sectors is affecting IPR owners; (ii) online business practices that allow ad networks to profit from third-party brands and trademarks; and (iii) trends in digital piracy and the sale of counterfeit goods online.

# 2 The Nexus Between Online Publishing, Online Advertising and Search

The content and services offered by online publishers contribute enormously to the success and vitality of the Web. Online publishers depend critically upon the sale of advertisements for their survival. They also depend on search engines to draw users to their sites (both through natural search results and through the ads they purchase on search engines, known as “sponsored” search results). Many online publishers, however, are finding it challenging to generate sufficient online advertising revenues to sustain their businesses. To understand this challenge, it is essential to understand the nexus between online publishing, online advertising, and search, and the degree to which market developments and diminishing competition in online search and advertising impact the ability of publishers and other rights holders to monetise their content online and develop sustainable businesses.

## A. Diminishing Competition in Online Advertising

Web publishers typically set aside a portion of the space on their web pages to display ads. They normally sell this ad space either directly to advertisers, or indirectly using the services of an advertising intermediary. Intermediaries such as ad networks play a crucial role in this marketplace, brokering online ad inventory to advertisers on behalf of publishers. More recently, advertising exchanges have developed to provide a marketplace in which advertisers, publishers, and even advertising networks buy and sell ad inventory through online auctions.

Today, competition to sell online advertising space on Web publishers’ behalf is on the decline, with publishers often forced to rely upon a single middleman between them and advertisers. Publishers 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 across the principal forms of online advertising, including:

- **Keyword-based advertising:** Keyword-based ads appear as sponsored links on search engine results pages, but also appear on publisher web pages based upon the content of the page (e.g., an advertisement for automobiles may be served on a page with an article about the state of the auto industry). Today, a single company accounts for roughly 80% of keyword-based advertising revenues in Europe and over 70% globally. 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. For many publishers, the failure to obtain a larger share of these revenues is threatening their ability to continue creating high-quality content. At the same time, these publishers find that websites misappropriating their content are able to fund infringing activities through the infringing sites’ own sale of keyword-based advertising.



- **Display advertising:** Display advertisements, in contrast to keyword-based ads, are typically graphical in nature and often help advertisers build brand awareness. Until recently, competition in the supply of display advertising tools and services was robust. That changed in May 2008 when the dominant provider of keyword-based advertising purchased DoubleClick, the leading provider of the tools used by ad agencies, marketers and publishers to sell and place display advertising. This \$3.2 billion deal provided a single company with an unparalleled scope of contracts and relationships with publishers, giving it significant market power and substantial leverage in setting the revenue terms with publishers.
- **Mobile advertising:** Companies are expected to invest \$72 billion in mobile broadband technologies in 2010.<sup>7</sup> These investments reflect the ever-growing importance to consumers of having access to data-rich applications and services wherever they happen to be, not just at home or work. Here too, however, market consolidation is clouding the prospects for innovation and growth. Google's recent acquisition of AdMob combined the two leading competitors in mobile advertising networks, and some fear it will allow Google to leverage its dominant PC-based ad network into the mobile space. Although the U.S. Federal Trade Commission, after a lengthy investigation, ultimately decided not to block the deal, it cautioned that the transaction "raised serious antitrust issues" and that the Commission would "continue to monitor the mobile marketplace to ensure a competitive environment."<sup>8</sup>
- **Classified advertising:** Classified advertisements have an important place online, just as they historically have provided print publishers with a major source of revenue. In the online world, these advertisements often are placed in connection with specialised, or "vertical" search engines. For example, a real estate developer may pay to have a classified ad appear when a user searches for properties on a search engine specialising in real estate. Vertical search engines, however, face challenges as the dominant generalised search engine moves to give preferred placement to its own vertical offerings – such as those for video search, shopping, financial, maps, and so on – and demote the search rankings of its vertical search competitors. The leveraging of market power in generalised search into these adjacent areas threatens to destroy an entire sector of specialised search engines and services.

The net result of the market consolidation across all types of online advertising is to leave publishers and other IP rights holders without the benefits of competition as they seek to monetise advertising space on their own sites or reach potential customers through advertising that they may place on search engines or other sites.

<sup>7</sup>See Marisa Torrieri, *Investors Giving Billions for Mobile Broadband*, TMCNet (11 Feb. 2010), at <http://4g-wirelessevolution.tmcnet.com/broadband-stimulus/topics/mobile-networks/articles/75254-investors-giving-billions-mobile-broadband.htm>

<sup>8</sup>U.S. Federal Trade Commission, *FTC Closes its Investigation of Google AdMob Deal* (21 May 2010), <http://ftc.gov/opa/2010/05/ggladmob.shtm>.



## B. Market Concentration in Online Search

As with online advertising, growing market concentration in online search poses great challenges for publishers. The importance of search engines to the fortunes of online publishers can scarcely be overstated. Because most users today begin their online surfing at a search engine, search operators act as the gateway to the Internet for most users. As a result, the algorithms and other methods that search engines use to rank search results effectively serve as arbiters of content and quality. They are the new editors, and even slight modifications to search engine rankings can have a significant impact on the ability of web publishers to reach online audiences.

The fact that search results on any given search engine invariably reflect the judgments of the search engine provider is not in itself a cause for concern. In a competitive search market, online publishers that saw their rankings on one search engine fall for no apparent reason simply would optimise their sites to be indexed by search engines that treated them fairly, and would likewise shift their search advertising budgets to such competing search platforms. If enough publishers migrated to competing platforms, users would eventually follow, which would put pressure on the offending search engine to revise its ranking system to remove any hidden biases. In short, one would expect a competitive market in search to lead search engines to place their users' interests in having neutral, relevant search results above the search engine's own desire for a short-term increase in profits.

Web search today, however, is anything but competitive. In many European markets, for instance, a single company controls 90 per cent or more of search<sup>9</sup> – making it the “canonical way to search the Web, an information doorway that dictates what kind of knowledge is visible to the browsing public.”<sup>10</sup> This gatekeeper status affords the dominant provider substantial power over the success or failure of online publishers, since it can control whether a given publisher has a high or low placement among the natural and/or sponsored search results that appear when a user types a keyword into its search box. Publishers are therefore forced to design their businesses around a single search provider's rules. And if the dominant provider decides they constitute a competitive threat, the results can be dramatic.

The well-documented plight of ICOMP member Foundem, a popular UK-based search and comparison service, illustrates these concerns well. Despite Foundem's being named the top price comparison site in the UK by the long-running *Gadget Show*<sup>11</sup>, Google users for many months rarely came across Foundem because of a “search penalty” that Google imposed upon Foundem in 2006<sup>12</sup>. Under this penalty, a Google user had to specifically search for “Foundem” to find the site; Google effectively caused Foundem to disappear from its natural search results

<sup>9</sup>See, e.g., Letter from Article 29 Data Protection Working Party to Google Inc. (26 May 2010) (“It must be noted that Google is the dominant search engine provider in almost every EU member state, with a market share of up to 95% in some national search engine markets.”), [http://ec.europa.eu/justice\\_home/fsj/privacy/docs/wpdocs/others/2010\\_05\\_26\\_letter\\_wp\\_google.pdf](http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/others/2010_05_26_letter_wp_google.pdf)

<sup>10</sup>Brad Stone, *Sure It's Big, But is it that Bad*, *New York Times*, (21 May 2010), <http://www.nytimes.com/2010/05/23/technology/23goog.html?pagewanted=1>

<sup>11</sup>See *The Gadget Show – Christmas Shopping*, *FiveFWD* (8 Dec. 2008), <http://fwd.five.tv/gadgetshow/videos/news/christmas-shopping>.

<sup>12</sup>Adam Raff, *Search But You May Not Find*, *New York Times* (29 Dec. 2009), at <http://www.nytimes.com/2009/12/28/opinion/28raff.html>



when users entered relevant search terms such as “price comparison UK”. Shortly after imposing this penalty on Foundem, Google also increased the prices it charged Foundem for search advertising on Google by nearly 10,000 per cent. In effect, these penalties locked Foundem out of the dominant search platform. After three years of efforts by Foundem, Google relented and removed these penalties against Foundem. Virtually overnight, traffic to Foundem surged many times over – highlighting the power of a dominant search engine over the fate of online sites and services that it perceives as competitors. Other parties have likewise complained of an inability to reach users because of arbitrary or otherwise inexplicable penalties imposed by the dominant search provider.<sup>13</sup>

The impact on web publishers of diminishing competition in search has taken a new turn as the dominant firm increasingly moves into more and more online markets. Expansion into these markets provides the company with both the incentive and ability to use its dominant search platform to benefit its own services and content over those of other publishers. These concerns have been illustrated by Google’s introduction of Universal Search in 2007, through which it systematically has inserted its own products and services at or near the top of search results, even when competing online services were more popular or more relevant. As Marissa Mayer, Google’s VP of Search Products, has explained, “Over several years...we’ve built the infrastructure, search algorithms, and presentation mechanisms to provide what we see as just the first step in the evolution toward universal search...using it to blend content from [Google] Images, [Google] Maps, [Google] Books, [Google] Video, and [Google] News into our web results.”<sup>14</sup>

Independent parties serving these markets see the situation as more than a benign “blending” of Google-affiliated content into natural search results. In a filing with the U.S. Federal Communications Commission, Foundem argued that “[w]hen coupled with Google’s 85% share of the global search market, [Universal Search] gives Google an unparalleled and virtually unassailable competitive advantage, reaching far beyond the confines of search.”<sup>15</sup> By adding another layer between software and game developers, authors, publishers, and other IP rights holders and the public whom they seek to serve, practices like Universal Search risk diminishing rights holders’ ability to monetise their content online.

<sup>13</sup>See, e.g., Eric Pfanner, *It’s Not Just Microsoft Against Google*, New York Times (1 March 2010) (discussing the case of EJustice.fr, a vertical search engine helping users search and view legal documents and other European legal resources that fell into “web obscurity” when Google stopped indexing its pages), at <http://www.nytimes.com/2010/03/01/technology/01cache.html>; Richard Waters and Nikki Tait, *Google Faces Brussels Antitrust Scrutiny*, Financial Times (24 Feb. 2010), at <http://www.ft.com/cms/s/2/46018520-20da-11df-b920-00144feab49a.html>

<sup>14</sup>Official Google Blog, *Universal Search: The Best Answer is Still the Best Answer* (16 May 2007), <http://googleblog.blogspot.com/2007/05/universal-search-best-answer-is-still.html>

<sup>15</sup>Comments of Foundem, FCC GN Docket No. 09-191 (23 Feb. 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020389727>



## C. Appropriation of Content

Another practice of concern to many publishers is the unauthorised use of their content online by third parties. While much of third-party use of content is arguably beneficial – indeed, sharing and linking of content is arguably one of the defining features of today’s Internet – some publishers have expressed concern that certain large, ad-supported services are using market power to exploit publishers’ content without authorisation and even in competition against them. These new barriers to monetising content further weaken the position of rights holders online.

One example that has become a central point of such concerns for major news publishers is the Google News service. Google News describes itself as a “computer-generated news site that aggregates headlines from news sources worldwide.”<sup>16</sup> News aggregator sites vary significantly in how they operate, with some seeking to publish only information that news publishers intentionally make accessible to third parties, and others seeking ways to work collaboratively with news publishers to find mutually sustainable business models. With respect to Google News, however, some publishers have expressed concerns that the service is impeding news publishers’ ability to attract users and monetise their own copyrighted content. Among other factors, they point to a recent study finding that nearly half of news users bypass newspaper sites in favour of Google News.<sup>17</sup>

A complaint filed recently by the Italian Newspaper Publishers’ Federation (FIEG), which is now the subject of an inquiry by the Italian Antitrust Authority, illustrates these concerns. According to press reports, the complaint alleged that Google News deprives publishers of readers and revenue by monetising these publishers’ copyrighted news content on Google’s own site, but does not provide a reasonable means by which publishers can “opt out” of Google News while still being listed in the results of Google’s dominant search engine (or on any of the thousands of sites that syndicate Google’s search services).<sup>18</sup> Some nine months after the opening of the investigation, Google offered to allow publishers to opt out of Google News and continue to be indexed by the search engine.<sup>19</sup>

<sup>16</sup>About Google News, [http://news.google.co.uk/intl/en\\_uk/about\\_google\\_news.html](http://news.google.co.uk/intl/en_uk/about_google_news.html)

<sup>17</sup>See Press Release, *Outsell Report Shows Nearly Half of News Users Bypass Newspaper Sites in Favor of Google* (19 Jan. 2010), [http://www.outsellinc.com/press/press\\_releases/news\\_users\\_2009](http://www.outsellinc.com/press/press_releases/news_users_2009).

<sup>18</sup>In a statement concerning the inquiry, the Antitrust Authority explained: “Google allegedly makes it possible for a publisher to not appear on Google News, but that allegedly involves the exclusion of the publisher’s content from the Google search engine. That is a highly penalizing condition.” Daniel Flynn, *Italy Antitrust Agency Extends Probe to Google Inc.*, Reuters (4 Sep. 2009), <http://www.reuters.com/article/idUSTRE5832CP20090904>

<sup>19</sup>See *Italy Regulator: Google Makes Commitments in Antitrust Probe*, Wall St. Journal (14 May 2010), <http://online.wsj.com/article/BF-CO-20100514-709537.html>



## CASE STUDY

by  
ICOMP  
member  
One News  
Page

# Best Practices for News Aggregators

News aggregators are a well established part of the online news ecosystem, conveniently enabling readers to find news stories on all topics. Their role in allowing people to “discover” news providers can be a helpful mechanism generating new visitor traffic to news sites. Yet some news aggregators inappropriately profit at the expense of the publishers that invest time and money to gather and report the news. Adherence to best practices is critical if publishers are to remain viable sources of news online.

While the content of these best practices necessarily must be the subject of debate and agreement among interested stakeholders, One News Page, one of the UK’s leading news aggregators, has developed the following points as a starting point for discussion on such best practices:

- First and foremost, aggregators should not infringe on copyright and therefore should display only a suitably brief snippet of the actual news article on their site.
- Aggregators should display prominently the brand identity of the original publishers, making clear the source of the article. This is ideally achieved by also displaying the publisher’s logo.
- Each news snippet should have a clearly visible and direct link which allows users to click straight through to the full news article at its source. There should be no interstitial page inserted between the snippet and the source page.
- Aggregators may provide other valued added services. These might include search functionality, extensive story archives and the ability for users to set up their own news alerts by email.
- News publishers should have a reasonable means of “opting out” of the news aggregator’s site, at least to the extent content published on the site would be infringing but for the publisher’s authorization.



In conclusion, there are compelling arguments on both sides of the news aggregation debate. Online news aggregators generate social value by providing a single access point for high-quality content from multiple sources. Yet it is also clear that those who invest in creating this content should retain the exclusive rights in that content granted to them by copyright. In most cases, one would expect market competition and private-party negotiations to strike the right balance among stakeholders. The question raised by the FIEG competition complaint is whether diminishing competition in online search and related markets has given the dominant player too much power to dictate the terms.

Perhaps the most high-profile recent example in which copyrighted content has been appropriated by an online service without authorisation is the Google Books service. Google began digitising books in 2004 and since then has scanned well over 12 million books that it has obtained from libraries, without obtaining authorisation from the relevant rights holders. In September 2005, a group of authors filed a U.S. class action copyright infringement lawsuit against Google Books, and related litigation was brought by a group of U.S. publishers. The resulting proposed settlement has been criticised as effectively granting Google an exclusive license to digitise most U.S. books and any book published in several other English-speaking countries, unless the relevant rights holder affirmatively and formally “opts out” of the proposed settlement.

In addition to the obvious concerns of rights holders directly impacted by Google Books, there is a more global concern as to how the proposed settlement would influence the future development of the Internet – not only of online access to books, but of online search more broadly, including in Europe. With unique rights to such a vast library, Google Books may become the de facto model for how consumers and libraries access digitised content, and how authors and publishers are compensated for that access. Also, by giving Google’s search engine exclusive access to this vast database of content, some have expressed the concern that Google would be able to further solidify its dominance in search to such a degree that no other entity would have any possibility to compete.<sup>20</sup> The foreclosure of competition in such a critical gateway to the Internet could have ramifications for IPR owners across the Internet, far beyond the confines of book publishing.

#### D. IP-Hostile Positions

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 a fortune and the creators are getting what amounts to zilch.”<sup>21</sup>

<sup>20</sup>See, e.g., Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, *Authors Guild v. Google*, at 22 (4 Feb. 2010) (expressing concern that “Google’s exclusive access to millions and millions of books may well benefit Google’s existing online search business” and noting that its “dominance may be further entrenched by exclusive access to content”), <http://www.openbookalliance.org/wp-content/uploads/2010/02/USDepartmentofJustice02.04Brief.pdf>

<sup>21</sup>Peter Osnos, *The Platform: Google’s Coming Monopoly and the News*, The Century Foundation (3 Feb. 2009), at <http://www.tcf.org/list.asp?type=NC&pubid=2205>.



In relation to this, there are concerns, particularly in Europe, over recent proposals that would mandate “multi-territorial” licensing for content. In some cases, licensing terms that differ by country or region can have pro-competitive effects: they allow licensors to calibrate terms based on regional variations in consumer interest and cultural diversity (e.g., a football match between Liverpool and Manchester United generally will create more fan interest, and thus more value in demand, in the UK than in Greece), and thus can help avoid under-investment in content creation that might result from forced uniform terms. In other cases, regional variations in licensing terms can create barriers to trade that have no pro-competitive or pro-creative justification.

While private negotiations between copyright owners and online sites frequently result in a multi-territorial licenses, the question of whether *mandatory* multi-territory rights licensing 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.

To conclude, while it is important that publishers be flexible in the ways in which they exploit the commercial values of their IP rights, publishers must have some mechanism for recouping their investment in content and controlling within reason how their content is distributed online. Otherwise, there eventually will be less content – and lesser quality content – available to consumers online.

# 3 Protecting Trademarks Online

Online technologies and services provide unrivaled avenues for brand owners to reach and connect with consumers, using the Internet to promote and market their brand. Given the plethora of undifferentiated products and services available online, an owner with a strong and trusted brand can attract significant attention and commerce on the Internet. Likewise, brands are important for consumers. Consumers rely upon brands they trust as a guarantee of quality and reliability.

Most brand owners protect their investments in their brands primarily through trademark protection. Trademarks generally protect the words or figurative marks that form an essential part of the identity of the product or service offered. Brand owners devote substantial time and resources to building customer loyalty; a trademark, in essence, represents the “promise” to a consumer about what he or she can expect from the product or service offered. The trademark thus protects the owner and consumer alike.

Against this backdrop, brand owners have expressed concerns over certain online business practices that they contend threaten to undermine both brand owner and consumer confidence in the Internet. Below we discuss two business practices in particular that are causing such concerns.

## A. Keyword Advertising and Trademarks

Some brand owners have objected to the use of their trademarks by third parties as keywords in sponsored search advertising. When an advertiser bids on a particular keyword from a search engine or other keyword-based advertising network, it is asking that its advertisement be displayed whenever a user searches for that particular term. For example, many handbag designers and manufacturers may bid to have their advertisements appear as a sponsored result when a user searches for the keyword “designer handbag.” This can be a useful way for advertisers to find interested consumers. The problem arises when one of these competitors – for example, a maker of low-quality, low-cost handbags, or even a counterfeiter – bids to have its advertisement appear whenever a user searches for a specific designer, such as “Chanel” or “Gucci.”

An obvious and effective way to limit this practice would be for search engines to implement a policy of refusing to accept bids from companies that seek to bid on keywords that are identical to another brand owner’s trademark (uses of a brand owner’s trademark for legitimate purposes, such as lawful resale of the brand owner’s products or lawful comparative advertising, would not be prohibited). Search engines such as Yahoo! and Microsoft have policies along these lines. These policies provide brand owners with recourse if a competitor misuses their trademarks as advertising keywords.

Brand owners contend that search engines failing to provide such recourse, however, leave them in a perilous position, by:



- **Increasing the cost of protecting trademarks:** Many brand owners find that they cannot simply ignore the use of their trademarks as keywords in competitors' search advertising campaigns, as doing so results in too many lost sales and potential consumer confusion. As a result, brand owners often are forced to pay inflated prices to buy their own trademarks as keywords. In one case, the leading online florist in the UK saw the cost of buying its own brand name rise 1,300 per cent on the dominant search advertising platform, leading it to pay an additional \$750,000 to that platform in just one year – simply to protect against competitors trading on the florist's own trademark.<sup>22</sup>
- **Diminishing a brand owner's return on investment:** Brand owners invest significantly in cultivating their brand and generating goodwill. Particularly when their trademarks are sold as keywords to rival advertisers, brand owners may lose out on the "reward for the costs of promoting, maintaining and enhancing" their own trademarks.<sup>23</sup>

To be sure, there is debate over the degree to which the law should prevent such practices. Indeed, recent decisions by a U.K. court and the European Court of Justice appear to have diminished the extent to which trademark owners can pursue questionable keyword advertising practices by search engines.<sup>24</sup> Yet one need not take a position on the legality of the practice to question whether it is in the interests of the broader online ecosystem for a large advertising platform to impose a practice that costs brand owners millions in lost revenues and generates millions in additional profits for the platform. It may be that a change in law is needed, but that could be avoided through the development of industry best practices.

The critical questions are (i) whether diminishing competition in the supply of keyword-based advertising makes it unrealistic to expect the dominant search engine to agree to or implement any best practices that might develop; and (ii) whether disregard for trademark owners' right and the consumers' confidence in trademarks, in the long run, will harm the cultural economy in Europe and beyond.

## B. Advertisements for Counterfeited Goods

The Internet increasingly serves as the point of sale for counterfeited physical goods. The European Commission's Communication of 11 September 2009, *Enhancing the Enforcement of Intellectual Property Rights in the Internal Market*, explained the phenomenon and its causes:

**While the Internet is not in itself the source of counterfeiting, it has nevertheless become an important vehicle for the sale of fake goods world-wide. Its global reach and accessibility, the possibility for traders to remain anonymous and for**

<sup>22</sup>See Eric Pfanner, *Filching a Good Name for Internet Use*, New York Times (21 March 2010), at <http://www.nytimes.com/2010/03/22/technology/22iht-brands.html>.

<sup>23</sup>See Darren Meale, *The Online Advertising Free-for-All*, 3 *Journal of Intellectual Property Law* 779, 786 (2008).

<sup>24</sup>*Id.* at 782 (discussing the UK case of *Wilson v. Yahoo*); Court of Justice of the European Union, Press Release No 32/10 (23 March 2010), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-03/cp100032en.pdf>



offers to be placed and withdrawn instantly has made it one of the most attractive tools for the sale of counterfeit goods. The enormous growth of the phenomenon makes this an area for priority action.<sup>25</sup>

Noting the rapid progress of technological developments and techniques used by counterfeiters online, the Commission's Communication goes on to note that collaboration between brand owners and Internet companies to forge "practical technology-based solutions" holds much promise. In that forthcoming dialogue, it would be advisable to consider in the first instance practices of otherwise legitimate Internet companies that foster counterfeiting. These practices include advertisements for counterfeited goods that are served by advertising networks in connection with keywords advertising and typosquatting sites.

Underscoring the need for best practices, a January 2010 article in *The Times* (UK) highlighted the increasing presence of advertisements for counterfeited jewelry, clothing, and electrical items on the sponsored search results of Google, which as noted generates the bulk of search traffic in Europe.<sup>26</sup> *The Times* explained that "[h]undreds of sites purporting to sell goods such as Ugg boots and Tiffany & Co jewellery pay up to £5 'per click' to Google to ensure that their site is prominently displayed as a sponsored link at the top of the search results." The article went on to express concern that "[t]housands of Britons are being duped into buying goods that are fake or simply never arrive, as well as putting their credit or debit card details at risk of fraud."<sup>27</sup>

<sup>25</sup>Communications from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Enhancing the Enforcement of Intellectual Property Rights in the Internal Market*, at 10 (11 Sept. 2009), [http://ec.europa.eu/internal\\_market/iprenforcement/docs/ip-09-1313/communication\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/ip-09-1313/communication_en.pdf).

<sup>26</sup>Lauren Thompson, *Google Making Millions from Advertising Counterfeit Goods*, *The Times* (UK) (9 Jan. 2010), [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/the\\_web/article6981227.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6981227.ece).

<sup>27</sup>*Id.*



# 4 Evolving Piracy Practices

Piracy of both physical and digitised goods remains a core concern for the health of the innovation economy in Europe. As the United Nations Conference on Trade and Development has explained: “When we consider the protection and enforcement of copyright and related rights, piracy appears as one of the central issues. All kinds of works are at risk. Music, books, videos, software, video games, still pictures, DVDs and even craft design are copied illegally.”<sup>28</sup>

The Internet has always provided a dark alley for pirates. In the 1990s, the most visible manifestations of piracy online were in illegal file sharing of music and software, with the music file-sharing site Napster attracting perhaps the most attention until it was shut down by order of a U.S. court in 1999. A few years later, as online bandwidth and compression technologies improved, piracy of movies, television programs, sporting events, books and other content has become commonplace, often through peer-to-peer file networks, unauthorised streaming websites, and hacked computers.

“Traditional” methods of piracy such as peer-to-peer file sharing and illegal download websites continue to plague rights holders and diminish their livelihood. Piracy threatens rights holders across the creative sectors, including software, games, e-books, cinema, and music. In Spain, for example, a “free-for-all Internet culture” is leading movie studios publicly to consider abandoning DVD sales in the country.<sup>29</sup> Sales of DVDs fell six times faster in Spain than in Europe in 2008. That year there were 2.4 billion unauthorised downloads of music, movies, video games, software and other copyrighted works in Spain – or some 50 per Spaniard.<sup>30</sup> Figures across Europe, although better, are bleak as well. A 2010 report commissioned by the International Chamber of Commerce found that Internet piracy could cost Europe £215 billion by 2015, with 1.2 million jobs lost.<sup>31</sup> The author of the report commented that piracy is “a major threat to the creative industries in terms of loss of employment and revenues.”<sup>32</sup>

Policymakers and IP owners have employed a variety of means in an attempt to mitigate the substantial threat of online piracy. These efforts include (1) the development of legal offers (e.g., iTunes and other legitimate music sales sites, on-demand offerings and simulcasts of live matches by the sports sector), (2) educational initiatives to help the public understand the moral and legal problems with online piracy, (3) enforcement of legal rights through litigation, and (4) seeking out the cooperation of Internet companies and service providers to stop distribution of infringing files.<sup>33</sup> While online piracy continues despite these efforts, these efforts have had some success.

<sup>28</sup>See United Nations Conference on Trade and Development, *Creative Industries and Development* (Jun. 2004), [http://www.unctad.org/en/docs/tdxibpd13\\_en.pdf](http://www.unctad.org/en/docs/tdxibpd13_en.pdf).

<sup>29</sup>Giles Tremlett, *Spain Finds that Film Piracy is a Hard Habit to Break*, *The Guardian* (UK) (31 March 2010), <http://www.guardian.co.uk/world/2010/mar/31/spain-film-piracy-downloading-dvds>

<sup>30</sup>*Id.*

<sup>31</sup>See Carrie-Ann Skinner, *Net Piracy Could Lose Europe £215 billion by 2015* (18 March 2010), <http://www.pcadvisor.co.uk/news/index.cfm?newsid=3217662>

<sup>32</sup>*Id.*

<sup>33</sup>Commission Staff Working Document, *supra* note 4 at 7.



In addition to obvious forms of piracy such as distribution of infringing materials over peer-to-peer networks, increasingly IP owners confront a “next-generation” of online piracy. A key distinction is that these new methods of piracy typically occur through seemingly legitimate websites, such as popular user-generated content sites, search engines, and online advertising networks.

### **A. User-Generated Content Sites**

In recent years, sites for sharing user-generated content (UGC) have given birth to new cultural themes and voice to consumer-artists who might never have been heard in previous times. Unfortunately, in addition to providing an outlet for creativity and innovation by users, many UGC sites have become havens for pirated content, with substantial numbers of television shows, movies, music videos, sporting events, and other copyrighted content uploaded without IP owners’ permission.

Some user-generated content sites and IP owners have worked collaboratively in an attempt to reduce the prevalence of piracy on these sites. For example, in October 2007, several of the world’s leading Internet and media companies announced joint support for a set of collaborative principles concerning user-generated content. Companies supporting these “User Generated Content Principles” (UGC Principles) include CBS Corporation, Crackle, Dailymotion, Disney, Fox Entertainment Group, Microsoft, myspace.com, NBC Universal, serverload, Sony Pictures, and Veoh. The principles are designed as “a set of guidelines to help user generated content services bring more content to more consumers through legitimate channels.”<sup>34</sup>

The UGC Principles include support for the implementation of filtering technology to block infringing uploads before they are made available to the public, cooperation to ensure that filtering technology is implemented in a manner that balances legitimate interests of IP owners and users, and the identification and removal of links to sites that are clearly dedicated to the dissemination of infringing content. Recognising that the landscape in legitimate user-generated content as well as piracy on UGC sites will continue to evolve, the final principle holds that IP owners and UGC sites should “cooperate in the testing of new content identification technologies and should update these Principles as commercially reasonable, informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users’ online activities and other appropriate circumstances.”<sup>35</sup>

Like any general statement of principle, the UGC Principles are not meant to be perfect or exhaustive in their identification of the actions that either UGC site operators or copyright owners should take in seeking balanced solutions to the problem of infringing online content. The UGC Principles do, however, appear to represent a solid foundation for future efforts to promote a sustainable online ecosystem, and most importantly they provide a model for consensus-based, collaborative processes to addressing the challenges of online infringement.

<sup>34</sup>The UGC Principles are available at [http://www.ugcprinciples.com/press\\_release.html](http://www.ugcprinciples.com/press_release.html).

<sup>35</sup>*Id.*



In contrast to this collaborative approach, some UGC sites have reportedly allowed infringing content to proliferate. At least in the past, these sites have taken a quite liberal view of the legal rules designed to shield Internet companies from liability for certain of their users' conduct. In essence, if these companies did not perceive themselves to be bound by a clear legal obligation to remove infringing content, they typically refused to do so.

For example, concerns about rampant piracy of televised football games on YouTube – the market-leading video sharing site – led ICOMP member the Premier League (UK) to file a lawsuit asserting that YouTube is “pursuing a deliberate strategy of engaging in, permitting, encouraging, and facilitating massive copyright infringement on the YouTube website.”<sup>36</sup> In the complaint, the Premier League noted that the amount of infringing content on YouTube is “staggering.” Slow takedown of infringing content by YouTube undermined a key value of sports content – its live status – and thereby prevented paying licensees of the content from realising the full value of their investment. YouTube, on notice that infringing sports content was being posted on its site and reaping the value of that content, nonetheless refused to become one of those paying licensees.

Of particular concern to the Premier League was the degree to which YouTube had the ability to limit the amount of infringing content that becomes publicly available on the site, but had “created a number of barriers that make it virtually impossible and wholly impractical” for IP owners to protect their works. Only after the filing of the Premier League litigation, as well as a US \$1 billion lawsuit in the United States against YouTube by Viacom International did YouTube introduce technology designed to filter out infringing content. Previously, YouTube filtered user-submitted videos for infringing content only for those IP owners that had signed license agreements to allow YouTube to post official versions of their content – leading the Premier League to charge that YouTube was engaged in the “twenty-first century embodiment” of a “protection” racket.<sup>37</sup>

It remains an open question whether YouTube's filtering approach, known as ContentID, will adequately protect IP owners. It is perhaps telling that lawsuits against YouTube have continued after the introduction of ContentID, with French broadcaster TF1 and Italian broadcaster Mediaset alleging copyright infringement in 2008.<sup>38</sup> More recently, in October 2009, a criminal investigation was launched against senior executives of YouTube and its corporate parent, Google, in Hamburg based upon a complaint brought by 25 German musicians, producers, and music publishers. The IP owners in that case assert that Google did not respond to requests to take down over 8,000 copyrighted videos and were denied access to the ContentID program.<sup>39</sup>

<sup>36</sup>See *Football Association Premier League Ltd. et al. v. YouTube, Inc. and Google Inc.*, No. 07 Civ. 3582 (LLS) ¶16 (S.D.N.Y. filed 25 Nov. 2008), <http://www.youtubeclaimaction.com/court/2008-11-26-RedactSecAmenCmpl.pdf>.

<sup>37</sup>*Id.* at ¶17

<sup>38</sup>See *Italy's Mediaset Sues YouTube*, PaidContent.org (July 2008), <http://paidcontent.org/article/419-italys-mediaset-sues-youtube-seeking-at-least-800-million-damages/>

<sup>39</sup>Janko Roettgers, *Achtung! Criminal Investigation Against YouTube Underway in Germany*, NewTeeVee (23 Oct. 2009), <http://newteevee.com/2009/10/23/achtung-criminal-investigation-against-youtube-underway-in-germany/>



## CASE STUDY

by  
ICOMP  
member  
CEPIC

# Online Infringement of Copyrighted Pictures

## A widespread phenomenon

CEPIC serves as the voice for the press, stock and heritage organisations of Europe in all matters pertaining to the photographic industry. The increasing incidence of copyright infringement online and the difficulties faced by those seeking to combat such infringement is one of the greatest challenges facing the photographic industry.

For a typical example, consider the website [www.pixdaus.com](http://www.pixdaus.com), which is a site at which users share and exhibit environmental photography. While some users submit their own photographs, other users upload copyrighted photos found on other websites – without, of course, obtaining the permission of the copyright owners of those photos.

At the request of a photographer, CEPIC reviewed a sampling of photographs from pixdaus and found not only photos from the member's agency but also pictures owned by Reuters and other photo agencies or professional photographers. While the site's terms of service prohibit use of copyrighted pictures without the owner's authorisation, the burden is on the owner to discover the infringement and request removal of the infringing copy. Discovery of infringing works is particularly challenging because many online images do not bear a particular credit.

## Surveys assessing copyright infringement on-line

The online infringement of copyrighted photos is a widespread phenomenon. According to visual technology provider LTU Technologies, 75% of the images found on Internet are used without authorisation.

To investigate the scope of the phenomenon, CEPIC member PicScout tracked a sample of 20,000 images owned by Getty Images and Corbis. For four months, PicScout crawled commercial websites in three countries: USA, UK, and Germany. The reports showed 1,200 instances of infringement. Many of the images were prominently used, often on homepages. Even a year after the study was carried out, many of these images were still in use on these websites.



## B. Search engines

Legal actions have had some success at shutting down the largest illegal file-sharing sites, such as Swedish-based Pirate Bay. Less well-known sites, however, are absorbing some of the audience that had existed on these larger sites, and increasingly, the starting point for finding these smaller pirate sites has shifted to search engines.

Shortly after the closing of Pirate Bay, *Forbes* magazine published an article, *Why Google is the New Pirate Bay*. The article explains, “By searching for pirated music or video, Google users can easily scan a range of lesser-known pirate sites to dig up illicit content.”<sup>40</sup> Google responded in the article that it follows a notice-and-takedown procedure for removing infringing content about which an IP owner complains. *Forbes* explained, however, that these methods are of limited value, as “Google’s popularity as a resilient portal for piracy means that even if the media industry were to pursue torrent sites one by one, the search engine would always link to the newest site to host those tracking files, [creating] a potentially endless war on torrent sites.”<sup>41</sup>

Determining the steps that search engines could take to systematically prevent use of their services for finding pirated content, while respecting user freedom and privacy, is a challenging exercise. Nevertheless, if there were a will to tackle the problem, one would hope that reasonable solutions, acceptable to all stakeholders, could be found. Perhaps the more challenging question is whether diminishing competition in search and related online sectors means that market forces alone cannot be relied upon to lead to industry-led, consensus-based solutions.

<sup>40</sup>Andy Greenberg, *Why Google is the New Pirate Bay*, *Forbes* (17 April 2009), <http://www.forbes.com/2009/04/17/pirate-bay-google-technology-internet-pirate-bay.html>.

<sup>41</sup>*Id.*



## CASE STUDY

by  
daredo  
music  
GmbH

# New Trends in Infringement of Music Online

## A new form of “Pirate Bay”

daredo music GmbH, a licensed distributor of songs and an artist promoter, has witnessed firsthand the quandary of otherwise legitimate search engines being misused to lead users to pirated content. When one searches for a daredo artist and the word “download” on the leading search engine in Germany, almost all of the search results are links to illegal download sites. Naturally, these sites provide no compensation for daredo music GmbH – and therefore with none for the artist either.

daredo believes that Google, which processes over 80% of all the internet searches in Europe, and YouTube, a subsidiary of Google, thus have a special responsibility to take action against this form of piracy.

## YouTube

Infringing videos are also readily accessible at YouTube. YouTube has now reached agreements with the four largest music companies (Sony, EMI, Warner and Universal), who together cover about 70% of the music market, but numerous smaller companies – including daredo music GmbH – do not have this advantage. Joachim Keil, head of the creative department at daredo music GmbH, has explained: “Our repertoire can be found [on YouTube] without any legal framework. We are talking here about thousands of videos and uploaded tracks from our repertoire, which altogether generate (YouTube itself displays these figures) over 10 million views.”

YouTube has become not only a source for streaming infringing files, but also for downloading them. Using third-party software that can be found easily online, it is possible to download a YouTube video file from the temporary cache to which the file is copied to facilitate streaming. The audio portion of the file is then extracted to an MP3 music file. Joachim Keil, head of the creative department of daredo music GmbH, was able to download a popular title by an artist which he represents in this way for free and without leaving a trace – the entire process, including the separation of image and sound, lasted “all told, not even six minutes”. Here, too, daredo suggests that market leader YouTube has a special responsibility to take steps discouraging this form of infringement.



### C. Illegal Streaming websites

Sport content has been a stimulus to new audiovisual and broadcasting technology for some time. The Olympics in 2012 will see Super HD and 3D television events, and live streaming of over 5,000 hours of sport will be available on the internet and broadcast on digital channels. That equates to over 200 days worth of live sport content.

Because of their popularity and value, however, major sports events and competitions are particularly common targets for attack from pirates. Football has seen an increase in the amount of sites and viewers illegally watching content. Football is not, however, the most pirated sport globally. This dubious honour belongs to cricket, which sees around 1,000 different websites illegally hosting pirated coverage of its live events. Many of these sites are supported by online advertisements and over 200 of these websites are even operating as subscription channels, with the pirates being directly remunerated.

The growing phenomena of Internet streaming of live sporting events and peer-to-peer file sharing are very real examples of the need for a strong response to new trends in digital piracy. Additional measures, such as notifications to users from their ISPs about breaches of IP rights, may be needed. While legal action should be only a very last resort, and in that instance preferably targeting the illegal websites and not the individuals using them, a credible legal threat is needed to help protect against piracy.

# 5 Next Steps to Improving the Health of Intellectual Property Online: ICOMP Questions

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 paper 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 business practices and diminishing competition in many key online markets that undermine their ability to commercialise their content online.

It is our hope that this paper will advance the debate in ways that prompt stakeholders to engage in further dialogue about how best to promote a vibrant online ecosystem that respects IP rights while encouraging investment in innovation and the emergence of legitimate, sustainable online business models. The following are some questions to consider in that discussion:

- Are there voluntary mechanisms, such as industry best practices, that could help restore a balance between content creators and online intermediaries such as search engines?
- Given the dearth of competition in certain key online sectors, such as search and various forms of online advertising, would regulatory intervention be desirable to advance market-led solutions and to prevent market abuses? If so, what form would they take? Should competition regulators in particular take a hard look at acquisitions, deals, or business practices that would further diminish competition in online advertising?
- How can the power of a dominant search engine to act as the “editor-in-chief” of the Internet, deciding which sites succeed or fail, best be addressed? Should the ability of a dominant search engine to leverage that dominance into other markets through the manipulation of search rankings be dealt with by competition regulators or others?
- In addition to or instead of mechanisms that address abuse of market power by dominant firms, are there steps that could strengthen the bargaining position of publishers? For example, what are the benefits and drawbacks of allowing content owners the right (without fear of antitrust liability) to bargain collectively with advertising networks?
- Should unfair competition law in Europe be strengthened to provide clearer remedies for trademark holders online?



- What role could industry best practices by search engines and advertising networks – such as a commitment against accepting infringing use of trademarks as advertising keywords, establishment of clear and easily discoverable processes for rights holders to pursue fast and effective takedown of ads that infringe trademarks, and policies against placing advertisements on known infringing sites – play in upholding trademark protection online?





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