



CCIA Submission in Response to the ACCC’s paper on “Mandatory News Media Bargaining Code”

5 June 2020

1. Introduction

The Computer & Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments in response to the Concepts Paper that the Australian Competition and Consumers Commission (ACCC) released on May 19, 2020 on a “Mandatory News Media Bargaining Code” (the Concepts Paper).²

CCIA has publicly encouraged policy options that would provide appropriate support for producers of public interest news content.³ The Association understands and supports the efforts to preserve news diversity and local news producers as these represent an essential part of any democracy. However, CCIA believes that the Concepts Paper published by the ACCC suggesting a mandatory news media bargaining code raises multiple concerns from a copyright, competition, and international trade perspective.

When searching for new policies in the digital space, CCIA encourages authorities to take into account real-world business dynamics and ensure that incumbents do not influence the real competitive dynamics behind the markets, as such a position would go against consumers’ benefits.

Therefore, it is important that the ACCC considers reexamining its Concepts Paper and searches for an alternative policy option such as voluntary codes of conduct that would not imply using

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² Referred to herein as the “Concepts Paper”, available at: <https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%202019%20May%202020.pdf>.

³ Statement of Matt Schruers, Vice President for Law and Policy, Computer & Communications Industry Association, “Online Platforms and Market Power, Part 1: The Free and Diverse Press”, Committee on the Judiciary, U.S. House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law, June 11, 2019, <https://www.cciagnet.org/wp-content/uploads/2019/06/MSchruers-6-11-19-Written-Testimony.pdf>.



the copyright and antitrust legal frameworks to engage in industrial policy that stifles innovation by entrenching incumbents and violating international trade commitments.

2. Real Market Dynamics to Inform Code of Conducts

It is important to understand existing market dynamics between digital platforms and news publishers before delving into the intellectual property, competition and trade issues that raise concerns. The Concepts Paper is part of a policy objective “to ensure that commercial arrangements between these parties do not undermine the ability and incentives for news media businesses to produce news for Australians.”⁴ CCIA supports this objective, however it cautions against the use of competition law tools and interventions that may distort the market, reduce incentives for publishers to innovate, increase prices, and reduce choice for consumers and particularly advertisers.

a) Challenges and Opportunities in Shifting Market Dynamics

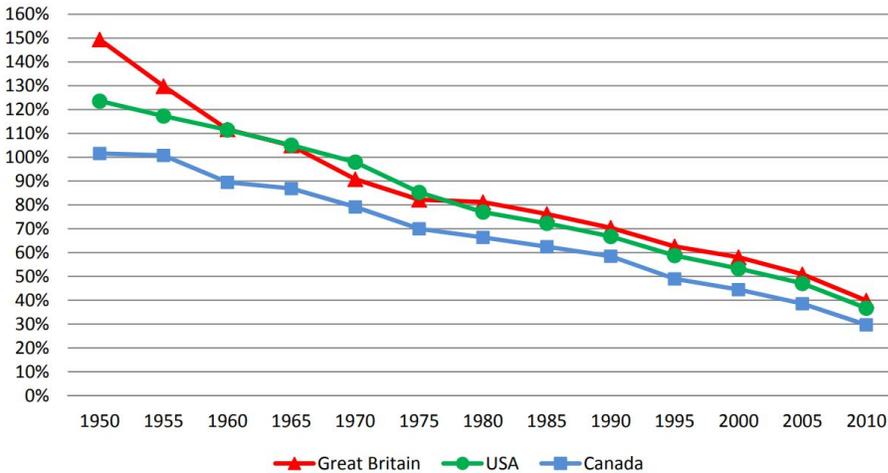
The development of the digital economy brings about challenges and opportunities to our societies that should be holistically evaluated before adopting any mandatory measure that could underpin the benefits of our economies going digital. One of the advantages that consumers benefit from with respect to digital intermediaries is that they offer value to consumers by making it easier to find and access the “long tail” of supply, whether retail, accommodation, audio-visual content, transportation, or news content. On the other side, for newspapers, the transition to digital has increased competition and increased unbundling, driving news content producers to innovate.

Against this backdrop, it is important for the ACCC to be aware that the market dynamics affecting publishers’ ability and incentives to generate more news content have shifted over time as news publishers face increasing competitive pressure from other sources of content. This trend started with radio, and then television, and then cable news. For the majority of the developed English speaking world, newspaper circulation has been in a steady state of decline since at least the 1950s.

⁴ The Concepts Paper, pg. 1.



Total daily newspaper paid circulation as % of households, Canada, USA, and Great Britain's national dailies, 1950-2010



Source: Communications Management Inc. “Sixty Years of Daily Newspaper Trends” (2011)⁵

Like other new information channels before them, the internet and digital tools have dramatically increased the volume of content available to any individual by reducing operating costs and increasing reach for the “long tail” of publishers. Content producers no longer need a printing press, delivery trucks, and relationships with newsstands and retailers to circulate news. Anyone can use their own website, or a self-publishing platform (e.g. Medium, WordPress, Substack) to publish professional-looking articles and content. This growing digitization has also created a significant increase in the supply of advertising inventory, as even small websites and digital native publishers now compete with legacy publishers for readers, viewers, and advertisers.

Competition from digital content is particularly acute because digital content is by its nature “unbundled”. Unlike print, digital content can be topic specific and is not packaged alongside other types of content (e.g. news, comics, sports, classifieds, etc.). Therefore, readers can consume specific content they desire without having to also purchase content which they perceive as having less value. This opens the door for many subject-specific content suppliers (e.g. sport, celebrity gossip, fashion, etc.). This increase in supply means a decrease in the amount that consumers are willing to pay for news content.⁶ It also means a decrease in the price

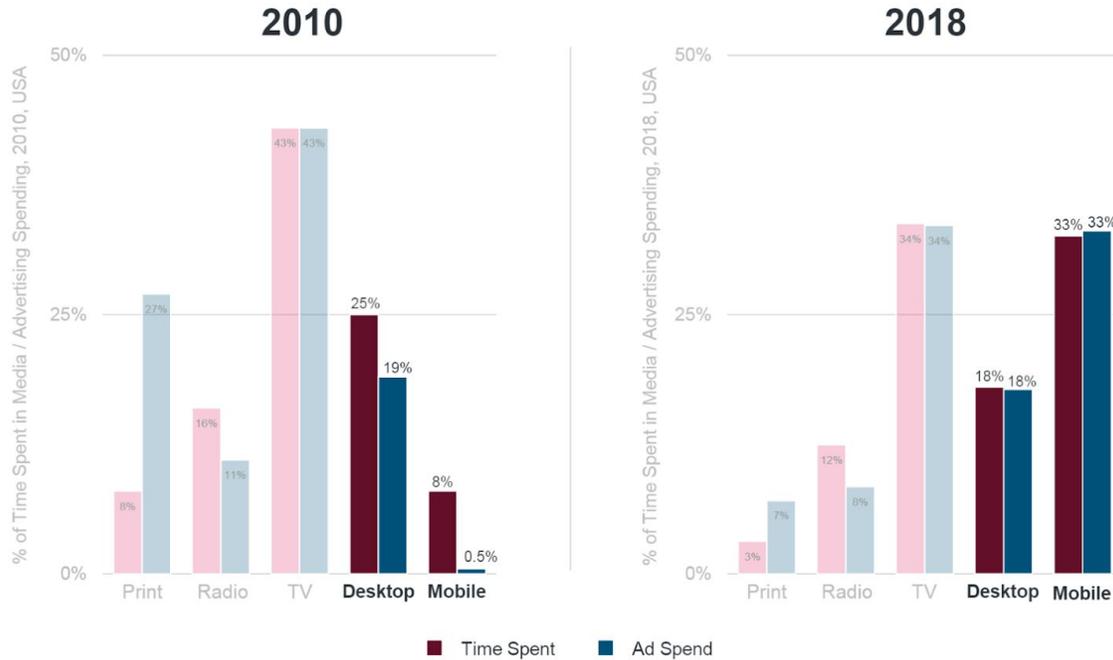
⁵ Available here: http://media-cmi.com/downloads/Sixty_Years_Daily_Newspaper_Circulation_Trends_050611.pdf

⁶ The Reuters Institute for the Study of Journalism conducted an online survey of more than 50,000 consumers of digital content in 26 countries. It found that while more and more people are reading news online, only nine percent of readers in English-speaking countries were paying for the content they consumed. By contrast, the highest number (27%) of people who are paying for online news was recorded in Norway, followed by Poland and Sweden



of advertising, and has put pressure on print media business models.⁷ One explanation for the declining revenue of print newspapers is that it is simply the natural result of changes in supply and demand.

Percentage of Time Spent in Media Format vs. Percentage of Advertising Spending



Source: Bond “Meeker’s Internet Trends 2019” (June 2019), slide 22⁸

As can be seen from the above chart, the decline in print advertising appears to be a response to shifting market dynamics, as the percentage of advertising revenue spend comes into line with the percentage of time spent on the media format. If anything, print media still receives a

(both 20%). See Nic Newman, Richard Fletcher, David A. L. Levy and Rasmus Kleis Nielsen, *Reuters Institute Digital News Report 2016* (Oxford: Reuters Institute for the Study of Journalism, 2016).

<http://www.digitalnewsreport.org>

⁷ This is especially true for classified advertising, which once represented a significant portion of newspaper revenues. See e.g. Economist “Who killed the newspaper?” (24 August 2006), available at: <https://www.economist.com/leaders/2006/08/24/who-killed-the-newspaper> (“Classified ads, in particular, are quickly shifting online. Rupert Murdoch, the Beaverbrook of our age, once described them as the industry’s rivers of gold—but, as he said last year, ‘Sometimes rivers dry up.’ In Switzerland and the Netherlands newspapers have lost half their classified advertising to the internet.”). Others have also linked the decline of print media to the decline of department store and retail advertising more broadly. See Shafer “Don’t Blame Craigslist for the Decline of Newspapers” (Politico, 13 Dec 2016), available at: <https://www.politico.com/magazine/story/2016/12/craigslist-newspapers-decline-classifieds-214525>

⁸ Bond “Internet Trends 2019” (June 2019), slide 22, available at: <https://www.bondcap.com/report/itr19/#view/22>



disproportionate percentage of advertising spend (7% of advertising spend as compared to only 3% of time spent). The above chart also shows that more time is being spent on digital formats than in the past. This is forcing publishers to innovate and adapt. Some of this innovation has been happening in their business models, with an increasing shift to subscriber-based systems.⁹ The Financial Times hit its target of a million paying subscribers a year ahead of schedule, The Times and Sunday Times have around half a million paying customers with the majority now digital-only, and The Guardian announced a small operating profit for 2018-19 after years of making substantial losses.¹⁰

Similar adaptations are happening with smaller publishers who have been focusing on local news and community-oriented reporting, and by eliminating content segments where they are unable to offer a unique value proposition to consumers (and which are generally over-served by competing publications, such as sport and world news).¹¹ Some of these adaptations are in fact facilitated by digital tools and the increased transparency and measurements that publishers get from audience engagement, allowing them to improve their content accordingly.

For example, CrowdTangle¹² is a tool that Facebook provides to publishers free of charge which allows them to track the performance of their content in real time across Facebook, Instagram, Reddit, and Twitter and compare it with the performance of other publishers' content. Not only does it help publishers understand how well stories are performing in the broader media landscape, it also helps them find and source original local news stories from social media that they can then research and report on. This new digital information landscape also provides journalists a huge opportunity (and responsibility) in helping citizens navigate, understand, and provide appropriate context.¹³ Globally, in 2019, digital advertising revenues for news publishers

⁹ Increasingly, subscriptions are seen as the best way to increase revenues. See Deloitte “Digital media: the subscription prescription” (2018), available at: <https://www2.deloitte.com/content/dam/Deloitte/global/Images/infographics/technologymediatelecommunications/gx-deloitte-tmt-2018-digital-media-report.pdf>, pg. 4 (“We expect news providers to focus increasingly on generating revenue from subscriptions, typically as a complement to advertising, given the challenges they have encountered during years of reliance on ad revenue alone. Whereas certain titles had a 10:90 ratio of subscription to ad revenue in 2012, we predict it may be 50:50 by 2020.”).

¹⁰ Reuters Institute Digital News Report 2019, available at: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2019-06/DNR_2019_FINAL_0.pdf, pg. 68.

¹¹ And with personalized advertising, these smaller non-premium publishers can get more value from their ad space by tapping into the larger number of advertisers who can afford digital advertising.

¹² See <https://www.crowdtangle.com/>

¹³ See e.g. UNESCO “Journalism, fake news & disinformation: handbook for journalism education and training” 2018, available at <https://unesdoc.unesco.org/ark:/48223/pf0000265552>; Data & Society “The Oxygen of Amplification: Better Practices for Reporting on Extremists, Antagonists, and Manipulators” (2018), available at: <https://datasociety.net/library/oxygen-of-amplification/>



increased by 5%, and paying news audiences increased by 0.5%.¹⁴ The average monthly unique visitors for the top 50 newspapers rose from 8.2 million in 2014 to 11.5 million in 2017, an increase of 40%.¹⁵

This is a shifting competitive landscape, and may be difficult for some publishers to manage, but others are finding success. There will always be demand for good journalism.¹⁶ The ACCC should continue to promote competition and protect incentives to compete and adopt digital distribution models. In the meantime, consumers have never had access to as much information and content, as quickly and as cheaply, ever before. Advertisers as well have greatly benefited by lowered costs and increased supply of advertising.

b) Referral Traffic Already Contributes to Maintain News Content Production

With respect to considering options to help news content producers increase profit in a digitized economy, it is important to highlight that digital intermediaries are already contributing to this end in the form of referral traffic.

In particular, the ACCC should take into account the value that publishers derive from free traffic to their websites that is greater than the value that platforms derive from advertising related to the content of those publishers.¹⁷ These dynamics are particularly relevant when discussing what an “appropriate remuneration” in this context should be.

More specifically, with regards to publishers, several studies have quantified the benefit that publishers receive from referral traffic.¹⁸ According to the European Commission “[t]he available

¹⁴ See WAN-IFRA “World Press Trends 2019: Facts and Figures” (2020), available at: <http://www.wptdatabase.org/world-press-trends-2019-facts-and-figures>

¹⁵ Newspapers Fact Sheet, Pew Research Center (June 13, 2018), available at: <https://www.journalism.org/fact-sheet/newspapers/> (“According to the independently produced reports from The New York Times and The Wall Street Journal, however, both companies saw large gains in digital circulation in the past year: 42% for the Times and 26% for the Journal, on top of gains in 2016. If these independently produced figures were included in both 2016 and 2017, weekday digital circulation would have risen by 10%.”)

¹⁶ Kaleida “News Ecosystem Report: Europe, 2018” (2018), available at: <https://www.scribd.com/document/385143419/Kaleida-News-Ecosystem-Report-Europe-2018> (survey results finding, at pgs. 9-10, that “news consumers value quality sources. They read articles in full. And they do this many times a day.” and that people “are much more likely to click on a story if the original source is a recognised news publisher.”)

¹⁷ The Concepts Paper only implicitly acknowledges this by accepting that a collective boycott would “damage news media businesses, which will lose the benefits of news referrals from the platform”. *Id.*, pg. 10.

¹⁸ See, e.g., Deloitte, “The impact of web traffic on revenues of traditional newspaper publishers” (March 2016) (“The value of a single visit is estimated to range between €0.04 and €0.08, irrespective of whether a visitor accesses a news site directly or through a referral site.”), available here:



empirical evidence shows that news aggregators have a positive impact on news publishers’ advertising revenue”.¹⁹ On the other hand, digital platforms may derive comparatively little revenue from the direct monetization of news content on their platforms. For example, Google states that “Google last year generated approximately AU\$10 million in revenue—not profit—from clicks on ads against possible news-related queries in Australia.”²⁰

The contribution of social media to news consumption and informal discussion networks has been found to promote civic engagement and individual participation in public affairs.²¹ The ACCC should conduct an evidence-based assessment of the value exchanged between digital platforms and publishers to avoid the appearance of favoring one industry over another.

In this respect, CCIA notes that the ACCC, in its Digital Advertising Services Inquiry,²² is separately investigating the existence of potential bargaining power imbalances with regards to the provision of digital advertising technology services to publishers. CCIA encourages the ACCC therefore to avoid misconstruing potential imbalances from that commercial relationship into the relationship with regards to content.

As shown above, the market dynamics with regard to content show a high degree of competition between content suppliers, successful publishers responding to this increased competition with innovative monetization models, and increased traffic and revenues for those publishers who have best adapted to market forces in light of digitization. CCIA believes that the primary subject of concern in the newspaper publishing industry is not, at its root, the technology industry. Rather, as noted above, technology has challenged the business model of some news media producers, mainly by globalizing the advertising market and disrupting the dominant local advertising position that many publishers had held for decades. CCIA submits that the ACCC should not adopt a policy of shielding businesses from market dynamics at the expense of consumer welfare, innovation and competitive incentives to adapt in light of digitization.

<https://www2.deloitte.com/uk/en/pages/technology-media-and-telecommunications/articles/the-impact-of-web-traffic-on-revenues.html>

¹⁹ European Commission Joint Research Center “Online News Aggregation and Neighbouring Rights for News Publishers” (20 December 2017), available at:

<https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf>

²⁰ Google “A fact-based discussion about news online” (31 May 2020), available here:

<https://australia.googleblog.com/2020/05/a-fact-based-discussion-about-news.html>

²¹ *See, e.g.*, Gary Tang & Francis Lee “Facebook Use and Political Participation: The Impact of Exposure to Shared Political Information, Connections with Public Political Actors, and Network Structural Heterogeneity” (Social Science Computer Rev. June 20, 2013), available at:

<https://journals.sagepub.com/doi/abs/10.1177/0894439313490625>.

²² Available here: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry>



Against this backdrop, the essential aspects of market dynamics that require further consideration for the purposes of adopting an adequate policy option in the proposed codes of conduct that would not distort market competition, freedom of contract, and international intellectual property rights commitments are discussed below.

3. Intellectual Property Considerations

The ACCC Concepts Paper includes multiple intellectual property rights-related policy options in its proposal including the assumption that news producers could be entitled with ancillary rights. While CCIA understands the endeavor to adopt codes of conduct that include these assumptions and related obligations, similar previous efforts have proven to fail as policy options.

a) Ancillary Rights are a Mischaracterization of Intellectual Property Theory

According to the ACCC's Concepts Paper, news content producers could be granted ancillary rights equivalent to those granted by intellectual property law through licensing agreements. These policy suggestions expand the theory of intellectual property law beyond the confines of established copyright law and violate long-standing rights of Internet services to make use of information online.

Most jurisdictions view displaying a short quotation or snippet to be permissible because: (a) it may be too short to qualify for copyright protection; (b) it may fall under an exception to copyright law – e.g., because it is considered a fair practice, fair use,²³ or fair dealing of the copyrighted work, including exceptions mandated by the Berne Convention; or (c) the copyright owner is considered to have granted its implied consent to showing such snippets (because it has made its work available on the Internet and is not blocking its work from being indexed by search engines).

Ancillary rights in news snippets and quotations are different from any existing intellectual property right. They are not patents, or trademarks, nor are they a form of industrial design or trade secret. Nor are ancillary rights equivalent to copyrights, since they create entitlements in

²³ What is being considered in terms of ancillary rights is also antithetical to ACCC Chair Rod Sims' recent calls for Australia to adopt a fair use exception. Rod Sims, *Fair use copyright reforms essential in a world of technological change*, Sydney Morning Herald (May 29, 2017), <https://www.smh.com.au/opinion/fair-use-copyright-reforms-essential-in-a-world-of-technological-change-20170529-gwfb0i.html>.



content that international copyright law specifically declares to be ineligible for such protection. In this sense, they are *sui generis*. While couched in terms of an intellectual property right, ancillary rights can be construed as picking winners and losers. Aimed at rectifying perceived economic imbalances between sectors, they act like a private tax or levy. The purpose of these “snippet levies” is to compel one group of businesses—Internet businesses—to subsidize another group of businesses—news publishers. International copyright law, however, does not regulate short phrases or facts, and it mandates that the right to quote not be abridged.

This notion of a tax or levy on links or quotations (uses permitted under international law) is relatively new. The idea has been prompted by the well-documented difficulties of traditional print media in responding to and competing in the online environment. In the past few years certain publishers’ hostility to news aggregation and social media has grown, even though online services drive considerable traffic to the websites of news publishers, who then monetize that traffic by selling advertisements and/or subscriptions. To publishers who prefer that their content not be indexed via search engines or introduced to social media platforms, long-standing protocols already provide highly granular control: for example, news publishers can easily prevent that by complying with the robots.txt exclusion protocol, an Internet industry standard. By adding two short lines of code (containing fewer characters than this aside) in the header of a website, website administrators can prevent automated programs from copying headlines, snippets, or any other content from that site. And for social media, they can also choose not to post links on those platforms.

b) Benchmarking Other Jurisdictions’ Experiences Show Little Success

There are existing real-life policy examples that have proven that the expansion of the intellectual property theory in the form of ancillary rights to protect news producers is not a successful option. Furthermore, CCIA fears that an ancillary rights approach to the challenges brought about by changes in the way consumers consume news could threaten the nature of news communication and harm innovation, without bringing about benefits for publishers.

Other jurisdictions have implemented related ancillary rights policy options with not much success. For example, Spain and Germany adopted similar approaches resulting in negative outcomes for consumers and media companies in such jurisdictions.

In Spain, the policy experiment of executing these constructed ancillary rights resulted in an undermining effect on consumers and news publishers experiences alike. A study conducted by an independent firm assessed the situation in Spain and outlined the negative impact of this



measure on consumers, SMEs, advertising revenue and even small and medium-sized publishers.²⁴ The study explained that the law was “an obstacle to the development of new business models and would lead to the closing down of innovative companies.”²⁵ NERA estimates the loss in consumer surplus amounts to EUR 1.85 billion per year for all Internet users in Spain.

In August 2013, Germany passed the ancillary copyright for press publishers. The law tried to give press publishers exclusive control over the use of snippets on all online platforms. As a consequence, several online players decided not to carry snippets of content produced by VG Media members, the collecting society tasked with enforcing the ancillary copyright. According to NERA, smaller, less popular online publications have suffered the most from the introduction of the law which caused a significant online traffic decline. While the average traffic decrease to online publications amounts to more than 6%, the traffic decrease for small publications amounts to more than double the average, 14%.²⁶

In France, the competition authority has recently imposed obligations to negotiate in good faith the commercial relationship between certain media platforms and Google to remedy an alleged abuse of dominance position of the latter.²⁷ Whereas it remains to be seen the impact of such expansive use of competition law on consumer welfare, the spirit of such remedy seems to be more aligned to the idea of having a voluntary code conduct as originally suggested by the ACCC where good faith negotiations are encouraged.

More broadly, a European Parliament study highlighted that there is “little evidence that declining newspaper revenues have anything to do with the activities of news aggregators or search engines”.²⁸

²⁴ NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual*, 9 July 2015, available at [https://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20\(VERSION%20FINAL\).pdf](https://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20(VERSION%20FINAL).pdf).

²⁵ *Id.* at 21.

²⁶ Jakob Kucharczyk, *German and Spanish Competition Authorities Got It Right on the Ancillary Copyright for Press Publishers*, Disruptive Competition Project, Sept. 17, 2015, <http://www.project-disco.org/european-union/091715-german-and-spanish-competition-authorities-got-it-right-on-the-ancillary-copyright-for-press-publishers/>.

²⁷ Bertille Gauthier, *The Autorité de la concurrence hands down a €150M fine for abuse of a dominant position*, Dec. 20, 2019, <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-hands-down-eu150m-fine-abuse-dominant-position>.

²⁸ European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, Sept. 2017, at 18, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf.



Benchmarking multijurisdictional ancillary rights policy options proves that the benefit of neighboring rights remains unclear as publishers haven't made a profit out of these provisions. Therefore, CCIA suggests that the ACCC engage in further analysis before imposing such rights and continues to explore ways to encourage good faith negotiations that bring about benefits to consumers and news productions alike.

c) *Australian International IP Commitments Should Not Be Jeopardized*

In addition to these policies ultimately being unhelpful to the constituencies that advocated for them, they also conflict with Australia's international obligations.

Any code of conduct that the ACCC proposes must be consistent with Australia's international commitments. CCIA has long argued that snippet taxes and *sui generis* or ancillary rights to domestic industries serve as a trade barrier, and are in fact a violation of international copyright commitments — long-standing international law that prohibits nations from restricting quotation of published works.²⁹

If Australia imposes a tax on quotations, these entitlements would be incompatible with Berne Convention Article 10(1)'s mandate that "quotations from a work . . . lawfully made available to be public" shall be permissible.³⁰ As TRIPS incorporates this Berne mandate, compliance is not optional for WTO members; non-compliance is a TRIPS violation. While this potential framework may not be structured in the same way, this proposal may still run afoul of the same international commitments, and Australia can be held liable for non-compliance with its international obligations.

²⁹ See, e.g., CCIA Post-Hearing Written Comments, Docket No. USTR-2017-0024 (Mar. 14, 2018), https://www.ccianet.org/wp-content/uploads/2018/03/CCIA_2018-Special-301_Review_Post-Hearing-Submission.pdf; CCIA Comments, Docket No. USTR-2012-0022 (Feb. 8, 2013), [https://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](https://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf); CCIA, *The Ancillary Copyright For News Publishers: Why It's Unjustified And Harmful* (May 2016), https://www.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Paper_A4-1.pdf; CCIA Comments, Docket No. USTR-2019-0023 (Feb. 6, 2020), https://www.ccianet.org/wp-content/uploads/2020/03/CCIA_2020-Special-301_Review_Comments.pdf.

³⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, art. 10(1), amended Oct. 2, 1979 (emphasis supplied). Moreover, if the function of quotations in this context – driving millions of ad-revenue generating Internet users to the websites of domestic news producers – cannot satisfy "fair practice", then the term "fair practice" has little meaning. Imposing a levy on quotation similarly renders meaningless the use of the word "free" in the title of Article 10(1). The impairment of the mandatory quotation right represents a TRIPS violation, because Berne Article 10 is incorporated into TRIPS Article 9. See TRIPS Agreement, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971)."). TRIPS compliance, in turn, is a WTO obligation.



Additionally, trade secret protection is required by TRIPS Article 39.2. The Concepts Paper contemplates remedying “information asymmetries” through information disclosure obligations on “underlying data.” The Concepts Paper can remain consistent with Australia’s TRIPS commitment by making clear that companies bound by the marketing code are not compelled to disclose information that has commercial value within the meaning of TRIPS art. 39.2(b), and has been subject to reasonable efforts to maintain secrecy. A mandatory code that compels negotiation and the disclosure of otherwise secret information having commercial value may be inconsistent with this obligation.

3. Competition Considerations

In addition to IP-related policy options, the ACCC’s Concepts Paper also includes several suggestions that are concerning from a competition policy point of view. As detailed in the following sections, some of the policy considerations such as granting an antitrust exemption to news producers, forcing disclosure of trade secrets or mandating data sharing obligations would only have as a result the distortion of Australian market dynamics with zero benefits for consumers, innovation or progress.

a) Antitrust Exemptions in the Form of Authorized Boycotts or Collective Bargaining Are Discouraged from a Competition Policy Perspective

The mandatory Code of Conduct proposed by the ACCC should aim to respect Australia’s competition rules. In this respect, the proposed Code of Conduct would allow news publishers to collectively negotiate with digital platforms relating to certain contractual conditions such as the quality, accuracy, and attribution of news sources. In practice, the proposals included in the ACCC’s Concepts Paper to allow news producers to collectively bargain, in practice, implies that news publishers will be able to cartelize to negotiate their contractual terms with online platforms, i.e. by fixing prices.

Australian antitrust norms do not allow market participants in a relevant market to band together and collectively agree on terms in negotiating against a competitor, as that is considered to alter the market dynamics to the detriment of consumers. Therefore, this type of solution would be equal to adopting an antitrust exemption which not only is disfavored internationally, but would also have a negative impact on consumers in Australia, as they won’t be able to benefit from the



natural market dynamics. It is worth recalling that the OECD calls for transparency for cartel exclusions and authorizations, and urges states to consider eliminating or reducing them.³¹

Furthermore, it is calculated that consumers pay on average 49 percent more overall when cartels exist, and up to 80 percent more when cartels are at their peak effectiveness.³² Based on these calculations, the already concentrated news producers market in Australia will become even more concentrated without leaving room for innovation-driven contestability. Eventually, consumers in Australia will pay higher prices and receive worse services as market positions would be entrenched to the detriment of progress.

b) Policy Options to Allow News Producers to Collectively Bargain Have Failed in the Past

Other jurisdictions' experiments prove that antitrust exemptions to protect news production and journalism have not succeeded in past attempts. In the U.S., similar efforts to preserve newspaper diversity in the form of antitrust exemptions have failed. The Newspaper Preservation Act of 1970 in the U.S. allowed competing newspapers to set up joint operating agreements in the same market area, making them exempt from parts of the antitrust laws. The goal was to keep competing newspapers publishing in areas where readership was declining. However, this Act failed to achieve the stated goal of the U.S. Congress to maintain independent competing voices in the press, as it was impossible to implement in practice. As a result, the Act has fostered monopolies and chains instead of producing independent voices.³³

Hence, past experiences in the news industry and in other sectors have demonstrated that implementation of antitrust exemptions or equivalent measures is challenging and does not help to achieve intended goals; rather, it furthers the monopolization of exempted stakeholders or incumbents.

c) Mandatory Data Sharing Requirements Are Not Justified from a Market Competition Perspective

³¹ OECD Competition Law and Policy Reports, *Hardcore Cartels* (2000), at 59, available at <https://www.oecd.org/competition/cartels/2752129.pdf>. See also e.g., fn. 25 Am. Antitrust Inst., Working Grp. On Immunities & Exemptions, *Comments of the Antitrust Institute 2* (2005), available at <http://www.antitrustinstitute.org/files/433.pdf>.

³² John M. Connor, *Price-Fixing Overcharges: Revised 3rd Edition*, American Antitrust Institute (Feb. 2014) at 1, available at <https://ssrn.com/abstract=2400780>.

³³ Felicity Barringer, *A 1970's Act to Preserve Faltering Newspapers Seems Only to Delay the Inevitable End*, N.Y. Times (Aug. 16, 1999), available at <https://www.nytimes.com/1999/08/16/business/media-1970-s-act-preserve-faltering-newspapers-seems-only-delay-inevitable-end.html>.



Most worldwide competition frameworks foresee the possibility of imposing remedies on market participants to fix anticompetitive practices that harm competition. In this respect, there is international consensus with respect to the flexibility and freedom that authorities should have in order to craft remedies that address the specific harm that a practice is causing to market dynamics. By the same token, there is wide consensus among the international community that remedies should not be imposed in a vacuum, i.e. without a proven competition harm.

With respect to the consideration of imposing mandatory data sharing obligations, it is perplexing to read that the ACCC is considering imposing such obligations within the mandatory code of conduct. Whereas mandating data sharing is a possibility that the ACCC, or any other authority, could impose to remedy a proven competition harm provided all legal standards are met, it seems unreasonable to include such obligations in a code of conduct applicable to a limited number of market participants.

Furthermore, imposing such a remedy in a code of conduct that would not be subject to judicial review seems to risk violating due process rights that govern the Australian judicial system and even its constitutional principles of natural law.

From an international perspective, it is important to note that the International Competition Network (ICN) in which Australia actively participates, established the Framework on Competition Agency Procedures (ICN's Framework).³⁴ According to the ICN's Framework to which Australia has adhered:

“No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).”

Whereas the option to include a remedy imposing mandatory data sharing in a Code of Conduct doesn't involve a contested enforcement proceeding, the outcome of such obligation is the same as if the ACCC were to impose a remedy as the outcome of an investigation without the parties affected being able to defend themselves.

³⁴ ICN Framework on Competition Agency Procedures, *available at* <https://www.justice.gov/opa/press-release/file/1151631/download>.



Since the ACCC is a signatory of the ICN's Framework, where it is recognized that a remedy should not be imposed without the affected party being given the opportunity to have such imposition reviewed by an independent adjudicative body, CCIA suggests removing this type of remedy from the Code of Conduct. The ACCC could still consider imposing such obligations to remedy proven competition harms in the context of an antitrust investigation.

d) Balancing Increased Transparency and the Protection of Business and Trade Secrets Is an Essential Element of Market Competition

The ACCC's Concepts Paper is correct to consider options that would increase transparency in the business relationships among news content producers and digital platforms. In fact, in the past, digital platforms such as Google have introduced enhanced transparency to their search rankings.³⁵ However, requiring even more transparency from certain digital platforms should in no circumstances undermine the right of businesses to preserve their business and trade secrets which are an essential element for competition to exist in the market.

Based on the questions raised in the ACCC's Concepts Paper with respect to possible obligations to give advance notice of algorithm changes that may affect the ranking of news or any other relevant changes to the platforms' algorithms, it is important not to impose predetermined obligations which may go beyond reasonable expectations, and may force companies to disclose important information that could give a competitive advantage to other competitors distorting market dynamics.

Because it is difficult to predetermine the terms under which digital platforms should give advance notice to news content producers, and since it is almost impossible to predict possible innovations that could significantly impact the way news is consumed, CCIA encourages the ACCC to encourage parties to work cooperatively and negotiate in good faith proportional solutions with respect to transparency standards.

CCIA understands that being flexible with respect to the transparency commitments that digital platforms should abide by vis-a-vis news content producers will be the key to ensure successful policy outcomes. Hence, providing interested parties with a sufficient degree of flexibility to work cooperatively will increase transparency in the markets without undermining the protection of trade and business secrets.

³⁵ Google Algorithm Update History, <https://moz.com/google-algorithm-change>.



4. Conclusion

The ACCC proposal relating to codes of conduct as a means to establish voluntary settings for digital platforms and news content producers to frame their business relationships seems to be a forward-thinking policy option. However, the ACCC's Concepts Paper evidences that Australia has moved from considering voluntary to mandatory codes of conduct that would include questionable obligations from international and legal perspectives and foreseeable limited success.

For the reasons outlined in this submission, CCIA encourages the ACCC to continue to advance its work towards adopting voluntary codes of conduct; and to do so cooperatively with all interested stakeholders. By the same token, CCIA strongly advises against adopting some of the proposals included in the ACCC's Concepts Paper without engaging in further studies of market dynamics.

Australia is at the crossroads regarding the adoption of cutting-edge policy tools that would provide for flexible frameworks that facilitate implementing proportional and reasonable solutions to preserve news content producers without undermining innovation and the advancement of the digital economy. Failure to further reflect on what the right policy approach should be and fast tracking the imposition of obligations on digital platforms that would only entrench existing news media monopolies would not only go against consumers in Australia, but would also set a bad policy precedent to the rest of the world.