

14 May 2019

Mr Rod Sims
Commissioner
Australian Competition and Consumer Commission
175 Pitt Street
Sydney, New South Wales, 2000

Dear Rod,

Thank you for taking the time to meet with me last Friday to discuss the Australian Competition and Consumer Commission's preliminary report to its Digital Platforms Inquiry.

Our interest in this report arises because we represent in addition to writers, and visual artists, a large number of journalists and publishers in licensing their content to ensure these parties get fair payment for the use of their work by schools, universities, government, Australian businesses and media monitoring companies.

As you know, a significant number of media publishers have proposed to the Commission that one policy solution to the digital platforms' use, and monetisation, of their content, is a licensing arrangement under which the digital platform must pay the relevant publisher for this use. This payment could be made directly to the publisher or via a collecting society like Copyright Agency.

In this letter, I outline our views on:

- the Commission's analysis of the problem of value draining from media companies because of the activities of digital platforms;
- our issues with the Commission's remedy to address this problem;
- the principles we have adopted in developing an alternative additional approach; and
- the specific policy settings of this approach which would, in my view, better address the problem and ensure a sustainable flow of revenue to support journalism.

I focus in this letter on the Commission's recommendations in relation to the use of 'snippets', or small portion of media articles, by the digital platforms. However, the principles in this letter of course, apply equally to the use of headlines and links only.

The ACCC's analysis and assessment of the problem to be solved

The Commission has conducted a very thorough and impressive analysis of the recent technical, economic and consumer developments, the extraordinary rise of digital platforms and the challenges that these profound changes present to news media businesses. This has significant implications for the robustness of critical journalism which is so important in a democracy.

The Commission has also done a good job in capturing well the unintended consequences that can flow where policy proposals do not fully take account of the potential responses of powerful digital platforms to policy and legislative action. I am thinking in particular of the

Commission's observations on what Google did in response to legislation in Germany and Spain that sought to levy Google for the use of snippets, or small portions of news articles.

As the Commission notes:

In Germany, this (legislative action) enabled newspapers to require aggregators to pay a licence fee before using snippets. Google responded by allowing search results to appear with snippets or images only where fees were waived. This resulted in a substantial drop in referral traffic and ultimately each of the publishers took the view that it was in their competitive interests to waive the fee. In Spain, a similar law applied a mandatory fee for the use of snippets, specifically in news aggregators which could not be waived. Google's response was to close Google News in Spain.

The sort of behaviour is an unsettling illustration of the disproportionate power of the digital platforms. To be blunt about it, it is easy to see them as the robber barons of the 21st Century.

The problem the Commission is seeking to solve is how does one ensure a revenue flow to challenged media businesses, to support original journalism that's in the public interest.

The ACCC's policy proposal

As you know, the Commission's proposal to support investment in print and online news is essentially to subsidise it via the tax system. The report recommends an extension of the existing Regional and Small Publishers Jobs and Innovations Package, tax incentives for the production of journalism, and making personal news media subscriptions tax deductible.

In our view, there are three problems with these proposals:

- They do not provide the right incentives to ensure that news media businesses are rewarded for the use and monetisation of their valuable content by the digital platforms.
- They are subject to the vagaries of funding from the Federal Government. Indeed, as the Commission itself notes, the Regional and Small Publishers Jobs and Innovations Package is (only) a three-year package which is currently due to expire at the end of this calendar year.
- They do not address one of the problems the Commission is seeking to address namely the reward for the production of original content. While direct funding would, of course, mean the production of original content, it would not stop media companies reproducing, without permission, the work of other media companies once the article has been published.

In providing this feedback I do not in any way wish to be critical of the Commission or Commission personnel who have made these recommendations. It is a devilishly tricky policy area. But I do provide the feedback in the hope that the Commission will recommend a different approach.

As an alternative, or in addition, to the remedies canvassed by the ACCC in the preliminary report, I suggest a different approach, as discussed in our meeting.

Principles adopted in developing our proposal

In developing the proposed approach, we have had regard to the following core principles.

Digital platforms that benefit from the use of content should pay for its use

Taking as a start point that digital platforms should pay for the use of news media content, is consistent with the approach that the European Union has adopted in its recently passed Article 15 of the Digital Single Market Directive. Article 15 provides a 'publishers right' that is designed to better ensure that publishers can negotiate a licensing arrangement with digital platforms.

As the Explanatory Memorandum to the proposal that led to the recently-adopted EU Digital Single Market Directive says, *Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services.*

The EU Directive includes a provision (Article 15) that enables compensation from online platforms to media companies for the value of their content. The new provision complements the existing European copyright framework. The Directive recognises that 'The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information'.

The current Australian Copyright Act was not designed for certain uses of content by digital platforms

The Australian Copyright Act is not the right vehicle to address the societal consequences of enormous multinational platforms aggregating vast amounts of content produced by other people. Those consequences include a value to the aggregators from the comprehensiveness of their data collection combined with market reach, without a commensurate responsibility to support the creators of the content they are aggregating. The Copyright Act is also part of an international system where countries agree to apply 'national treatment' to content from other countries, but the problem we are looking to solve here is support for quality Australian news and journalism. The new 'press publishers' right' in the EU is also specifically for European media companies and journalists, not part of an international system. The Copyright Act does deal with small portions, but on a case by case basis, but does not take into account the

cumulative effect on the user's side, particularly where content is woven together on an industrial-scale (or rather, a digital-scale) to create extraordinary utility for users and value to digital platforms which provide this information - from which they harvest huge amounts of revenue from advertising, the monetisation of data and scale.

There are also practical implications with enforcing rights under the Copyright Act due, in part, to the lengthy delays of taking enforcement action through the courts where opponents are extraordinarily well-resourced. More significantly, there is a real issue with the power imbalance between the digital platforms and the media companies which creates a reluctance to challenge practices and risk being excluded from or deprioritised within that platform's services.

The digital platforms have enormous power and the capacity to shift revenue attributions

As the response by Google to legislation in both Spain and Germany illustrates, digital platforms have enormous power to subvert the intention of legislators and to punish those that have the temerity to seek fair payment for the use of their work. Digital platforms are also good at managing their revenue and tax affairs so as best to minimise the tax they pay. I don't say this by way of a gratuitous slur, but simply to say the design of any solution should take this into account.

Any proposal should ensure sustainable funding linked to the creation of value for use of content

I believe strongly that any policy proposal to help sustain journalism simply must be linked to the value that is being created by the use of that content by the digital platforms. Currently, the media companies are not properly rewarded for the value that the digital platforms extract from use of their content. Referrals to media web sites are simply not sufficient recompense. The solution is to link the value extracted by the digital platforms with the creation of content (including original content) with the production of that content by the news media companies.

A further proposal to help ensure a reward for use and sustainable funding

In light then of the core principles above, Copyright Agency proposes the following model:

- The creation of a 'sui generis' (or 'standalone/of its own kind') piece of legislation that would provide an obligation on the operator of a digital platform (as defined by the Commission in its report), to be licensed for the use of that content. The digital platform could either obtain a licence for this use with the publisher directly or via a collecting society. 'Use' would include the provision of headlines and/or small portions by digital platforms.
- The legislation would allow for the licence fee to be negotiated between the platform and the media company, or the collecting body. The legislation should contemplate flexible licensing arrangements where media companies are free to negotiate directly with the digital platform or to default to the relevant collecting body doing this. The

legislation should provide some factors that are relevant to setting the amount of compensation including:

- the direct and indirect financial benefits to the platform of using that content;
- the scale of the platform and/or its market share;
- the need to encourage investment in original, Australian content (i.e. not to provide an incentive to use overseas or derivative alternative content).

In our view the digital platform should pay a fee set with reference to their total revenue generated in Australia rather than revenue *attributable* to the content licences. The reason for this is that in our experience companies are good at finding ways of attributing less and less revenue to our licence schemes over time, where their licence fee is set with reference to attributable revenue. Better to set the fee with reference to overall revenue with a lower percentage or revenue licence fee than would apply if it applied to attributable revenue.

- In circumstances where the parties could not agree the rate, we propose an independent rate setting mechanism similar to that which exists under the Copyright Act, where parties cannot agree the licence fee. As you know, under the Copyright Act parties in dispute over licence fees can take their dispute to the Copyright Tribunal for a ruling. As exists today under the Copyright Act, the Commission would have the power to join such proceedings.
- In terms of distributing the money for the use of content, we envisage that one model for this would be to use the same approach as currently applies when we distribute money to news media companies for use of their content by media monitoring companies on the basis of actual usage of that content. For instance, a distribution model that could work in relation to Google under a blanket licence is as follows, if in any month there are 1 million searches in Australia, covered by a blanket licence, that turn up a news headline or a snippet (on the first page) the fees would be distributed to each media company on the basis of the proportion of their searches of the total number of searches that appeared over that month.

It would, I believe, be possible with the extraordinary advances in AI and the capacity for digital technology to time stamp and record every transaction, to provide for some weighting that accords a higher value to original content than that to content which replicates the original article.

Alternatively, distribution could be made on the basis of proxy data or sampling. Further alternatives could be to include qualitative criteria to ensure that the money is distributed in a manner that is weighted to further the objectives of the legislation: Australian media companies, the production of original content, and journalists.

The legislation could designate the recipients of the scheme and establish qualifying criteria. As you know, I believe that the ABC should be entitled to share in the distribution pool for such a scheme (after all it currently requires many users of its

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content to engage with its commercial arm). However, if it was determined to be contrary to public policy for the publicly funded broadcasters to participate in distributions, they could be excluded from the distributions under the legislation. The role of an experienced collecting body, such as the Copyright Agency, would be to implement the legislation in a manner that ensures that the money is distributed to the intended beneficiaries in a fair and transparent manner.

The problem of not including all Australian news media organisations in the schemes is that search engines would most likely favour those Australian news media organisations not included in the scheme and subvert the scheme's intent. The Commission has shown clearly Google will exercise its considerable power to subvert legislative schemes aimed at providing a revenue stream to media companies, as it did in both Germany and Spain.

As stand-alone legislation, designed to address a particular set of circumstances, there would be no need to ensure that it covered every digital service provider. It would only apply to those platforms that meet the definition, which should really be aimed at those operating with the benefit of huge amounts of valuable content generated by others in the business of making content. By definition, this would not need to include platforms such as Wikipedia for example, that essentially work from user generated content.

I am happy to discuss any elements of this proposal with your team at their convenience.

With every good wish,

Yours sincerely,



Kim Williams AM