



Level 3
11-31 York St
Sydney, NSW 2000
www.startupaus.org

Digital Platforms Inquiry
Australian Competition and Consumer Commission
175 Pitt St
Sydney NSW 2000

By email: platforminquiry@accg.gov.au

15 February 2019

Dear Sir/Madam

ACCC Digital Platforms Inquiry - Preliminary Report: StartupAUS Submission

Preliminary Recommendation 7 - take-down standard

StartupAUS does not support Preliminary Recommendation 7 for the Australian Communications and Media Authority to set a mandatory standard for the take-down of copyright-infringing content by digital platforms.

StartupAUS has long advocated publically and through consultation with the government for the expansion of the existing Australian take-down scheme and accompanying safe harbour provisions to include all commercial online platforms.¹ The Australian Parliament recently expanded the existing take-down scheme in the Copyright Act (Cth)² to cover online service providers, yet fell short of including commercial online platforms within that definition. Nevertheless, the Government in making those changes endorsed the efficacy of the take-down scheme with the Minister for Communications and the Arts stating:

The measures in the Bill will ensure these sectors are protected from legal liability where they can demonstrate that they have taken reasonable steps to deal with copyright infringement by users of their online platforms.

Extending the safe harbour scheme in this way will provide greater certainty to institutions in these sectors and enhance their ability to provide more innovative and creative services for all Australians.

¹ McCauley, Alex 'Copyright reform is free and effective: StartupAUS' (Australian Financial Review, 7 May 2017); StartupAus, 'Crossroads', December 2018, Recommendation 2.

² See Part V Division 2AA.

*The changes will also give copyright owners tools to work with these sectors to prevent copyright infringement by their users.*³

The existing take-down scheme in Australia is carefully balanced so as to incentivise service providers to quickly remove allegedly infringing content from their networks on receipt of a take-down notice. It does this by providing them with an incentive to act on those requests by putting them at risk of being liable for damages if they fail to do so. In this way, the scheme provides a carrot and stick approach to encouraging cooperation. The Productivity Commission also acknowledged the “important part [the current scheme plays in] balancing the interests of users, rights holders and online intermediaries.”⁴

If adopted, Preliminary Recommendation 7 would result in a scheme that implemented a take-down mechanism without the accompanying safe harbour that provides the incentive with which to cooperate - essentially, it is all stick and no carrot. Such a scheme is fundamentally at odds with long standing international practice in this area and is at odds with the views of the Productivity Commission.

StartupAUS is particularly concerned that if adopted, the preliminary recommendation would put Australia further out of step with those countries around the world that are heavily investing in, and fostering, their local tech sectors, including the U.S., the E.U., Japan, South Korea and Singapore. Those countries broadly operate under a globally accepted standard for issuing and processing take-down notices that is relied upon by digital platforms around the world, including leading Australian digital platforms such as 99designs, Envato and Canva. Creating a separate scheme for Australia would place an additional regulatory burden on Australian platforms and startups to effectively manage two schemes, one for notices issued to them from within Australia and one for notices issued to them from other countries around the world in which they also operate.

StartupAUS also strongly disagrees with the preliminary report’s characterisation of there being “lower incentives for digital platforms to respond promptly to take-down requests” than traditional media. Startups are inherently risky ventures, with a high failure rate under the best of circumstances. Any significant threat to operational resources or cash, such as defending a copyright infringement claim, is a legitimately existential risk.

While the report cites the *Pokemon*⁵ decision as one of the bases for its preliminary recommendation, it fails to recognise the cost to a digital platform in defending such a claim (not to mention the risk of being ordered to pay an applicant’s costs) as a substantial risk in and of itself. The threat of incurring legal fees in Federal Court proceedings is sufficient incentive for most Australian platforms to quickly remove infringing content from their systems on receiving a take-down notice.

³ Minister Fifield ‘*Major reform to Copyright Safe Harbour legislation*’ (Media Release, 6 December 2017).

⁴ Productivity Commission, *Intellectual Property Arrangements* (Final Report No. 78, September 2016), 551.

⁵ *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541.

In fact, the *Pokemon* example provides a case in point - the defendant, Redbubble, did in fact take swift action to remove the infringing content on being notified by Pokemon of its existence. Despite that, Pokemon nevertheless commenced proceedings, and Redbubble was ordered to pay 70% of Pokemon's costs, even though Pokemon was effectively unsuccessful. This case highlights perfectly the precarious position in which Australian digital platforms find themselves, especially when confronted by huge, well-resourced copyright holders, such as global gaming, music and entertainment media conglomerates. The case also demonstrates why Australian digital platforms need the protections afforded by the Australian take-down scheme.

StartupAUS also notes that the issue of copyright reform is complex and has been the sole focus of many previous inquiries, most notably that of the Productivity Commission. In September 2016 the Commission recommended "expand[ing] the safe harbour scheme to cover not just carriage service providers, but all providers of online services".⁶ While StartupAUS strongly opposes Preliminary Recommendation 7, it would support a recommendation that was consistent with the recommendation made by the Productivity Commission.

Preliminary Recommendations 1 & 2 - Mergers and acquisitions

Mergers and acquisitions are a fundamental part of a successful, growing startup ecosystem. Globally, acquisitions of startups have provided successful founders of high growth tech enterprises with capital to build subsequent large-scale ventures. eBay's acquisition of PayPal in 2002 helped fuel the growth of a cohort of Silicon Valley companies now worth more than \$100 billion, with PayPal founders or early employees going on to start LinkedIn, Tesla, SpaceX, Yammer, YouTube, Yelp, and Palantir.⁷

This is a pattern that has repeated itself on numerous occasions in growing technology sectors around the world. There are few options for founders of startups to reach a liquidity event or 'exit'. A major one is acquisition - often by a digital platform. As a result, many startup founders deliberately target this sort of acquisition as a way to reach an exit. Making this harder or less likely would reduce incentives for would-be entrepreneurs.

The positive effects on competition from this sort of activity have not been taken into account in the preliminary report. Taking the example above, the companies founded by PayPal's founders and early employees have generated intense competition and opened new markets in a large range of industries. Tesla's impact on the competitive environment in the auto industry has, by itself, been globally transformative.

⁶ Productivity Commission, 'Intellectual Property Arrangements' (Final Report No. 78, September 2016), Recommendation 19.1.

⁷ Gelles, D (2015) '*The PayPal Mafia and the rise of the Unicorns*', Sydney Morning Herald

Reducing the activity or agility of the acquisition market in Australia presents a significant challenge to would-be entrepreneurs looking to start a business here. Increased involvement from the regulator may have the effect of driving down entrepreneurship rates by removing or restricting exit opportunities for startup founders. If fewer firms are founded, competition will necessarily suffer. Preliminary recommendations 1 and 2 are likely to have this effect.

It is far too early in the development of Australia's technology sector, in our view, to be proposing an increase in regulatory oversight of tech M&A. The preliminary report cites the case of Facebook's purchase of Instagram as a driver for concern. The report raises (although underplays) valid concerns about the practicability of competition regulators identifying the potential for companies to become vigorous competitors of global tech platforms. But it fails to recognise that, economy-wide, if an Australian entrepreneur developed an Instagram equivalent and was acquired by a global tech company, it may very well lead to strongly positive sectoral growth and a rapid boost to the competitive environment as a result of flow-on effects.

In our view, increasing red tape around tech acquisitions in Australia would be harmful to the domestic Australian technology sector and would do little to address the global problems identified in the report. More work needs to be done to identify particular cases of concern in the domestic market and to understand positive flow-on effects of acquisitions in this sector.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Alex McCauley', with a long horizontal flourish extending to the right.

Alex McCauley
CEO, StartupAUS