



Law Council
OF AUSTRALIA

Business Law Section

5 June 2020

Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: bargainingcode@acc.gov.au

Dear Sir/Madam

ACCC mandatory news media bargaining code concepts paper

1. This submission is made by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**the Committee**).
2. The Committee makes the following preliminary comments in relation to the consultation regarding the ACCC's Concepts paper (19 May 2020) relating to the proposed mandatory news media bargaining code (**the Concepts Paper**).
3. The *Concepts Paper* is directed to establishing a mandatory code of conduct by which news media businesses will be compensated by Google and Facebook for "use of news content".

Will an obligation to pay remuneration constitute a tax?

4. At page 14, the *Concepts Paper* identifies a number of ways that Google and Facebook may "use" news content as follows:
 - *featuring headlines of news articles;*
 - *featuring hyperlinks to news content hosted on news media businesses' own websites;*
 - *featuring short extracts or 'snippets' of news content;*
 - *featuring images extracted from news content;*
 - *fully reproducing news content in full in text, audio, video and image formats;*
 - *'scraping' the content of news media websites in order to produce snippets and index content for later use in potential search results;*
 - *allowing the digital platform's users to 'share', 'like', comment on and discuss individual pieces of news content.*

5. The *Concepts Paper* then acknowledges that the amount of any remuneration for such uses may be affected by pre-existing rights such as copyright.
6. The Committee notes that not all of the above types of “use” involve use or infringement of copyright. For example:
 - a. in most cases it is unlikely that copyright will subsist in a headline;¹
 - b. generally, it is not thought that a hyperlink to someone’s website involves any exercise of copyright in that website;
 - c. in the case of “news content” such as snippets there are likely to be issues of fair dealing for purposes of reporting news or current events or for research or study.²
7. First, where the use in question amounts to an *infringement* of copyright, in addition to the technological remedies discussed below the owner of the copyright has a clear and well-established suite of remedies under the *Copyright Act 1968* (Cth) already.³
8. Secondly, to the extent that the digital platform’s use of the news content is *not an infringement* of copyright, an obligation to make a payment for that use imposed by regulation may constitute a tax and, if so, may be invalid under the principles established in the *Blank Tapes* case.⁴
9. In the *Blank Tapes* case, a majority of the High Court held that an obligation to pay to a collecting society a “royalty” on sales of blank tapes was not in truth a “royalty” as the payment was not made for use of copyright. The obligation to pay, therefore, was a tax. The legislation imposing it was invalid under s 55 of the *Constitution* because it did not deal with the imposition of the tax only. It also contravened s 81 of the *Constitution* as the money was not paid into the Consolidated Revenue Fund.
10. The majority also noted that, if the law was not a tax, it would have been invalid as an acquisition of property on other than just terms. It will be necessary, therefore, for any price to be imposed on Google and Facebook (if it is not a tax) to be carefully calibrated to avoid contravening this prohibition.

News media businesses’ ability to control use of their content

11. Consultation questions 42 to 46 relate to how and the extent to which news media businesses have control over whether their material is displayed on the services provided by Google and Facebook.
12. In addition to their rights to prevent infringement of their copyright, the Committee understands that news media businesses have extensive technological abilities to control whether any of their content is automatically included in services provided by Google and Facebook and, if content is included, how much of that content.

¹ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984; 189 FCR 109.

² For example, *Copyright Act 1968* (Cth) ss 40 – 43B, 103A – 103C.

³ *Copyright Act 1968* (Cth) ss 36 and 115.

⁴ *Australian Tape Manufacturers Association Ltd v The Commonwealth* [1993] HCA 10; 176 CLR 480.

13. These controls are available to news media businesses through, for example, the robot.txt file for their websites and the *Robots Exclusion Protocol*⁵ and, at much more granular levels, through *meta robots tags* and *x-robots-tags*.⁶

Contact points

14. Consultation questions 52 to 56 relate to how best to ensure a contact point at a digital platform so that the digital platform provides timely responses to issues and concerns raised by a news media business.
15. Both Google and Facebook do have to provide a designated contact point under the *Digital Millennium Copyright Act* in the United States. That contact point could be designated under the proposed code of conduct also. There may, however, be difficulties in trying to enforce compliance. A further consideration might be which entities within Google and Facebook administer the content displayed on the “Australian” versions of Google and Facebook. (This raises a further question of which Google or Facebook sites will be subject to the code of conduct. For example, will it apply to Google.com and Google.co.uk and, if so, how will it be enforced?)
16. The Committee notes that *Copyright Regulations 2017* reg. 19 imposes a scheme for designated representatives in respect of service provider safe harbours under the *Copyright Act 1968* (Cth) ss 116AA to 116AJ.
17. To the extent, if any, that scheme already applies to Google and Facebook, it could usefully be deployed in this context.⁷ To the extent it does not, it could provide a useful model.
18. The Committee notes that it is not unheard of for copyright claimants under notice and take down schemes to make overbroad claims about their rights from time to time. In case of such eventualities, news media businesses should also have reciprocal obligations for contact points.

Conclusion and further contact

19. The Committee would be pleased to discuss any aspect of this submission.
20. Please contact the chair of the Committee, Matthew Swinn on +61 3 9643 4389, if you would like to do so.

Yours faithfully



Greg Rodgers
Chair, Business Law Section

⁵ See e.g. <http://www.robotstxt.org/robotstxt.html>

⁶ See e.g. <https://moz.com/learn/seo/robots-meta-directives>

⁷ As enacted, the scheme applies only to “carriage service providers”. The Committee has previously questioned whether that is consistent with Australia’s obligations under the Australia - United States Free Trade Agreement