

**C©PYRIGHTAGENCY**

**Response to  
ACCC Digital Platforms report**

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## 1 INTRODUCTION

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We welcome and support the findings and many of the recommendations in the ACCC's final report from its inquiry into digital platforms. In particular, the ACCC found that 'many print/online news media businesses have struggled to survive and have reduced their provision of news and journalism' and that Australian news and journalism is a public good that requires special consideration:

*The profound impact of digital platforms on media markets requires careful consideration. News and journalism generate important benefits for society through the production and dissemination of knowledge, the exposure of corruption, and holding governments and other decision makers to account.*

One of the proposals put to the ACCC by a number of submitters, including Copyright Agency, was the introduction of a licensing framework that would require platforms to pay fair compensation to creators of news and journalism to fund the future production of news and journalism.

The ACCC accepted that digital platforms should pay fair compensation. It recommended that the issue be addressed 'at first instance' by a code of conduct regulating the dealings between digital platforms and media companies. We support a code that is overseen by the ACCC.

The proposals for a licensing framework should also remain under consideration. They are not inconsistent with the ACCC's recommendation for a code of conduct, and the ACCC's reservations can be addressed.

There have also been important developments internationally since the ACCC's final report. Members of the European Union have started to implement the press publishers' right in the recently-adopted Digital Single Market Directive (for example, a Bill has been introduced in France), and media companies in the US are looking at ways to challenge the platforms' unfair bargaining position.

The platforms are liable both for their own reproduction and communication of content, and their authorisation of reproduction and communication by other people, including their customers. The legislative provisions on authorisation require review in the light of a range of developments since they were introduced.

## 2 CODE OF CONDUCT

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The purpose of a Code of Conduct would be to support the sustainability of Australian news and journalism and other culturally important content.

It would cover a range of issues relating to remuneration arrangements between digital platforms and media companies, including enabling media businesses to monetise content, and information sharing. It would also cover matters relating to negotiations and dispute resolution.

It should be overseen by the ACCC. We believe that this makes sense because:

- **competition law expertise:** the ACCC has rightly characterised the problem confronting media companies as one of unequal bargaining power between the parties, due to the market power of platforms, and it has the experience and expertise to address this; and
- **consistency:** the ACCC has recommended the establishment of a specialist digital platforms branch within the ACCC to monitor anti-competitive conduct, enforce competition laws and conduct an extended public inquiry, and there is considerable merit in aligning this with oversight of the code.

### 3 ACCC'S RESERVATIONS ABOUT PROPOSALS FOR A LICENSING FRAMEWORK

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The ACCC's reservations about proposals for a licensing framework related to:

- the wider context of:
  - imbalance of bargaining power; and
  - failures of past compensation regimes in Spain and Germany; and
- practical issues:
  - implementation issues;
  - scope: which content producers would benefit; and
  - potential negative consequences.

We address each of these below.

#### 3.1 Imbalance of bargaining power

The ACCC said:

*the issues identified in relation to snippets stem from a wider set of issues regarding an imbalance in bargaining power, which the ACCC recommends be addressed at first instance through a code of conduct*

We agree that there is a wider context that includes an imbalance of bargaining power. It is not yet clear, however, that the recommended code of conduct will, of itself, effectively address that issue. In referring to the code as a 'first instance' measure, the ACCC has acknowledged that the effectiveness of the code will need to be reviewed.

##### 3.1.1 Copyright exceptions

The ACCC said:

*Even if copyright was found to subsist in a headline or if it was found that a snippet reproduced a substantial part of a news article, the digital platform copying the headline or snippet may be able to claim a fair dealing exception, such as fair dealing for the purposes of reporting of news.*

We are strongly of the view that fair dealing for reporting news does not apply to platforms, but the ACCC's reference to it highlights areas of uncertainty.

The ACCC also said:

*These 'fair use' provisions in copyright law contribute to the public interest by allowing for information to be disseminated and transmitted freely by the media. However, such provisions are not strictly defined, and they present adverse incentives to the production of original content.*

We agree that exceptions such as fair dealing, when applied appropriately, can contribute to the public interest. We welcome, however, the ACCC's acknowledgement that they can also interfere with commercial negotiations for fair payments to content creators.

##### 3.1.2 Value to platforms of using vast amounts of content for aggregation, search and social media services

Special consideration needs to be given to the value to the platforms of using vast amounts of other people's content for their aggregation, search and social media services. The scale of this is unprecedented, and not clearly contemplated in the current copyright regime. It focuses more on the content used, on a case by case basis, rather than the aggregated effect of the case-by-case

uses. This unprecedented scenario calls for new types of solutions, such as the press publishers' right recently introduced in the European Union.

### 3.2 Past experience

The ACCC said:

*past experience in other countries suggests that the regime may not work; rather, the ACCC considers that it would be more appropriate for digital platforms and news media businesses to negotiate payments between themselves. This would provide flexibility to the payment model, which can be adjusted to the requirements of digital platforms and news media businesses.*

The recently-adopted European Union (EU) Digital Single Market (DSM) Directive is expressly intended to address the issues that led to the failures of the schemes introduced in Spain and Germany. An Australian scheme would take into account the experience in Spain and Germany, as well as the more recent experience of the EU Directive and its implementation.

### 3.3 Implementation issues

The ACCC said:

*There would likely be implementation problems in relation to determining which media businesses and digital platforms would be subject to the scheme and the amount of revenue to be distributed. This could lead to distortions in the digital and news markets.*

This issue is no different to that in the EU, and can be addressed. The beneficiaries of the scheme are businesses and people who produce the news and journalism that the ACCC has identified as a public good. Compensation is paid by online platforms that derive substantial business benefits from their use of news and journalism produced by other people.

### 3.4 Why only media businesses

The ACC said:

*It is unclear why digital platforms should compensate media businesses for use of content while not offering compensation to other content creators and websites.*

The ACCC found that news and journalism are a public good, and the scheme should assist people to produce that content. That includes journalists and news photographers as well as media companies.

### 3.5 Potential negative consequences

The ACCC said:

*The requirement to pay for content could create incentive problems and negative consequences. For example, if Facebook is forced to pay based on users posting content, one response may be to further limit the amount of news in a user's feed (for example, I demote any type of news article, or at an extreme, ban users from sharing links to news content).*

The scheme should not be rejected solely on the basis that a global platform does not want to pay for the content that underpins its business model. And the ACCC has recognised that the current practice of platforms not paying for content is harmful and needs to be addressed.

#### **4 ABOUT COPYRIGHT AGENCY**

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Copyright Agency is a not-for-profit copyright management organisation that manages copyright licensing arrangements for writers, artists and publishers, including licences that allow the copying and sharing of news content. It collects and distributes more than \$100m a year in copyright fees and royalties.