1. On 3 June 2020 I made a submission dealing with question 18 of the ACCC Concepts Paper dated 19 May 2020. That question asked: "How might the bargaining code define 'use' for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?" This submission continues that focus, which is here translated to the subject matter of the remuneration issue and the remuneration amount in the Exposure Draft, as situated within Division 7 of the proposed Part IVBA to the Competition and Consumer Act 2010. This submission has as its central concern: what is that remuneration being paid for? Consistent with my earlier submission, unless that payment has a quid pro quo relationship with some property or private right given or forgone in exchange, the characterisation of the payment becomes problematic. My submissions are not directed to questioning the policy ends, but rather the legislative means.

2. My previous submission can be summarised as follows:
   - Of the suggested 'uses' in the Concepts Paper hyperlinking clearly was a significant use and one which currently fell outside of the scope of copyright exclusive rights;
   - That unless there was copyright reform, or a tort of unfair competition created, the requirement of any mandated payment may not be in respect of any recognisable property or other private right;
   - The requirement of a mandated payment which is not in respect of any recognisable property or other private right was essentially a taxation/public subsidy model and therefore a non-market approach which triggers wider concerns;
   - That a preferable means to achieve the stated ends was predicated upon copyright reform in which there was an expansion of the communication to the public right to include the provision of a hyperlink where the link provides access to specific works or other subject matter.

3. The Exposure Draft defines (in cl 52ZF(1)(c)) the ***remuneration issue*** as "the remuneration for a registered news business for the making available of the registered news business' covered news content by the digital platform service". As a public-law arbitrated payment this becomes the ***remuneration amount*** which is defined (in cl 52ZO(1)(b)) as "an amount … for remunerating the registered news business for the making available of the registered news business' covered news content by the digital platform service for one year". The definitional framework (in cl 52A) means that a ***news business*** here comprises a ***news source*** (or combination of news sources) where a ***news source*** is defined to mean "any of the following, if it produces, and publishes online, news content:
   (a) a newspaper masthead;
   (b) a magazine;
   (c) a television program;
   (d) a radio program;
   (e) a website;
   (f) a program of audio or video content designed to be distributed over the internet."

4. The Copyright Act 1968 provides as a broad-based exclusive right the right to communicate works and most other subject matter to the public. As defined in section 10(1) of the Copyright Act communicate means: "make available online or electronically transmit (whether over a path, or a

combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act."

5. The Exposure Draft, when read with its Explanatory Memorandum, begs two related and unanswered copyright questions:
   (i) Is the drafting predicated on Google and Facebook presently infringing the making available aspect of the communication to the public right in the copyright subject matter included within of the registered news business' covered news content?
   (ii) If it is so predicated, whether mandated payment of the remuneration amount by Google and Facebook amounts to (in effect) either:
      - a mandatory settlement for infringements by Google and Facebook of that making available right in copyright over the past one year, or;
      - an up-front payment in relation to the future one year for exercises by Google and Facebook of that making available right in copyright and thereby operating as a quasi-compulsory copyright licence?

   The matters (cl 52ZP(2)) that go to the quantum of the remuneration amount to be determined at arbitration are directed to variables that would inform a reasonable royalty under a copyright licence for the exercise of the making available right for one year by Google and Facebook the registered news business' covered news content. Notably, the first of those matters "is the direct benefit (whether monetary or otherwise) of the registered news business' covered news content to the digital platform service". Also, in its July 2020 document titled *Q&As: Draft news media and digital platforms mandatory bargaining code* and under the question "Who would pay for the arbitration?" the ACCC states that: "The fees of a Copyright Tribunal Member, which are $1,103 per day, may also be useful guide."

6. If the answer to the question put at para 5(i) is "yes", it is incumbent upon the drafters of this proposed new law to better spell out the copyright law metes and bounds of the scheme. For example, and as is implicit from the two choices presented at para 5(ii) above, it is unclear whether it is intended that the remuneration amount as defined (cl 52ZO(1)(b)) is intended to be in relation to a retrospective one year, or a prospective one year or a hybrid period. More fundamentally, what is the position of a third-party copyright owner who has licensed its subject matter for exploitation so as to form part of a registered news business' covered news content and for which a remuneration amount is paid by Google and Facebook for the making available right? Is there a liability in the registered news businesses to account to such third-parties for a portion of that remuneration amount when received? Are such third-parties precluded from bringing an independent infringement action against Google and Facebook for exercises of the making available right for which a remuneration amount has been paid? The list of such questions could continue, but at this point the copyright law implications of the drafting are so obscure as to make a longer list somewhat pointless.

7. However if it is the case that the answer to the question put at para 5(i) is "no", the current drafting logic is more problematic. While couched in terms of payment by Google and Facebook for their making available of third-parties content if there is no such unlawful exercise of rights occurring as a matter of Australian copyright law, the drafting could be regarded as a form of camouflage. If there exists no property or private rights substratum for the remuneration amount, the mandated payment could be characterised as both a form of protectionist taxation and a corelative public subsidy.

8. In other words, under this alternative characterisation the mandated remuneration amount becomes in essence both a selective tariff on services provided by Google and Facebook, and also a form of government patronage favouring certain local media interests.

9. Both characterisation as a copyright payment (whether a mandatory copyright settlement or a quasi-compulsory copyright licence) and alternatively as a taxation-subsidy measure raises a many issues – including issues in Australian constitutional law, international intellectual property law and international trade law. Ultimately, the uncertain character of the law and the effect of these issues may make the proposed law seriously vulnerable to constitutional and international law challenges. Such challenges, if successful, could frustrate or delay the policy objectives that are being sought. It was an attempt to resolve uncertainty and to avoid these issues that I made the copyright reform suggestions in my earlier submission. To be clear, I will repeat those suggestions in the paragraph below.

10. It remains possible to reform Australian copyright law, consistent with article 8 of the WIPO Copyright Treaty, to include within the scope of the communication to the public right the act of providing a hyperlink. National treatment principles enshrined in international law (and WTO rules) would mean that all copyright owners would need to be afforded this expanded right under the Copyright Act 1968 without discrimination. However this could be done in a way directed to the end objective of addressing the bargaining power imbalances identified by the ACCC, and providing a private rights basis to justify payment for use, while not unduly burdening society at large. Therefore I submitted, and re-submit, that copyright reform should be undertaken to perfect the policy ends being sought by:
    - Expansion of the communication to the public right to include the provision of a hyperlink where the link provides access to specific works or other subject matter;
    - Creation of a free exception for non-commercial exercises of the communication to the public right by provision of a hyperlink;
    - Creation of a remunerated exception for commercial exercises of the communication to the public right by provision of a hyperlink, so that that aspect of the right can only be exercised through a mandated bargaining code process such as the one proposed, or for exercise that occurs outside the scope of such a bargaining code, then under a general statutory licence created in copyright law;
    - Clarification that allowing a digital platform's users to 'share', 'like', comment on and discuss individual pieces of news content', insofar as these activities include the provision of a hyperlink, involves a joint exercise of the right of the communication to the public right by the customer/subscriber and by Google/Facebook such that for the one act the former may avail himself or herself of a free exception for any non-commercial exercise whereas the latter will be subject to a remunerated exception for any commercial exercise.

Dr David Brennan, 27 August 2020
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