Introduction

1. This submission is confined to question 18 of the Concepts Paper: "How might the bargaining code define 'use' for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?" The answer to question 18 is fundamental to any bargain in which Google and Facebook are mandated to make payments. All specific statutory references made in this submission are to the *Copyright Act 1968* (Cth). My doctoral research (Brennan 2003) considered the existence and valuation of copyright rights related to retransmission (the rebroadcasting of a primary broadcast by a third party) within the TRIPS framework and that work informs this submission.

2. The Concepts Paper on page 14 states:

> The sections above have consistently referred to the 'use' of news media content by each of Google and Facebook. However, it is important to highlight that various services provided by each digital platform interact with news content in a number of different ways, including:
>
> - 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' [explained by footnote as 'the process by which search engines such as Google use automated processes to collect and index the content of third-party websites for inclusion in their search results'] 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.
>
> The implementation of a bargaining framework to address remuneration would need to determine which of these interactions would, and would not, constitute a 'use' of news content that triggers obligations for remuneration. Questions around the applicability of pre-existing rights that may subsist in news content, such as copyright, may also be relevant to assessing what constitutes a remunerable 'use' of news content.

As explained in the Copyright section below, of the seven uses listed in the Concepts Paper it is the second and seventh that emerge as the most critical in any copyright reform discussion.

3. The most efficient and desirable way to conceive of any 'payment for use' bargaining system (whether by genuine market dealings, agreement in the shadow of a statutory copyright licence or pursuant to a mandatory code) is where the payment is predicated upon clear private rights in local news. The contribution of Ronald Coase (Coase 1959) has led to broad acceptance in the field of law and economics that the delimitation of private legal rights is an essential prelude to market-based transactions, and that a waste of resources typically occurs when the criteria used to delimit rights is vague. Uncertainty means that resources need to be employed solely to establish a claim. Any system that seeks to approximate a market solution of payment for use of information, so that the creator of (say) a literary work is able to obtain from its user a share of the value appropriated from that use, has to ensure that private rights in the work can be clearly established and ascertained.

4. It has been generally accepted for centuries in free market societies that copyright property provides the least worst private rights mechanism to stimulate the production of information-based works in the cultural domain – as opposed, for example, to patronage systems or the under production of such works.

5. However on page 11 of the Concepts Paper it is stated that 'The Australian Government has asked the ACCC to develop a mandatory bargaining code, which would **not** involve changes to Australian copyright law'. (emphasise in original) This begs the question: how should Google and Facebook be obliged to pay local news media interests for 'use' unless copyright rights in local news media interests are being clearly exploited by Google and Facebook by that 'use'? The mandated bargaining code seems to require some clear private rights basis for the uses that it covers. This is in order to form a nexus between exploitation of those rights and payment for use. Otherwise, as a mandated code, it could be characterised either as an acquisition of property not on just terms (*Trade Practices Commission v Tooth*) or as a tax (*Australian Tape Manufacturers v Commonwealth*).

6. As noted below, if existing copyright protections were adequate to serve the negotiating needs of local news media interests (noting that neither Google nor Facebook are currently eligible for Part V Division 2AA protection) there would be no obvious need to mandate a news media bargaining code. As also noted in the concluding sections below, aside from copyright reform, two apparent non-copyright alternatives are:

    (a) Some form of new unfair competition statutory tort – which could not under national treatment principles be confined to the protection of local news media interests from Google and Facebook; or,
    (b) An expressly enacted taxation/public subsidy model – which could theoretically be confined to the protection of local news media interests from Google and Facebook although is obviously a non-market approach which triggers patronage and revenue rule concerns.

Copyright

7. The seven uses listed on page 14 of the Concepts paper and reproduced above can be considered in purely Australian copyright terms.
    — The first use ['featuring headlines of news articles'] has been held to not comprise a substantial part of an associated article (*Fairfax v Reed*).
    — The second use ['featuring hyperlinks to news content hosted on news media businesses' own websites'] has been held not to be an exercise of the communication to the public right applying a current statutory provision (*Cooper v Universal Music*, s 22(6)). Authorisation liability in Google or Facebook is unlikely if all that is being provided is a link to a web page given the raft of provisions that protect web page browsing *per se* from direct copyright liability (ss 22(6A), 43A, 111A).
    — The third use ['featuring short extracts or 'snippets' of news content'] may or may not comprise a substantial part of copyright subject matter depending upon fact-specific factors.
    — The fourth use ['featuring images extracted from news content'] may or may not comprise a substantial part depending upon fact-specific factors, however if the use is the reproduction *in toto* of a photograph it will more likely comprise an exercise of copyright relative to if the use is the copying of a still image from a television broadcast (*Network Ten v TCN Channel Nine*).

- The fifth use ['fully reproducing news content in full in text, audio, video and image formats'] is likely to comprise a substantial part exercise of copyright rights. It is most unlikely, if undertaken by Google or Facebook, to be regarded as a fair dealing under current law (*De Garis v Neville Jeffress Pidler*).
- The sixth uses ['scraping' the content of news media websites in order to produce snippets and index content for later use in potential search results] are (i) 'scraping' which is likely to comprise a substantial part exercise of copyright rights if the content collected involves *in toto* reproduction or copying of copyright subject matter (i.e. caching) and (ii) snippets and indices may or may not comprise a substantial part depending upon fact-specific factors (i.e. similar to the third use). Two observations. First: if scraping involves use that is outside of the concepts of a 'temporary copy' made as 'part of the technical process of making or receiving a communication' it will be beyond the most relevant exceptions (ss 43A, 111A). Second: although Google and Facebook have to date been excluded from the regime, within the logic of the Part V Division 2AA remedial limitation regime, a scraping use may comprise a Category B activity (if a caching occurs within the s 116AB meaning) and/or a Category D activity, and the creation of 'snippets and indices' may comprise a Category D activity.
- The seventh use ['allowing the digital platform's users to 'share', 'like', comment on and discuss individual pieces of news content'] appears to be similar to the second use (assuming activities such as 'share' or 'like' essentially resolve to no more than proving a hyperlink to third-party content) although the person selecting the hyperlink is a customer of or subscriber to the Google or Facebook service. Thus, under existing authority and statute law, the mere provision of a link is unlikely to comprise any exercise of the communication of the public right by, or any authorisation liability in, either the customer/subscriber or Google/Facebook.

8. Thus, the seven categories of identified use can be classed as those in which:

    (a) Copyright liability likely applies depending on substantial part considerations to the third, fourth, fifth and sixth uses (involving in part reproduction and copying);
    (b) Copyright liability is unlikely to apply to the first use (headlines) because of substantial part considerations
    (c) Copyright liability is unlikely to apply to the second and seventh uses (hyperlinking) because of the way in which the exclusive right of communication to the public is conceived in Australian copyright law.

    It can be assumed that for (a) the existing rights in copyright that might apply to the third, fourth, fifth and sixth uses are currently insufficient to serve the negotiating needs of local news media, in their dealings with Google and Facebook. This may be because those uses are either commercially insignificant to Google and Facebook, already licenced (whether expressly or impliedly) by news media on unfavourable terms due to an imbalance in bargaining power, not substantial part uses or a combination of all three. It can also be assumed that for (b) there would be little appetite to reform copyright law so that 'headline'-type uses would implicate exclusive rights. This leaves (c) hyperlinking which appears to be one of the most critical uses of local news media content by Google and Facebook (whether directly or via their customers/subscribers) that can be exploited under current copyright law without implicating exclusive rights. A strong copyright reform case

could be made to extend to communication to the public right to hyperlinking so as to provide a substratum of private rights for any market or quasi-market solution to both redress the bargaining power imbalances identified previously by the ACCC and to provide a clearer private rights support for a mandatory code.

9. Whether hyperlinking should comprise an aspect of the exclusive right of communication to the public in copyright has been a keenly-considered topic in Europe for decades (Papadaki 2017) for reasons not unrelated to those confronting Australian policy-makers: apparent free-riding by Google and Facebook on local producers of cultural content. On this topic there is genuine policy choice. The comments of Ginsburg (2014) (made in support of a report by the Association Littéraire et Artistique Internationale (2014)) are apt:

> It is important to recognise that the offer of specific access is an act of making available, regardless of whether the access is authorised by the copyright owner or by law. But, it does not follow that every act of making available (and accordingly every deep or framing link) is an infringement, any more than every act of reproduction violates that exclusive right. For example, a private copy is certainly a reproduction, but in most EU Member States it is not an infringing one. It is not necessary to deny that copying occurs in order to preserve the freedom of private copying. By the same token, to preserve the freedom of linking, it is not necessary to refuse to recognise that deep links and framing links make specified content available. Just as private copying may benefit from a statutory or a judge-made exception, or from the copyright owner's implied licence, so these copyright-tempering devices may apply to linking. But one should not confuse the potential conclusion that a targeted act of making available is not infringing with the counterfactual (and juridically dangerous) determination that it did not occur at all. (p 148)

10. The current CJEU position from a 2014 decision on the issue is that only if a so-called 'new public' is being reached will a the provision of a hyperlink amount to the exercise of the communication to the public right (*Svensson v Retriever*). However this position is at odds with the treatment in Australia of retransmission where a party such as Foxtel submits to a statutory licence (Part VC) for the exercise of the communication to the public when it retransmits within the area of the intended footprint of the primary broadcaster. It is also difficult to reconcile with basic copyright principles which the CJEU itself has had to grapple with. Thus, in 2018 the CJEU held that the re-posting by upload to one website of a photograph that was publicly available on another website, was indeed an exercise of the communication to the public right (*Land Nordrhein-Westfalen v Renckhoff*) and that activity was distinguished from the provision of a hyperlink considered in the 2014 case. Had the defendant in the 2018 case caused the photograph to render on its website by deep linking to the other website instead, no communication to the public right would have been implicated.

11. It would be 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 would mean that all copyright owners would need to be afforded this expanded right under the Australian Act 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. For example:

- 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 occur outside the scope of such a bargaining code, then under a general statutory licence created in copyright law;
- Clarification that the seventh use listed in the Concepts Paper ['allowing the 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 (a joint exercise characterisation being broadly consistent with comments in *National Rugby League Investments v Singtel Optus*) 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.

12. Thus such reform would provide a clearer basis of private rights upon which any bargaining code might operate and justify payment for use, while providing under a statutory copyright licence equivalence for copyright owners not within the scope of the code.

13. As flagged above in the absence of clearer private right entitlements in local news media to underpin payments for use under a mandated code, the question is begged what alternatives exist? The next two sections briefly set out the two more salient alternatives.

Unfair Competition

14. An alternative way to create new private rights to support a bargaining code would be by the statutory creation of a tort of unfair competition. Judicial creation of such a tort has been resisted in Australia with an explanation for that resistance coming from Dixon J (*Victoria Park Racing v Taylor*):

> But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization. (p 509)

15. This statement in *Victoria Park Racing v Taylor* has been endorsed by the High Court in 2000 (*Campomar v Nike*) on the basis that it 'should be regarded as an authoritative statement of contemporary Australian law' (p 55). In the current setting Google and Facebook are in a similar position to the opportunistic (and successful) defendant in *Victoria Park Racing v Taylor*, whereas local news media are in a similar position to the plaintiff in that case.

16. If a statutory tort of unfair competition were to be created, it would take time to properly formulate. It would be difficult to legislatively craft such a statutory tort, within our tradition of resistance to the idea, in a way that meets the Coasean objective of creating clear private rights. However, similar to copyright protection, it could not be confined to the protection of local news media. Article 10bis of the *Paris Convention* obliges Australia to extend national treatment in relation to protection against unfair competition.

Taxation / Public Subsidy

17. The final alternative is to tax (e.g. licensing fees) Google and Facebook (and any comparable future digital platforms in terms of size, scope and impact) and remit that extra revenue to local news media by way of public grant or subsidy. Indeed an attempt to extract from Google and Facebook, under a mandatory code, payments that have no nexus to a grant of permission in terms of private rights whether in copyright, rights under a new tort of unfair competition or otherwise could be characterised as a tax. (*Australian Tape Manufacturers v Commonwealth*)

18. While taxation / public subsidy can be seen as the most targeted solution to the identified problem, it creates its own set of issues and controversies. Clearly it is the antithesis of a market-based solution. The subsidies or grants are a form of patronage which is contrary to a local news media independent from government, and the odium of patronage is the reason why copyright law has been long preferred. Moreover any targeted taxing of Google and Facebook might, if viewed in geo-political terms, provide incentives for Google and Facebook to shift assets and assert revenue rule protection against Australian government enforcement. (Dodge 2002)

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Campomar v Nike (2000) 202 CLR 45
Cooper v Universal Music (2006) 156 FCR 380
De Garis v Neville Jeffress Pidler (1990) 37 FCR 99
Fairfax v Reed (2010) 189 FCR 109
Land Nordrhein-Westfalen v Renckhoff [2018] OJ C 352/13
National Rugby League Investments v Singtel Optus (2012) 201 FCR 147
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