RESPONSE TO ACCC MANDATORY NEWS MEDIA BARGAINING CODE CONCEPTS PAPER

Submission by Screenrights

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ABOUT US

Audio-Visual Copyright Society Limited trading as Screenrights is a not for profit copyright collecting society representing rightsholders in film, television and radio programmes. Screenrights has over 4,709 members in 69 countries world-wide covering a wide spectrum of copyright owners including broadcasters, producers, writers, music copyright owners and creators of artistic works. Many of our members are engaged in news media which is the subject of this consultation.

Screenrights is the declared collecting society under the Copyright Act 1968 (Cth) (the "Act") that administers statutory licences for educational copying and communication of broadcasts under Part IVA Division 4 of the Act, retransmission of free to air broadcasts under Part VC of the Act and government copying in respect of television, radio and internet broadcasts under s183 of the Act.

The statutory licences operate as remunerated exceptions to copyright. Screenrights' experience in administering statutory licences for thirty years gives us a unique perspective on the operation of blanket licences and rate setting.

Screenrights' subsidiary EnhanceTV Pty Limited operates EnhanceTV, a video-on-demand service for educational institutions with a Screenrights licence to access broadcast content for teaching purposes.

In New Zealand, Screenrights also supplies an educational copyright licensing scheme for "communication works" under New Zealand copyright law, which is platform neutral in that it includes broadcasts and transmissions over the Internet.

EXECUTIVE SUMMARY

Our focus in this submission is our membership who are part of the "news media" in Australia: broadcasters and makers of factual audio-visual content. As a declared copyright collecting society, we also draw on our experience in rate setting in commenting on the concepts relevant to a mandatory news media bargaining code.

In our view, the proposed Code should:

- Apply a broad definition of "news content".
- Minimise the opportunity for disputes by setting out clear procedures.
- Rather than merely providing a framework for determining appropriate remuneration for the use of news media content by digital platforms, it should fix a rate (or rates).
- Such remuneration should be shared between news media businesses and the owners of the underlying content.

INTRODUCTION

We are grateful to the ACCC for the opportunity to participate in this consultation. Our approach in this submission is not to provide a comprehensive response to all the questions posed in the Concepts Paper, but to assist the Commission by providing responses based on our experience as a copyright collecting society over the last three decades. Our detailed responses are set out below.

1. How should 'news' be defined for the purpose of determining the type of content that will be subject to the bargaining code?

In our submission, news comes in many forms and should be given a correspondingly broad definition. A recent study commissioned by the Australian Communications & Media Authority ("ACMA") emphasised that television news is still the most general source of news for Australian consumers.[1] It is therefore vital that any definition of news include broadcast news.

At present there is no overarching definition of "news" in Australia. As the UTS Centre for Media in Transition has observed:

> *Numerous ways of defining 'news' and 'current affairs' as well as 'journalism' are found in the academic literature and in legal and regulatory instruments. In addition, while 'news and current affairs' is the term generally used in the broadcast environment, 'news and comment' is often used in referring to print and online media*.[2]

While we agree in principle that there should be a content-based definition, in our view the "public interest journalism" definition used in the DPI Report is too narrow. In our view, such a definition will not allow news media businesses to be properly compensated for the use of their content by digital platforms.
It is also problematic because it involves a value judgment as to what is "news". This is of concern from a public policy perspective, as it has the potential to make the Code (and by extension, the Regulator) the arbiter of what is and is not "news".

We are in favour of a broad definition of "news". This issue receives some attention in copyright law in the context of the fair dealing exception for "news reporting".

For example, in *De Garis v Neville Jeffress Pider* (1990) 37 FCR 99 at 109, Beaumont J considered that the "reporting of news" in s. 42(1) of the

[1] UTS Centre for Media Transition, *News in Australia Impartiality and commercial influence Review of literature and research*, January 2020, p. https://www.acma.gov.au/sites/default/files/2020-01/News%20in%20Australia_Impartiality%20and%20commercial%20influence_Review%20of%20literature%20and%20research.pdf

[2] Ibid. See introduction.

Copyright Act 1968 is intended to comprehend the following matters in the definition of "news" from the *Macquarie Dictionary*:

1. A report of any recent event, situation;
2. The report of events published in a newspaper, journal, radio, television, or any other medium;
3. Information, events considered as suitable for reporting;
4. Information not previously known.

The authorities are clear that the reporting of news can go beyond a report of events which are current. This definition would include factual content beyond mere reportage including current affairs programs, documentary and other genres which are integral to the reporting and discussion of news in Australian media.

In our view, this definition is more instructive than existing content regulations that apply to "news". For example, while various codes of conduct that apply to broadcast news services (and are overseen by the ACMA) stipulate standards about accuracy and impartiality, they do not shed much light on how "news" is defined.[3]

Screenrights notes that, however defined, audio-visual news content includes some material which is neither created nor owned by a broadcaster. Even in the narrowest definition which effectively limited the scope of the code to the content of the nightly news broadcast, while the majority will be owned by the broadcaster there will be significant amounts of material owned by third parties. Some of this material may be included under licence (e.g. from a news agency) but much will be there without licence and in reliance on fair dealing provisions.

As you widen the definition, which in our submission is essential to meeting the policy goal, then an ever wider array of creators and rightsholders will be implicated by the Code. It is commonplace today that broadcasters increasingly rely on independent producers to create that content. Furthermore, this wider factual content often drives the news cycle and is reused without a licence under fair dealing provisions in news reporting by other broadcasters. For example, an independent documentary filmmaker may gain access to North Korea or Tibet, the material they film forms the basis for an episode of Compass, the story crosses over into news and the material is then seen across a variety of broadcast news outlets.

These third parties are an essential element of the Australian news media market and need to be included within the Code if it is to achieve its policy goals.

We are supportive of only professional members of the news media being covered by the Code. In saying that, we are conscious that the term "media business" encapsulates everything from major corporations to sole traders. It is therefore important that the way this term is defined does not undermine the ability of small

[3] ACMA, *Impartiality and commercial influence in broadcast news: Discussion paper* , January 2020, p.11. https://www.acma.gov.au/consultations/2020-01/impartiality-and-commercial-influence-broadcast-news-consultation-022020#consultation-documents

media businesses to participate in the Code. We therefore agree that this should not require membership of a particular professional organisation.

2. How can a bargaining code ensure that both news media businesses and digital platforms can easily and objectively identify the content subject to the code?

As discussed above, it is difficult to come up with a comprehensive definition of "news content". In our view, the most workable way forward is to apply an inclusive definition which can be further articulated in a schedule which is agreed between the parties and amended from time to time.

3. Would it be appropriate for the bargaining code's definition of 'news content' to capture material:

- **with the primary purpose of investigating, recording or providing commentary on issues of interest to Australians, and**
- **that is subject to the professional standards set by a relevant journalism industry body, journalistic standards set in a relevant media industry code, or equivalent journalistic standards set by an individual news media business?**

While the proposed definition of "news content" is reasonably broad, we believe that the inclusion of a "primary purpose" test is problematic. For example, how would you assess the "primary purpose" of a piece of content? Is it not the purpose of the creator of the content that is relevant? And how would you assess whether investigating, recording or providing commentary was "the primary purpose" as opposed to a mere "purpose". In our submission, the inclusion of a "primary purpose" test in the proposed definition of "news content" creates more complexities that it solves and should be omitted.

4. Would a principles-based, or list-based approach be preferable in determining which digital platform services are captured by the bargaining code?

From a policy perspective, a principles-based approach is likely to be preferred. However, from a practical perspective, a list-based approach that is capable of regular review is likely to be more workable and provide greater certainty for the parties to the Code. We are therefore in favour of an inclusive, rather than a comprehensive list of digital platform services captured by the Code.

Such an approach also takes into account the fact that the Code is currently directed at two digital platforms who have been found to have substantial market power in the Australian news media market, rather than digital platforms at large.

5. If a list is referenced in the bargaining code, what amendments should be made to the list below?

- **Google Search**
- **Google News**
- **YouTube**
- **AMP (cached on Google's servers)**
- **Google Assistant voice activation services and related services provided through 'Google Home' hardware and home automation devices**
- **Android TV**
- **Facebook News Feed**
- **Facebook Instant Articles**
- **Facebook Watch**
- **Instagram**
- **WhatsApp**
- **Facebook News Tab**

The proposed list sets out the businesses owned by Google and Facebook and available in Australia. However, it is not apparent that they all use news content in the way envisaged by the Code. For example, is it appropriate that Google Assistant be covered?

Furthermore, it raises questions why some services are in and others are not. For example, why is WhatsApp included and Facebook's instant messaging service is not?

An alternative approach may be to begin with the core Google and Facebook services which use news content , and to add other services following implementation of the Code. Such services might include Facebook, Instagram and Google search.

6. How might a bargaining code include mechanisms to incorporate newly emerging and newly relevant products and services in the future?

The Code could include a mechanism whereby new digital platforms could apply for membership or, alternatively, be nominated by any of the parties to the Code or by the Regulator itself. The platform would then have an opportunity to respond to the nomination. In circumstances where the platform did not consent to joining the Code, the Regulator could make a determination based on a set of objective criteria.

7. What are the necessary elements for a bargaining framework to effectively address the bargaining power imbalance between news media businesses and each of Google and Facebook?

The proposed bargaining framework is a novel approach to addressing the bargaining power imbalance between news media businesses and Google and Facebook. It is also atypical of the ACCC's usual role in regulating industry codes, which generally relates to monitoring and enforcing certain industry behaviour.[4]

While the framework is indeed intended to regulate the conduct of the parties to the Code, the ultimate goal is establishing a price for the use of news content by Google and Facebook. Given the findings of the DPI Report that Google and Facebook have become "unavoidable trading partners for Australian news media businesses", the task at hand shares many of the characteristics of the access undertaking regime under Part IIIA of the *Competition and Consumer Act* 2010. Put another way, the Code is concerned with setting the terms of access (including price) to "essential infrastructure".

The framework is likely to have enormous precedent value for how other jurisdictions approach this issue. It is also likely to involve significant sums of money. It therefore follows that negotiations are likely to be extremely robust.

Screenrights' experience in negotiating rates for new and highly contested uses of content[5] tells us that it will be important to streamline the process and to limit the scope for disputes.

The framework will need to clearly articulate its scope. These issues are dealt with in our responses to questions 1-6 above. It will also be important for the framework to establish a detailed process for conducting negotiations. Mechanisms such as time limits are likely to be useful in this regard. And enshrining "good faith" bargaining may also be beneficial.

In our view, the most effective mechanism would be for the Code itself to set a rate for the use of news content by digital platforms. The framework could also provide flexibility for the parties to agree on an alternative rate. This is not without precedent in Australian legislation. For example, s.55 of the *Copyright Act* sets a "prescribed royalty" for manufacturing sound recordings of musical works. That rate applies in the absence of an agreement between the parties (or a determination by the Copyright Tribunal).

In our view, setting a rate in the Code is likely to short circuit many of the difficulties of trying to agree a rate based on relevant pricing principles. That is because the application of pricing principles relies on access to relevant data. And as the

[4] See s. 51ACC *Competition and Consumer Act* 2010.

[5] For example, the retransmission of free-to-air television by subscription television services in *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* [2006] ACopyT 2.

Concepts Paper recognises, there is an asymmetry of information as between news media businesses and digital platforms.

We note that the Concepts Paper addresses data issues in questions 20-29 (and, in particular, question 23). We limit our comments to noting that the ability of the parties to agree a rate for the use of news content is likely to depend entirely on access to relevant data. Based on Screenrights' experience in the Copyright Tribunal, this is a complex and difficult process.

In addition to these matters, the framework will need to establish relevant reporting, enforcement and appeal mechanisms. We note that these matters are addressed in questions 52-58 of the Concepts Paper. We do not have specific suggestions about what form these mechanisms should take.

8. How effective would the following bargaining frameworks be in achieving appropriate remuneration for news media businesses for the use of news content by each of Google and Facebook:

- **bilateral negotiation, mediation and arbitration**
- **collective bargaining**
- **collective boycott or 'all in/none in'?**

As noted above, media businesses range from the very large to the very small. Large media businesses have reported their difficulty in conducting negotiations with Google and Facebook[6] and this situation is likely to be even more acute in the cases of a small regional broadcaster, for example. In Screenrights' view, it is vital that all media businesses be treated equally under the Code. In our view, a collective bargaining model has the greatest likelihood of achieving that.

This kind of process could facilitate rate setting for the use of news content, in a similar way to how it is approached in the context of collective licensing of copyright material. As discussed in our response to question 7, we favour the establishment of a rate (or rates) in the Code itself.

9. Are there major practical issues involved in the implementation of any of the bargaining frameworks listed in Question 8 above? If so, how might such practical issues be overcome?

The major practical issues of a collective bargaining approach (apart from the competition issues) are that it will make the negotiation process more complex as it will need to allow for a broader range of interests.

[6] See, for example, the submissions of News Corp and FreeTV Australia to the DPI Inquiry.

The advantage of the rate setting approach, is that media businesses who do not directly participate in the bargaining process, would have the ability to opt in to the Code.

It may also be appropriate to consider flexibility to allow media businesses to opt out and to pursue their own agreement with Google and Facebook. We envisage that such arrangements would still be covered by the procedural mechanisms, pricing principles, data sharing and enforcement provisions of the Code. This is similar to the situation under s. 55 of the *Copyright Act* described in our response to question 7.

10. Are other bargaining frameworks more likely to effectively address the bargaining imbalance between news media businesses in Australia and each of Google and Facebook?

As discussed in our response to question 7-9 above, we are in favour of the Code setting a rate for the use of news content by digital platforms. This approach is similar to collective licensing of copyright material but can hopefully avoid some of its complexities.

Would it be useful for the bargaining code to include a requirement for parties to negotiate 'in good faith'?

Yes. This is consistent with the approach in other bargaining codes.

11. Should the bargaining code include requirements (such as time limits) and/or guidance on how negotiations should be conducted? What requirements or guidance are likely to be productive? What requirements or guidance are likely to be counterproductive?

As discussed in our response to question 7 above, we think that there is benefit in the Code including specific procedural requirements.

12. How relevant are the following factors to determining appropriate remuneration for news media business:

- **the value of news to each digital platform**
- **the value a news media business derives from the presence of its news on each digital platform**
- **the value of the availability of news on each relevant digital platform to digital platform users?**

As discussed above, based on our experience in the Copyright Tribunal, we query whether seeking to determine appropriate remuneration is the best approach.

Putting that reservation aside, Screenrights believes that all of these factors are relevant. In our view, the value to platforms users is the most relevant factor, followed by the value to each digital platform and lastly, the value to news media businesses themselves. The major obstacle is deriving adequate data that would enable this value to be calculated.

Even if the Code were able to overcome the existing information asymmetries, determining an appropriate rate is still likely to be a complex, expensive and lengthy task.

13. Would it be appropriate for commercial negotiations conducted under the bargaining code to have regard to the cost of producing news content?

Yes, Screenrights believes that the cost of producing news content is relevant.

14. How might any of the factors listed in Questions 13 and 14 above be quantified and/or treated in the course of negotiations between parties?

It would be useful if this were set out in ACCC Guidelines.

15. What other factors may be relevant to determining appropriate remuneration for news media businesses?

News content often includes other underlying content for which no copyright licence has been paid. That is because the fair dealing for news reporting exception (discussed in the context of the definition of news in response to question 1) is widely used by news media businesses.

For example, an obituary will have footage of the person which might derive from various sources. Similarly, a story about the Melbourne Cup is likely to include unlicensed footage of that event.

In our submission, this is relevant both in determining remuneration and who should share in the remuneration paid to news media businesses.

16. Are there any relevant 'market' benchmarks that may assist in the determination of appropriate remuneration?

We note that Article 15 of the EU Copyright Directive has recently established a press publishers' right. This right is in the process of being implemented in the legislation of member states, however, Germany already has a version of this right in its domestic legislation. This might provide the basis for a benchmark.

17. How might the bargaining code define 'use' for the purpose of any mechanisms facilitating negotiation on payment for the use of news content?

We consider that "use" should be given a broad interpretation based on its ordinary meaning. In order to provide greater certainty, the Code could include a mechanism whereby determinations can be made in relation to specific uses.

18. How might any bargaining framework implemented by the bargaining code deal with the full range of businesses present in the Australian news media industry, including smaller, local and regional news media businesses and not-for-profit news media organisations?

As stated above, in Screenrights' view, this is a key issue. In our submission, the framework should specifically allow for consultation with smaller media businesses. As set out in response to question 9, media businesses who have not directly participated in a negotiation should still be able to opt in to rates set by the Code.

As noted in our response to question 15, we also believe that the framework needs to take account of the contribution of the underlying, and often unremunerated, rights in news content.

Moreover, as audio-visual news content is routinely created and owned by a range of underlying rightsholders in addition to the broadcaster of the content, it is critical that the code includes a mechanism that will allow the remuneration to be distributed accurately between the various interests. Such mechanisms exist in the administration of copyright statutory licences and the structure of administration of these licences may be a useful point of reference in developing this aspect of the code.

40. Should the bargaining code contain any mechanisms requiring each of Google's and Facebook's ranking and display algorithms not to penalise the use news media business models that incorporate paywalls and subscription fees?

Screenrights believes that it is fundamental that news media businesses be able to set their business models (including by requiring payment) without being penalised by Google and Facebook's algorithms. Likewise, they should be able to control how their content is displayed. For example, a media business should be able to object to its content appearing alongside advertising material promoting copyright infringing or otherwise inappropriate material.

In our view, these are matters that could usefully be dealt with In the Code.

CONCLUSION

Screenrights supports a Code that facilitates the appropriate remuneration of all news media businesses for the use of news content on digital platforms.

We look forward to commenting on the Draft Code. In the meantime, please contact us if we can be of further assistance.

James Dickinson
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