

4 March 2019

Mr Rod Sims
Chairman
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601
platforminquiry@acc.gov.au

Dear Mr Sims,

The Australian Publishers Association (APA) is pleased to provide a response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Preliminary Report.

The report is a welcome account of the substantial market power of digital platforms and their negative impact on traditional media. Digital platforms have brought benefits to the public and to the media industry in exposing journalistic content to a wider audience and reducing some distribution costs. However, as the report makes clear, when independent commercial media can no longer fund investigative journalism important public benefits are put at risk.

Preliminary Recommendations

The APA broadly supports the recommendations of the preliminary report.

We support, in particular, Recommendation 7 regarding take down standards.

Regulatory measures are needed to secure effective removal of copyright infringing material. The report accurately identifies that rights holders in Australia face special difficulties obtaining takedown of copyright-infringing content on digital platforms in a timely way.

We would welcome action to create more timely and effective procedures for the take-down of copyright infringing content of Australian rights holders on digital platforms and increase the enforceability of copyright protections online. Any improvement would be a welcome development for rights holders, including the ACCC's proposed recommendation that the ACMA determine a Mandatory Standard.

However, in general, authorisation liability has remained a problem for rights holders in takedown notice systems. We support the comments of the Australian Copyright Council on the Preliminary Report and in particular on Recommendation 7 and authorisation liability.

Liability for authorising a copyright infringing act is an area of notorious ambiguity in copyright legislation¹. The case law is relatively small with an equally ambiguous legacy.

Securing the takedown of multiple, linked copyright-infringing websites is likely to remain a challenge for, and continue to impose a cost on, rights holders. The effect of any measures, such as an ACMA standard, should be monitored. The ACCC should recommend that if the results fall short of a threshold, consideration be given to legislation that makes explicit that digital platforms bear responsibility.

Monitoring and Oversight

We welcome the Report's recommendations for continuing regulatory oversight, monitoring and investigation of the effect of digital platforms. A regulatory authority tasked, as proposed by Preliminary Recommendations 4 and 5, should not limit its oversight, and in particular should include the book industry and Amazon within its scope.

The Inquiry and the Preliminary Report have focused on the impact of digital platforms on the news and media industries. Digital platforms have also had an impact on the book industry. The Internet has brought great benefits in audience reach and digital distribution, but it has also significantly increased the risk of copyright infringement², and eroded the capacity of right holders to exclude non-paying consumers. The effects on advertising-funded media have been more severe, but the growth of dominant global digital companies has also made it more difficult for authors and publishers to monetise the production and consumption of books.

In one still controversial example, Google scanned library books³, many still in copyright, to create a digital archive of materials converted from print and made them available without regard to permission from, or remuneration for, publishers or authors⁴.

Amazon does not have precisely the same business model as Google or Facebook. However, it is one of the largest global companies in the world, and it has leveraged many of the same dynamics and business practices. It is revealing that both Google and Amazon have created and promoted digital assistants - Alexa and the Google Assistant - that employ powerful search engines, machine intelligence, and market power over information. Many of the same concerns held about digital platforms, including husbanding of consumer data, lack of transparency, and the potential to

¹ Foo, *The Liability of Content Providers for authorisation of Copyright Infringement in the cases of Cooper and Sharman*; Computers and Law, 2006 <http://www5.austlii.edu.au/au/journals/ANZCompuLawJl/2006/11.pdf>

²<https://www.communications.gov.au/sites/g/files/net301f/DeptComms%20Online%20Copyright%20Infringement%20Report%20FINAL%20.pdf>

³ <https://www.chronicle.com/article/HathiTrust-Lawsuit-Highlights/129241/>

⁴ <https://www.chronicle.com/article/HathiTrust-Lawsuit-Highlights/129241/>

preference its own products, have been expressed about Amazon⁵. In its own domain, Amazon's market power is as substantial as Google's and Facebook's. Its dominance of retail generally and of ebooks in particular is immense. In our previous submission, we referred to the actions of the Japanese Fair Trading Commission and the European Commission⁶. They demonstrate the potential for anti-competitive effects by such a dominant player and of the merit of continued scrutiny of its relations with smaller companies and for a broad approach to any analysis of its effect on competition.⁷

The claims sometimes made for Amazon's contribution to national economies also merit greater scrutiny.

The APA recommends that the ACCC consider greater analysis of Amazon's market power and greater regulatory scrutiny of its use.

The APA is the national body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools, tertiary and academic publishing.

Yours sincerely,

Lee Walker

President

⁵ APA submission to ACCC Digital Platforms Inquiry, 20 April 2018

<https://www.accc.gov.au/system/files/Australian%20Publishers%20Association%20%28April%202018%29.pdf>

⁶ APA submission to ACCC Digital Platforms Inquiry, 20 April 2018

<https://www.accc.gov.au/system/files/Australian%20Publishers%20Association%20%28April%202018%29.pdf>

⁷ Lina M. Khan, 'Amazon's Anti-Trust Paradox', Yale Law Journal, Jan 2017