

Select Committee on Future of Public Interest Journalism

Submission

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Definitions

For the purposes of this submission:

“*Aggregation*” means the practice of providing email newsletters and websites which contain a collection of headline and first sentence/s and/or paragraph HTML links to stories in original publishers’ newsletters and on their websites.

“*Aggregator*” means a person who or entity practises aggregation.

“*Journalist*” means a person who creates original news stories and features using her or his own resources or those of her or his employer.

“*Publisher*” means a media organisation which, or person who, publishes stories produced using its or her or his own resources and staff or for which payment is made e.g. for copy from news agencies or freelance journalists

“*Copy*” or “*story*” means an editorial news or feature article.

Introduction and summary

“Aggregation” is an established practice in news publishing but until the introduction of the internet has been generally in the form of one sentence summaries of stories which appeared in, usually, newspapers.

“What the papers say” on radio and television programs is a common example.

The internet has seen a proliferation of a more extensive and aggressive form of aggregation: collections of headlines of stories in original publishers’ sites are presented in email newsletters (enewsletters) and websites as links to the original stories. They are usually accompanied by the first sentence or first few sentences of the original stories.

The material is probably obtained by web crawling and from search engine news alerts using minimal staff and in all probability without payment being made for the copy.

The enewsletters and websites sometimes do, however, carry stories by the aggregators’ own staff.

They also often carry advertisements, in some cases a substantial number.

The practice would appear to be blatant breach of copyright but it is legal because common law has established that a single line of text - a headline - is too short to be copyrighted.

Australian aggregators also are excluded from recent amendments to the Copyright Act which provide for courts to order internet service providers to disable sites located outside Australia and which provide access to copyright material.

Aggregation therefore is a legal practice which is able to operate on a low cost, high margin basis largely by using genuine journalists' and publishers' material while profiting from advertising sales.

Genuine journalists and publishers, with all "normal" costs, have to compete on what is a very slanted playing field.

It seems reasonable to assume that many journalists who have been retrenched in recent years will have considered or will be considering establishing media ventures.

But aggregation is a disincentive – and an unfair one.

Recommendations

That the practice of aggregation be proscribed with the aim of ensuring that journalism and publishing can be practiced within a fair and equitable system which encourages progress by:

- making Australian aggregators subject to the same provisions of the Copyright Amendment (Online Infringement) Act 2015, which provide for the disabling of overseas infringers' sites by internet service providers
- <https://www.comlaw.gov.au/Details/C2015A00080>
- amending the Copyright Act 1968 and any other relevant laws to protect headlines of stories, particularly those used by aggregators as links, so over-riding case law which says that short, one-line strings of text are not protected, and, in particular, a 2010 Federal Court ruling (Fairfax v Reed, FCA 984) that headlines are not original enough to warrant protection
- <http://www.austlii.edu.au/au/cases/cth/FCA/2010/984.html>
- amending the Act to prohibit aggregators from using as links any other material in original material e.g. first sentences or sentences or paragraphs
- ensuring that newsletters are included in the definition of "location"
- assessing whether the Communications Alliance's Copyright Notice Scheme – currently being held in abeyance by the Australian Communications and Media Authority – could, if adopted be extended to businesses in addition to "consumer, residential, (and) landline internet account holders only"

http://www.commsalliance.com.au/_data/assets/pdf_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf

A further recommendation is that enquiries be made about whether aggregators are engaging in misleading and deceptive behaviour e.g. by claiming to be producing newsletters when they may contain essentially reproductions of original material.

Qualifications

Extent of research

The submission is based on a very limited review of online publications in several countries covering the single industry to which it relates.

It is not based on detailed examination of applicable various Acts or trade agreements.

Permission to publish

Consideration has been given to the possibility that the “aggregators” covered by this submission may have obtained partial or total permission from the copyright holders to publish the material to which the submission refers.

However, that is believed to be unlikely given the extent and nature of the lists of publications and websites involved and personal experience.

Aggregators method of collecting links

The aggregation method or methods used is/are not known precisely but it seems almost certain that stories selected are located by web crawling and or easily-created news alert systems provided by via internet search engines.

Source of news items

Some aggregators do publish some stories which have been written by their own staff and may buy stories from news agencies and freelance journalists - but the proportion is demonstrably small in comparison to linked stories.

The primary sources of aggregated stories vary from the world’s most authoritative and best-known news publications to minor trade publications and unprofessional blogs.

In Australia, most of the national and metropolitan daily newspapers are targets as are the ABC and state-wide, regional and local publications. So are blogs although many of these cannot be said to be professionally produced.

There is also a tendency to use media releases with the initial appearance of being stories.

Methods of posting, design

Newsletters are emailed to recipients.

They contain a collection of headline links and usually the first or first few sentences, often with photographs from the original publishers’ sites.. These are often surrounded variously by banner, box and classified advertisements.

Clicking on a headline takes users to the original publishers’ site where the story can be read in its entirety, and the picture re-viewed, unless pay walls exist (see “Other preventive methods”)

An Australian aggregator “double dips”. Clicking on a link takes users to a page on the aggregator’s website which contains the same headline and first sentence/s but a different set of advertisements. Clicking on the second link takes the user to the original publication.

Some sites also contain numerous links to their own classified advertising.

Numbers of news items

Based on limited research about 18 months ago:

One US trade aggregator’s enewsletter contained 12 links/own stories, four blogs, seven links to local news items and two links “to view more local news”.

An edition of another US trade publication had about 15 mainly linked stories. Its website had six linked stories.

A New Zealand aggregator's edition contained 15 linked stories as did an Australian aggregator's edition.

Numbers of advertisements

The Australian aggregated newsletter carried six banner advertisements, 23 box advertisements, nine classified advertisements plus two links to further classifieds, and seven box self-advertisements which promoted the aggregators own goods.

One US publication had 18 classified advertisements in one edition. The advertisements are usually a few words e.g. "General manager, operations" which link to a job description on another page.

The same publication also had links to "more job advertisements".

Aggregators' costs

The costs of establishing and operating aggregated newsletters are difficult to estimate.

But they are likely to be low given that mass emailing software/services are not expensive in total or per recipient nor in comparisons with advertising revenue.

After establishment costs, recurrent costs are likely to be very low using web crawlers and news alerts.

It is likely that only one staff member is engaged for a very short period of time each day to select and post the links.

The use of media releases without or with very little re-writing also means that "copy" is obtained at minimal cost.

Advertising costs could be higher given that sales staff are needed – but given that most aggregators also have hard copy publications the same sales (and journalistic) staff are likely to be used.

Creators' and "original" publishers' costs

The costs of creating and publishing original stories are substantial, e.g:

- journalists' costs in establishing and maintaining sources of information - whether journalists are employed or freelance
- journalists' researching, interviewing, analysing, writing, sub-editing and editing costs
- fixed overheads
- salaries and benefits
- travel and accommodation costs - local, interstate and international.

Benefits to aggregators

Aggregators benefit from:

- advertising revenue - one Australian newsletter, based on its published advertising rates, six years ago was estimated to have annual revenue of more than \$200,000, a figure which probably has markedly increased because of an apparent increase in advertising sales

- to which should be added the value of cross-marketing of the publisher's other products and services e.g. other email newsletters, online employment and sales services and hard copy publications
- with the further addition of the value of promotion of the publisher's goods and services e.g. if the publisher's primary business is not publishing it uses the newsletter and site to promote its primary goods and services e.g. communication (public relations) services.

In one email soliciting classified advertising, an aggregator claimed its newsletter was the industry's "most trusted and widely read newsletter."

Benefits/disadvantages to original publishers

Benefit

Original publishers benefit by having readers of the email newsletter directed to their sites, the increased readership possibly - possibly – contributing to justification for increasing advertising rates.

Disadvantages

- a loss of advertising sales and revenue - advertising sold by aggregators might be advertising which otherwise would have been placed with the original publisher
- no royalty payments.

Benefits/disadvantages to journalists

Employed journalists

Benefit

Journalists employed by original publishers theoretically may benefit through the aggregator providing wider distribution of their stories and by-lines, enhancing their reputations and hence their salary and career advancement prospects – but whether anyone has benefited in this way is not known.

Experience is that publishers rarely pay by reputation.

Disadvantage

If journalists have agreements with a publisher which allows them to contribute to other media outlets – their ability to do so is impaired by aggregation.

Publishers are unlikely to want regurgitated material which has been widely published on the internet by aggregators.

Freelance journalists

Neutral. If a freelance journalist sells a story to a publisher and assigns copyright to the publisher, then any disadvantage is to the publisher.

Disadvantage. The same applies as to an employed journalist – publication via an aggregated newsletter impairs the ability of on-sell the story.

The known current legal position (at December 2015)

Overseas aggregators

The Copyright Amendment (Online Infringement) Act 2015 provides for a copyright owner to seek a Federal Court injunction requiring a "carriage

service provider” (ISP) to take reasonable steps to disable access to an online site if the Court is satisfied that:

- “(a) a carriage service provider provides access to an online location outside Australia; and
- (b) the online location infringes, or facilitates an infringement of, the copyright; and
- (c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).”

There are various tests to be applied by the Court.

This appears to cover overseas aggregators’ websites and it therefore is open to any Australian publisher or copyright owners to apply for an aggregated website to be disabled.

But whether the term “location” applies to aggregated online newsletters is not clear.

The Inquiry therefore is asked to seek that clarification and if necessary recommend amendments that will cover aggregated newsletters in the same way as web sites.

Australian aggregators

Australian aggregators are free to aggregate because:

- the amendments to the Act apparently do not apply to Australian locations
- in *Fairfax v Reed*, FCA 984 (7 September 2010), according to the Australian Copyright Council: “The judge held that the headlines were not original enough for copyright protection, although she did not rule out the possibility that a particularly original headline could be protected by copyright.”

And, as the Council said at the time, a headline was unlikely to be ruled to be protected by copyright because there was “a long line of Australian case law which indicates that short, one-line strings of text are not protected by copyright”.

A Council media release about the case read:

“Federal Court decides against copyright in headlines 08/09/2010

The Federal Court’s Justice Bennett has ruled that no copyright exists in headlines, in a defining case brought by Fairfax Media Publications against Reed International Books Australia (trading as Lexis Nexis).

Justice Bennett found that Fairfax had failed to prove that any of the ten selected Australian Financial Review headlines it submitted was a discrete work of joint authorship in which copyright could subsist.

The judgment stated at [159-162]: “As to whether Reed, in reproducing and communicating headlines of the AFR as part of [its] Abstracts, takes a substantial part of any of the contended works:

- Even if the Story/Headline Combination constitutes a copyright work, Reed does not take a substantial part of such a work.
- Reed does not take a substantial part of either the Story Compilation or the Edition Work.”

“Reed’s conduct in reproducing and communicating the AFR headlines as part of the Abstracts is a fair dealing for the purpose of reporting news, such that Reed’s conduct would not constitute an infringement of copyright by reason of s 42(1)(b) of the Act.”

The full judgement is at:

<http://www.austlii.edu.au/au/cases/cth/FCA/2010/984.html>)”.

Headline writing is a skill.

Rather than discuss the headline ruling under “Comments” below, the issue is dealt with here.

Most, if not all, journalists who have been engaged in writing headlines know it is a skill and an art.

Many headlines are straight-forward but many require skill to provide the essence (= substantial part) of the story but within a usually highly restricted space using specified fonts and sizes.

And it often has to be done quickly – time is of the essence to ensure that deadlines are met.

While many headlines are “straight”, reflecting serious stories, many are creatively “catchy”, designed to attract readers’ attention and enliven a publication e.g:

Story: Cook Islands Government’s financial records in disarray: “Cooks’ books in a stew”.

Story: Comedian Bob Hope scored a hole-in-one at golf: “Joker cards ace”.

The skill is recognised in the annual Walkley Awards for journalists – there is a special category for headline writing.

The Federal Court ruling is therefore considered to be wrong.

Non-legal /legal preventive method

The Communications Alliance Ltd in 2015 released “A scheme to address online copyright infringement”.

The scheme currently is being held in abeyance by the Australian Communications and Media Authority.

According to the Alliance’s website the scheme was an industry-led “notice and discovery” scheme with the participating ISPs being Telstra Bigpond, Optus, iiNet, iPrimus and Internode.

Under it, copyright holders would be able to issue infringement notices against internet users who accounts were suspected of being used to access copyright material.

The infringements notices were to be given to ISPs which would then issue three types of notices to the alleged infringers:

- an education notice which would advise about proper content use and include advice that failure to act might result in further action by the copyright holder
- a warning notice (up to three), following a copyright holder issuing a further infringement notice/s: it would include advice that failure to act might result in the copyright holder applying to the courts for access to the user's account details from the ISP
- and, after an education notice and three warning notices had resulted in no action, a discovery notice saying that the copyright holder might apply to the courts for an order requiring the ISP to disclose the account holders details to the copyright owner.

The scheme proposed that ISPs and copyright holders, with Federal Government advice, would establish a Copyright Industry Panel (or independent judicial/administrative body) to provide educational material and to operate an appeal process for account holders.

Other preventive methods

Pay walls, particularly on major publishers' sites, prevent aggregators from publishing anything more than the headline and first sentences/paragraphs of stories.

The linked page requires the payment of a subscription to access the publication.

But many publications, including trade publications such as those which are the primary subject of this submission, are free.

Subscriptions are seen as commercially unviable because they deter readership and hence advertising rates can be reduced.

Misleading, offensive, erroneous, defamatory material

An issue which has not been investigated is whether aggregators are liable for linked advertisements and stories they use and which breach laws e.g. which are either misleading, offensive, erroneous or defamatory.

In 2010, when the issue was studied in a cursory manner, two legal cases were noted:

- a then current High Court appeal by Google against a Federal Court ruling, in a case brought by the Australian Competition and Consumer Commission, that Google was responsible for misleading advertisements it carried.
- Victorian Supreme Court decisions that Google and Yahoo defamed a Melbourne man, Michael Trkulja, by providing links to material which wrongly associated him with underworld figures. Damages were awarded in each case. Justice Beach was quoted as saying that Google was "like the newsagency that sells a newspaper containing a defamatory story ... While there might be no specific intention to publish defamatory material, there is a relevant intention by the newsagent to publish the newspaper for the purposes of the law of defamation."

The current situation needs to be investigated.

The following comments were included in a submission to the 2015-16 Productivity Commission's Intellectual Property Arrangements Inquiry but are considered relevant.

Scope of the inquiry

It is suggested that the submission provides information which comes under each of the Points.

Under Point 1 it demonstrates that aggregation:

- impedes access to goods and services and can impact on costs because of the low cost – high margin business model employed by aggregators – 1(b)
- restricts competition and therefore investment by genuine journalists and publishers – 1(c).

Under 2(a) and (b) It proposes changes as specified to encourage creativity, investment and innovation by removing protections for aggregators to create a level playing field for genuine journalists and publishers, so providing consumers with access to an increased range of quality and value goods and services i.e. more and more professional publications and epublications.

And the law changes proposed should provide greater certainty about what constitutes copyright infringements – 2(c).

3 (d) requires the commission to consider the government's desire to retain appropriate incentives for innovation, investment and the production of creative works.

Private journalism and publishing are believed to have rarely, if ever, attracted government support and it would be contrary to the principle of an independent and objective media – “the fourth estate” - for it to be granted. However, if aggregation continues there may a case for government grants to assist genuine journalists and publishers to compete fairly with aggregators.

Proscribing aggregation would be preferable.

2 What is IP and why are IP arrangements important?

Box 1

Existing copyright laws do not protect the original expression of news and feature stories – aggregators are allowed to use that material and to prosper by using it.

Journalists' and publishers' moral rights can also be breached because while aggregators usually make no changes to stories – that would be contrary to their low cost model - stories can appear in any publication, including the worst, impacting on reputation.

Other legal protections

Contract law does not apply because almost by definition there are not likely to be any contracts between genuine journalists and aggregators – and common law, as has been explained, gives aggregators the right to use headlines as links.

Recommendation: Whether aggregators are engaging in misleading and deceptive behaviour e.g. by claiming to be producing newsletters when they essentially may be reproductions is an issue which should be investigated.

IP rights are intended to promote innovation and creativity ...

Aggregation is an example of IP being copied at little cost and it probably leads to under-investment in innovation, other potential publishers being deterred by aggregation's anti-competitive nature. Exclusive rights for genuine journalists and publishers are needed.

Box 2 The special characteristics of intellectual property

Aggregation discourages inventiveness and creativity.

Under existing laws, the information gathered by genuine journalists and publishers is “non-rivalus” – aggregators are free to use it.

It is also “non-excludable” because the law makes preventive action difficult.

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There should be no notion that non-remuneration for “pastime pursuits”, for activities such as blogging and tinkering in a shed, also applies to journalism, especially freelance journalism.

Publishers of all kinds often obtain copy for no payment – opinion pieces and letters to editors are common. This practice is often justified on the ground that the publications are generously and nobly providing a forum for expert and public opinion.

But publishers also have a tendency to treat freelance journalists' copy in the same manner. As one editor once claimed when trying to dodge paying for a story: “Most freelancers don't want payment, they just want exposure.” Presumably exposure to the cold night air, roofless, foodless and drinkless and maybe with a starving spouse and children!

Figure 1

Giving copyright holders exclusive rights for a specified period, and limiting copyright to 70 years after the creator's death, is opposed.

Copyright should be “forever” with creators being able to trade their rights and bequeath ownership without encumbrance so that descendants and companies can continue to hold or trade them as they see fit. Otherwise, a family company dealing in literary material, may not be able to survive.

Statutory licencing of copyright to businesses is opposed – it is “forced taking” or compulsory acquisition from the copyright holder

While the case of licensing to public institutions has merit, copyright holders should be able to trade their rights commercially without any coercion.

Fair dealing provisions should not be available to aggregators. But fair dealing, widely accept, should also be questioned if it involves dealing for the sake of self-advancements, as in research and study, and profit, as in the case of aggregators.

... but granting parties exclusive rights can limit competition

In the case of journalist and publishing, granting exclusive rights will increase not limit competition.

These are highly competitive occupations with considerable emphasis on “exclusive” copy. There is always the pressure to obtain stories, or a fresh, important angle which the competition does not have.

Not to grant exclusivity is tantamount to inviting readers – consumers – to decide that they won't buy the publication with the exclusive story but to wait until the story appears in a freely available aggregated newsletter or website.

... and restrict the diffusion of knowledge

In journalism and publishing, there is nothing to stop rival journalists and publishers - and aggregators – from accepting the creator's efforts in breaking a story and then using their own resources to report it, even developing fresh angles.

3 A framework for assessing IP arrangements

Effectiveness: do IP rights target additional innovation and creative output?

As previously mentioned, the current system cannot be said to be effective for journalism and news publishing because it restricts rather than promotes the creation of “genuinely new and valuable IP.”

It will become effective if laws are changed overturning the common law ruling that headlines can't be copyrighted and if the Copyright Act is again amended, this time providing for the blocking of Australian aggregated newsletters and websites.

If this is done, more genuine journalists and publishers should feel confident in launching ventures, providing more choice for consumers and greater competition, promoting a wider variety of publications, including high quality ones.

Efficiency: getting the balance right

An efficient system ensures IP is generated at lowest cost to society

If this is to occur then the system must provide for competitiveness. At present, it doesn't, as explained previously.

Box 4 Alternatives to IP rights

There seems to be few, if any, trade secrets in journalism/publishing.

But publishers can sign deals for notable stories and to stage conferences etc- and thereby obtain exclusive coverage. But there is nothing, apart from pay walls, which many industry publications don't have, to prevent aggregators using any material published on the internet – by using the headlines of stories as links.

An efficient system ensures that IP rights are tradeable

As previously mentioned, journalists/publishers should be free to trade the material they create – and as said, the right to do so should remain with the copyright holder and not expire 70 years after the creator's death.

An efficient system considers the longer-term effects of IP rights

Statutory licencing needs to be confined to public institutions

Under fair use/fair dealing provisions, aggregators could claim protection but they are doing more because the links go to the entire story and not to a summary as in e.g. “what the papers say” segments.

An efficient system considers the longer-term effects of IP rights

It's obvious by now that the submission is arguing that current law should be changed to allow journalists/publishers to be able to develop business on a

level playing field in the knowledge that their efforts will not be undermined by unfair competition.

And, as said, the 70-year sunset provision for copyright should be removed to allow free trading and the continued ownership of rights by persons and or entities who

Adaptability: making sure IP rights are apt for the future

It's fair to say that, as outlined, the IP system has not adapted to protect genuine journalists/publishers from aggregators. The internet and the functions available have out-paced legislation.

Accountability: a transparent, evidence-based system

The nature and extent of public or consumer consultation in matters that affect them is varies greatly, ranging from tokenism to comprehensive participation.

This is based on observations of consultation methods and work as a trained social and market researcher.

Whether there was adequate consultation in developing the current IP system is not known –and nor are the parameters which would result in adequate consultation. A details examination is needed to make a judgement about whether more consultation is needed.

4 Improving arrangements for specific forms of IP

Aggregation is an example of where IP rights have not been varied or not varied sufficiently to deal with new circumstances.

It's mystifying why Australian sites cannot be disabled while overseas aggregation sites, which often use Australian material, can be.

The issue about whether they are covered by the common law decision about headlines not being copyright also may not be up-to-date.

Copyright

It's notable that journalism and newspapers have not been mentioned specifically in the Issues Paper, although broadcasting can includes news services.

And as the Paper notes, the mass use of the internet has, among the many benefits for creators, copyright infringement is easier and cheaper.

That again reinforces the need for aggregators to be proscribed.

The demands for ISPs to take responsibility for copyright infringement is being partly met by the Communications Alliance – albeit in a trial - described under “Legal/non-legal preventive method” above.

But, as pointed out, the trial applies to consumers and not businesses which, it is submitted, should be included – including aggregators.

So, in answer to the questions posed, repetition acknowledged:

The current laws do not fit the needs of genuine journalists and publishers, because they permit aggregators to operate, discouraging additional creative works because it's not profitable to produce them when they can be replicated freely and widely around the world by aggregators.

It follows that the protections are not proportional to creators' efforts.

Licensing, in the past, has been too difficult administratively and from a freelance journalist's position, negotiating payments has been too difficult because of publisher power.

Moral rights are essential, especially because the internet provides a means for copy to appear in any type of publication including those with which a creator might not want to be associated – and there are always editors and sub-editors who will change copy for the sake of it, destroying its integrity.

To repeat:

Recent changes to the Copyright Act have made easier the disabling of overseas-based aggregators but have left Australian-based aggregators intact.

The Act should be amended to include Australian-based aggregators among those whose sites can be disabled – the data is in the newsletters provided (in confidence).

Fair dealing should exclude, if it doesn't already, aggregators. At best they should be restricted to a one-sentence summary of a creator's work – then they should have to develop their own copy to cover the story.

Whether existing restrictions have been made sufficiently clear is not known.

Enforcing IP rights

The Issues Paper has identified a major problem for aggrieved copyright holders – the cost of obtaining relief.

The Communications Alliance scheme, if it were extended to businesses-to-business, would help immensely in cutting costs because it seeks to avoid litigation. The belief is that only the most hardened aggregator would resist remedial action in the face of five warnings leading to litigation.

Aggregators could be licenced by collection organisations such as the Copyright Agency Ltd – but the fees would have to be substantial enough to put aggregators on a similar cost footing as genuine journalists/publishers.

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He then trained as a political sociologist, holding a BA Hons from the Australian National University and a graduate Diploma of Sociology (survey research) from La Trobe University.

As a public relations practitioner, he was in 1983-84 director of public relations at the Aboriginal Development Commission (chair: Charles Perkins) and in private practice consulted mainly to market research companies.

As a private research consultant he specialized in health, communication and Aboriginal Affairs research, including consulting to and managing projects for the Australian Institute of Health.