

The EU Press Publishers' Right Is Inapt and Off-Target

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TRANSCRIPT

It's a pleasure to be with you online. I'm sorry to miss being with you in person. My talk draws upon my law review article, *Mandating Digital Platform Support for Quality Journalism*.¹ It's in the readings for the symposium. If anyone wants to dig more deeply into these issues, from my perspective, at least.

The rationale for the EU's new press publisher right is set out in the preambles to the Single Digital Market Directive, as Edouard² pointed out. Paragraph 54 highlights the essential role of a free and pluralist press for the proper functioning of a democratic society.

Paragraph 55 notes that it's important to ensure the sustainability of the publishing industry, and thereby to foster the availability of reliable information. I wholeheartedly agree with these laudatory goals.

Our democracy depends on a robust, vibrant press committed to original journalism and to journalistic ethics. And I want to push back a bit against Lisa³ and Colin⁴ from the first panel. I do not think this is just a matter of consumer sovereignty. Rather, I think it is incumbent on a democratic government to support quality journalism.

However, as I argue in my article, I think that both the press publishers neighboring right and, for that matter, any copyright the press publisher has in news articles are likely to be ineffective in addressing newsrooms' dramatic loss of revenue in recent decades.

Further, those IP rights miss the mark in terms of identifying what is causing that loss of revenue. So some background to this. Certainly, in the United States, -- and this is also drawing upon repeating a bit what we said in the first panel-- newsrooms have suffered a precipitous decline in recent years.

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1. 34 HARV. J. L. & TECH. 473 (2021).

2. Edouard Treppoz, another panelist at the 2022 Kernochan Symposium.

3. Lisa M. George, another panelist at the 2022 Kernochan Symposium.

4. Colin Stretch, another panelist at the 2022 Kernochan Symposium.

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In the United States, the government provides relatively little financial support for the press, far less than other advanced democracies provide for the press. Rather, American newsrooms are heavily dependent on commercial advertising.

And from 2005 to 2022, newspapers suffered a decline in ad revenue of eighty-one percent, a huge drop in ad revenue. Projections are that ad revenue drop will continue in the years ahead.

Newspapers do earn about five billion dollars per year in digital ad revenue. That is expected to surpass print ad revenue in 2026. But is not nearly enough to make up for the devastating losses in print ad revenue over the last couple of decades. And tellingly, digital add revenue has been fairly flat even as unique visits to newspaper websites have increased substantially.

That decline in ad revenue has severely impacted news publisher's ability to provide the journalism upon which our democracy depends. U.S. newsroom employment fell by twenty-six percent between 2008 and 2020. That's a loss of 30,000 jobs out of a total of 120,000.

Newspaper newsroom employment was hit even more severely. Newspaper newsroom employment declined by just short of sixty percent from 2006 to 2021. So what media scholars refer to as quality journalism has been particularly hard hit.

Original investigative journalism is the most expensive journalism to produce. And newsrooms often cut back on that to save money. Maybe not The New York Times, maybe not The Washington Post, but other outlets.

In addition, local news has been very badly impacted. Numerous areas of the United States are now news deserts. There is no local news coverage at all in vast regions of the United States.

Now there are a number of reasons for newsrooms' dramatic decline in revenue over the past couple of decades. They include the global financial collapse of 2008 and the loss of classified advertising to Craigslist and other online classified ad providers.

But in recent years, one factor looms, particularly large, I argue. And that is the overwhelming market power of digital platforms, particularly Google and Facebook. And digital platforms, again, particularly Google and Facebook, impose multiple harms on news publishers.

First, Google and Facebook have devoured the advertising revenue upon which American news publishers are heavily dependent. Google and Facebook, together, earn more than half of all U.S. digital advertising revenue. And their closest competitor, Amazon, earns slightly over eleven percent. Google and Facebook also account for more than seventy percent of global digital advertising revenue growth.

Importantly, though, the digital platforms not only devour advertising revenues that might otherwise go to news publishers. They also exercise extraordinary market power and engage in considerable self-dealing in various aspects of the complex digital advertising market.

In that regard, first and foremost, Google and Facebook enjoy enormous advantages in attracting advertising to their platforms. They can offer advertisers

unparalleled audience reach, state of the art display placement technology, and precise consumer targeting to a huge audience.

But Google and Facebook don't merely attract advertising dollars to their respective platforms. They also run electronic auction marketplaces for digital display ads. And they act as brokers for website proprietors, including many news publishers in selling aspects to digital advertisers. They take a considerable cut of advertising revenues in that role.

Further, in addition to harming publishers by devouring ad revenues, the digital platforms have become a vital gateway to readers for most newspapers. As a result, digital platforms have co-opted news publishers' traditional roles as curators, editors, and distributors of journalists' work, thereby diminishing news publishers' ability and incentive to maintain their existing brand representing quality journalists.

Today, increasing numbers of readers, particularly younger readers, go to Facebook or YouTube or Instagram or, God forbid, TikTok as their primary gateway for news, including news articles that they reach through the social media platforms.

All right. So Edouard⁵ and Andrew⁶ have discussed, respectively, the EU press publishers right and the U.S. Copyright Office study regarding whether the U.S. should adopt a press publisher's right. A press publishers' right is a "neighboring right." It is an IP right that stands over and above any copyrights that press publishers hold in their news stories..

Under Art. 15 of the EU Single Digital Market Directive, European press publishers have an exclusive right vis-à-vis "information service providers" to reproduce and make available to the public copies and extracts of press publications online.

The target of press publishers' rights, information service providers, will primarily be online news aggregators like Google News and the Google Search News tab. These aggregators reproduce and display headlines, reduced size images, and in some cases, short extracts of newspaper articles.

Facebook's display of news article extracts that are posted by its users would be covered by general copyright law, both in the U.S. and in the EU, not by Article 15.

Under Article 15, news aggregators like Google would, in theory, have to negotiate with press publishers for a license to copy and display news story extracts, unless their extracts are "very short," whatever that might mean. It's certainly more likely that just the headlines and perhaps the thumbnail images would qualify as very short extracts, than the story lede.

Now the reason why granting press publishers IP rights is unlikely to provide press publishers with significant revenue is that it is far, far more valuable for press publishers to have the headlines and short extracts of their news stories displayed by major aggregators like Google News than it is for platforms to display their news stories.

5. Edouard Treppoz, another panelist at the 2022 Kernochan Symposium.

6. Andrew Foglia, another panelist at the 2022 Kernochan Symposium.

As I mentioned earlier, newsrooms are heavily dependent on platforms as gateways to their readers. But for major platforms like Google and Facebook, news articles are a tiny fraction of the content they display.

In fact, Facebook is generally moving away from news content. It has recently been reported that Meta has informed U.S. news publishers that it will not renew licenses to pay for U.S. news content on Facebook's news tab. The Wall Street Journal reports that Facebook's move away from news was influenced by "the stepping up of regulation around the world aiming to require technology platforms such as Facebook to pay for news."

So the platforms are in a far stronger negotiating position than are the news publishers in bargaining for licenses to display new story abstracts. The bottom line is that the platforms are ready simply to walk away, while the news publishers, by contrast, desperately need the platforms to access readers.

We've already seen this market power imbalance. When Germany enacted a press publishers' right, Google announced that any news publishers wishing to be indexed in Google News had to grant Google a royalty-free license to display extracts of their news articles. All of the major news publishers in Germany eventually agreed to Google's demand rather than be excluded from Google News.

Then in Spain, news publishers were accorded a non-waivable compulsory remuneration right against digital platforms that post links to or excerpts of their news stories. Google responded by closing its entire Google News site in Spain. The result was a net decrease in internet traffic to Spanish news publishers' websites, particularly those of smaller publishers.

So the bottom line is that merely granting newsrooms a press publishers' right is unlikely to bring most publishers significant additional revenue. Indeed, that was the conclusion of the U.S. Copyright Office in its study.

In addition, as I said earlier, the press publishers' right misses the mark in terms of identifying what is causing the press publishers' devastating loss of revenue. News publishers are not losing revenue because Google News is displaying headlines and extracts of their news stories. If anything, news aggregators like Google News appear to generate greater traffic to news publishers' websites overall. That's why news publishers are so eager to have their stories listed in Google News.

In that regard, preliminary data suggests that Google News listings do not substitute for reading the news articles on the news publisher website. We need more data about this to come to a definitive conclusion. But I did find this 2020 search optimization consultant study of click-through rates by mobile phone users.

The study indicates that mobile phone users click through to Google News sources slightly less frequently than they click through to organic results on the Google search, generally. But the differences are very small. That suggests to me that Google News listings are probably not serving as substitutes for news articles any more than Google's general organic search result listings are serving as substitutes for visiting the listed websites.

So as Lisa George noted in the first panel, Google News appears to serve as a complement to the news articles. The Google News website is not a substitute for those news articles.

The devastating harm to news publishers stems far more from Google's and Facebook's dominance in the digital advertising market. The news publishers, importantly, would be suffering a devastating loss of revenue in advertising even if Google and Facebook stop displaying any news stories at all. So to the extent that the press publishers' right is designed to remedy newsroom's financial woes, it is simply off target.

What, then, might be some more promising remedies for news publishers? Well, there are several. One is competition law or maybe some combination of competition law and IP law. That has been briefly mentioned today and I think it will be the focus of the next panel.

In my article, I recommend that a 2.5 percent excise tax be imposed on the digital advertising revenue of the leading digital advertisers and that the proceeds should be allocated to support quality journalism. Such a tax in the United States would yield over three billion dollars per year that could be allocated to quality journalism.

I also advocate various measures to give more prominence to original news reporting. That would give press publishers greater incentives to invest in quality journalism.

Finally, I advocate an API for news publishers' curated news. I don't have time to go into any of those proposals now, but I'd be happy to discuss in the Q&A if anyone wishes to take them up.

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