Sedating Democracy's Watchdogs: Critical Reflections on Canada's Proposed Online News Act

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INTRODUCTION

In April 2022, the Government of Canada introduced Bill C-18 (the Online News Act).[1] This Bill is one of the recent attempts by governments in several countries to address a perceived crisis-level disruption to newspapers' finances[2] by requiring internet platform operators to pay for newspapers' content displayed on their platforms. As of the writing of these comments, the Bill has passed the third reading at the House of Commons and is now awaiting review and voting by the Senate.[3]

The stated purpose of Bill C-18 is "to regulate digital news intermediaries with a view to enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability, including the sustainability of news businesses in Canada, in both the non-profit and for-profits sectors, including independent local ones."[4] It seeks to accomplish this goal by "establish[ing] a framework through which digital news intermediary operators and news businesses may enter into agreements respecting news content that is made available by digital news intermediaries."[5]

The key element of Bill C-18 is empowering an "eligible news business" or "group of eligible news businesses" to initiate a regulated bargaining process (either individually or collectively) with an "operator" of a "digital news intermediary" and

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1. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022 (first reading, Apr. 5, 2022) (Can.), https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/first-reading [https://perma.cc/KM9J-VE4W] [https://web.archive.org/web/20230121184840/https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/first-reading].

2. *See generally* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

3. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, § 2(1) (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF].

4. *Id.* at § 4.

5. *Id.* at ii (Summary).

imposing a corresponding duty on such operator to participate in the process,[6] coupled with a duty on all participants to bargain in good faith.[7] The bargaining process consists of three steps. It begins with bargaining sessions. If the parties are unable within a reasonable period to reach an agreement in the bargaining sessions, they enter mediation sessions, and if the mediation sessions do not result in an agreement within a reasonable period, then either party may initiate final offer arbitration.[8]

The underlying assumption behind the proposed legislation is that fundamental unfairness exists in the relationships between news publishers and internet platforms. Essentially, the Bill's animating narrative draws a connection between newspapers' declining revenue (both from advertising and from readers' subscriptions), the growth of digital advertising and of Google's and Facebook's dominance thereof, and the fact that newspapers' content can be accessed freely via Google News or Facebook users' postings. The logic runs as follows: By providing links to newspapers' stories, Google and Facebook freeride on that content to attract readers to their platforms (and away from newspapers).[9] As readers have migrated, so have advertisers. Faced with dwindling advertising revenue and confronting platforms with unmatched bargaining power, newspapers have no choice but to acquiesce to the sharing of their stories through these platforms because without readers' traffic to their websites, they would lose even more advertisers. Hence not only the need to force platforms into a negotiation process that could result in payment obligations imposed on them through mandatory arbitration but also the need to allow newspaper publishers to bargain collectively.

In the following comments, I wish first to question the logic behind the proposed legislation and then to highlight and discuss three noteworthy elements of Bill C-18: (1) how it relates to and departs from copyright (and how it contemplates payments for actions and in circumstances that exceed news publishers' entitlements under the *Copyright Act*); (2) the difference between collective administration of copyright and the Bill C-18's collective bargaining model; and (3) the sweeping immunity from scrutiny under the *Competition Act* afforded to such collective bargaining. Finally, I will share my biggest concern about Bill C-18's proposed solution: its sedating impact on the watchdog role of the press.

6. *Id.* at §§ 18–21.

7. *Id.* at § 22.

8. *Id.* at § 19.

9. *See, e.g.*, MINOW, *supra* note 2, at 99 (describing the problem as requiring "[i]ntellectual property protection and enforcement . . . [to] ensure compensation for the work of journalists that is at risk of appropriation by third parties posting on an internet site. It requires federal action, as this is a body of federal law. Digital companies free ride on the news links shared by users without reinvesting in the apparatus necessary for investigating, testing, and reporting news, which undermines people's ability to get and trust news.").

I. ON THE NEWSPAPERS' CRISIS, FREE RIDING, AND BARGAINING POWER

There is no question that newspapers, especially local ones,[10] have been struggling, or that readership has declined and advertising revenue has dwindled. However, the assumption that these troubles happened because of Google and Facebook deserves closer scrutiny—at least if by "because of" we mean or imply some fault or otherwise normatively-suspect behavior, which the arguments about freeriding and bargaining power imbalance imply.

An alternative way to understand the plight of newspapers is to recognize that their traditional business model, supported primarily by advertising revenue, was based on newspapers' own local monopolistic or oligopolistic position on advertising, a model that the internet had already disrupted even before the growth of Google and Facebook as advertising behemoths. According to a 2009 testimony of the Newspaper Association of America before the U.S. Federal Trade Commission, classified ads accounted for forty to sixty percent of the revenue of many American newspapers until approximately the mid-2000s[11] (and contributed even more to the profit since classified ads were very inexpensive to sell).[12] According to Rupert Murdoch, the former chairman and CEO of News Corp., "the old model was founded on quasi monopolies, such as classified advertising, which has been decimated by new cheaper competitors such as Craig's List, monster.com, careerbuilder.com and so on."[13]

As the U.S. Copyright Office report explains, following the migration of classified ads advertisers,

> Display advertisers followed suit, redirecting their budgets from print newspapers to the internet and national ad networks to take advantage of better consumer targeting. And while digital ad revenue across all internet platforms soared, "half of all digital [display] revenue went to just two tech companies," Facebook and

10. *Id.* at 11.

11. SHIRA PERLMUTTER, U.S. COPYRIGHT OFF., COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS: A REPORT OF THE REGISTER OF COPYRIGHT 9 n.20 (June 30, 2022), https://copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf [https://perma.cc/E7BF-383G] [https://web.archive.org/web/20230121185257/https://copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf] (citing *How Will Journalism Survive the Internet Age?*, FED. TRADE COMM'N (Dec. 1, 2009), https://www.ftc.gov/news-events/events/2009/12/how-will-journalism-survive-internet-age [https://perma.cc/SJ4H-UGE3] [https://web.archive.org/web/20230121185638/https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/contreras.pdf] (statement of Mark Contreras, Newspaper Assoc. of Am., tr. at 2)).

12. FED. TRADE COMM'N, *supra* note 11, at 33 (statement of Rick Edmonds).

13. *Id.* at 50. The impact of the migration of classified ads to online services has had an even broader impact. According to Seamans and Zhu, many newspapers responded to the loss of that revenue by increasing the price of subscriptions. This led to lower circulation, which made the newspaper less attractive to display advertisers and forced newspapers to decrease the display-ad rate charged from display-ad buyers. Robert Seamans & Feng Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 MANAG. SCI. 476, 490 (2014).

> Google. For newspapers, now reliant upon these national ad networks to fill their digital pages rather than their in-house advertising departments, the resulting flow of digital ad revenue has been too small to offset broader declines in ad revenue.[14]

It is also possible that the migration of advertising dollars to Google and Facebook and away from newspapers resulted from more than the erosion of newspapers' local monopolies brought about by new digital advertising players, and that anti-competitive practices—not just competition on the merit—contributed to the rise of Google and Facebook. Indeed, on January 24, 2023 the U.S. Department of Justice sued Google for monopolizing digital advertising technologies and claimed (in the accompanying media release) that one of the effects of the alleged violation of the Sherman Act was "reducing revenues for news publishers and content creators."[15] If this allegation is correct (and if also true for Facebook), then the claim that these companies' wrongful behavior was a major cause of newspapers' struggles may be sustained. But if so, then the problem lies with those harmful actions and the remedy ought to be found in enforcing the existing competition laws and, if necessary, improving them.[16] In any event, this harm is quite different from the alleged free-riding on newspapers' stories.

When internet platforms post or allow their users to post links to newspaper stories, describing that as freeriding is hardly accurate. Rather, the platforms provide newspapers a service and drive traffic to their websites. As I explain in greater detail below, this is not done without the publishers' consent, but typically with it.

The argument that newspapers are forced to grant consent because they lack sufficient bargaining power vis-à-vis Google or Facebook also deserves closer scrutiny. Every content creator who wishes to distribute their content online faces a dilemma: whether to allow only paying customers to access their content and thereby limit the size of their audience or to maximize readership (or viewership or listenership) while relying on indirect ways to appropriate value from exposure. In an imaginary creators'

14. PERLMUTTER, *supra* note 11, at 9 (internal citations omitted).

15. *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, U.S. DEP'T JUST. (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies [https://perma.cc/2EE4-2KEZ] [https://web.archive.org/web/20230308231321/https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies].

16. Indeed, only last year the *Competition Act* was amended. Some of the amendments were intended to make it easier to remedy anti-competitive practices that may arise in digital commerce. For example, for abuse of dominance, the non-exhaustive list of factors to be considered have been updated to include: effects on barriers to entry, such as network effects; effects on both price competition and non-price competition, such as quality, choice or consumer privacy; the nature and extent of change and innovation in the relevant market; and any other factor that is relevant to competition in the market that is or would be affected by the practice. *See Guide To the 2022 Amendments To the Competition Act*, COMPETITION BUREAU CAN. (June 24, 2022), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act#sec05 [https://perma.cc/2ZW6-LM4A] [https://web.archive.org/web/20230308231724/https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act].

paradise, most content creators would like to have it both ways: to maximize the number of readers and maximize payment. But in reality, there is often a trade-off between the two. Therefore, the fact that newspaper publishers begrudgingly choose to allow free access to their stories is not an indication that they are being unfairly exploited by Google or Facebook due to lack of sufficient bargaining power, as opposed to choosing the increased readership and taking advantage of the services that those two platforms offer. The argument about lack of bargaining power is also belied by the fact that there does not seem to be a marked difference between these two platforms and smaller ones as far as payment for linked content is concerned. Google and Facebook do not pay less for linked content than smaller players, such as Twitter, Reddit, or any individual who posts links on their webpages do.[17]

The perception of significant bargaining power imbalance is fundamental to the regulatory scheme of Bill C-18. Unfortunately, the concept may be more elusive than what proponents of the legislation hope or believe and lead to broader application of the bargaining regime than intended. Under Section 6, the Bill would apply to a digital news intermediary only if there is a significant bargaining power imbalance between its operator and news businesses. The existence of such bargaining power imbalance is to be determined on the basis of the following factors: (a) the size of the intermediary or the operator; (b) whether the market for the intermediary gives the operator a strategic advantage over news businesses; and (c) whether the intermediary occupies a prominent market position.[18]

It is clear that Google and Facebook are the primary targets of the Bill's definition and the applicability criteria. During the Standing Committee on Canadian Heritage's clause-by-clause review, Government officials indicated that the Bill would not apply to services such as Reddit and Twitter because despite being "digital news intermediaries" (according to the definition in § 2(1)), they may not be sufficiently dominant.[19] However, it is far from clear that these statutory criteria would not apply to them in practice because these criteria are broad and quite vague.

The first criterion is "the size of the intermediary or the operator," but it does not indicate the basis for determining size (e.g., number of users, revenue, number of employees), whether size is to be assessed on absolute or relative terms, and if relative,

17. Even if such a difference existed and it was found, for example, that newspapers apply paywalls but remove them for traffic directed via a dominant platform, this may not necessarily indicate that the large platform has exercised undue power. Rather, it may indicate that the trade-off between exposure and direct revenue may work differently with respect to different platforms, based on the size, type, or other characteristic of the audience they serve.

18. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, § 6 (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF].

19. *Freedom of Expression Is Not a Loophole: Responding to the Government's Inaccurate Defence of Mandated Payments for Links in Bill C-18*, MICHAEL GEIST (Nov. 21, 2022), https://www.michaelgeist.ca/2022/11/freedom-of-expression-is-not-a-loophole-responding-to-the-governments-inaccurate-defence-of-mandated-payments-for-links-in-bill-c-18 [https://perma.cc/TVH9-3KEN] [https://web.archive.org/web/20230209231705/https://www.michaelgeist.ca/2022/11/freedom-of-expression-is-not-a-loophole-responding-to-the-governments-inaccurate-defence-of-mandated-payments-for-links-in-bill-c-18].

relative to whom (relative to the news business, to competitors of the intermediary who offer the same service, or relative to behemoths such as Google or Facebook). While it may be easy to exclude an operator of a tiny Mastodon "instance"[20] or that of an obscure discussion board on the basis of their small size, however defined, it is not at all clear that Twitter or Reddit do not satisfy the size criterion.

The second criterion—whether the market for the intermediary gives the operator a strategic advantage over news businesses—is highly vague and arguably could apply to any operator of an intermediary because any intermediary that specializes in something different from a news business would likely have a strategic advantage over news businesses with respect to the service in which it specializes.

The third criterion—whether the intermediary occupies a prominent market position—also does not easily exclude Twitter or Reddit. Note that this criterion does not refer to a *dominant* position, a phrase which could have the same narrow meaning that it has under the *Competition Act*, but refers to *prominent* position, an adjective that could easily apply to Twitter or Reddit.[21] How much weight courts will be willing to give the Government official's testimony in determining legislative intent remains to be seen.

II. COPYRIGHT AND THE ONLINE NEWS ACT

This part discusses the interface between publishers' rights under the *Copyright Act*, focusing on the ways in which Bill C-18 exceeds copyright law's entitlements.

At the core of Bill C-18 lies a jurisprudential puzzle: contrary to the legal maxim *nemo dat quod non habet* (one cannot give what they do not have), the Bill contemplates a regulatory scheme that requires internet news intermediaries to pay for news content, including in circumstances where no permission or payment are required under any existing law, but without granting news publishers any new legal entitlement. It compels the intermediaries to reach payment agreements with news publishers with respect to activities that the intermediaries are free to carry out without permission and without an obligation to pay.

Of course, news publishers' entitlement to payment could be predicated on their copyrights in news content. However, the Bill contemplates payments for actions and

20. "Mastodon is a free social media service that functions much like Twitter. . . . Instead of one town square for everyone, however, Mastodon is composed of thousands of social networks, all running on different servers, or 'instances,' that can communicate with each other through a system called the Fediverse." Peter Butler, *What Is Mastodon, the Alternative Social Network Now Blocked by Twitter?*, CNET (Dec. 16, 2022, 11:23 AM), https://www.cnet.com/tech/services-and-software/what-is-mastodon-the-alternative-social-network-now-blocked-by-twitter [https://perma.cc/WY7V-554C] [https://web.archive.org/web/20230308233201/https://www.cnet.com/tech/services-and-software/what-is-mastodon-the-alternative-social-network-now-blocked-by-twitter].

21. Competition Act, R.S.C. 1985, c C-34 (Can.), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines#sec01 [https://perma.cc/SB3V-WFK4] [https://web.archive.org/web/20230308233624/https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines].

in circumstances that exceed news publishers' entitlements under the *Copyright Act* and are not available under any other law. Thus, internet intermediaries are required to participate in a mandatory negotiation process that may result in a binding arbitration award requiring them to pay for actions that they are lawfully permitted to pursue and that news publishers are not entitled to control.

A. SUBJECT MATTER EXPANSION

Bill C-18's first beyond-copyright excursion may be found in Section 2, which, among other definitions, defines the subject matter and the actions to which the regulated negotiation scheme applies. First, Section 2(1) defines the term "news content" as "content—in any format, including an audio or audiovisual format—that reports on, investigates or explains current issues or events of public interest." Next, Section 2(2) defines the "making available of news content" concept as follows:

> (2) For the purposes of this Act, news content is made available if
> (a) the news content, or any portion of it, is reproduced; or
> (b) access to the news content, or any portion of it, is facilitated by any means, including an index, aggregation or ranking of news content.

These definitions, which, alongside Section 6, determine the intermediaries to whom the Online News Act would apply, exceed copyright protection in several respects. First, missing from the definition of "news content" is any requirement for "originality," which (like in the United States)[22] is the *sine qua non* of copyright in Canada.[23] While many news articles or broadcasts may be sufficiently original, not all of them would be. For example, if a newspaper publishes a mere transcript of a politician's speech, that transcript would qualify as "news content" and entitle the newspaper publisher to payment, despite lacking any original expression of the reporter.[24]

Also missing is a fixation requirement. Thus, a webcast of a live event, transmitted to the public without being simultaneously fixed,[25] would qualify as "news content" despite not being protected by copyright.[26]

22. Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 345 (1991).

23. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339 (Can.).

24. This example is based on Walter v. Lane [1900] AC 539 (UKHL) (U.K.), a famous British case from 1900 where the House of Lords held that a newspaper publisher whose reporters took notes and then transcribed speeches had copyright in the published speeches. This holding, an extreme application of what later became to be known as the "sweat of the brow" approach to copyright, cannot be good law in Canada following the explicit addition of an originality requirement in the statute and in light of the unequivocal decision of the Supreme Court of Canada in *CCH Canadian Ltd.* on the meaning of the originality requirement. [2004] 1 S.C.R. 339 (Can.). *See also* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 18–51 (2015).

25. Copyright Act, R.S.C. 1985, c C-42 3(1.1) (Can.).

26. Can. Admiral Corp. Ltd. v. Rediffusion Inc., [1954] Ex. C.R. 382, 394 (Can.).

Second, the definition of "making available of news content" exceeds copyright in the following ways. First, it applies to "news content" or "any portion of it." By contrast, the exclusive rights under Canada's *Copyright Act* apply to the "work" or "any substantial part thereof."[27] The difference between "any portion of it" and "any substantial part thereof" is significant. In *Cinar v Robinson*, the Supreme Court emphasized that "any substantial part thereof" does not apply to "every 'particle' of an original work, 'any little piece the taking of which cannot affect the value of [the] work as a whole.'"[28] The Court further emphasized that the author's legal monopoly applies only to a substantial part of her original expression and does not extent "over ideas or elements from the public domain, which all are free to draw upon."[29] By contrast, Bill C-18 would apply to acts pertaining to "the news content *or any portion of it*," a phrase that could include every 'particle' of news content, and maybe even a single word (emphasis added).[30] Thus, a Facebook post that merely quotes from a news article (or even mentions the existence of a news article by reproducing its heading) might require compensation, a requirement which does not exist in copyright law and may also run afoul of Article 10(1) of the Berne Convention which mandates the free use of quotations.[31]

Likewise, while there may be copyright in a news article, there can be no copyright in the news itself, as there can be no copyright in facts.[32] The Bill's definitions, however, seem to ignore this fundamental principle of copyright law.

B. EXPANSION OF APPLICABLE ACTIONS

In addition to covering subject matter that copyright law excludes, Bill C-18 would require payments for actions that do not implicate any exclusive right under the *Copyright Act*. The definition in Section 2(2) covers two types of acts: reproduction (in subsection (a)) and facilitating access to the news content by any means, including an index, aggregation or ranking of news content. The *Copyright Act* grants copyright owners an exclusive reproduction right and an online intermediary that reproduced a news article on its platform without the consent of the copyright towner may be liable for copyright infringement. However, the two paradigmatic intermediaries that Bill

27. Copyright Act (Can.), *supra* note 25, at 3(1).

28. Cinar Corp. v. Robinson, [2013] 3 S.C.R. 1168, para. 25 (Can.).

29. *Id.* at para. 23–24.

30. The equally authoritative French version of the Bill reads "le contenu de nouvelles est reproduit, en tout ou en Partie." Online News Act, *supra* note 3, at § 2.

31. Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), 10(1), S. Treaty Doc. No. 99-27 (1986), https://wipolex.wipo.int/en/text/283698 [https://perma.cc/8UG7-RJQJ] [https://web.archive.org/web/20230127195555/https://www.wipo.int/wipolex/en/text/283698] [hereinafter *Berne Convention*]. *See generally* TANYA FRANCES APLIN & LIONEL BENTLY, GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS (2020).

32. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, para. 22 (Can.) (citing Feist Publ'ns, Inc. v Rural Tel. Servs. Co., 499 US 340 (1991)). *See also Berne Convention*, *supra* note 31, at art. 2(8) ("[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.").

C-18 seeks to regulate, Google and Facebook, do not typically engage in activities that would be considered infringing reproductions under Canadian copyright law.

In the case of Facebook, neither it nor its users typically reproduce news content. While a Facebook user could copy and paste the text of a news article, Facebook users often share news articles by posting links to the news stories they wish to share. But posting a link to a work does not amount to reproducing it. Nor does posting a link amount to communicating the work to the public by telecommunication, an act covered by Section 3(1)(f), and which includes "making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public."[33] Nor would posting a link amount to authorization to reproduce, communicate, or otherwise make it available. The link itself merely references the location of the news content and directs the user to that location; it is the person who uploaded the content to the linked website—typically the news publisher—who reproduced and authorized any further communication or display of that content.[34] The news publisher fully controls whether the content will be available on its website,[35] whether those who have the link can access the content, whether they hit a paywall, or whether they encounter a 404 error message,[36] and the publishers also "control what image will accompany the link and how much text, if any, will appear to Facebook users."[37]

Even if a Facebook user copied the text of a news article and posted it (instead of linking to it), it would be the user who may be liable for reproducing and subsequently communicating it to the public by telecommunication, not Facebook[38] (although Facebook may be required to forward a notice of claimed infringement to its user if it receives such notice from the copyright owner and may be sanctioned if it fails to forward such a notice).[39]

Google's indexing of news content admittedly involves more than linking to the content. Typically, indexing web content requires Google to reproduce the content and keep a cached copy of it, and then, in response to a search query, display a link—which may include the article's title—to the publisher's website. In the past, Google also displayed a snippet of the news article, but it appears to have stopped that practice.[40]

33. Copyright Act (Can.), *supra* note 25, at § 2.4(1.1).

34. *Cf.* Crookes v. Newton, [2011] 3 S.C.R. 269, paras. 26–30 (Can.). *See also* Soc'y of Composers, Authors and Music Publishers of Can. v. Entm't Software Ass'n, [2022] S.C.C. 30, para. 106 (Can.).

35. *Soc'y of Composers, Authors and Music Publishers of Can.*, [2022] S.C.C. 30, para. 106 (Can.).

36. HTTP 404, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=HTTP_404&oldid=1121193912 [https://perma.cc/HP8M-AS37] [https://web.archive.org/web/20230204051510/https://en.wikipedia.org/w/index.php?title=HTTP_404&oldid=1121193912].

37. PERLMUTTER, *supra* note 11, at 13.

38. *See* Copyright Act (Can.), *supra* note 25, at § 2.4(1)(b) ("2.4(1) For the purposes of communication to the public by telecommunication, (a) …; (b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public[.]").

39. *Id.* at §§ 41.25–41.26.

40. Mariella Moon, *Google News Redesigned with a Cleaner Look*, ENGADGET (June 27, 2017, 8:58 PM), https://www.engadget.com/2017-06-27-google-news-redesigned-cleaner-look.html [https://perma.cc/

It is unnecessary, for the purpose of this Article, to discuss whether and which of those actions implicate copyright owners' exclusive rights, because even if they do, these actions with respect to news content likely do not attract copyright liability.

One reason is that Google does not index news content (and does not display links to such content) if the news publisher does not wish it to be indexed. Among other tools, Google relies on the widely-used Robots exclusion protocol, which allows website operators to automatically notify Google if they do not want their website or specific parts of it to be indexed. Google's computers that otherwise would automatically copy everything recognize these familiar lines of code and know to keep out.[41] Copyright infringement exists only if one engages any of the copyright owner's exclusive rights without their consent,[42] which may be express or implied.[43] Implied consent may be found on the basis of an established trade or business usage or custom and if those whose consent is alleged to be implied are aware of that established practice,[44] which newspaper publishers very likely are.[45]

Even if Google failed to establish the existence of an implied license, it may nonetheless be able successfully to rely on fair dealing. In *Soc'y of Composers, Authors and Music Publishers of Can. v. Bell Canada*, the Supreme Court held that the use of previews (that allowed users to listen to thirty- to ninety-second excerpts of musical works prior to purchasing the work) was not an infringement of copyright since it was "fair dealing" for the purpose of research under Section 29 of the *Copyright Act*.[46] When Google indexes news content posted by a publisher to let users discover and reach that content, the Court's reasoning may seem easily applicable.

In sum, while Facebook's and Google's typical actions with respect to news article would not attract copyright liability, those activities could nonetheless fall within Bill C-18's first definition of the term "making available of news content."

The second definition in Section 2(2)—facilitating access to news content or any portion of it "by any means, including an index, aggregation or ranking of news content"—is even more expansive. It exceeds copyright protections because Canadian copyright law does not grant copyright owners a right to control access to works or an exclusive right to authorize such access. Even if an infringing copy or infringing

9ZY4-H5LE] [https://web.archive.org/web/20230204051724/https://www.engadget.com/2017-06-27-google-news-redesigned-cleaner-look.html].

41. Ariel Katz, *The Orphans, the Market, and the Copyright Dogma: A Modest Solution to a Grand Problem*, 27 BERKELEY TECH. L.J. 1285, 1295 (2012).

42. Copyright Act (Can.), *supra* note 25, at § 27(1).

43. Netupsky et al. v. Dominion Bridge Co. Ltd., [1972] S.C.R. 368 (Can.).

44. Robertson v. Thomson Corp., 2001 CanLII 28353, paras. 142–43 (Can. Ont.), *aff'd* Robertson v. Thomson Corp., [2006] 2 S.C.R. 363 (Can.).

45. In 2012, Parliament endorsed search engines' practices when it enacted § 41.27 of the Copyright Act. This section provides that if a search engine that complies with certain conditions (that mimic Google's practices) is nonetheless found to have infringed a copyright, then the owner of the copyright is not entitled to any remedy other than an injunction. Since Google would normally comply with content owners' requests to remove their own webpages from search results, it seems unlikely that they will ever need to resort to such an injunction.

46. Soc'y of Composers, Authors and Music Publishers of Can. v. Bell Canada, [2012] 2 S.C.R. 326 (Can.).

communication to the public of a work have been made, accessing the copy or the communication and any consequent reading, watching, or listening to the work does not constitute an infringement. In the absence of an exclusive right to access a work, authorizing (or facilitating) access to it is not an infringement.[47] Nevertheless, under Bill C-18, an internet intermediary that facilitates access to news content "by any means" may be liable to pay for that content.

C. "MAKING AVAILABLE" UNDER THE COPYRIGHT ACT AND UNDER BILL C-18

Bill C-18's definition of "making available" is also different—and broader—than the *Copyright Act*'s "making available" provision in Section 2.4(1.1), which reads:

> For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

In 2022, the Supreme Court held that this "making available" provision, enacted in 2012, did not create a new exclusive right. Rather, it was enacted to clarify two points: first, that the right to "communicate a work to the public by telecommunication" in Section 3(1)(f) (which itself is only a subset of the public performance right in Section 3(1)), "applies to on-demand streams." Second, it clarifies that liability for such performance arises "as soon as it is made available for on-demand streaming."[48]

Accordingly, if an internet intermediary uploads copyrighted news content to a server and configures it in such a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public, the internet intermediary may be liable for infringing Section 3(1)(f). But if the internet intermediary merely provides a platform that allows other people to make the news content available to the public, those other people may be liable, but not the internet intermediary.[49] Needless to say, if the news content was made available by, on behalf, or with the consent of the owner of the copyright (e.g., the news publisher), no liability could attach.

47. Columbia Pictures Indus. Inc. v. Gaudreault, 2006 F.C.A. 29, paras. 30–32 (Can.).

48. Soc'y of Composers, Authors and Music Publishers of Can. v. Entm't Software Ass'n, [2022] S.C.C. 30, para. 91 (Can.).

49. *See* Copyright Act (Can.), *supra* note 25, at § 2.4(1)(b) ("2.4 (1) For the purposes of communication to the public by telecommunication, (a) …; (b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public[.]").

D. FURTHER EXPANSION

Beyond the definition of "making available of news content" in Section 2(2), which already exceeds copyright protection, Sections 23 and 24 of Bill C-18 further exceed copyright: the former impliedly and the latter explicitly.

Section 23 provides:

> For greater certainty, an eligible news business or a group of eligible news businesses may initiate the bargaining process in relation to news content in which copyright subsists only if
> (a) the business or a member of the group owns the copyright or is otherwise authorized to bargain in relation to the content; or
> (b) the group is authorized to bargain in relation to the content.

This clarifying provision merely states that, with respect to content in which copyright subsists, the content may be subject to bargaining only if the news publisher owns the copyright in it or if the publisher or the negotiating group are authorized to bargain in relation to the content (presumably by the owner of the copyright). Note, however, that Section 23 does not say that an eligible news business (or a group of eligible news businesses) may initiate the bargaining process *only* in relation to news content in which copyright subsists and *only* if they own the copyright in the news content or are otherwise authorized to bargain in relation to it. The absence of the first limitation may reasonably be interpreted as merely clarifying that if copyright in the news content subsists but the news publisher is not the owner then it cannot bargain with respect to that content unless the owner authorized it to do so.

Does this phrasing imply that news publishers can force a news intermediary to bargain with them for payment with respect to public domain news content? Possibly. While it may be tempting to argue that even if the Bill does not say so, it is obvious that news publishers can only bargain with respect to content in which they own copyright and with respect to uses that fall within the scope of their copyrights—after all *nemo dat quod non habet*—the presence of Section 24 weakens such an argument. Section 24 provides:

> For greater certainty, limitations and exceptions to copyright under the Copyright Act do not limit the scope of the bargaining process.

This language suggests that Bill C-18 would mandate bargaining not only over what news publishers are entitled to (uses that fall within the scope of any exclusive rights that they own) but also with respect to uses of news content which, as a matter of law, are intended to be in the public domain and not subject to publishers' control. Granted, Section 24 is enacted "for greater certainty," and accordingly cannot be relied on as a source of an entitlement that does not otherwise exist. But as noted earlier, the definitions in Section 2(2) appear to define entitlement that would not otherwise exist; Section 24 merely confirms that.

III. MANDATED COLLECTIVE BARGAINING

In addition to mandating payments in circumstances that exceed copyright protections, the second crucial element of Bill C-18 is its mechanism for mandating bargaining and collective bargaining between news publishers and intermediaries. Collective action with respect to the use of copyrighted works is not a foreign concept for copyright law. Indeed, Canada's *Copyright Act* has included provisions that allowed for and regulated collective administration of copyrights since 1931.[50] However, the collective bargaining that Bill C-18 contemplates is quite different (if not a mirror image) of collective administration under the *Copyright Act.*

The *Copyright Act*'s regulatory regime with respect to the collective administration of copyright seeks to realize the ease, convenience, and reduced transaction costs via collective administration on the one hand,[51] while protecting users "from the potential exertion of unfair market power by collective societies" on the other.[52] The regulatory scheme attempts to reconcile these somewhat conflicting goals by allowing copyright owners to administer their copyrights collectively (and limiting the competition law liability that such collective action might entail) while regulating copyright collectives' actions, principally by regulating the maximum fees they can charge and "vesting a 'statutory license' in favour of 'everybody who pays or tenders' the approved fee."[53]

The goal in allowing copyright owners to license uses of their work collectively is not to enhance their market power and allow them to charge higher prices than they could have otherwise charge.[54] On the contrary, regulating the fees that collective societies may charge was deemed necessary in order to curb the exercise of excess market power by collective societies.[55] Indeed, following an amendment in 2018, the *Act* now explicitly states that in fulfilling its mandate to set fees that are "fair and equitable," the Copyright Board (the regulatory body empowered to fix collective societies' fees) shall consider "what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints."[56] In other words, the Board is required to set fees that emulate those that would exist in a competitive market.

The stated goal of Bill C-18, by contrast, is the opposite. The Bill does not seek to reduce transaction costs but to permit publishers to bargain collectively to enhance their bargaining power and charge more than they could in a competitive market. This goal is based on a premise that the competitive conditions disfavor news publishers and

50. York Univ. v. Canadian Copyright Licensing Agency (Access Copyright), [2021] S.C.C. 32, ¶ 50 (Can.). *See generally* Ariel Katz, *Spectre: Canadian Copyright and the Mandatory Tariff—Part I*, 27 INTELL. PROP. J. 151 (2015) [hereinafter *Spectre Part I*]; Ariel Katz, *Spectre: Canadian Copyright and the Mandatory Tariff—Part II*, 28 INTELL. PROP. J. 39 (2015) [hereinafter *Spectre Part II*].

51. *York Univ.*, [2021] S.C.C. 32, para. 60 (Can.).

52. *Id.* at para. 67.

53. *Id.* at para. 52 (quoting Vigneux v. Canadian Performing Right Society Ltd., [1943] S.C.R. 348, 353 (Can.)).

54. *Id.* at 64–65.

55. *Id.* at 68–69.

56. Copyright Act (Can.), *supra* note 25, at §§ 29; 66.501(a).

that even when intermediaries make news content available with the publishers' consent, the existence of a "significant bargaining power imbalance"[57] forces the publishers effectively to forgo remuneration. Regulatory intervention, therefore, is supposed to remedy that by imposing on intermediaries an obligation to pay more than they otherwise would and permit the publisher to earn more than they would be willing to accept in the free market.

This difference in goals also affects a difference in the means for accomplishing them. In the case of collective administration of copyrights, the regulatory scheme is constraining vis-à-vis the content owners (who administer the copyrights collectively) but permissive for the users: the regulator (the Copyright Board) sets the maximum fees that the collective can charge, accompanied by a statutory "must sell" requirement—a statutory license under regulated terms.[58] Interested users may avail themselves of that statutory license by paying or offering to pay the regulated fees, but they are they under no obligation to do so. "If a collective society does not have a large enough repertoire or other sources emerge to provide better value, users may find that the collective is not 'the most cost-effective way to obtain licences,' and might prefer to 'negotiate with the right-holders directly, or through other intermediaries.'"[59] Or they might use the works without a license and risk being liable for infringement.[60] In short, the existing collective administration of copyright regime imposes a "must sell" duty on copyright collectives, but there is no "must buy" requirement for users.

Bill C-18 introduces a nearly mirror-image form of regulatory intervention: it is entirely permissive in its treatment of news publishers, while imposing on the intermediaries duties to deal and duties to pay. Rather than attempting to curb or eliminate the exercise of market power by content providers, it seeks to enhance it.

Bill C-18 bears some resemblance to the collective bargaining allowed for under the Canadian federal Status of the Artist legislation,[61] and that of Quebec.[62] These laws apply labor-law collective bargaining models to the relationships between authors and producers.[63] Like Bill C-18, those schemes explicitly provide for the ability to impose

57. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, § 6 (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF], ("[t]his Act applies in respect of a digital news intermediary if, having regard to the following factors, there is a significant bargaining power imbalance between its operator and news businesses[.]").

58. *York Univ.*, [2021] S.C.C. 32, para. 52 (Can.).

59. *Id.* at para. 65 (quoting *Spectre Part I*, *supra* note 50, at 159).

60. Canadian Broad. Corp. v. SODRAC 2003 Inc., [2015] S.C.C. 57, para. 108 (Can.).

61. Status of the Artist Act, S.C. 1992, c 33 (Can.).

62. An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists, C.Q.L.R. c S-32.1 (Can.); An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters, C.Q.L.R. c S-32.01 (Can.).

63. *Spectre Part II*, *supra* note 50, at 64. The federal Status of the Artist Act applies, on the producer side, only to specified federal government institutions and federally regulated broadcasters, while Quebec's scheme is more comprehensive and provides for collective bargaining between recognized creators' associations and producers. *Id.*

minimum terms and conditions for the provision of artists' services and other related matters, including minimum fees that producers should pay for those works, and like labor law models, their *raison d'être* is a perceived imbalance of power between the weak worker/artist and the employer/producer.

Collective bargaining in labor law aims to advance several goals, principally "redressing the unequal balance of bargaining power between employers and employees."[64] Fundamental to the recognition of collective bargaining in labor law was the recognition of the helplessness of the individual employee. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp* (and quoted approvingly by the Supreme Court of Canada in Reference Re Pub. Serv. Emp. Rels. Act (Alta.)):

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment[.][65]

While labor law, the Status of the Artist legislation, and Bill C-18 share similarities in the mischief that they seek to address and the means for remedying it, there is a significant difference between the first two and the third. The beneficiaries of collective bargaining under the Status of the Artist legislation and in labor law are *individual* artists or workers. By contrast, not only are the beneficiaries of Bill C-18 corporations (including the largest media organizations in the country), but the Parliamentary Budget Officer estimated that over seventy-five percent of the generated revenue would go to broadcasters such as Bell, Rogers, and the CBC.[66] Moreover, one of the eligibility criteria for being an "eligible news business" is a requirement to "regularly employ[] two or more journalists in Canada," a requirement that has been criticized for excluding many emerging entrepreneurial news startup that have proliferated across the country.[67] Thus, Bill C-18 grants the largest and most powerful media organizations a

64. Health Servs. and Support—Facilities Subsector Bargaining Assn. v. British Columbia, [2007] S.C.R. 391, para. 57 (Can.).

65. Reference Re Pub. Serv. Emp. Rels. Act (Alta.), [1987] S.C.R. 313, para. 23 (Can.) (Dickson, C.J., and Wilson, J., dissenting) (citing Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)).

66. *Big Cost, Smaller Benefit: Government Modelling Pegs Likely Bill C-18 Revenues at Less Than Half of Parliamentary Budget Officer Estimates*, MICHAEL GEIST (Dec. 8, 2022), https://www.michaelgeist.ca/2022/12/big-cost-smaller-benefit [https://perma.cc/J6RD-NV5C] [https://web.archive.org/web/20230210210047/https://www.michaelgeist.ca/2022/12/big-cost-smaller-benefit].

67. INDEPENDENT ONLINE NEWS PUBLISHERS OF CANADA, BRIEF ON BILL C-18, THE ONLINE NEWS ACT, PRESENTED TO THE HOUSE OF COMMONS STANDING COMMITTEE ON CANADIAN HERITAGE 4 (Sept. 26, 2022), https://www.ourcommons.ca/Content/Committee/441/CHPC/Brief/BR11966324/br-external/IndependentOnlineNewsPublishersOfCanada-e.pdf [https://perma.cc/7HVR-MHCT] [https://web.archive.org/web/20230215165139/https://www.ourcommons.ca/Content/Committee/441/CHPC/Brief/BR11966324/br-external/IndependentOnlineNewsPublishersOfCanada-e.pdf].

right to enhance their bargaining power through collective bargaining but denies that right from the smallest and least powerful.

IV. OVERBROAD COMPETITION LAW EXEMPTIONS

Normally, in the absence of statutory authorization to do so, news publishers who sought to engage in the type of collective bargaining that Bill C-18 contemplates could easily run afoul Section 45(1)(a) of the *Competition Act*, which prohibits competitors from conspiring, agreeing, or arranging "to fix, maintain, increase or control the price for the supply of [their] product."[68] Violating this prohibition may give rise to criminal and civil liability. Although the explicit authorization in the Online News Act to bargain collectively (and consequently allow news publishers to earn more than they otherwise would) could be relied on for denying such liability,[69] including an explicit exemption makes sense, if only for the sake of increasing certainty and predictability.

Bill C-18 contains such an explicit exemption but it also extends more broadly, potentially immunizing anti-competitive conduct that is not required for accomplishing the objective of the Online News Act. Thus, Section 47 provides exemptions with respect to "covered agreements" (i.e., agreement that are entered into as a result of bargaining sessions or mediation referred to in Section 19, including the arbitration panel decision)[70] and Section 48 provides additional exemptions with respect to "other agreements," namely, those entered into by an operator and a group of news publishers outside the statutory bargaining process.

The competition law exemptions provided for in these sections are broader than necessary for several reasons. First, the exemption from Section 45 of the *Competition Act* applies to the entire section, not only to Subsection 45(1)(a). As noted, Subsection

68. Competition Act, R.S.C. 1985, c. C-34, § 45(1)(a) (Can.).

69. Such immunity may be based on several interpretative doctrines and principles. One such principle is "implied exception," according to which "[w]hen two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general." *See* RUTH SULLIVAN, THE CONSTRUCTION OF STATUTES § 11.05(6) (7th ed. 2022). Alternatively, the recency of the Online News Act could also be relied on for invoking the rule of "implied repeal" whereby "[w]hen two provisions are in conflict and the conflict cannot be resolved through other means, the more recently enacted provision prevails over and excludes the application of the earlier one." *Id.* at § 11.05(7). A third route could be applying the Regulated Conduct Defence (RCD). As the Competition Tribunal explained recently "the RCD began as a common law doctrine that provided a form of immunity from certain provisions in the precursors of the [Competition] Act for persons alleged to have contravened these provisions. The doctrine evolved to be applied where the conduct giving rise to the alleged contravention was required, directed or authorized, expressly or impliedly, by other validly enacted legislation[.]" The Comm'r of Competition v. Vancouver Airport Auth., 2019 Comp. Trib. 6, para. 187 (Can.). However, since historically the RCD evolved to address conflicts between the federal *Competition Act* and provincial legislation, it is not clear whether it is also available when the authorizing legislation is federal. *Id.* at para. 200.

70. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, § 47 (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF].

45(1)(a) deals with agreements between competitors with respect to prices, which is ostensibly what Bill C-18 wishes to allow. However, Subsection 45(1)(b) deals with agreements to "allocate sales, territories, customers or markets for the production or supply of the product" and Subsection 45(1)(c) deals with agreements "to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product." Consider the effect of exempting these additional subsections. Suppose that in an agreement that two national newspapers negotiate with Google, they propose to allocate the ads that Google serves on their respective websites on a territorial basis (e.g., that ads from local advertisers based in Eastern Canada would be served primarily on the website of Newspaper A while Newspaper B would be served primarily with ads of advertisers from Western Canada. Such an agreement could be lucrative for the newspapers (who could charge a higher price to the advertisers who now face fewer ad outlets) and for Google (who could earn a higher commission from the higher advertising fees). An agreement where Newspaper A undertakes to limit its coverage of local news to stories from Eastern Canada while Newspaper B covers local stories from the West could have a similar effect of increasing the market power of the newspapers relative to local advertisers (and can also contribute to the newspapers' bottom line by allowing them to reduce the costs required for covering local news—to the detriment of readers). Or consider an agreement where Google offers the newspapers a higher payment in exchange for allowing it to veto the publication of stories that it considers harmful to its interests. While such anticompetitive agreements may contribute to the newspapers' profitability, making them lawful has nothing to do with the mischief that Bill C-18 is supposed to remedy. Yet, such agreements, which otherwise would be illegal under subsections 1(b) and 1(c), would become legal under Bill C-18.

Second, in addition to the exemption from Section 45, Bill C-18 also provides a blanket exemption from Section 90.1. Section 90.1 concerns "agreement or arrangement—whether existing or proposed—between persons two or more of whom are competitors [that] prevents or lessens, or is likely to prevent or lessen, competition substantially in a market," and it empowers the Competition Tribunal on application by the Commissioner to prohibit any person from doing anything under such an agreement or arrangement as well as issue consent orders that require taking any other action.[71]

Although Sections 45 and 90.1 both concern agreements or arrangements that involve competitors, there are important differences between them. Section 45 defines a criminal offence (which may also give rise to liability for damages under Section 36), while Section 90.1 involves a civil-administrative proceeding which may only result in injunctive relief. Section 45 concerns a narrow set of agreements or arrangements between competitors (horizontal), the commission of which constitutes a *per se* offence, i.e., no proof of adverse effect on competition is required.[72] Section 90.1 applies potentially to a wider variety of collaborations between competitors but remedy is available only if the Commissioner of Competition can prove that the collaboration

71. Competition Act, R.S.C. 1985, c. C-34, § 90.1 (Can.).
72. *Comm'r of Competition*, 2019 Comp. Trib. 6, at para. 243.

prevents or lessens competition substantially or is likely to prevent or lessen it substantially.

It is not clear why a blanket exemption from potential application of Section 90.1 is warranted because the section itself includes two subsections which could allow the Competition Tribunal to deny an order in circumstances where granting it would frustrate the goals of the Online News Act. One such subsection is subsection 90.1, which provides:

> (4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

If, as some proponents of Bill C-18 argue, the collective bargaining that it contemplates is required to remedy the monopsony power yielded by Google and Facebook against newspaper publishers, and if it is true that without such intervention the quantity and quality of news reporting would decrease, then the requirements set out in subsection 90.1(4) may be fulfilled because the collective bargaining would result in greater and better news output (i.e., gains in allocative efficiency). At the very least, Section 90.1 could be useful for ensuring that collective bargaining would be limited to those circumstances where its efficiency gains would outweigh and offset the anti-competitive harms.

In addition, subsection 90.1(2) provides a non-exhaustive list of considerations that the Tribunal may consider in deciding whether to make the finding referred to in subsection (1). The last of those enumerated consideration is "any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement."[73] Arguably, Parliament's explicit decision to permit collective bargaining to remedy a perceived mischief is a relevant consideration.

Third, in addition to these exemptions from Sections 45 and 90.1 of the *Competition Act*, Bill C-18 places an additional procedural/evidentiary obstacle on the Competition Bureau's ability to scrutinize anti-competitive actions that are not exempted. This obstacle stems from the confidentiality provisions in Section 55. The Bill contemplates involvement of the Canadian Radio-television and Telecommunications Commission (CRTC), and Section 53 imposes a duty on an operator or news business to provide the CRTC with any information that it requires for the purpose of exercising its powers or performing its duties and functions. In turn, Section 55 allows those who provide such information to designate it as confidential. If they do, then on the one hand, Sections 55(4)(b) & 55(5)(b) empower the CRTC to disclose such confidential information or

73. Competition Act, R.S.C. 1985, c. C-34, § 90.1(2)(h) (Can.).

require its disclosure to the Commissioner of Competition if the information is relevant to competition issues before the CRTC.[74] But on the other hand, the Commissioner of Competition (and any individual whose duties involve the administration and enforcement of the *Competition Act*) are prohibited from using the information for any other purpose other than facilitate the Commissioner's participation in the specific Online News Act proceedings in which the information was disclosed.[75] Thus, even if disclosed information reveals the existence of anti-competitive acts or practices that are unrelated to or exceed the scope of the bargaining process under the Online News Act, the Commissioner of Competition is prohibited from using that information, for example, to open an investigation into those acts or practices. This prohibition may allow parties to misuse the bargaining process as a method for laundering anti-competitive behavior and immunizing it from scrutiny.

In sum, Bill C-18 unnecessarily grants newspaper publishers—as well as online platforms with whom they negotiate—overbroad exemptions from the application of Canada's *Competition Act*. These exemptions potentially shield from scrutiny more anti-competitive acts than is necessary for attaining the goals of the Online News Act. Paradoxically, amendments to the *Competition Act* from last year were enacted to make it easier to remedy anti-competitive practices that may arise in digital commerce.[76] Bill C-18 undermines many of them.

V. SEDATING DEMOCRACY'S WATCHDOGS

The press has often been viewed and described as the "watchdog of democracy."[77] It performs this role through "(1) independent scrutiny by the press of the activities of government, business, and other public institutions, with an aim toward (2) documenting, questioning, and investigating those activities, in order to (3) provide publics and officials with timely information on issues of public concern."[78]

Following years of internet utopianism, the belief in the internet's capacity and promise to bring about a more decentralized, democratic, free, and just society, recent years have seen reckoning with the threat that the growth and dominance of internet platforms may pose. As the Executive Summary of a 2020 report from the Brookings Institute noted:

> In the four years since the last U.S. presidential election, pressure has continued to build on Silicon Valley's biggest internet firms: the

74. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, §§ 55(4)(b), (5)(b) (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF].

75. *Id.* at § 55(6).

76. *Guide To the 2022 Amendments To the Competition Act*, *supra*, note 16.

77. Christian Leblanc, Marc-André Nadon, & Émilie Forgues-Bundock, *The Journalist-Source Privilege in Quebec Civil Law: Globe and Mail v. Canada (Attorney General)*, 54 SUP. CT. L. REV. 273 (2011).

78. W. Lance Bennett & William Serrin, *The Watchdog Role*, *in* THE PRESS 169, 169 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

> Cambridge Analytica revelations; a series of security and privacy missteps; a constant drip of stories about discriminatory algorithms; employee pressure, walkouts, and resignations; and legislative debates about privacy, content moderation, and competition policy. The nation—indeed, the world—is waking up to the manifold threats internet platforms pose to the public sphere and to democracy.[79]

If Google and Facebook pose manifold threats to the public sphere and to democracy itself, then the free press must play a vital role in scrutinizing them. Yet, Bill C-18 (and similar legislative/regulatory interventions in other countries) undermines the press' incentive to do so. If payments from Google and Facebook are crucial for the economic survival of news publishers—as proponents of the legislation maintain—then those publishers will become financially dependent on Google and Facebook. Rather than serving as a vigilant watchdog scrutinizing the practices of these companies and the business models that undergird their dominance, Bill C-18 threatens to make news publishers dependent on these business models and turns them into stakeholders with strong interest in their maintenance. Rather than invigorating the watchdog, Bill C-18 sedates it.

In elaborating the Supreme Court's characterization of copyright role as "engine of free expression,"[80] Neil Netanel describes several ways in which copyright promotes free speech. One of them is copyright's "structural function," by which he refers to copyright's capacity to support "a sector of authors and publishers who look to the market, not government patronage, for financial sustenance and who thus gain considerable independence from government influence."[81] Historically, copyright was seen as an antidote to the ills of an earlier period when writers' and artists' heavy dependence on royal, feudal, and church patronage "undermined expressive autonomy and thwarted the development of a vital, freethinking intelligentsia."[82] According to Netanel, this historical structural function of copyright still has purchase,[83] and copyright "provided the financial wherewithal for authors and publishers to create and disseminate expression, information, and opinion without having to curry favor from ministers and nobles, or their potential counterparts in the new Republic."[84]

From this perspective, if government intervention is required to ensure the vitality of democracy's watchdog, then Bill C-18 provides an ill-advised and counterproductive solution to whatever problems newspapers are facing, because making newspapers

79. Josh Simons & Dipayan Ghosh, *Utilities for Democracy: Why and How the Algorithmic Infrastructure of Facebook and Google Must Be Regulated*, BROOKINGS INSTITUTION (Aug. 2020), https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated [https://perma.cc/EL3P-NFFW] [https://web.archive.org/web/20230210211742/https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated].

80. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1984).

81. NEIL W. NETANEL, COPYRIGHT'S PARADOX 81 (2008).

82. *Id.* at 90.

83. *Id.* at 93.

84. *Id.* at 89.

dependent on Google and Facebook introduces another type of patronage, not that of ministers and nobles but of those digital platforms. In fact, this kind of patronage may be even more problematic because these contemporary patrons yield an enormous amount of power but, as private enterprises, are even less accountable than modern governments. The fact that this patronage does not depend on the benevolence of these platforms and that an obligation to pay may be imposed on them through the mandatory arbitration process does not undermine this concern. Whether the payment in voluntary or not, the platforms' ability to pay depends on their business models. As Siva Vaidhyanathan noted succinctly: "The problem with Facebook is Facebook," by which he meant that the various problems with Facebook, including the challenges it has posed for democracy, are not accidents but a direct result of how it was designed to function.[85] Addressing these problems require vigilant watchdogs, not sedated by being dependent on that design.

In 2021, when the Senate of Canada was debating Bill S-225, a precursor of Bill C-18, Mr. Edward Greenspon, a former editor-in-chief of the Globe and Mail, who testified before the Senate Standing Committee on Transport and Communications warned:

> [I]nviting the platforms to negotiate deals with individual publishers can badly distort the information marketplace. People have expressed concerns for decades that advertisers influence news agendas. In fact, it was rare to find an advertiser that had enough of a market share, more than 1% or 2% of a publisher's total revenues, to do so. In contrast, I can well imagine a platform accounting for 10% or more of a news organization's revenue under this system. They have massive public policy agendas of their own, including tax policy, regulatory oversight, data, et cetera.[86]

85. SIVA VAIDHYANATHAN, ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY (2018).

86. Standing Senate Committee on Transport and Communications (43rd Parliament, 2nd Session), SENATE OF CAN. (2021), https://sencanada.ca/en/committees/trcm [https://perma.cc/C93X-VMEL] [https://web.archive.org/web/20230308235829/https://sencanada.ca/en/committees/trcm]. *See also* Senator Paula Simons, *SPEECH: Sen. Simons on why Bill C-18 is the wrong response to Canada's journalism crisis*, YouTube (Feb. 10, 2023), https://youtu.be/Sw44rJS2TTw [https://perma.cc/64GQ-U39G] [https://web.archive.org/web/20230309005940/https://www.youtube.com/watch?v=Sw44rJS2TTw].

VI. CONCLUSION: IS IT WORTH IT?

Bill C-18 is one of recent attempts by governments in several countries to address a perceived crisis-level disruption to the newspapers' finances[87] by requiring internet platform operators to pay for newspapers' content displayed on their platforms. The underlying assumption behind the proposed legislation is that of fundamental unfairness in the relationships between news publishers and internet platforms.

To achieve its purported purpose of "enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability,"[88] Bill C-18 adopts several extraordinary measures: it entitles news publishers to payments in circumstances that exceed what publishers are entitled to under the *Copyright Act*; it permits collective bargaining—effectively cartelizing the media—in circumstances that exceed what labor law or Canada's Status of the Artist legislation recognize; and it provides an excessive exemption from scrutiny under the *Competition Act*. And it seeks to implement these remarkable measures on the basis of a mix of questionable assumptions.

There is no question that a robust newspaper publishing industry is crucial for ensuring the health of Canadian democracy, and if democracy's watchdogs indeed face a crisis, then government action to support it may be justified. It is essential, however, that the chosen remedy be based on a proper diagnosis of the problem. Unfortunately, the Bill is based on a misdiagnosed problem, and counterproductively, by allowing Canada's media organizations, including the largest among them, to bargain collectively and shielding them from effective competition law oversight, and by making them financially dependent on internet platforms and the business models that have facilitated their growth, the Bill threatens to sedate the watchdogs that it is supposed to sustain.

87. *See generally* MINOW, *supra* note 2.

88. Bill C-18, *Online News Act*, 1st Sess., 44th Parl., 2022, § 2(1) (as Passed by the House of Commons, Dec. 14, 2022) (Can.), https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF [https://perma.cc/676H-VFA6] [https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF].