

THE COLUMBIA JOURNAL OF  
**LAW** *the* **ARTS**

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A QUARTERLY JOURNAL OF LAW AND THE ARTS,  
ENTERTAINMENT, COMMUNICATIONS, AND INTELLECTUAL PROPERTY

**2022 SYMPOSIUM OF THE KERNOCHAN CENTER FOR LAW, MEDIA, AND THE ARTS:  
“Under PRESSure: Legal Protections, Regulations,  
and the Future of Press Publishing”**

Digitization and the Value of Intermediaries in the Market for News

*Lisa M. George*

Blame the Internet, Not Online News Aggregators

*Colin Stretch & Sanjana Parikh*

The Past and Present of Press Publishers’ Rights in the EU

*Edouard Treppoz*

Do Press Publishers Need Additional Copyright Protections?  
Reading the Copyright Office’s Report on Protections for Press Publishers

*Andrew Foglia*

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

*Neil Netanel*

Legislative Options for Supporting Local News:

Alternatives to Copyright Reform

*Dana Scherer*

Addressing the Power Imbalance:  
A Legislative Proposal for Effectuating Competitive Payments  
from Platforms to Newspapers

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Getting Facebook and Google to Pay for News:  
Explaining Australia’s News Media Bargaining Code

*Andrea Carson*

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

*Ariel Katz*

**Vol. 46, No. 3 ♦ Symposium Issue ♦ Spring 2023**

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## Editor's Note on the Symposium Issue

Each academic year, the *Columbia Journal of Law & the Arts* publishes an Issue dedicated to the annual Symposium of the Kernochan Center for Law, Media, and the Arts, which is hosted at Columbia Law School. This year's Symposium was titled "Under PRESSure: Legal Protections, Regulations, and the Future of Press Publishing" and was held on Friday, October 21, 2022. As always, the *Journal* was honored to participate in the event and is pleased to publish the proceedings here.

There are two types of publications in this Issue. Each speaker was asked to select one of the two options: to write an Article based on his or her remarks at the Symposium or to produce a Transcript of his or her remarks. The Articles have been written, edited, and proofread to the same high standard as other academic articles published by the *Journal* in its non-Symposium Issues. The Transcripts have been edited lightly for concision and clarity. The pieces in this Issue are presented in the order in which contributors spoke at the Symposium. The Program of the 2022 Symposium on page *vii* of this Issue reflects the actual order of the speakers on the day of the event.

More information about the 2022 Symposium can be found on the Kernochan Center's website,<sup>1</sup> including readings for the event,<sup>2</sup> biographies of the speakers,<sup>3</sup> and video recording of the event.<sup>4</sup>

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1. The 2022 Symposium webpage is at <https://kernochan.law.columbia.edu/content/symposium-2022-under-pressure-legal-protections-regulations-and-future-press-publishing> [<https://perma.cc/2LNN-X38M>] [<https://web.archive.org/web/20230426032808/https://kernochan.law.columbia.edu/content/symposium-2022-under-pressure-legal-protections-regulations-and-future-press-publishing>].

2. Readings for the 2022 Symposium can be found at <https://kernochan.law.columbia.edu/content/under-pressure-legal-protections-regulations-and-future-press-publishing-readings> [<https://perma.cc/HKQ5-FPU7>] [<https://web.archive.org/web/20230426032504/https://kernochan.law.columbia.edu/content/under-pressure-legal-protections-regulations-and-future-press-publishing-readings>].

3. Speaker biographies for the 2022 Symposium can be found at <https://kernochan.law.columbia.edu/content/under-pressure-legal-protections-regulations-and-future-press-publishing-speaker-bios> [<https://perma.cc/6LE4-3XJC>] [<https://web.archive.org/web/20230426033403/https://kernochan.law.columbia.edu/content/under-pressure-legal-protections-regulations-and-future-press-publishing-speaker-bios>].

4. Video recording of the 2022 Symposium can be found at <https://youtu.be/LMZmgWpFuQY> [<https://perma.cc/6E7R-34L6>] [<https://web.archive.org/web/20230426033105/https://www.youtube.com/watch?v=LMZmgWpFuQY>].





## Program of the 2022 Symposium

### WELCOME REMARKS

*Speaker:*

Philippa S. Loengard

### SESSION I — IS ONLINE NEWS AGGREGATION A PROBLEM?

*Speakers:*

Lisa M. George

Colin Stretch

Emily Bell

*Moderator:*

Philippa S. Loengard

### SESSION II — THE CURRENT STATUS IN THE U.S. AND EU OF IP PROTECTIONS OF PRESS PUBLISHERS' RIGHTS: SHOULD THE U.S. ADOPT ANCILLARY IP RIGHTS?

*Speakers:*

Eduoard Treppoz

Andrew Foglia

Neil Netanel

*Moderator:*

Jane C. Ginsburg

### SESSION III — ANTITRUST AND OTHER REGULATION OF PRESS PUBLISHER/NEWSAGGREGATOR RELATIONS: A SOUNDER APPROACH?

*Speakers:*

Dana Scherer

Hal J. Singer

Andrea Carson

Ariel Katz

*Moderator:*

Shyamkrishna Balganesh



## **Digitization and the Value of Intermediaries in the Market for News**

Lisa M. George<sup>\*</sup>

### **INTRODUCTION**

This short paper presents an economic perspective on factors that shape the market for news in the digital age. Using standard economic concepts of supply, demand, and competition, I offer ways of thinking about the value and impact of search, aggregation, and social networks in the market. I extend these ideas to discuss how royalty payments from platforms to publishers can alter incentives for market participants, with the potential for unintended consequences. The paper synthesizes ideas presented at the 2022 Symposium of the Kernochan Center for Law, Media and the Arts.<sup>1</sup>

### **I. THE ECONOMIC PERSPECTIVE**

Despite popular views to the contrary, economic analysis of the media reaches well beyond the “business side” of the news industry. Economic research studies how agents in the market for information goods—firms, journalists, readers, and advertisers—make choices about what information to produce and what to consume. The pursuit of profit certainly plays a role, since producers have little incentive to publish news and information that does not interest readers and does not attract advertisers. But just as important is the consumer pursuit of value, understanding how readers, watchers, and sharers allocate their scarce time and money to an expanding stock of available information. More than anything else, it is the competition among producers for the scarce attention of consumers that ultimately shapes the outcomes we observe.

Economists connect the forces of supply and demand using models that predict behavior, then test these predictions against real-world data. This process of modeling and testing lies at the heart of economic science. With more than two decades of experience with digital markets, economic research has established some robust empirical facts that show how digital technology has altered supply, demand, and competition in the market for news. Research can also help us understand why

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1. Please contact the author for a copy of the full presentation.

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institutions of search, aggregation, and social networks have emerged as new intermediaries in the market and reveal their effects on both producers and consumers.

Economic analysis goes beyond positive predictions about behavior to offer normative assessments of value. The foundation of normative assessment is the concept of “revealed preference,” the idea that consumers reveal the value of goods and services through their choices. The simple notion that consumers allocate scarce time and money to the products they value most can have far-reaching implications, one of which is that quality is determined through the perspective of those making choices rather than an outside or fixed perspective of good and bad. Another implication of revealed preference is that products available but not consumed have low value despite potentially substantial costs to produce. While it is likely the case that some people have preferences over information consumed by others, the economic framework emphasizes value from those who actually allocate scarce funds and attention.

Economic models can also predict the behavior of agents on the supply side. This is the case not only for prices or business models, but also for content decisions. From an almost limitless set of possibilities, news producers plan and produce bundles of stories with a quantity and perspective expected to deliver maximum subscriber and advertiser revenue at minimum cost. Outlets might vary in their style (formality, political slant, topical emphasis) and production approach (role of editors, freelance reporters), but all share an objective of designing products to maximize profitability given demand.

Technology, costs, and competition all play a role in incentivizing both the amount and nature of content that we observe across news outlets. While firms in perfectly competitive markets are typically incentivized to produce product varieties desired by consumers, structural factors that limit competition can lead to very different outcomes. Through most of the twentieth century, the high cost and slow pace of transporting heavy newspapers across cities in the U.S. limited the size of news markets, typically to the city or county level. Markets for less “perishable” media, such as magazines, could be profitably distributed nationally or over larger geographies. High fixed costs of production further limited the number of firms that could profitably exist in most markets. In the years prior to digitization, few cities had more than two daily newspapers, and many were served by a single outlet.<sup>2</sup>

What were the incentives to produce news and information with this cost structure? Economic models tell us that profit-seeking firms with high fixed costs and minimal competition tend to design products to satisfy an *average* reader. Advertiser funding creates further incentives for newspapers to produce centrist content, as appealing to the median reader at modest prices maximizes readership.<sup>3</sup> The American tradition of

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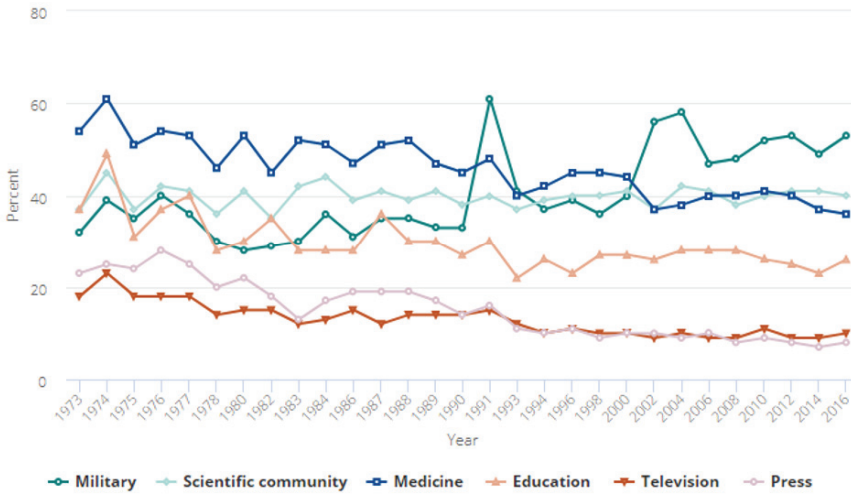
2. For historical background and consolidation trends in newspaper markets, see generally Lisa George, *What's Fit To Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets*, 19 INFO. ECON. AND POL'Y 285 (2007).

3. The alternative to centrist products at modest prices being targeted products at higher prices, which might reduce sales but raise subscription revenue. For empirical evidence of how the rise of advertiser funding shifted publisher incentives to produce centrist rather than partisan coverage, see Maria Petrova, *Newspapers and Parties: How Advertising Revenues Created an Independent Press*, 105 AM. POL. SCI. REV. 790, 790–808 (2011).

urban dailies with centrist coverage stood in contrast to the organization of news markets in more densely-populated European countries with national papers with partisan orientation. Overall, the organization of the U.S. newspaper market is a product of high production and transport costs over a large geographic area, limiting the potential for content competition.<sup>4</sup>

**II. DEMAND TRENDS: TRUST AND POLARIZATION**

Economics teaches that demand can shift independent of supply concerns. In the US, social surveys indicate that demand for news and information was changing well before the digital era, in some cases before suppliers faced incentives to satisfy that demand. Political polarization and declining institutional trust are two related social trends that began in the 1970s but set the stage for changes in news markets later observed in the digital era.



**Figure 1: Public Confidence in Institutional Leaders, 1973–2016<sup>5</sup>**

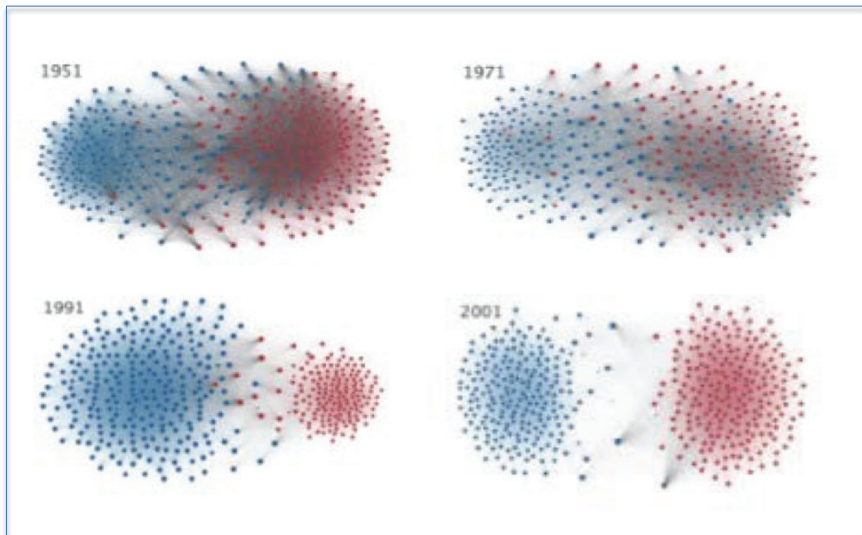
The General Social Survey has recorded declining trust in civic institutions since the 1970s. The steepest declines were in the 1990s, leveling off in the following decades. Figure 1 reports GSS responses related to institutional trust from 1973 through 2016.<sup>6</sup>

4. The incentives of news firms to enter markets and position products in response to demand is explored in Lisa George & Joel Waldfoegel, *Who Affects Whom in Daily Newspaper Markets?*, 111 J. POL. ECON. 765 (2003).

5. NAT'L SCI. BD., *SCIENCE & ENGINEERING INDICATORS 2018 CHAPTER 7*, 63 (2018).

6. The General Social Survey (GSS) is a project of the independent research organization NORC at the University of Chicago, with principal funding from the National Science Foundation. The Figure reports responses to the following question: "As far as the people running these institutions are concerned, would

A few points in the Figure are worthy of note. Even in the 1970s, trust in media lay below trust in other institutions such as education, science, and the military. The gap between trust in media and other institutions also widened over time. Trust in media *relative to* other institutions came to be important in the digital era.



**Figure 2: Division of Democrat and Republican Party Members Over Time<sup>7</sup>**

In the years preceding digitization, large-scale social surveys also reported increasing measures of political polarization. For example, the share of individuals describing their political preferences as moderate fell from about forty-three percent in 1992 to thirty-five percent in 2019.<sup>8</sup> Observational studies of polarization in politics show even more pronounced trends than survey responses. For example, Figure 2 shows within-party and cross-party cooperation in roll-call votes in Congress in 1951, 1971, 1991, and 2001. Cross-party cooperation was not uncommon in the 1950s, less common in the 1970s, rare in 1990s, and close to zero after 2000.<sup>9</sup>

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you say that you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?" The Figure shows the share of respondents indicating "a great deal of confidence." Additional trends are detailed in the full report. NAT'L SCI. BD., *supra* note 5.

7. Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS ONE, Apr. 21, 2015, at 6 n.4, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0123507> [<https://perma.cc/A8JL-HAMS>] [<https://web.archive.org/web/20230126021056/https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0123507>].

8. Lydia Saad, *Americans' Political Ideology Held Steady in 2020*, GALLUP (Jan. 11, 2021), <https://news.gallup.com/poll/328367/americans-political-ideology-held-steady-2020.aspx> [<https://perma.cc/N2MM-5S3D>] [<https://web.archive.org/web/20230126021343/https://news.gallup.com/poll/328367/americans-political-ideology-held-steady-2020.aspx>].

9. Andris et al., *supra* note 7, at 1–14. The Figure depicts each member of the U.S. House of Representatives as a single node. Republican (R) representatives are in red and Democrat (D) representatives

Increased polarization and declining trust in media altered underlying demand for news and information before the digital transition even while supply constraints still limited the number and design of products offered to consumers. The most direct evidence of demand for partisan slant comes from daily newspaper readership. A groundbreaking methodological study of news coverage measured the left-right slant of over 400 daily newspapers by comparing language recorded in comprehensive full-text news databases to language used by Republican and Democrat in speeches in the House of Representatives. One robust finding was that partisan slant is strongly correlated with vote shares, with newspapers in liberal cities more left-leaning than newspapers in conservative regions.<sup>10</sup>

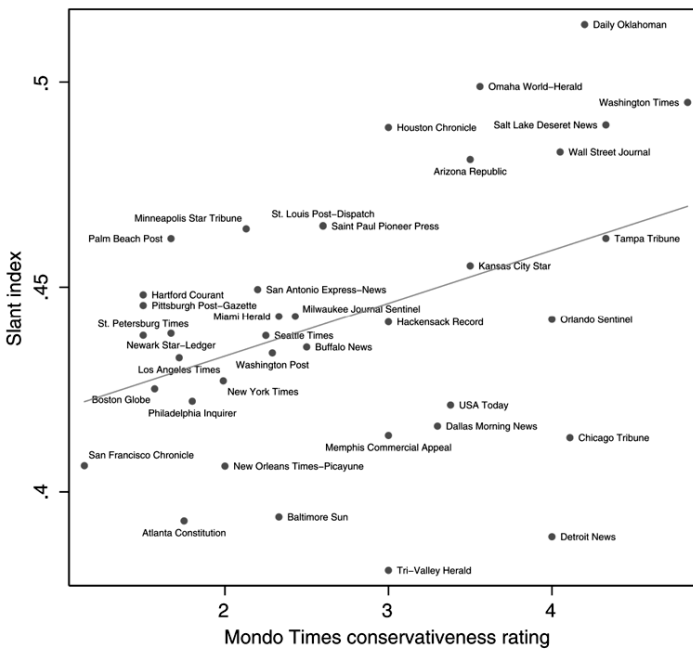


Figure 3: Language-Based and Reader-Submitted Ratings of Partisan Slant<sup>11</sup>

are in blue, with edges representing cross-party cooperation on roll-call votes. See source for methodological details.

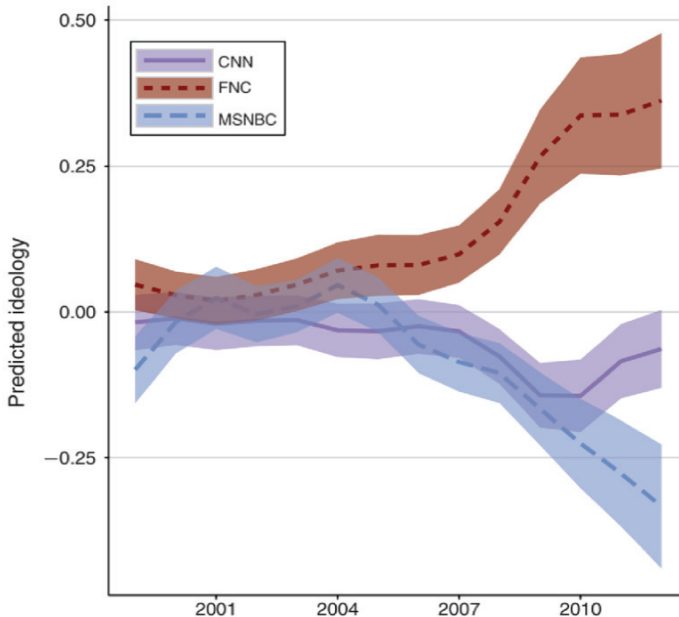
10. Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 *ECONOMETRICA* 35, 71 n.1 (2020), <https://www.jstor.org/stable/25621396> [https://perma.cc/UMF4-BV3B] [https://web.archive.org/web/20230126021601/https://www.jstor.org/stable/25621396]. Gentzkow and Shapiro extend methods used by Groseclose and Milyo that measured slant using references to politically-aligned think tanks using large text archives. See Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 *Q. J. OF ECON.* 1191, 1191–1237 n.4 (2005), <https://www.jstor.org/stable/25098770> [https://perma.cc/S8P9-UHV3] [https://web.archive.org/web/20230126021801/https://www.jstor.org/stable/25098770].

11. Gentzkow & Shapiro, *supra* note 10, at 47.



For perspective, Figure 3 reports the Gentzkow and Shapiro (2010) measure of slant against user ratings collected by the media directory website Mondo Times ([mondotimes.com](http://mondotimes.com)) for a set of papers included in both data sources. The Mondo Times ratings use a five-point scale of one (liberal) to five (conservative) and are highly correlated with the language-based measure. The authors show that their language-based measure of slant for their full sample of 433 news outlets is highly correlated with standard measures of partisanship such as vote shares and campaign contributions.<sup>12</sup>

The central result of the study, however, is not the slant index itself, but the finding that newspaper readership is correlated with pro-attitudinal slant. Republicans in liberal cities are less likely to read the local newspaper than Democrats in those cities, and Democrats in conservative cities are less likely to read the newspaper than Republicans in those cities. In other words, consumers revealed a preference for coverage aligned with political preferences in markets characterized by few products and take-it-or-leave-it choices.<sup>13</sup>



**Figure 4: Estimated Ideology by Channel Year<sup>14</sup>**

12. *Id.* The authors' Figures 4–6 show correlations between measured newspaper slant and local partisan shares, which are strongly positive.

13. *Id.*

14. Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565, 2574 n.9 (2017), <https://www.aeaweb.org/articles?id=10.1257/aer.20160812>. [<https://perma.cc/>

Without fundamental changes to the supply-side factors that limited competition in news markets and incentivized centrist content, shifts in demand toward news aligned with political viewpoints did not have major effects on newspaper markets. It was only with the expansion of cable television in the 1980s and associated expansion in channel capacity that news firms began to offer partisan news to satisfy underlying demand.

While systematic studies of slant in cable television are few, textual analysis has also been used to measure trends in partisan coverage on CNN, Fox News, and MSNBC from 2000 to 2012. Results show modest partisan slant from 2000 until about 2004, increasing thereafter, with trends reported in Figure 4.<sup>15</sup> But with competition in newspaper markets still restricted by high costs, the scope for preferences for pro-attitudinal coverage remained limited.

It is worth noting that preference for pro-attitudinal coverage was not the only aspect of demand to have been shifted in the years preceding digitization. In particular, the demand for national relative to local news also changed. Expansion of satellite technology allowed *USA Today* and later the *New York Times* to print and deliver in multiple cities, which in turn enabled them to compete for home delivery with local newspapers across the country. National circulation of both papers spread rapidly through the 1990s.<sup>16</sup>

Empirical studies of newspaper circulation and textual analysis of content show that national expansion of the *New York Times* reduced sales of urban dailies, especially among highly educated readers. Competition from the *Times* also induced shifts in coverage toward local content at competing daily papers.<sup>17</sup> The internet accelerated this trend, reducing circulation of daily newspapers and inducing shifts toward local coverage even before widespread availability of broadband and digital platforms.<sup>18</sup> The spread of technologies bringing new competition to local markets revealed unsatisfied aspects of demand that were only to grow with full digitization.

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6GSH-J7T6] [<https://web.archive.org/web/20230126021927/https://www.aeaweb.org/articles?id=10.1257/aer.20160812>].

15. *Id.* at 2565–99. The authors present several alternative measures of slant that are consistent with Figure 3. See Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2656 app. (2017), <https://www.aeaweb.org/content/file?id=5278> [<https://perma.cc/5XGS-AZH9>] [<https://web.archive.org/web/20221206233347/https://www.aeaweb.org/content/file?id=5278>].

16. Lisa M. George & Joel Waldfogel, *The “New York Times” and the Market for Local Newspapers*, 96 AM. ECON. REV. 435, 435–47 n.1 (2006), <https://www.jstor.org/stable/30034376> [<https://perma.cc/UK9D-6AS2>] [<https://web.archive.org/web/20230126022335/https://www.jstor.org/stable/30034376>].

17. *Id.*

18. Lisa M. George, *The Internet and the Market for Daily Newspapers*, 8 B.E. J. ECON. ANALYSIS & POL’Y 1, 1–33 n.1 (2008), <https://www.degruyter.com/document/doi/10.2202/1935-1682.1944/html> [<https://perma.cc/V9YT-XWWQ>] [<https://web.archive.org/web/20230126022435/https://www.degruyter.com/document/doi/10.2202/1935-1682.1944/html>].

### III. SUPPLY TRENDS: TECHNOLOGY AND COMPETITION

It is hard to overstate the effects of high-speed internet on the supply of media products of all kinds—news, information, music, video, etc. In economic terms, technology reduced the up-front or “fixed” costs of producing content and reduced the per-unit costs of distributing products to far-flung consumers. Lower up-front costs reduced the barriers to entering markets, bringing about an explosion in the quantity and variety of news and information produced. The explosion of digital information was not limited to news from established publishers, but included material from government, educational, and commercial sources as well as independent experts seeking to access consumers directly. Lower distribution costs united products formerly separated by geography (national, local, global) or format (television, print, radio) into a single digital market. The shift from insulated monopoly producers to massive global competition was the most profound shock induced by digitization, from which many publishers never recovered.<sup>19</sup>

From the consumer perspective, the explosion of new information options was accompanied by only modest expansion in the time available for consumption. The expansion in choice without increase in time introduced consumption costs not present in the predigital world. In other words, realizing the benefit of higher quality content matched to individual preferences required expenditure of time on search and discovery. All else equal, many consumers also wanted to read articles popular with others, adding further costs of selecting content of highest social value. In short, search, discovery and social connection imposed new costs on consumers at the same time production and distribution costs were falling for news producers.<sup>20</sup>

The new media institutions of search, aggregation, and social media arose directly to help consumers minimize the costs of discovering the best content at any point in time. Today, consumers that access news via platforms and social media show higher overall information consumption and greater appetite for variety than those who access news through direct access to individual outlets. Of course, many consumers still prefer news from established brands such as the *New York Times* and subscribe to these outlets. But many, many people have revealed that content from news media is highly substitutable across news providers as well as between news outlets and other sources.<sup>21</sup>

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19. George & Waldfogel, *supra* note 16. Early insights on the link between fixed costs, distributional costs and competition in the digital era were documented in CAL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1999).

20. *Id.* For a discussion of time and attention tradeoffs in news consumption, see Lisa George & Christiaan Hogendorn, *Aggregators, Search and the Economics of New Media Institutions*, 24 INFO. ECON. POL'Y 40 (2012).

21. This result appears in several empirical studies of aggregators. See, e.g., Lisa George & Christiaan Hogendorn, *Local News Online: Aggregators, Geo-targeting and the Market for Local News*, 68 J. INDUS. ECON. 780 (2020); Susan Athey, Markus Mobius & Jenő Pal, *The Impact of Aggregators on Internet News Consumption* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28746, 2021); Ro'ee Levy, *Social Media, News Consumption, and Polarization: Evidence From a Field Experiment*, 111 AM. ECON. REV. 831 (2021). Time and attention tradeoffs also play an important role in theoretical studies of aggregation. See George & Hogendorn, *supra* note 20; Larbi Alaoui & Fabrizio Germano, *Time Scarcity in the Market For News*, 174 J. ECON. BEHAV. ORG. 173 (2020).

Some empirical evidence shows that the small costs of search and discovery do affect consumption. One example comes from the 2010 introduction of personalized geographic targeting on Google News. At that time, Google added to the landing page a permanent strip of links to articles associated with the location of the user's IP address with a goal of promoting discovery of local content. The geo-targeted links did increase visits to local news sites. However, the targeted content shifted consumption by only a small magnitude from a very low base, suggesting that low interest in local news arises from lower demand relative to other content rather than due to search costs.<sup>22</sup>

A more broad-based study based on the full shutdown of Google News in Spain showed that the shutdown of Google News reduced news consumption by 20% for Google News (treated) users. The shutdown also reduced page views on publisher sites outside of Google News by 10%, with effects concentrated on smaller outlets.<sup>23</sup> In other words, consumption lost with closure of Google News was not replaced by direct visits. Taken together, this research suggests that aggregation works to increase demand for news, especially for smaller outlets.

Increased quantity and variety of news consumed is a first-order effect of the content explosion caused by digitization, as is the emergence of intermediaries that match content to consumer preferences. Other effects of digitization are secondary from the consumer standpoint but still have important industry implications. The desire to share news links with commentary on social media creates strong network effects in media, in other words raises the demand to read and share what others are reading and sharing. Network effects tend to concentrate attention into a smaller number of sources. This is despite the first-order effects of increased availability and consumption of niche products. The net effect in news has been concentration of attention onto a small number of large outlets such as the *New York Times* and *Washington Post* while smaller producers struggle to find audience. Empirical findings indicates that, as predicted by theory, aggregators benefit smaller producers more than large ones.<sup>24</sup>

The popularity of news sharing also alters incentives on the supply side. Whereas advertiser funding tends to incentivize neutral content that maximizes viewing, subscriber funding and, especially, social networks can work in the opposite direction. This is because readers tend to share content that appeals to emotion. In this regard search and aggregation are different than social media, with success in social media more driven by sensational coverage.<sup>25</sup>

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22. See George & Hogendorn, *supra* note 21.

23. See Athey et al., *supra* note 21.

24. The tendency of digital markets to both enhance the market share of superstars while also supporting "long-tail" of niche content is at this point a well-documented feature of digital markets for music, books and other digital media, see ERIK E. BRYNJOLFSSON, YU (JEFFREY) HU & MICHAEL D. SMITH, RESEARCH COMMENTARY: LONG TAILS VS. SUPERSTARS: THE EFFECT OF INFORMATION TECHNOLOGY ON PRODUCT VARIETY AND SALES CONCENTRATION PATTERNS, 21 INFO. SYS. RSCH. 736-47(2010). Aggregators disproportionately affect visits to smaller outlets. See George & Hogendorn, *supra* note 21; Athey et al., *supra* note 21; Leslie Chiou & Catherine Tucker, *Content Aggregation by Platforms: The Case of the News Media*, 26 J. ECON. MGMT. STRATEGY 782 (2017).

25. For an early study of how affect impacts sharing, see Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MKTG. RSCH. 192 (2012).

#### IV. POLICY, INCENTIVES, AND CONSEQUENCES

With this background on how demand, supply, and competition affect equilibrium outcomes in news markets, it is possible to make some predictions about the positive and normative effects of policy interventions.

I've noted above that underlying features of demand for news and information such as preference for pro-attitudinal coverage, for variety, and for non-local content emerged before digitization, so underlying consumer preferences are unlikely to be altered by new policies. Instead, outcomes will be determined by how agents on the supply-side—intermediaries and publishers—alter product offerings when faced with new incentives established by policies. Consumer responses to product adjustments will in turn establish the new outcomes.

The intervention currently favored by media outlets is royalty fees paid by platforms to publishers.<sup>26</sup> These fees might be assessed at the outlet level or on a per-article basis, but the overall incentives and therefore effects would be similar. Policies might also include fees for links shared by users on social networks. In each case, however, the ultimate impact of royalty fees will be determined by two demand factors: (1) the extent to which platform users view content from sources without royalties (government, scientific, independent, or in-house content) as close substitutes for publisher content with royalty fees; and (2) the extent to which consumers view publisher news links as adding value to the platform. These two related attributes of demand matter because they determine the profitability of different platform strategies.

To see this, consider the choices of an aggregator such as Google News. Standard profit maximization dictates that Google will link to a particular news article on the Google News page if it is profitable to do so, meaning the incremental revenue from the new link exceeds the cost. In the current environment with no royalties, the new link is posted if the advertising revenue (from time spent on the Google News page) with the new link exceeds revenue from the best alternative link. Stated another way, links are added when the advertising revenue of the new link exceeds the opportunity cost of removing the best alternative link.

With royalty fees, a link to a publisher article is profitable only if the incremental revenue from the new article *less the royalty cost* exceeds revenue from the next best.

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26. This approach has been favored by major publishers such as NewsCorp since early in the digital era. See, e.g., Roy Greenslade, *Murdoch and Curley To Google: Pay Up!*, THE GUARDIAN (Oct. 9, 2009, 8:31 AM), <https://www.theguardian.com/media/greenslade/2009/oct/09/rupert-murdoch-associated-press> [<https://perma.cc/4GWQ-ASQM>] [<https://web.archive.org/web/20230308190420/https://www.theguardian.com/media/greenslade/2009/oct/09/rupert-murdoch-associated-press>]. Print and broadcast news organizations more recently pressed for payments through support of the Journalism Competition and Preservation Act. See *Pass Journalism Competition and Preservation Act: Editorial*, AP NEWS (Oct. 26, 2018), <https://apnews.com/article/419b70b2ae674239bf2fd4dee1b34e61> [<https://perma.cc/VYP9-CPD6>] [<https://web.archive.org/web/20230308191228/https://apnews.com/article/419b70b2ae674239bf2fd4dee1b34e61>]. For broadcast news, see *Testimony of Joel Oxley at Congressional Hearing on Journalism Competition and Preservation Act*, NAT'L ASSOC. OF BROAD. (Feb. 2, 2022), <https://www.nab.org/documents/newsroom/pressRelease.asp?id=6375> [<https://perma.cc/KNQ7-FEM6>] [<https://web.archive.org/web/20230308191615/https://www.nab.org/documents/newsroom/pressRelease.asp?id=6375>].

This changes the tradeoff for Google from one of selecting the best link for consumer engagement to one of selecting the best link for consumer engagement less royalty cost. In other words, the quality threshold for linking to a publisher article with royalty is higher than for linking to content without a royalty cost. If royalties for some articles were higher than for others, the quality threshold for including a high royalty link would be higher than for a lower priced link. With a higher threshold for profitability, Google would be expected to include fewer publisher links on the Google News page relative to alternative sources, with the quantity of publisher links falling with higher royalty prices.

What will determine the number of publisher links in practice is how consumer engagement with Google News varies with the type of links on the Google News page. If consumers view articles from sources without royalties (independent journalists, in-house coverage, educational or government sources) as close substitutes for publisher articles, then time spent on the Google News page would not be highly sensitive to the type of links posted. This means that the difference in advertising revenue from publisher links relative to other links would be small and may not exceed the royalty cost. In this case it would not be profitable for Google to include many links to articles with royalties. This decision might be made at the level of individual user, so some users would see publisher links and others might not. Overall, if most users viewed articles from non-royalty sources as close substitutes for publisher content, links to publisher articles on the Google News page would fall, possibly to zero. This implies that *visits* to publisher sites would fall, and publishers would earn minimal royalties.

If, on the other hand, users do *not* view royalty-free sources as close substitutes for publisher articles, removing publisher links would reduce the time individuals spend on the Google News platform. In this case, removing publisher links would reduce platform revenue, so it would be profitable for Google to include links for which incremental revenue from attention exceeded royalty cost. Again, the substitutability of articles from the consumer perspective is key, with the most profitable publisher links likely to be those most differentiated from royalty-free content. In this case of more limited substitutability, the quantity of links to publisher content would fall with royalty price but less so for publishers with the most distinctive content from the user perspective. This implies that visits to some publishers' sites would rise and earn royalties, while links to undifferentiated content would shrink or disappear, earning minimal royalties.

It might be the case that consumer time on Google News is so highly dependent on publisher links that removing them would substantially reduce engagement on the Google News page. If the royalty cost is low, it would be profitable to maintain the site with links selected based on the incremental revenue-cost tradeoff described above. However, if royalty prices were high and substitutability low, total royalty costs would exceed the revenue from attention to the Google News page. In this case it would be more profitable to shut down the Google News site altogether than to redesign the site. In this case, news visits would fall, and royalty payments would be zero.

It's worth noting that these scenarios do not require comparisons of publisher content with royalty-free sources on an article-by-article or topic-by-topic basis. What

matters is the engagement attached to a publisher link relative to the next best royalty-free link *on any subject*, which might be drawn from television, magazines, or independent writers. The essential tradeoffs are also the same whether royalties are assessed at the outlet or article level, though the former is likely to produce less diverse links to a smaller set of sources.

The tradeoffs for liking on social media are somewhat different, but the platform strategy would still be governed by a balance between incremental revenue and cost. In the case of sharing, platform users select links to share rather than the platform, which means that users can affect the cost faced by the firm. This choice can include potentially malicious behavior, such as automated sharing. Because a social network has less control over linking and sharing than an aggregator, the cost benefit tradeoff would become a more binary one of whether to allow allowing sharing of particular content at all based on the incremental revenue from engagement less royalty cost.

How likely are these different scenarios? One lesson of research on digital media is that competing products are closer substitutes from the perspective of consumers than publishers expect.<sup>27</sup> Another lesson is that trust matters. If consumers trust information provided by government organizations, scientific sources, or other institutions as much as (or more) than they trust news media, then substitutability between published news articles and primary sources is likely to be high.

Some of the most relevant empirical evidence on substitutability comes from Chiou and Tucker (2017), which found that temporary removal of all Associated Press coverage from Google News during a contract dispute substantially reduced visits to AP content (measured via comparison to visits via Yahoo News), but did *not* reduce time spent on the Google News platform.<sup>28</sup> This result suggests that it might be possible for Google to remove many links to sites requiring royalties without substantial attention and revenue loss from the Google News page.

Evidence from Athey et al. (2021), which records effects of closing Google News in Spain, suggests that the value of publisher links compared to alternative coverage might be higher from the consumer perspective, but that the royalty cost of linking to publisher content exceeded the value of attention to the Google News page.<sup>29</sup> As a result, it was more profitable for Google to shut down the Google News site entirely than to incur royalty costs. Other indirect evidence on substitutability comes from George and Hogendorn (2020), which found that adding targeted links to the Google News page shifted the share of attention to local articles rather than increasing overall

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27. For example, the high sensitivity of e-book sales to price changes suggests that even small price savings will induce purchase. For popular coverage, see Ryan Mac, *Amazon Does E-Book Math for Hachette in Arguing for \$9.99 Prices*, FORBES (Jul. 29, 2014, 8:18 PM), <https://www.forbes.com/sites/ryanmac/2014/07/29/amazon-does-e-book-math-for-hachette-in-arguing-for-9-99-prices/?sh=2040fc3a70d0> [https://perma.cc/JME6-XWVM] [https://web.archive.org/web/20230308182239/https://www.forbes.com/sites/forbesdigitalcovers/2018/07/12/why-the-rocks-social-media-muscle-made-him-hollywoods-highest-paid-actor/?malcolm=A&api=true&streamIndex=1]. A comprehensive academic study of e-book pricing is available in Imke Reimers & Joel Waldfogel, *Throwing the Books at Them: Amazon's Puzzling Long Run Pricing Strategy*, 83 S. ECON. J. 869 (2017).

28. See Chiou & Tucker, *supra* note 24.

29. Athey et al., *supra* note 21.

demand for local news, again indicating a substitutability of content that works against the potential for publishers to earn substantial revenue from royalties.<sup>30</sup>

And what about the incentives of a royalty regime on publishers? The value of a link to Google will depend on its differentiation from other independent content without royalties. Thus, a natural response for publishers seeking royalties would be to differentiate coverage from other sources, a change likely to benefit consumers. However overall demand for publisher coverage will still matter for profitability on Google News, so it is likely that links with royalties will likely be paid to the largest and most popular producers.

## V. CONSEQUENCES AND CONCLUSIONS

This article offers an introduction to supply, demand and competitive incentives that determine the content that gets produced and consumed in media markets in the digital era. Economic research on media topics is far-reaching, and I focus here only on direct production and consumption decisions rather than broader social outcomes. But this is not to say that the consequences news production and consumption decisions do not matter: a substantial literature documents how news coverage and news consumption impact the behavior of politicians, of voters, and of firms, in most cases for the better.

But a key lesson from economics is that consumption is what matters in a world of abundant choice and limited time. News publishers and digital platforms will always design products to maximize profitability, making decisions that depend on incremental revenue and cost. Both policy and technology alter the profitability tradeoffs of producers, often with unintended or unforeseen consequences.

Digital markets have replaced the take-it-or-leave-it model of monopoly news markets of earlier decades. The digital environment of low production and distribution cost, easy entry and aggressive competition has given power to consumers, but also to the tools that help individuals discover, access, and share information. Real-world evidence indicates that diminishing the features that complement news consumption will lessen rather than increase interest in news. That is the unintended consequence of intervention that we all should keep in mind.

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30. George & Hogendorn, *supra* note 21.





## Blame the Internet, Not Online News Aggregators

Colin Stretch\* & Sanjana Parikh†

“Facebook is not compatible with democracy,” declared Representative David Cicilline (D-R.I.) on Twitter.<sup>1</sup> One might think that the Congressman was announcing the results of an investigation into the 2016 election when making that claim. Not so—the Congressman’s tweet was a reaction to Facebook’s decision to halt the sharing of news on its platform in *Australia*. According to Representative Cicilline, Facebook’s decision to forego carrying news links on its website to avoid paying a new tax to publishers was the equivalent of “bring[ing] an entire country to its knees.”<sup>2</sup> Really?

Australia’s link tax is one of many recent policy proposals that places online news aggregators such as Facebook in their crosshairs. In the quest to take on “Big Tech,” legislators and regulators have armed themselves with privacy law, antitrust law, copyright law, and, in a few states, even the Constitution.<sup>3</sup> Moves to reduce the influence of technology platforms on the news require us to take a step back and consider whether we have accurately identified the causes of the challenges faced by the news media. Absent a clear-eyed understanding of the forces at play, any so-called solutions will surely miss the mark.

This essay argues that is exactly what is happening. The real problem for news publishers is the internet itself, not online news aggregation. If anything, online news aggregation is a force that works *in favor of* news publishers by driving traffic to them that they can monetize through advertising, subscriptions, or both. Once that is understood, it becomes clear that current policy proposals that intend to force online aggregators to pay publishers to link to their content fail to grasp the economic

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1. @davidcicilline, TWITTER (Feb. 17, 2021, 5:51 PM), <https://twitter.com/davidcicilline/status/1362172969699704833> [<https://perma.cc/6JQA-24YV>] [<https://web.archive.org/web/20230211204149/https://twitter.com/davidcicilline/status/1362172969699704833>].

2. *Id.*

3. *See, e.g.,* Vivek Ramaswamy and Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2021, 12:45 PM), <https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105> [<https://perma.cc/6FMT-LNHJ>] [<https://web.archive.org/web/20230309155537/https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105>].

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relationship between news aggregators and news platforms and are ultimately counterproductive.

## I.

Is online news aggregation a problem? Through one popular lens—the one adopted by most news organizations—the answer is clearly yes, aggregators are a major problem. Consider, first, that by many measures, the traditional news media business has declined precipitously in the last several decades. In 2000, U.S. newspapers reached more than 55 million households every single day; in 2020, they reached fewer than half that number.<sup>4</sup> The loss in audience matches a sharp revenue drop: news publisher revenue declined over fifty percent during the same period, from about \$46 billion in 2002 to about \$22 billion in 2020.<sup>5</sup> Employment in the news sector shrunk as revenue disappeared: fifty-seven percent fewer reporters, editors, photographers, and operators worked in the newspaper industry in 2020 than in 2004.<sup>6</sup>

By contrast, online news aggregators have been doing quite well. Whereas these entities for all practical purposes did not exist in 2000, the majority of Americans now report that they consume news digitally,<sup>7</sup> and nearly half of them find news on social media;<sup>8</sup> two-thirds point to search engines such as Google.<sup>9</sup> The revenues of these companies has correspondingly skyrocketed: Facebook and Google together make more than \$200 billion in annual ad revenue, an order of magnitude more than the entire news publishing industry made at its zenith.<sup>10</sup> This is only the beginning—

4. *Newspapers Fact Sheet*, PEW RSCH. CENTER (Jun. 29, 2021), <https://www.pewresearch.org/journalism/fact-sheet/newspapers> [https://perma.cc/U8U7-8GDV] [web/20230211204458/https://www.pewresearch.org/journalism/fact-sheet/newspapers].

5. Adam Grundy, *Service Annual Survey Shows Continuing Decline in Print Publishing Revenue*, U.S. CENSUS (June 7, 2022), <https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html> [https://perma.cc/8G9R-TDCW] [https://web.archive.org/web/20230211204620/https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html]. Note: Data is not adjusted for price changes.

6. *Newspapers Fact Sheet*, *supra* note 4.

7. See Eliza Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, PEW RSCH. CENTER (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices> [https://perma.cc/TNX3-S7XL] [https://web.archive.org/web/20230211204749/https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices] (stating that sixty percent of Americans often get their news from a smartphone, computer, or tablet).

8. See Mason Walker and Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CENTER (Sept. 20, 2021), <https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021> [https://perma.cc/Z6UX-89KW] [https://web.archive.org/web/20230211204920/https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021] (stating that forty-eight percent of U.S. adults report “often” or “sometimes” accessing news via social media).

9. Shearer, *supra* note 7 (indicating that sixty-five percent of U.S. adults report accessing news via Google specifically).

10. Brad Adgate, *Newspapers Have Been Struggling and Then Came the Pandemic*, FORBES (Aug. 20, 2021), <https://www.forbes.com/sites/bradadgate/2021/08/20/newspapers-have-been-struggling-and-then-came-the-pandemic/?sh=2812236b12e6> [https://perma.cc/W76G-394E] [https://web.archive.org/web/

newspaper and magazine publishers are projected to lose another \$15.5 billion in combined revenue through 2026,<sup>11</sup> while digital advertising revenues are projected to climb to nearly three-quarters of a trillion dollars in the same time period.<sup>12</sup>

These changes mirror what we've seen with our own eyes. The news industry just isn't what it used to be. Since 2004, 1,800 U.S. newspapers have shut down.<sup>13</sup> More than 3 million people no longer have a local newspaper, to say nothing of the decline in resources dedicated to covering local news by the newspapers that remain.<sup>14</sup>

The impact of local news is well-known to those of us who were fortunate enough to grow up with it. The local paper was a valuable source of community information, a venue for reconciling opposing perspectives, and a mechanism to drive transparency and accountability in the institutions that directly affected our daily lives. In many, if not most, communities in this country, local news is no longer there to serve those functions.

The loss of local news is not the only casualty here. Accompanying the decreasing diversity of sources for local news, we are witnessing an extraordinary decline in trust in the news—one recent study found that three in four Americans do not trust what they read in the paper<sup>15</sup>—as well as worrisome trends in media literacy: another study found that Americans who rely on social media for news are less knowledgeable about current events and more likely to have been exposed to false claims and misinformation.<sup>16</sup>

There is, in short, a problem. But is *online news aggregation* a problem?

20230512083139/https://www.forbes.com/sites/bradadgate/2021/08/20/newspapers-have-been-struggling-and-then-came-the-pandemic].

11. *2022 Outlook Segment Findings: Markets and Industries*, PWC, <https://www.pwc.com/gx/en/industries/tmt/media/outlook/segment-findings.html> [https://perma.cc/3JB3-XDSE] [https://web.archive.org/web/20230211205504/https://www.pwc.com/gx/en/industries/tmt/media/outlook/segment-findings.html].

12. *Perspectives from the Global Entertainment & Media Outlook 2022–2026*, PWC, <https://www.pwc.com/gx/en/industries/tmt/media/outlook/outlook-perspectives.html> [https://perma.cc/3DNC-BZ9U] [https://web.archive.org/web/20230211205630/https://www.pwc.com/gx/en/industries/tmt/media/outlook/outlook-perspectives.html].

13. See Adgate, *supra* note 10 (citing research that finds 200 of 3,143 United States counties to be news deserts).

14. See *id.*

15. See Joy Jenkins & Lucas Graves, *Reuters Digital News Report 2022: United States*, REUTERS (June 15, 2022), <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/united-states> [https://perma.cc/7MF6-NJXB] [https://web.archive.org/web/20230126181200/https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/united-states] (reporting that the share of Americans who trust news generally fell to 26 percent).

16. See Amy Mitchell, Mark Jurkopwitz, J. Baxter Oliphant & Eliza Shearer, *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CENTER (July 30, 2020), <https://www.pewresearch.org/journalism/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable> [https://perma.cc/AS5V-KURU] [https://web.archive.org/web/20230126183526/https://www.pewresearch.org/journalism/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable] (“Even as Americans who primarily turn to social media for political news are less aware and knowledgeable about a wide range of events and issues in the news, they are more likely than other Americans to have heard about a number of false or unproven claims.”).

## II.

A few reasons caution against blaming online news aggregators for the news industry's woes. First, the trends we are witnessing were in motion long before most of us had even heard of Facebook and Twitter, and well before Google News existed. Recall Tom Cruise's infamous "couch jump" on *The Oprah Winfrey Show* in 2005.<sup>17</sup> Cruise had been invited on the show to give a carefully staged preview of his upcoming film. What people remember, however, is the moment when Cruise jumped on the couch, gushing about then-girlfriend Katie Holmes. This was one of the first "celebrity memes" to go viral—first on YouTube and then on Internet gossip blogs.<sup>18</sup> It savaged the carefully manicured public image that Cruise's PR team had developed through traditional media and revealed that the Internet had fundamentally altered the traditional news media's grip on information dissemination. As another example, sports fans may recall when Buzz Bissinger (of *Friday Night Lights* fame) dressed down the founder of *Deadspin*, an irreverent and often crass sports blog.<sup>19</sup> Bissinger thought he was standing up for quality sports journalism; what the episode actually underscored was that the internet had enabled a new style of content to find an audience, and its popularity was growing at the expense of the old guard.

These incidents had everything to do with disruption of traditional news media, and nothing to do with online news aggregation. The culprit, rather, was technology—or, to be more specific, the internet—and it wasn't only Tom Cruise's PR team, or Buzz Bissinger's lock on sports commentary that were being disrupted.

If the internet was the culprit, it was *news publishers* that were the victim. News publishers historically operated local monopolies.<sup>20</sup> They hired journalists who wrote stories that attracted readers whose attention could be sold to advertisers who would pay for real estate in that newspaper.<sup>21</sup> The distribution infrastructure necessary to operate this business—from the printing presses and associated labor force that printed the paper to the paperboys who delivered it—was expensive, but once established, it operated as a formidable barrier to entry. As a result, for most of the twentieth century, news publishers faced limited competition, attracted reliable audiences, and delivered reliable returns to advertisers and, in turn, to investors.

17. See generally Kate Knibbs, *The Couch Jump That Rocked Hollywood*, RINGER (Aug. 1, 2018, 6:00 AM), <https://www.theringer.com/tv/2018/8/1/17631658/tom-cruise-oprah-couch-jump> [https://perma.cc/3JT5-G8ZX] [https://web.archive.org/web/20230126185640/https://www.theringer.com/tv/2018/8/1/17631658/tom-cruise-oprah-couch-jump].

18. *Id.* (quoting Brandon Ogborn, who wrote *The TomKat Project*, a play about Cruise's reputation).

19. See generally Richard Sandomir, *A Confrontation on 'Costas Now' Worthy of a Blog*, N.Y. TIMES (May 1, 2008), <https://www.nytimes.com/2008/05/01/sports/football/01sandomir.html> [https://perma.cc/DF39-8GA9] [https://web.archive.org/web/20230126203928/https://www.nytimes.com/2008/05/01/sports/football/01sandomir.html].

20. See Lisa George, *Digital Technology, Disruption, and the Market for News*, in HANDBOOK ON THE ECON. OF THE MEDIA 261 (Robert G. Picard & Steven S. Wildman eds., 2015).

21. See Ben Thompson, *Popping the Publishing Bubble*, STRATECHERY (Sept. 16, 2015), <https://stratechery.com/2015/popping-the-publishing-bubble> [https://perma.cc/43LV-2D5S] [https://web.archive.org/web/20230126212851/https://stratechery.com/2015/popping-the-publishing-bubble].

The internet disrupted this business model by setting distribution costs to zero.<sup>22</sup> The infrastructure that publishers had built to deliver content became obsolete. Anyone with a connection to the internet could publish, and anyone browsing the internet became a potential customer. And, as my co-panelist Professor Lisa George has written, the decrease in distribution costs meant that newspapers no longer enjoyed local monopolies once content could be accessed from anywhere.<sup>23</sup> *Deadspin* could compete head-to-head with *Sports Illustrated*, and if people liked the *Deadspin* content better, *Deadspin* would win. All of the trends discussed above—the decline in newspaper circulation, revenue, and newsroom headcount—derive from that simple fact. Because of the internet, the barriers to entry for delivering content disappeared, and the news industry experienced massive upheaval.

That upheaval has costs, but it also has fueled real innovation. For all the talk about the challenges facing traditional journalism, we, as consumers, are experiencing something of a "golden age." Whatever your interest, whether it be tech news, or sports, or wine, or law (which happen to be top of mind for the co-authors), you can choose from free and paid newsletters, ad-based online publications, subscription publications, and of course, any number of podcasts. Through the magic of the internet, all of these media have an opportunity to reach anyone, anywhere.<sup>24</sup> And if you are a consumer in most of the world, the choices available to you far exceed anything any of us experienced before the Internet.

Applying, then, the lens that the *internet* is the so-called "problem" (albeit one with a lot of real and potential upside), where do online news aggregators fit in? Under this framework, online news aggregators are clearly part of the upside. Anyone producing news, whether via newsletters, subscription or ad-based publications, or podcasts, can use the online tools available to them, including online news aggregation, to attract and develop their audience. Where that's not the case, the publication can simply decline to use them. No one is required to be indexed by Google and appear in Google News, no one is obligated to enable the display of their links on Facebook, and no one has any obligation to establish a Twitter presence. To the extent news producers take these actions today, it is because they derive value. A newsletter publisher may find new subscribers via Twitter, and an ad-supported news publication may derive traffic from Google, which translates into ad revenue. That is a choice for news publishers to make; if it did not make economic sense for them, we would see them making a different choice.

To return to the initial question posed to the panel, far from being the "problem," online news aggregation is a *solution* (or at least part of one) to the challenges posed by technology. It is a mechanism by which journalists and their employers who are seeking

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22. See Ben Thompson, *The AI Unbundling*, STRATECHERY (Sept. 12, 2022), <https://stratechery.com/2022/the-ai-unbundling> [<https://perma.cc/GG6R-LHHA>] [<https://web.archive.org/web/20230126214001/https://stratechery.com/2022/the-ai-unbundling>].

23. See George, *supra* note 20, at 261–62.

24. See Jenkins & Graves, *supra* note 15.

to survive in a very different environment than existed two decades ago can find and grow their audience.

### III.

Accurately labeling the internet as the “problem,” rather than online news aggregation *enabled by* the internet, matters for at least two reasons.

First, an accurate understanding of the nature of the problem to be solved is critical to sound policymaking. Three recent policy proposals that mischaracterize the role of online news aggregation and the value it drives for publishers illustrate the consequences of this error for the policies’ goals themselves.

Spain’s so-called “Google Tax” was one of the first measures to be adopted that targeted online news aggregators.<sup>25</sup> Alongside other European countries such as Germany and France, Spain, responding to publishers’ accusations that technology platforms were cannibalizing their advertising revenues, passed a law requiring online services that posted links to or summaries of news articles to pay the associated publishers under the guise of copyright.<sup>26</sup> However, it was the publishers more than Google that derived value from the links, and Google responded rationally by turning off Google News in the country.<sup>27</sup> This step was entirely predictable. Why would Google continue to provide a service that delivered value to publishers (by driving substantial traffic to them) once it was forced to pay those same publishers for the privilege of doing so?

The step made everyone, from news publishers to Google itself, and especially consumers, worse off. One study estimated that readers visited news publishers’ websites ten percent less often than they did when the News product was operational.<sup>28</sup> For publishers, fewer site visits necessarily mean less advertising revenues. By fundamentally misunderstanding the value proposition of online news aggregators, Spain’s link-tax proposal led to a worse outcome for each and every affected constituency.<sup>29</sup>

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25. See Dominic Rushe, *Google News Spain To Close in Response To Story Links “Tax”*, THE GUARDIAN (Dec. 11, 2014, 3:25 PM), <https://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links> [<https://perma.cc/5CPP-UF3D>] [<https://web.archive.org/web/20230126215036/https://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links>].

26. See *id.*

27. See *id.*

28. See Susan Athey, Markus Mobius & Jenő Pal, *The Impact of Aggregators on Internet News Consumption* (NBER, Working Paper No. 28746, 2021), [https://www.nber.org/system/files/working\\_papers/w28746/w28746.pdf](https://www.nber.org/system/files/working_papers/w28746/w28746.pdf) [<https://perma.cc/YP5H-8A8K>] [[https://web.archive.org/web/20221119114048/https://www.nber.org/system/files/working\\_papers/w28746/w28746.pdf](https://web.archive.org/web/20221119114048/https://www.nber.org/system/files/working_papers/w28746/w28746.pdf)].

29. Note that Germany’s proposal was never enforced because German publishers chose not to forego the loss of traffic from Google referrals. See Laura Kayali, *Google Refuses To Pay Publishers in France*, POLITICO (Sept. 25, 2019, 1:30 PM), <https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google> [<https://perma.cc/RVF5-JBMQ>] [<https://web.archive.org/web/20230126234945/https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google>].

Lesson learned? Hardly. More recently, Australia put in place a Media Bargaining Code that forced online news aggregators to pay news organizations for the privilege of displaying news organizations' content on their platforms from Facebook's News Feed, Instagram, Google Search, and Google News.<sup>30</sup> The platform and publisher were charged with negotiating a deal amongst themselves within three months, otherwise the publisher could force the platform into binding arbitration to set the price.<sup>31</sup> Again, responding rationally to the fact that driving traffic to publishers delivers value to the publishers, and not the other way around, Facebook made the decision to prohibit the sharing of news links on its service instead of paying its beneficiaries (sparking criticism from a wide range of audiences, and not only Representative Cicilline). Whatever one thinks of Facebook's execution of that response—which many considered clumsy<sup>32</sup>—it is difficult to argue with the logic of its position, or that the Code as originally formulated had made all parties, especially consumers, worse off.

Closer to home, a similar proposal has been advancing through the United States Senate and seems equally unlikely to reckon with the economic realities facing news publishers today. The Journalism Competition and Preservation Act of 2022, introduced by Senator Klobuchar, has lofty aims of restoring local news outlets and revitalizing democracy.<sup>33</sup> The bill aims to subsidize journalism under antitrust laws by enabling publishers to collectively bargain with digital platforms for the price of aggregating, displaying, or directing users to their news content online.<sup>34</sup> If the parties are unable to reach an agreement within three months, much like in Australia, the terms and pricing will be determined by an arbitration panel.<sup>35</sup> What this bill neglects to account for, however, is that if economic value flowed from online news aggregators

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30. AUSTRALIAN COMPETITION & CONSUMER COMPETITION, Q&AS: DRAFT NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE 1, 8 (July 2020), <https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf> [<https://perma.cc/KPT3-SMYE>] [<https://web.archive.org/web/20221112053324/https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf>].

31. *Id.* at 7.

32. See Mike Cherney, *Facebook's Hardball Move in Australia Comes With Risks*, WALL ST. J. (Mar. 2, 2021, 5:30 AM), <https://www.wsj.com/articles/facebooks-hardball-move-in-australia-comes-with-risks-11614681007> [<https://perma.cc/5VKQ-FJAJ>] [<https://web.archive.org/web/20230127004115/https://www.wsj.com/articles/facebooks-hardball-move-in-australia-comes-with-risks-11614681007>].

33. See Brier Dudley, *A Q&A with U.S. Sen. Klobuchar on Threat To Local Papers, Democracy*, SEATTLE TIMES (Nov. 18, 2022, 1:22 PM), <https://www.seattletimes.com/opinion/qa-u-s-sen-klobuchar-on-threat-to-local-papers-democracy> [<https://perma.cc/9K73-TZKL>] [<https://web.archive.org/web/20230123235050/https://www.seattletimes.com/opinion/qa-u-s-sen-klobuchar-on-threat-to-local-papers-democracy>].

34. See generally S. 673, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/673/text> [<https://perma.cc/R2CA-FN8U>] [<https://web.archive.org/web/20230123235217/https://www.congress.gov/bill/117th-congress/senate-bill/673/text>]; see also *Statement on Judiciary Committee Passage of Bipartisan Legislation To Save Local Journalism*, KLOBUCHAR.SENATE.GOV (Sept. 22, 2022), <https://www.klobuchar.senate.gov/public/index.cfm/2022/9/klobuchar-statement-on-judiciary-committee-passage-of-bipartisan-legislation-to-save-local-journalism> [<https://perma.cc/K6JS-PTEF>] [<https://web.archive.org/web/20230124000054/https://www.klobuchar.senate.gov/public/index.cfm/2022/9/klobuchar-statement-on-judiciary-committee-passage-of-bipartisan-legislation-to-save-local-journalism>].

35. See S. 673, 117th Cong. § 4 (2022).



to publishers as it presupposes, then arm's-length negotiation processes would have already resolved the issue. S. 673, in its current formulation, risks the same consequences for consumers that were seen in Spain and Australia. Indeed, as of this writing, Facebook had recently indicated that, if forced to choose between not carrying news links at all, on the one hand, and paying publishers for the privilege of delivering traffic to them, on the other, it will choose the former.<sup>36</sup> Not surprising.

The second reason that it matters to pin the blame where it belongs is the possibility—and some would argue the certainty—that when it comes to technological disruption to traditional news media, we are only just at the beginning. Early last year, the *New York Times Magazine* published an article on GPT-3, an artificial-intelligence text model from Open AI.<sup>37</sup> The article painted a picture of a world in which a user can enter a simple language prompt (such as, “Write me an essay on the role of online aggregators in the news publishing industry”), and the model instantaneously generates well-constructed paragraphs that convincingly examine the topic in question. By the end of the year, indeed, users were able to use ChatGPT, a chatbot based on the GPT-3 technology, to do exactly that. ChatGPT made large language model text generation available to the public, and consumers were astonished by the bot's ability to draft coherent responses to their vast array of queries.<sup>38</sup>

To be sure, this model and others like it aren't perfect, yet, but the progress here is revolutionary and only accelerating.<sup>39</sup> It is a matter of years, not decades, until AI models generate well-written, accurate content with minimal human involvement. Image and video generation models<sup>40</sup> likewise will generate content for various

36. See Alexandra Bruell, *Facebook Threatens To Pull News from Platform if Congress Passes Bill Helping Publishers*, WALL ST. J. (Dec. 5, 2022, 8:51 PM), <https://www.wsj.com/articles/facebook-threatens-to-pull-news-from-platform-if-congress-passes-bill-helping-publishers-11670291482> [<https://perma.cc/2XT5-QDBU>] [<https://web.archive.org/web/20230124000544/https://www.wsj.com/articles/facebook-threatens-to-pull-news-from-platform-if-congress-passes-bill-helping-publishers-11670291482>].

37. See Steven Johnson, *A.I. Is Mastering Language. Should We Trust What It Says?*, N.Y. TIMES MAG. (Apr. 17, 2022), <https://www.nytimes.com/2022/04/15/magazine/ai-language.html> [<https://perma.cc/J3HJ-TDEF>] [<https://web.archive.org/web/20230124005928/https://www.nytimes.com/2022/04/15/magazine/ai-language.html>].

38. See *ChatGPT: Optimizing Language Models for Dialogue*, OPENAI BLOG (Nov. 30, 2022), <https://openai.com/blog/chatgpt> [<https://perma.cc/8P5L-ZSTU>] [<https://web.archive.org/web/20230124010103/https://openai.com/blog/chatgpt>]; see also Jonathan Vanian, *Why Tech Insiders Are so Excited About ChatGPT, a Chatbot that Answers Questions and Writes Essays*, CNBC (Dec. 13, 2022, 6:51 PM), <https://www.cnbc.com/2022/12/13/chatgpt-is-a-new-ai-chatbot-that-can-answer-questions-and-write-essays.html> [<https://perma.cc/4ET3-CNDR>] [<https://web.archive.org/web/20230124010233/https://www.cnbc.com/2022/12/13/chatgpt-is-a-new-ai-chatbot-that-can-answer-questions-and-write-essays.html>] (describing ChatGPT's virality).

39. See Ben Thompson, *AI Homework*, STRATECHERY (Dec. 5, 2022), <https://stratechery.com/2022/ai-homework> [<https://perma.cc/A6TG-YAE7>] [<https://web.archive.org/web/20230124010808/https://stratechery.com/2022/ai-homework>].

40. See also *Dall-E Now Available Without Waitlist*, OPENAI BLOG (Sept. 28, 2022), <https://openai.com/blog/dall-e-now-available-without-waitlist> [<https://perma.cc/X7HP-KCKA>] [<https://web.archive.org/web/20230124011002/https://openai.com/blog/dall-e-now-available-without-waitlist>]; see also *Introducing Make-A-Video: An AI System that Generates Videos from Text*, META AI BLOG (Sept. 29, 2022), <https://ai.facebook.com/blog/generative-ai-text-to-video> [<https://perma.cc/QUP9-V2SQ>] [<https://web.archive.org/web/20230124011214/https://ai.facebook.com/blog/generative-ai-text-to-video>].

industries, news among them. The seismic advances of generative AI in the fall of 2022 will no doubt seem quaint in the near future—perhaps even by the time of publication. When that happens, it will set the cost of content generation near zero, much like the internet did for distribution, and again disrupt the economics of the news. When—not if, but when—that happens, we would be well served to identify the *technological* trends that are driving that disruption and to formulate our policy responses and consumption habits accordingly.



## The Past and Present of Press Publishers' Rights in the EU

Edouard Treppoz\*

In the EU, the policy choice was to create a new ancillary right in favor of press publishers, meaning newspapers published in print or online. It was one of the achievements made by the controversial DSM Directive.<sup>1</sup> Two articles were highly disputed: Articles 15 and 17. Both share the same goal: obtaining a better share of the value created on the internet for the authors. Article 17 offers authors strong negotiation leverage by considering that online content sharing service providers communicate content uploaded by users to the public. Article 15 creates an ancillary right in favor of press publishers to facilitate negotiation against internet platforms.

Recital 54 clearly explains the motivation of the EU legislator. First, there is a strong need for “a free and pluralist press,” which “provides a fundamental contribution to . . . the proper functioning of a democratic society.” Second, the “availability of reliable information” is related to the ability of press publishers to recoup their investments (Recital 55). Third, “publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments.” The equation thus described seems rather simple. If press publishers are not able to license, they won't be able to recoup their investments, and the public availability of reliable information will be in danger. Having said that, the goal for the EU legislator “is to strengthen [press publishers'] bargaining position[s] by securing their legal certainty,”<sup>2</sup> which implies that the legislation wants to ensure press publishers' ability to license. Providing an ancillary right is clearly seen by the EU legislator as a tool in favor of the protection of investment. That was already the case with the *sui generis* right given to the maker of a database in order to ascertain its investment in the creation of the database.<sup>3</sup>

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1. Council Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter *Directive 2019/790*].

2. Commission Staff Working Document Executive Summary of the Impact Assessment on the Modernization of EU Copyright Rules, SWD (2016) 302 final, at 3.

3. Council Directive 96/9, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, ch. 3, 1996 O.J. (L 77) 20 [hereinafter *Directive 96/9*].

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Interestingly, these two ancillary rights are pure EU creation without any international background. Both are created at an EU level in order to secure investment and to facilitate licensing. The additional element for the justification of the press publishers' right depends on a close link with democracy.

While it is easy to feel apprehensive about the complexities of such a licensing scheme, the solutions the scheme could bring are even more complex to determine. What is not clear at first is why copyright protection is not be sufficient to solve the problem of licensing. At least in France, press editors are vested with moral and economic rights regarding publication.<sup>4</sup> Moreover, the existence of a contract between the journalist and the press publisher leads to a presumption of assignment of the journalist's rights to the publisher, contrary to the traditional solutions of French law.<sup>5</sup> Furthermore, the Belgian case of *Copipresse*<sup>6</sup> showed that copyright is not an inefficient means of licensing press publishers' content. In that case, Press publishers won against Google because titles and first lines of articles reproduced by Google are protected by copyright law. Nevertheless, Google decided to stop aggregating these press publications in Belgium right after that decision. If this outcome was more a draw than a victory for press publishers, the failure does not come from copyright law. It remains that the Achilles heel of news articles' copyright protection is the originality requirement and the need to prove that the reproduced extracts or titles are original and protected. The strength of the press publishers' right is that the protection is not related to any legal requirement such as originality or investment. Protection is only tied to the legal notion of press publication. The apparent automatic nature of the right makes it easier to prohibit unlicensed online use of press publishers' articles and gives them a strong negotiating leverage. The last question concerns the efficiency of a press publishers' right. Before the creation of an EU ancillary right, European national experiences show that providing press publishers' ancillary rights in addition to copyright protection is not always efficient.<sup>7</sup> German copyright law was amended in 2013 in order to create a new ancillary right in favor of Press Publishers.<sup>8</sup> Nevertheless, it was a failure since Google refused to negotiate with press publishers. Spain has passed

4. Indeed, a newspaper is characterized as a "collective work" for which economic and moral rights shall vest to the "natural or legal person under whose name it has been disclosed." Code de la propriété intellectuelle [C. Prop. Int.] [Intellectual Property Code] arts. L113-2 (Fr.). For the inclusion of moral rights, see Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 22, 2012, Bull. Civ. I no. 70 (Fr.).

5. See Code de la propriété intellectuelle [C. Prop. Int.] [Intellectual Property Code] art. L 132-36 (Fr.).

6. Cours d'Appel [Court of Appeals] Brussels, (9th Ch.), May 5, 2011, n° 2011/2999.

7. See ELEANORA ROSATI, *COPYRIGHT IN THE DIGITAL SINGLE MARKET* 254 (Oxford Press, 2021).

8. Laurence Franceschini, *Rapport de la Mission de Réflexion sur la Création d'un Droit Voisin Pour les Éditeurs de Presse* [Report on the Study of the Creation of an Ancillary Right for Press Publishers]<sup>10</sup> (Ministère de la Culture, July 2016), <https://www.culture.gouv.fr/Espace-documentation/Rapports/Rapport-de-la-mission-de-reflexion-sur-la-creation-d-un-droit-voisin-pour-les-editeurs-de-presse> [https://perma.cc/PQ6G-XT2K] [https://web.archive.org/web/20230309145728/https://www.culture.gouv.fr/Espace-documentation/Rapports/Rapport-de-la-mission-de-reflexion-sur-la-creation-d-un-droit-voisin-pour-les-editeurs-de-presse].

a somewhat similar law. The law went into effect in Spain in January 2015, but Google News Spain was shut down on December 2014.<sup>9</sup>

What is unclear is how a failure at a national level could become a success at an EU Level. Is it enough to grant a new right to press publishers to strengthen their bargaining position? In order to answer that question, the first part of the article will be devoted to the European law of press publishers. The second part will discuss the French experience which shows that the ancillary right is not an effective solution as such.

## I. THE EU'S RESPONSE: THE IP TOOL

In order to explain the EU's response, our presentation will delve into the object of protection (Part I.A.), persons concerned by this new right (Part I.B.), and the scope of protection (Part I.C.).

### A. WHAT IS PROTECTED?

When it comes to the object of protection, the title of Article 15 is crystal clear, mentioning the "protection of *press publication*" (emphasis added). Paragraph 1 of Article 15 specifies that the right covers press publication. Consequently, the object of protection is this new notion of press publication. Whereas copyright covers original works, this new ancillary right protects press publication which appears as the key goal of this Article 15.

Logically, the notion of press publication is defined in Article 2 of the DSM directive. Pursuant to this article, press publication is considered as "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter." The collection "a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine, b) has the purpose of providing the general public with information related to news or other topics; and is published in any media under the initiative, editorial responsibility and control of a service provider."

Recital 56 gives an interesting illustration of what should be covered by this notion of press publication: "daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites."

Based on that definition, various exclusions can be envisioned. The purpose of the press publication has to be journalistic. It is a collection of works of journalistic nature, providing to the general public information related to news. One can easily understand then why "periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive" (Article 2 Paragraph 4 *in fine*). A scientific journal lacks this journalistic purpose, excluding its benefitting from the Article 15. Another exclusion is related to editorial responsibility. A blog could be a collection of literary works of a journalistic nature. Nevertheless, if it

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9. *Id.* at 11.

lacks any editorial responsibility, such a blog may not be characterized as a press publication (Recital 56). Finally, even if the limitation is not explicit, it seems that press publication should not be extended beyond the written press whether published on paper or online, excluding non-written media such as radio or TV channels.<sup>10</sup> Such a limitation is consistent with the various illustrations of press publication given by Recital 56. All examples are indeed related to the written press. Moreover, the definition is clearly limited to a collection of “literary works,” which should be understood as written works. The collection may include other types of works such as photographs or video (Recital 56). The use of the adverb *mainly* may be interpreted as meaning that literary works are the main type of works, even if other types of works can be included, for example, to illustrate a literary work.<sup>11</sup> Ultimately, the need to create a new ancillary right was real for the written press, but not for radio or TV press already protected by previous ancillary rights.<sup>12</sup> This new right seems to be interpreted as covering written press published on paper or online.

The object of protection being explained, the question becomes who is affected by this new right.

## B. WHO IS AFFECTED?

Two categories of persons are directly affected, either by benefitting from or being disadvantaged by this new right. Between these two persons, the situation of authors, i.e., those who creates literary works comprising the collection, has to be explained.

**Publishers (direct beneficiaries).** The direct beneficiary of this new right is the publisher of the press publication. Here again, the key notion is the one of press publication, from which one may infer the definition of publisher. Consequently, the press publication must be published under the initiative, editorial responsibility, and control of a service provider. It could be logically concluded that the press publisher is the one under whose initiative, responsibility, and control the publication is published.<sup>13</sup>

Having explained what a press publication is, one may wonder about the French newspaper *Le Monde* and its website or the U.S. newspaper the *New York Times* and its website. The former will benefit from this new right, but not the latter. Indeed, this new right is limited to “publishers of press publication established in a Member State.”<sup>14</sup> The EU directive clearly allows discrimination based on the location of the publication’s

10. Tristan Azzi, “Le droit voisin des éditeurs de publication de presse ou l’avènement d’une propriété intellectuelle catégorielle,” 5 *DALLOZ IP/IT* 297 (2019).

11. André Lucas, *Droit d’Auteur et Droits Voisins*, *REVUE PROPRIETES INTELLECTUELLES* n° 72 *JULY* 2019, at 64.

12. See Council Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, recital 54, 2001 O.J. (L 167) (“In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.”).

13. See ROSATI, *supra* note 7, at 258.

14. *Directive 2019/790*, *supra* note 1, at art. 15.

establishment. Such discrimination may seem awkward at first. Indeed, intellectual property and, more precisely, copyright law are usually governed by the national treatment principle, prohibiting any discrimination based on nationality.<sup>15</sup> It is clear that the EU legislator may not discriminate based on nationality in order to determine copyright protection, at least where the national treatment rule is applicable. The situation is completely different when it comes to press publishers' rights. This new EU right is not covered by any international convention, excluding it from the national treatment rule. Consequently, if the national treatment rule is not applicable, the EU legislator is free to discriminate. Interestingly, the EU legislator has already limited another ancillary right not covered by any international convention. Under the EU directive on the legal protection of databases, a new *sui generis* right has been created for the making of the database, but only for "database whose makers or right holders are nationals of a Member State or who have their habitual residence in the territory of the Community."<sup>16</sup> The logic of discrimination is the same. The explanation is identical: the lack of international convention. Nevertheless, the connecting factor used in order to discriminate is not exactly the same. With the database directive, a US maker clearly cannot benefit from the *sui generis* right, even if the US maker had some establishment in the EU. Concerning the DSM directive, it is less clear whether one establishment in the EU suffices or if it has to be the main establishment. Following Recital 55, it seems that even if the *New York Times* may have some establishment in the EU, it could not be considered as having "their registered office, central administration or principal place of business within the Union." It seems that by requiring an establishment in the EU, the text indirectly means the main establishment.

**Information society service providers.** If the publisher may benefit from this new ancillary right, information society service providers will have to pay for their online use of press publications (see Article 15). The definition of information society service providers is also given in Article 2 Paragraph 5. Following this paragraph, "information society service" means a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535." The definition is based on a previous directive. Pursuant to that directive, the service has to be provided for remuneration. The E.C.J. considered in the *Airbnb* case that the service could be provided for remuneration, "even though the remuneration received is only collected from the guest and not only from the host."<sup>17</sup> This means that the remuneration does not necessarily need to be paid by the end users.<sup>18</sup> The Advocate General Szpunar clearly established that "the remuneration provided by a service provider in the context of his economic activity is not necessarily paid by the person who benefits from that service."<sup>19</sup> In other words, an aggregation of news free for users but remunerated by advertising should be considered

15. See Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), art. 5, S. Treaty Doc. No. 99-27 (1986).

16. Directive 96/9, *supra* note 3, at art. 11.

17. Case C-390/18, *Airbnb Ireland*, ECLI:EU:C:2019:1112, ¶ 46 (Dec. 19, 2019).

18. See ROSATI, *supra* note 7, at 262.

19. Case C-390/18, *Airbnb Ireland* (Op. of Maciej Szpunar), ECLI:EU:C:2019:336, ¶ 38 (Apr. 30, 2019).



as being provided for remuneration. Ultimately, the service has to be provided at a distance, by electronic means, and at the individual request of a recipient of services.

If the beneficiary has to be established in the EU, there is no symmetry concerning the providers. The policy goal is clear: to protect EU press publishers against service providers targeting an EU public. When it comes to IP or to data protection, the application of EU law is based on the sector of the public that is targeted as an audience. One can quote the seminal *L'Oréal*<sup>20</sup> decision for trademark protection. Such a geographic connecting factor was also applied by the ECJ for the *sui generis* right for databases<sup>21</sup>, also limited to EU makers. Discrimination applies to determine who will benefit from the protection, but not in order to identify who will have to respect the protection. The “*effet utile*” of the protection requires that the protection be applied as soon as an EU public is targeted.

**Authors (indirect beneficiaries).** Finally, it is important to mention the situation of the authors of works included in press publications. To put it simply, the question here is whether the journalist may directly or indirectly benefit from this new right covering a press publication made of articles protected by copyright law.

From a U.S. perspective, it is important to note the hierarchy existing among copyright and ancillary rights. The hierarchy is clearly endorsed by international and European texts. As an example, one could quote the Article 1 Paragraph 2 of the WIPO Performances and Phonograms Treaty, under which “protection granted shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.”<sup>22</sup> By the same token, Article 12 of the Directive 2006/115 clearly rules that “protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.” An even stronger hierarchy is created here by Article 15 considering that this new ancillary right “shall leave intact and shall in no way affect any rights provided for in Union law to authors and other right-holders, in respect of the works and other subject matter incorporated in a press publication.” This ancillary right is clearly subordinated to copyright and other related rights. Moreover, the press publishers’ rights “shall not be invoked against (...) authors and other right-holders,” meaning that author’s rights should prevail over those of press publishers.<sup>23</sup> From the author’s perspective, this new right should usually be advantageous.

But the advantage is limited to authors of works incorporated in press publications. Indeed, the last paragraph of Article 15 clearly provides that “authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.” Authors are clearly the indirect beneficiaries of this new ancillary right. A first question may be asked concerning the meaning of “appropriate.” It is certainly important to mention that “appropriate” is often used in this directive to mean

20. Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, ECLI:EU:C:2011:474 (Jul. 12, 2011).

21. Case C-173/11, *Football Dataco v. Sportradar GmbH*, ECLI:EU:C:2012:642 (Oct. 18, 2012).

22. WIPO Performances and Phonograms Treaty (WPPT) (Dec. 20, 1996), 2186 U.N.T.S. 203.

23. *Directive 2019/790*, *supra* note 1, at art. 15.

something like “proportionate.” One may consider that “appropriate” is equivalent to “fair.” Indeed, chapter three mentions a fair remuneration imposing an appropriate and proportionate remuneration in Article 18. A second question may be related to the basis of this appropriate remuneration. A first interpretation may limit it to a remuneration strictly based on Article 15. Nevertheless, another interpretation may consider taking into consideration not only revenues streamed from Article 15, but any revenues paid by a provider to a publisher.<sup>24</sup> The second one is clearly in favor of authors, but perhaps not based on the “*effet utile*” of this new ancillary right originally created for press publishers and not for authors.

### C. WHAT IS THE PROTECTION'S SCOPE?

In order to determine the scope of protection, one must focus on the rights provided by Article 15 and the exceptions to these rights.

**Rights given to the publisher.** The scope of this new right is explicitly limited to the online use of press publication. It means that a reproduction on paper of this press publication is not covered by Article 15. However, a digital reproduction for an online use is covered and could be prohibited or monetized by the publishers. It is important to mention that the definition of reproduction in Article 15 is the same as the one defined in the Info. Soc. Directive<sup>25</sup>. Consequently, the reproduction does not need to have a permanent nature. A temporary copy is legally a reproduction under EU law. Under EU copyright law, a reproduction in part has to copy an original part of the work in order for the reproduction to violate the author's copyright. Under Article 15, it is less clear whether such a condition may apply. My understanding is that any reproduction in part of a press publication is legally a reproduction, provided that the very short extract exception does not apply (see Recital 58).

Logically, the second right provided for online use is the making available right defined in Article 3 par 2 of the Info. Soc. Directive. The EU making available right is a faithful implementation of Article 8 of the 1996 WIPO Copyright Treaty<sup>26</sup>. It means that when a provider downloads a part of a press publication on its website, it needs authorization based on the right of reproduction and on the making available right. Finally, the duration of protection is short. Indeed, under Article 15 Paragraph 4, “the right shall expire two years after the press publication is published. Such a short duration is coherent due to the lack of interest of news after a certain period.”

**Exceptions.** Three exceptions to this new ancillary right have been specifically created. Moreover, all copyright exceptions defined in Article 5 of the Info. Soc. Directive are also applicable.

Under Article 15 Paragraph 1, it is explicitly said that private or non-commercial uses of press publications by individual users are not covered by this new right. Such

24. See Azzi, *supra* note 10.

25. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society.

26. WIPO Copyright Treaty (WCT), Dec. 20, 1996, 2186 U.N.T.S. 121.

an exclusion may appear to be redundant, since the press publishers' rights may be invoked against information society online providers whose services have to be remunerated. The online use of a press publication by a non-commercial blog should normally not be covered by the press publishers right. What is not clear is how to determine when the use becomes commercial. The website of an influencer doing product placement shall not be a non-commercial use anymore.<sup>27</sup> In sum, bloggers are free to use press publications, provided that they generate no remuneration.

Another exception concerns acts of hyperlinking. While it is prohibited to reproduce and make available press publication content by downloading it, it is not prohibited to use a hyperlink in order to make available the content of the press publication. Further questions are related to the limits of this exception. First, the previous version of the directive expressly excluded "acts of hyperlinking which do not constitute communication to the public."<sup>28</sup> Indeed, the exclusion was subordinated to the non-characterization of the act of hyperlinking as an act of communication under the interpretation of the E.C.J. of the Info. Soc. Directive. To make it simple, hyperlinking authorized content is not an act of communication to the public based on the *Svensson*<sup>29</sup> case interpreting the Info. Soc. Directive. Following this drafting, it is no more an act of communication under Article 15 of the DSM directive. On the other side, hyperlinking unauthorized content in full knowledge that such hyperlinking is unauthorized is an act of communication to the public based on the *GS Media* case<sup>30</sup> interpreting the Info. Soc. Directive. Under the former version of the directive, this hyperlinking was characterized as an act of communication to the public. The goal was to keep a perfect analogy with the rule under copyright law. With this exception's new formulation, it seems that an act of hyperlinking might be an act of communication to the public under the Info. Soc. directive but not under Article 15 of the DSM directive.

Finally, the last exception is based on the use of individual words or very short extracts of press publication. Interestingly, the justification for this exception is not freedom of expression, but the fact that such use "may not undermine the investment made by publishers of press publication in the production of content" (Recital 58). Without any doubt, the ECJ will have to determine the exact scope of this exception. A key element might be the protection of investments and how the act affects those investments. Recently, the Court limited the scope of the *sui generis* database right against acts adversely affecting the investments of the maker.<sup>31</sup> The logic might be the same for Article 15 and the interpretation of this exception.

Beyond these specific exceptions to Article 15, copyright exceptions shall apply *mutatis mutandis*. This means that if the reproduction of a journalistic article is authorized pursuant to the quotation exception of the Info. Soc. Directive, then the same exception applies to the right of the press publishers. This new ancillary right will

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27. Jean-Michel Bruguière, *Le Droit Voisin des Éditeurs de Presse dans la Directive sur le Droit d'Auteur dans le Marché Numérique*, 371 LEGIPRESSE 267 (2019).

28. See ROSATI, *supra* note 7, at 276.

29. Case C-466/12, *Svensson v. Retriever Sverige AB*, ECLI:EU:C:2014:76 (Feb. 13, 2014).

30. Case C-160/15, *GS Media BV v. Sanoma Media Neth. BV*, ECLI:EU:C:2016:644 (Sep. 8, 2016).

31. Case C-762/19, *CV-Online Latvia SIA v. Melons SIA*, ECLI:EU:C:2021:434 (Jun. 3, 2021).

be aligned with copyright so as not to affect the latter. It is clear that if the quotation were authorized under copyright law, but not under Article 15; it would have badly affected the application of copyright law. Consequently, all copyright exceptions are applicable when it comes to press publishers' rights.

The tool being explained, the question becomes whether it will achieve its goal. A good case study is France as it was the first country to implement Article 15 and an interesting litigation against Google has developed there.

## II. THE FRENCH EXPERIENCE : THE ANTITRUST TOOL

Since October 2019, France is the first EU country to have implemented and applied Article 15 of the DSM Directive. The situation in France is therefore quite interesting to study. If the goal of Article 15 was to make “the licensing and enforcement of rights in press publications” less complex and more efficient (Recital 54), the first application of the French publishers' right shows that doing so was not so easy or efficient. This paper will first present the Google litigation in France and then attempt to identify from this experience the strengths and failures of the EU's response.

### A. THE GOOGLE LITIGATION

After the French implementation of Article 15, Google's reaction was fast and bold.<sup>32</sup> In September 2019, the company declared, “when the French law comes into force, we will no longer display an overview of the content in France for European press publishers unless the publisher has made the arrangements indicate that it is his wish. This will be the case for search results from all Google services.”<sup>33</sup> Most of the French publishers accepted Google's condition, giving free licenses on their content to Google.

The first question was whether such a move was acceptable from the IP side. More precisely, did Google respect Article 15 of the DSM directive by negotiating free licenses? It is clear that the directive does not expressly prohibit the waiving of the press publishers' rights. It is interesting to compare that silence with other articles of that same directive. When it comes to contractual protection, in order to correct the imbalance between authors and licensees or assignees, Article 21 clearly considers that

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32. Edouard Treppoz, *“Competition Law Strengthening the Failure of the New Publishers' Rights: Is It Fair? The French Competition Authority Orders Google To Negotiate with Publishers and News Agencies”*, MEDIAWRITES (Apr. 23, 2020), <https://mediawrites.law/competition-law-strengthening-the-failure-of-the-new-publishers-rights-is-it-fair-the-french-competition-authority-orders-google-to-negotiate-with-publishers-and-news-agencies> [<https://perma.cc/QQ2R-SHDB>] [<https://web.archive.org/web/20230126004637/https://mediawrites.law/competition-law-strengthening-the-failure-of-the-new-publishers-rights-is-it-fair-the-french-competition-authority-orders-google-to-negotiate-with-publishers-and-news-agencies>].

33. See Richard Gingras, *Nouvelles Règles de Droit d'Auteur en France: Notre Mise en Conformité avec la Loi*, BLOG GOOGLE FR. (Sep. 25, 2019), <https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/impact-initiatives/comment-nous-respectons-le-droit-dauteur> [<https://perma.cc/E3PF-MJ3G>] [<https://web.archive.org/web/20230126005128/https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/impact-initiatives/comment-nous-respectons-le-droit-dauteur>].

“any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be enforceable in relation to authors and performers.” By the same token, Article 7 of the DSM Directive holds that “Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.” It is clear that the EU legislator knows how to strengthen IP protection by the tool of unenforceability when needed. The EU protection may prevail over contractual provisions. It seems quite clear that if nothing is said, such a silence should be interpreted as authorizing the press publisher to waive its right. The conclusion should be the same for accepting free licenses.<sup>34</sup> Paradoxically, if a fair remuneration was the goal of the Directive and the French implementation, nothing was said on the prohibition of a free license, nor on the waivable nature of the new right. Consequently, Google’s move from the copyright side was difficult to contest. That’s why publishers decided to use another battlefield. The AFP news agency and publishers’ unions weaponized the French Competition Authority against Google for an abuse of dominant position.

On April 9, 2020, the French Competition Authority (FCA) rendered its first interim decision clearly in favor of French publishers.<sup>35</sup> Firstly, the FCA held that Google is likely to hold a dominant position (ninety percent) in the French market for general online research services. It would be interesting to understand why the FCA limits the relevant market to online research services. If the market was understood as having access to press information online, Facebook or Twitter would compete in the same market as Google.<sup>36</sup> Secondly, the FCA considers that Google may have abused its dominant position by imposing free licenses which were less favorable to the press publishers than the previous system. For the French Authority, Google is considered “essential and not replaceable for the economic viability of the press publishers,”<sup>37</sup> justifying that a publisher losing Google’s traffic would dramatically alter its economic situation. The risk of abuse of its dominant position might then exist. Interestingly, the FCA considered that Google, without formally breaching the French implementation, did circumvent its goal by imposing free licenses.<sup>38</sup> The failure of the French implementation and the EU directive was not to prohibit free license. Antitrust law fills the gap by requiring that Google pay for licenses. This decision could be seen as fair but

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34. Bruguière, *supra* note 27, at 267; ROSATI, *supra* note 7, at 287.

35. DECISION 20-MC-01 OF 9 APRIL 2020 ON REQUESTS FOR INTERIM MEASURES BY THE SYNDICAT DES ÉDITEURS DE LA PRESSE MAGAZINE, THE ALLIANCE DE LA PRESSE D’INFORMATION GÉNÉRALE AND OTHERS AND AGENCE FRANCE-PRESSE, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Apr. 9, 2020).

36. Jean-Cristophe Roda, *Google Contraint de Négocier avec les Éditeurs de Presse: Quand la Loi sur les Droits Voisins Croise l’Abus de Position Dominante*, 20 GAZETTE DU PALAIS 26 (Jun. 2 2020) (comparing the French position with the Australian Competition Authority’s taking into account Facebook); cf. DIGITAL PLATFORMS INQUIRY FINAL REPORT, AUSTRALIAN COMPETITION & CONSUMER COMM’N (2019).

37. DECISION 20-MC-01 OF 9 APRIL 2020 ON REQUESTS FOR INTERIM MEASURES BY THE SYNDICAT DES ÉDITEURS DE LA PRESSE MAGAZINE, THE ALLIANCE DE LA PRESSE D’INFORMATION GÉNÉRALE AND OTHERS AND AGENCE FRANCE-PRESSE, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Apr. 9, 2020), n° 235.

38. *Id.*

only if the silence of the directive on that given point was not precisely a compromise. If it was, it is not clear if antitrust Law should alter that compromise.

Finally, the FCA held that there has been a serious and immediate damage to the press sector resulting from Google's practice. Strong interim measures were ordered: (1) Google has to negotiate the terms, conditions, and the remuneration in good faith; (2) Google has to communicate information required for a fair evaluation of the remuneration to press publishers; (3) Google has to maintain the display of content in the manner chosen by the publisher. With a little help from the Competition Authority, negotiation might become much more fruitful for the French press publishers and news agencies.

The Paris Court of Appeal confirmed this decision rendered by the Competition Authority in October 2020.<sup>39</sup> To the Court, it was fair to take into account the market for online research services of which Google holds ninety percent. It is worth mentioning that the Court clearly stated that the press publishers' rights does not create a right to be remunerated but does require a fair and balanced negotiation. Google's behavior neutralized the "*effet utile*" of the Press Publishers' rights.

The litigation has nevertheless continued, since some press publishers found that Google did not respect the measures ordered by the FCA and confirmed by the Paris Court of Appeal. They lodged a complaint in August 2020, and in July 2021 the FCA found that Google had failed to comply with some of the injunctions ordered in April 2020.<sup>40</sup> Because of this behavior, the authority issued a fine of 500 Million euros. In particular, the authority recognized that Google did not comply with the order to negotiate in good faith. Google practically refused to clearly identify the press publisher right as the justification of the license, trying to impose a global negotiation not focused on Article 15. Moreover, Google tried to exclude or limit the scope of the right by excluding news agencies when their content was reused by press publishers as well as press publishers lacking Political and General Information (PGI) certification and also by having a restrictive interpretation of revenues derived from Article 15. Interestingly, the authority considers that indirect revenue related to the attractiveness of Google's search service should also be taken into account.

Finally, in June 2022, the litigation ended. Google made commitments that were accepted by the Authority Competition, closing the proceedings on the merits.<sup>41</sup>

What are Google's commitments? First, Google promised not to limit negotiation to publishers having PGI certification and also not to limit Press Agencies' right to content integrated into third party publication. Second, Google undertakes to negotiate in good faith, which means to specifically identify Article 15 in the negotiation, the ancillary right being recognized as the reason for the license and of the remuneration. Third, Google will communicate the relevant information for a transparent evaluation

39. Cour d'Appel [CA] [regional court of appeal] Paris, civ., Oct. 8, 2020, 20/08071.

40. DECISION 21-D-17 OF 12 JULY 2021 ON COMPLIANCE WITH THE INJUNCTIONS ISSUED AGAINST GOOGLE IN DECISION 20-MC-01 OF 9 APRIL 2020, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Jul. 12, 2021).

41. DECISION 22-D-13 OF 21 JUNE 2022 REGARDING PRACTICES IMPLEMENTED IN THE PRESS SECTOR, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE], (Jun. 21, 2022).

of the press publisher's remuneration. The striking point is that this communication is made under the supervision of an independent monitoring trustee. The goal is to combine the legitimate need for Google to protect its trade secrets and the necessity for the publishers to have access directly or indirectly to all information relevant to determine its remuneration. Fourth, Google will make an offer for remuneration and, where an agreement is not made, an arbitral tribunal may determine the remuneration amount. The arbitration may be entirely at the cost of Google. Finally, this entire process will be supervised by an independent monitoring trustee, being notably in charge to overcome any points of disagreement. Interestingly, Google will have to comply with what has been decided by the trustee, but this is not necessarily true of the press publishers.

The key point of these commitments concerns the need for a third and neutral party to ascertain the fairness of the negotiation. As explained, the independent monitoring trustee will play a decisive role. One may also quote the use of the arbitration in order to fix the remuneration. Starting from intellectual property, it seems that the solution for a fair share of revenue is not any more related to intellectual property, or at least not solely related to it.

#### B. WHAT DOES IT TELL US ABOUT THE EU ANSWER?

The first lesson learned from the French experience is that the EU ancillary right does not solely suffice to strengthen press publishers' power to negotiate in order to obtain fair remuneration. Fairness might eventually be achieved by a complex combination of antitrust law and the intervention of a neutral third party.

Further questions might be raised based on that combination of tools. First, antitrust is efficient only if there is a risk of an abuse of dominant position. The FCA position was that this was the case with Google. Nevertheless, it won't necessarily lead to the same result with other providers less powerful than Google, meaning that antitrust law would not always be the key to achieving fairness. Second, antitrust, as such, is not really convincing. Indeed, if fairness is ultimately obtained in the French Google case, it will be achieved thanks to the intervention of neutral parties. The use of a neutral party seems to be the key to achieve fairness. Finally, the most crucial question concerning that combination of tools is whether the creation of an ancillary right was really needed. If the goal is to obtain fair licensing in favor of press publishers, why would copyright law not be sufficient? Antitrust law needs a right granted to press publishers in order to impose a fair remuneration. The question becomes whether such an outcome may not be obtained based on copyright law. Indeed, the ECJ recognized that eleven words of a newspaper article might be protected by copyright law.<sup>42</sup> Based on that protection, press publishers might have been able to negotiate and—thanks to antitrust law—to reach a fair price. Creating an ancillary right would not necessarily be required.

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42. Case C-5/08, *Infopaq Int'l A/S*, ECJ:EU:C:2009:465 (Jul. 16, 2009).

A second lesson from the French experience is that the IP-only answer was not able to impose fairness. Clearly, the main failure of Article 15 of the DSM directive is related to its waivability. Copyright law is accustomed to correcting the imbalance among contractual parties by imposing unwaivable rights. But when parties do not have the same strength, negotiation would not lead to fairness. A way to correct such an imbalance is to impose unwaivability. Under French copyright law, moral rights are unwaivable.<sup>43</sup> Interestingly, EU copyright uses the same weapon in order to achieve the same outcome. As previously said, the contractual protections given by the same DSM directive are characterized as being unwaivable.<sup>44</sup> Furthermore, from an American perspective, it is informative to delve into the EU resale right directive.<sup>45</sup> Article 1 of that directive defines the resale right as a right “to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.” Recital three presents a strong analogy with the objective sought by the EU legislator when creating the press publishers’ rights. Indeed,

the resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

If the goal to correct the unbalanced relationship is identical, the tool is not the same. Resale right is defined at Article 1 Paragraph 1 as “an inalienable right which cannot be waived, even in advance.” It seems clear that a first strengthening of the ancillary right would be to make it unwaivable. Nevertheless, it would not have been sufficient since providers may still have the power to impose a free license. As such, the right is not waived, but licensed for free. Wouldn’t the ideal tool be to impose an unwaivable right to be paid? The only way out would be for the provider to leave the market. The Spanish and the Belgian experiments show that the exit route was clearly an option for Google. The difference here is that the EU market could not be compared with national markets. Indeed, if leaving a national market might be a strategical option to force other markets not to use the same tool, the strategy is much more dangerous to wield at the EU level.

A last lesson is related to a more comprehensive point of view taken into account by Article 17 of the DSM directive. The goal of Article 17 is still to achieve a better remuneration for authors against internet service sharing platforms. The main

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43. See Code de la propriété intellectuelle [Intellectual Property Code], art. L121-1 (Fr.) (“It shall be perpetual, inalienable and imprescriptible.”).

44. See Directive 2019/790, *supra* note 1, at art. 23 (“Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.”).

45. Council Directive, of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001/84/EC, 2001 O.J. (L272) 33.



breakthrough of Article 17 is how it addresses that online content sharing services providers communicate content downloaded by users to the public. Consequently, content sharing services must license content uploaded on their platform by users. More precisely, pursuant to Article 17 Paragraph 3, online content sharing service providers have an obligation to make “their best efforts to obtain an authorization.” They do not have an obligation to license, but an obligation to make their best effort to negotiate. Concerning Article 17, the best effort obligation is seen as an alleviation from the obligation to have a license. What is interesting is that the negotiation is no longer free, since the online content sharing services platform must behave in order to negotiate licensing. Consequently, an offer which is not fair may not fulfill the best effort requirement. Indeed, imposing systematically to all publishers a free license would be considered a breach the best effort negotiation. The situation is analogous to FRAND licenses.<sup>46</sup> The purpose of this license is to prevent the owner of a patent integrated in a technical standard from abusing his monopoly by charging an excessive license fee. Consequently, the owner of a standard essential patent (SEP) must not only make an offer. He has to make a Fair, Reasonable and Non-Discriminatory license (“FRAND”) offer.<sup>47</sup> The characterization of the license as FRAND changes everything. First, what has been negotiated would not be legally binding if it is not FRAND. Second, a judge or eventually an arbitrator may have at the end to determine whether the contract concluded is FRAND. Consequently, the negotiation and the contract are not any more determined by the strongest party, since the legal system requires its FRAND character. Would it be interesting to impose to the provider either an obligation to make its best effort to get a license, or an obligation to obtain not only a license but a FRAND license? Two benefits would result from such an obligation. First, an unfair offer would expose the provider to breach its best effort obligation. Clearly, an exit option without real negotiation would be considered as a breach of its best effort obligation. In order to be efficient, the mechanism needs to fine the provider which breaches its best effort obligation. Second, in the end, a judge will have to decide if the best effort has been respected. This leads to the judicialization of the process of negotiation. Fairness might result from the fear of the judicial intervention. Ultimately, if the best effort obligation were the solution, was it necessary to create a new ancillary right to support such a best effort obligation? Fairness would result from the legal and potentially judicial framing of the negotiation, correcting the imbalance among parties. It might be eventually possible to achieve that result based on the copyright protection owned by the press publishers. Clearly, the ancillary right is a flawed solution, which has been restored by antitrust law. The best restoration would have been to add a best-

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46. For a first understanding of FRAND litigation in a European context, see Case C-170/13, *Huawei Tech. Co. Ltd v. ZTE Corp.*, ECJ:EU:C:2015:477, and *Optis Cellular Tech., LLC v. Apple Retail U.K. Lim.* [2022] EWCA (Civ) 1411.

47. ANNEX 6: ETSI INTELLECTUAL PROPERTY RIGHTS POLICY ¶ 6.1 (Nov. 29-30, 2022) (“When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory (‘FRAND’) terms and conditions.”).

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efforts obligation to license. The question remains whether the creation of the ancillary right was such a good option if a best-efforts obligation based on copyright protection would suffice.



## **Do Press Publishers Need Additional Copyright Protections? Reading the Copyright Office's Report on Protections for Press Publishers**

Andrew Foglia \*

### **INTRODUCTION**

In June 2022, the United States Copyright Office published a report on copyright protections for press publishers.<sup>1</sup> The report was the product of a year-long study focused on whether press publishers in the United States need additional statutory protections against online news aggregators. The report concluded that they do not. This essay will discuss the history of the Copyright Office's report and summarize its findings. Part I describes the origins and method of the study. Part II turns to the report itself, beginning with its historical background on the internet and press publishers, the rise of online news aggregators, and recent legislative efforts to buttress press publishers' finances through copyright or competition law. Part III covers the Report's key findings that press publishers already have significant protections under U.S. copyright law, that these protections are subject to some important limitations, but that the most important limitation is not a matter of copyright but bargaining power between press publishers and the largest search and social media platforms. Part IV briefly summarizes the report's conclusions and recommendations.

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1. U.S. COPYRIGHT OFFICE, *COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS* (2022), <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf> [<https://perma.cc/435W-SM4U>] [<https://web.archive.org/web/20230128015422/https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>] [hereinafter *Publishers' Protections Report*].

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## I. STUDY PROCESS

Since 2000, declining newspaper circulation and revenues have incited several large-scale inquiries into the future of journalism in the United States.<sup>2</sup> The topic arose anew in the context of Senate Judiciary Committee hearings on reforms to digital copyright law. Witnesses for news media groups lamented online news aggregators' practice of reproducing publishers' original reporting without compensation (or credit to the authors). They called the Committee's attention to the new "press publishers' right" in the European Union, which gave publishers the ability, with some limitations, to exclude commercial aggregators from reproducing the publishers' news materials.<sup>3</sup>

Following on these hearings, in May 2021, a group of six United States senators asked the Copyright Office to conduct a study that would: (a) "[a]ssess the viability of adding specific ["ancillary copyright"]<sup>4</sup> protections to U.S. Copyright law similar to those . . . being implemented in Europe[;]"<sup>5</sup> (b) analyze the scope of the potential new right and how it might affect existing rights of authors; and (c) discuss relevant copyright exceptions and international treaty implications.<sup>6</sup>

2. See, e.g., DANA A. SCHERER & CLARE Y. CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE (2022), <https://crsreports.congress.gov/product/pdf/R/R47018> [<https://perma.cc/JAD4-4KAL>] [<https://web.archive.org/web/20220823002026/https://crsreports.congress.gov/product/pdf/R/R47018>]; STEVEN WALDMAN, FED. COMM'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf> [<https://perma.cc/86SU-H73J>] [<https://web.archive.org/web/20220823002030/https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf>]; See PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY IN LOC. MEDIA, THE RISE OF A NEW MEDIA BARON AND THE EMERGING THREAT OF NEWS DESERTS 20–21 (2016), [http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc\\_RiseOfNewMediaBaron\\_SinglePage\\_01Sep2016-REDUCED.pdf](http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf) [<https://perma.cc/4YW2-VFPS>] [[https://web.archive.org/save/http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc\\_RiseOfNewMediaBaron%20\\_SinglePage\\_01Sep2016-REDUCED.pdf](https://web.archive.org/save/http://newspaperownership.com/wp-content/uploads/2016/09/07.Unc_RiseOfNewMediaBaron%20_SinglePage_01Sep2016-REDUCED.pdf)].

3. Directive 2019/790 of the European Parliament and of the Council of Apr. 17, 2019, on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 15, 2019 O.J. (L 130/92) [hereinafter *Directive 2019/790*].

4. The term "ancillary copyright" generally refers to copyright-like protections belonging to press publishers in the material that they publish. See *Publishers' Protections Report*, *supra* note 1, at 1 (explaining that ancillary copyright protections "would require online news aggregators to pay publishers for excerpts of content they provide for others to view"); Giovanni Maria Riccio, *Ancillary Copyright and Liability of Intermediaries in the EU Directive Proposal on Copyright*, SSRN (Mar. 1, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149363](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363) [<https://perma.cc/5N5U-UE9K>] [[https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149363](https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363)] (In the E.U., for example, "whenever a subject uses parts of a journalistic article (including . . . so-called snippets) he is expected to pay the above ancillary rights to publishers.")

5. Ancillary copyright protections "would require online news aggregators to pay publishers for excerpts of content they provide for others to view." *Publishers' Protections Report*, *supra* note 1, at 1. In the E.U., for example, "whenever a subject uses parts of a journalistic article (including . . . so-called snippets) he is expected to pay the above ancillary rights to publishers." Giovanni Maria Riccio, *Ancillary Copyright and Liability of Intermediaries in the EU Directive Proposal on Copyright*, SSRN (Mar. 1, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149363](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363) [<https://perma.cc/5N5U-UE9K>] [[https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149363](https://web.archive.org/web/20230325063024/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149363)].

6. Letter from Senators Leahy, Tillis, Cornyn, Hirono, Klobuchar, and Coons to Shira Perlmutter, Register of Copyrights 1 (May 3, 2021) (on file with the Copyright Office). The Letter followed a prior suggestion for a Copyright Office study of ancillary copyright that was included in a discussion draft of the

The Copyright Office's study proceeded in three phases. First, we canvassed past studies, academic articles, and popular press in order to set the scope of the study and help frame questions for public comments. Second, we gathered views from the public. In the fall of 2021, we published two notices of inquiry in the Federal Register to solicit public comments.<sup>7</sup> We received approximately forty-seven responsive comments in total.<sup>8</sup> And on December 9, 2021, we held a public roundtable for members of the public to further communicate their views.<sup>9</sup> We then reviewed all the comments and all the documents cited in the comments.<sup>10</sup> Third, and finally, we wrote the Report.

## II. THE REPORT'S BACKGROUND

### A. "THE INTERNET HAS USHERED IN AN ERA OF DISRUPTION AND TRANSFORMATION"<sup>11</sup>

Our Report began with a brief history of the press publishing industry in the internet era. Although this history bore only glancing relevance on the legal status of aggregation, we found it helpful to place aggregation in the context of a larger story about the digitization of press publishing.<sup>12</sup> Focusing narrowly on aggregation might give a misleading impression of the harms caused by aggregation and the good that one could reasonably hope to achieve by limiting the practice.

The base line facts are brutal. Between 2008 and 2018, newspaper ad revenue plunged by sixty-two percent.<sup>13</sup> Classified advertisers fled to free, online platforms like

Digital Copyright Act. Digital Copyright Act, Sec. 8 (Discussion Draft 12/18), <https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B> [<https://perma.cc/3YU8-A7CV>] [<https://web.archive.org/web/20230214143745/https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B>] ("The Register of Copyrights shall study the costs, benefits, and viability of adding ancillary copyright for press publishers to Federal law. The Register shall, not later than 12 months after the date of the enactment of this Act, submit to the Congress a report on the evaluation, including any legislative recommendations the Register may have."). Notably, neither the Digital Copyright Act draft nor the senators' request mentioned antitrust policy, but antitrust policy would play a central role in comments on the Copyright Office study as it developed.

7. *Publishers' Protections Report*, *supra* note 1, at 6; *Publishers' Protections Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56,721 (Oct. 12, 2021); *Publishers' Protections Study: Request for Additional Comments*, 86 Fed. Reg. 62,215 (Nov. 9, 2021).

8. *Id.*

9. *Publishers' Protections Report*, *supra* note 1, at 7.

10. These comments, and the sources they cite, are extraordinarily helpful in informing the Copyright Office's policy analysis. It bears mentioning, however, that the comment process does not necessarily furnish the Office with complete arguments and rebuttals on every point of interest. Sometimes only one commenter chooses to address a particular issue in any detail and the Office is left without the benefit of opposing viewpoints.

11. *Publishers' Protections Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56, 721 (Oct. 12, 2021).

12. As we put it in the Report: "The copyright issues associated with news aggregation are part of a longer discussion about the viability of legacy press publishers and, more broadly, the survival of journalism in the internet era, dating back to the early 2000s." *Publishers' Protections Report*, *supra* note 1, at 5.

13. *Id.* at 8 (citing Elizabeth Grieco, *Fast Facts about the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CENTER (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/>

Craigslist and Facebook,<sup>14</sup> and display advertisers likewise shifted their focus online.<sup>15</sup> Circulation numbers (though not revenues) fell to their lowest point since 1940,<sup>16</sup> as digital distribution abetted the “unbundling” of popular features like sports box scores, weather reports, or movie showtimes<sup>17</sup> and simultaneously terminated city papers’ local monopolies by giving all news outlets effectively limitless geographic reach.<sup>18</sup> From 2004 to 2018, total newspaper revenue fell fifty-two percent.<sup>19</sup> Staff cutbacks and paper closings were equally severe.<sup>20</sup>

Of course, there are other, less bleak stories to tell about journalism in the internet age. The flipside to local papers facing more competition is that readers have access to more news outlets than ever before.<sup>21</sup> And the same low distribution costs that allow *The Guardian* to reach readers in Peoria also enable individuals to share news or analysis

2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles [https://perma.cc/E6CT-M4YD] [https://web.archive.org/web/20230214145317/https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles].

14. *Id.*

15. SCHERER & CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE 5–6. Overall digital advertising revenue skyrocketed during this period, but “half of all digital [display] revenue went to just two tech companies,” Facebook and Google. Michael Barthel, *5 Key Takeaways About the State of News Media in 2018*, PEW RSCH. CENTER (July 23, 2019), <https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018> [https://perma.cc/3N6C-6E29] [https://web.archive.org/web/20230214145527/https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018].

16. Michael Barthel & Kirsten Worden, *Newspapers Fact Sheet*, PEW RSCH. CENTER (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers> [https://perma.cc/J5AK-LGXT] [https://web.archive.org/web/20230214145742/https://www.pewresearch.org/journalism/fact-sheet/newspapers].

17. See Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 Harv. J.L. & Tech. 473, 491 (2021) (“In print newspapers, investigative reporting is bundled together with light entertainment. As a result, print advertising revenues and subscriptions effectively cross-subsidize investigative reporting even if readers spend far more time reading entertainment. But digital technology greatly diminishes newsrooms’ ability to bundle.”).

18. *Publishers’ Protections Report*, *supra* note 1, at 10–11.

19. ACCENTURE, USA NEWS MEDIA LANDSCAPE TRENDS 5 (2021), [https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture\\_analysis\\_USAnewsmedia.pdf](https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf) [https://perma.cc/Z3YY-QRHG] [https://web.archive.org/web/20230214145957/https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture\_analysis\_USAnewsmedia.pdf] (“Between 2004 and 2018 total newspaper revenues fell by \$30 billion, to \$27.4 billion. This amounted to a 52% fall.”).

20. *Publishers’ Protections Report*, *supra* note 1, at 10 (“[t]he combination of increased competition, dwindling revenue, and high debt overhangs, led to a wave of bankruptcies, consolidations, and leveraged buyouts among local newspapers. From 2008 to 2019, the number of newspaper newsroom employees dropped by more than 40%, and one in five papers closed.”); see Elizabeth Grieco, *Fast Facts about the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CENTER (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles> [https://perma.cc/E6CT-M4YD] [https://web.archive.org/web/20230214145317/https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles]; Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This Is the Result.*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html> [https://perma.cc/B3LZ-8M2W] [https://web.archive.org/web/20230214150654/https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html].

21. *Publishers’ Protections Report*, *supra* note 1, at 7 (“Readers have access to high-quality journalism from around the globe”).

via blog, newsletter, or social media platform.<sup>22</sup> Aggregation itself may add value for news consumers by helping them to discover articles they would not otherwise encounter or to share common points of reference.<sup>23</sup> There is, according to one commenter on the Copyright Office's study, "some sense" in which "the 21<sup>st</sup> century is a golden age of journalism."<sup>24</sup>

Moreover, the 21st century's ugly revenue and circulation numbers do call for some additional context. The disruptions brought on by the internet echo previous technology-led shifts in the news industry, transforming both distribution and content—for better and for worse.<sup>25</sup> In the 20th century, radio and television brought news to new audiences and in new formats, but drew consumers and advertisers away from print media.<sup>26</sup> "Foreshadowing some of the concerns heard today, print journalists complained that radio stations often lifted copy directly from newspapers, aired stories that didn't go into depth, and hired inexperienced reporters."<sup>27</sup>

A wider historical perspective also shows that the enormous profit margins newspapers enjoyed at the end of the 20th century were, in some respects, an aberration. From 1975 to 1990, press publishers leveraged market consolidation, efficient management, and spiking ad rates to increase profits.<sup>28</sup> "[A]s more newspapers became monopolies, rates skyrocketed 253 percent (compared with 141 percent for general consumer prices)."<sup>29</sup> By the 1990s, despite years of declining circulation, the industry's average cash flow margins were twenty-nine percent.<sup>30</sup>

22. *Id.* at 7–8.

23. See generally Engine Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022) [hereinafter *Engine Second-Round Comments*] (discussing benefits of aggregation to startup companies); Reddit, Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022) [hereinafter *Reddit Second-Round Comments*] (describing web communities that have developed around sharing and discussion of news stories).

24. The R Street Institute ("R Street") and Niskanen Center ("Niskanen"), Joint Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021 Notice of Inquiry, 4 (Nov. 26, 2021) [hereinafter *R Street/Niskanen Joint Initial Comments*].

25. In the 1830s, reductions in the cost of ink and paper enabled newspapers to pursue a mass-market audience, which changed their incentives from pleasing party patrons to avoiding political affiliation, leading to a new focus on independent reporting. STEVEN WALDMAN, FED. COMM. COMMISSION, THE INFORMATION NEEDS OF COMMUNITIES 34 (June 9, 2011), <https://www.fcc.gov/document/information-needs-communities> [https://perma.cc/7B9S-JS54] [https://web.archive.org/web/20230214152112/https://www.fcc.gov/document/information-needs-communities]. Railroad construction and then the telegraph supported the growth of national corporate brands, and the owners of those brands realized they could save money by "dealing with a few large papers instead of a bevy of small ones." *Id.* at 34.

26. *Id.* at 35 ("Along with readers went advertisers. Between 1929 and 1941, newspaper ad revenue dropped 28 percent overall and national advertising fell 42 percent.")

27. *Id.* During the same time period, the newspaper industry rapidly consolidated: in 1910, nearly sixty percent of cities had competing daily papers; by 1971, that figure had fallen to two percent. As of 1977, 170 newspaper groups owned two-thirds of the country's 1,700 daily papers. SUZANNE M. KIRCHOFF, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION, CONG. RSCH. SERV. 3 (2010), <https://sgp.fas.org/crs/misc/R40700.pdf> [https://perma.cc/SCKF-L7TX] [https://web.archive.org/web/20221025231553/https://sgp.fas.org/crs/misc/R40700.pdf].

28. WALDMAN, *supra* note 25, at 35.

29. *Id.* at 36.

30. *Id.*



None of this is to say that concern over shrinking news revenue and staffing rates are misplaced. As a 2011 FCC report put it, “[a]n abundance of media outlets does not translate into an abundance of reporting.”<sup>31</sup> Citizen journalists and hyperlocal blogs may serve their communities in some unique ways without adequately replacing the benefits of healthy local newspapers.<sup>32</sup> And, so far, new local and hyperlocal initiatives are concentrated in major metropolitan areas, not the sites of America’s growing news deserts.<sup>33</sup>

On the contrary, it is clear that the internet “has shaken the foundations of newspaper financing.”<sup>34</sup> But history should make us cautious about treating press publishers’ 1990s peaks as a baseline or believing that the 1990s publishing ecosystem can be recreated when its technological foundations have crumbled.<sup>35</sup>

31. *Id.* at 6.

32. At the public roundtable, a representative of the News Media Alliance argued that citizen journalism does not merit the name “journalism:” “[w]here a Facebook poster goes out and takes pictures on their phone[,] that’s not journalism because there’s a method and there’s a Code of Conduct that we adhere to ensure . . . that people can rely on it. . . . [D]o we want citizen medicine practice on the streets?” Publishers’ Protections Study Roundtable Transcript at 64:18–65:20 (Dec. 9, 2021) (Danielle Coffey, News Media Alliance), <https://www.copyright.gov/policy/publishersprotections/211209%20Publishers%20Protections%20Transcript.pdf> [<https://perma.cc/2HVV-TZAX>]. [<https://web.archive.org/web/20220705065233/https://www.copyright.gov/policy/publishersprotections/211209%20Publishers%20Protections%20Transcript.pdf>] [hereinafter *Transcript*]; see also Darren Smith, *Media Ethics and Guerilla Warfare*, THOUGHT LEADER (Oct. 31, 2007), <https://thoughtleader.co.za/media-ethics-guerrilla-warfare> [perma.cc link unavailable] [<https://web.archive.org/web/20230214153643/https://thoughtleader.co.za/media-ethics-guerrilla-warfare>] (noting the troubling implications of an undisciplined army of citizen journalists); Vincent Mahler, *Citizen Journalism is Dead*, Media in Transition (captured Sept. 24, 2006), <https://web.archive.org/web/20060924125946/http://nml.ru.ac.za/maher/?p=6> (“[C]itizen journalism is potentially devoid of any form of ethical accountability other than the legislative environment in which the individual operates. So, on the level of routine practice, there is very little control, especially in terms of accuracy.”), *comments revised and expanded* in Vincent Mahler, *Towards a Critical Media Studies Approach to the Blogosphere*, NEW MEDIA LAB (Feb. 2, 2006), <https://web.archive.org/web/20060924145309/http://nml.ru.ac.za/maher/papers/VMO-01.pdf>; Jesse Singal, *Citizen Journalism Is a Catastrophe Right Now, and It’ll Only Get Worse*, N.Y. MAG. (Oct. 19, 2016), <https://nymag.com/intelligencer/2016/10/citizen-journalism-is-a-catastrophe-itll-only-get-worse.html> [<https://perma.cc/3UCD-PR77>] [<https://web.archive.org/web/20230214154411/https://nymag.com/intelligencer/2016/10/citizen-journalism-is-a-catastrophe-itll-only-get-worse.html>] (arguing that citizen journalism spreads misinformation faster than professional journalists can correct it); Carina Tenor, *Hyperlocal News: After the Hype*, THE LONDON SCH. OF ECON. AND POL. SCI. (2018), <https://www.lse.ac.uk/media-and-communications/assets/documents/research/Polis-Hyperlocal-News-report-Jul-2018.pdf> [<https://perma.cc/WSS8-BY2Y>] [<https://web.archive.org/web/20230214154619/https://www.lse.ac.uk/media-and-communications/assets/documents/research/Polis-Hyperlocal-News-report-Jul-2018.pdf>].

33. Clare Malone, *Is There a Market for Saving Local News?* THE NEW YORKER (Feb. 3, 2022), <https://www.newyorker.com/news/annals-of-communications/is-there-a-market-for-saving-local-news> [<https://perma.cc/449L-DGDQ>] [<https://web.archive.org/web/20221128162137/https://www.newyorker.com/news/annals-of-communications/is-there-a-market-for-saving-local-news>].

34. *Publishers’ Protections Report*, *supra* note 1, at 8.

35. To be clear, no commenters on the study suggested that the U.S. government could restore the press publishing business to the 1990s. What they asked was for the Office to recommend changes that (a) they believe are justified as a matter of fairness and (b) might arrest what they view as a terminal decline. See, e.g., News Media Alliance, Comment Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021 Notice of Inquiry 5 (Nov. 26, 2021) (“Press publishers across America—and around the world—are struggling for their very existence. While due to some extent to changes in consumption habits and increased access to information, the plight of press publishers in the online ecosystem and the resulting threat to quality

**B. “NEWS AGGREGATORS, INCLUDING SEARCH ENGINES AND SOCIAL MEDIA PLATFORMS, HAVE NOW BECOME THE PREFERRED OR INITIAL SOURCE OF NEWS FOR A MAJORITY OF DIGITAL NEWS CONSUMERS”<sup>36</sup>**

In addition to undercutting newspapers’ advertising business, the internet also fostered a set of distributors that “aggregate” news content from others’ original reporting. The term “news aggregator” can apply to a wide variety of services, including search and social media platforms, that distribute links to or snippets of third-party news articles,<sup>37</sup> but the Copyright Office’s Report focused on one type of aggregation: the unlicensed reproduction of headlines and lede sentences.

Compared to the collapse of classified ad sales, the Copyright Office found no conclusive evidence that the rise of online news aggregators,<sup>38</sup> specifically, has reduced newspapers’ profits.<sup>39</sup> Commenters generally disagree on whether aggregators’ reproduction of headlines and ledes tends in the aggregate to *substitute* for the original articles, depriving the original publisher of expected profits, or *supplement* the original articles by driving more traffic to the publisher’s website than the story would otherwise have obtained.<sup>40</sup> It is clear that news aggregators drive a great deal of traffic to news publishers’ sites,<sup>41</sup> probably more than the sites would otherwise receive,<sup>42</sup> but traffic to individual articles may be less valuable to the publisher than traffic to the home page,<sup>43</sup> and aggregation broadly may still hurt publishers by undermining the

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journalism is in large part created by fundamental power imbalances in the news marketplace that benefit a few dominant platforms to the detriment of others.”)

36. *Publishers’ Protections Report*, *supra* note 1, at 14.

37. *Id.* at 11–13.

38. The term “news aggregator” can apply to a wide variety of services, including search and social media platforms. *Id.* at 11–13. The Copyright Office’s Report focused on one type of aggregation: the unlicensed reproduction of headlines and lede sentences. *Id.*

39. *Id.* at 15–16.

40. *Id.* at 14.

41. *Id.* at 14 (citing NEWMAN ET AL., REUTERS INST. DIGITAL NEWS REPORT 2018 14–15 (Apr. 2018); Doh-Shin Jeon, *Economics of News Aggregators* 1–2 (Toulouse Sch. of Econ., Working Paper No. 18-912, 2018), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf) [<https://perma.cc/X6LV-BBL2>] [[https://web.archive.org/web/20221026171312/https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://web.archive.org/web/20221026171312/https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf)]).

42. *Publishers’ Protections Report*, *supra* note 1, at 15 (citing Jeon, *supra* note 39 (reviewing empirical literature and concluding that Google News and Facebook increase overall traffic to news sites); OLMSTEAD ET AL., NAVIGATING NEWS ONLINE: WHERE PEOPLE GO, HOW THEY GET THERE AND WHAT LURES THEM AWAY, PEW RSCH. CENTER (2011), <https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf> [<https://perma.cc/PC9M-D9WV>] [<https://web.archive.org/web/20220516210657/https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/NIELSEN-STUDY-Copy.pdf>]).

43. *Publishers’ Protections Report*, *supra* note 1, at 15–16 (citing Jeon, *supra* note 41, at 18 (“[N]ews aggregators reduce traffic to newspaper home pages while increasing traffic to individual news articles. Even if all empirical articles agree on the statement that the business-stealing effect is dominated by the readership-expansion effect, if this comes with a reduced traffic to home pages, it can have a long-term consequence that is not captured by the empirical studies.”)); *see also Transcript* at 107:1–5 (Dec. 9, 2021) (Hal Singer, Econ One, consultant to NMA).

connection between popular stories and the publishers' overall brand reputation.<sup>44</sup> The Copyright Office did not attempt to resolve this debate in the economics literature, noting only that the empirical data is "thin."<sup>45</sup>

**C. "OUT OF CONCERN FOR THE CONTINUED VIABILITY OF THEIR NEWS INDUSTRIES, SEVERAL NATIONAL AND REGIONAL LEGISLATURES HAVE IN RECENT YEARS CONSIDERED OR ENACTED NEW FORMS OF LEGAL PROTECTIONS FOR PRESS PUBLISHERS."<sup>46</sup>**

The headwinds facing traditional press publishers are not a U.S. phenomenon. A number of countries have attempted to shore up their press publishing industries by granting publishers new rights sounding in copyright or in competition law. In keeping with the senators' request to assess protections "similar to those now being implemented in Europe," the Copyright Office looked at these international models for new press publishers' rights. The record, although sparse, played a significant role in the Office's final recommendations.

In the 2010s, Spain and Germany legislated additional protections for press publishers. Germany's law granted publishers an exclusive right for commercial uses of their texts.<sup>47</sup> The right did not extend to individual words or "very short excerpts," and it did not apply to mere linking.<sup>48</sup> The law fomented a wave of legal challenges, and the Court of Justice of the European Union ultimately struck it down due to a procedural defect in its enactment.<sup>49</sup>

Spain took a different approach from Germany, granting news publishers not an exclusive right but a non-waivable right to equitable payment.<sup>50</sup> In other words, press publishers could not prevent aggregators from reproducing snippets of their articles, but the aggregators did need to pay for the use.<sup>51</sup>

44. *Publishers' Protections Report*, *supra* note 1, at 15–16 (citing Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. & TECH. 473, 482 (2021)).

45. *Id.* at 14.

46. *Id.* at 17.

47. *Id.* at 17 (citing Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, as amended by Ahtes Gesetz zur Änderung des Urheberrechtsgesetzes, May 7, 2013, BGBl I at 1161, § 87f (Ger.)).

48. *Id.*

49. *Id.* at 18–19; *see also* Case C-299/17, VG Media v. Google, ECLI:EU:C:2019:716 (Sept. 12, 2019).

50. *Publishers' Protections Report*, *supra* note 1, at 20 (citing Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law 21/2014, of November 4, Amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree 1/1996, of April 12, and Law 1/2000, of January 7, on Civil Procedure] (B.O.E. 2014, 11404), [https://www.congreso.es/constitucion/ficheros/leyes\\_espa/L\\_021\\_2014.pdf](https://www.congreso.es/constitucion/ficheros/leyes_espa/L_021_2014.pdf) [<https://perma.cc/XPB7-XYRU>] [[https://web.archive.org/web/20230214160235/https://www.congreso.es/constitucion/ficheros/leyes\\_espa/L\\_021\\_2014.pdf](https://web.archive.org/web/20230214160235/https://www.congreso.es/constitucion/ficheros/leyes_espa/L_021_2014.pdf)]).

51. *Id.*

Spain's law famously led Google News to exit Spain.<sup>52</sup> Some of the empirical literature on aggregation arises from this natural experiment. Studies found that news sites lost traffic and that smaller publishers were the hardest hit.<sup>53</sup> While the Office chose not to draw large inferences from a small set of studies, we concluded that at the very least the evidence from Spain did not clearly indicate that the law helped Spanish publishers.<sup>54</sup>

The most important antecedent ancillary copyright law was, however, the one mentioned in the letter requesting the study: Article 15 of the European Directive on Copyright and Related Rights. Article 15 provides EU publishers an exclusive right to authorize the reproduction or making available of press publications by online service providers.<sup>55</sup> It does not apply to individual words or "very short extracts."<sup>56</sup> Nor does it apply to mere linking, mere facts, or to any other use permitted by EU copyright law.<sup>57</sup>

A key point about Article 15 is that it arose in response to uncertainty about publishers' rights across the EU. Unlike in the United States, where the work made for hire doctrine ensures that publishers will generally own the copyright in the articles they publish, some EU publishers faced "the burden of having to prove ownership of copyright in each journalistic output" before they could license or enforce rights in the digital environment.<sup>58</sup>

52. *Id.* at 20 (citing Richard Gingras, *Novedades acerca de Google Noticias en España* [News About Google News in Spain], GOOGLE: BLOG OFICIAL DE GOOGLE ESPAÑA (Dec. 11, 2014) (Spain), <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html> [<https://perma.cc/9RCU-BLHB>] [<https://web.archive.org/web/20230309124958/https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>]).

53. See Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany*, SSRN, Dec. 1, 2018, at 9 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2837553](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553) [<https://perma.cc/NP4Z-CVW6>] [[https://web.archive.org/web/20230214160648/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2837553](https://web.archive.org/web/20230214160648/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553)]; PEDRO POSADA DE LA CONCHA ET AL., NERA ECONOMIC CONSULTING, *IMPACTO DEL NUEVO ARTICULO 32.2 DE LA LEY DE PROPIEDAD INTELECTUAL* [Impact of the New Article 32.2 of the Spanish Intellectual Property Law] 46–7 (2015), <https://www.asktheeu.org/en/request/3176/response/11308/attach/2/AnnexI.pdf> [<https://perma.cc/J4VW-YNUH>] [<http://web.archive.org/web/20230122015552/https://www.asktheeu.org/en/request/3176/response/11308/attach/2/AnnexI.pdf>]; Matthew Ingram, *External Traffic to Spanish News Sites Plummets After Google Move*, GIGAOM (Dec. 16, 2014), <https://research.gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move> [<https://perma.cc/LJA2-54H7>] [<http://web.archive.org/web/20230122015708/https://research.gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move>].

54. *Publishers' Protections Report*, *supra* note 1 at 22.

55. *Directive 2019/790*, *supra* note 3, at art. 15.

56. *Id.* at arts. 15; 31–32.

57. *Id.*

58. *Publishers' Protections Report*, *supra* note 1, at 22–23 (quoting EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR INTERNAL POLICIES OF THE UNION, POLICY DEPARTMENT FOR 'CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, *STRENGTHENING THE POSITION OF PRESS PUBLISHERS AND AUTHORS AND PERFORMERS IN THE COPYRIGHT DIRECTIVE 15* (2017), [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL\\_STU%282017%29596810\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf) [<https://perma.cc/7L4H-KZQ4>] [[https://web.archive.org/web/20220901044436/https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL\\_STU\(2017\)596810\\_EN.pdf](https://web.archive.org/web/20220901044436/https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)]).

Implementation of Article 15 is still underway, and so the Copyright Office could not assess its impact.<sup>59</sup>

**D. “DEVELOPMENTS IN THE UNITED STATES AND ABROAD HAVE HIGHLIGHTED OTHER, COMPETITION-BASED APPROACHES TO ADDRESSING THE RELATIONSHIP BETWEEN NEWS PUBLISHERS AND LARGE NEWS AGGREGATORS”<sup>60</sup>**

In addition to these ancillary copyright approaches, the Office also looked to examples where countries used competition (in the U.S., antitrust) law to try to protect publishers. The most salient of these is Australia’s News Media and Digital Platforms Mandatory Bargaining Code of 2021.<sup>61</sup> The Code enabled press publishers to notify designated digital platforms—at the time, just Google and Facebook—of their intent to bargain over payment for use of the publishers’ materials on the digital platforms.<sup>62</sup> Platforms that failed to reach an agreement with publishers would face the threat of binding arbitration.<sup>63</sup>

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59. *Id.* at 23; see also Christina Angelopoulos, “Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market – Part 1,” KLUWER COPYRIGHT BLOG (Nov. 29, 2022), <http://copyrightblog.kluweriplaw.com/2022/11/29/comparative-report-on-the-national-implementations-of-articles-15-17-of-the-directive-on-copyright-in-the-digital-single-market-part-1> [<https://perma.cc/F4Q6-DLCL>] [<http://web.archive.org/web/20230122015854/http://copyrightblog.kluweriplaw.com/2022/11/29/comparative-report-on-the-national-implementations-of-articles-15-17-of-the-directive-on-copyright-in-the-digital-single-market-part-1>].

60. *Publishers’ Protections Report*, *supra* note 1, at 23.

61. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.), [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_aspassed/toc\\_pdf/20177b01.pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf) [<https://perma.cc/5WKN-EBFG>] [[https://web.archive.org/web/20221209232107/http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_aspassed/toc\\_pdf/20177b01.pdf](https://web.archive.org/web/20221209232107/http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf)]. The Report also described decisions of the French competition authority to sanction Google for failure to bargain with press publishers in good faith. See *Publishers’ Protections Report*, *supra* note 1, at 25–26.

62. *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021*, *supra* note 61, at sec. 52ZE.

63. *Id.* at sec. 52ZIA. One important feature of Australia’s News Media and Digital Platforms Mandatory Bargaining Code is that because it is a competition law and not a copyright law, it applies in theory to all news content and not just the content that is protected by copyright law. *Publishers’ Protections Report*, *supra* note 1, at 25.

Australia's approach has proven attractive to policymakers in other countries.<sup>64</sup> A Canadian equivalent is advancing through Parliament.<sup>65</sup> In the United States, the latest version of the Journalism Competition and Preservation Act (JCPA)<sup>66</sup> introduced an Australia-like mandatory bargaining component.<sup>67</sup> Out of deference to the agencies tasked with enforcing antitrust law, the Copyright Office did not assess the merits of these antitrust approaches.<sup>68</sup>

Two points bear mentioning. First, the popularity among policymakers of Australia's bargaining code may reflect a broader turn in this area from copyright or neighboring right approaches to antitrust approaches. Many commenters on the Copyright Office's study argued that it was not copyright but competitive imbalance that needed addressing.<sup>69</sup>

64. See Andy Blatchford, *Canada Wants Digital Giants To Compensate Local News Outlets*, POLITICO (Apr. 5, 2022, 3:20 PM), <https://www.politico.com/news/2022/04/05/canada-digital-giants-compensate-local-news-00023113> [<https://perma.cc/7RP9-JDFF>] [<https://web.archive.org/web/20230124011837/https://www.politico.com/news/2022/04/05/canada-digital-giants-compensate-local-news-00023113>]; William Turvill, *Canada's News Industry Expects up to \$150m Annual Windfall from Australia-style Big Tech Crackdown*, PRESS GAZETTE (Dec. 2, 2021), <https://pressgazette.co.uk/canada-google-facebook-regulation-news-industry> [<https://web.archive.org/web/20230124012309/https://pressgazette.co.uk/news/Canada-google-facebook-regulation-news-industry>] ("Prime minister Justin Trudeau (pictured) has pledged to introduce a news media bargaining code for Canada within the next two months."); Theano Karanikioti, *Following in Australia's Footsteps: EU To Make Google and Facebook Pay for News?*, THE PLATFORM L. BLOG (Feb. 12, 2021), <https://theplatformlaw.blog/2021/02/12/following-in-australias-footsteps-eu-to-make-google-and-facebook-pay-for-news> [<https://perma.cc/BR4V-89RH>] [<https://web.archive.org/web/20230124012840/https://theplatformlaw.blog/2021/02/12/following-in-australias-footsteps-eu-to-make-google-and-facebook-pay-for-news>] ("Members of the European Parliament are eager to follow in Australia's footsteps and force Google and Facebook to pay for news, the Financial Times reported. MEPs working on the Digital Services Act ('DSA') and the Digital Markets Act ('DMA') could consider amending these instruments to reflect aspects of the proposed Australian News Media and Digital Platforms Mandatory Bargaining Code.").

65. C-18, An Act respecting online communications platforms that make news content available to persons in Canada, 1st Sess., 44th Parl., 2023 (at second reading), <https://www.parl.ca/legisinfo/en/bill/44-1/c-18> [<https://perma.cc/5G9Q-UU87>] [<https://web.archive.org/web/20230214164255/https://www.parl.ca/legisinfo/en/bill/44-1/c-18>]; *MPs pass bill mandating internet giants pay for news. Meta threatens to block content*, CBC (Dec. 14, 2022), <https://www.cbc.ca/news/politics/bill-c18-internet-news-meta-1.6686447> [<https://perma.cc/3QLZ-L7M6>] [<https://web.archive.org/web/20230124014029/https://www.cbc.ca/news/politics/bill-c18-internet-news-meta-1.6686447>].

66. Journalism Competition and Preservation Act of 2022, S. 673, 117th Cong. (2022).

67. *Id.* at § 4.

68. *Publishers' Protections Report*, *supra* note 1, at 24.

69. *Id.* at 23 n.107 (citing NEWS MEDIA ALLIANCE, *HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM* 22 (2020), in News Media Alliance, Initial Comments on U.S. Copyright Office's Publishers' Protections Study at Appendix: Part 1 (Nov. 23, 2021), <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/11-23-2021-News-Media-Alliance-Comments-on-USCOs-Publishers-Protections-Study.pdf> [<https://perma.cc/B39P-ANWF>] [<https://web.archive.org/save/http://www.newsmediaalliance.org/wp-content/uploads/2018/08/11-23-2021-News-Media-Alliance-Comments-on-USCOs-Publishers-Protections-Study.pdf>]; Hal Singer, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry (Dec. 13, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0038> [[perma.cc link unavailable](https://perma.cc/link/unavailable)] [<https://web.archive.org/web/20230512064404/https://www.regulations.gov/comment/COLC-2021-0006-0038>] [hereinafter *Singer Additional Comments*]; see also News Corporation, Initial Comments on U.S. Copyright Office's Publishers' Protections Study at 16 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0016> [[perma.cc link unavailable](https://perma.cc/link/unavailable)] [<https://web.archive.org/web/>

Second, some have argued that the JCPA does fall within the Copyright Office's expertise because its bargaining right rests on copyright.<sup>70</sup> A mandatory bargaining provision requires the existence of something to bargain over.<sup>71</sup> In the case of the JCPA, that something is the large digital platforms' ability to aggregate headlines and lede sentences, which is one of the very things the Copyright Office's study set out to analyze. Fortunately for those making this argument, the Copyright Office's Report *does* discuss copyright protections around aggregation and their limitations.

### III. FINDINGS

#### A. "EXISTING U.S. COPYRIGHT LAW GIVES PUBLISHERS SEVERAL MEANS TO PROTECT THEIR NEWS CONTENT."<sup>72</sup>

The Copyright Office found that press publishers have significant protections under current U.S. copyright law.<sup>73</sup> Press publishers typically own the copyright their print

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20230512064640/<https://www.regulations.gov/comment/COLC-2021-0006-0016>] ("But any recalibration of copyright and related law . . . likely will prove ineffectual if the current imbalance in negotiating power between publishers and republishers of news content is not remedied."); Electronic Frontier Foundation, Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021 Notice of Inquiry at 4–5 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0036> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064935/https://www.regulations.gov/comment/COLC-2021-0006-0036>] ("The harms facing news media are not those of aggregators and copyright. A far bigger factor is monopoly control of online advertising. . . . Until there are more alternatives to the current online advertising market, news media will continue to be at the mercy of large companies like Google and Facebook."); Netanel, *supra* note 17, at 475 ("Several factors have contributed to journalism's tailspin. . . . But in recent years one factor looms particularly large: the overwhelming market power of digital platforms, principally Google and Facebook."); MPA The Association of Magazine Media, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry at 3 (Jan. 5, 2022), <http://www.newsmediaalliance.org/wp-content/uploads/2018/08/MPA-Reply-Comments-to-the-USCO-on-the-Publisher-Protections-Study-01.05.2022.pdf> [<https://perma.cc/F7KH-REFW>] [<https://web.archive.org/web/20230309132220/http://www.newsmediaalliance.org/wp-content/uploads/2018/08/MPA-Reply-Comments-to-the-USCO-on-the-Publisher-Protections-Study-01.05.2022.pdf>]; National Press Photographers Association, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021, Notice of Inquiry at 4–5 (Jan. 5, 2022), <https://www.regulations.gov/comment/COLC-2021-0006-0053> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064903/https://www.regulations.gov/comment/COLC-2021-0006-0053>]; National Public Radio, Inc., Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 8 (Nov. 24, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0030> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064915/https://www.regulations.gov/comment/COLC-2021-0006-0030>]; Public Knowledge, Comments Submitted in Response to U.S. Copyright Office's Oct. 12, 2021, Notice of Inquiry at 12 (Nov. 26, 2021), <https://www.regulations.gov/comment/COLC-2021-0006-0029> [perma.cc link unavailable] [<https://web.archive.org/web/20230512064935/https://www.regulations.gov/comment/COLC-2021-0006-0029>].

70. See *Transcript*, *supra* note 43, at 119–20, 130 (M. Williams, News Media Alliance).

71. *Transcript*, *supra* note 43, at 97:19–25 (Ole Jani, Axel Springer SE) ("But better bargaining power is of no value if there is nothing to bargain about, right? And if you have no enforceable rights, if you don't have any specificity on your assets and on your property, if people can just use it, there is no bargaining situation in the first place.")

72. *Publishers' Protections Report*, *supra* note 1, at 29.

73. See *id.* at 29–30.

issues and in their websites as collective works.<sup>74</sup> They also regularly own the copyright in individual articles they publish, whether by assignment from the author or through the work made for hire doctrine.<sup>75</sup> As mentioned above, the work made for hire doctrine creates different default rules for publishers in the United States compared to pre-Article 15 EU.<sup>76</sup> The EU's concern that without a new, ancillary right, publishers would struggle to prove ownership of enforceable rights in their journalistic output<sup>77</sup> does not apply in the United States.

### B. "THESE EXCLUSIVE RIGHTS ARE NOT ABSOLUTE, HOWEVER."<sup>78</sup>

Publishers' rights under U.S. copyright law are subject to important limitations. Facts and ideas are not copyrightable.<sup>79</sup> Journalists' expression of facts and ideas is protectable,<sup>80</sup> but aggregators remain free to copy purely factual material.<sup>81</sup> As a rule of thumb, the more material that an aggregator reproduces, the more likely it is to capture protected expression.<sup>82</sup> Whether aggregation of just the headline or lede sentence reproduces original expression may vary from case to case.<sup>83</sup>

A corollary to the non-copyrightability of facts and ideas is that "where there are only a few, limited ways of expressing an idea, the merger doctrine bars protection for

74. See *id.* at 29 (citing 17 U.S.C. § 101).

75. See *id.* at 29, 29 n.146. The same is not necessarily true for photographs. See *id.* at 30. For that reason, the discussion that follows largely focuses on text articles and not any included photographs.

76. See *Publishers' Protections Report*, *supra* note 1, at 22–23.

77. See *id.*

78. *Id.* at 30.

79. 17 U.S.C. § 102(b).

80. *Publishers' Protections Report*, *supra* note 1, at 29 n.144 ("News articles are literary works under 17 U.S.C. § 102(a)(1); news photographs are pictorial works under 17 U.S.C. § 102(a)(5); and television and radio news broadcasts, when fixed, are audiovisual works under 17 U.S.C. § 102(a)(6) and sound recordings under 17 U.S.C. § 102(a)(7), respectively."); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) ("Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports."); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 549 (S.D.N.Y. 2013).

81. *Publishers' Protections Report*, *supra* note 1, at 30–31. See also *Feist Publ'n, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 348 (1991) ("all facts—scientific, historical, biographical, and news of the day . . . may not be copyrighted and are part of the public domain available to every person."); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) ("It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."); *Meltwater*, 931 F. Supp. 2d at 549 ("The reporting of facts is not protectable under the Copyright Act since facts are never original to an author." (internal quotation marks omitted)). To put it differently, any news outlet could report on Gerald Ford pardoning Nixon, but the Nation's unlicensed publication of part of Gerald Ford's autobiography describing the pardon decision was copyright infringement. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589–90 (1985).

82. See *Publishers' Protections Report*, *supra* note 1, at 32 (citing *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999)).

83. See Alexander Weaver, *Aggravated With Aggregators: Can International Copyright Law Help Save the News Room?*, 26 EMORY INT'L L. REV. 1161, 1184 (2012) (discussing headline originality in context of merger doctrine).



the expression in order to avoid giving a backdoor monopoly in the idea itself.<sup>84</sup> In theory, the merger doctrine gives users, including aggregators, leeway to reproduce not just facts contained within a news article but also the article's expression in cases where there is a limited number ways of to express the facts.<sup>85</sup> In practice, the Copyright Office did not identify any cases applying the merger doctrine to newspaper headlines or ledes.<sup>86</sup>

A third, related limitation is the short phrases doctrine. "Words and short phrases, such as names, titles, and slogans" are not copyrightable.<sup>87</sup> The Copyright Office has said this is because they contain a *de minimis* amount of authorship.<sup>88</sup> The Office could not identify cases applying the short phrases doctrine to headlines or ledes (or instances of anyone attempting to register a headline or lede as an independent work), but the short phrases doctrine nonetheless came in for some criticism in the public comments. Most notably, Professor Jane C. Ginsburg argued the rule should not be interpreted as a blanket prohibition on the protection of original, albeit succinct phrases.<sup>89</sup> The Report discussed Professor Ginsburg's argument and offered some potential responses to it,<sup>90</sup> but for purposes of this essay it suffices to say that the short phrases doctrine remains a potential limitation in this area.

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84. *Publishers' Protections Report*, *supra* note 1, at 33 (citing *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 497 F.3d 109, 116–17 (2d Cir. 2007)); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); 4 NIMMER ON COPYRIGHT § 13.03[B][3][a].

85. See *N.Y. Mercantile Exch.*, 497 F.3d at 118 (holding that merger doctrine prevented plaintiff for recovering from copying of its settlement prices because "any settlement price for a particular futures contract would be determined based on the same underlying market facts, [and] any dissension would be exceptionally narrow"); *BanxCorp. v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 309 (S.D.N.Y. 2013) (holding that a publisher of national interest rate indices could not use copyright law to exclude retailers from republishing interest rate data because the rates were noncopyrightable facts and the publisher's expression of those facts invariably merged with the idea). Policy considerations weigh heavily in merger analysis, and the inquiry focuses less on the quantity of possible expressions than on the effect of granting copyright protection. *N.Y. Mercantile Exch.*, 497 F.3d at 117 n.9. Press publishers' critical role in communicating information to the public may create a background concern about the threat of copyright infringement suits chilling the reporting of the news. Cf. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967) (citing *Baker v. Selden*, 101 U.S. 99, 103 (1880)) ("We cannot recognize copyright as a game of chess in which the public can be checkmated.")

86. *Publishers' Protections Report*, *supra* note 1, at 34.

87. 37 C.F.R. § 202.1(a).

88. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(C) (3d ed. 2021) [hereinafter *COMPENDIUM (THIRD)*].

89. See generally Jane C. Ginsburg, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 9, 2021 Notice of Inquiry (Jan. 5, 2022).

90. *Publishers' Protections Report*, *supra* note 1, at 35–36.

**C. “SOME, BUT NOT ALL, NEWS AGGREGATION IS  
LIKELY TO QUALIFY AS FAIR USE.”<sup>91</sup>**

By far the most significant copyright limitation for aggregators, however, is fair use.<sup>92</sup> The Copyright Office, acknowledging the fact-specific nature of the fair use test and the absence of authoritative decisions on news aggregators’ use of headlines and lede sentences, specifically, declined to offer a broad assessment—“aggregating fair” or “aggregating unfair.”<sup>93</sup> Instead, the Report drew on roughly analogous cases dealing with news reporting or online indexing to sketch arguments a court would consider in applying the four (non-exclusive) fair use factors to the aggregation of headlines and ledes.

On the first factor, purpose and character of the use, case law offers a few different data points. As a threshold matter, we know that news reporting is not a blanket license to copy. The Report noted that “[a]lthough ‘news reporting’ is one of the illustrative ‘fair’ purposes listed in 17 U.S.C. § 107, and the fair use doctrine often permits quotation in a news reporting context, the mere fact that an entity is engaged in a form of news reporting does not resolve the fair use question.”<sup>94</sup> To give a simple example, in *Harper & Row*, the defendant, Nation Enterprises, was undoubtedly reporting news when it published unauthorized excerpts from Gerald Ford’s autobiography, but that did not stop the Supreme Court from rejecting Nation Enterprises’ fair use defense.<sup>95</sup>

We know that linking and indexing, which are part of the function of aggregation, can be transformative.<sup>96</sup> Courts approved Google’s aggregation of photographs<sup>97</sup> and its digitization of books<sup>98</sup> as “highly transformative” and fair use.

We also know that reuse of news material without commentary or criticism may weigh against a fair use defense.<sup>99</sup> In *Los Angeles News Service v. Reuters Television International, Ltd.*, for example, the Ninth Circuit held that retransmission of a rival news service’s footage of the Rodney King riots was not fair where the retransmitter added nothing to the copied footage.<sup>100</sup> But this is not an iron rule. In some cases, “the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.”<sup>101</sup>

91. *Id.* at 44.

92. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section [§ 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

93. Publishers’ Protections Report, *supra* note 1, at 39.

94. *Id.* at 39–40.

95. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); *see also* *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012).

96. Publishers’ Protections Report, *supra* note 1, at 41.

97. *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1168 (9th Cir. 2007).

98. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

99. Publishers’ Protections Report, *supra* note 1, at 41.

100. *L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 990 (9th Cir. 1998).

101. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014).

On the second factor, the nature of the copyrighted work, the Report said little.<sup>102</sup> The case law is clear that news materials, being factual, enjoy “thinner” copyright protection,<sup>103</sup> and it is equally clear that this thinner protection rarely affects the outcome.<sup>104</sup>

The third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, offers a few more data points. We know that the more you take of the original work, the higher a risk you run of taking a substitutional amount.<sup>105</sup> In *Fox News Network, LLC v. TVEyes, Inc.*, the Second Circuit distinguished an index that enabled users to watch ten-minute news clips (unfair, “in many . . . situations [this] suffices for a user to view an entire news segment”)<sup>106</sup> from Google Books’ fair display of short snippets (giving “just enough context surrounding the searched term to help [a searcher] evaluate whether the book falls within the scope of her interest . . . without revealing so much as to threaten the author’s copyright interests”).<sup>107</sup> How a court might apply these precedents to headlines and ledes is less certain. As a quantitative percentage of an article, a headline and a lede sentence may not be much. On the other hand, they may in a qualitative sense represent the heart of the work.<sup>108</sup>

The fourth factor, market harm, raises two additional considerations. First, *Authors Guild v. Google* tell us that we have to consider whether the harm inflicted on the original work was connected with a protectable interest. If market substitution occurs because a reader is looking for a pure, unprotectable fact, finds it in a headline, and so does not need to read the article, that is not the kind of harm to the original publisher’s copyright interest and should not weigh against fair use.<sup>109</sup> This brings us back to the argument over whether aggregators substitute for original publications or supplement them.

Second, courts have to ask what would happen if this kind of copying were systematic, which of course it is in the case of news aggregation. This brings us back to unresolved arguments over whether aggregated headlines and ledes substitute for the original articles or expand the market for them.<sup>110</sup> “If aggregation provides a substitute that satisfies most demand for the full original[] and decreases the resources available for original news reporting, this would cut against a finding of fair use.”<sup>111</sup>

102. *Publishers’ Protections Report*, *supra* note 1, at 42.

103. *Google L.L.C. v. Oracle Am. Inc.*, 141 S. Ct. 1183, 1197–98 (2021); *see also* 4 NIMMER ON COPYRIGHT § 13.05[A] [2][a].

104. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (citing WILLIAM F. PATRY, PATRY ON FAIR USE § 4.1 (2015)). The Report noted *Oracle Am. Inc.*, 141 S. Ct., at 1201–02, as a recent exception. *Publishers’ Protections Report*, *supra* note 1, at 42 n.225.

105. *See Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d at 90 (describing the general rule while ultimately finding the reproduction of an entire recording did not weigh against fair use).

106. *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180–81 (2d Cir. 2018).

107. *Authors Guild*, 804 F.3d at 218.

108. Jane C. Ginsburg, Comments Submitted in Response to U.S. Copyright Office’s Oct. 12, 2021, Notice of Inquiry at 2 (Nov. 23, 2021).

109. *Publishers’ Protections Report*, *supra* note 1, at 43–44 (citing *Authors Guild*, 804 F.3d at 224).

110. *See* Ginsburg, *supra* note 108.

111. *Publishers’ Protections Report*, *supra* note 1, at 45 (internal quotation marks and citation omitted).

In all, these guideposts indicated to the Copyright Office that some but not all news aggregation would likely qualify as fair use.

**D. “PROTECTIONS ARE DIFFICULT TO ASSERT EFFECTIVELY  
FOR REASONS UNRELATED TO COPYRIGHT LAW.”<sup>112</sup>**

The Report also noted that publishers have some protections outside of copyright law. Most significantly, they can use paywalls to limit access to their articles or use the robots.txt exclusion protocol to prevent search engines from indexing their sites.<sup>113</sup>

The limitation on these non-copyright protections, and the fundamental weakness of all publishers’ protections, in the view of many commenters, is that publishers broadly cannot afford to keep aggregators out.<sup>114</sup> They depend on Google and Facebook for traffic.<sup>115</sup> They would just like Google and Facebook to pay them for their content.<sup>116</sup> In other words: the issue is not copyright law, but bargaining power.<sup>117</sup>

#### IV. CONCLUSIONS

The Copyright Office drew three key conclusions from these findings. First, adopting a new right modeled on Article 15 is not necessary because publishers in the United States already enjoy similar protections under copyright law via the work made for hire doctrine.<sup>118</sup> Second, a new right would probably be ineffective without changes in the competitive landscape to empower publishers to enforce those rights against the largest digital platforms.<sup>119</sup> With their current lack of bargaining power vis-à-vis

112. *Id.* at 51 (emphasis omitted).

113. *Id.* at 46.

114. *Id.* at 51.

115. *Id.*; see also *id.* at 49 (“Reports from the U.S. House Judiciary Committee and from Australia’s Competition and Consumer Commission both described Google and Facebook as ‘gateways’ to online news media. Even some of the largest and best-known publishers claim they depend on Google ‘for up to 80–95% of their traffic.’”) (citing STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW, H. COMM. ON THE JUDICIARY, 116TH CONG., MAJORITY STAFF REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 63 (Comm. Print 2020); AUSTL. COMPETITION & CONSUMER COMM’N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 206 (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [<https://perma.cc/K3Q8-Y6B7>] [<https://web.archive.org/web/20230214172303/https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>]).

116. Publishers’ Protections Report, *supra* note 1, at 51. This question of compensation of course looks different depending on whether you believe aggregators are fundamentally adding value to the publishers by bringing traffic to them or taking value by substituting for traffic, data, and ad sales the publishers would otherwise retain.

117. *Transcript*, *supra* note 43, at 33:3–6 (Dec. 9, 2021) (Jane C. Ginsburg, consultant to NMA) (“All the copyright protection in the world is not going to help if the copyright owners have no choice but to agree to contractual terms that are very unfavorable to them.”). This is an important story about the Report. When the study started, it was about ancillary copyright in the sense of EU Article 15. But by the time we were receiving comments, media comments were far more focused on antitrust approaches like Australia’s News Media Bargaining Code or the JCPA than on ancillary copyright.

118. Publishers’ Protections Report, *supra* note 1, at 52.

119. *Id.* at 52–54.

Google and Facebook, trying to protect publishers with new rights would be, in Cory Doctorow's memorable formulation, "like trying to protect a bullied child by giving them more lunch money."<sup>120</sup>

Third, new rights would raise constitutional and policy concerns.<sup>121</sup> The limits of publishers' existing copyright protections—e.g., fair use, the idea/expression dichotomy—are "built-in First Amendment accommodations" in copyright law.<sup>122</sup> To expand on existing protections, Congress would need to override those limitations, triggering First Amendment scrutiny.<sup>123</sup>

Based on these conclusions, the Copyright Office recommended against adopting ancillary copyright protections in the United States. The research we gathered and the public comments we received painted a clear picture that the internet has devastated the traditional, advertising-supported method of financing high-quality press publications. But we did not see evidence that copyright law is the problem or likely to be the solution.

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120. Aaron Swartz Day, *Cory Doctorow—Aaron Swartz Day 2022*, YOUTUBE (Dec. 17, 2022), <https://www.youtube.com/watch?v=xf0QWycmn0s> [<https://perma.cc/EW8G-2C66>] [<https://web.archive.org/web/20230214172623/https://www.youtube.com/watch?v=xf0QWycmn0s>] (describing the ineffectiveness of giving new copyright protections to creative workers facing structural power imbalances).

121. *Publishers' Protections Report*, *supra* note 1, at 54–55.

122. *Id.* at 54 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003); *Golan v. Holder*, 565 U.S. 302, 329 (2012)).

123. A press publishers' right that did not include a fair use defense might also raise questions about consistency with the Berne Convention's right of quotation. See *Publishers' Protections Report*, *supra* note 1, at 56.

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

Neil Netanel\*

### 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*.<sup>1</sup> 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 Edouard<sup>2</sup> 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 Lisa<sup>3</sup> and Colin<sup>4</sup> 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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\* Pete Kameron Professor of Law, UCLA School of Law.

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 ad 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 Edouard<sup>5</sup> and Andrew<sup>6</sup> 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.

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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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## Legislative Options for Supporting Local News: Alternatives to Copyright Reform

Dana Scherer\*

### TRANSCRIPT

Thank you. First, thank you all for inviting me. And I know we have our bios online, but just so you have some background about me because it's going to inform what I say today. I work at the Congressional Research Service, a nonpartisan agency that is part of the Library of Congress. Our job is to give nonpartisan expert analysis to members of Congress and their staff. CRS works exclusively for Congress, but the reports that we write are available to the public. So, if you want to learn more about some of the comments that I'm saying today in writing, you can go to [crsreports.congress.gov](https://crsreports.congress.gov), where you can find the paper that my colleague and I wrote about newspapers.<sup>1</sup>

In other words, I take no position. I'm just explaining. I can talk about competition issues. Prior to working at the Congressional Research Service, I spent almost ten years at the Federal Communications Commission ("FCC"), including a six-month detail at the Antitrust Division of the Department of Justice plus five years working in the private sector at Univision.

That said, I also have a slightly different perspective today than I would have a month ago. That is in part to my experience with my wife, Charlotte Scherer, who's up there, who used to live in Fort Myers, Florida, where I would commute to see her.

My definition of local versus national news has expanded somewhat in September during Hurricane Ian. I also have an aunt who lives in Port Charlotte. In order to figure out what was going on, and particularly since she lost electricity, I used Google News to search for the Fort Myers news gazette.

Because the local television station went off the air, the station relied on Facebook Live to report the weather. In order to tell my aunt what was going on, I actually

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1. DANA A. SCHERER & CLARE Y. CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE (2022).

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monitored local news sites from my desk in Washington, D.C. This personal experience adds some perspective.

I also noticed that the local organizations were able to give some nuance and have some details that the national organizations, that were kind of flying in, just didn't have. I relied on the local news sites that definitely offered a different perspective.

That said, I'm going to talk about four different bills that have been introduced by members of Congress that address some non-copyright policy options. And then also describe one in detail, which Ariel<sup>2</sup> and Hal<sup>3</sup> are also going to talk about, which was also mentioned, the Journalism Competition and Protection Act.

First, I'm going to talk about a couple of bills that have been introduced. Some have gone further than others. One would establish a committee. It's called the Future of Local News Act of 2021.<sup>4</sup> It would have thirteen members, including eight appointed by members of Congress, to study the state of local news, make suggestions for policy, not unlike what we're doing today. And so far, it's been introduced in the House and Senate and hasn't gone further.

The second option, which we've also heard discussed, would provide tax breaks, including payroll tax breaks, for media organizations that hire journalists, and potentially, also give tax breaks to people who subscribe to local media.<sup>5</sup>

That proposition got a little bit further. Parts of it were included in the Build Back Better compilation or the legislative package.<sup>6</sup> It was passed by the House as a big omnibus bill. The Senate did not go forward with that. The bill that ultimately became law, known as the Inflation Reduction Act, did not include these kinds of tax breaks. This legislative option remains on the table.

And then the third policy option goes to what Colin<sup>7</sup> mentioned. He stated that when people, that is consumers, use Google or Facebook to link to a news website, then the news website publishers can make money from digital advertising. This option also addresses Neil's<sup>8</sup> point about there being Google and Facebook, but particularly, Google having such a big role as intermediaries.

If you look at my report, you'll actually see my boxes and arrows describing all the different components of the advertising technology supply chain. One senator referenced a Google employee who likened it to Goldman Sachs or Citibank owning the New York Stock Exchange.<sup>9</sup>

That's because Google is both buying advertising on behalf of advertisers on websites on media sites, and acting as the seller on behalf of media organizations.

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2. Ariel Katz, another panelist at the 2022 Kernochan Symposium.

3. Hal J. Singer, another panelist at the 2022 Kernochan Symposium.

4. Future of Local News Act, H.R. 3169, S. 1601, 117th Cong. (2021).

5. Local Journalism Sustainability Act., H.R. 3940, S. 2434, 117th Cong. (2021)

6. Build Back Better Act, H.R. 946, 167 CONG. REC. H6375, H6560–H6561 (2021).

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

8. Neil Netanel, another panelist at the 2022 Kernochan Symposium.

9. Press Release, Mike Lee, Senator, Lee Introduces Digital Advertising Act (May 19, 2022), <https://www.lee.senate.gov/2022/5/lee-introduces-digital-advertising-act> [https://perma.cc/P5KH-XETP] [<https://web.archive.org/web/20230428020721/https://www.lee.senate.gov/2022/5/lee-introduces-digital-advertising-act>] (citing a Google employee).

Because Google is also selling its own advertising and collecting data, some argue it's not necessarily acting in the best interests of all the people on that entire supply chain.

And for that reason, governments in Australia and Europe and now the U.S. have proposed focusing on the ad technology component between these revenue sources.

Senator Mike Lee introduced a bill called the Competition and Transparency in Digital Advertising Act.<sup>10</sup> This bill would rely on antitrust enforcement. The bill would effectively require certain companies generating more than \$20 million digital advertising revenue annually to divest components of their ad tech divisions. It would also require any agents acting on behalf of buyers or sellers of advertising to represent their interests, just like a real estate broker is supposed to represent the interests of people who are buying and selling houses.

The bill would prohibit them from coordinating or sharing information. Even among buyers and sellers within same "agency," the bill would apply the same kind of rules. So that's the third legislative option.

The fourth bill, which we are going to go into a little bit more today, is the Journalism Competition and Preservation Act ("JCPA").<sup>11</sup> And the status of that right now in the Senate is that it was ordered to be reported by the Senate Judiciary Committee.<sup>12</sup>

Which means that they voted on it in committee. It would go to the Senate floor for a potential chamber vote.

I'm just going to describe it briefly since we're going to go through it more in detail. But it essentially would give an antitrust exemption to media organizations, specifically owners of broadcast TV and radio stations and press publications to collectively bargain with Google or Facebook or other social or online media organizations that meet certain thresholds.

This goes back to what we were talking about bargaining power to effectively give them increased bargaining power for negotiation for a limited period of six years. If they can't come to some sort of agreement on their own, they can make a final offer through arbitration. The bill also would include some monitoring by government agencies.

Whatever final agreement they would come up with would have to be filed by the Federal Trade Commission and the Department of Justice. Also, the Government Accountability Office would then issue a report to Congress, explaining and analyzing what the developments were.

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10. Competition and Transparency in Digital Advertising Act, S. 4258, H.R. 7839 (2022). Representative Ken Buck introduced the companion bill. Senator Lee introduced a similar bill in the 118th Congress. A Bill to Amend the Clayton Act to Prevent Conflicts of Interest and Promote Competition in the Sale and Purchase of Digital Advertising, S. 1073 (2023).

11. Journalism Competition and Preservation Act of 2022, H.R. 1735 (2021), S. 673 (2022). Senator Amy Klobuchar introduced a similar bill in the 118th Congress. Journalism Competition and Preservation Act of 2023, S. 1094 (2023).

12. On November 28, 2022, Senator Richard Durbin reported the bill with an amendment in the nature of a substitute.

Finally, I'm just going to talk about two things because I'm going to compare that regime to another regime, which is similar. And that has to do with the retransmission of broadcast television stations. That's more my original bailiwick having worked at both the Federal Communications Commission and a television organization.

Similar to what we're talking about here, broadcast stations have the right, and also, Neil mentioned this, to negotiate with cable and satellite operators for payment. Or option to two, if they don't think they have a whole lot of bargaining power, require that cable and satellite operators retransmit their signals for no payment.

But in contrast to this bill, the JCPA, there's a government agency that can act as a referee and has more of an oversight function. And that's the Federal Communications Commission. The other aspect of it is that in the Communications Act, all parties are required to negotiate in good faith.

There are some steps or factors outlined in the Communications Act about what that means and also what it does not mean or what would not be considered bad faith.

Similar to the JCPA in 2019, Congress enacted a law called the Television Viewer Protection Act of 2019, that would enable, that would permit small cable operators with 500,000 or fewer subscribers to collectively negotiate. This would be giving small cable operators a leg up in their negotiations with giant broadcasting companies or big broadcasting companies.

That's one aspect of it. That's similar, but we're talking instead of an exemption in antitrust law, we're talking about a carve out in communications law. And one other thing I wanted to raise here, which is it goes back to my background, when I was at the FCC, I was part of the team that worked on the merger between Comcast, which is an acquirer of license or of intellectual property rights, and NBC Universal, which is the licensor.

The licensee is Comcast; the licensor is NBC. They're the ones that own the property rights. One of the conditions, which I drafted, so this is how I remember it, was that there would be a firewall between NBC and Comcast during these negotiations.

That meant that Comcast couldn't use information it gained from owning NBC when it was negotiating with NBC's stations competitors. And likewise, NBC couldn't use the information from Comcast as it negotiated with Comcast competitors.

Interestingly, and this again goes back to my background and working at Univision, Google made an investment in Univision Televisa in April 2021 [of] a billion dollars along with some private equity firms.

JCPA does not mention this, but Google actually, just like Comcast and NBC, has an insider's view on both sides of the equation. As Google, of course, will be the licensee of content. But as a strategic investor in Univision Televisa, it would also be a licensor. So that's an issue that I think is interesting that hasn't been addressed. And I think that's about it. I would be happy to respond to other questions.

//END//

## **Addressing the Power Imbalance: A Legislative Proposal for Effectuating Competitive Payments from Platforms to Newspapers**

Hal J. Singer\*

### **INTRODUCTION AND EXECUTIVE SUMMARY**

The purpose of this study is to explore the underpayment to newspapers from Facebook and Google attributable to the power imbalance between individual news publishers and the dominant platforms, and to describe how a pending bill in Congress—the Journalism Competition and Preservation Act (JCPA)<sup>1</sup>—could effectuate competitive payments to news publishers, effectively simulating a world in which the power imbalance is removed. Facebook and Google (the “dominant platforms”)<sup>2</sup> appropriate the value added of news publishers generally—and newspapers specifically<sup>3</sup>—by reframing articles in rich previews containing headlines, summaries, and photos; and by curating the content alongside advertisements. This reframing and curation decrease the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms.<sup>4</sup> By exploiting

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1. H.R. 2054, 116th Cong. § 2(b)(1)(A) (as introduced Apr. 3, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/2054/text> [<https://perma.cc/79ZA-FD7F>] [<https://web.archive.org/web/20220901034447/https://www.congress.gov/bill/116th-congress/house-bill/2054/text>].

2. NEWS MEDIA ALLIANCE, COMMENTS OF NEWS MEDIA ALLIANCE BEFORE THE FEDERAL TRADE COMMISSION REGARDING THE HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY 15 (Aug. 20, 2018), [https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF\\_NMA-FTC-Hearings-Comments-FINAL.pdf](https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF_NMA-FTC-Hearings-Comments-FINAL.pdf) [<https://perma.cc/7Z59-YXRJ>] [[https://web.archive.org/save/https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF\\_NMA-FTC-Hearings-Comments-FINAL.pdf](https://web.archive.org/save/https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF_NMA-FTC-Hearings-Comments-FINAL.pdf)].

3. I use the term “news publishers” to refer to any publisher of legitimate news content, through any medium. I use the term “newspapers” to refer to the subset of news publishers in the newspaper industry.

4. Damien Cave, *An Australia with No Google? The Bitter Fight Behind a Drastic Threat*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/22/business/australia-google-facebook-news-media.html> [<https://perma.cc/A9NZ-WXWJ>] [<https://web.archive.org/web/20230127173459/https://www.nytimes.com/2021/01/22/business/australia-google-facebook-news-media.html>].

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their monopsony power over newspapers, Facebook and Google effectively pay a price of zero for accessing and “crawling” the newspapers’ content.

This study finds that allowing current market forces to dictate the newspapers’ “pay shares”—that is, the portion of platform revenues that redounds to newspaper publishers—ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions,<sup>5</sup> as contemplated in the JCPA.

The report is not intended to isolate that portion of the underpayments to news publishers that can be attributable to the platforms’ exclusionary conduct. Facebook and Google engage in a host of potentially anticompetitive strategies vis-à-vis news publishers—both within a platform’s firm boundaries and across the platform’s firm boundaries with third parties—that likely sustain the power imbalance and contribute to the suppression of payments to news publishers. For example, Facebook’s algorithm rewards click-worthy stories, an attribute of stories not produced by legitimate news publishers, by moving them to the top of users’ news feeds.<sup>6</sup> Facebook also co-mingles sponsored content or ads alongside user-generated content in its news feed, thereby equating the quality of legitimate news and potentially fake news (though not all sponsored content is fake news).<sup>7</sup> Both strategies tend to commodify legitimate news,

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com/2021/01/22/business/australia-google-facebook-news-media.html] (citing Tama Leaver, a professor of Internet Studies at Curtin University in Perth).

5. See, e.g., Sanjutka Paul & Hal Singer, *Countervailing Coordination Rights in the News Sector Are Good for the Public (A Response to Professor Yun)*, COMPETITION POL’Y INT’L (June 12, 2019), <https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun> [https://perma.cc/R74L-R4HZ] [https://web.archive.org/web/20230127173937/https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun].

6. Postings with comments and likes on a person’s status are given more weight in the Facebook algorithm. See, e.g., *The Facebook Algorithm Explained*, BRANDWATCH (May 7, 2021), <https://www.brandwatch.com/blog/the-facebook-algorithm-explained> [https://perma.cc/638R-GPV4] [https://web.archive.org/web/20230127174127/https://www.brandwatch.com/blog/the-facebook-algorithm-explained].

A change to Facebook’s algorithm in January 2018 to prioritize content based on audience engagements was estimated to have decreased referral traffic from Facebook to news publishers’ sites by one third. *How Much Have Facebook Algorithm Changes Impacted Publishers?*, MKTG. CHARTS (Apr. 4, 2019), <https://www.marketingcharts.com/digital/social-media-107974> [https://perma.cc/6TLW-3945] [https://web.archive.org/web/20230127174450/https://www.marketingcharts.com/digital/social-media-107974].

7. Christopher Mims, Facebook Is Still in Denial About Its Biggest Problem, WALL ST. J. (Oct. 1, 2017, 7:00 AM), <https://www.wsj.com/articles/facebook-is-still-in-denial-about-its-biggest-problem-1506855607> [https://perma.cc/36UX-SDB7] [https://web.archive.org/web/20230127174814/https://www.wsj.com/articles/facebook-is-still-in-denial-about-its-biggest-problem-1506855607] (“On a network

diminishing its value. Prior to introducing its Instant Articles program, Facebook defaulted users to an in-app browser that degraded the download speeds of news publishers.<sup>8</sup> News publishers care about download speeds because users are quick to abandon a story that takes too long to download; news publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.<sup>9</sup> Because legitimate news organizations need advertising revenues to staff reporters and editors, Facebook's policies discriminate in favor of intentionally fabricated news, which has only minimal quality and managerial costs, and against legitimate news. In December 2020, Facebook unveiled an AI assistant tool called "TLDR," which reportedly "could summarize news articles in bullet points so that a user wouldn't have to read the full piece," further depriving news publishers of traffic.<sup>10</sup> Although Facebook has yet to release it, the new tool reportedly could also provide audio narration,<sup>11</sup> which conveniently would not include a link to the original article.

Google employs a different set of potentially anticompetitive strategies against news publishers. For example, it inserts snippets of news stories from legitimate news sites on its search results page, which induces some users to forgo clicking on the link and thereby deprives news sites of clicks and the associated advertising revenues.<sup>12</sup> Like Facebook, Google also aggregates news sources with and without editorial oversight.<sup>13</sup> Such commodification (or "atomization") of news can also cause reputational harm to news publishers by signaling no quality difference between replicators of news and the original source.<sup>14</sup> Google's placement of news on accelerated mobile pages (AMP) requires the creation of costly and otherwise unnecessary parallel websites by publishers that are hosted, stored and served from Google's servers rather than the

where article and video posts can be sponsored and distributed like ads, and ads themselves can go as viral as a wedding-fail video, there is hardly a difference between the two.").

8. Sally Hubbard, *Why Fake News Is an Antitrust Problem*, FORBES (Jan. 10, 2017, 12:00 AM), <https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/?sh=70b171930f1e> [<https://perma.cc/2QHV-FPKY>] [<https://web.archive.org/web/20230127175037/https://gum.criteo.com/syncframe?origin=publishertag&topUrl=www.forbes.com>] ("In a test by The Capitol Forum, Facebook's in-app browser loaded on average three seconds slower than regular Safari on iOS. Studies show that 40 percent of desktop users and 53 percent of mobile users abandon websites that take more than three seconds to load.")

9. See Ryan Mac, *Facebook Said It's Developing a Tool To Read Your Brain*, BUZZFEED NEWS (Dec. 15, 2020, 9:22 PM), <https://www.buzzfeednews.com/article/ryanmac/facebook-news-article-summary-tools-brain-reader> [<https://perma.cc/8M23-F9HL>] [<https://web.archive.org/web/20230127175253/https://www.buzzfeednews.com/article/ryanmac/facebook-news-article-summary-tools-brain-reader>].

10. See *id.* ("the company also unveiled an AI assistant tool called 'TLDR,' which could summarize news articles in bullet points so that a user wouldn't have to read the full piece.")

11. See *id.*

12. Staff of Subcomm. on Antitrust, 117th Cong., Investigation of Competition in Digit. Mkts. 46 (Comm. Print 2022), <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf> [<https://perma.cc/R7A4-293V>] [<https://web.archive.org/web/20230211042432/https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>] (discussing Google's incentives to minimize outbound referrals).

13. *Id.* at 52.

14. *Id.* at 52.

publishers.<sup>15</sup> To the extent that Google and news publishers are horizontal competitors for the same readership and advertisers, this conduct can be understood as a form of raising rivals' costs.<sup>16</sup> When a publisher attempts to avoid this AMP-related incremental cost by moving its content behind a paywall, its rise in subscriptions is offset by declines in traffic from Google and other platforms.<sup>17</sup>

According to a complaint filed by ten state attorneys general in December 2020, Google and Facebook conspired to prevent the ascendancy of a process called "header bidding," which was used by news publishers as a workaround to reduce their reliance on Google's ad platforms and thereby capture a larger pay share on their sites.<sup>18</sup> In particular, header bidding permitted news publishers to solicit bids for ad placements from multiple ad exchanges at once. In March 2017, Facebook announced it was testing a header-bidding program with several major publishers.<sup>19</sup> However, by September 2018, those plans were abandoned, as Google and Facebook entered into an agreement not to compete for news publishers.<sup>20</sup> As part of the agreement, Facebook allegedly received special information and speed advantages to help it succeed in the auctions as well as a guarantee that Facebook would win a fixed percentage of auctions that it bid on in what appears to be a market-allocation scheme.<sup>21</sup>

Although these strategies and restraints are consistent with the claim that Facebook and Google enjoy monopsony power vis-à-vis news publishers,<sup>22</sup> and although they likely support the platforms' ability to underpay news publishers, isolating the incremental harms flowing from a *particular* anticompetitive restraint is outside the scope of this report.<sup>23</sup> In contrast to an antitrust matter, which would focus on a set of

15. *Id.* at 51.

16. See generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals Costs To Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

17. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 51 (citing News Media Alliance white paper). Some news publishers assert that this practice results in inferior rankings in search results as compared to other search platforms.

18. Complaint at 4–9, *State v. Google LLC*, 2020 WL 7382404 (E.D. Tex.) (No. 4:20cv957) (filed Dec. 16, 2020) [hereinafter *Texas Complaint*]. See also Daisuke Wakabayashi & Tiffany Hsu, *Behind a Secret Deal Between Google and Facebook*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html?referringSource=articleShare> [<https://perma.cc/Z6TK-QTLS>] [<https://web.archive.org/web/202301122094840/https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html>].

19. Wakabayashi & Hsu, *supra* note 18.

20. *Id.*

21. *Id.*

22. Other regulators have found that Facebook and Google enjoy significant buying power vis-à-vis newspapers. See, e.g., *Digital Platforms Inquiry, Final Report*, AUSTRALIAN COMPETITION & CONSUMER COMM'N, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [<https://perma.cc/B6QK-3X76>] [<https://web.archive.org/web/20230310163642/https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>] ("There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable.")

23. Indeed, the Department of Justice and Federal Trade Commission recently sued Google and Facebook, respectively, under the antitrust laws, alleging restraints in support of monopolization in some of the same markets (such as advertising and search advertising) as those studied here. Complaint at 3, *U.S. v. Google LLC*, 1:20-cv-03010 (D.D.C. Oct. 20, 2020) ("For many years, Google has used anticompetitive tactics

restraints, this report focuses on the underpayments to news publishers flowing from the power imbalance between the platforms and individual news publishers *generally*, whether achieved by natural barriers or artificial barriers (restraints) or some combination of the two. In a competitive input market for online news content, where news publishers enjoyed free agency and could play one platform against another, payments to news publishers would approach the incremental contribution of news publisher content (legitimate news) to the platforms' advertising revenues.

This report is organized as follows. **Part I** assesses the significant buying (monopsony) power of Facebook and Google in the acquisition of news publisher content generally. Monopsony is the flip side to monopoly, or selling power, in the output market. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their respective platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets. The platforms' massive buying power can be demonstrated *indirectly*, via evidence of high market shares combined with high barriers to entry. For example, Facebook and Google accounted for over half of U.S. digital display advertising in 2019;<sup>24</sup> combined shares in excess of fifty percent are consistent with collective market power under U.S. antitrust jurisprudence. Buying power also can be proven *directly* via evidence of payments below competitive levels or the ability to exclude rivals. Direct evidence of the platforms' buying power includes: (1) payments to news publishers significantly below competitive levels, (2) news publishers are compelled to accept these take-it-or-leave-it terms by the platforms, indicating the power imbalance; (3) the platforms have used exclusive agreements with third parties to exclude horizontal rivals, and they have prevented rivals from acquiring news content via acquisition.

**Part II** explores how payments to newspapers would be measured in a "but-for" world where the platforms' buying power were removed, thereby making the news content (input) market competitive. Economic theory dictates that in competitively

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to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising—the cornerstones of its empire.” [hereinafter *Google Complaint*]; Complaint at 9, Fed. Trade Comm'n v. Facebook Inc., 1:20-cv-03590-JEB (D.D.C. Jan. 13, 2021) [hereinafter *Facebook Complaint*] (“By monopolizing personal social networking, Facebook thereby also deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.”).

24. *Leading Digital Display Ad Sellers in the US, by Net Revenue Share, 2019–2020*, EMARKETER (July 27, 2020), <https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending> [<https://perma.cc/YY7N-9VFN>] [<https://web.archive.org/web/20230206170458/https://www.insiderintelligence.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending>].

supplied input markets, input providers tend to capture 100 percent of their marginal revenue product (MRP). Fortunately, the three measures of incremental revenue generated by newspapers for the platforms serve as a reasonable approximation for the newspapers' collective MRP. By compelling the dominant platforms to pay newspapers the fair-market value of their value added, Congress could replicate payments to news publishers in a world absent Google and Facebook's buying power. Newspapers are a "must-have" input for the platforms, as news drives most of the conversation. Must-have inputs, such as broadcasting and sports networks, command something closer to their MRP, as their selling power counteracts a portion of cable's buying power. These must-have input providers capture pay shares of between seven and eleven percent of the cable operators' total revenue—pay shares that vastly exceed the pay shares currently captured by newspapers from Google and Facebook.

In **Part III**, I assess the myriad social harms of newspapers not receiving competitive compensation. The news industry has incurred losses in advertising revenue every year since 2006,<sup>25</sup> around the time that the platforms solidified their market power over digital advertising. This is not to say that Facebook's and Google's domination of digital advertising came entirely at the expense of newspapers. Rather, it is to provide context as to how *any* underpayment to newspapers can exacerbate an environment that is already quite dire. The effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.<sup>26</sup> As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy.<sup>27</sup> The elimination of local news threatens democracy. Another critical role of traditional news outlets is providing fact-based journalism in the face of disinformation campaigns. The reduction in traditional newspapers has coincided with more Americans using social media platforms to access news. Moreover, the negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms, can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts—along with the other supporting employees at a publishing firm—lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that

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25. *Id.*

26. Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CENTER (July 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008> [<https://perma.cc/YY7N-9VPN>] [<https://web.archive.org/web/20230206171811/https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008>].

27. PENELOPE MUSE ABERNATHY, *THE EXPANDING NEWS DESERT* 33 (The Center for Innovation and Sustainability in Local Media, 2018 Report), [https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf) [<https://perma.cc/9MBS-AB2X>] [[https://web.archive.org/web/20230310163937/https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://web.archive.org/web/20230310163937/https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf)].

was once there. Finally, there are also social harms of news publisher closure on a community, including the lack of social cohesion and a reduction in the diversity of viewpoints.

These findings support a proportionate intervention to effectuate competitive payments to newspapers and thereby mitigate these social harms.<sup>28</sup> At a high level, and as contemplated by the JCPA, the solution to the power imbalance is to permit newspapers to collectively bargain for payments from platforms, with voluntary negotiations between the platform and newspaper collective, followed by, if necessary, an adequate enforcement mechanism that ensures equitable payment to all news publishers.

### I. GOOGLE AND FACEBOOK POSSESS SIGNIFICANT BUYING POWER IN THE ACQUISITION OF NEWSPAPER CONTENT

Monopsony, or buying power in the input market, is the flip side to monopoly, or selling power in the output market. Some firms, like single-company towns, might enjoy power on the buying side for labor but lack selling power in any output market. Other firms, like Apple, might enjoy selling power in the sale of laptops due to brand prestige but lack buying power over office supplies or any other standard inputs used by thousands of other firms. Still other firms possess both buying power and selling power. The relevant question here is whether Facebook or Google (or both) possesses monopsony power in the acquisition of news content for their respective platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google), and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets.

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28. Social harms are a form of “negative externalities:” costs not fully borne by parties to the transactions at issue—the news publishers and dominant tech platforms—but instead by society at large. Degradation in fact-based news coverage has been found to impose substantial long-term costs to society. See, e.g., Roberto Cavazos, *The Economic Cost of Bad Actors on the Internet: Fake News in 2019*, UNIV. OF BALT. (2019), <https://s3.amazonaws.com/media.mediapost.com/uploads/EconomicCostOfFakeNews.pdf> [<https://perma.cc/7XXL-HD72>] [<https://web.archive.org/web/20230206171921/https://s3.amazonaws.com/media.mediapost.com/uploads/EconomicCostOfFakeNews.pdf>] (“We think it reasonable that a global and growing multitude of small costs associated with fake news, along with larger incidents are imposing a cost on the global economy of at least \$78 billion per year.”).

**A. INDIRECT MEASURES OF BUYING POWER:  
HIGH MARKET SHARES AND BARRIERS TO ENTRY**

In April 2020, Facebook and other social media groups were a source of news for forty-seven percent of Americans, and seventy-three percent reported getting news from any online source (including from social media).<sup>29</sup> Indeed, Facebook has become the world's most popular source of news.<sup>30</sup> According to testimony submitted to the Antitrust Judiciary Subcommittee, news publishers feel extremely beholden to Google and Facebook for accessing viewers and advertisers.<sup>31</sup> The Judiciary Report concludes that "several dominant firms have an outsized influence over the distribution and monetization of trustworthy sources of news online, undermining the availability of high-quality sources of journalism."<sup>32</sup> A small change in an algorithm by either platform can materially decrease traffic to news publishers sites.<sup>33</sup>

In interviews with staff of the Judiciary Antitrust Subcommittee, "numerous businesses described how dominant platforms [including Google and Facebook] exploit this gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market."<sup>34</sup> News publishers in particular testified that "dominant firms can impose unilateral terms on publishers, such as take-it-or-leave-it revenue sharing agreements."<sup>35</sup> This evidence is consistent with monopsony power. In addition to the House Antitrust Subcommittee, which found that Facebook is a monopolist over social networks, the UK's Competition and Markets Authority (CMA),<sup>36</sup> the UK's House of Lords,<sup>37</sup> Germany's Federal Cartel Office,<sup>38</sup> and the

29. NIC NEWMAN ET AL., DIGITAL NEWS REPORT 2020 10 (Oxford University Reuters Institute for the Study of Journalism), [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR\\_2020\\_FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf) [<https://perma.cc/CC4F-DWT5>] [[https://web.archive.org/web/20230206172034/https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR\\_2020\\_FINAL.pdf](https://web.archive.org/web/20230206172034/https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf)].

30. Farhad Manjoo, *The Frightful Five Want to Rule Entertainment. They Are Hitting Limits*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/technology/the-frightful-five-want-to-rule-entertainment-they-are-hitting-limits.html> [<https://perma.cc/GW2X-7BN9>] [<https://web.archive.org/web/20230206172247/https://www.nytimes.com/2017/10/11/technology/the-frightful-five-want-to-rule-entertainment-they-are-hitting-limits.html>].

31. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 62.

32. *Id.* at 49.

33. *Id.*

34. *Id.* at 6.

35. *Id.* at 50 (citing Submission of Source 140).

36. COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 26 (July 1, 2020) (finding that Facebook's "market power . . . derives in large part from strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms").

37. HOUSE OF LORDS COMM'NS AND DIGIT. COMM., BREAKING NEWS? THE FUTURE OF UK JOURNALISM 6 (2020) ("This change in the business model of journalism has created an existential threat to the industry, particularly combined with a host of other challenges ranging from a surge in 'fake news' to the ability of giant technology platforms such as Facebook and Google to undercut the power of publishers and their revenues.").

38. See BUNDESKARTELLAMT, CASE SUMMARY: FACEBOOK, EXPLOITATIVE BUSINESS TERMS PURSUANT TO SECTION 19(1) GWB FOR INADEQUATE DATA PROCESSING 8 (Feb. 15, 2019) ("The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the

Australian Competition and Consumer Commission (ACCC)<sup>39</sup> have all found Facebook enjoy monopoly power in the output market for social networks. Indeed, the ACCC concluded that Facebook and Google have significant buying power over the distribution of news online: “Google and Facebook are the gateways to online news media for many consumers.”<sup>40</sup>

As demonstrated below, buying power can be proven directly via evidence of payments below competitive levels or the ability to exclude rivals. Buying power can also be demonstrated indirectly via evidence of high market shares combined with high barriers to entry.

## 1. High Market Shares

In a competitive market for online search, news publishers could play one platform against another in an effort to extract as high a payment as possible for their input (legitimate news). But there are simply no other viable alternatives as Google controls the vast majority of searches and thus eyeballs. As of July 2020, Google accounted for a combined eighty-nine percent of the U.S. desktop search (of which their share was eighty-one percent) and mobile search (where their market share was ninety-four percent) markets.<sup>41</sup> Impressively, Google has built upon this market share for more than a decade.<sup>42</sup> A 2009 internal Google document estimated Google’s share of general search in the United States to be 71.5 percent, followed by Yahoo with 17.0 percent and Bing with 7.5 percent.<sup>43</sup> The United Kingdom’s CMA estimated that, as of mid-2020, Google’s index of the web is three to five times the size of Bing’s.<sup>44</sup> Google’s dominance in online search gives it dominance over the search advertising market: As of 2019, Google controlled nearly three quarters of the search advertising market.<sup>45</sup>

Similarly, Facebook (including Meta-owned Instagram and WhatsApp) is by far the most popular social networking platform on the planet. As of December 2019, Facebook had 1.8 billion monthly active persons (MAP), WhatsApp had 2.0 billion MAP, and Instagram had 1.4 billion MAP.<sup>46</sup> Its closest social networking competitors had far fewer monthly active users: Snapchat had 443 million MAP, Twitter had 582

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remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist.”)

39. AUSTRALIAN COMPETITION & CONSUMER COMM’N, *supra* note 22, at 99.

40. *Id.* at 296.

41. *Desktop & Mobile Search Engine Market Share United States of America, January 2009 to September 2020*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/desktop-mobile/unitedstates-of-america/#monthly-200901-202009> [https://perma.cc/7ZA3-4ZJE].

42. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 177.

43. *Id.* at 179 (citing Marissa Mayer email).

44. COMPETITION & MKTS. AUTH., *supra* note 36, at 89.

45. Megan Graham, *Amazon Is Eating into Google’s Most Important Business: Search Advertising*, CNBC (Oct. 15, 2019, 1:06 PM), <https://www.cnbc.com/2019/10/15/amazon-is-eating-into-googles-dominance-in-search-ads.html> [https://perma.cc/P3BE-QQP9] [https://web.archive.org/web/20230126200132/https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2020/10/06/investigation\_of\_competition\_in\_digital\_markets\_majority\_staff\_report\_and\_recommendations.pdf].

46. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 93.



million MAP, and LinkedIn had 260 million MAP.<sup>47</sup> Facebook reports 2.5 billion daily active users across its family of social networking platforms.<sup>48</sup> According to an internal report obtained by the House Subcommittee, from September 2017 to September 2018, Facebook alone reached more than seventy-five percent of U.S. Internet users.<sup>49</sup> Based on Facebook's production to the Subcommittee, social media users spent more time on Facebook (48.6 minutes per day) than on Snapchat (21 minutes) or Twitter (21.6 minutes) in 2018.<sup>50</sup>

The two platforms monetize access to their users via the sale of advertising space. Given their control over end users, the market for digital advertising also is highly concentrated. According to eMarketer, Facebook accounted for 42.2 percent U.S. digital display advertising in 2019, while Google accounted for 10.6 percent.<sup>51</sup> The U.K.'s CMA similarly found that Facebook and Instagram generated over half of display advertising revenues in 2019 in the U.K.<sup>52</sup> Combined shares in excess of fifty percent are consistent with collective market power under U.S. antitrust jurisprudence.<sup>53</sup> Moreover, their combined shares are growing: As of 2017, Google and Facebook accounted for ninety-nine percent of year-over-year growth in U.S. digital advertising revenue.<sup>54</sup> According to Morgan Stanley, in the first quarter of 2016, eighty-five cents

47. *Id.* The House Report does not consider TikTok to be a social media platform. *Id.* ("Although it meets the broad definition of social media as a social app for distributing and consuming video content, TikTok is not a social network."). And LinkedIn has been relegated to a "niche strateg[y]" of appealing to professional connections. *Id.* at 90. It bears noting that the FTC's recent antitrust complaint against Facebook does not include LinkedIn in the relevant market definition. *Facebook Complaint*, *supra* note 23, ¶ 58 ("Personal social networking is distinct from, and not reasonably interchangeable with, specialized social networking services like those that focus on professional . . . connections."). I nonetheless reference LinkedIn's statistics here to be over-inclusive.

48. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 133.

49. *Id.* at 138 (citing Cunningham Memo).

50. *Id.* at 139.

51. EMARKETER, *supra* note 24.

52. COMPETITION & MKTS. AUTH., *supra* note 36, at 10.

53. The concept of collective market power is well-understood in antitrust. *See, e.g.*, J. Thomas Rosch, Commissioner, Federal Trade Commission, Antitrust Law Enforcement: What To Do About the Current Economics Cacophony? 15 (June 1, 2009) (transcript available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/antitrust-law-enforcement-what-do-about-current-economics-cacophony/090601bateswhite.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-law-enforcement-what-do-about-current-economics-cacophony/090601bateswhite.pdf) [<https://perma.cc/4BL4-URBP>] [[https://web.archive.org/web/20230126204611/https://www.ftc.gov/sites/default/files/documents/public\\_statements/antitrust-law-enforcement-what-do-about-current-economics-cacophony/090601bateswhite.pdf](https://web.archive.org/web/20230126204611/https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-law-enforcement-what-do-about-current-economics-cacophony/090601bateswhite.pdf)] ("But firms who are participants in a duopoly or a tight oligopoly market collectively enjoy power that is akin to monopoly power in the sense that that [sic] they have the power to increase prices and reduce output in the market as a whole."); Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 75 (2014) ("The Justice Department's high-profile case against Apple and five major book publishers concerning e-book pricing rests on seemingly obvious evidence of the exercise of collective market power creating anticompetitive effects."); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 216 (2020) ("To whatever extent one thinks managers do pay attention to vote share or reelection odds, this new economic analysis mathematically proves that prices will be increased by high levels of horizontal shareholding across a set of firms that have collective market power.").

54. Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUS. INSIDER (Apr. 26, 2017), <https://www.businessinsider.in/facebook-and-google-completely-dominate-the-digital-ad-industry/articleshow/58389060.cms> [<https://perma.cc/G9N4-2VLP>] [<https://web.archive.org/web/>

of every new dollar spent in online advertising went to Google or Facebook.<sup>55</sup> This level of dominance implies that the two platforms can push down payments to news publishers below competitive levels.

Facebook and Google have leveraged their platform power into vertical markets that match advertisers to publishers, formerly occupied by independent “ad tech” intermediaries such as LiveRamp. CMA estimates that Google captures over fifty percent of the search and digital display advertising market across the ad tech stack.<sup>56</sup> This power over the ad tech stack allows Google to exercise buying power vis-à-vis all publishers, including news publishers, as noted at the Senate Judiciary Committee Hearing in September 2020.<sup>57</sup> And in December 2020, ten states brought an antitrust suit against Google alleging monopolization of the ad tech stack.<sup>58</sup> The House Antitrust Judiciary Subcommittee attributes these high shares of digital advertising to high barriers to entry, specifically to behavioral data online, which can be used in targeted advertising.<sup>59</sup> Advertisers can only access these data through engagement with Facebook’s and Google’s ad tech.<sup>60</sup> Their advantage also derives from the aforementioned network effects—the larger the platform, the more efficient it is for the advertiser who can measure frequency to particular consumers and can better tailor ads to specific segments.

## 2. Barriers To Entry

The discussion in the Introduction pertained to artificial barriers to entry or tactics employed by the dominant platforms, some of which likely contribute to the power imbalance between platforms and news publishers. Other barriers to entry that limit outside options for news publishers derive from natural forces. For example, as the number of users on Google’s online search platform increases, advertisers gain access to a larger trove of consumer data, which cannot be offered by a rival. Similarly, Facebook enjoys strong network effects that keep would-be rival social network platforms at bay. And as more users engage with Facebook’s social network, rival social

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20230126205259/https://www.businessinsider.in/facebook-and-google-completely-dominate-the-digital-ad-industry/articleshow/58389060.cms]; Sarah Sluis, *Digital Ad Market Soars To \$88 Billion, Facebook and Google Contribute 90% of Growth*, AD EXCHANGER (May 10, 2018, 1:57 PM), <https://www.adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth> [<https://perma.cc/TX3D-UYGL>] [<https://web.archive.org/web/20230126205502/https://www.adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth>].

55. John Herrman, *Media Websites Battle Faltering Ad Revenue and Traffic*, N.Y. TIMES (Apr. 17, 2016), [https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?\\_r=0](https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?_r=0) [<https://perma.cc/MLT2-TXBN>] [[https://web.archive.org/web/20230203210045/https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?\\_r=0](https://web.archive.org/web/20230203210045/https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?_r=0)].

56. COMPETITION & MKTS. AUTH., *supra* note 36, at 10.

57. *Stacking the Tech: Has Google Harmed Competition in Online Advertising?: Hearing Before S. Subcomm. on Antitrust and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019).

58. *Texas Complaint*, *supra* note 18.

59. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 56.

60. *Id.*

networks have a harder time attracting customers, as no one wants to be alone on a network. Social network platforms must attract a critical mass of users to become attractive to advertisers.<sup>61</sup> Social *network* platforms “facilitate their users finding, interacting, and networking with other people they already know online;” in contrast, social *media* platforms “facilitate the distribution and consumption of content.”<sup>62</sup> Unlike a social media sites such as YouTube, social *network* platforms have a “robust social graph” connecting content among a group of friends, and that graph is extremely difficult to assemble for a social networking entrant.<sup>63</sup> Accordingly, the Majority Report concludes that YouTube and other social *media* sites do not compete against Facebook in any meaningful sense.<sup>64</sup>

Switching costs also prevent competition for these platforms vis-à-vis news publishers. Facebook’s users cannot take their photos and personal information to an upstart.<sup>65</sup> Google and Facebook also enjoy strong data advantages arising from their incumbency, providing further user lock-in.<sup>66</sup> Because website performance degrades with additional “crawlers” obtaining data to create a webpage index, most websites only allow one crawler, which is Google’s “Googlebot,” blocking any new search engine crawler.<sup>67</sup> The only English-language search engines that maintain their own comprehensive webpage index are Google and Bing; Yahoo and DuckDuckGo purchase access to the index from Google or Bing.<sup>68</sup> Finally, online search and social networking markets are prone to tipping towards monopoly because incumbents can exploit economies of scale and scope. Facebook can spread its fixed costs over a billion worldwide monthly active users,<sup>69</sup> a massive scale economy. Because Google offers complementary services in addition to general search (e.g., maps, local business answers, news, images, videos, definitions, and “quick answers”), Google enjoys additional scope economies. A rival search engine would have to offer a similar suite of products to compete effectively.

61. *Id.* at 71.

62. *Id.* at 73–74.

63. *Id.*

64. *Id.* at 74.

65. *Id.* at 123 (citing Omidyar Network Report and Production of Facebook).

66. *Id.* at 325.

67. *Id.* at 79 (citing research by Zack Maril).

68. *Id.* at 64.

69. *Leading Countries Based on Facebook Audience Size as of October 2020*, STATISTA (Jan. 2022), <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users> [https://perma.cc/2YJF-RQWM] [<https://web.archive.org/web/20230203221056/https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users>] (estimating 2.7 billion monthly active users worldwide and 190 million in the United States). The House Judiciary Committee estimates Facebook has 1.8 billion “monthly active persons” (MAPs), not including the MAPs of Instagram and WhatsApp. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 92 (“[t]he social network marketplace is highly concentrated. Facebook (1.8 billion users) and its family of products—WhatsApp (2.0 billion users), Instagram (1.4 billion users)— have significantly more users and time spent on its platform than its closest competitors, Snapchat (443 million users) or Twitter (582 million users).”).

**B. DIRECT MEASURES OF MONOPSONY POWER: ABILITY TO PUSH PAYMENTS TO PUBLISHERS BELOW COMPETITIVE LEVELS OR EXCLUDE RIVAL SEARCH ENGINES (GOOGLE) OR RIVAL SOCIAL NETWORK PLATFORMS (FACEBOOK)**

At the Judiciary Antitrust Subcommittee's sixth hearing, Rep. Pramila Jayapal (D-WA) noted that Google's control over both the buy-side and sell-side of the ad stack allowed Google to "set rates very low as a buyer of ad space from newspapers, depriving them of their ad revenue [while selling at higher prices] to small businesses who are very dependent on advertising on their platform."<sup>70</sup> In Part II.C., I review the actual payments and offers made by Facebook and Google to newspapers to date; that the two platforms are able to impose payments significantly below competitive levels (in many cases, a payment of zero) and below the pay shares for other "must-have" input providers in comparable industries is direct evidence of their monopsony power.

In 2020, the ACCC found that the power imbalance between platforms and news publishers has "resulted in news media businesses accepting *less favorable* terms for the inclusion of news on digital platform services than they would otherwise agree to."<sup>71</sup> That news publishers are compelled to accept these take-it-or-leave-it terms is also consistent with the claim that platforms enjoy significant buying power; if news publishers had alternative pathways to advertisers and viewers, and if other parameters of the contract such as pricing were held constant, they might not accept these "less favorable" terms.

Another form of direct evidence of monopsony power is the ability to exclude rival platforms, which would otherwise put upward pressure on payments to news publishers. Google has used exclusive agreements to ensure its prime real estate on the browser and home page of the mobile user screen. In particular, Google imposes exclusionary terms in contracts effectively requiring phone and tablet makers that used its Android operating system to pre-install both Chrome and Google Search.<sup>72</sup> Among desktop browsers, Google Search enjoys default placement in eighty-seven percent of browsers, equal to the sum of Chrome (fifty-one percent of the U.S. browser market), Safari (thirty-one percent), and Firefox (five percent).<sup>73</sup> Among mobile phones, Google Search is the default on Android and on Apple's iOS mobile operating system, accounting for nearly all smartphones in the United States.<sup>74</sup> According to the House

70. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 174 (quoting CEO Hearing Transcript at 169 (Rep. Pramila Jayapal (D-WA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary)).

71. *Australia's News Media Bargaining Code, Breaking Down the Code, Australia's Fake News*, STRATECHERY (Aug. 20, 2020), <https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news> [<https://perma.cc/3L6S-FCPF>] [<https://web.archive.org/web/20230205171239/https://stratechery.com/2020/australias-news-media-bargaining-code-breaking-down-the-code-australias-fake-news>] (emphasis added).

72. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 177.

73. *Id.* at 146.

74. *Id.* at 147.

Subcommittee's review, as well as antitrust analyses,<sup>75</sup> Google conditioned Android Devices' access to the Google Play Store on making Google Search the default search engine, a requirement that gave Google a significant advantage over competing search engines.<sup>76</sup> Google also used revenue-sharing agreements to establish default positions on Apple's Safari browser (on both desktop and mobile) and Mozilla's Firefox.<sup>77</sup> In October 2020, the Department of Justice Antitrust Division commenced litigation to challenge several of those exclusionary agreements.<sup>78</sup>

The platforms also excluded rivals from acquiring news content via acquisition. Facebook acquired two large rival social network platforms: Instagram in 2012 and WhatsApp in 2014.<sup>79</sup> According to internal documents produced to the House Subcommittee, Facebook "acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market."<sup>80</sup> Similarly, Google acquired DoubleClick in 2007 and AdMob in 2010 when these companies were in their infancies, both of which could have evolved into serious horizontal rivals to Google in the market for digital advertising.<sup>81</sup> Indeed, DoubleClick arguably had reached significant scale to impose meaningful price discipline on Google at the time of its acquisition.<sup>82</sup>

Potential horizontal competitors to Facebook often enter as a complement to Facebook's offerings by relying on the Facebook application's programming interfaces (APIs) called Facebook's Open Graph. When Facebook detects that an app is too close of a substitute or presents a threat to Facebook's monopoly, it can deny access to its API to foreclose competition. For example, Facebook restricted API access to Pinterest, a visual discovery engine for finding ideas like recipes or style inspiration, and Facebook's CEO admitted that Pinterest was a competitor to Facebook during the House

75. Benjamin G. Edelman & Damien Geradin, *Android and Competition Law: Exploring and Assessing Google's Practices in Mobile*, 12 EUR. COMPETITION J. 159–194 (2016) ("Google's MADA strategy leverages the company's market power in certain services and apps for which there is no clear substitute (most notably Google Play and YouTube) in order to compel device manufacturers wishing to manufacture commercially-viable devices to install other services and apps (including Google Search and Google Maps) for which there are substitutes. This is a clear case of tying.").

76. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 82.

77. *Id.*

78. *Google Complaint*, *supra* note 23.

79. Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES (Apr. 9, 2012, 1:15 PM), <https://archive.nytimes.com/dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion> [<https://perma.cc/K7BH-H774>] [<https://web.archive.org/web/20230308002503/https://archive.nytimes.com/dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion>]; Parmy Olson, *Facebook Closes \$19 Billion WhatsApp Deal*, FORBES (Oct. 6, 2014, 1:25 PM), <https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/?sh=34a70a065c66> [<https://perma.cc/TJ2Q-G5XA>] [<https://web.archive.org/web/20230512213556/https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/?sh=34a70a065c66>].

80. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 149.

81. *See, e.g.*, ROBERT HAHN & HAL SINGER, AN ANTITRUST ANALYSIS OF GOOGLE'S PROPOSED ACQUISITION OF DOUBLECLICK (AEI-BROOKINGS JOINT CENTER RELATED PUBL'N NO. 07–24 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1016189](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016189) [<https://perma.cc/4J98-BH7R>] [[https://web.archive.org/web/20230202221451/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1016189](https://web.archive.org/web/20230202221451/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016189)].

82. *Id.*

hearings.<sup>83</sup> Internal documents reveal that Facebook perceived that Vine, a video-sharing app acquired by Twitter, had “replicated Facebook’s core News Feed functionality,” and cut off Vine’s access to Facebook APIs.<sup>84</sup> Twitter shuttered the app in 2016.<sup>85</sup> Other perceived rivals that lost access to Facebook’s API include MessageMe (competing with Facebook Messenger) and Arc (competing with Facebook).<sup>86</sup>

Similarly, the most likely horizontal competitors to Google’s search, such as local restaurant reviews, begin as complements in vertical search. When Google spies a potential threat, it can invade the vertical space and use its gatekeeping power to steer searches to its affiliated clone. This strategy is effective not only at extending its monopoly into the edge for vertical search but also at preserving its monopoly in general search. Google also demanded that certain vertical rivals permit Google to scrape their user-generated content,<sup>87</sup> diminishing the rivals’ incentives to innovate by appropriating what would otherwise be proprietary data and disrupting business plans.

## II. NEWSPAPERS WOULD CAPTURE NEARLY ALL OF THEIR INCREMENTAL REVENUE CONTRIBUTION IN THE ABSENCE OF THE PLATFORMS’ BUYING POWER

This section uses economic theory to demonstrate that newspapers would capture something close to their MRP in the absence of Facebook’s and Google’s buying power. Using standard economic principles, I show how a buyer of news, such as Facebook or Google, can still earn substantial profit from the deployment of news, even when it is obliged to compensate newspapers at a competitive rate defined by the MRP.

### A. PAYMENTS TO INPUT PROVIDERS UNDER COMPETITIVE CONDITIONS

Under competitive conditions, standard economic models predict that each input to production receives compensation (the “factor price”) equal its MRP, which in turn predicts the share of revenue paid to that input.<sup>88</sup> As illustrated in Figure 1 below, a

83. Hal Singer, *Top 10 Admissions from Tech CEOs Secured at the Antitrust Hearing*, PROMARKET (July 31, 2020), <https://www.promarket.org/2020/07/31/top-10-admissions-from-tech-ceos-secured-at-the-antitrust-hearing> [https://perma.cc/M36W-QUCX] [https://web.archive.org/web/20230202221653/https://www.promarket.org/2020/07/31/top-10-admissions-from-tech-ceos-secured-at-the-antitrust-hearing].

84. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 167.

85. Seth Fiegerman, *Twitter Officially Shuts Down Vine*, CNN MONEY (Jan. 17, 2017, 10:01 AM), <https://money.cnn.com/2017/01/17/technology/vine-shuts-down/index.html> [https://perma.cc/U45F-JBUS] [https://web.archive.org/web/20221222163306/https://money.cnn.com/2017/01/17/technology/vine-shuts-down/index.html].

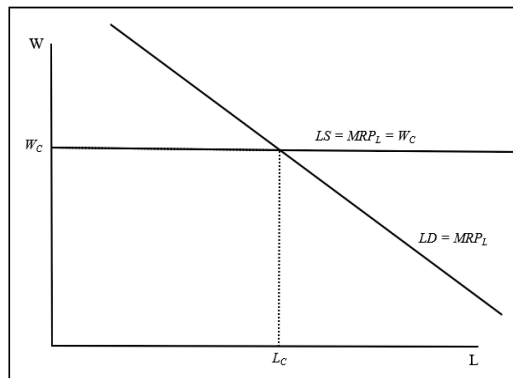
86. *Id.* at 168–69.

87. *Id.* at 84.

88. Elementary economics shows that competitive firms pay labor a share of revenue commensurate with labor’s productivity, based on the marginal product of labor. *See, e.g.*, ROY RUFFIN & PAUL GREGORY, *PRINCIPLES OF MICROECONOMICS* 331–36 (Harper Collins 5th ed. 1993) (explaining that standard economic theory makes predictions regarding the share of payments made to labor that are borne out in the data; economic theory explains why the share of payments going to labor remained relatively constant over several

firm that lacks monopsony power faces a *horizontal* (or “perfectly elastic”) supply curve for each factor of production. For example, if the factor in question is labor—meaning that the employer is buyer—and if the employer faces a perfectly competitive labor market, then the employer takes the market wage as given, and can hire as much labor as it requires at the market wage,  $w_c$ . Accordingly, the price of labor cannot be affected by changes in the quantity demanded (purchased) by the employer,  $LD$ . As illustrated in Figure 1, the buyer has a downward-sloping demand curve for the factor of production, reflecting declining marginal productivity as more and more of the factor is used. As long as the demand curve for the factor is above the (horizontal) supply curve, it is economically rational for the employer to continue purchasing more of the factor because the marginal benefits of doing so exceed the marginal costs.

**Figure 1: Competitive (“Perfectly Elastic”) Factor Supply Curve**



The same principles apply to any perfectly fungible, competitively supplied factor of production such as paper clips: virtually any businesses can presumably purchase as many perfectly interchangeable paper clips as it requires at the market price. Because the supply of paperclips is (from the point of view of any individual buyer) effectively unlimited, an individual business cannot bid up the market price of paperclips by purchasing “too many” of them, nor can it suppress the market price of paperclips by purchasing “too few.”

Importantly, that the factor price is equal to MRP does not necessarily imply that the buyer earns zero profit from the factor. As illustrated in Figure 1, whenever the factor demand curve is downward-sloping, the buyer can earn profit on the *inframarginal* units of the factor (to the left of competitive output along the labor demand curve, where the buyer is willing to pay more than the competitive wage). Even under perfect competition, the inframarginal units of the factor generate more revenue than they are paid. The buyer’s profit on the inframarginal units is given by the area of

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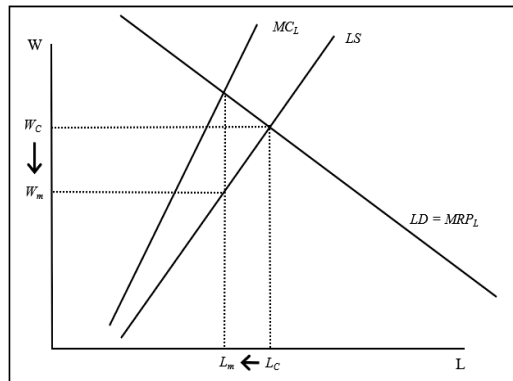
decades (from 1948 to 1990) even though the capital stock more than doubled over this time period). See also MICHAEL KATZ & HARVEY ROSEN, MICROECONOMICS 264–265 (Irwin McGraw-Hill 3rd ed. 1998).

the triangle under the factor demand curve. It bears noting that even if newspapers were to capture 100 percent of their incremental revenue contribution under a regulated outcome, the platforms would continue to earn margins—equal to the difference between MRP and payments—on all the other (non-newspaper) input providers to their platform.

### B. PAYMENTS TO INPUT PROVIDERS UNDER MONOPSONY CONDITIONS

In markets with monopsony power, buyers maximize profits by depressing factor prices below the MRP. This means that there is a gap between the amount that a factor is compensated and the amount of revenue the factor generates for the buyer at the margin. The more monopsony power that a buyer has, the larger is the gap, and the more compensation is suppressed below the competitive level.

**Figure 2: Imperfectly Competitive (Upward-Sloping) Factor Supply Curve**



As illustrated in Figure 2, a buyer with monopsony power faces an *upward-sloping* factor supply curve. The extent to which a buyer can push down factor prices is dictated by its monopsony power. Monopsony power can be measured using the elasticity of supply, which measures the responsiveness of the quantity of the factor supplied to changes in the factor price. A lower elasticity of supply implies a greater exercise of monopsony power—that is, a greater gap between a worker's wage and her MRP. To illustrate, note that the degree of factor price suppression in Figure 2 depends on how steep the factor supply curve is. Steeper factor supply curves are associated with lower supply elasticities and thus greater suppression of factor prices.<sup>89</sup>

There is a direct parallel between a monopolist—a *seller* with market power—and a monopsonist—a *buyer* with market power. Just as the monopolist's optimal markup

89. For a linear factor supply curve such as that depicted in Figure 2, the elasticity of supply varies with movements along the curve. Nevertheless, for any given point on the curve, an increase in the steepness of the curve implies a lower supply elasticity.



over marginal cost varies inversely with the elasticity of consumer *demand*, the monopsonist's optimal markdown below MRP is inversely related to the elasticity of factor *supply*. The solution to the monopolist's problem of what price to charge is given by  $(p-c)/p = 1/E_D$ , where  $p$  is the price,  $c$  is the marginal cost, and  $E_D$  is the elasticity of consumer demand. By symmetry, the solution to the monopsonist's problem of what factor price to pay is  $(MRP-w)/w = 1/E_S$ , where  $w$  is the factor price,  $MRP$  is the worker's marginal revenue product, and  $E_S$  is the elasticity of factor supply.<sup>90</sup> Buyers can suppress factor prices below (or further below) competitive levels by engaging in conduct that has the effect of dampening the factor supply elasticity.

### C. EVIDENCE THAT PAYMENTS TO NEWSPAPERS ARE BELOW COMPETITIVE LEVELS

In a competitive factor market, economic theory dictates that newspapers' compensation should approach their MRP. That is clearly not happening today, as indicated by public records of payments to newspapers.

#### 1. Current Payments To Newspapers

Facebook's 10-Ks show its maximum payment for content across all content providers, including newspapers. The 10-K includes information on Facebook's "cost of revenue," which includes, among other things, costs associated with partner arrangements, including traffic acquisition and content acquisition costs, credit card and other transaction fees related to processing customer transactions, and cost of consumer hardware device inventory sold. Between 2016 and 2018, Facebook's cost of revenue ranged between thirteen and seventeen percent of its total revenue.<sup>91</sup> Accordingly, Facebook's payment for content acquisition, a subset of this share, was less than thirteen to seventeen percent of its revenues. And Facebook's payment for newspaper content would be even smaller.

Facebook reportedly made a deal in 2019 with a number of newspapers to pay "trusted news sources" an undisclosed amount for their services. According to *MarketWatch*, these deals could range from a couple hundred thousand dollars for smaller, regional publications to \$3 million for larger, national publications.<sup>92</sup>

90. See, e.g., ROGER BLAIR, *SPORTS ECONOMICS* 354 (Cambridge Univ. Press 2012).

91. Facebook Inc., Annual Report (Form 10K) (Jan. 31, 2019), <https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm> [<https://perma.cc/KW55-VUCK>] [<https://web.archive.org/web/20230213164755/https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm>].

92. Lukas Alpert, *Facebook, Wall Street Journal Publisher and Others Reach Deal for News Section*, MKT.WATCH (Oct. 18, 2019, 5:25 PM), <https://www.marketwatch.com/story/facebook-wall-street-journal-publisher-and-others-reach-deal-for-news-section-2019-10-18> [<https://perma.cc/9BF6-5YCF>] [<https://web.archive.org/web/20230202221940/https://www.marketwatch.com/story/facebook-wall-street-journal-publisher-and-others-reach-deal-for-news-section-2019-10-18>].

According to the *Wall Street Journal*, Facebook was only offering payment to roughly fifty out of the 200 news providers on Facebook News.<sup>93</sup>

Google reportedly offered a total of \$1 billion over three years to a number of news providers in Germany, Brazil, Argentina, Canada, the U.K., and Australia. While many companies accepted this deal, one major German news source, Axel Springer, refused.<sup>94</sup> In the cases of France and Belgium, Google made indirect deals by putting money into a “Special Fund for French Media” and bought ads on Belgian media websites as a fix to Belgian demands for copyright fees. Neither of these cases suggests an outright deal or offer to publishers.<sup>95</sup> Following France’s implementation of a new rule enacted under a recent European Union law that creates “neighbouring rights” in February 2021, Google agreed to pay \$76 million over three years to a group of 121 French news publishers to settle a dispute.<sup>96</sup> In October 2021, Facebook reached an agreement with the French press alliance to pay national and regional newspapers for “using excerpts of their articles when they’re shared on the social network.”<sup>97</sup>

## 2. Converting Payment Levels To Pay Shares

Economists recognize that “[i]n a world of perfect competition, the output contribution of individual production factors equals their respective revenue shares.”<sup>98</sup> Thus, under competition, the share of total revenue that each factor receives is

93. Paris Martineau, *Facebook Tries Again With News, This Time Paying Publishers*, WIRED (Oct. 25, 2019, 8:18 PM), <https://www.wired.com/story/facebook-tries-again-news-paying-publishers> [<https://perma.cc/Y764-3Q5P>] [<https://web.archive.org/web/20230202222131/https://www.wired.com/story/facebook-tries-again-news-paying-publishers>].

94. David Meyer, *Why Google’s \$1 Billion Deal with News Publishers Isn’t the End of Their War*, FORTUNE (Oct. 1, 2020, 10:07 AM), <https://fortune.com/2020/10/01/google-billion-dollar-news-showcase-axel-springer> [<https://perma.cc/2K85-HP8Z>] [<https://web.archive.org/web/20230202222309/https://fortune.com/2020/10/01/google-billion-dollar-news-showcase-axel-springer>].

95. Harro Ten Wolde & Eric Auchard, *Germany’s Top Publisher Bows to Google in News Licensing Row*, REUTERS (Nov. 5, 2014, 10:35 AM), <https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105> [<https://perma.cc/MXX9-ME2U>] [<http://web.archive.org/web/20230125220151/https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105>]; Jeff J. Roberts, *Did Google Pay Belgian Newspapers a \$6M Copyright Fee? Sure Looks Like It*, YAHOO! FINANCE (Dec. 13, 2012), <https://finance.yahoo.com/news/did-google-pay-belgian-newspapers-164423947.html> [<https://perma.cc/WK76-8F2D>] [<https://web.archive.org/save/https://finance.yahoo.com/news/did-google-pay-belgian-newspapers-164423947.html>].

96. Mathieu Rosemain, *Google’s \$76 Million Deal with French Publishers Leaves Many Outlets Infuriated*, REUTERS (Feb. 12, 2021, 1:06 PM), <https://reut.rs/3jrG74t> [<https://perma.cc/A65Y-XNXV>] [<http://web.archive.org/web/20230125222106/https://www.reuters.com/article/us-google-france-copyright-exclusive/exclusive-googles-76-million-deal-with-french-publishers-leaves-many-outlets-infuriated-idUSKBN2AC27N>].

97. Benoit Berthelot, *Facebook Will Pay French Newspapers for Using Their News*, YAHOO! FINANCE (Oct. 21, 2021), <https://finance.yahoo.com/news/facebook-pay-french-newspapers-using-160728538.html> [<https://perma.cc/Q5JX-UJRJ>] [<https://web.archive.org/web/20230512214407/https://finance.yahoo.com/news/facebook-pay-french-newspapers-using-160728538.html>].

98. Sabien Dobbelaere & Jacques Mairesse, *Panel Data Estimates of the Production Function and Product and Labor Market Imperfections*, 28 J. APPLIED ECON., Jan.–Feb. 2013, at 1.

proportional to the relative importance of that factor in generating output. When factor markets are less than perfectly competitive, the share of revenue paid to the noncompetitive factor(s) may fall because (1) a monopsonist pays compensation below the competitive level and (2) a monopsonist uses less of the factor than would be employed under competition.

For example, noted economist Professor Alan Manning has explained that, in professional sports, there is “a clear link between the removal of anti-competitive labor practices and rises in the share of revenue going to athletes.”<sup>99</sup> The same principles can be applied to the broader economy. A 2013 paper observes that “the constancy of the share of income that flows to labor has been taken to be one of the quintessential stylized facts of macroeconomics,”<sup>100</sup> but that in recent years “prominent measures of labor’s share in the United States have declined significantly.”<sup>101</sup>

More recent research has reached similar conclusions for both labor and capital, two critical inputs to production. A recently published paper in the *Journal of Finance* concluded that, in sectors throughout the economy, “the shares of both labor and capital are declining and are jointly offset by a large increase in the share of pure profits,” and that “increase[s] in industry concentration can account for most of the decline in the labor share.”<sup>102</sup> Similarly, a 2020 study published in the *Quarterly Journal of Economics* concludes that rising market power “can account for a number of secular trends in the past four decades, most notably the declining labor and capital shares as well as the decrease in labor market dynamism.”<sup>103</sup>

Conversion of newspaper payments to pay shares is straightforward. Google’s annual U.S. advertising revenues in 2020 was roughly \$49 billion.<sup>104</sup> Facebook’s annual U.S. advertising revenues in 2020 was roughly \$22 billion.<sup>105</sup> Accordingly, a one percent pay share for U.S. newspapers would amount to annual payments of \$490

99. Alan Manning, *Monopsony In Labor Markets: A Review*, 74 I.L.R. REVIEW 10 (2020).

100. Michael Elsy, Bart Hobijn, & Aysegul Sahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2013, at 1.

101. *Id.* at 2.

102. Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FINANCE 2421, 2421–24 (2020).

103. Jan De Loecker, Jan Eeckhou, & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECONOMICS 561, 562 (2020).

104. Alphabet, Inc., Annual Report (Form 10-K) (Feb. 2, 2021). Per Google’s 10-K, total Google Search ad revenue in 2019 is \$98 billion globally and \$45 billion in the US, meaning forty-six percent of Google Search ad revenues come from the US. Using Google’s quarterly 10-Q filings, I obtain actual quarterly revenues for Q1-3 2020 and estimate Q4 based on previous Q4 performance, implying forecasted 2020 global Google Search ad revenues of \$107 billion. I multiply this figure by the forty-six percent share of global Google Search revenues that stem from the US to obtain \$49 billion for 2020.

105. Facebook, Inc., Annual Report (Form 10-K) (Jan. 27, 2021). Per Facebook’s 10-K, total U.S. and Canada advertising revenue in 2019 is \$33.5 billion, and the total active users for U.S. and Canada is \$245.5 million, implying average revenue per user of \$136.4. Facebook also states that there are 220 million US users in 2019. Multiplying this figure by the ARPU from the U.S. and Canada aggregate, this implies U.S.-only advertising revenues of \$30 billion. Statista reports that in 2019, 31.8 percent of Facebook’s advertising revenues come from Instagram, to which newspapers make no contribution. To net out the advertising revenues from Instagram, I multiply \$30 billion by (1–0.318) to obtain US only, Facebook (non-Instagram) 2019 revenues of \$20.5 billion. Using Facebook’s quarterly reports for 2020 Q1-3, I perform a similar calculation and arrive at \$21.9 billion in U.S. (non-Instagram) advertising revenues for 2020.

million by Google and annual payments of \$220 million by Facebook. Based on the reported payments to U.S. newspapers reviewed above, it is reasonable to assume that the current pay shares are less than one percent. In the next section, I examine the pay shares in comparable industries.

### 3. Regulatory Benchmarks

Benchmarking is a common tool used by economic scholars and practitioners.<sup>106</sup> A benchmark is more informative when it reflects attributes with the “but-for world” envisioned here—that is, everything is the same except for the power imbalance between newspapers and platforms. The salient characteristics of that but-for world include (1) the group seeking fair-market compensation constitutes only one of several input providers for the dominant platform; (2) the payment to the input provider is governed directly or indirectly by an enforcement mechanism, as opposed to being set entirely through market forces; and (3) the group seeking fair-market value bargains collectively. Even imperfect benchmarks that satisfy one or two of the criteria of the but-for world can offer insight as to the reasonableness of the implied pay shares that are sought here. Table 1 presents an overview of potential benchmarks, discussed below, including the associated pay shares for the input providers.

**Table 1: Pay Shares In Potential Benchmarks**

Potential Benchmark	Pay Shares	Protected Class Represents Only One of Many Inputs	Regulated Allocation	Collective Bargaining
Artists and Publishers Under Music Streaming Royalties	65–70%	✗	✓	✓
Broadcasters Under Retransmission Consent	~11%	✓	✓	✗
Regional Sport Networks	~7%	✓	✗	✗
Athletes in Professional Sports Leagues	50–60%	✗	✗	✓

106. See, e.g., Justin McCrary & Daniel Rubinfeld, *Measuring Benchmark Damages in Antitrust Litigation*, 3 J. ECON. METHODS 63, 63 (2014) (“We have found the benchmark approach to be the most commonly used damages methodology”).

As Table 1 shows, none of the potential benchmarks satisfies all three salient characteristics of the but-for world. While broadcasters and regional sports networks (RSNs) represent only one of many inputs on their respective platforms, making them a close comparable, broadcasters cannot bargain collectively vis-à-vis cable operators, and RSN licensing fees are not set in a regulated environment. Yet the pay shares for broadcasters (approximately eleven percent of cable revenues) and RSNs (approximately seven percent of cable revenues) vastly exceed the pay shares currently captured by U.S. newspapers from Google and Facebook (less than one percent). Relative to these comparables, this deficit in pay shares indicates that newspapers are not capturing anything close to competitive rates and is thus indicative of Google's and Facebook's buying power vis-à-vis newspapers.

The pay shares for music rightsholders (sixty-five to seventy percent) and athletes in professional sports leagues with unions and free agency (sixty percent) likely overstate the fair-market value of pay shares here, as those input providers account for the totality of the relevant inputs in the production process in their respective fields.<sup>107</sup> Nevertheless, those benchmarks are informative of a related but-for world in which all content providers—including but not limited to newspapers, broadcasters, bloggers, and video services—could achieve fair-market value for their revenue contributions to the platforms. In other words, if the platforms' monopsony power over all content providers were vanquished, Facebook and Google could be forced to pay content providers more than half of their advertising revenues.

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107. *Kelsey Plum Explained What Equal Pay for WNBA Players Is Really About*, BASKETNEWS (Nov. 29, 2022, 1:49 PM), <https://basketnews.com/news-181639-kelsey-plum-explained-what-equal-pay-for-wnba-players-is-really-about.html> [<https://perma.cc/8VBB-U9LW>] [<https://web.archive.org/web/20230310165453/https://basketnews.com/news-181639-kelsey-plum-explained-what-equal-pay-for-wnba-players-is-really-about.html>] (“NBA players currently receive approximately 50% of shared revenue”), Ben Lindbergh, *Baseball's Economics Aren't As Skewed As They Seem*, THE RINGER (Feb. 21, 2018, 10:17 AM), <https://www.theiringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred> [<https://perma.cc/4NG8-WJXF>] [<https://web.archive.org/web/20230310165724/https://www.theiringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred>] (“An even distribution would also bring baseball in line with the salary-capped NFL, NBA, and NHL, all of which allocate close to 50 percent of revenue to their players.”).

### III. UNDERPAYMENT TO NEWSPAPERS RESULTS IN MYRIAD SOCIAL HARMS

This section reviews the social harms flowing from the underpayments to news publishers. There are myriad social harms flowing from underpayments to newspapers, beginning with employment effects in the input market (e.g., journalism jobs).

#### A. EMPLOYMENT (OUTPUT) EFFECTS IN THE INPUT MARKET

The net effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.<sup>108</sup> The Bureau of Labor Statistics predicts that over the next decade, the total employment of reporters, correspondents, and broadcast news analysts will continue to decline.<sup>109</sup>

The decline in newspaper advertising revenue coincides with the rise of platform power. From 1956 through 2005, advertising revenue for U.S. newspapers steadily increased, peaking around \$50 billion in 2005.<sup>110</sup> The rise of platform power was assisted by favorable legislation in the 1990s and early 2000s.<sup>111</sup> In the mid-2000s, Facebook and Google began to consolidate their power, with competitors MySpace (Facebook's precursor), and Infoseek, Lycos, and Altavista (Google's precursors) steadily disappearing.<sup>112</sup> Since 2006, U.S. newspaper advertising revenue declined from

108. Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CENTER (July 13, 2021), <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008> [https://perma.cc/F4X7-648U] [http://web.archive.org/web/20230126004717/https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008].

109. *Occupational Outlook Handbook: Reporters, Correspondents, and Broadcast News Analysts*, U.S. DEP'T OF LAB.: BUREAU OF LAB. STAT. (Sept. 8, 2022), <https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm> [https://perma.cc/HJU5-FNK2] [http://web.archive.org/web/20230126005322/https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm].

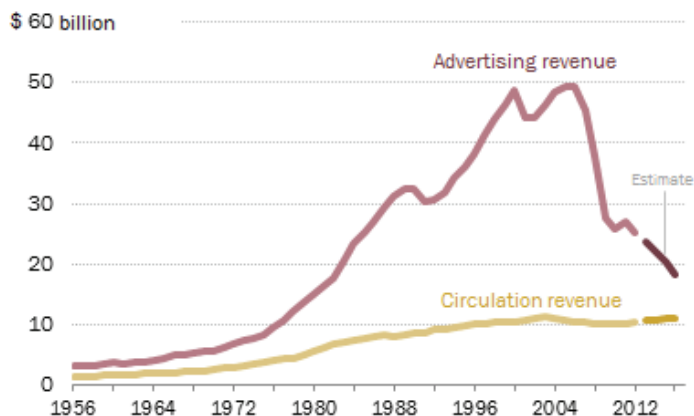
110. Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RSCH. CENTER: FACT TANK (June 1, 2017), <https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry> [https://perma.cc/J3V2-K4ND] [http://web.archive.org/web/20230126005929/https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry].

111. For example, Congress passed the Communications Decency Act in 1996 and the Digital Millennium Copyright Act in 1998, shielding platforms from certain liabilities and giving the new platforms generous tax incentives.

112. Alex Hern, *Myspace Loses All Content Uploaded Before 2016*, GUARDIAN (Mar. 18, 2019, 11:33 AM), <https://www.theguardian.com/technology/2019/mar/18/myspace-loses-all-content-uploaded-before-2016> [https://perma.cc/MAV6-RU99] [https://web.archive.org/web/20230310165900/https://www.theguardian.com/technology/2019/mar/18/myspace-loses-all-content-uploaded-before-2016]; Greg Notess, *Internet Search Engine Updated*, INFO. TODAY (May 2001), [https://www.infotoday.com/online/OL2001/engine5\\_01.html](https://www.infotoday.com/online/OL2001/engine5_01.html) [https://perma.cc/QEW8-GKT6] ("Infoseek, one of the earliest Web search engines, is dead. Purchased by Disney back in the summer of 1999 as the central search engine and directory part of the Go.com portal, Infoseek/Go had been languishing for some time.").

\$49 billion in 2006 to \$18 billion in 2016.<sup>113</sup> Figure 3 shows the rise and fall of newspaper advertising revenues since 1956.

FIGURE 3: TOTAL ADVERTISING REVENUES FOR U.S. NEWSPAPERS, 1956-2016.<sup>114</sup>



Platforms have contributed to shrinking newspaper advertising revenues in two ways. Platforms are not only a direct competitor to newspapers for advertising dollars (a horizontal competition), but platform dominance can also be used to squeeze newspapers (vertical competition) for lower input prices. In 2016, the news industry incurred losses in total weekday circulation, despite gains for certain top-selling sites.<sup>115</sup> The news industry also incurred losses in advertising revenue in 2016, marking a steady decline since 2006.<sup>116</sup> According to one news publisher's testimony to the Antitrust Subcommittee, "digital subscription revenues remain a minor revenue stream and do not appear to be on a path to replace the decline in print subscriptions" for the vast majority of newspapers.<sup>117</sup>

Since dominant platforms aggregate content on their sites, newspapers have little choice but to permit sharing their content this way, as they are dependent on the platforms for traffic. But by providing snippets of content, the platforms permit users to obtain the news without clicking through to the underlying source, ultimately depriving the publisher of traffic and its associated ad revenues.<sup>118</sup> This, in turn, also

113. Barthel, *supra* note 110.

114. *Id.*

115. *Id.*

116. *Id.*

117. Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.).

118. HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM, NEWS MEDIA ALL. 12 (June 2020), <http://www.newsmediaalliance.org/wp-content/uploads/2020/06/NMA-Google-White-Paper-Design-Final.pdf>

creates less of a need to subscribe to the newspaper platform. The platforms do not compensate newspapers for this lost traffic.

## B. REMOVAL OF ECONOMIC STIMULUS TO LOCAL ECONOMIES

The negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms,<sup>119</sup> can have ripple effects throughout local economies. When reporters, correspondents, and broadcast news analysts along with the other supporting employees at a publishing firm lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there.<sup>120</sup>

Local newspapers also provide a valuable service to local businesses by creating a way to connect with community members and advertise their products and services.<sup>121</sup> When underpayments intensify news publisher closure, local businesses no longer have access to this mode of communication and advertising. Furthermore, research has shown that there is a causal link between local newspaper closures and higher municipal borrowing costs, likely due to the reduction in independent oversight.<sup>122</sup> This translates into an approximate cost increase of \$650,000 per average municipal bond issuance.<sup>123</sup> Higher borrowing costs are ultimately borne by local taxpayers, thereby reducing real disposable incomes and removing further stimulus from local economies.<sup>124</sup>

## C. THREATS TO DEMOCRACY FROM NEWS DESERTS

As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or have declared bankruptcy.<sup>125</sup> One study estimates that the United States has lost nearly 1,800 newspapers since 2004 either to

<https://perma.cc/B9XX-N85X> [https://web.archive.org/web/20230126222201/http://www.newsmediaalliance.org/wp-content/uploads/2022/09/NMA-White-Paper\_REVISED-Sept-2022.pdf].

119. See Part III.B.1

120. Josh Bivens, *Updated Employment Multipliers for the U.S. Economy*, ECON. POL'Y INSTITUTE (Jan. 23, 2019), <https://www.epi.org/publication/updated-employment-multipliers-for-the-u-s-economy> [https://perma.cc/J6GX-A8DJ] [https://web.archive.org/web/20230126223435/https://www.epi.org/publication/updated-employment-multipliers-for-the-u-s-economy].

121. *The Benefits of Local Newspapers*, COVINGTON NEWS, <https://www.covnews.com/nie/benefits-local-newspapers/#:~:text=Small%20business%20owners%20often%20connect,strengthen%20local%20schools%20and%20infrastructure> [https://perma.cc/RP2J-J7WC] [https://web.archive.org/save/https://www.covnews.com/nie/benefits-local-newspapers/#:~:text=Small%20business%20owners%20often%20connect,strengthen%20local%20schools%20and%20infrastructure].

122. Pengjie Gao, Chang Le, & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135 J. FIN. ECON. 445, 446 (2020).

123. *Id.*

124. Dermot Murphy, *When Local Papers Close, Costs Rise for Local Governments*, COLUM. JOURNALISM REV. (June 27, 2018), [https://www.cjr.org/united\\_states\\_project/public-finance-local-news.php](https://www.cjr.org/united_states_project/public-finance-local-news.php) [https://perma.cc/6D2N-36M4] [https://web.archive.org/web/20230127023240/https://www.cjr.org/united\_states\_project/public-finance-local-news.php].

125. ABERNATHY, *supra* note 27, at 33.



closure or merger, leaving the majority of counties in America beholden to a single publisher of local news and 200 counties without any paper.<sup>126</sup>

The elimination of local news threatens democracy. A critical function of a local newsroom is coverage of local and state government affairs.<sup>127</sup> Without this coverage, Americans are more likely to rely on national news and partisan heuristics to make political decisions.<sup>128</sup> A robust local news business is also a natural pipeline by which government officials effectively communicate to an electorate (and vice versa). Research shows that in areas with higher local news coverage, voters are better informed on their congressmen and that politicians more actively pursue their constituents' interests through moderating their partisan voting, more frequently standing witness to committee hearings, and generating more federal funding for their districts.<sup>129</sup> Local newsrooms may also provide a check on local government corruption and mismanagement.<sup>130</sup> Moreover, robust local news coverage is positively correlated with higher rates of voter turnout,<sup>131</sup> more support for local services,<sup>132</sup> and greater levels of social cohesion.<sup>133</sup>

#### D. THE RISE OF FAKE NEWS AND DISINFORMATION CAMPAIGNS

As professional news dwindles, fake news fills the void. The House Judiciary Report notes that “the gap created by the loss of trustworthy and credible news sources has been increasingly filled by false and misleading information.”<sup>134</sup> This comes as no surprise since the dominant platforms “face little financial consequence when misinformation and propaganda are promoted online.”<sup>135</sup> Instead, these platforms

126. *Id.* at 10.

127. *Online Platforms and Market Power, Part 1: The Free and Diverse Press Before the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm on the Judiciary*, 116TH CONG. 4–5 (2019) (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution).

128. Joshua P. Darr, Matthew P. Hitt, & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMMUNICATION 1007, 1010 (2018).

129. James M. Snyder & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POL. ECON. 355, 402 (2010).

130. Mary Ellen Klas, *Less Local News Means Less Democracy*, NIEMAN REPS. (Sept. 20, 2019), <https://niemanreports.org/articles/less-local-news-means-less-democracy> [<https://perma.cc/G8N5-GY3L>] [<https://web.archive.org/web/20230127031121/https://niemanreports.org/articles/less-local-news-means-less-democracy>].

131. Matthew Gentzkow et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011); Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 J. POLITICS 447, 447 (2014).

132. Noah Smith, *Goodbye Newspapers. Hello, Bad Government*, BLOOMBERG (June 1, 2018, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government> [<https://perma.cc/K7SK-9L5S>] [<https://web.archive.org/web/20230512215000/https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government>].

133. Amy Mitchell et al., *Civic Engagement Strongly Tied to Local News Habits*, PEW RSCH. CENTER (Nov. 3, 2016), <https://www.journalism.org/2016/11/03/civic-engagement-strongly-tied-to-local-news-habits> [<https://perma.cc/YZC6-CT6E>] [<https://web.archive.org/save/https://www.journalism.org/2016/11/03/civic-engagement-strongly-tied-to-local-news-habits>].

134. STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 12, at 49.

135. *Id.* at 53.

incentivize publishers to gain the most attention possible, regardless of the methods or integrity.<sup>136</sup> Using preference-based algorithms, the platforms create echo chambers in which fragmented views of the news are reinforced, leading to further mistrust.<sup>137</sup> This is in contrast to traditional news outlets, which focus instead on forming relationships with their audience and building a reputation for quality and trust.<sup>138</sup>

The reduction in these traditional newspapers has coincided with more Americans using social media platforms to access news.<sup>139</sup> This shift is expected to lead to a greater spread of both partisanship and misinformation,<sup>140</sup> leading to significant social harms. For instance, misinformation could have resulted in hastening the COVID-19 epidemic by influencing citizens' behavior and response to government countermeasures.<sup>141</sup> In an August 2020 survey, "relatively high levels of misperception" could be found among those receiving news information from social media sources, while the "lowest levels of misperceptions" was found among those receiving information from "local television news, news websites or apps, and community newspapers[.]"<sup>142</sup> Underpayment to these trusted news sources has contributed to their lower prevalence, proliferating this shift to less reliable sources.

#### IV. CONCLUSION

Allowing current market forces to dictate the newspapers' pay shares ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees,

136. MICHAEL CLAY CAREY, LOCAL NEWS AND COMMUNITY RESILIENCY IN APPALACHIA 23–24 (Center for Journalism & Liberty, Sept. 22, 2020).

137. *Id.*

138. NEWS MEDIA ALLIANCE, COMMENTS OF NEWS MEDIA ALLIANCE BEFORE THE FEDERAL TRADE COMMISSION REGARDING THE HEARINGS ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY 15 (Aug. 20, 2018), [https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF\\_NMA-FTC-Hearings-Comments-FINAL.pdf](https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF_NMA-FTC-Hearings-Comments-FINAL.pdf) [<https://perma.cc/7Z59-YXRJ>] [[https://web.archive.org/save/https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF\\_NMA-FTC-Hearings-Comments-FINAL.pdf](https://web.archive.org/save/https://www.newsmediaalliance.org/wp-content/uploads/2018/08/vF_NMA-FTC-Hearings-Comments-FINAL.pdf)].

139. Peter Suci, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), <https://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=1eebb4723e17> [<https://perma.cc/DSK8-5C7E>] [<https://web.archive.org/save/https://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=609e6e103e17>].

140. ROBERT FARIS ET AL., PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION (Berkman Klein Center for Internet & Society at Harvard Univ., No. 2017-6), <https://cyber.harvard.edu/publications/2017/08/mediacloud> [<https://perma.cc/7BZV-6CQC>] [<https://web.archive.org/save/https://cyber.harvard.edu/publications/2017/08/mediacloud>].

141. Matteo Cinelli et al., *The COVID-19 Social Media Infodemic*, 10 SCI. REP., No. 16598 (2020).

142. MATTHEW BAUM ET AL., THE STATE OF THE NATION: A 50-STATE COVID-19 SURVEY, REPORT #14: MISINFORMATION AND VACCINE ACCEPTANCE 11 (The COVID-19 Consortium for Understanding the Public's Policy Preferences Across States Sept. 2020), <http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf> [<https://perma.cc/2LXS-6TEB>] [<https://web.archive.org/web/20201001015817/http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf>] (a joint project of Northeastern University, Harvard University, Rutgers University, and Northwestern University).

as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions, followed by an enforcement mechanism to ensure that fair market value is being paid for the access being granted to the publishers' content.

## Getting Facebook and Google to Pay for News: Explaining Australia's News Media Bargaining Code

Andrea Carson\*

### TRANSCRIPT

Thank you very much. I'd just like to say what a great pleasure it is to be here albeit at 3:13 in the morning. And it's really wonderful to be able to hear what's going on in the United States.

I'm going to share some slides just to give some context to what's happened in Australia with the News Media Bargaining Code, which relies on competition law, which has been referred to here as antitrust.

So I guess, the background to the Australian context is it's been a very concentrated media ownership environment, probably, one of the most concentrated environments of any developed democracy.

And it's become further concentrated over time with changes to media merger and acquisition laws. And we saw a significant change in 2017-- there are two main media newspaper companies in Australia, that's Fairfax Media and News Corp Australia, which, of course, is owned by media baron Rupert Murdoch.

After the last raft of changes to media ownership laws in 2017, Channel 9, the television station took over Fairfax Media,<sup>1</sup> which led to further ownership consolidation. Coming off the back of the global financial crisis, newspapers had lost millions of dollars, well, billions, actually, in advertising revenue exacerbated with online competitors coming on board.

And that led to an inquiry by the Australian Competition and Consumer Commission ("ACCC"). In 2017, the federal Government asked the ACCC to look at what the state was of media in Australia with growing concerns about the sustainability of newsrooms, particularly with misinformation circulating online. And

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1. Fairfax Media was a predominantly print and radio broadcast company and was the second largest Australian media company after Rupert Murdoch's News Corp Australia.

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as Hal's<sup>2</sup> talk explained, the arrival of digital competitors such as Facebook and Google had created an uneven playing field of bargaining power for traditional media to compete to attract advertising.

In 2019, the ACCC reported back with twenty-three recommendations for change. Of those, the federal government, which was a conservative government, at the time, instructed the ACCC to develop the News Media Bargaining Code, which is what I'm here to talk about today.

The objective of the code that arose out of the ACCC inquiry was to address bargaining power imbalances so that news outlets receive fair remuneration from digital platforms for the value their content generates.

The News Media Bargaining Code was developed during 2020. By early 2021 it looked like it was about to come into law. And that is when Google and Facebook ran counter online campaigns. In Google's case, it told users its Google services would be severely disrupted if the law succeeded. And Facebook, for its part, actually pulled news from its platform for ten days.

News was defined very broadly by Facebook and it actually removed some important emergency services information from its platform during a time when Australia was experiencing bushfires. That caused some public backlash towards Facebook, yet the maneuver also forced the government to make some amendments to the bill, which I'll go into in just a moment, which I think we can see were clearly in the interests of the big tech companies.

So just a little more background. Similar to what Hal has been reporting, over time, the ACCC inquiry found that 3.48 billion [Australian dollars] was the estimated loss in classified advertising in Australia between 2001 and 2016.<sup>3</sup> And that reporting staff across newspapers and television and radio had decreased by twenty percent between 2014 and 2018.<sup>4</sup>

If we look at the advertising, distribution in Australia, it's a similar picture of decline with over eighty percent going to Google and Facebook, which is why Google and Facebook are exclusively named in the News Media Bargaining Code. The other big platforms that operate in Australia, at this point in time, are not subject to that code. Only nineteen percent of the advertising revenue was going to the news media sector.

As a consequence, also, of the COVID-19 pandemic, Australia was developing more news deserts in local media with 164 outlets, closing in the first year of the COVID-19 pandemic.<sup>5</sup>

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2. Hal J. Singer, another panelist at the 2022 Kernochan Symposium.

3. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY 17 (June 2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [https://perma.cc/Q6GP-KDMX] [https://web.archive.org/web/20230315044731/https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf].

4. *Id.* at 18.

5. PUBL. INT. JOURNALISM INITIATIVE, SUBMISSION TO THE SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS: INQUIRY INTO MEDIA DIVERSITY IN AUSTRALIA 3 (Jan. 2021) [https://piji.com.au/wp-content/uploads/2021/02/piji-submission\\_senate-committee\\_media-diversity-inquiry.pdf](https://piji.com.au/wp-content/uploads/2021/02/piji-submission_senate-committee_media-diversity-inquiry.pdf) [perma.cc link unavailable] [https://web.archive.org/web/20230312081026/https://piji.

Let's talk about the platforms' backlash. I've got an example there in the slides of what the advertising campaign looked like that Google ran with that yellow triangle, warning Australians that their experience on the platform would be disrupted if the News Media Bargaining Code was legislated. And Facebook went one step further, rather than threatening to remove services, it actually did pull news content from its platform.

So what did the code look like? It has some criteria about who's eligible. A news organization must have a turnover of 150,000 [Australian dollars] per annum, which is consistent over at least a three- or five-year period.

It needs to produce core news. "Core news" is not well defined. Meaning that to be eligible, if you are a core news provider, you must be registered with the Australian Communication and Media Authority ("ACMA"), who oversees that component of the News Media Bargaining Code. And from there, once you're registered, you're in a position to be able to, in theory, bargain with either Google or Facebook for the value of the platforms presenting third-party news on their platforms. Initially, before the backlash from Google and Facebook, it was going to be a one-way value exchange.

What that meant was that the news media companies were able to determine what they thought their value was that was being exploited by the big tech companies. This part of the bill changed after Google's and Facebook's online campaigns against the code. The federal Treasurer backed down on that element of the bill and made it a two-way exchange.

As Hal pointed out, this code, also, has final offer arbitration. But there's a really important caveat here, which I want to underscore. And that is that arbitration and negotiation does not occur unless the code is actually activated, or what is officially known as designated.

The designation power of the code resides with the Treasurer. To date designation has not occurred. We had a change of government in Australia in May 2022. And so in actuality, the code, although it's been legislated, it hasn't been activated.

So the deals that have happened up until this point have been with the fear of the code being activated. Designation will force the big tech companies to negotiate. At this point in time, that negotiation with news media companies has been on a voluntary basis because there hasn't been the activation.

And as one can imagine, the big tech companies have only been engaging in negotiations with the larger media companies. Those smaller companies do have the right, under the News Media Bargaining Code, to collectively bargain. But because the code hasn't been designated, it makes it very hard, even when they come together as a group, to force Google or Facebook to the negotiation table.

In fact, as we will see with the deals that have been done, and keep in mind these deals are commercial-in-confidence, so the figures and the companies that I'm reporting here are based on media interviews and anything that has leaked out into

the public sphere. There's no formal documentation of these deals because of commercial confidentiality arrangements.

So the threat of final offer arbitration has never been realized because the code has not been activated to date. The law came into power in February 2021. So there's been just over a year of these negotiations. They range from five years to just two years in duration. They're not consistent.

To date, Facebook has made fourteen deals that we know of, and Google has undertaken twenty. By talking to some of the outlets that have gone through this negotiation process, Google has been an easier operator to deal with by more readily coming to the table with its deals. Facebook seems to have drawn a line at a given point, perhaps thinking it has satisfied enough deals to prevent the Treasurer from designating and forcing negotiation.

So as we can see there it's been estimated by the former head of the ACCC that 200 million [Australian] dollars have been exchanged between news media companies in Australia and Google and Facebook in the past year.

When we look at the recipients of those deals, it's estimated that News Corp has been the biggest winner, getting approximately seventy million [Australian dollars] a year. And Nine Entertainment Co., getting approximately fifty million [Australian dollars] from its deal, leaving a much smaller proportion going to media startups.

Now, one of the important things here is that the policy intention of the Code was to improve public interest journalism.<sup>6</sup> However, there is no actual provision in the Code that any of the exchange of money from platforms to news media companies needs to be spent on journalism.

For example, it could go to the paper stock of the annual reports for reporting annual statements. It doesn't have to be spent on journalism and that's something that might be reviewed, given that there's been a change of government in May 2022. And Australia now has a left-of-center government.

The losers of the deal are several. As I mentioned that Facebook drew a line in the sand and just stopped negotiating halfway through this year. It did not negotiate a deal with Australia's second national broadcaster, the SBS, nor did it negotiate a deal with The Conversation, which is -- I think you've got The Conversation also in America -- a non-profit outlet that uses academic resources combined with journalism to provide public interest information.

The Conversation ran quite a campaign about how it was frozen out by Facebook. And that has led to no avail because there is no designation of the Code. If we look at some of the major critiques since the Code has come into power, it's been that the

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6. The Treasurer explicitly said a code aim was to "sustain public interest journalism in Australia." See Joint Media Release, Paul Fletcher & Josh Frydenberg, Parliament Passes News Media and Digital Platforms Mandatory Bargaining Code, MINISTERS, TREASURY PORTFOLIO (Feb. 25, 2021), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms> [<https://perma.cc/7GTK-CQK3>] [<https://web.archive.org/web/20230428014450/https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms>].

small startups, largely those under 150,000 [Australian] dollars in revenue a year, are excluded from participating in the process of deal-making.

They also have limited capacity to collectively bargain because the Code has not been designated. There's no requirement to spend the revenue on public interest journalism, which goes against the grain of the policy intention of the Code. The deals of commercial-in-confidence, and they vary in years.

And there's no opacity after the expiry of these deals. We don't know what the future holds or whether the Code will ever be designated to compel the big tech companies to renegotiate these deals in the future.

But on the other hand, more optimistically, it is world-first legislation. It does use competition law as opposed to copyright law to have a financial exchange between news media organizations and big tech companies to address bargaining power imbalances so as to ensure news businesses receive fair remuneration from digital platforms for the value their content generates.

There have been little funds going to startups at this point. But with a review in place now, which is due to report to government this month. And that may be publicly released in the next two months, we might see some changes with the recommendations from the labor government.<sup>7</sup>

So some conclusions, perhaps, up for discussion is that essentially, the beneficiaries of the News Media Bargaining Code, to date, have been legacy media.

One might argue that further distorts the already concentrated media market and that there's been a silencing effect from mainstream media who are quite happy to have their 200 million [Australian] dollars exchanged in the last year that creates a path dependency for media companies, which now are quite reliant on big tech as a fairly significant revenue source for them.

There are no great incentives for new media startups in the Australian space given, I should say, that when the ACCC did its initial digital platforms report in 2019, the main twenty-three recommendations, as Dana<sup>8</sup> pointed out, one of those recommendations was also for tax breaks, both to news subscribers and to news media companies.

Those tax breaks were not taken up, and there are not many incentives for startups in the Australian environment, given the power imbalance to try and negotiate with big tech. And the concentrated media environment landscape still remains as such in Australia.

So the next steps, as I mentioned, the Department of Treasury has reviewed the News Media Bargaining Code to see how it's performing. We don't yet publicly know

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7. The Treasury review reported in December 2022 and thirty-four stakeholder submissions were made to it, which are on the website at <https://treasury.gov.au/consultation/c2022-264356> [perma.cc link unavailable] [<https://web.archive.org/web/20230428014657/https://treasury.gov.au/consultation/c2022-264356>]. It made five recommendations, the most significant being that the government consider if ACCC information-gathering powers could be used to obtain information about commercial agreements between digital platforms and news businesses. A further review was recommended in four years' time.

8. Dana Scherer, another panelist at the 2022 Kernochan Symposium.



what has gone into that review. Its reporting to the new government this month or last month. And hopefully, we might see the public side of that later this year.

What was asked to review on was to ask media companies to make clear how many more journalists they had employed as a consequence of these deals, whether they had invested in the professional development of journalists or investment in hardware and infrastructure, and what they see as the long-term sustainability of news businesses as a consequence of the Code.

I will leave it there, and I'm happy to take questions. Thank you very much.

//END//

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

Ariel Katz\*

### INTRODUCTION

In April 2022, the Government of Canada introduced Bill C-18 (the Online News Act).<sup>1</sup> This Bill is one of the recent attempts by governments in several countries to address a perceived crisis-level disruption to newspapers' finances<sup>2</sup> 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.<sup>3</sup>

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."<sup>4</sup> 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."<sup>5</sup>

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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\* Associate Professor, University of Toronto, Faculty of Law. This article is based on comments made at the 2022 Kernochan Symposium titled "Under PRESSure—Legal Protections, Regulations, and the Future of Press Publishing" at Columbia Law School on October 21, 2022.

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://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](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).

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imposing a corresponding duty on such operator to participate in the process,<sup>6</sup> coupled with a duty on all participants to bargain in good faith.<sup>7</sup> 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.<sup>8</sup>

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).<sup>9</sup> 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.

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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,<sup>10</sup> 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<sup>11</sup> (and contributed even more to the profit since classified ads were very inexpensive to sell).<sup>12</sup> 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.”<sup>13</sup>

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

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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](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.<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup> 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://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](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”<sup>20</sup> 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.<sup>21</sup> 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

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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)<sup>22</sup> is the *sine qua non* of copyright in Canada.<sup>23</sup> 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.<sup>24</sup>

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

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.”<sup>27</sup> 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.’”<sup>28</sup> The Court further emphasized that the author’s legal monopoly applies only to a substantial part of her original expression and does not extend “over ideas or elements from the public domain, which all are free to draw upon.”<sup>29</sup> 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).<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup> The news publisher fully controls whether the content will be available on its website,<sup>35</sup> whether those who have the link can access the content, whether they hit a paywall, or whether they encounter a 404 error message,<sup>36</sup> and the publishers also “control what image will accompany the link and how much text, if any, will appear to Facebook users.”<sup>37</sup>

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<sup>38</sup> (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).<sup>39</sup>

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.<sup>40</sup>

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://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](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.<sup>41</sup> Copyright infringement exists only if one engages any of the copyright owner's exclusive rights without their consent,<sup>42</sup> which may be express or implied.<sup>43</sup> 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,<sup>44</sup> which newspaper publishers very likely are.<sup>45</sup>

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*.<sup>46</sup> 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.<sup>47</sup> 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.”<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup> 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,<sup>51</sup> while protecting users "from the potential exertion of unfair market power by collective societies" on the other.<sup>52</sup> 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."<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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."<sup>56</sup> 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"<sup>57</sup> 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.<sup>58</sup> 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.'"<sup>59</sup> Or they might use the works without a license and risk being liable for infringement.<sup>60</sup> 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,<sup>61</sup> and that of Quebec.<sup>62</sup> These laws apply labor-law collective bargaining models to the relationships between authors and producers.<sup>63</sup> 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://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](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."<sup>64</sup> 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[.]<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> Thus, Bill C-18 grants the largest and most powerful media organizations a

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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.”<sup>68</sup> 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,<sup>69</sup> 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)<sup>70</sup> 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

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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://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](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.<sup>71</sup>

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.<sup>72</sup> 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

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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.”<sup>73</sup> 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

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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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.”<sup>77</sup> 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.”<sup>78</sup>

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

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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://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](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.<sup>79</sup>

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,”<sup>80</sup> 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.”<sup>81</sup> 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.”<sup>82</sup> According to Netanel, this historical structural function of copyright still has purchase,<sup>83</sup> 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.”<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup>

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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<sup>87</sup> 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,"<sup>88</sup> 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.

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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://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](https://web.archive.org/web/20230121184953/https://www.parl.ca/Content/Bills/441/Government/C-18/C-18_3/C-18_3.PDF)].







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