

**UCLA** Institute for Technology,  
Law & Policy

# **SUSTAINING JOURNALISM, SUSTAINING DEMOCRACY**

A Policy Guide on Platforms  
and the Press

Developed by the UCLA Information Policy Lab.

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# Introduction: Best of Frenemies

Courtney Radsch

Michael Karanicolas

After decades of shrinking revenues, and an increasing expectation among consumers that the news should be free, the global news media industry has reached a crisis point. The importance of the press to maintaining democracy means that, as the financial models which underlie the news media industry have come under increasing strain, both emerging and established democracies have seen a steady erosion of trust in institutions of knowledge and governance. Evidence of the problem can be seen in the proliferation of misinformation and conspiracy theories, which blur the line between fantasy and reality, from politics to public health. As the electorate loses faith in our political and governance structures, extremism and political violence become normalized. Even worse, as structures of public accountability degrade, autocrats and would-be autocrats have grown skilled at manipulating the online discourse to suit their pursuit of power.

While there is no single cause underlying journalism's long-term decline, much of the blame points to shifting markets for information, and the increasing reliance of news outlets on online platforms to disseminate their product and to generate revenue. As the major platforms have grown to dominate our political and information ecosystem, the already tenuous funding models underlying news media have been stretched to a breaking point. The leading platforms not only claim a sizable share of both the publishing and advertising infrastructure, but also possess a formidable grip on audience access, content moderation, and data, allowing them to set the terms of their engagement with the news media industry, and to claim the lion's share of revenue generated from news content. The demands of following a platform-specific logic for how news is generated and distributed has added technical complexity and instability to news media operations. News is constrained by the policies, conventions and fluctuating algorithms that determine visibility and viability. Content moderation systems are opaque in their rule-making and enforcement, and this in turn governs visibility, monetization, and outreach of the content published by journalistic organizations. In this environment, journalists must remain vigilant not only of the legal and ethical standards underlying their work, but also the community standards and engagement metrics that determine their audience and viability. When virality governs the news industry, the public interest suffers.

In less developed countries, or those with poor press freedom records, the situation is often even more dire. Although platforms can be a lifeline for media outlets in places where the airwaves are restricted, government intervention is prevalent, and journalistic independence is limited, news outlets have an even more difficult path pursuing sustainability and predictability in their engagement with platforms. This is due to the latter's overwhelming focus on their english-language, and specifically American, operations.<sup>1</sup> The experience of Ukraine's largest independent media outlet, Ukrainska Pravda (UP), illustrates this challenge perfectly. The outlet's 100 million monthly page views soared 900% in the first month of Russia's attack on Ukraine, a global news event. However, erroneous content moderation decisions by the platforms meant that native ads on its website dropped to nearly zero over the same time period, while programmatic revenue dropped 90%.<sup>2</sup>

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<sup>1</sup> Marwa Fatafta, *Facebook is Bad at Moderating in English. In Arabic, It's a Disaster*, REST OF WORLD (Nov. 18, 2021), [www.restofworld.org/2021/facebook-is-bad-at-moderating-in-english-in-arabic-its-a-disaster](http://www.restofworld.org/2021/facebook-is-bad-at-moderating-in-english-in-arabic-its-a-disaster).

<sup>2</sup> Daniel Salaru, *Ukraine: As War Drags on, Independent Media Continue to Adapt*, INT'L PRESS INST. (July 11, 2022), [www.ipi.media/ukraine-as-war-drags-on-independent-media-continue-to-adapt](http://www.ipi.media/ukraine-as-war-drags-on-independent-media-continue-to-adapt).

As democracies around the world have watched this problem unfold, and experienced the ancillary impacts of journalism's decline, they have begun to implement a range of solutions aimed at supporting long term sustainability for news media. Among the most high profile interventions have been the European Union's 2021 Digital Copyright Directive and Australia's 2021 News Media and Digital Platforms Mandatory Bargaining Code, but similar initiatives have been pursued in many other countries, from Indonesia to India to Canada. In the United States, there have been a number of legislative proposals aimed at tackling the problem, most notably the Journalism Competition and Preservation Act.

These initiatives have faced a range of challenges and criticisms. In Australia, Facebook infamously shut down news in the country for four days in response to the new Code, though they reversed course on this after public outcry, and early results from that country appear promising.<sup>3</sup> Subsidy or tax credit schemes create challenges related to determining who is or is not worthy of support, or the even more fraught question of who even qualifies as a "journalist". There are concerns that whoever controls these levers of funding, whether it is a government or a company, may abuse this power to punish disfavored perspectives or to silence critical reporting. But if the threshold for qualifying is too low, it could result in channeling resources to the worst purveyors of misinformation and hate, further degrading the political discourse. Some journalists have also raised concerns that these programs, even if administered fairly, could further erode public confidence in their reporting, by creating a perception that they are beholden to their government or Big Tech paymasters.<sup>4</sup>

There is also a tension between calls to harness the resources of major platforms to support journalism and ongoing antitrust and competition inquiries that view the platforms' market power as the heart of the problem.<sup>5</sup> There are concerns that a licensing model that ties the future of journalism to the profitability of Big Tech will make it more difficult to break the companies up and further entrench the surveillance-heavy business model they are built around.

Every proposed solution involves trade-offs and challenges. However, given the foundational importance of the press to a functioning democracy, and the existential crisis facing newsrooms around the world, inaction is not an option.

This publication considers the range of policy changes that have been tried or recommended by global regulators, assessing their impacts on press freedom and news media sustainability, with consideration for the risk of capture, and other potential tradeoffs of these interventions. It examines four categories of interventions: related to taxes and direct subsidies; copyright and licensing; competition and antitrust regulation; and transparency. Each piece discusses the driving concept behind each intervention, its advantages to publishers, how these benefits are distributed and how decisions are made regarding them, potential government involvement in each one, and their ability to address key underlying challenges related to news media sustainability. Our research also emphasizes the interrelationships between these policies and their broader effect on the platformization of journalism. However, given

that these interventions are in their early stages, or in some cases are still theoretical, a dearth of data makes it difficult to conclusively assess their impacts on media sustainability, media freedom and access to news. Where data asymmetries exist related to these questions, they are noted as areas for further research and potential regulatory attention.

This publication was developed as part of an innovative new experiential learning class at the UCLA School of Law aimed at onboarding students into the tech policy space and developing their critical analytical capabilities by training them to answer emerging policy questions. Developed by the Institute for Technology, Law and Policy at UCLA, this new Information Policy Lab engaged a group of students to work through the implications of proposed interventions on media freedom and sustainability. They address the theory of change driving each intervention, the benefits that accrue to publishers, the definition of who benefits and how that decision is made going forward, and the potential for government intervention. They also address the adequacy of each approach for addressing core challenges to news media viability in the platform era. This analysis underscores the interdependency between them and their impact on platformization, which policymakers may want to consider more explicitly.

Fact-based journalism is essential to populations in conflict and crisis, as well as to public health, development, and accountable governance. The increasing dominance of online platforms over our public sphere has led to an uneasy relationship between news organizations and large tech companies. While the latter have generated new opportunities to connect journalists with audiences, evade censorship, and engage in influential cross-border collaborations, they have also forced journalists to contend with shifting algorithmic priorities, warped incentive structures in the online economy, and an increasingly complex array of technology policies that shape the environment in which they work and the business models for sustainability. Perhaps most urgently, the platformization of journalism has contributed to a crisis in funding in which quality journalism, particularly locally-focused and investigative journalism, has struggled to figure out how to navigate sustainability in the information age.

Public interest news media are rarely viable economically, and it is no different in the platform economy. But platforms have undermined the entire market for fact-based, reliable information that is at the core of journalism as a public good that is fundamental to well-functioning democracies. Rebalancing market dynamics and seeking to address information asymmetries is critical to not only ensuring the future viability of the news media industry, but the future of democracy.

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<sup>3</sup> Bill Grueskin, *Australia Pressured Google and Facebook to Pay for Journalism. Is America next?*, COLUMBIA JOURNALISM REV. (Mar. 9, 2022), [www.cjr.org/business\\_of\\_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php](http://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php).

<sup>4</sup> *Google And Facebook To The Rescue: Canadian News Gets On Big Tech's Payroll*, CANADALAND (Apr. 11, 2022), [www.canadaland.com/podcast/770-google-and-facebook-to-the-rescue-canadian-news-gets-on-big-techs-payroll](http://www.canadaland.com/podcast/770-google-and-facebook-to-the-rescue-canadian-news-gets-on-big-techs-payroll).

<sup>5</sup> Cory Doctorow, *Newspapers vs Big Tech: Antitrust Tackles the Problems That Copyright Just Can't Fix*, ELECTRONIC FRONTIER FOUNDATION (Dec. 9, 2021), [www.eff.org/deeplinks/2021/12/newspapers-vs-big-tech-antitrust-tackles-problems-copyright-just-cant-fix](http://www.eff.org/deeplinks/2021/12/newspapers-vs-big-tech-antitrust-tackles-problems-copyright-just-cant-fix).

## Executive Summary: Platform Transparency for News Sustainability

Recent efforts to address news media sustainability have included a significant focus on transparency for digital platforms. Those efforts focus on transparency for 1) digital advertising; 2) content moderation algorithms; and 3) journalism funding.

### Recommendations

- 1. Require transparency for platforms' digital advertising, including auctions, pricing, and performance.** This should include disclosure of data about which parties are buying and selling ad inventory, and for what prices. Advertisers and publishers should be able to make direct advertising agreements, rather than needing to go through intermediaries. These requirements should also facilitate third party verification of the metrics used to judge performance of ads.
- 2. Require transparency about platforms' algorithms.** This should include information about how platforms prioritize content, and when platforms plan to make changes to their algorithms. Allowing news publishers to know how platforms prioritize content will improve publishers' ability to monetize their content, as well as allow for broader public oversight over their operations.
- 3. Require transparency about platforms' funding of journalism.** This should include information about the policies platforms use to decide who to fund; it should also include information on who platforms fund and for how much.
- 4. Include third-party verification in any transparency regulation.** A common problem with current systems is an inability to verify what platforms say. Independent third-party verification renders transparency meaningful, by enhancing trust in the platforms' disclosures.

### Considerations

- 1. Mandatory transparency frameworks may be less suited to countries where democratic norms and institutions are weaker.** In countries where democratic norms and institutions are weaker, transparency mandates can serve as a potential pressure point, and as a result should be approached with caution. States which do impose transparency mandates should consider their potential global utility, and facilitate access as broadly as possible, including for material of relevance to stakeholders in other parts of the world.
- 2. Transparency requirements should be considered in conjunction with other regulatory fixes.** Transparency requirements have benefits on their own, but can also make complementary regulatory fixes possible, by addressing information asymmetries which challenge evidence-based policymaking. Transparency measures should be written with complementary regulatory approaches in mind, to get the most value out of regulatory interventions.

## Executive Summary: Copyright, Licensing and Collective Bargaining Approaches towards News Sustainability

Recent laws in several countries seek to give publishers more power in their negotiations with digital platforms, using one of three approaches: 1) using copyright law to enhance publishers' ability to monetize their news content; 2) regulating the negotiation process between platforms and publishers; and 3) allowing publishers to collectively bargain in these negotiations.

### Recommendations

- 1. Interventions which extend copyright protections for news can only be effective if implemented alongside parallel regulatory measures which target broader structural imbalances in the news media ecosystem.** For instance, France needed to couple antitrust enforcement with its new ancillary rights law. Without protection in negotiations, the new ancillary rights did little to help news publishers.
- 2. Reforms which target licensing should include an arm's length collection agency and a central database of ownership information.** The music industry in the United States relied on these structures to achieve positive changes through regulation.

### Considerations

- 1. Moves to expand copyright protection for news create difficult tradeoffs with regard to freedom of expression:**
  - a. Avoid vague language.** Imprecision can lead to disparities in how the new rules are enforced. A lack of clarity runs counter to general principles of freedom of expression.
  - b. Strengthening copyright protections can lead to automated filtering and content takedowns.** Technology companies use various imperfect technologies to prevent copyright infringement; these technologies can silence legitimate fair use expressions. This danger is particularly acute when laws remove intermediary liability protections for violations of new copyrights. This challenge persists in the enforcement of copyright in music, and would be even more acute should similar techniques port over to the news realm.
- 2. Collective bargaining gives news publishers more power in negotiations with digital platforms.** This approach has worked well in the music industry in the United States, but ensuring that the benefits flow appropriately to small and upcoming outlets require that new entrants should be able to be added to deals after the fact.
- 3. There is a risk collective bargaining groups may accumulate too much power and negotiate deals that are unfair to some news publishers.** In music, regulation of collectives was hard to change, even as the market changed drastically, leading to some artists suffering.

## Executive Summary: Subsidy Based Approaches Towards News Sustainability

Subsidy based approaches seek to promote news sustainability by providing economic benefits to news publishers, to counter diminished revenues. Strategies in this space include government initiatives, including tax credits and taxes on digital advertising, and platform-led initiatives, which provide funds, services and training to news publishers and journalists.

### Recommendations

- 1. Government-led approaches are more suitable for short term economic support for the news industry.** On a balance of considerations, journalism is better off being supported by governments than by platforms. While both avenues pose risks to editorial independence, democratic checks and balances are more likely with the government. The lack of data and transparency around platform-led initiatives as well as skewed incentives make these riskier.
- 2. Digital ad taxes are the most effective measure to support government subsidies.** In addition to providing direct payments to news organizations, digital taxes also bring greater consistency to the economic aid news organizations can expect.
- 3. Deeper, structural issues persist and must be addressed beyond subsidy programs.** The initiatives we studied provide much needed support to the news industry, but do not solve underlying structural imbalances created by platforms' stranglehold on digital advertising. Thus, these measures should be considered in combination with the other approaches explored in this publication.

### Considerations

- 1. Deciding eligibility for government subsidies and benefits remains a controversial issue:**
  - a. Defining terms like 'journalism' and deciding qualifying criteria for news organizations is challenging:** Statutory schemes must necessarily define the organizations and content they cover. Overly narrow definitions risk excluding smaller or specialized publications and journalists, while overly broad definitions could divert funds to entities disseminating misinformation or other harmful content.
  - b. Government influence on decisions around qualification poses a risk of media capture:** Attempts to counter concerns of governments picking winners in the news industry and thus influencing journalism have included setting up independent advisory boards or committees. However, concerns about influence in appointment to these committees and potential conflicts of interest for industry appointees persist.
- 2. The benefits of platform-led initiatives are outweighed by the risk of further consolidation of power in the hands of platforms:** While they might ease news publishers' financial burdens in the short term, these initiatives are likely to make journalism increasingly dependent on platforms, giving tech companies a greater say in editorial policies, ultimately undermining the goal of press independence and sustainability.

## Executive Summary: Antitrust-based Responses for News Sustainability

Antitrust-based solutions to promote news media sustainability seek to address large platforms' market power, which allows them to claim the lion's share of digital advertising revenues. Strategies here include: 1) establishing enforceable codes of conduct to support news publishers' bargaining position; 2) establishing antitrust safe harbors to allow collective bargaining by news media businesses; 3) establishing data-related interoperability obligations for digital platforms; and 4) applying structural remedies, including through breaking platforms' vertical integration by either separating digital platforms' core business from their ad businesses or restricting platforms' operations within the open display ad market.

### Recommendations

- 1. In order to be successful, antitrust-based remedies should target the technology platforms that have obtained dominance over advertising markets.** In order to minimize unnecessary disruption to the online speech ecosystem, these powers should be wielded as a scalpel, not as a sledgehammer.
- 2. Antitrust-based remedies should be flexible enough to adapt to new anticompetitive practices that may evolve in the future.** The online information economy moves rapidly, requiring an equally nimble approach to enforcement.
- 3. Antitrust agencies should continue to utilize existing enforcement tools.** The existing enforcement powers of antitrust agencies provide the flexibility needed to evaluate anticompetitive conduct on a case-by-case basis and should not be set aside.

### Considerations

- 1. Antitrust solutions may be more effective when paired with new data protection laws.** The current advantage that platforms enjoy is predicated on their dominance of targeted advertising. If that aspect of the surveillance economy were nullified, the platforms' structural dominance over the ad market would decline.
- 2. Antitrust-based solutions have both benefits and drawbacks.** Codes of conduct and antitrust safe-harbors may work more rapidly, but they will not solve structural concerns related to big platforms' market power. Structural approaches are the only responses that tackle the problem at its source. However, by making the digital ad market more competitive, they could help lower the prices for ads, which would ultimately mean less revenue for news outlets.
- 3. Data-based interoperability solutions may introduce privacy concerns, as it would force platforms to disclose their data.** These would need to be carefully considered as part of the legislative process.
- 4. Antitrust solutions are most effective when combined with complementary interventions.** These include schemes to provide public funds to news organizations or impose transparency requirements on online platforms.

# Platform Transparency for News Sustainability

Alessia Zornetta  
Lin Wang

## Introduction

Digital platforms have revolutionized the information ecosystem. Google and Meta currently dominate the digital advertising industry and control access to digital content for many internet users.<sup>1</sup> The relationship between platforms and news publishers is characterized in three main ways. First, platforms collect and process data from their users, which serves as the foundation for the AdTech industry. News publishers' sale of ad inventory to advertisers is intermediated and administered by platforms through highly sophisticated algorithms. Second, platforms control the access and distribution of content through their recommendation and ranking algorithms. To increase their audience and attract further revenue, publishers need to tweak their content according to algorithmic trends upon platforms' guidance. Third, major digital platforms run funding programs (both voluntary and mandatory) for news publishers, thus directly contributing to their financial stability. Information asymmetry is a common denominator in all three aspects of the relationship between platforms and publishers. Platforms possess all the knowledge and power, while publishers are doomed to accept and work with whatever platforms are willing to disclose.

In addition to information asymmetry, platforms are also able to exercise an unparalleled degree of power over publishers by benefitting from network effects. Network effects occur when a platform's value grows exponentially for every user that joins the network. For intermediary platforms, the benefit their business clients derive depends on user participation and vice-versa.<sup>43</sup> Network effects result in the concentration of users in a handful of platforms. Consequently, publishers striving to reach as many users as possible must concentrate their investments on dominant platforms. The lock-in generated by network effects enables platforms such as Google and Meta to dominate the market and exclude rising competitors, leaving publishers virtually no alternative.<sup>2</sup> With a lack of competition, those big platforms are likely to abuse their power since their users have limited choices, and unlikely to disclose information that strengthens the publishers' relative bargaining position absent a legislative mandate to do so.

Transparency can be an essential tool to tackle information asymmetry and establish fair business transactions among the parties involved.<sup>3</sup> Providing news publishers with meaningful and reliable information about platforms' logic, algorithms, and internal decision-making should be a priority among policymakers aiming to curb platforms' market dominance. The following sections address the issue of opacity in digital platforms as related to three main aspects characterizing the relationship between platforms and news media: advertising, algorithmic, and funding transparency. This chapter aims at identifying suggestions on how to structure transparency requirements in an effective and meaningful way to promote the sustainability of journalism.

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<sup>1</sup> Taylor Owen & Emily Bell, *The Platform Press: How Silicon Valley Reengineered Journalism*, COLUMBIA JOURNALISM REV. (2017), [www.cjr.org/tow\\_center\\_reports/platform-press-how-silicon-valley-reengineered-journalism.php](http://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php) (last visited Jan 3, 2023).

<sup>2</sup> See generally, Manuel Wörsdörfer, *Big Tech and Antitrust: An Ordoliberal Analysis*, 35 PHILOS. TECHNOL. 65 (2022); Luigi Zingales, Fiona Scott Morton & Guy Rolnik, Stigler Committee on Digital Platforms, (2019).

<sup>3</sup> Mikkel Flyverbom, *Sunlight in Cyberspace? On Transparency as a Form of Ordering*, 18 EUROPEAN JOURNAL OF SOCIAL THEORY (2015), [www.journals.sagepub.com/doi/10.1177/1368431014555258](http://www.journals.sagepub.com/doi/10.1177/1368431014555258).

## I. Digital Advertizing

### A. Background

“AdTech” refers to the use of automated technologies to buy and place advertising space online. AdTech enables programmatic advertising and microtargeting by advertisers. Advertisers rely on data and algorithms to target specific audiences and automatically place ads on websites, apps, and other platforms.<sup>4</sup> The most common way to implement programmatic advertising is through real-time bidding (RTB). While the consumer loads a webpage, a real-time auction among advertisers takes place to allocate advertising space within milliseconds.<sup>5</sup>

The AdTech system has three main actors: publishers, advertisers, and intermediaries. Publishers, such as news media organizations, sell the space available on their web pages (ad inventory) to advertisers. Advertisers buy the ad inventory and target specific users at specific moments. Intermediaries, as the name suggests, manage the transaction, and assist publishers and advertisers in optimizing ad placement. Google and Meta are the leading Ad Exchange platforms; they provide and administer the digital marketplace where the buying and selling of advertising takes place.

The operations of AdTech systems is extremely complex and opaque, and differs among platforms. Overall, real-time bidding can be divided into three main parts: the pre-publishing phase, real-time bidding, and monetization.<sup>6</sup> First, during the pre-publishing phase, advertisers develop ad campaigns and submit this “ad creative data” to the ad exchange platform. In doing so, they specify the details of the targeted audience, the timeframe for running the campaign, the total budget, and the preferred monetization metrics.<sup>7</sup> The real-time bidding phase starts when a user clicks on a webpage. Within milliseconds, a real-time auction for the publisher's ad space takes place in the Ad Exchange platform.

Different advertisers compete for the same space because multiple ads might match the same user at the same time. Ultimately, the system's algorithm chooses the winning ad and displays the advertisement to the user. Advertisers and publishers do not communicate in this phase and “only have visibility over their contracted part of the supply chain.”<sup>8</sup> Finally, the monetization phase occurs once a digital ad has been displayed. Advertisers are charged according to the monetization metric (pay-per-click, pay-per-impression, or pay-per-action). The performance measurement takes place via the intermediaries themselves and third parties.<sup>9</sup> The advertising revenues will then be shared among the publishers and the intermediaries along the ad supply chain.

News media organizations are involved in the AdTech system in two main ways. First, news media organizations, as publishers, sell their ad inventory to potential advertisers and rely on it as a source of revenue. Second, news organizations purchase ad inventory on other publishers' websites to attract a larger audience.

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<sup>4</sup> COURTNEY C. RADSCH, *Making Big Tech Pay for the News They Use*, (July 7, 2022), [www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use](http://www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use).

<sup>5</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, DIGITAL ADVERTISING SERVICES INQUIRY – FINAL REPORT, (2021).

<sup>6</sup> *Id.*; ZINGALES ET AL., *supra* note 7; COMPETITION AND MARKETS AUTHORITY, ONLINE PLATFORMS AND DIGITAL ADVERTISING – MARKET STUDY FINAL REPORT, (2020), [assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final\\_report\\_Digital\\_ALT\\_TEXT.pdf](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf).

<sup>7</sup> Laura Edelson et al., *Universal Digital Ad Transparency*, TPRC49: The 49th Research Conference on Communication, Information and Internet Policy (Aug. 3, 2021), [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3898214](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3898214).

<sup>8</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10.

<sup>9</sup> COMPETITION AND MARKETS AUTHORITY, *supra* note 11.



The operation of the AdTech system is highly complex and multi-layered, which contributes to a lack of transparency. Publishers and advertisers who do not have access to the same technical tools and resources have to rely on the information provided by ad platforms such as Google and Meta without the possibility of verifying such information. Google and Meta benefit from this information asymmetry as it limits publishers and advertisers' choices among AdTech suppliers without forcing the platforms to compete based on the quality of the service. Additionally, ad platforms benefit from the opacity of the AdTech system when pricing their services.<sup>10</sup>

When news media publishers sell ad inventory, the lack of pricing and quality assessment data limits their decision-making power. Access to information about the sale process of their ad inventory, including bidding data, impression data, and targeting parameters, is fundamental to making informed decisions about what ad exchange service to use and verifying whether they are being provided with a fair transaction.<sup>11</sup> Incentivizing transparency is essential to reduce information asymmetry and empower publishers and advertisers to make informed decisions, assess service quality, and maximize revenues.<sup>12</sup> Given news media's dependence on advertising revenue, improving transparency across the AdTech sector is fundamental to promoting journalism's sustainability.<sup>13</sup>

Transparency across the AdTech sector should concern three key aspects: auctions, pricing, and performance.

### 1. Auctions

Meta and Google have been intensely criticized for the lack of information about how AdTech auctions run on their ad exchange platforms.<sup>14</sup> According to multiple competition commissions worldwide, Meta and Google dominate the AdTech market, and publishers dissatisfied with their services have no viable alternatives. It is possible to identify a link between the disadvantages suffered by news publishers and the opacity surrounding the ad exchange platforms. For instance, the Australian Competition Commission has found that Google's Unified Auction enables the company to self-preference and retain undisclosed fees.<sup>15</sup>

To be meaningful, transparency over AdTech auctions should include information about parties to the supply chain, enabling publishers to identify possible advertisers and create direct advertising agreements. Additionally, platforms should provide empirical data regarding traffic and monetization. Lastly, intermediaries should enable data traceability along the supply chain. This would allow publishers and advertisers to follow the money spent and received and to identify hidden fees.<sup>16</sup> Disclosing the necessary information to publishers over the overall auction process would grant publishers the ability to make evidence-based investments and editorial decisions, which could be based on the value obtained from different ad exchange platforms and the fees being retained by platforms.

<sup>10</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10.

<sup>11</sup> *Id.*; Gabby Miller, *Everything to Know about Canada's Online News Act Hearings*, COLUMBIA JOURNALISM REVIEW (2022), [www.cjr.org/tow\\_center/online-news-act-hearings.php](http://www.cjr.org/tow_center/online-news-act-hearings.php).

<sup>12</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10.

<sup>13</sup> Owen & Bell, *supra* note 6.

<sup>14</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10; COMPETITION AND MARKETS AUTHORITY, *supra* note 11.

<sup>15</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10; ZINGALES ET AL., *supra* note 7.

<sup>16</sup> RADSCH, *supra* note 9.

### 2. Pricing

There is a concomitant need to improve transparency around the pricing of AdTech services. There are two primary ways in which advertisers and publishers interact with ad platforms. Larger advertisers and publishers usually enter into closed agreements with specific ad tech providers. Smaller ones typically rely on standard form contracts such as those offered by Google Ads.<sup>17</sup> Regardless of publishers' size, platforms continue to hold the majority (if not the entirety) of the information and thus regulate pricing according to their needs. The lack of transparency over pricing across the supply chain limits publishers' decision-making about optimizing their ad inventory. It prevents them from comparing ad platforms and identifying the best cost per value.

Opacity also surrounds the fees of so-called "take-out rates" across the AdTech supply chain. Throughout the supply chain, advertisers and publishers are kept separated from one another, thus preventing publishers from knowing how much advertisers were charged and vice-versa.<sup>18</sup> The impact of such opacity on the news industry is remarkable. Publishers lack insight into the efficacy of their ad inventory and, overall, their return on investment.<sup>19</sup>

### 3. Performance

Lastly, platforms have hindered efforts to verify the performance of display advertising, further impacting publishers. Advertisers use performance assessment services to check whether their ad campaigns are performing as expected. To do so, third-party verification services must access raw data from the ad platforms. However, dominant platforms have continuously blocked access to third-party verification services, thus forcing verification parties to rely on performance information provided by the platforms themselves. Similarly to the issues for pricing, these disclosures cannot be independently verified, which worsens the information asymmetry among advertisers, publishers, and platforms. As a result, publishers are not able to structure their ad inventory in ways more appealing to advertisers, limiting their revenue-generation potential.

## B. Legislative Initiatives

To address platforms' dominance over the digital advertising industry regulators worldwide have devoted resources to identify possible regulatory or legislative interventions.

### 1. European Union

The European Union has been the standard-setting regulator across Western jurisdictions when it comes to tackling digital platforms' power. First, the General Data Protection regulation severely limited the data collection and processing that lay the foundation for the AdTech algorithms used by platforms. Although slow, the European Privacy authorities have gradually started to fine platforms' illegal data collection practices, which ultimately have the potential to curb platforms' dominance in the field.<sup>20</sup>

<sup>17</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10; COMPETITION AND MARKETS AUTHORITY, *supra* note 11.

<sup>18</sup> ISBA & PRICEWATERHOUSECOOPERS, ISBA PROGRAMMATIC SUPPLY CHAIN TRANSPARENCY STUDY, (2020), [www.isba.org.uk/system/files/media/documents/2020-12/executive-summary-programmatic-supply-chain-transparency-study.pdf](http://www.isba.org.uk/system/files/media/documents/2020-12/executive-summary-programmatic-supply-chain-transparency-study.pdf).

<sup>19</sup> AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 10; OWEN & BELL, *supra* note 6.

<sup>20</sup> See e.g., Adam Satariano, *Meta Fined \$414 Million After Ad Practices Ruled Illegal Under EU Law*, THE NEW YORK TIMES (Jan. 4, 2023), [www.nytimes.com/2023/01/04/technology/meta-facebook-eu-gdpr.html](http://www.nytimes.com/2023/01/04/technology/meta-facebook-eu-gdpr.html); *Advertising ID: Apple Distribution International Fined 8 Million Euros*, COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (Jan. 4, 2023), [www.cnil.fr/en/advertising-id-apple-distribution-international-fined-8-million-euros](http://www.cnil.fr/en/advertising-id-apple-distribution-international-fined-8-million-euros).

Moreover, the EU recently passed two groundbreaking regulations demanding more transparency and curbing anticompetitive practices by large digital platforms (so-called “gatekeepers”).<sup>21</sup> The Digital Services Act (DSA) is a regulation that forces dominant digital platforms to provide a wide range of disclosures to EU authorities and the general public. This includes a transparency framework for digital advertising. First, online platforms must disclose the parameters used for targeting purposes and the entity behind the advertisement.<sup>22</sup> Very large platforms (including Google and Meta) will have to develop a publicly available ad library containing detailed information about all ads displayed on the platform.<sup>23</sup> Although not explicitly addressed to news publishers, this disclosure can significantly impact how publishers can market their ad inventory.

Second, the DSA established that the European Commission would issue a code of conduct for online advertising addressed to both intermediaries and actors involved in the programmatic advertising value chain.<sup>24</sup> The Code should guarantee an effective transmission of information to create a competitive, transparent, and fair environment for online advertising.<sup>25</sup> Although promising, the provision lacks enforcement power. Indeed, codes of conduct are typically soft regulatory tools that parties choose whether to adopt.<sup>26</sup> On the other hand, the flexibility enabled by codes of practice has laid the ground for further action while avoiding legislative deadlocks.<sup>27</sup>

In addition to the DSA, the EU also enacted the Digital Markets Act (DMA). It contains a series of provisions incentivizing sustainable competition in the digital space by curbing the dominance of digital platforms and prohibiting anti competitive practices and unfair business transactions. Large platforms will be forced to disclose specific information to publishers and advertisers regarding pricing and fees, remuneration and deductions, as well as metrics used in the calculation of the former.<sup>28</sup>

## 2. United States of America

On the other side of the Atlantic, legislative proposals addressing digital advertising differ in content and strength. For instance, the US Social Media Disclosure and Transparency of Advertisements (DATA) Act would demand increased transparency over the criteria used to target specific ads and reinforce independent researcher access to platforms’ data.<sup>29</sup> Enabling independent researcher data is a first step towards diminishing the information asymmetry. However, the bill did not pass, and it is unclear if similar future legislation would adequately address problems with researcher access. Another relevant initiative is the US Honest Ads Act proposed in 2020, which aimed at improving transparency

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<sup>21</sup> Council Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277), [www.data.europa.eu/eli/reg/2022/2065/oj/eng](http://www.data.europa.eu/eli/reg/2022/2065/oj/eng) [hereinafter DSA]; Council Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265), [www.data.europa.eu/eli/reg/2022/1925/oj/eng](http://www.data.europa.eu/eli/reg/2022/1925/oj/eng) [hereinafter DMA].

<sup>22</sup> DSA, *supra* note 26, at art 26.

<sup>23</sup> DSA, *supra* note 26, at art 39.

<sup>24</sup> DSA, *supra* note 26, at art 46.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See e.g., EU Code of Practice on Disinformation, EUROPEAN COMMISSION (2018), [www.ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](http://www.ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454).

<sup>28</sup> DMA, *supra* note 26, at art 5 (9), (10).

<sup>29</sup> Social Media Disclosure and Transparency of Advertisements (DATA) Act, H.R. 3451, 117th Cong. (2021).

requirements for digital ads and regulates the purchase and sale of political advertisements. The Honest Ads Act would require online ad vendors to maintain a public database of all online political advertisements, thus increasing transparency over the target audience, timing, and payment of digital ads.<sup>30</sup> Both initiatives represent significant steps forward but neither offers a complete solution as they fail to tackle the issue of pricing and supply chain opacity.

## II. Algorithms

### A. Background

The relationship between publishers and digital platforms is heavily influenced by the algorithms through which online content is made visible to users. These algorithms play a fundamental role in the platforms’ business model, but it is equally important to news media. For a platform, the different algorithms it constructs allow it to stay on the cutting edge of tech competition and consumer trends. Algorithms are constantly re-adjusted to pursue the platform’s goals, and are fed by the data the platform collects.

On the other hand, algorithms function as boundaries that news media publishers must play within for their content to have exposure to consumers. Reflecting the underlying logic of monetization in the digital era, algorithms determine the traffic allocated to different information on a platform and are uniquely shaped to provide individualized content. As one of the most valuable technologies of digital media today, algorithms have the potential to bring a variety of benefits for news media. For instance, algorithms can make online dissemination more effective, matching relevant news content to targeted users. Greater audiences render ad inventory more attractive to advertisers and draw more advertising revenue.<sup>31</sup> However, the reality is that news media publishers struggle to exploit the full potential of platforms’ algorithms.<sup>32</sup>

Platform giants use algorithms and the data they produce to pursue their business goals.<sup>33</sup> Given the importance of algorithms for digital platforms, the complex algorithmic structure and the data derived

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<sup>30</sup> Tim Lau, *The Honest Ads Act Explained*, Brennan Center for Justice (Jan. 17, 2020), [www.brennancenter.org/our-work/research-reports/honest-ads-act-explained](http://www.brennancenter.org/our-work/research-reports/honest-ads-act-explained); Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of America’s Elections*, Brennan Center for Justice (Apr. 6, 2018), [www.brennancenter.org/our-work/policy-solutions/getting-foreign-funds-out-americas-elections](http://www.brennancenter.org/our-work/policy-solutions/getting-foreign-funds-out-americas-elections).

<sup>31</sup> Erick Elejalde et al., *Understanding News Outlets’ Audience-Targeting Patterns*, 8 EPJ Data Sci. 1 (2019).

<sup>32</sup> Owen & Bell, *supra* note 6.

<sup>33</sup> See generally Mark Fenwick et al., *The End of ‘Corporate’ Governance: Hello ‘Platform’ Governance*, 20 EUR BUS ORG LAW REV 171 (2019); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARVARD LAW REVIEW 1599 (2018); Tarleton Gillespie et al., *Expanding the debate about content moderation: scholarly research agendas for the coming policy debates*, 9 INTERNET POLICY REVIEW (2020), [www.policyreview.info/articles/analysis/expanding-debate-about-content-moderation-scholarly-research-agendas-coming-policy](http://www.policyreview.info/articles/analysis/expanding-debate-about-content-moderation-scholarly-research-agendas-coming-policy) (last visited Oct 14, 2022); Heidi Tworek, *A New Blueprint for Platform Governance*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (Feb. 24, 2020), [www.cigionline.org/articles/new-blueprint-platform-governance](http://www.cigionline.org/articles/new-blueprint-platform-governance).

from it are kept secret.<sup>34</sup> Sometimes, platforms share information about trends and planned algorithmic shifts with content-creating users, including news media organizations. However, when platforms do so, they rely on data collected, processed, and interpreted by platforms themselves, hindering any possibility of independent verification. Publishers are expected to blindly rely on their statements without means of accessing the data to check platforms' claims.

What results is not only an ineffective use of platforms by publishers, but also the weakening of the journalism industry itself.<sup>35</sup> This was especially clear when Facebook declared its "pivot to video" era. At the time, the company shared data with publishers supporting the claim that video-based content was receiving the most attention from users, thus leading advertisers to direct spending towards video. In response, publishers worldwide restructured internal staff, laid off writers and invested in video-making resources.<sup>36</sup> However, soon it became clear that Facebook had misrepresented the performance of video-based content to advertisers, which led to a counter-shift in advertisers' spending. Many news organizations suffered irreparable damage, including mass layoffs, closures, and plummeting revenues.<sup>37</sup>

Could this devastating blow have been avoided? Arguably, yes, if journalists had access to the underlying data on which Facebook was basing its claims. A critical advantage of pushing platforms to be more transparent is that it allows journalists to avoid unnecessary costs and misguided business decisions. When Facebook claimed, erroneously, that its algorithmic metrics showed that video content "was the future of Facebook and the future of media," publishers had no choice but to rely on Facebook's claim.<sup>38</sup> When platforms highlight new "trends" that impact journalism content, journalists should be able to interpret that same data and decide how to proceed for themselves accordingly.

By allowing journalists access to the data arising from the different algorithms that platforms use, instances of falsified or misleading statistics, problems like the Facebook "pivot to video" can be avoided. Not only would journalists be able to spot where platform claims are coming from, but they may also be able to spot other areas where their content may better perform within the algorithm. Additionally, independent third parties, such as researchers or other industry leaders, would be able to weigh in on the claims of content trends that platforms make, potentially identifying errors or miscalculations before publisher's restructure and the future of journalism is dimmed further.<sup>39</sup>

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<sup>34</sup> Gregory Gerard Greer, *Artificial Intelligence and Trade Secret Law*, 21 UIC REV. INTELL. PROP. L. [i] (2021); Mariateresa Maggiolino, *EU Trade Secrets Law and Algorithmic Transparency*, BOCCONI LEGAL STUDIES RESEARCH PAPER NO. 3363178 (Mar. 31, 2019), [www.papers.ssrn.com/abstract=3363178](http://www.papers.ssrn.com/abstract=3363178); NATHANIEL PERSILY & JOSHUA A. TUCKER, *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM* (2020); Paddy Leerssen, *The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems*, 11 EUROPEAN J. OF L. AND TECH. (Feb. 24, 2021), [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3544009](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3544009).

<sup>35</sup> Alfred Hermida & Mary Lynn Young, *Journalism Innovation in a Time of Survival*, in *NEWS MEDIA INNOVATION RECONSIDERED* 40 (Mar. 24, 2021), [www.onlinelibrary.wiley.com/doi/abs/10.1002/9781119706519.ch3](http://www.onlinelibrary.wiley.com/doi/abs/10.1002/9781119706519.ch3).

<sup>36</sup> Will Oremus, *The Big Lie Behind Pivoting to Video*, (Oct. 18, 2018), [www.slate.com/technology/2018/10/facebook-online-video-pivot-metrics-false.html](http://www.slate.com/technology/2018/10/facebook-online-video-pivot-metrics-false.html).

<sup>37</sup> Trevor Hook, *Pivot to What? The Metajournalistic Discourse Surrounding Facebook's "Push to Video"* (2020), [www.mospace.umssystem.edu/xmlui/handle/10355/79862](http://www.mospace.umssystem.edu/xmlui/handle/10355/79862); Courtney C. Radsch, *Frenemies: Global Approaches to Rebalance the Big Tech v Journalism Relationship*, BROOKINGS (Aug. 29, 2022), [www.brookings.edu/blog/techtank/2022/08/29/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship](http://www.brookings.edu/blog/techtank/2022/08/29/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship).

<sup>38</sup> Hook, *supra* note 42, at 7-8; Radsch, *supra* note 42.

<sup>39</sup> Caitlin Vogus, *Independent Researcher Access to Social Media Data: Comparing Legislative Proposals*, CTR. FOR DEMOCRACY AND TECH. (Apr. 21, 2022), [www.cdt.org/insights/independent-researcher-access-to-social-media-data-comparing-legislative-proposals](http://www.cdt.org/insights/independent-researcher-access-to-social-media-data-comparing-legislative-proposals).

Another important benefit of encouraging or mandating transparency around a platform's algorithmic data and use is its social component. In more detail, "[i]f companies have to reveal substantial information about their operations to regulators and the public, they are more likely to conform to public values and expectations."<sup>40</sup> As it stands, platforms' configuration of and data from their algorithms are not in the public domain. Thus, like the Facebook example, much of what we know about algorithm performance and outcomes stems from what platforms decide to disclose.

Encouraging more transparency would pressure platforms to align algorithms to the social values they praise, and allow them to be held accountable to these values.<sup>41</sup> After all, transparency concerns are not just about platforms failing to disclose algorithm information, but also the concern that platforms would release incorrect data deliberately or carelessly.<sup>42</sup> It can be argued that "[v]etted researchers and regulators should have access to enough information about the algorithms used in content moderation, prioritization, advertising, and recommendation, and enough data about how these algorithms affect platform content to allow an independent assessment."<sup>43</sup> This would help to analyze better how algorithms "have created risks of 'real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality.'"<sup>44</sup>

Lastly, demanding more transparency about decisions around algorithmic change from platforms is necessary to inform publishers' editorial decisions. A critical part of a successful business is knowing market demands in order to make a competitive and sought-after product. Publishers invest many resources for digital content to attract new users. For platforms, their business models continue to include journalism, but "[t]hese companies have evolved beyond their role as distribution channels, and now control what audiences see, who gets paid for their attention, and even what format and type of journalism flourishes."<sup>45</sup>

Platforms know the content users want and seek out, yet they withhold information that journalists need in return to make *their* product competitive and sustainable.<sup>46</sup> Potentially, journalists could exploit the platforms' data to reach larger audiences, thus attracting advertisers and increasing overall revenues. However, platforms tend to withhold the necessary information to facilitate such use by publishers.<sup>47</sup> When platforms change their prioritization criteria abruptly without disclosing it to publishers, the efforts made by the latter towards making appealing online content might be in vain. For instance, initially, Facebook had promised to prioritize news content in users' feeds and many publishers invested in digital content creation. However, after the Cambridge Analytica scandal, Facebook shifted towards prioritizing content from users' friends and family instead, giving publishers

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<sup>40</sup> Mark MacCarthy, *How Online Platform Transparency can Improve Content Moderation and Algorithmic Performance*, BROOKINGS (Feb. 17, 2021), [www.brookings.edu/blog/techtank/2021/02/17/how-online-platform-transparency-can-improve-content-moderation-and-algorithmic-performance/](http://www.brookings.edu/blog/techtank/2021/02/17/how-online-platform-transparency-can-improve-content-moderation-and-algorithmic-performance/).

<sup>41</sup> TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* (2018).

<sup>42</sup> See e.g., *The Facebook Files*, WALL STREET JOURNAL (Oct. 1, 2021), [www.wsj.com/articles/the-facebook-files-11631713039](http://www.wsj.com/articles/the-facebook-files-11631713039).

<sup>43</sup> Mark MacCarthy, *supra* note 45 (quoting the DSA).

<sup>44</sup> *Id.*

<sup>45</sup> Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, COLUMBIA JOURNALISM REV. (Mar. 29, 2017), [www.cjr.org/tow\\_center\\_reports/platform-press-how-silicon-valley-reengineered-journalism.php](http://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php).

<sup>46</sup> *Id.*

<sup>47</sup> Owen & Bell, *supra* note 6.

only a few days' notice.<sup>48</sup> These changes had a huge impact on publishers in terms of diminishing reach and referral traffic. Without adequate transparency requirements, publishers continue to be left with "little choice but to deal with the changes Facebook makes, given the dependent relationship news media companies have with the social network".<sup>49</sup>

The benefits of transparency align with supporting the sustainability of the journalism industry. Although news media publishers are unlikely to gain any control or substantive rights of platforms' algorithmic decisions, encouraging more transparency would allow publishers to analyze their own risks better, improve their content performance, and prepare for future algorithmic changes. With increased transparency, news organizations could strengthen their watchdog role to ensure platforms are playing fairly in their role as hosts of news media.

## B. Legislative Initiatives

Some legislators are already taking steps toward requiring more transparency for platforms using news media and content.

### 1. Australia

Australia's News Media and Digital Platforms Mandatory Bargaining Code requires "Facebook and Google to share algorithmic information with...news organizations."<sup>50</sup> The reasoning for this is "the massive financial and editorial impacts that major tweaks to platform algorithms or priorities can have on news organizations, including closures and layoffs." Requiring platforms to share algorithmic changes likely to significantly impact publishers' referral traffic or ranking are reflective of the need to reduce the information asymmetry among the two.<sup>51</sup>

### 2. Japan

The Japanese Fair Trade Commission has proposed a series of transparency solutions to support news publishers. First, it mandates platforms "to disclose sufficient information for publishers to prepare for algorithm changes [...] whenever possible (and) to establish an effective consultation system." Additionally, platforms must "disclose necessary information to publishers, such as in the process of calculating the amount paid to publishers."<sup>52</sup> The proposal stresses the need to rebalance the market powers of platforms and publishers by improving disclosure practices.

### 3. European Union

In the EU, the Digital Services Act requires platforms to clearly explain the functioning of algorithmic recommendation systems in their terms of service, both towards individual and business users.<sup>53</sup>

<sup>48</sup> Mike Isaac & Sydney Ember, *Facebook to Change News Feed to Focus on Friends and Family*, NEW YORK TIMES (June 29, 2016), [www.nytimes.com/2016/06/30/technology/facebook-to-change-news-feed-to-focus-on-friends-and-family.html](http://www.nytimes.com/2016/06/30/technology/facebook-to-change-news-feed-to-focus-on-friends-and-family.html).

<sup>49</sup> *Id.* See also Radsch, *supra* note 42.

<sup>50</sup> Courtney C. Radsch, *Making Big Tech Pay for the News They Use*, CTR. FOR INT'L MEDIA ASSISTANCE (July 7, 2022), [www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use/](http://www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use/).

<sup>51</sup> Anya Schiffrin, *Australia's News Media Bargaining Code Pries \$140 Million from Google and Facebook*, POYNTER (Aug. 16, 2022), [www.poynter.org/business-work/2022/australias-news-media-bargaining-code-pries-140-million-from-google-and-facebook/](http://www.poynter.org/business-work/2022/australias-news-media-bargaining-code-pries-140-million-from-google-and-facebook/).

<sup>52</sup> JAPAN FAIR TRADE COMMISSION, FINAL REPORT REGARDING DIGITAL ADVERTISING (Feb. 17, 2021), [www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html](http://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html).

<sup>53</sup> DSA, *supra* note 26, at art 27.

This means that publishers will be able to demand access to information about platforms' algorithms contractually and hold platforms accountable in case their information is misleading.

In Canada, discussions around upcoming platform laws also seem to target algorithmic transparency among its primary goals. Similarly, public consultations in the UK have been pushing for the introduction of regulatory requirements giving publishers "transparency over the algorithms that drive traffic and revenue; more control over the presentation and branding of their content as well as access to data."<sup>54</sup>

Unsurprisingly, platforms have pushed back against these initiatives.<sup>55</sup> Platforms continue to resist data sharing demands, allowing only a handful of licensed entities or government departments to obtain access to the algorithm source codes.<sup>56</sup> Moreover, platforms have routinely argued that implementing algorithmic transparency is costly, potentially hindering market entry by competitors.<sup>57</sup> Yet, some regulators have already identified solutions to counter platforms' arguments. For instance, in the EU, the DSA and the DMA impose obligations in a graduated approach. Only very large platforms – who control the digital market and enjoy more significant financial resources – have to comply with the most burdensome transparency requirements. Platforms such as Meta and Google certainly have the means to pursue more transparent algorithmic practices. Furthermore, leaked documents have already shown that platforms possess all the necessary information, making disclosure just a step away. Ultimately, algorithmic transparency will benefit not only publishers and journalists but consumers and users overall, promoting trust in the content being produced and displayed on the platform.

## III. Journalism Funding

The last aspect of the relationship between platforms and publishers that demands more transparency concerns platforms' funding of journalism. Platform giants such as Google and Meta have faced criticism in light of their impact on the information ecosystem. Faced with the threat of regulatory and legislative action, as well as public criticism, platforms have launched various initiatives to support journalism. In particular, both Google and Meta have provided monetary aid to news organizations through the Google News Initiative<sup>58</sup> and the Meta Journalism Project.<sup>59</sup>

<sup>54</sup> SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT AND THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, A NEW PRO-COMPETITION REGIME FOR DIGITAL MARKETS – GOVERNMENT RESPONSE TO CONSULTATION, (May 6, 2022), [www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation](http://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation).

<sup>55</sup> See, e.g., Gerrit De Vynck, *Google is Threatening to Pull its Search Engine out of Australia*, WASHINGTON POST, (Jan. 22, 2021), [www.washingtonpost.com/technology/2021/01/22/google-australia-publishers](http://www.washingtonpost.com/technology/2021/01/22/google-australia-publishers).

<sup>56</sup> For example, governmental access is required to ensure compliance under the German Network Enforcement Law. See *Netzdurchsetzungsgesetz*, NetzDG [Network Enforcement Act], BGBl. I S. 3352 (as amended June 3, 2021) § 4; see generally Vogus, *supra* note 44.

<sup>57</sup> *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the Senate Comm. on the Judiciary*, 116th Cong. (Nov. 17, 2020), [www.judiciary.senate.gov/meetings/breaking-the-news-censorship-suppression-and-the-2020-election](http://www.judiciary.senate.gov/meetings/breaking-the-news-censorship-suppression-and-the-2020-election); MacCarthy, *supra* note 45.

<sup>58</sup> About – Google News Initiative, GOOGLE, [www.newsinitiative.withgoogle.com/about](http://www.newsinitiative.withgoogle.com/about) (last visited Jan 6, 2023).

<sup>59</sup> Welcome to the Meta Journalism Project, META JOURNALISM PROJECT, [www.facebook.com/formedia/mjp](http://www.facebook.com/formedia/mjp) (last visited Jan 6, 2023).

Economic sustainability has been a critical concern across the journalism industry. Producing high-quality journalism is costly, time-consuming, and requires professional news media structures.<sup>60</sup> As highlighted above, the decline in advertising revenue continues to pressure the news media industry.<sup>61</sup> For small independent media, the situation has proven particularly challenging, leading to an unprecedented decline of local news and an expansion of news deserts.<sup>62</sup>

According to the companies' impact reports, funding initiatives have provided an unprecedented amount of financial support to news organizations worldwide, from small independent rural media to big journalism outlets. Support opportunities vary in form and kind, ranging from fellowships to training, direct financial support, and issue-specific opportunities (such as during the Coronavirus pandemic). Google claims that "[t]o date, the Google News Initiative has supported 7000+ news partners in more than 120 countries and territories through more than \$300 million in global funding".<sup>63</sup> Similarly, in 2018 Meta promised to invest "\$300 million over the next three years on news partnerships and programming."<sup>64</sup> Since then, a significant source of income for many journalists came from the payment or funding received from platforms in exchange for their work.<sup>65</sup> Yet dominant platforms have failed to offer considerable insight into their funding decisions. Funding allocation remains an inherently opaque process.<sup>66</sup>

One main issue with the lack of transparency over platforms' funding of journalism is the inability to verify companies' statements. This is especially damaging in a period where regulators around the world are considering legislation and other regulatory tools to curb platforms' market dominance and prevent the societal harms deriving from it.<sup>67</sup> Platforms have routinely opposed government intervention, offering self-regulation as a preferred alternative, and using initiatives such as those supporting journalism to support their positions. Nevertheless, regulators lack access to the necessary information to make evidence-based policies.<sup>68</sup>

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<sup>60</sup> See, e.g., Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, THE ATLANTIC (Oct. 2, 2013), [www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151/](http://www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151/).

<sup>61</sup> COMPETITION AND MARKETS AUTHORITY, *supra* note 11; Owen & Bell, *supra* note 6.

<sup>62</sup> DAVID ARDIA ET AL., CTR. FOR INNOVATION, TECH., AND PUB. LIFE, LOCAL NEWS, PLATFORMS, & MIS/DISINFORMATION, (Dec. 2020), [www.citap.unc.edu/local-news-platforms-mis-disinformation/](http://www.citap.unc.edu/local-news-platforms-mis-disinformation/); PENELOPE MUSE ABERNATHY, *News Deserts and Ghost Newspapers: Will Local News Survive?* (2020).

<sup>63</sup> 2021 Impact Report – Google News Initiative, GOOGLE, [www.newsinitiative.withgoogle.com/impact2021](http://www.newsinitiative.withgoogle.com/impact2021) (last visited Jan. 5, 2023).

<sup>64</sup> Christine Schmidt, *Facebook is Committing \$300 Million to Support News, with an Emphasis on Local*, NIEMAN LAB, (Jan. 15, 2019), [www.niemanlab.org/2019/01/facebook-is-committing-300-million-to-support-news-with-an-emphasis-on-local](http://www.niemanlab.org/2019/01/facebook-is-committing-300-million-to-support-news-with-an-emphasis-on-local).

<sup>65</sup> Charis Papaevangelou, *Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism*, (2022), [shs.hal.science/halshs-03748885](https://shs.hal.science/halshs-03748885).

<sup>66</sup> Owen & Bell, *supra* note 6.

<sup>67</sup> See, e.g., Bill C-18, *Act Respecting Online Communications Platforms that Make News Content Available to Persons in Canada*, 1st Session, 44th Parl., [www.parl.ca/legisinfo/en/bill/44-1/c-18](http://www.parl.ca/legisinfo/en/bill/44-1/c-18) (Can.); Journalism Competition and Preservation Act, S. 673, 117th Cong. (2022), [www.congress.gov/bill/117th-congress/senate-bill/673/text](http://www.congress.gov/bill/117th-congress/senate-bill/673/text); Júlio Lubianco, *Fake News Bill Gets Stuck in Brazilian Congress and It's Unlikely to be Voted on Before the Elections; Remuneration Proposal for Journalistic Organizations is a Sensitive Topic*, LATAM JOURNALISM REVIEW BY THE KNIGHT CENTER (Apr. 12, 2022), [www.latamjournalismreview.org/articles/fake-news-brazil-payment-journalism](http://www.latamjournalismreview.org/articles/fake-news-brazil-payment-journalism).

<sup>68</sup> Radsch, *supra* note 42.

This lack of transparency can spur media capture.<sup>69</sup> When the conditions for accessing and retaining funding are opaque, publishers have fewer resources to push back against platforms. Coupled with the economic dependence that many news outlets have on these revenue streams, the lack of transparency might deter journalistic efforts that put the funding at risk. Media capture occurs when journalists refrain from investigating and criticizing certain subjects or stakeholders due to pressure arising from the economic dependence on the same.<sup>70</sup> For instance, small independent news organizations have already admitted having refrained from engaging in journalistic work that would put platforms' reputations at risk for fear of losing platforms' support, which represents their only solution for economic survival.<sup>71</sup> In some instances, outlets have decided to avoid platform funding entirely, to safeguard their ability to report independently on these companies.<sup>72</sup>

Requiring platforms to share data or business policies on who and what they decide to fund for news journalism is important.<sup>73</sup> This approach benefits the sustainability of journalism in two key ways: First, it can help to reduce the asymmetry of information platforms have over press outlets, and second, it encourages and facilitates collective decision making among journalists doing business with platforms.<sup>74</sup>

### A. Legislative Initiatives

Currently, there are different proposed standards for platforms to share their selection or payment processes for news media. Some regulators have considered regulatory options to force platforms to be more transparent regarding their journalism funding to promote fair commercial agreements.

In Australia, the ongoing revision of the News Media and Digital Platforms Mandatory Bargaining Code stresses the latter need. The Code addresses the bargaining imbalance between Australian news businesses and the digital platforms they do business with by pressuring platforms to compensate the news media organizations.<sup>75</sup> However, a significant criticism during the first year of enforcement of the Code was that "the lack of transparency about commercial agreements undermine[d] the ability to assess whether the Code has achieved its policy objectives."<sup>76</sup>

Although the Code was aimed at ensuring platforms negotiated fair deals with publishers, civil society organizations have stressed that the measure benefited major outlets and left journalists most in

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<sup>69</sup> Papaevangelou, *supra* note 70; Felix M. Simon, *Uneasy Bedfellows: AI in the News, Platform Companies and the Issue of Journalistic Autonomy*, 10 DIGITAL JOURNALISM (May 18, 2022), [www.tandfonline.com/doi/full/10.1080/21670811.2022.2063150](http://www.tandfonline.com/doi/full/10.1080/21670811.2022.2063150).

<sup>70</sup> Anya Schiffrin, *Introduction to Special Issue on Media Capture*, 18 JOURNALISM (2017), [www.journals.sagepub.com/doi/full/10.1177/1464884917725167](http://www.journals.sagepub.com/doi/full/10.1177/1464884917725167); Simon, *supra* note 74.

<sup>71</sup> Papaevangelou, *supra* note 70.

<sup>72</sup> See, e.g., About Us – The Markup, THE MARKUP, [www.themarkup.org/about](http://www.themarkup.org/about) (last visited Jan 6, 2023).

<sup>73</sup> Brigitte Sebbah et al., *Journalism and Platforms: From Symbiosis to Dependency*, 9 SUR LE JOURNALISME, ABOUT JOURNALISM, SOBRE JORNALISMO (2020).

<sup>74</sup> Bill C-18, *supra* note 72; Radsch, *supra* note 42; TREASURY OF AUSTRALIA, NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE – THE CODE'S FIRST YEAR OF OPERATION, (Dec. 1, 2022), [www.treasury.gov.au/publication/p2022-343549](http://www.treasury.gov.au/publication/p2022-343549) (Austl.).

<sup>75</sup> *News Media Bargaining Code*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION, [www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code](http://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code) (last visited Nov. 18, 2022).

<sup>76</sup> TREASURY OF AUSTRALIA, *supra* note 79.

need aside.<sup>77</sup> Other countries have also been considering similar approaches. In the United Kingdom, the government has committed to developing a new pro-competition regime for digital markets. Its goal is to “promote competition in digital markets for the benefit of consumers,” focusing on trust and transparency.<sup>78</sup> Indonesia and South Africa have considered plans to pursue similar agendas.<sup>79</sup> Canada’s proposed Online News Bill also follows the Australian example and demands increased transparency over commercial agreements between platforms and publishers to promote fairness and competition.<sup>80</sup>

The Australian case exemplifies the importance of transparency as a tool to empower publishers and to support additional regulatory approaches such as the ones discussed in the previous chapters of this report. Because “there is no public accounting of who’s getting what, news organizations aren’t sure how much they should ask for or expect.”<sup>81</sup> Without establishing rules or standards regarding metrics used by platforms in deciding what to pay for news content, regulatory tools such as the Australian News Bargaining Code will fall short of their broader goals.

Overall, enhanced funding transparency strengthens publishers’ bargaining position.<sup>82</sup> Mandating more funding transparency enables journalists to compare, combine and coordinate their positions and thus stand in a less asymmetric position. By creating a system within platforms that does not shroud journalists in mystery over what their peers or competitors are being offered, journalists will likely turn to share and request more funding information from one another without fear that sharing that information will mean less business or income for themselves. Moreover, disclosing information about funding agreements and conditions might reduce the likelihood of media capture, thus safeguarding journalism’s fundamental oversight role.<sup>83</sup>

## IV. Defining Meaningful Transparency

Transparency relies on disclosure to keep recipients informed and to guide decisions. The benefits of increased transparency are numerous. Nevertheless, a question often arises as to whether transparency should be mandated by law or whether platforms should continue to pursue voluntary transparency initiatives. Transparency can only be impactful if adequately structured. For news media, this means that publishers need to be able not only to receive the information but also to understand, interpret, and independently verify it.<sup>84</sup>

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<sup>77</sup> Bill Grueskin, *Millions of Dollars for News, Shrouded in Mysterious Deals*, JUDITH NEILSON INSTITUTE (Mar. 10, 2022), [www.jnstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/](http://www.jnstitute.org/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals/); Chris Marchese, *Rupert Murdoch’s Australian Shake Down of American Tech*, NETCHOICE (Jan. 22, 2021), [www.netchoice.org/rupert-murdochs-australian-shake-down-of-american-tech](http://www.netchoice.org/rupert-murdochs-australian-shake-down-of-american-tech).

<sup>78</sup> SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT AND THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, *A NEW PRO-COMPETITION REGIME FOR DIGITAL MARKETS – GOVERNMENT RESPONSE TO CONSULTATION*, (May 6, 2022), [www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation](http://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation).

<sup>79</sup> Grueskin, *supra* note 82.

<sup>80</sup> Bill C-18, *supra* note 72.

<sup>81</sup> Grueskin, *supra* note 82.

<sup>82</sup> OECD, *Competition Issues Concerning News Media and Digital Platforms*, OECD Competition Committee Discussion Paper, 31 (2021).

<sup>83</sup> Owen & Bell, *supra* note 6.

<sup>84</sup> Leerssen, *supra* note 39.

## A. Mandatory or Voluntary Transparency

At present, the debate on how to structure transparency requirements is extremely heated, with some arguing in favor of voluntary transparency initiatives coupled with independent access and others demanding stringent mandatory reporting requirements. Transparency can have both positive and negative externalities, depending on the socio-political system in which it is introduced.

On the one hand, voluntary transparency systems, where platforms disclose information upon their own initiative and allow access to selected entities, have proven beneficial in contexts with weak democratic structures. Such voluntary transparency systems allow platforms to limit interference by authoritarian governments. In socio-political systems characterized by weak freedom of speech, privacy, and civil liberties, allowing platforms to control who has access to platform information might be beneficial. On the other hand, in democratic contexts, voluntary transparency practices have been seen as a weak tool for platform accountability, as critics argue that it is used by platforms to prevent regulatory intervention and maintain their current market dominance.<sup>85</sup> The EU Code of Practice on Disinformation is example of the tension between these two positions.<sup>86</sup> The first version of the Code in 2018 promised to improve transparency over platforms’ actions in the fight against disinformation.<sup>87</sup> Nevertheless, signatory platforms could opt to only comply with selected provisions. The first impact assessments of the Code showed that it had serious weaknesses in enforcement and impact. Overall, platforms’ transparency practices were not significantly affected by the Code.<sup>88</sup> Voluntary transparency allows companies to shape information, hinder potentially damaging data, and evade disclosure altogether. Especially for news media, voluntary transparency initiatives still present significant limitations towards incentivizing change in platforms’ policies and diminishing information asymmetries.<sup>89</sup> In a democratic socio-political context, mandatory transparency can have a meaningful impact if accompanied by sufficient safeguards, including as a supporting tool for other regulatory interventions.

## B. Third-Party Oversight

A common denominator among the three aspects of the relationship between publishers and platforms described above was the inability to verify platforms’ statements. For this reason, mandating access to platforms’ data by independent third parties is a fundamental step towards meaningful transparency. For publishers, transparency requirements should include access to AdTech data, algorithmic content moderation and recommendation data, and journalism funding data. First, accessing AdTech data – i.e., data about parameters set by advertisers during the pre-publishing phase, targeting, matching, and performance – would enable publishers to improve their own ad inventory offering and make data-

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<sup>85</sup> Christopher Parsons, *The (In)effectiveness of Voluntarily Produced Transparency Reports*, 58 BUSINESS & SOCIETY 103 (2019); JAMES PAMMENT, *THE EU CODE OF PRACTICE ON DISINFORMATION: BRIEFING NOTE FOR THE NEW EU COMMISSION (2020)*; Robert Gorwa & Timothy Garton Ash, *Democratic Transparency in the Platform Society*, SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM 286 (2020); KIKI SORENSEN, *What’s Wrong with Transparency Reporting (and How to Fix It)*, (Oct. 12, 2021), [www.adl.org/resources/report/whats-wrong-transparency-reporting-and-how-fix-it](http://www.adl.org/resources/report/whats-wrong-transparency-reporting-and-how-fix-it); Edelson et al., *supra* note 12.

<sup>86</sup> PETER H CHASE, *THE EU CODE OF PRACTICE ON DISINFORMATION: THE DIFFICULTY OF REGULATING A NEBULOUS PROBLEM* (Aug. 29, 2019), [www.ivir.nl/publicaties/download/EU\\_Code\\_Practice\\_Disinformation\\_Aug\\_2019.pdf](http://www.ivir.nl/publicaties/download/EU_Code_Practice_Disinformation_Aug_2019.pdf).

<sup>87</sup> EU Code of Practice on Disinformation, EUROPEAN COMMISSION (2018), [www.ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](http://www.ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454).

<sup>88</sup> The Facebook Files, *supra* note 47.

<sup>89</sup> Parsons, *supra* note 90.

driven investment decisions. Second, accessing content moderation and recommendation data would allow publishers to tweak their own content according to algorithmic trends and benefit from recommender systems to reach broader audiences. It would also enable publishers to verify companies' guidance before undertaking restructuring decisions. Third, accessing journalism funding data would empower publishers to cross-compare funding received, highlight funding disparities, and ultimately negotiate fair deals with platforms.

In addition to specific transparency requirements, third-party oversight is necessary to ensure the completeness and accuracy of companies' disclosures.<sup>90</sup> Such oversight could be entrusted to independent government agencies or industry representative bodies. For instance, in the European Union, the European Board for Digital Services will be tasked with coordinating companies' compliance with the requirements of the Digital Services Act.<sup>91</sup> In the United States, proposed legislation containing transparency requirements envision the Federal Trade Commission as the primary independent compliance watchdog.<sup>92</sup> Alternatively, platforms could be required to be subject to independent auditors.

## Conclusion

The growing dominance of digital platforms has significantly impacted news media. On the one hand, the ease of access to information enabled by digital platforms has the potential to increase the reach of news organizations to unprecedented levels. Conversely, the opacity characterizing publishers' interactions with platforms continues to negatively impact news media sustainability. This chapter highlighted three main areas of focus for transparency initiatives to strengthen support for journalism. First, greater transparency is needed in the AdTech system to enable publishers to make informed ad inventory decisions. Second, algorithmic disclosures present an opportunity to guide publishers' investments, both editorially and economically. Third, more detailed transparency over platforms' funding initiatives will empower news media to fight for fairer business transactions with platforms.

<sup>90</sup> MacCarthy, *supra* note 45.

<sup>91</sup> DSA, *supra* note 26, at art 61-62.

<sup>92</sup> See e.g., Platform Accountability and Transparency Act, 117th Cong. (2021), [www.coons.senate.gov/imo/media/doc/text\\_pata\\_117.pdf](http://www.coons.senate.gov/imo/media/doc/text_pata_117.pdf); Social Media Disclosure and Transparency of Advertisements (DATA) Act, H.R. 3451, 117th Cong. § 2(b) (2021).

# Copyright, Licensing and Collective Bargaining Approaches towards News Sustainability

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## Introduction

Over the past decade, news publishers around the world have witnessed a steep decline in revenue, as news consumption, and consequently advertising on news content, has shifted to digital platforms. Between 2002 and 2020, US newspaper publishers' revenue dropped by 52%, while periodical publishing took a hit of 40.5%.<sup>1</sup> At the same time, the platforms' digital advertising businesses have grown in leaps and bounds, with Google and Meta Platforms together receiving 50.5%<sup>2</sup> of the roughly \$261.1 billion total digital ad spending in the US in 2022.<sup>3</sup> This has raised serious concerns about the sustainability of news publishing, especially in view of the important role of the press as the fourth estate of democracy – providing information to the masses and ensuring accountability of those in power.

A number of early policy initiatives aimed at addressing the sustainability of news publishing have focused on enhancing publishers' ability to monetize their copyrighted news content by enhancing or augmenting their rights around it. Such approaches seek to enhance publishers' ability to negotiate better revenue sharing deals with digital platforms, on whom they increasingly depend to reach consumers. Another closely related approach focuses on regulating the negotiation process itself to correct for publishers' weaker bargaining position. This paper looks at 1) such copyright-related approaches, including the grant of new rights to encourage licensing of news content, and 2) collective bargaining proposals that seek to rectify the disparity in bargaining power between news publishers and digital platforms in licensing negotiations. In the first section of the paper, we examine copyright and licensing based solutions, looking at the contrasting approaches taken by the EU and the US in introducing new rights for news publishers. In the second section, we examine the system of music licensing by online streaming platforms, seeking insights from another area where copyright exploitation has increasingly moved to an online model. Finally, we look at collective bargaining proposals that have been adopted in Australia and proposed in Canada and the United States.

## I. Copyright and Licensing

One of the initial questions policymakers must answer is whether the extant bucket of rights under copyright is adequate, or if it requires expansion in order for news publishers to be able to enter into

<sup>1</sup> Adam Grundy, *Internet Crushes Traditional Media: From Print to Digital*, US Census Bureau Website (June 7, 2022), [www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html](http://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html).

<sup>2</sup> Max Willens, *Meta and Google's Hold on Digital Advertising Loosens as TikTok and Others Gain Share*, Insider Intelligence (June 27, 2022), [www.insiderintelligence.com/content/meta-google-s-hold-on-digital-advertising-loosens-tiktok-others-gain-share](http://www.insiderintelligence.com/content/meta-google-s-hold-on-digital-advertising-loosens-tiktok-others-gain-share).

<sup>3</sup> *Digital Advertising – United States*, STATISTA, [www.statista.com/outlook/dmo/digital-advertising/united-states#:~:text=Digital%20Advertising%20%2D%20United%20States&text=In%20global%20comparison%2C%20most%20ad,to%20US%24379.10%20in%202022](http://www.statista.com/outlook/dmo/digital-advertising/united-states#:~:text=Digital%20Advertising%20%2D%20United%20States&text=In%20global%20comparison%2C%20most%20ad,to%20US%24379.10%20in%202022) (last visited Nov. 16, 2022).

fair licensing deals with digital platforms. This section studies the responses of the European Union (EU) and the United States, as jurisdictions that answered this question affirmatively and negatively, respectively.

### A. Ancillary Rights – The European Approach

EU member states have been some of the earliest to attempt to address news sustainability in digital markets through new rights within copyright. In 2013, Germany amended its copyright law to provide new ancillary rights (Leistungsschutzrecht) for news publishers, requiring online search engines and news aggregators to pay a licensing fee for use of news publishers' content, including snippets of news, with an exception for "individual words or very short excerpts." Although news associations welcomed the amendment,<sup>4</sup> sections of the German public were worried about the detrimental impact this could have on the freedom of online discourse.<sup>5</sup> A number of trade and industry associations issued a joint statement, stating the move would "reduce incentives to develop self-sustaining business models."<sup>6</sup>

In response, Google, the primary target of the amendment (which was popularly referred to as the "Google Tax"), changed its Google News product to an "opt-in" model, de-indexing all German news publishers by default and requiring them to affirmatively ask to be included.<sup>7</sup> As a result, only publishers who were willing to waive these new licensing fees could reach audiences through Google News, blunting the intended impact of the law. The following year, Spain passed a similar law, and drawing from Germany's experience, included a provision barring news publishers from waiving their right to license fees. However, this backfired very quickly, with Google delisting Spanish outlets and completely withdrawing Google News from Spain. In a blogpost announcing the decision, Google argued that it made no money from its Google News product, which instead benefitted news publishers by bringing them traffic and increasing their reach, and as such, Google should not have to pay them to display their content.<sup>8</sup>

Despite these suboptimal national experiences with ancillary rights, the European Commission moved forward with proposals for introduction at the EU level, based on the premise that such rulemaking could increase the effectiveness of the ancillary right, as well as provide greater legal clarity.<sup>9</sup> Ultimately, the EU embedded the ancillary right for news publishers in European law through the 2019 Directive on Copyright and Related Rights in the Digital Single Market. Article 15 of the Directive

<sup>4</sup> *Europe's Publishers Welcome New German Law to Force Content Aggregators and Search Engines to Recognise Copyright*, PRESSWIRE (May 1, 2013), [www.presswire.com/content/903/europes-publishers-welcome-new-german-law-force-content-aggregators-and-search-engines](http://www.presswire.com/content/903/europes-publishers-welcome-new-german-law-force-content-aggregators-and-search-engines).

<sup>5</sup> Till Kreuzer, *German Copyright Policy 2011: Introduction of a New Neighbouring Right for Press Publishers?*, INITIATIVE GEGEN EIN LEISTUNGSSCHUTZRECHT (Apr. 5, 2011), [www.leistungsschutzrecht.info/stimmen-zum-lsr/fachpublikation/german-copyright-policy-2011-introduction-of-a-new-neighbouring-right-for-press-publishers](http://www.leistungsschutzrecht.info/stimmen-zum-lsr/fachpublikation/german-copyright-policy-2011-introduction-of-a-new-neighbouring-right-for-press-publishers).

<sup>6</sup> *Gemeinsame Erklärung Zum Vorhaben Eines „Leistungsschutzrechts Für Presseverleger“*, INITIATIVE GEGEN EIN LEISTUNGSSCHUTZRECHT (Nov. 17, 2010), [www.leistungsschutzrecht.info/stimmen-zum-lsr/stellungnahme/gemeinsame-erklarung-zum-vorhaben-eines-leistungsschutzrechts-fuer-presseverleger](http://www.leistungsschutzrecht.info/stimmen-zum-lsr/stellungnahme/gemeinsame-erklarung-zum-vorhaben-eines-leistungsschutzrechts-fuer-presseverleger).

<sup>7</sup> Frederic Lardinois, *Google Makes Google News in Germany Opt-In Only to Avoid Paying Fees Under New Copyright Rules*, TECHCRUNCH (June 1, 2013), [www.techcrunch.com/2013/06/21/google-makes-google-news-in-germany-opt-in-only-to-avoid-paying-fees-under-new-copyright-law](http://www.techcrunch.com/2013/06/21/google-makes-google-news-in-germany-opt-in-only-to-avoid-paying-fees-under-new-copyright-law).

<sup>8</sup> Richard Gingras (Head, Google News), *An Update on Google News in Spain*, GOOGLE EUROPE BLOG (Dec. 11, 2014), [www.europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html](http://www.europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html).

<sup>9</sup> European Commission SWD (2016) 301 final, Vol. 1, 159-160 (Sept. 16, 2016), [www.eumonitor.eu/9353000/1/j4nvg5kjg27kof\\_j9vvik7m1c3gyxp/vk7k8gzqvpwy/f=/12254\\_16\\_add\\_1.pdf](http://www.eumonitor.eu/9353000/1/j4nvg5kjg27kof_j9vvik7m1c3gyxp/vk7k8gzqvpwy/f=/12254_16_add_1.pdf).

grants "publishers of press publications" in member states two year exclusive rights to (a) authorize reproduction of their press publications, and (b) authorize making available to the public these press publications, for online use by "information society service providers."<sup>10</sup> These are the same rights granted (for longer terms) by the EU to authors, performers, phonograph producers, film producers and broadcasters with respect to their creations.<sup>11</sup> Article 15 goes on to exempt non-commercial use of press publications by individual users, hyperlinking, and the use of "individual words or very short extracts of text" from press publications.<sup>12</sup>

Article 17 of the Directive also imposes an obligation on online content sharing service providers (a definition that encompasses social media platforms and user generated content platforms) to obtain authorization from rights holders in order to make news content available to the public.<sup>13</sup> They are required to take best efforts to ensure the unavailability of unauthorized content on their services, and must follow a notice and takedown regime for removal of infringing content uploaded by users.<sup>14</sup> If they fail to observe these obligations, service providers risk being held liable for user-uploaded content.<sup>15</sup>

The passage of the Directive has remained controversial, with some European scholars of intellectual property rejecting an ancillary rights approach.<sup>16</sup> While ancillary rights in other areas of copyright, such as music and literary publication, have been premised on the investment required to create sound recordings or publish literature, the definition of press publications within the Directive has been criticized as being overbroad, with no underlying *de minimis* threshold for investment.<sup>17</sup> Moreover, the scope and extent of ancillary rights remains unclear due to the vague language of the Directive. For instance, the scope of exemptions remains cloudy, with no additional guidance on how to interpret "very short extracts," leaving this for member states to decide in their respective national transpositions of the Directive. While some margin of appreciation can be necessary in Directives that are meant to apply across the EU's 27 member states, in dealing with potential restrictions on speech uncertainty is generally understood to be problematic. Differing interpretations could lead to wide disparities in how the Directive is enforced in different member states, with an overly strict interpretation leading to overbroad gatekeeping of facts and news, to the detriment of online discourse. Further, variance in interpretation across member states leads to fragmentation of the EU copyright system, going squarely against the Union's stated aim of harmonizing European copyright law.

Meanwhile, Article 17 has come under fire from member states and activists alike, criticized as interfering with online freedom of speech by encouraging automated filtering of content, and incentivizing user

<sup>10</sup> 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) [www.eur-lex.europa.eu/eli/dir/2019/790/oj](http://www.eur-lex.europa.eu/eli/dir/2019/790/oj).

<sup>11</sup> 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, 2001 O.J. (L 167), [www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029).

<sup>12</sup> 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) [www.eur-lex.europa.eu/eli/dir/2019/790/oj](http://www.eur-lex.europa.eu/eli/dir/2019/790/oj).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> P. Bernt Hugenholtz, *Neighbouring Rights Are Obsolete*, 50 IIC – INT'L REV. INTELL. PROP. & COMPETITION L. 1006 (2019), [www.doi.org/10.1007/s40319-019-00864-3](http://www.doi.org/10.1007/s40319-019-00864-3).

<sup>17</sup> *Id.*



generated content platforms to be overzealous in removing content in order to avoid liability. Poland even sought to annul Article 17, arguing that it infringes freedom of expression and information.<sup>18</sup> The Court of Justice of the European Union (CJEU) rejected the challenge, finding that Article 17 contained adequate safeguards to balance freedom of expression and information on one hand and intellectual property rights on the other.<sup>19</sup> The Advocate General of the EU issued an opinion warning platforms that blocking of lawful speech is not permitted, and content hosting services should not be put in a position to judge online legality of complex copyright issues.<sup>20</sup> Despite these clarifications, digital rights groups remain concerned that in practice, Article 17 will lead to more upload filters and other technological means of avoiding liability that are not advanced enough to make nuanced distinctions between infringing and lawful content.<sup>21</sup>

As the first member state to transpose the Directive into national law, France offers instructive insights into the law in practice. Following transposition, Google decided to unilaterally withdraw snippets from Google News in France, instead displaying only headlines and URLs. The French antitrust authority found this to be unfair conduct, and potentially an abuse of market power, and issued an order in April 2020 giving Google three months to negotiate licenses with French publishers “in good faith.”<sup>22</sup> In July 2021, the authority found Google in violation of this obligation to negotiate “in good faith,” following complaints from publishers about Google’s unfair negotiation tactics, such as focusing on its News Showcase product, attempting to exclude revenues from advertising on search results, and failing to share data related to Google’s revenues in France.<sup>23</sup> The authority imposed a 500 million Euro fine and ordered Google back to the negotiating table.<sup>24</sup> Google appealed the fine, seeking to settle with the authority by offering legally binding commitments to negotiate with publishers. Ultimately, these commitments were accepted by the French antitrust authority in June 2021, and Google withdrew its appeal against the fine.<sup>25</sup>

France’s experience with the Directive suggests that merely granting new rights to news publishers may prove ineffective without additional interventions that go beyond copyright – in this case strict antitrust enforcement. This requires governments and their agencies to be intentional (and often aggressive) about licensing negotiations, stepping in to address news publishers’ lack of bargaining power relative to powerful platforms, and compelling platforms to negotiate in good faith. However,

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<sup>18</sup> Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:297, Action brought on 24 May 2019, [www.eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AC%3A2019%3A270%3ATOC&uri=uriserv%3AOJC\\_.2019.270.01.0021.01.ENG](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AC%3A2019%3A270%3ATOC&uri=uriserv%3AOJC_.2019.270.01.0021.01.ENG).

<sup>19</sup> Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:297 (April 26, 2022), [www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0401](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0401).

<sup>20</sup> Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:297, Opinion of the Advocate General delivered on 15 July 2021, [www.curia.europa.eu/juris/document/document.jsf?docid=244201&doclang=en](http://www.curia.europa.eu/juris/document/document.jsf?docid=244201&doclang=en).

<sup>21</sup> Christoph Schmon, *Article 17 Copyright Directive: The Court of Justice’s Advocate General Rejects Fundamental Rights Challenge but Defends Users Against Overblocking*, ELECTRONIC FRONTIER FOUNDATION (July 15, 2021), [www.eff.org/deeplinks/2021/07/article-17-copyright-directive-court-justices-advocate-general-rejects-fundamental](http://www.eff.org/deeplinks/2021/07/article-17-copyright-directive-court-justices-advocate-general-rejects-fundamental).

<sup>22</sup> Natasha Lomas, *France’s Competition Watchdog Orders Google to Pay for News Reuse*, TECHCRUNCH (Apr. 9, 2020), [www.techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/](http://www.techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/).

<sup>23</sup> *France Fines Google 500 Mln Euros over Copyright Row*, REUTERS (July 13, 2021), [www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13/](http://www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13/).

<sup>24</sup> *Id.*

<sup>25</sup> Giorgio Liali & Mark Scott, *France Accepts Google’s Truce with Publishers*, POLITICO (June 21, 2022), [www.politico.eu/article/french-competition-authority-greenlights-google-pledges-over-paying-news-publishers](http://www.politico.eu/article/french-competition-authority-greenlights-google-pledges-over-paying-news-publishers).

it remains uncertain whether all member states share the political will of the French government to supervise and direct negotiations. It is worth noting that despite the deadline for national transposition being 7 June 2021, 13 out of 27 countries had not fully transposed the Directive into national law as of 19 May 2022.<sup>26</sup> Thus, the effectiveness of additional ancillary rights remains dubious, without additional measures in areas such as antitrust and guidance for licensing processes to supplement them.

In sum, the European approach to ancillary rights offers two important lessons:

1. Merely granting new rights to news publishers may prove ineffective without additional interventions that go beyond copyright.
2. Interventions that encourage content filtering – such as removal of intermediary liability for copyright infringement – inevitably raise serious freedom of expression concerns.

## B. Look Elsewhere – The U.S. Approach

In June 2022, prompted by the upheaval in European copyright law described above, the U.S. Copyright Office published a study assessing the desirability of adding new protections under copyright law for American news publishers. In the course of this study, the Copyright Office looked at the ancillary rights approach endorsed by the EU and competition law approaches adopted by Australia and France, and proposed in America through the Journalism Competition and Preservation Act (JCPA). It also looked at other proposals received through public comment, including a tax on digital advertising revenue to support journalism, and assistance for local newspapers to reorganize as nonprofits. While acknowledging the crisis of sustainability faced by the news publishing industry, the study concluded that additional copyright protections were neither desirable nor likely to be effective in solving the problem.<sup>27</sup>

In arriving at this conclusion, the Copyright Office pointed out that press publishers in America already enjoy significant copyright protections.<sup>28</sup> It also noted that even when a platform uses some of a news publisher’s content, such use may be protected in some cases by exceptions to copyright protection, such as the fair use doctrine and the merger doctrine, restricting publishers’ ability to rely on copyright to prevent third party use.<sup>29</sup> Ancillary rights were also found to potentially be at odds with the wide scope of freedom of expression under the First Amendment to the U.S. Constitution – while traditional exceptions to copyright protection have been found to be “built-in First Amendment accommodations” in copyright law,<sup>30</sup> attempting to modify these protections would likely result in a First Amendment challenge.<sup>31</sup>

Finally, reflecting on Europe’s experience with ancillary rights, the Copyright Office found that the effectiveness of additional copyright protection is contingent on the competitive landscape, noting

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<sup>26</sup> *Copyright: Commission Urges Member States to Fully Transpose EU Copyright Rules Into National Law*, EUROPEAN COMMISSION (May 19, 2022), [www.ec.europa.eu/commission/presscorner/detail/EN/IP\\_22\\_2692](http://www.ec.europa.eu/commission/presscorner/detail/EN/IP_22_2692).

<sup>27</sup> *Copyright Protections for Press Publishers*, U.S. COPYRIGHT OFFICE (June 2022), [www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf](http://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf).

<sup>28</sup> Press publishers generally hold copyright protection for the whole of their print issues or websites as a collective work, as well as for individual articles through something called the work-made-for-hire doctrine. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003); *Golan v. Holder*, 565 U.S. 302, 329 (2012).

<sup>31</sup> *Copyright Protections for Press Publishers*, U.S. Copyright Office (June 2022), [www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf](http://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf).

that even with such additional protections, publishers could struggle to make platforms pay due to a lack of equal bargaining power.<sup>32</sup> It noted, in the context of France, that ancillary rights required supplemental competition interventions in order to truly be effective, and ultimately recommended against any similar expansion of copyright protection for news publishers in U.S. copyright law. Thus, while the European Union works to create a cohesive pan-European licensing system based on ancillary rights, such proposals are unlikely to be replicated in the United States. Instead, policymakers have chosen to go for a more targeted approach through the Journalism Competition and Preservation Act (JCPA), which the Senate Judiciary Committee approved in September 2022, and which is discussed in further detail in the section on collective bargaining.

It is becoming increasingly clear that focusing on enhancing news publishers' copyright protections does not by itself enable them to obtain better deals from digital platforms. Digital platforms remain extremely powerful, enabling them to pursue tactics of attrition in negotiations, like withdrawing or modifying their news products to circumvent the intended outcome of the law. In the absence of additional measures, such as those in France, news publishers may be given take-it-or-leave-it deals, with the underlying threat of diminished reach and viewership as a consequence of not having their content on platforms. By themselves ancillary rights may not be successful in compelling platforms to come to the negotiating table, and they cannot guarantee a fair deal will be struck. Greater focus is needed on the nature of the negotiations themselves, to ensure they are carried out in a fair manner, free from the undue influence that platforms may enjoy by virtue of their deep pockets and scale – millions of users that publishers may depend on them to reach.

The implementation of any licensing scheme which accumulates royalties for the copyright holder requires a means to track use of the owner's copyrighted work and a collection body to collect and distribute royalties corresponding to those uses. The next section examines the mechanisms and institutions the music industry uses to regulate the licensing of copyrights in musical works for online uses, primarily by digital streaming platforms that dominate the space. The music industry has been operating under a complex licensing scheme for many years and is an instructive case study as many of the criticisms raised against the music industry mirror concerns with copyright expansions and enforcement for news. Looking at a parallel scheme such as music licensing can help predict how well a news licensing scheme may work in practice.

## II. Licensing and Copyright Enforcement in the Music Industry

Like news, music has had to adapt to significant changes due to the digitization and subsequent platformization of its products. Illegal online music sharing catalyzed a market shift away from sales, and the music industry's profits decreased by half.<sup>33</sup> The emergence of streaming platforms both saved the music industry from this profit loss and radically changed the business models of music and its related players.<sup>34</sup>

<sup>32</sup> *Id.*

<sup>33</sup> Jem Aswad, *Copyright Royalty Board Confirms Streaming Royalty Raise for Publishers and Songwriters*, VARIETY, (July 1, 2022, 2:01 PM), [www.variety.com/2022/digital/news/copyright-royalty-board-streaming-royalty-publishers-songwriters-1235308088/](http://www.variety.com/2022/digital/news/copyright-royalty-board-streaming-royalty-publishers-songwriters-1235308088/).

<sup>34</sup> *Id.*

Every song has two copyrights attached to it.<sup>35</sup> One copyright is for the composition, meaning the lyrics and musical notes that make up the song.<sup>36</sup> The second copyright the sound recording, or the actual recording of the song.<sup>37</sup> There are also two corresponding forms of music royalties, mechanical royalties and public performance royalties, and different types of music consumption may invoke one or both royalties, depending on its classification.<sup>38</sup> The classification of whether a type of consumption of music is a mechanical reproduction or a public performance is a matter of statute.

### A. Modern Licensing and Royalty Collection Legislation in the Music Industry

To address many of the changes in the industry, a major piece of music legislation was passed in 2018 in the United States: the Modernization of Music Act (MMA). Among the several changes made by the MMA was the statutory codification of a stream as part mechanical reproduction and part public performance.<sup>39</sup>

The MMA established the Mechanical Licensing Collective (MLC), to collect mechanical royalties for streaming.<sup>40</sup> It also established the Digital Licensee Coordinator ("DLC") to oversee licensing activities.<sup>41</sup> The DLC is tasked with being the "middleman" between the streaming services and the MLC, garnering feedback and collecting mandated financial contributions to the MLC.<sup>42</sup> The MLC also created and maintains a publicly accessible works database and provides a means for creators to register and update their information in the database.<sup>43</sup>

One of the problems the MMA sought to address was unmatched royalties. The audiofile of a song can be embedded with metadata containing the copyright ownership of the song. However, the information is frequently outdated, incorrect or incomplete.<sup>44</sup> Before the MMA, the digital service providers ("DSPs") were charged with handling the mechanical royalties from streaming.<sup>45</sup> Because of the aforementioned insufficient ownership metadata, a "blackbox" of unmatched royalties accumulated, leaving many owners unpaid for the use of their songs.<sup>46</sup> To add to the problem, the DSPs began to make songs available on their platforms for streaming before obtaining the required licenses.<sup>47</sup>

<sup>35</sup> *Music Royalties 101 – Intro to Music Royalties*, ROYALTY EXCHANGE, (Feb. 10, 2021), [www.royaltyexchange.com/blog/music-royalties-101-intro-to-royalties](http://www.royaltyexchange.com/blog/music-royalties-101-intro-to-royalties).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> William B. Colitre, *Take the Tempo Up Challenges Posed by How to Structure Royalties for on-Demand Streaming and Issues Related to Public Performance Rights Played an Important Role in the Music Modernization Act's Evolution*, L.A. LAW. (May 2019), at 32, 34-35

<sup>40</sup> *The Mechanical Licensing Collective – Background*, THE MECHANICAL LICENSING COLLECTIVE, [www.f.hubspotusercontent40.net/hubfs/8718396/files/2021-02/The%20Mechanical%20Licensing%20Background.pdf](http://www.f.hubspotusercontent40.net/hubfs/8718396/files/2021-02/The%20Mechanical%20Licensing%20Background.pdf) (last visited Feb. 19, 2023).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Mary LaFrance, *Music Modernization and the Labyrinth of Streaming* (2018) 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310, 318-19.

<sup>45</sup> *Id.*

<sup>46</sup> Aswad, *supra* note 130.

<sup>47</sup> Colitre, *supra* note 136.

A new licensing system of the scale of the MLC requires significant financial support; the MLC submitted an estimate that it would cost \$37.25 million to build its infrastructure and \$29 million to operate during its first year.<sup>48</sup> The DSPs liabilities from the use of unlicensed works were waived in exchange for the DSPs covering the costs of building and operating the MLC.<sup>49</sup> In February 2021, the DSPs turned over \$424 million in unclaimed royalties to the MLC. The MLC will attempt to match the royalties to rightsholders.<sup>50</sup> If it is unsuccessful after two years, it may distribute the royalties to publishers based on market share.<sup>51</sup> Instead of individual licenses, the mechanical licenses are granted through a blanket license.<sup>52</sup> “The DSPs send sound recording usage data, and accompanying mechanical royalties, to The MLC on a monthly basis. The MLC then matches the usage data to the musical works data in The MLC database. Once the data is matched, The MLC pays out the mechanical royalties[.]”<sup>53</sup>

The MMA solution to music licensing’s problems shows that if licensing is to be employed effectively in the context of news, a disinterested collection agency and a central database containing ownership information like that created by the MMA are crucial. The more decentralized and difficult the licensing scheme is, resistance rather than compliance becomes more likely, as seen with the original structure of mechanical licensing.<sup>54</sup>

Because of the need to create new infrastructures, licensing policy solutions are likely to cost more and take more time to get up and running than other measures such as collective bargaining. Between songwriters, producers, artists, record labels, publishers and performance rights organizations, there is potentially a multitude of individuals invested in a single song. News copyright ownership may still have multiple stakeholders involved, between authors, editors and the outlets themselves. However, news would still likely have fewer stakeholders, and thus there is an opportunity for the licensing system to be significantly less complicated and less costly than for music.

## B. Detecting and Enforcing Infringement

News has the potential to bring its own complexities to a licensing scheme, though. One example is in the platform’s ability to detect infringement of text content. Article 17(4)(b) of the EU Copyright Directive discusses how a platform can establish it has made “best efforts” to ensure the availability

<sup>48</sup> Murray Stassen, *Mechanical Licensing Collective Proposes Start-Up Assessment of \$37.25M Ahead of 2021 Launch*, MUSICBUSINESS WORLDWIDE (Sept. 18, 2019), [www.musicbusinessworldwide.com/mechanical-licensing-collective-proposes-start-up-assessment-of-37-25m-ahead-of-2021-launch](http://www.musicbusinessworldwide.com/mechanical-licensing-collective-proposes-start-up-assessment-of-37-25m-ahead-of-2021-launch).

<sup>49</sup> 85 Fed. Reg. 33735 (June 2, 2020), [www.govinfo.gov/content/pkg/FR-2020-06-02/pdf/2020-11893.pdf](http://www.govinfo.gov/content/pkg/FR-2020-06-02/pdf/2020-11893.pdf); see also William B. Colitre, *The Architecture of Compromise: Constructing the Music Modernization Act*, 1 BUS. L. NEWS 2019 (2019), [www.calawyers.org/publications/business-law/business-law-news-2019-issue-1-the-architecture-of-compromise-constructing-the-music-modernization-act](http://www.calawyers.org/publications/business-law/business-law-news-2019-issue-1-the-architecture-of-compromise-constructing-the-music-modernization-act).

<sup>50</sup> Ed Christman *The Black Box Battle Begins*. The Market

<sup>51</sup> *Id.*

<sup>52</sup> Chris Eggertsen, *The MLC Receives Over \$424 in Unmatched ‘Black Box’ Streaming Royalties*, BILLBOARD, (Feb. 16, 2021), [www.billboard.com/pro/mechanical-licensing-collective-receives-over-424-million-unmatched-royalties-streaming-services/](http://www.billboard.com/pro/mechanical-licensing-collective-receives-over-424-million-unmatched-royalties-streaming-services/).

<sup>53</sup> *Frequently Asked Questions*, THE MLC, [www.themlc.com/faqs/categories/mlc](http://www.themlc.com/faqs/categories/mlc) (last visited Nov. 18, 2022).

<sup>54</sup> *Music Streaming Royalties Explained*, MANATT (2016), [www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf](http://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf).

of certain works.<sup>55</sup> The directive says that Member States should not mandate the use of a particular technical solution in order to keep the law “future proof.”<sup>56</sup> The directive seems unconcerned with the ability of current market practices to detect infringement, stating that content recognition technology is already used to manage the use of copyrighted content in the case of video and audio content.<sup>57</sup> It also notes that stakeholders discussed technologies like hashing, watermarking, the use of metadata and keyword searching.<sup>58</sup> The article qualifies that platforms can only be liable if the rights holders have provided “relevant and necessary information” to the platform.<sup>59</sup>

Hashing technology has been employed in some circumstances as a way to detect infringement and identify a song. Content ID, a YouTube technology, employs hashing to search its database for a potential match to a song used in a user-uploaded video.<sup>60</sup> Shazam, an app used by people who hear a song and would like it identified, also uses hashing.<sup>61</sup>

Google invested over \$60 million in Content ID.<sup>62</sup> The technology has been problematic, however, as there have been many instances where Content ID has taken down content that was legitimate fair use.<sup>63</sup> Hashing technology can be deceived simply by editing the file.<sup>64</sup> Thus, in the case of detecting an unauthorized sample which may have been altered in many different ways by a music producer, hashing is an ineffective tool. In effort to comply with the EU directive, it is likely that platforms will employ hashing technology or a similarly flawed algorithm.

In the U.S., overaggressive takedowns of legitimate fair use materials are far less relevant for music than for news. Fair use is an uncommon defense for copyright infringement claims in music. However, some recent case law and academic writing has indicated a shift of ideals to more liberal fair use standards in music, particularly because of the increasing use of sampling. Sampling is the use of a segment or element from a previously created sound recording in a new song.<sup>65</sup> Historically, the law has held that even a tiny snippet of a song requires the sampling artist to obtain a license from the work they are borrowing from.<sup>66</sup> However, in *VMG v. Ciccone*, the Ninth Circuit held that “de minimis or trivial” sampling of the sound recording does not constitute infringement.<sup>67</sup> This decision created a circuit split on this issue, as the Sixth Circuit had previously held that no amount of copying of the sound recording, regardless of how trivial, was permissible.<sup>68</sup> De minimis sampling of a composition

<sup>55</sup> *Communication from the Commission to the European Parliament and the Council Empty, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM (2021) 288 final (Jun. 4, 2021), [www.eur-lex.europa.eu/legal-content/EN/TXT/?qid=1625142238402&uri=CELEX%3A52021DC0288](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?qid=1625142238402&uri=CELEX%3A52021DC0288).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Rafal Kuchta, *The Hash – A Computer File’s Digital Fingerprint*, NEWTECH.LAW (Oct. 9, 2017), [www.newtech.law/en/the-hash-a-computer-files-digital-fingerprint/](http://www.newtech.law/en/the-hash-a-computer-files-digital-fingerprint/).

<sup>61</sup> *Id.*

<sup>62</sup> Melanie N. Tate, *The EU Copyright Directive And The United States Copyright Act: Why An Established Approach is Better Suited To A New Digital Reality*, HOUSTON JOURNAL OF INTERNATIONAL LAW, VOL. 43:3, 335 (Oct. 13, 2022).

<sup>63</sup> *Id.*

<sup>64</sup> Kuchta, *supra* note 157.

<sup>65</sup> Adam Baldwin, *Music Sampling and the De Minimis Defense: A Copyright Standard*, 19 UIC REV. INTELL. PROP 310 (2020).

<sup>66</sup> *Id.* at 373.

<sup>67</sup> *VMG Salsoul, LLC. v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

<sup>68</sup> Baldwin, *supra* note 162.

has been held to not constitute infringement.<sup>69</sup> De minimis applies when the average audience would not recognize the infringement.<sup>70</sup>

Regulators should be cautious that enforcing infringement can lead to technical solutions, like automated filtering, that silence free expression. For instance, digital platforms use hashing technologies to filter other kinds of content; these technologies both incorrectly filter legitimate fair use, and miss actual infringement.

### III. Collective Bargaining

Collective bargaining policies permit news publishers to negotiate collectively with platforms through measures such as antitrust exemptions. Allowing news publishers to come to the negotiation table collectively will put them in a better position to broker favorable deals with platforms like Meta and Google. This section examines three different approaches to collective bargaining: an Australian law, a law proposed in Canada, and a law proposed in the U.S. This section then compares these approaches to lessons learned from the music industry.

#### A. The Australian Bargaining Code

Australia has been a global leader in enacting this kind of collective bargaining policy. In 2021, Australia passed the News Media and Digital Platforms Mandatory Bargaining Code (“the bargaining code”) following a report by the Australian Competition and Consumer Commission (ACC) detailing how digital platforms were benefiting from news publishers’ content.<sup>71</sup> The bargaining code does not grant new rights to journalism, and because of this, the bargaining code applies to headlines and snippets as well as material protected by already existing copyright law.<sup>72</sup>

Under the bargaining code, publishers and platforms have an extra incentive to reach a deal: they could be sent to a unique arbitration process. In this arbitration, the code dictates that both the news publisher and the platform are to submit offers to the arbitrator, who then accepts one of the two offers with no room for compromise.<sup>73</sup> As of March 2022, no one had been sent to this arbitration process, suggesting the incentive structure is working.<sup>74</sup> An estimated more than \$200 million has been infused into journalism since the implementation of the bargaining code and early signs suggest that many journalism jobs have been created through this influx of money into the industry.<sup>75</sup>

<sup>69</sup> *Newton v. Diamond*, 388 F.3d 1189, 1193–94 (9th Cir. 2004).

<sup>70</sup> *Id.*

<sup>71</sup> AUSTRALIAN COMPETITION & CONSUMER COMMISSION, MANDATORY NEWS BARGAINING CODE (May 19, 2020), [www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf](http://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf).

<sup>72</sup> Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 21 (2021), [www.legislation.gov.au/Details/C2021A00021](http://www.legislation.gov.au/Details/C2021A00021) (Austl.); *Copyright Protections for Press Publishers*, U.S. COPYRIGHT OFFICE (June 2022), [www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf](http://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf).

<sup>73</sup> AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *supra* note 168.

<sup>74</sup> Bill Grueskin, *Millions of Dollars for News, Shrouded in Mysterious Deals*, JUDITH NEILSON INSTITUTE (Mar. 10, 2022), <https://www.jni.org.au/news/millions-of-dollars-for-news-shrouded-in-mysterious-deals>.

<sup>75</sup> Nic Fildes, *Australia’s Media Thrives After Forcing Big Tech to Pay for Content*, FINANCIAL TIMES, [www.ft.com/content/80db14de-8268-4356-b7fe-a184f319f331](https://www.ft.com/content/80db14de-8268-4356-b7fe-a184f319f331).

However, there are some news outlets who the platforms have not negotiated with. James Taylor, a managing director of a public broadcaster in Australia told a parliamentary committee, “Facebook has not provided us with clarity as to their rationale for not entering into an arrangement with us. We’ve attempted to elicit a response from Facebook about their rationale. We’re still a little in the dark.”<sup>76</sup> Also, the bargaining code does not obligate the parties to disclose amounts and deal terms.<sup>77</sup> News outlets may have no idea how much money its peers have received on what terms. This is an indication that bargaining inequity persists even after the implementation of the code, since the platforms know how much money was involved in each deal but the news outlets do not, which is an advantage in any bargaining process. The code also does not require news to use the money on journalism nor does it require the news outlets to disclose how the deal money has been used.<sup>78</sup>

#### B. Canada’s Online News Act

In 2022, Canadian legislators introduced an act that would allow news publishers to bargain collectively, C-18 or the Online News Act. The Online News Act captures much of what has been effective about the Australian bargaining code while striving to avoid the code’s pitfalls. The act mandates arbitration in the case of a negotiation failure, but does not include a provision like the bargaining code that one of the two offers submitted by the parties must be chosen.<sup>79</sup> The act states that there can be an exemption from arbitration if a deal satisfies several criteria.<sup>80</sup> The criteria requirement allows for oversight of the deals, preventing the opacity of the Australian model.<sup>81</sup> There are no requirements in the Online News Act regarding how the value of the news content is determined.<sup>82</sup> News organizations can be added to a collective deal even after the deal is done, helping small and upcoming publishers to not be left behind.<sup>83</sup>

On October 21, 2022, Meta released a statement of its position on the Online News Act.<sup>84</sup> In the release, it stated that it “may be forced to consider whether [Meta] continues to allow the sharing of news content in Canada.”<sup>85</sup> Google has also stated that it is in opposition to the Act and claims that the Online News Act has an overly broad definition of “eligible news business” and will lead to the funds supporting spreaders of disinformation.<sup>86</sup> Australia faced a similar opposition when it was in the process of passing the bargaining code. Facebook shut down its services in Australia for about a week

<sup>76</sup> Grueskin, *supra* note 171.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Bill C-18, *Act Respecting Online Communications Platforms that Make News Content Available to Persons in Canada*, 1st Session, 44th Parl., [www.parl.ca/legisinfo/en/bill/44-1/c-18](http://www.parl.ca/legisinfo/en/bill/44-1/c-18) (Can.)

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Marc Dinsdale, *Sharing Our Concerns with Canada’s Online News Act*, META, (Oct. 21, 2022), [www.about.fb.com/news/2022/10/metass-concerns-with-canadas-online-news-act/](https://www.about.fb.com/news/2022/10/metass-concerns-with-canadas-online-news-act/).

<sup>85</sup> *Id.*

<sup>86</sup> Marie Woolf, *Google Contacts Each MP Over Fast-tracking of Online News Bill Through Commons*, CTV NEWS (Jun. 1, 2022), [www.ctvnews.ca/politics/google-contacts-each-mp-over-fast-tracking-of-online-news-bill-through-commons-1.5928695](https://www.ctvnews.ca/politics/google-contacts-each-mp-over-fast-tracking-of-online-news-bill-through-commons-1.5928695).

in 2021, only restoring service after gaining some amendment to the code.<sup>87</sup> The move was not a clear win for Facebook, though, as public backlash was immediate and global in scale.<sup>88</sup> Whether Canada will experience actual shutdowns in protest to C-18, especially given the backlash Facebook received in response to its last shutdown remains to be seen.

Third-party critics of C-18, such as Michael Geist, have expressed concern about the Act's scope, specifically its ambiguity regarding what and how much will constitute reproduction of news text.<sup>89</sup> Other third-party critics point to the fact that, although there is a right to audit the funds gained by outlets, there are no requirements regarding how the funds should be used nor is there a procedure for redistributing the funds in the event that they are not being used to support Canadian journalism.<sup>90</sup>

### C. The United States: The Journalism Competition and Preservation Act

In the United States, the proposed Journalism Competition & Preservation Act (JCPA) exempts news publishers from antitrust laws for eight years, in order to allow them to collectively bargain against platforms.<sup>91</sup> It also creates a private right of action in the event that platforms do not negotiate in good faith.<sup>92</sup> The bill explicitly says that it will not modify the existing copyright status of news and a joint negotiation entity may not discriminate against an eligible journalism provider based on size or views expressed by the eligible journalism's content.<sup>93</sup> Unlike the bargaining code, the JCPA has a transparency requirement regarding the terms of the deal and disclosure of the use of the funds where "an eligible digital journalism provider shall provide public transparency regarding the use of any funds received or related to such agreement or arbitration decision to support ongoing and future operations to maintain or enhance the production or distribution of news[...]including public reporting of funds received each year under or related to each such agreement or decision."<sup>94</sup>

Notably, the JCPA has a provision which would prevent the platforms from retaliating against news publishers that choose to participate in collective negotiations. Critics such as TechFreedom have criticized the anti-retaliation rules, equating it to a "must carry" provision.<sup>95</sup> In a letter to legislators, writers for TechFreedom expressed their belief that courts would likely interpret the "must carry" provision broadly, leading to a limit on platforms' ability to moderate objectionable content.<sup>96</sup>

<sup>87</sup> Amanda Meade et al., *Facebook Reverses Australian News Ban After Government Makes Media Code Amendments*, THE GUARDIAN, (Feb. 22, 2021), [www.theguardian.com/media/2021/feb/23/facebook-reverses-australia-news-ban-after-government-makes-media-code-amendments](http://www.theguardian.com/media/2021/feb/23/facebook-reverses-australia-news-ban-after-government-makes-media-code-amendments).

<sup>88</sup> Grueskin, *supra* note 171.

<sup>89</sup> Michael Geist, *Why the Online News Act is a Bad Solution to a Real Problem, Part One: The Risk to Free Flow of Information*, (Sep. 20, 2022), [www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-one-the-risk-to-free-flow-of-information/](http://www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-one-the-risk-to-free-flow-of-information/).

<sup>90</sup> Jesse Brown, *Canada's Online News Act Must be Transparent, Fair, and Include News Innovators*, CANADALAND (May 31, 2022), [www.canadaland.com/canadas-online-news-act-must-be-transparent-fair-and-include-news-innovators/](http://www.canadaland.com/canadas-online-news-act-must-be-transparent-fair-and-include-news-innovators/).

<sup>91</sup> Journalism Competition and Preservation Act, S. 673, 117th Cong. (2022), [www.klobuchar.senate.gov/public/\\_cache/files/0/2/02edbc26-debb-41b4-8c19-da7090159e30/60AA7BF7A217968D95D8CE417B93C06C.sil22a02.pdf](http://www.klobuchar.senate.gov/public/_cache/files/0/2/02edbc26-debb-41b4-8c19-da7090159e30/60AA7BF7A217968D95D8CE417B93C06C.sil22a02.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at § 6(c).

<sup>95</sup> *Re: Sep. 15, 2022 Markup: Journalism Competition & Preservation Act (S. 673)*, TECHFREEDOM (Sep. 14, 2022),

[www.techfreedom.org/wp-content/uploads/2022/09/2nd-letter-Journalism-Competition-Preservation-Act-JCPA.pdf](http://www.techfreedom.org/wp-content/uploads/2022/09/2nd-letter-Journalism-Competition-Preservation-Act-JCPA.pdf).

<sup>96</sup> *Id.*

Supporters of the JCPA reject this claim and respond that a platform will not be prevented from carrying out its terms and services in the event that content is deindexed or deranked for reasons unrelated to the media platform's assertion of its rights under the bill.<sup>97</sup>

### D. Collective Bargaining in the Music Industry – Performance Rights Organizations

The music industry has used collective bargaining to set rates and license public performance rights for songs since the early 1900s through the use of performance rights organizations.<sup>98</sup> PROs bargain with and issue public performance licenses to entities such as businesses and streaming services on behalf of the many artists signed to it.<sup>99</sup> In the United States, the two largest PROs are Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP).<sup>100</sup>

The PROs "operate primarily through blanket licenses, which give the licenses the right to perform any and all the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used."<sup>101</sup> The system allows all artists varying broadly in levels of fame or financial success in music to nonetheless be a part of and benefit from the power of such a large organization.

An antitrust exception has been carved out for PROs of music because "those who performed copyrighted music for profit were so numerous and widespread, that, as a practical matter, it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses."<sup>102</sup> If the potential licensee and the PROs cannot agree on a fee, the parties are sent to a rate court.<sup>103</sup> The MMA also changed aspects of the rate courts' process: allowed the courts to consider what music's value was in a willing buyer, willing seller standard in its rate deliberations.<sup>104</sup>

The PROs do not have total immunity from antitrust law or an unlimited ability to negotiate and issue licenses on behalf of the artists they represent. Because BMI and ASCAP represent the majority of musical works in existence, both PROs signed consent decrees limiting their power after an investigation by the Department of Justice into anticompetitive behavior.<sup>105</sup> The consent decrees forbid the PROs from doing things such as withholding parts of its repertory in order to raise licensing fees or preventing a licensee from getting a license directly from the owner of the copyright.<sup>106</sup> ASCAP's consent decree includes that it must grant membership to all who wish to be represented by the PRO.

<sup>97</sup> *Myth vs. Fact, The Journalism Competition and Preservation Act (JCPA)*, NEWS MEDIA ALLIANCE (Aug. 1, 2022), [www.newsmediaalliance.org/myth-vs-fact-the-journalism-competition-and-preservation-act-jcpa/](http://www.newsmediaalliance.org/myth-vs-fact-the-journalism-competition-and-preservation-act-jcpa/).

<sup>98</sup> Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes* (2016) 31 BERKELEY TECH. L.J. 725.

<sup>99</sup> Leah Scholnick, *Licensed to Rock the Campaign Trail: Are the Ascap and Bmi Political Campaign Licenses Violating Their Antitrust Consent Decrees?* (2022) 43 Cardozo L. Rev. 124.

<sup>100</sup> *Id.*

<sup>101</sup> *Broadcast Music v. CBS, Inc.*, 441 U.S. 1, 5 (1979).

<sup>102</sup> *Id.* at 5.

<sup>103</sup> COPYRIGHT AND THE MUSIC MARKETPLACE, U.S. COPYRIGHT OFFICE (Feb. 2015), [www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf](http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf).

<sup>104</sup> *Id.*

<sup>105</sup> Scholnick, *supra* note 196.

<sup>106</sup> Colitre, *supra* note 136.

Even after the decrees, the PROs have faced antitrust lawsuits.<sup>107</sup> The decrees, which have been in place since 1941, have been reviewed on multiple occasions, but still remain.<sup>108</sup>

For example, in 2011, Pandora entered into blanket licensing agreements with ASCAP. Members of ASCAP were concerned about, what they believed to be, below market rates negotiated in the deal.<sup>109</sup> The members wanted to pull out and license directly to secure higher rates with Pandora and new media licenses, while still participating in the more traditional blanket licenses (such as music in venues and businesses).<sup>110</sup> ASCAP allowed the members to withdraw, but Pandora brought suit arguing that this was in violation of ASCAP's consent decree.<sup>111</sup> The court said that the consent decrees require ASCAP to offer Pandora a license to all works in its repertory; ASCAP cannot selectively withdraw the right to license work in a category (i.e., new media).<sup>112</sup> Pandora also took BMI to court with a near identical result.<sup>113</sup> Despite calls on the DOJ to modify the consent decrees on this topic, the DOJ refused to do so in both 2016 and 2021.<sup>114</sup>

Notably, BMI and ASCAP continue to violate this prohibition because both PROs offer a political license and give their members the option to withdraw their works from the license if they do not wish their work to be used by a particular candidate.<sup>115</sup> BMI and ASCAP have not yet been challenged on these violations.<sup>116</sup>

Applying some of the takeaways from music PROs to news, there are clearly many benefits that come from collective bargaining. Bargaining collectives inherently have more power and influence in negotiations and it is highly likely that this is also true for the news industry. Like smaller musical artists, the increase in power will be of utmost importance for smaller outlets that would otherwise get overlooked for a deal. Though legislators may want to keep in mind the potential antitrust consequences that could be created by especially large news bargaining collectives in the long run, those consequences may be less likely due to some differences between news and music. One major difference between the bargaining power of PROs and the potential bargaining power of news (at least in the countries that will not grant additional rights to news), is that the artists who the PROs represent have copyright ownership and copyright law backing them. This creates higher stakes for entities which offer or wish to play certain songs – a music creator is able to sue for infringement if a song is used without a deal being made.

## E. Analysis

The comparison between news and music is not a perfect one. Though both news and music bring value to society, news faces an additional and heavy risk of capture from financial structures that are, in some part, funded by governments or platforms. All additional structures aside, music is backed by

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<sup>107</sup> *Id.*

<sup>108</sup> Scholnick, *supra* note 196.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

two copyrights, and enjoys significantly more protection from infringement than news in places like the United States. This basic fact informs the copyright market dynamics of music.

Regardless of the differences, learning from music's licensing and collective bargaining can help avoid making the same mistakes, and ultimately save time and money. If a licensing model is to be successful, news organizations will need to build a central database like the MLC with accurate data regarding copyright ownerships, without making the system overly complex. Having a protocol and procedure in the event that there are unmatched licensing royalties will also be important to consider.

Technological limitations and the ability to detect and police infringement would need to be considered thoroughly to ensure compliance with new laws. Additionally, guidelines as to what legally will constitute infringement also needs to be addressed. In the case of the EU, clarity is needed as to what constitutes a covered publication, as well as a very short extract. Credibility, consistency and predictability around what content needs to be licensed is vital. This will enable online discourse to continue unimpeded while ensuring adequate revenue sharing with journalistic organizations that invest in the creation of quality news content, while also promoting information integrity.

With regard to collective bargaining, news organizations should carefully calculate the establishment and activities of the news collectives to ensure they are not subject to legal challenges later on. As seen with music, consent decrees can be near impossible to get changed or removed, even in the face of drastically changing market conditions.

Though there have been early indications that Australia's bargaining code has been successful at infusing money into the journalism industry, it is too soon to tell if it will be a long term solution for journalism sustainability. The JCPA and C-18 seem to be improvements on the Australian model, because they empower news publishers through mandated transparency of negotiations.<sup>117</sup> However, at the time of research, the future of both the JCPA and Bill C-18 remains uncertain, and their potential impact remains even murkier. Governments considering legislative interventions targeting copyright should consider the delicate balance involved in safeguarding access to knowledge while promoting news media sustainability, and learn from the experiences in Australia, Canada and the United States, as well as lessons from the implementation of parallel schemes in the music industry.

## Conclusion

The crisis of news sustainability continues to be a global problem, and it has become increasingly clear that copyright-centric approaches are not a silver bullet. As a multivariate problem involving economics, technology and politics, solution building requires continuous and dynamic engagement from policymakers, who must use a variety of tools and approaches at their disposal while remaining sensitive to local conditions and realities. It is important to look at how other industries like music have tackled similar problems, and to effectively identify benefits and pitfalls inherent in their solutions.

There is no one-size-fits-all fix to this problem. Copyright, licensing and collective bargaining schemes will likely need to be combined with other policy solutions (such as transparency and antitrust solutions) in order to be effective.

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<sup>117</sup> See *supra* notes 178, 205 and accompanying text.

# Subsidy Based Approaches towards News Sustainability

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## Introduction

Since the digital revolution tech companies have grown increasingly powerful, and have come to threaten news organizations' viability and sustainability all around the world. The pandemic exacerbated pre-existing barriers for news organizations who were already experiencing a steady decline in revenue due to the dominance of platforms, such as Google and Meta, in the online advertising industry. As a result, many news organizations have had to reduce operating budgets; and in the worst cases, close down news rooms entirely.

In response, governments around the world have proposed subsidy programs to help the news industry survive the economic impact of declining ad revenues. These range from direct funding to newsrooms to other, indirect means of providing economic benefits to news publishers. Recently, platforms have also initiated subsidy programs for newsrooms. This chapter will explore both government and platform subsidy schemes. In the first part, it will examine subsidy approaches from governments in the United States, Sweden and Canada, including tax credits and digital advertisement taxes. In the second part, it will consider to subsidy programs offered by platforms, specifically Meta and Google. Finally, the paper will evaluate the benefits and drawbacks of each subsidy program and provide concluding observations.

## I. Government Programs and Proposals

### A. Tax Credits

One approach to subsidies is to give tax credits to news media outlets. We evaluate three different countries' tax credit programs aimed at keeping journalism sustainable: the United States, Canada and Sweden. The U.S. was chosen due to its relevance to UCLA's ITLP. In addition, Canada's model informs how the U.S. could successfully implement a similar plan. Sweden's model was chosen because of its innovation as it was one of the oldest tax credit programs.

#### *The United States of America*

In the United States, the most robust tax credit proposal intended to support journalism sustainability is the Local Journalism Sustainability Act. The Act was introduced in July 2020 as HR 7640 by Representatives Ann Kirkpatrick and Dan Newhouse and received support from over 70 co-sponsors from both political parties.<sup>1</sup> The purpose of the Act was to provide tax incentives that support newspapers and other local media.<sup>2</sup>

<sup>1</sup> *Local Journalism Sustainability Act*, NEWS MEDIA ALLIANCE, [www.newsmediaalliance.org/advocacy/advocacy/local-journalism-sustainability-act/](http://www.newsmediaalliance.org/advocacy/advocacy/local-journalism-sustainability-act/) (last visited Nov. 17, 2022).

<sup>2</sup> *Id.*

The Local Journalism Sustainability Act has three main provisions. First, it would provide consumers with a tax credit of 80% the first year, followed by a credit for 50% of the subscription price. The cap of the credit is \$250 a year.<sup>3</sup> Secondly, the Act would relieve employers of 50% of the payroll taxes from the journalists they employ, up to \$12,500 per quarter for one year, and 30% in quarters thereafter.<sup>4</sup> Finally, the Act would provide a local media advertising credit of up to \$5,000 the first year and up to \$2,500 in subsequent years to small businesses that advertise in local newspapers, radios, or television stations.<sup>5</sup>

After the first version of the Bill stalled in the House, it was reintroduced in the House as H.R. 3940 and in the Senate as S. 2434 in 2021 with a number of definitional improvements to ensure that benefits flow to the local newsrooms that need them most. These changes included narrowing the definitions of "local newspaper" and "journalist." This version of the Act restricts qualifying publications to those whose primary content is "derived from primary sources and relating to news and current events," "serves the needs of a regional or local community," "employs at least one local news journalist who resides in such regional or local community," and whose publisher does not employ greater than 750 employees.<sup>6</sup> Further, it restricts the definition of local news journalist to those who "regularly gather, collect, photograph, record, write, or report news or information that concerns local events or other matters of local public interest,"<sup>7</sup> narrowing the qualifying topics and activities introduced in the first version of the Act. The Bill died with the end of the 117th U.S. Congress on 03 January 2023, and is yet to be introduced afresh in the ongoing 118th U.S. Congress.<sup>8</sup>

This Act has faced a number of criticisms. Some academics argue that, because the payroll tax credit is refundable, there is no incentive for organizations to use it for its intended purpose.<sup>9</sup> In other words, once an organization receives the refundable tax credit, nothing compels it to actually use the money to hire another journalist, as intended by the Act.<sup>10</sup> Additionally, critics worry that the contested definitions in the Act of "journalist" and "local newspaper" create a low bar and could encourage organizations that proliferate harmful misinformation to take advantage of the Act's benefits.<sup>11</sup> Finally, critics are also concerned that smaller news organizations will be unable to benefit from the payroll tax credit because of their reliance on freelance journalists who may not fit the definitional standards set by the Act. Here, it is relevant to note that these smaller outlets are more likely to be publications serving underrepresented communities, such as African Americans and other minorities.<sup>12</sup> As for the non-refundable tax credit for consumers, the benefit leaves out households that pay no federal income

<sup>3</sup> *Local Journalism Sustainability Act*, H.R. 7640, 116th Cong. § 25 (b) (2020), [www.congress.gov/116/bills/hr7640/BILLS-116hr7640ih.pdf](http://www.congress.gov/116/bills/hr7640/BILLS-116hr7640ih.pdf).

<sup>4</sup> *Id.* at § 3 (a).

<sup>5</sup> *Id.* at § 45 (a).

<sup>6</sup> *Local Journalism Sustainability Act*, H.R. 3940, 117th Cong. § 25E (d)(1) (2021), [www.congress.gov/bill/117th-congress/house-bill/3940](http://www.congress.gov/bill/117th-congress/house-bill/3940).

<sup>7</sup> *Id.* at § 25E (d) (2)

<sup>8</sup> As of February 10, 2023.

<sup>9</sup> Howard Saltz, *Opinion: The Local Journalism Sustainability Act Is An Empty Promise That Won't Work*, POYNTER (Apr. 6, 2022), [www.poynter.org/commentary/2022/local-journalism-sustainability-act-cons](http://www.poynter.org/commentary/2022/local-journalism-sustainability-act-cons).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Sarah Scire, *Some Questions (and Answers) About the Local Journalism Sustainability Act*, NIEMAN LAB (Sept. 14, 2021), [www.niemanlab.org/2021/09/some-questions-and-answers-about-the-local-journalism-sustainability-act](http://www.niemanlab.org/2021/09/some-questions-and-answers-about-the-local-journalism-sustainability-act).

tax.<sup>13</sup> This could disproportionately sideline mid- and low-income households that owe no federal income tax from participating in the consumer tax credit program.<sup>14</sup> Tracie Powel, the founder of a venture philanthropy that supports news organizations, explains that “when it comes to having to choose between a subscription and a prescription, low and middle-class families will choose the latter each and every time.”<sup>15</sup>

On the other hand, supporters of the U.S.’s Local Journalism Sustainability Act hope that consumer tax credits will encourage subscription habits that enable news organizations to sustain themselves without government assistance. Besides this, the Act’s dispersal of benefits through small businesses and consumer tax credits could be considered less politically and ethically fraught; given that Americans place significant value on freedom of the press, giving individuals and local businesses the power to decide which media outlets to support could help avoid concerns of government capture or interference in the media.<sup>16</sup>

### Canada

Canada successfully enacted Bill C-30, a tax credit scheme similar to the American proposal. Introduced on June 29, 2021, the Bill incorporates prior proposals that support journalists through tax reforms, with additional changes to the digital news subscription tax credit.<sup>17</sup> The legislation amended Canada’s Income Tax Act to provide support to Canadian journalism organizations producing original news content through three main provisions: a 25% refundable labor tax credit for salary or wages payable in respect of an eligible newsroom employee on or after January 1, 2019; a 15% non-refundable personal income tax credit to allow individuals to claim digital news subscription costs paid to a qualifying organization after 2019 and before 2025; and extending eligibility for registration as a qualified donee to registered journalism organizations, beginning on January 1, 2020.<sup>18</sup>

To qualify for benefits, Canadian news organizations must apply to the Canada Revenue Agency (CRA). An independent advisory board provides non-binding recommendations to the Minister regarding organizations’ eligibility.<sup>19</sup> Advisory board members are selected based on factors that consider the linguistic, cultural and ethnic diversity of the country. The board is composed of journalism industry experts and retired faculty members from post-secondary journalism schools across Canada.<sup>20</sup> The Canadian government prioritizes the importance of the board’s independence, hoping to avoid conflict between a free press and government influence. However, the government has already faced backlash from conservatives, who accuse them of using money to cut favors with journalists ahead of elections,

<sup>13</sup> *Id.*

<sup>14</sup> Note that in 2020, 61 percent of American households owed no federal income tax. Naomi Jagoda, *Sixty-One Percent of Households Owed No Federal Income Taxes Last Year: Analysis*, THE HILL (Aug. 9, 2021), [www.thehill.com/policy/finance/568567-61-percent-of-households-owed-no-federal-income-taxes-last-year-analysis](http://www.thehill.com/policy/finance/568567-61-percent-of-households-owed-no-federal-income-taxes-last-year-analysis).

<sup>15</sup> Scire, *supra* note 12.

<sup>16</sup> Sarah Scire, *Does the World Need a New Deal for Journalism?*, NIEMAN LAB (June 21, 2021), [www.niemanlab.org/2021/06/does-the-world-need-a-new-deal-for-journalism](http://www.niemanlab.org/2021/06/does-the-world-need-a-new-deal-for-journalism).

<sup>17</sup> *Canadian Journalism Labour Tax Credit*, GOV’T OF CAN. (Sept. 2, 2022), [www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/business-tax-credits/qualified-canadian-journalism-organization/guidance.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/business-tax-credits/qualified-canadian-journalism-organization/guidance.html).

<sup>18</sup> *Id.*

<sup>19</sup> Bill C-30, 2nd Session, 43rd Parl. §248 (1) (2021), [www.parl.ca/LegisInfo/en/bill/43-2/C-30](http://www.parl.ca/LegisInfo/en/bill/43-2/C-30) (Can.).

<sup>20</sup> *Independent Advisory Board on Eligibility for Journalism Tax Measures*, GOVERNMENT OF CANADA (Oct. 3, 2022), [www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/business-tax-credits/qualified-canadian-journalism-organization/independent-advisory-board-on-eligibility-for-journalism-tax-measures.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/business-tax-credits/qualified-canadian-journalism-organization/independent-advisory-board-on-eligibility-for-journalism-tax-measures.html).

given that decisions of the advisory board are non-binding, which means that the government ultimately decides on questions of eligibility.<sup>21</sup>

In order to qualify for benefits under Bill C-30, a Canadian news organization must fit the definition of a Qualified Canadian Journalism Organization (QCJO).<sup>22</sup> There are a number of qualifications that an organization must meet to be designated a QCJO. First, it must be determined to be “operating in Canada,” meaning that its content is designed, edited and, except in the case of digital content, published in Canada.<sup>23</sup> A QCJO cannot be a crown corporation, municipal corporation, or government agency; it must be organized as a corporation, partnership or trust.<sup>24</sup> Second, the organization must be incorporated under the laws of Canada, a province or a territory, and be a resident in Canada.<sup>25</sup> Thirdly, the chairperson (or other presiding officer), and at least ¾ of the directors (or other presiding officers) must be Canadian citizens.<sup>26</sup> If the chairperson is a member of the board of directors, they may count towards the ¾ criteria. Finally, the organization must regularly employ two or more journalists who work in the production of its content.<sup>27</sup> Freelance journalists are not included, but would be self-employed contractors.<sup>28</sup>

As for subject matter requirements, a QCJO must produce original written news content.<sup>29</sup> However, the Act does not define the required amount of original news content. The term “news” refers to “new, factual, and important information about issues, events, governments, and other items or matters of public interest.”<sup>30</sup> “Advertisements, listings, catalogs, directories, guides, financial reports, schedules, calendars, timetables, comic books, cartoons, puzzles, games and horoscopes” are not considered news.<sup>31</sup> The original news content should be based on journalistic processes and principles including: a commitment to researching and verifying information before publication; a consistent practice of providing rebuttal opportunity for those being criticized and presenting alternate perspectives, interpretations and analyses; an honest representation of sources; and a practice of correcting errors.<sup>32</sup>

Canada’s Bill C-30 has faced a number of criticisms similar to those faced by the U.S.’s Local Journalism Sustainability Act. Some Canadian journalists express concerns over the government setting the definitions of “journalism” and “news,” and the implications that this sets for media capture by the government.<sup>33</sup> Additionally, critics worry that the Bill’s intent has not matched its impact: according to information provided by the Canada Revenue Agency, only about one percent of Canadian tax filers

<sup>21</sup> Alan Freeman, *Canada Plans Hefty Aid Package for its Struggling Media Sector. Not Everyone is Pleased*, THE WASHINGTON POST (Nov. 28, 2018), [www.washingtonpost.com/world/2018/11/28/canada-plans-hefty-aid-package-its-struggling-media-sector-not-everyone-is-pleased](http://www.washingtonpost.com/world/2018/11/28/canada-plans-hefty-aid-package-its-struggling-media-sector-not-everyone-is-pleased).

<sup>22</sup> *Id.*

<sup>23</sup> Bill C-30, 2nd Session, 43rd Parl. §248 (1)(a)(iv) (2021), [www.parl.ca/LegisInfo/en/bill/43-2/C-30](http://www.parl.ca/LegisInfo/en/bill/43-2/C-30) (Can.).

<sup>24</sup> *Canadian Journalism Labour Tax Credit*, *supra* note 231.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Bill C-30, 2nd Session, 43rd Parl. §248(1) (a)(v)(A)(2021), [www.parl.ca/LegisInfo/en/bill/43-2/C-30](http://www.parl.ca/LegisInfo/en/bill/43-2/C-30) (Can.).

<sup>32</sup> *Canadian Journalism Labour Tax Credit*, *supra* note 231.

<sup>33</sup> See Rex Murphy, *Rex Murphy: What Right Does the Government Have to Judge Rebel News?*, NATIONAL POST (Apr. 16, 2022), [www.nationalpost.com/opinion/rex-murphy-what-right-does-the-government-have-to-judge-rebel-news](http://www.nationalpost.com/opinion/rex-murphy-what-right-does-the-government-have-to-judge-rebel-news).



claimed the subscription tax credit offered by Bill C-30.<sup>34</sup> Canadian journalism leaders worry that, rather than incentivizing new subscribers to sign up, the consumer tax credit is only being used by those who would have subscribed anyways.<sup>35</sup> Further, like the U.S. Act, the refundable labor tax credit provided by Bill C-30 has been criticized because it doesn't obligate that organizations spend the credits in a way that is beneficial to journalism sustainability, such as hiring additional journalists. Finally, the Bill's focus on organizations that primarily offer "written news" in print or digital forms may leave out organizations that provide other valuable news deliverables that are increasingly popular, such as video, podcasts, and audio content.

### Sweden

Sweden has long standing subsidy schemes for commercial media,<sup>36</sup> which are largely based on legislation passed in 1971 and 1975.<sup>37</sup> The Swedish support system for press and media subsidies consists of two ordinances: ordinance 1990:524, which provides support to news media organizations through press subsidies for print and digital newspapers, and ordinance 2018:2053, a media subsidy that is available to all kinds of media regardless of platform.<sup>38</sup>

The Swedish press subsidies included in ordinance 1990:524 consist of three forms of support: operational subsidies, distribution subsidies, and support for postal distribution in sparsely populated areas. The operational subsidies are entitlements, which means that all newspapers have the right to receive the support if they meet certain criteria; among other things, the newspaper must have a coverage rate less than 30 percent and must be published at least once a week.<sup>39</sup> The size of the operating subsidy granted to the organization is determined by how often a newspaper is published and how many subscribers it has.<sup>40</sup> The Swedish system also provides joint distribution subsidies to avoid monopolization of the industry by allowing the number two newspaper to use the existing distribution system of the leading newspaper.<sup>41</sup> All newspapers that used this system were paid a small sum per copy distributed.<sup>42</sup>

The Swedish media subsidies introduced by ordinance 2018:2053 also include three support schemes: local journalism subsidies to assist in sparsely populated areas, innovation and development subsidies for the development of digital services and digital collaboration between media, and, introduced in 2020, editorial subsidies based on the costs for editorial activities.<sup>43</sup> Unlike the press subsidies, which

<sup>34</sup> Sarah Scire, *Canada Offered a Tax Credit to Encourage Digital News Subscriptions. Here's How It's Going*, NIEMAN LAB (Apr. 26, 2022), [www.niemanlab.org/2022/04/canada-offered-a-tax-credit-to-encourage-digital-news-subscriptions-heres-how-its-going](http://www.niemanlab.org/2022/04/canada-offered-a-tax-credit-to-encourage-digital-news-subscriptions-heres-how-its-going).

<sup>35</sup> *Id.*

<sup>36</sup> Subsidies to French Newspapers, French News (Jan. 6, 2017), [www.french-property.com/news/french\\_life/newspapers\\_press\\_subsidies](http://www.french-property.com/news/french_life/newspapers_press_subsidies).

<sup>37</sup> Karl Erik Gustafsson et al., *Press Subsidies and Local News: The Swedish Case*, UNIVERSITY OF OXFORD, REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM, 7, [www.reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Press%20Subsidies%20%26%20.Local%20News%20the%20Swedish%20Case](http://www.reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Press%20Subsidies%20%26%20.Local%20News%20the%20Swedish%20Case) (last visited Nov. 17, 2022).

<sup>38</sup> *Direct Media Subsidies to News Media – a Nordic Overview*, NORDICOM (Oct. 13, 2022), [www.nordicom.se/en/facts-analysis/nordic/factsheets/direct-media-subsidies-news-media-nordic-overview](http://www.nordicom.se/en/facts-analysis/nordic/factsheets/direct-media-subsidies-news-media-nordic-overview).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

are entitlements, the media subsidies are distributed to the extent there are funds available.<sup>44</sup> In December 2021, another rights-based subsidy was introduced which is intended to compensate for the Swedish postal service's change of distribution scheme, which has led to higher costs for the media actors.<sup>45</sup>

Applications for support are examined by the press support committee at the Swedish Press, Radio and Television Authority.<sup>46</sup> The subsidies are administered by the Swedish Press and Broadcasting Authority.<sup>47</sup> Decisions on the distribution of the support lie with the Media Subsidies Council, an independent decision-making body within the Authority.<sup>48</sup> Like the Canadian board, the Media Subsidies Council has been criticized for its suggested composition of industry-nominated individuals,<sup>49</sup> as critics have expressed concern over potential conflicts of interest between board members and their industry employers. Today, the board consists of politicians, researchers, lawyers, and industry experts who have been appointed by the government.<sup>50</sup>

There are some benefits to be observed from Sweden's tax credit programs. For one, the tax credit programs have been credited for promoting media pluralism and diversity in the country, as well as garnering high newspaper readership and trust from the population.<sup>51</sup> Additionally, the Swedish system's innovative idea of using the existing distribution system of the leading newspaper ensures industry competition and promotes diversity. The Swedish media subsidies also prioritize innovation and development of digital services and digital collaboration between media,<sup>52</sup> which is vital in sustaining media in an increasingly digital world.

However, the Swedish tax credit program faces a number of criticisms similar to the other countries' programs. As mentioned above, Sweden's Media Subsidies Council, which determines which organizations benefit from the tax credits,<sup>53</sup> has faced criticism over its makeup of journalism industry insiders and potential for undue government influence, given appointment to the board is in the hands of the government. Additionally, there have been calls for greater support for local journalism to be incorporated into the country's tax credit program; in June 2022, after a government investigation, a new proposal for press and media subsidies focusing on local and regional news media was introduced.<sup>54</sup>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Proposition [Prop.] 2017/18:154; Propositionens huvudsakliga innehåll [government bill] 34, [www.riksdagen.se/sv/dokument-lagar/dokument/proposition/journalistik-i-hela-landet\\_H503154](http://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/journalistik-i-hela-landet_H503154) (Swed.).

<sup>47</sup> *Id.*

<sup>48</sup> *Direct Media Subsidies to News Media – a Nordic Overview*, *supra* note 252.

<sup>49</sup> Proposition [Prop.] 2017/18:154; Propositionens huvudsakliga innehåll [government bill] 34, [www.riksdagen.se/sv/dokument-lagar/dokument/proposition/journalistik-i-hela-landet\\_H503154](http://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/journalistik-i-hela-landet_H503154) (Swed.). Note the original language: "Ett stort antal remissinstanser för fram kritik mot utredningens förslag att nämnden ska bestå av ledamöter nominerade av branschen. Remissinstanserna framhåller bl.a. risken för jävsproblematik. Remissinstanser som för fram synpunkter i den riktningen är *Bonnier AB, ETC Förlag, Linnéuniversitetet, Nya Wermlandstidningen AB, Publicistklubben, Stockholms universitet områdesnämnden för humanvetenskap, TS Mediefakta, Pres(s)gruppen och TU – medier i Sverige. Publicistklubben* anför att de inte kommer att delta i en ordning med branschrepresentation. Flera remissinstanser framhåller att nämnden bör ha en politisk representation, i likhet med sammansättningen av presstödsnämnden. Denna uppfattning förs fram av bl.a. *Gota Media AB, Tjänstemännens centralorganisation och Svenska Journalistförbundet. Södertörns högskola* föreslår att hälften av ledamöterna tillsätts via branschorganisationer och hälften via det politiska systemet."

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 11.

<sup>52</sup> Mediestödsförordning (Svensk författningssamling [SFS] 2018:2053), [www.rkrattsbaser.gov.se/sfst?bet=2018:2053](http://www.rkrattsbaser.gov.se/sfst?bet=2018:2053) (Swed.).

<sup>53</sup> *Direct Media Subsidies to News Media – a Nordic Overview*, *supra* note 252.

<sup>54</sup> *Id.*

## Tax Credits – Analysis

In each of the tax credit programs, one major problem faced by governments is setting definitional standards for who will benefit from each program. Each of the three countries struggle to define the terms “journalist,” “news organization,” and other relevant terms vital to determining which news organizations receive tax credit benefits. For instance: do qualifying journalists need a certain educational degree? Do they need to be based in a certain area? Do they need to produce a certain amount of content per week? The answers to these questions have great impacts in determining what organizations will receive assistance in an increasingly challenging journalism environment.

These definitional issues lead into another concern with tax credit programs: media capture. For many, it is a significant concern that the government is the one responsible for deciding what types of content, organizations, and people will qualify to receive financial assistance. Even in Canada, where the government created an independent board to analyze the requests and tried to avoid the appearance of conflict between a free press and government influence, there was public backlash over who should sit on the board. To assuage public concerns of media capture in tax credit programs such as those in Sweden and Canada, it may be more beneficial if these boards included a majority of non-governmental stakeholders.

## B. Digital Ad Taxes

Other proposals to provide subsidies to news organizations center around raising funds through digital advertisement taxes. As mentioned previously, one of the most significant struggles news media organizations are facing is the decline in advertising revenue due to the rise of digital advertising.<sup>55</sup> Moreover, taxing schemes have lagged in taxing digital platforms equally to traditional brick and mortar companies; for example, in the U.S., Facebook paid only 4 percent in corporate-income tax between 2007 and 2015 compared to the S&P 500 average corporate-income tax rate of 27 percent.<sup>56</sup> With this, some propose that digital advertisement taxes be implemented to redirect some of this lost revenue back to news media organizations by making digital platforms pay a fee on their advertising revenue to support journalism sustainability.

### *The United States of America*

The leading digital advertisement tax proposal in the United States comes from Free Press, an American news media advocacy organization.<sup>57</sup> Free Press proposes taxing a small portion of digital platforms’ earnings from targeted advertisements to fund local, independent, and noncommercial journalism, as well as to support new news-distribution models.<sup>58</sup> In their proposal, Free Press explores numerous tax schemes. Proposed tax rates range from one to two percent.<sup>59</sup> The proposed tax schemes also vary based on who and what is taxed: one option suggests taxing all online enterprises that earn more than \$200 million in annual digital advertising revenues, while another proposes taxing all advertising revenues,

<sup>55</sup> Julia Angwin, *Can Taxing Big Tech Save Journalism?*, THE MARKUP (July 16, 2022), [www.themarkup.org/newsletter/hello-world/can-taxing-big-tech-save-journalism](http://www.themarkup.org/newsletter/hello-world/can-taxing-big-tech-save-journalism).

<sup>56</sup> Craig Aaron & Timothy Karr, *Beyond Fixing Facebook*, FREE PRESS 25 (Feb. 19, 2019), [www.freepress.net/policy-library/beyond-fixing-facebook](http://www.freepress.net/policy-library/beyond-fixing-facebook).

<sup>57</sup> See generally *id.*

<sup>58</sup> *Id.* at 7, 9.

<sup>59</sup> *Id.* at 24.

including offline placements.<sup>60</sup> Regardless of the differences in who and what is subject to a tax, each Free Press proposal would yield approximately \$2 billion annually to be directed back towards news media organizations.<sup>61</sup> However, despite the Free Press’ extensive detailing of different tax scheme proposals, the organization does not offer any suggestions on how they would select qualifying news organizations to benefit from the tax.

To administer these funds, Free Press proposes that Congress create a “Public Interest Media Endowment,” which would be charged with re-directing the tax revenues to fund independent and noncommercial news outlets.<sup>62</sup> Free Press proposes that the funds could be used for a number of projects to support news media sustainability, including improving the quantity of civic information in local communities, training more people in local journalism and fact-checking, and offering a state-level media-literacy curriculum for schools.<sup>63</sup>

### *Austria*

In 2019, the Austrian government updated its advertising tax to include digital advertisements.<sup>64</sup> The updated policy imposes a five percent tax on digital advertising services that target the Austrian market.<sup>65</sup> The tax applies to companies that have at least €750 million (\$860 million U.S.) in worldwide revenue and €25 million (\$28 million U.S.) in revenue from sales in Austria.<sup>66</sup> Most notably, the Austrian policy prioritized setting aside €15 million (\$16.9 million U.S.) of the revenue raised from the digital advertisement tax to be used towards modernizing Austrian media companies.<sup>67</sup> However, little detail is available regarding the specifics of this program, including which organizations would benefit, how funds would be distributed, what “modernizing” media means on a practical level, and more.

### *Canada and the EU*

Similar programs in other jurisdictions show an increasing desire to grapple with soaring digital advertising revenues. For instance, Canada recently implemented a Digital Services Ad Tax.<sup>68</sup> Under this program, advertisements on websites, electronic portals, gateways, stores, distribution platforms, or any other similar electronic interfaces (but for platforms that solely process payments and a few other exceptions) are subject to a goods and services tax or harmonized sales tax at the applicable local rate.<sup>69</sup> The European Union made a similar Digital Services Tax proposal in 2018 which would enable all Member States to tax profits generated in their territory, even if a company did not have a physical

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 22.

<sup>63</sup> *Id.*

<sup>64</sup> Daniel Bunn, *Austria Makes Mid-Stream Adjustment on Digital Tax Efforts*, TAX FOUNDATION (Apr. 3, 2019), [www.taxfoundation.org/austria-digital-tax-efforts/](http://www.taxfoundation.org/austria-digital-tax-efforts/).

<sup>65</sup> Press Release, Office of the U.S. Trade Representative – Executive Office of the President, Section 301 Investigation: Report on Austria’s Digital Services Tax (Jan. 13, 2021).

<sup>66</sup> Bunn, *supra* note 278.

<sup>67</sup> *Id.*

<sup>68</sup> *GST/HST for Digital Economy Businesses: Overview*, GOV’T OF CANADA, [www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/digital-economy.html](http://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/digital-economy.html).

<sup>69</sup> *Id.*

presence there.<sup>70</sup> This was meant to target large, U.S.-based digital platforms and ensure that online businesses contributed to public finances at the same level as brick-and-mortar EU companies.<sup>71</sup> Most uniquely, the proposal included an additional interim tax on certain digital activities of 3% to generate immediate revenues for Member States.<sup>72</sup> While neither the Canada tax nor the EU proposal include any immediate plan to redirect revenues from the taxes to benefit news media organizations, these moves show that other countries are considering the implications of rising digital advertising revenues and methods to level the playing field.

### Digital Ad Taxes – Analysis

There are a number of benefits to digital advertisement tax proposals in comparison to other subsidy schemes. For one, tax proposals provide an opportunity to provide more consistent benefits to news organizations. Once a tax is established, news organizations will have relatively set expectations about the financial benefits they will be able to reap from the tax. This consistency can assist news organizations in planning their operations, delegating resources, and more. This differs from other proposals which may provide more variable benefits. For instance, tax credit programs that provide citizen vouchers to support news media organizations may lead to an unequal distribution of benefits to news organizations due to citizens' partisan beliefs, lack of familiarity with smaller or less mainstream news organizations, or other individual considerations.<sup>73</sup>

Furthermore, digital advertisement tax proposals are encouraging because they provide direct funds to news organizations to sustain and improve their operations. As elucidated in the Free Press proposal, these funds can be used for a range of projects, from expanding resources to improve news quality to hiring more staff and more.<sup>74</sup> In other words, digital advertisement taxes can directly impact the quality and sustainability of news media by streamlining funds directly to organizations in need. Again, this differs from other proposals like tax credits, which provide less direct financial relief to news organizations.

Despite these benefits, digital advertisement taxes also pose a number of issues. For one, like other subsidy proposals, definitional issues come into play on both sides of the digital advertisement tax equation. First, there is the issue of who should be subject to a tax. The proposals discussed above display the broad range of proposed subjects to be taxed, ranging from the Austrian proposal which suggest taxing digital platforms that earn above a certain threshold<sup>75</sup> to the Free Press proposal which advocates for a tax on *all* online and offline advertisements.<sup>76</sup> The latter may not be as effective in addressing the structural imbalance between platforms and news media organizations, given that taxing offline advertisements might disincentivize traditional classified advertisements that are a source of revenue for news media organizations. Obviously, in a plan to raise money for news media sustainability, deciding who and what is being taxed has massive implications on the success of the program.

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<sup>70</sup> Daniel Bunn & Elke Asen, *What European Countries Are Doing About Digital Services Taxes*, TAX FOUNDATION (Aug. 9, 2022), [www.taxfoundation.org/digital-tax-europe-2022/](http://www.taxfoundation.org/digital-tax-europe-2022/).

<sup>71</sup> *Fair Taxation of the Digital Economy*, EU TAXATION AND CUSTOMS UNION, [www.taxation-customs.ec.europa.eu/fair-taxation-digital-economy\\_en](http://www.taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en) (last visited Feb. 19, 2023).

<sup>72</sup> *Id.*

<sup>73</sup> Neil Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. TECH. 473, 523 (2021).

<sup>74</sup> Aaron & Karr, *supra* note 270 at 22.

<sup>75</sup> Bunn, *supra* note 278.

<sup>76</sup> Aaron & Karr, *supra* note 270 at 24.

On the other side, there is also the question of who will qualify to benefit from the digital advertisement tax. Despite repeated calls for tax revenues to be distributed to “support local, independent, and noncommercial journalism projects,”<sup>77</sup> the Free Press proposal does not provide any further explanations of what would qualify a news media organization to fit under this category and receive funding. Future digital advertisement tax proposals will face difficult questions of inclusion, including whether to focus benefits just on local, smaller organizations as the Free Press proposal does<sup>78</sup> or to provide benefits to as many struggling news organizations as possible.

With this, digital advertisements may also bring up familiar fears of media capture. This is because government entities will necessarily be involved in administering digital advertisement taxes and in determining how funds are redistributed. In jurisdictions such as the United States, where freedom of the press is a central national value and misinformation and media trust are at the forefront of public debate, government intervention in funding news organizations could be polarizing. These concerns could be exacerbated by a plan such as the Free Press' proposal to charge Congress with the power to re-direct digital ad tax revenues to the news organizations that they select,<sup>79</sup> as some might worry that these funds would be distributed unequally or only to news organizations that serve government or partisan interests. It is particularly likely that this would be an issue in countries with authoritarian governments where there is less press freedom and a history of media capture, such as Hungary.<sup>80</sup>

Finally, digital advertisement taxes do not tackle the underlying structural issues of the news industry; in fact, they may actually increase the power of digital platforms and prolong the cycle that has put news organizations in the precarious positions they currently find themselves in. Because most digital advertisement tax proposals rely on digital platforms' advertising revenue, the taxes create an incentive to support digital advertising. Otherwise, news media organizations will lose out on revenue from the tax. Therefore, digital advertisement taxes do little to shift the power back in the hands of news media organizations.

## II. Platform Led Programs

Over the years, a number of digital platforms have reacted to the threat of government regulation by initiating their own platform-to-news publishers funding model to subsidize news organizations around the world. Platforms, including Google and Meta, profess their benevolence and commitment to quality news through offering robust financial support to news organizations; however, critics are concerned about the long-term repercussions that result from platforms' direct participation in the news industry.<sup>81</sup>

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<sup>77</sup> *Id.* at 7.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 22.

<sup>80</sup> See generally Marius Dragomir, *The Media-Capture Epidemic*, PROJECT SYNDICATE (Mar. 15, 2021), [www.project-syndicate.org/commentary/hungary-media-capture-model-goes-global-by-marius-dragomir-2021-03](http://www.project-syndicate.org/commentary/hungary-media-capture-model-goes-global-by-marius-dragomir-2021-03) (discussing Hungarian Prime Minister Viktor Orban's campaign against independent media in Hungary).

<sup>81</sup> Emily Bell, *Do Technology Companies Care About Journalism?*, in MEDIA CAPTURE: HOW MONEY, DIGITAL PLATFORMS, AND GOVERNMENTS CONTROL THE NEWS (Anya Schiffrin ed., 2021), at 293.

## Google News Initiative

The Google News Initiative (GNI) was founded in 2018 to support the journalism industry in its transition to digital media and away from traditional print media. Prior to this, in 2015, Google founded the Digital News Innovation (DNI) fund, (which became a part of GNI) and has since launched six competition rounds and supported 662 projects, contributing a total amount of 140,689,000 Euros.<sup>82</sup> GNI's mission is to collaborate with publishers and journalists to promote (1) evolving business models; (2) raising up quality journalism; and (3) driving innovation in newsrooms.<sup>83</sup> Google committed \$300 million to help journalism thrive in the digital age.<sup>84</sup> Presently, Google provided \$189M to support 6,250 news partners in 118 countries.<sup>85</sup>

First, considering the evolution of business models for journalism from advertisement-revenues to other-revenues, GNI Sub Lab provides newsrooms the Subscribe with Google (SwG) tool which draws attention to consumers who are looking for an accessible way to subscribe to news content.<sup>86</sup> Google's goal is to develop a sustainable and thriving business model for news organizations by promoting digital subscriptions.<sup>87</sup> Second, Google aims to combat misinformation through partnering with the International Fact Check Network, especially during elections, and training journalists in using Google's digital tools. Google also provides education materials that help consumers identify the difference between fact and fiction. Finally, Google aims to drive innovation in the newsroom through supporting news organizations that have projects to develop sustainable video operations. Google also launched the GNI Cloud program for organizations who use machine learning to develop content tagging. GNI aims to empower news organizations through technological innovations by offering services such as natural language processing, geographic immersive experiences, and secure access to the internet.<sup>88</sup> In essence, GNI provides funding and programming for training, grants, credits for online adversity, access to services and a series of "Innovation Challenge."

In 2020, Google launched the Journalism Emergency Relief Fund to help local news publishers around the world during COVID-19. The application process was open for 15 days. At the end of this period, Google proudly announced that it reviewed 12,165 applications from over 140 countries and selected 5,600 publishers from 115 countries. From the total amount of \$39.5M, each newsroom was eligible for funding between \$5,000 to \$30,000. Although Google provides a publicly available spreadsheet of the 5600 recipients, the information contained errors and duplicates. It was difficult to find published information on the amount each recipient received, nor the length of time each recipient

<sup>82</sup> *Digital News Innovation Fund Impact Report*, GOOGLE NEWS INITIATIVE, [www.newsinitiative.withgoogle.com/dnifund/](http://www.newsinitiative.withgoogle.com/dnifund/) (last visited Nov. 9, 2022).

<sup>83</sup> *How Google Supports Journalism and the News Industry*, GOOGLE, [www.blog.google/supportingnews/#overview](http://www.blog.google/supportingnews/#overview), (last visited Nov. 9, 2022).

<sup>84</sup> *Id.*

<sup>85</sup> *Impact Report 2020*, GOOGLE, [www.newsinitiative.withgoogle.com/impact/](http://www.newsinitiative.withgoogle.com/impact/), (last visited Nov 9, 2022).

<sup>86</sup> Richard Gringas, *The Google News Initiative One Year in*, GOOGLE NEWS INITIATIVE (Mar. 20, 2019), [www.blog.google/outreach-initiatives/google-news-initiative/google-news-initiative-one-year](http://www.blog.google/outreach-initiatives/google-news-initiative/google-news-initiative-one-year).

<sup>87</sup> Jim Albrecht, *Introducing Subscribe with Google*, GOOGLE NEWS INITIATIVE (Mar. 20, 2018), [www.blog.google/outreach-initiatives/google-news-initiative/introducing-subscribe-google](http://www.blog.google/outreach-initiatives/google-news-initiative/introducing-subscribe-google).

<sup>88</sup> Philipp Schindler, *The Google News Initiative: Building a Stronger Future for News*, GOOGLE NEWS INITIATIVE (Mar. 20, 2018), [www.blog.google/outreach-initiatives/google-news-initiative/announcing-google-news-initiative/](http://www.blog.google/outreach-initiatives/google-news-initiative/announcing-google-news-initiative/).

would be receiving funding.<sup>89</sup> Based on our independent research, upon clicking on the links that Google suggests visiting for more information, many of the links are no longer available to the public. It appears that Google's policy for providing funding is to be as inclusive as possible while "sticking to the eligibility rules."<sup>90</sup> However, it remains difficult to access information on the "eligibility rules" after the application period has ended. Google has not provided transparency of the details of the internal governance structure that determine eligibility to the funding competitions. In 2021, GNI announced the launch of the "COVID-19 Vaccine Counter Misinformation Open Fund" worth up to \$3M.<sup>91</sup> The fund aims to help news organizations with a proven track record in fact-checking and debunking activities. Google reviewed 309 applications from 74 countries, and the expert jury selected 11 projects.<sup>92</sup> When researching how the jury was selected, Google provided a link on its blog post entitled "An open fund for projects debunking vaccine misinformation,"<sup>93</sup> which at the time of research was broken.<sup>94</sup> However, Google has maintained a public list of jury members, including academics, researchers and founders.

Google also funds journalism through innovation challenges. Similar to its previous European model in the DNI, Google launched the GNI's Innovation Challenges. Since 2018, Google reports providing \$30M in funding to over 200 projects across the Asia Pacific, Latin America, Middle East, Turkey & North America representing 47 countries. Innovation Challenges included, for example, the 2019 GNI North American Innovation Challenge providing \$5.8M to help 34 projects in 17 states and the Middle East, Turkey and Africa 2022 GNI Innovation Challenge, round 3, which provided \$3.2M to help 34 projects from 17 countries.<sup>95</sup>

Finally, GNI also launched the YouTube Innovation Funding which aims to help newsrooms and publishers strengthen their online video capabilities and experiment with new formats for video journalism.<sup>96</sup> YouTube announced that it received hundreds of applications, but only 87 successful projects were funded representing 23 different countries. For example, the Economist in the UK received funding from the GNI YouTube Initiative Fund to strengthen its video production facilities and expertise. Their new format aims to give viewers tools to spot misinformation.<sup>97</sup>

<sup>89</sup> Ludovic Blecher, *Providing Emergency Funding for 5,3000+ Local News Organizations*, GOOGLE NEWS INITIATIVE (May 28, 2020), [www.blog.google/outreach-initiatives/google-news-initiative/providing-emergency-funding-5300-local-news-orgs/#:~:text=To%20provide%20some%20help%2C%20last,funding%20ranging%20from%20%245%2C000%20%2D%20%2430%2C000](http://www.blog.google/outreach-initiatives/google-news-initiative/providing-emergency-funding-5300-local-news-orgs/#:~:text=To%20provide%20some%20help%2C%20last,funding%20ranging%20from%20%245%2C000%20%2D%20%2430%2C000).

<sup>90</sup> *Id.*

<sup>91</sup> Alexios Matnzarilis, *An Open Fund for Projects Debunking Vaccine Misinformation*, GOOGLE NEWS INITIATIVE (Jan. 12, 2021), [www.blog.google/outreach-initiatives/google-news-initiative/open-fund-projects-debunking-vaccine-misinformation](http://www.blog.google/outreach-initiatives/google-news-initiative/open-fund-projects-debunking-vaccine-misinformation).

<sup>92</sup> Alexios Matnzarilis, *Google News Initiative Vaccine Open Fund Winners*, GOOGLE NEWS INITIATIVE (Mar 17, 2021) [www.blog.google/intl/en-in/company-news/outreach-initiatives/google-news-initiative-vaccine-open](http://www.blog.google/intl/en-in/company-news/outreach-initiatives/google-news-initiative-vaccine-open). Note that by clicking on the hyperlink 'an expert' jury in the blog post, the reader is brought to a page that does not exist.

<sup>93</sup> *Id.*

<sup>94</sup> Broken link: [www.newsinitiative.withgoogle.com/covid-vaccine-counter-misinfo-fund](http://www.newsinitiative.withgoogle.com/covid-vaccine-counter-misinfo-fund).

<sup>95</sup> Irvine Partners, *5 South African Recipients Announced as Part of the Third Google News Initiative Innovation Challenge*, BIZCOMMUNITY (Aug. 1, 2022), [www.bizcommunity.com/Article/196/15/230189.html](http://www.bizcommunity.com/Article/196/15/230189.html).

<sup>96</sup> Timothy Katz, *GNI YouTube Innovation Funding: Supporting 87 News Organizations in 23 Countries to Build Video Capabilities and Innovate with New Formats*, YOUTUBE (Dec. 17, 2018), [www.blog.youtube/news-and-events/gni-youtube-innovation-funding](http://www.blog.youtube/news-and-events/gni-youtube-innovation-funding).

<sup>97</sup> *Id.*

## Facebook Journalism Project

Meta also funds journalism. In 2017, Meta launched the Facebook Journalism Project (FJP) with the mission of having “meaningful conversations” and “community values sharing and discussing ideas and news.”<sup>98</sup> During the earlier stages, Facebook collaborated with journalists to develop tools that would increase news readership. Later, Facebook launched the FJP to work on three specific areas. First, Facebook collaborates with news organizations to develop news products by sharing resources on local news and business models. Second, Facebook provides e-learning courses on Facebook products, tools, and services for journalists in nine languages. In addition, Facebook provides tools that give access to information that measures social performance and help identify influencers. Third, Facebook provides tools that give the public information that enables them to make smart choices about the news they read. In this vein, Facebook collaborates with third-party organizations that will help readers understand the news, whether or not the content was accessed on the platform.<sup>99</sup>

In 2020, Facebook invested 100M to support the news industry during COVID-19, with a \$1M grant program for fact-checkers.<sup>100</sup> Facebook would provide \$25 million in emergency grant funding to support the news industry through the COVID-19 Local News Relief Fund Grant Program and the Facebook Local News Accelerator Program.<sup>101</sup> The COVID-19 Local News Relief Fund received more than 2,000 applications for grants ranging from \$25,000 – \$100,000. Facebook announced that 400 North American local newsrooms received funding to: a) respond to immediate community needs and/or b) offset some revenue shortfalls to help publishers maintain long-term sustainability during COVID-19.<sup>102</sup> Facebook partnered with the Local Media Association and The Lenfest Institute for Journalism (U.S. associations) and the News Media Canada and The Independent News Challenge (Canadian associations) to determine which news organization would receive a grant.<sup>103</sup> The collaboration with third-party news organizations to determine who receives grants is a better model than Facebook determining unilaterally; however, it appears that Facebook maintains control over who is on the board and for how long.

The local News Accelerator Program includes a three-month period of workshops, after which participants from the US and Canada receive relief grants to safeguard their progress and be in a better position for future opportunities.<sup>104</sup> The program totals 1,000 global participants.

## Platforms Funding Journalism – Analysis

The risks emerging from platforms subsidizing news organizations outweigh the benefits, unless well-defined regulatory measures are in place to ensure accountability and transparency. Governments around the globe are enacting more robust laws and regulations aimed at managing new relationship

<sup>98</sup> *Introducing the Facebook Journalism Project*, META (Jan. 11, 2017), [www.facebook.com/formedia/blog/introducing-facebook-journalism-project](http://www.facebook.com/formedia/blog/introducing-facebook-journalism-project).

<sup>99</sup> *Id.*

<sup>100</sup> *Facebook Invests \$100 Million to Support News Industry During Coronavirus*, META (Mar 30, 2020) [www.facebook.com/formedia/blog/coronavirus-update-news-industry-support](http://www.facebook.com/formedia/blog/coronavirus-update-news-industry-support).

<sup>101</sup> *Id.*

<sup>102</sup> *Facebook Journalism Project Provides \$16 Million in Funding to Support More Than 200 Local Newsrooms*, META (May 7, 2020), [www.facebook.com/journalismproject/programs/grants/coronavirus-local-news-relief-fund-recipients](http://www.facebook.com/journalismproject/programs/grants/coronavirus-local-news-relief-fund-recipients).

<sup>103</sup> *400 Local Newsrooms Receive Grants to Support Coronavirus Work*, META (Apr. 7, 2020), [www.facebook.com/formedia/blog/community-network-coronavirus-grants-news-reporting-recipients-round-1](http://www.facebook.com/formedia/blog/community-network-coronavirus-grants-news-reporting-recipients-round-1).

<sup>104</sup> *Id.*

dynamics that emerge in a technological era.<sup>105</sup> The Canadian *Online News Act* ignited criticism from experts when the government attempted to shift the balance of power between platforms and news publishers.<sup>106</sup> Sue Gardner, an advisor and consultant to start-ups and philanthropic organizations, explains that although Bill C-18 would force platforms to pay news organizations for content that publishers voluntarily place on Facebook, “the real aim of Bill C-18 is a governmental response to the long-standing complaints from news publishers that big internet platforms broke their business model.”<sup>107</sup> Platforms are strongly opposed to governmental intervention in the current business model and *strongly* resist regulations that threaten the status quo.<sup>108</sup> Tech companies, including Google and Meta, have decided to take matters into their own hands by proposing funding mechanisms that would position themselves as a de-facto infrastructural backbone of the news industry.<sup>109</sup> Platforms have already actively tried to avoid regulatory measures in Europe, and a similar situation arises now in Canada.<sup>110</sup>

Among growing research, Nielsen & Ganter purports that the DNI fund was a “response to specific regional pressures in Europe [...] and attempt to improve relations with publishing partners,”<sup>111</sup> after the French government threatened to impose a new tax that would compensate publishers for media content indexed in the search engine.<sup>112</sup> Soon thereafter, the Google News Initiative was launched in response to the threat of regulatory measures that governments around the globe insisted on imposing,<sup>113</sup> examples are stronger laws on privacy protections, data transparency, anti-hate speech, anti-competitive activities, consumer protection against price discrimination, and algorithmic transparency.<sup>114</sup> Platform companies are increasing budgets to support funding programs for news organizations, a clear indicator that platforms are further attempting to avoid regulatory measures that impose barriers to maintaining market dominance and profiting schemes.<sup>115</sup>

<sup>105</sup> DAVID ARDIA ET AL., *CTR. FOR INFO., TECH., AND PUB. LIFE, LOCAL NEWS, PLATFORMS, & MIS/DISINFORMATION*, (Dec. 2020), [www.citap.unc.edu/local-news-platforms-mis-disinformation](http://www.citap.unc.edu/local-news-platforms-mis-disinformation).

<sup>106</sup> See previous examples of Canada’s attempt to regulate internet relationships. See also Bill C-11, which aims to resolve online streaming issues, and Bill C-27, which aims to tackle privacy. Bill C-11, 1st Session, 44th Parl. (2022), [www.parl.ca/legisinfo/en/bill/44-1/c-11](http://www.parl.ca/legisinfo/en/bill/44-1/c-11) (Can.); Bill C-27, 1st Session, 44th Parl. (2021), [www.parl.ca/legisinfo/en/bill/44-1/c-27](http://www.parl.ca/legisinfo/en/bill/44-1/c-27) (Can.).

<sup>107</sup> Sue Gardner, *Bill C-18 is Bad for Journalism and is Bad for Canada*, MCGILL MAX BELL SCHOOL OF PUBLIC POLICY (Oct. 22, 2022), [www.mcgill.ca/maxbellschool/article/max-policy/c-18](http://www.mcgill.ca/maxbellschool/article/max-policy/c-18).

<sup>108</sup> *Sharing Our Concerns With Canada’s Online News Act*, META, (Oct. 21, 2022), [www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act](http://www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act).

<sup>109</sup> Charis Papaevangelou, *Funding Intermediaries: Google and Facebook’s Strategy to Capture Journalism*, 2023 DIGITAL JOURNALISM 1-22, [www.halshs.archives-ouvertes.fr/halshs-03748885/document](http://www.halshs.archives-ouvertes.fr/halshs-03748885/document).

<sup>110</sup> *Sharing Our Concerns With Canada’s Online News Act*, META, (Oct. 21, 2022), [www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act/](http://www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act/).

<sup>111</sup> Rasmus Kleis Nielsen & Sarah Anne Ganter, *Dealing with Digital Intermediaries: A Case Study of the Relations Between Publishers and Platforms*, 20(4) NEW MEDIA AND SOCIETY 1600 (Apr. 17, 2017), [www.journals.sagepub.com/doi/full/10.1177/1461444817701318](http://www.journals.sagepub.com/doi/full/10.1177/1461444817701318).

<sup>112</sup> Shana Lynch, *France, Google Talk Tax Audit*, SILICON VALLEY BUSINESS JOURNAL (Nov. 20, 2012), [www.bizjournals.com/sanjose/news/2012/11/20/france-google-talk-taxes.html](http://www.bizjournals.com/sanjose/news/2012/11/20/france-google-talk-taxes.html).

<sup>113</sup> Phillip Schindler, *The Google News Initiative: Building a Stronger Future for News*, GOOGLE NEWS INITIATIVE (Mar. 20, 2018), [www.blog.google/outreach-initiatives/google-news-initiative/announcing-google-news-initiative](http://www.blog.google/outreach-initiatives/google-news-initiative/announcing-google-news-initiative).

<sup>114</sup> Nikki Usher, *From Media Capture to Platform Capture*, in *MEDIA CAPTURE: HOW MONEY, DIGITAL PLATFORMS, AND GOVERNMENTS CONTROL THE NEWS* (Anya Schiffrin ed., 2021), at 34-35.

<sup>115</sup> DAVID ARDIA ET AL., *CTR. FOR INFO., TECH., AND PUB. LIFE, LOCAL NEWS, PLATFORMS, & MIS/DISINFORMATION*, (Dec. 2020), [www.citap.unc.edu/local-news-platforms-mis-disinformation](http://www.citap.unc.edu/local-news-platforms-mis-disinformation).

According to Nikki Usher, one approach taken by platforms to avoid regulatory measures is through collaborations with political campaigns. She argues that “platforms make profits from deals with third-parties such as brands and politicians who hope personalized targeting will lead to more persuasive messaging.”<sup>116</sup> Usher explains that “money makes politics go ‘round, and these companies have more than enough of it to keep regulations at bay. The feds can threaten to exact concessions from platform companies without ever bringing any specific and documented legal regulations into fruition, thus prompting platform companies to dispense cash to keep politicians on their side.”<sup>117</sup> Avoiding regulation allows platforms to continue to have free reign in their relationships with news media organizations. This collaboration between politicians and platforms also directly hurts the public’s interest in having a voice in shaping the legal landscape of platforms’ activities.. Usher explains that platforms feel forced to provide services to politicians who support the interest of platforms. She warns that “it is hard to tell what kinds of concessions government officials are able to exact from platforms when there are no open, public conversations about the legal repercussions for tech companies’ bad behavior.”<sup>118</sup>

Another approach involves opposing proposed interventions as misguided or unsound policy, often combined with the threat of a withdrawal from that jurisdiction. In a statement before the Standing Committee of Canadian Heritage, Meta expressed its dismay at not being invited to participate in discussions around Bill C-18, discussed earlier in this paper, and said that the Bill misrepresented the relationship between platforms and news publishers. This statement went on to refer to the company’s collaboration with Canadian news providers despite news content not being a revenue driver, and that it may decide to prohibit sharing of news content in Canada in response to the proposed law.<sup>119</sup>

In addition to funding journalism, platforms also provide services and training to newsrooms. The services and resources provided by platforms are an attractive proposition for many journalists and newsrooms, but these resources are often tied to the platform ecosystem, creating greater dependence.. Platforms also provide training opportunities for journalists who wish to gain expertise and credentials. In providing training, platforms are in a position to impose “ways of doing” that would push media outlets to behave in a way that would only benefit platforms. Researchers mention that “the vast scope of their wealth and products mean technology platform companies that are funding journalism are simultaneously working with governments, commercial organizations and other stakeholders in ways that might represent a conflict of interest.”<sup>120</sup> The risk for media organizations becoming dependent on the resources only made available on the platforms is high, thus news organizations are surrendering control to platforms on steering the relationship dynamic that ultimately determines the fate of journalism and the news industry.<sup>121</sup> News organizations risk becoming dependent on platforms’ decisions without having safeguards in place when platforms suddenly change their algorithm models and shift their interests. Facebook’s infamous ‘pivot to video’ is a case in point. In 2016, Facebook presented data that depicted video content as gathering maximum attention from users, prompting advertisers to direct spending towards video content and encouraging news publishers to restructure their newsrooms – with many firing writers and hiring staff to create video content to

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Sharing Our Concerns With Canada’s Online News Act*, META (Oct. 21, 2022), [www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act](http://www.about.fb.com/news/2022/10/metasc-concerns-with-canadas-online-news-act).

<sup>120</sup> DAVID ARDIA ET AL., CTR. FOR INFO., TECH., AND PUB. LIFE, LOCAL NEWS, PLATFORMS, & MIS/DISINFORMATION, (Dec. 2020), [www.citap.unc.edu/local-news-platforms-mis-disinformation/](http://www.citap.unc.edu/local-news-platforms-mis-disinformation/).

<sup>121</sup> Papaevangelou, *supra* note 323.

meet this supposed surge in user demand.<sup>122</sup> Ultimately it became clear that Facebook’s figures had misrepresented the true popularity of video content to advertisers. The subsequent counter-shift in ad spending spelt disaster for many news organizations, some of which had to lay off staff or even to close down altogether.<sup>123</sup>

Platform subsidy programs pose risks to the independence of the editorial process that many news organizations require for disseminating accurate information to the public. Through funding news media, platforms become either directly or indirectly involved in the editorial process of the news organizations they are funding. For example, in 2019 “Google announced it would partner with the news chain McClatchy to fund three new local news entities in communities of less than five hundred thousand people.[...] For the first time, a major technology company is working directly with news executives to set up local news operations, which it proposed to fund.”<sup>124</sup> According to Google Blog, “the sites will be 100 percent McClatchy owned and operated and McClatchy will maintain sole editorial control and ownership of the content.”<sup>125</sup> However, there is a substantial risk that the funding creates a direct relationship with the heart of the newsroom, thus giving platform companies a level of access to journalists that few other organizations would have. This access is being gained at a time when the need for investigations into platform accountability is high and the arguments for regulation are growing.”<sup>126</sup>

Many researchers confirmed that it remains difficult to truly assess the benefits and disadvantages of platform funding models. Neither Meta nor Google have clear and transparent policies around disclosing data on their funding projects, leading to a lack of information to work with.<sup>127</sup> Usher mentions that “researchers and academics are often asked to sign nondisclosure agreements as a condition of receiving funding. Most of the time, journalistic organizations themselves do not disclose the funding they have received. The governance and accountability processes of [1] how the funds are dispersed and [2] what affects the funding are either not tracked or not reported in every case.”<sup>128</sup> Tech companies found ways to use their economic power to create “a patronage system within news, which ties reporting organizations to these commercial entities in often opaque and subtle ways.”<sup>129</sup> The secrecy around ways platforms interact with news organizations is concerning because it enables tech giants to continue using their power in a way that harms the news industry. Research about how platforms fund journalism is limited due to a lack of transparency.<sup>130</sup> With both Meta and Facebook, information is scattered across the platform without a uniform and consistent data bank that would

<sup>122</sup> Laura Hazard Owen, *Facebook’s Pivot to Video Didn’t Just Burn Publishers. It Didn’t Even Work for Facebook*, NIEMAN LAB (Sept. 15, 2021), [www.niemanlab.org/2021/09/well-this-puts-a-nail-in-the-news-video-on-facebook-coffin](http://www.niemanlab.org/2021/09/well-this-puts-a-nail-in-the-news-video-on-facebook-coffin).

<sup>123</sup> Emily Bell, *Do Technology Companies Care About Journalism?*, in *MEDIA CAPTURE: HOW MONEY, DIGITAL PLATFORMS, AND GOVERNMENTS CONTROL THE NEWS* (Anya Schiffrin ed., 2021), at 293.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Charis Papaevangelou, *Big Tech’s Funding of Journalism*, CTR. FOR MEDIA, TECH. & DEMOCRACY OF MCGILL UNIV., [www.p-charis.github.io/Platform-funding-of-journalism/](http://www.p-charis.github.io/Platform-funding-of-journalism/) (last visited Nov. 5, 2022).

<sup>128</sup> See Usher, *supra* note 328, at 295.

<sup>129</sup> *Id.*

<sup>130</sup> Charis Papaevangelou, *Funding Intermediaries: Google and Facebook’s Strategy to Capture Journalism*, 2023 DIGITAL JOURNALISM 1-22, [www.halshs.archives-ouvertes.fr/halshs-03748885/document](http://www.halshs.archives-ouvertes.fr/halshs-03748885/document).

provide clarity on the ways the platforms decide to allocate funding. The public must decipher a patchwork of relevant information hidden in blog posts and embedded links which often point to a dead-end.<sup>131</sup>

Countries around the world, like Sweden and Canada, and to some extent the United States, are moving towards providing tax and subsidy incentives for news media organizations. These governmental efforts are a federal attempt to provide financial sustainability options to the suffering news industry. The mechanism of governmental tax and subsidy programs is one option that may be more favorable than other avenues as it promotes democratic principles that platform subsidy programs have not been able to implement in their models. When news organizations accept funding from platform sources, they are increasingly faced with the possibility of endangering their own autonomy. In addition, there are lower risks associated with newsrooms becoming dependent on platform ecosystems that may not always have an incentive to promote the best interests of the news industry.<sup>132</sup> That being said, it appears that at this point the future for news sustainability may be better resolved at a government level, as opposed to the platform level, because citizens are more equipped in raising their opinions and concerns, including the demand for more transparency.

### III. Conclusion

In conclusion, the current governmental subsidy programs, although insufficient, are important first-steps that draw public attention to the urgency of resolving news sustainability across the globe. Having examined tax credits, digital advertisement taxes, and platform-run programs, there are a number of important takeaways from each. Tax credits subsidies can be an important resource to promote journalism sustainability, although the governments should play no direct role in decisions over who should benefit from these funds. The allocation must be independent of the government in order to maintain a free press and a real democracy.

Digital advertisement taxes also offer another interesting opportunity to promote journalism sustainability by providing direct funding to news organizations for resources, training, and other necessary operational needs. Unfortunately, due to the dependence on digital advertising profits, such programs do little to change the structure of the news ecosystem and to shift the power away from digital platforms and back into the hands of news organizations. Therefore, it is unclear whether these are the strongest subsidy programs for promoting news media sustainability long-term. Finally, platforms funding news media organizations may impose significant consequences for the future of journalism. The lack of transparency may indicate that platforms may have ulterior motives when initiating funding programs, for example, Google launching DNI to avoid regulatory scrutiny in France and Facebook launching FJP to redeem its reputation after being caught for proliferating misinformation and disinformation.

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<sup>131</sup> Personal research demonstrates that when clicking on the links provided on the Google News Initiative Blogs, they do not work.

<sup>132</sup> Julia Angwin, Comment at UCLA Institute for Technology, The Information Policy Lab: News Sustainability in a New Era of Tech Regulation (Sept. 2022) (“All money is dirty money, it depends which money journalists should accept.”).

In all, subsidy programs should be government-directed and focused on sustaining local news media to help the news organizations that are struggling the most; to avoid the monopolization of the journalism industry; and to fortify the organizations that are trusted by the public. The future of journalism depends on stronger accountability and transparency to “level the playing field and give the media a fighting chance.”<sup>133</sup> In order to maintain democracy, the government needs to implement solutions that encourage journalism sustainability without interfering with the actual content or operations of the news.

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<sup>133</sup> Courtney C. Radsch, *Frenemies: Global Approaches to Rebalance the Big Tech v Journalism Relationship*, BROOKINGS (Aug. 29, 2022), [www.brookings.edu/blog/techtank/2022/08/29/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship](https://www.brookings.edu/blog/techtank/2022/08/29/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship).

# Antitrust-based Solutions for News Media Sustainability

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News media sustainability is a major concern among regulators around the world. From the antitrust perspective, the primary concern is that the market power of digital platforms enables them to claim the lion's share of digital advertising revenues to the detriment of news publishers. Specifically, regulators have focused on antitrust concerns related to platforms' data monopoly and lack of transparency, the vertical integration within the ad market and potential conflicts of interest, news media dependence on platforms' algorithms, and the platforms' alleged free-riding on publishers' content. The United States, Europe and India have all considered regulatory interventions or enforcement actions to deal with digital platforms' dominance in the advertising market.

The first section of this chapter explains how the digital advertising market works and what the relationship is between news outlets and digital platforms. It also addresses the importance of monopolies over personal data in this space. The second section describes the potential antitrust concerns that arise from digital platforms' dominance over the digital advertising market and personal data, the digital platforms' vertical integration, and their power over news media. The third section presents a comparative analysis of the responses to these antitrust concerns from regulators and antitrust agencies worldwide. The fourth section provides a set of potential policy recommendations and their trade-offs.

## I. How Does the Digital Ad Market Work?

### A. Digital Advertising and the News Media

News media functions as a two-sided market: on one side, it seeks to attract readers, and on the other, it seeks to attract advertisers.<sup>1</sup> The more readers a newspaper has, the more advertisers will be interested in placing advertisements on that medium.<sup>2</sup> Regardless of whether news media decide to pursue increased profitability through reader payments or digital advertising revenues, they will be forced to interact with digital platforms. However, there is sound evidence that the relationship between news

<sup>1</sup> Fiona S. Morton et al., *Protecting Journalism in the Age of Digital Platforms: Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee*, George J. Stigler Center for the Study of the Economy and the State 19 (Jul. 1, 2019) [www.research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C](http://www.research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C).

<sup>2</sup> Comisión Nacional de los Mercados y la Competencia (2021), E/CNMC/002/2019 Estudio sobre las condiciones de competencia en el sector de la publicidad online en España, [www.cnmc.es/sites/default/files/3626347\\_10.pdf](http://www.cnmc.es/sites/default/files/3626347_10.pdf), p. 36.

publishers and digital platforms is imbalanced in favor of the platforms,<sup>3</sup> and that their entrenched market power enables them to gain an unfair share of digital advertising revenue.<sup>4</sup> The market shares of Google and Meta in the digital advertising sector satisfy what most regulators consider to be dominant positions. In 2019, Google and Meta accounted for sixty percent of the digital advertising spend in the United States and sixty-three percent of the digital advertising spend in the United Kingdom.<sup>5</sup>

### B. The Relationship Between News Media and Digital Platforms

The relationship between digital platforms and news media in the online advertisement space is primarily vertical in nature. From the publishers' perspective, digital platforms (including search engines, social networks, and news aggregators) act as important traffic generators for news outlets.<sup>6</sup> At the same time, platforms like Google act as crucial intermediaries of open display advertising services, which permit content creators to place ads on their websites.<sup>7</sup> Finally, news publishers can also receive a share of the revenues for the display of their content in platforms' news aggregators, which collect and curate news content through a combination of editorial work and algorithms.<sup>8</sup> As a result of these interactions, platforms' business models have a significant effect on news media sustainability.<sup>9</sup>

From the platforms' perspective, they directly and indirectly monetize third-party news content by selling ad space on their own sites or collecting user data that can in turn be used to provide targeted ad services.<sup>10</sup> Platforms like Google also provide intermediation services for placing open display advertising on third-party websites.<sup>11</sup>

In the open display advertising space, news media and other content creators compete to sell advertising inventory using a wide variety of third-party intermediaries and exchanges commonly known as "ad tech products".<sup>12</sup> One particularity of this market is that Google holds a dominant position at every level of the intermediary chain<sup>13</sup> by controlling the publisher ad servers (which permit publishers to offer advertising space for sale), advertiser ad networks (bidding tools used by advertisers to buy ad space), and ad exchange servers (which match publishers with advertisers each time an ad space is sold).<sup>14</sup>

<sup>3</sup> Competition and Markets Authority, *Online Platforms and digital advertising Market study final report*, COMPETITION AND MARKETS AUTHORITY 306 (July 1, 2020) [www.assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](http://www.assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf).

<sup>4</sup> OECD, *Competition issues concerning news media and digital platforms*, OECD Competition Committee Discussion Paper 22 (2021).

<sup>5</sup> David J. Moore, *Identity crisis: Why Google and Facebook dominate digital advertising*, DIGITAL CONTENT NEXT (May 19, 2021), [www.digitalcontentnext.org/blog/2020/05/19/identity-crisis-why-google-and-facebook-dominate-digital-advertising](http://www.digitalcontentnext.org/blog/2020/05/19/identity-crisis-why-google-and-facebook-dominate-digital-advertising).

<sup>6</sup> Australian Competition & Consumer Commission, *Digital Platforms Inquiry – Final Report 15* (2019), [www.accc.gov.au/publications/digital-platforms-inquiry-final-report](http://www.accc.gov.au/publications/digital-platforms-inquiry-final-report).

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 16.

<sup>10</sup> OECD, *supra* note 8, at 13.

<sup>11</sup> Comisión Nacional de los Mercados y la Competencia, *supra* note 2, at 51.

<sup>12</sup> Competition and Markets Authority, *supra* note 7, at 19.

<sup>13</sup> Competition and Markets Authority, *supra* note 7, at 19. The ACCC states that the revenue and ad inventory flowing from Google's ad tech services "are significantly larger than any other firm or supplier." Australian Competition & Consumer Commission, *supra* note 10, at 128.

<sup>14</sup> Department of Justice, *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, (Jan. 24, 2023) [www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies](http://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies).



Finally, some also argue that news media and publishers interact as horizontal competitors for “user attention” and for the supply of display advertising space.<sup>15</sup> Users may decide whether to spend their limited time reading news content from digital platforms or news websites. Similarly, advertisers may choose whether to purchase advertising space on digital platforms or news websites.<sup>16</sup> A direct competition between news publishers and platforms may also be found when the latter act as news curators<sup>17</sup> and even as content generators.<sup>18</sup>

### C. The Importance of Data for the Digital Advertising Market

What mainly distinguishes print advertising from online advertising is the relevance of users’ data to the latter.<sup>19</sup> The personal data accumulated by online businesses has become the primary competitive variable in online advertising.<sup>20</sup> This data allows sellers of ad space, including the major platforms, to offer targeted advertising, which is especially valuable to businesses looking to place advertisements.<sup>21</sup>

Digital platforms like Google and Meta know significantly more about their users than anyone else, including news publishers.<sup>22</sup> This depth of user data is something that other competitors generally do not have.<sup>23</sup> The major platforms’ size and scale means they are able to refine their usage of data and target ads more effectively than any other competitor. Google and Meta also have entrenched their data dominance through several high-profile acquisitions and various commercial practices that have left ad competition behind.<sup>24</sup>

This is important because Google and Meta would not maintain their market power on advertising if they did not maintain their dominant position on consumer data. Advertisers will generally prefer Google and Meta for ad placement because they believe that achieves the highest value for their ad spend, and because those platforms host a large and diverse portion of the digital audience.

<sup>15</sup> OECD, *supra* note 8, at 11.

<sup>16</sup> Giangaspero, Matteo, *Is Competition Policy the Right Response to the Crisis of Journalism?*, COMPETITION POLICY INTERNATIONAL (Feb. 8, 2022) [www.competitionpolicyinternational.com/is-competition-policy-the-right-response-to-the-crisis-of-journalism](http://www.competitionpolicyinternational.com/is-competition-policy-the-right-response-to-the-crisis-of-journalism).

<sup>17</sup> Australian Competition & Consumer Commission, *supra* note 11, at 170.

<sup>18</sup> OECD, *supra* note 8, at 12.

<sup>19</sup> Cairncross, *supra* note 3, at 44.

<sup>20</sup> Comisión Nacional de los Mercados y la Competencia, *supra* note 2, at 54.

<sup>21</sup> Yan Lau, A Brief Primer on the Economics of Targeted Advertising, FEDERAL TRADE COMMISSION (Jan. 2020), [www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic\\_issues\\_paper\\_-\\_economics\\_of\\_targeted\\_advertising.pdf](http://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf).

<sup>22</sup> Cairncross, *supra* note 3, at 45.

<sup>23</sup> Competition and Markets Authority, *supra* note 9 at 28.

<sup>24</sup> Sunny Seon Kang, *Don't Blame Privacy for Big Tech's Monopoly on Information*, JUST SECURITY (Sept. 18, 2020) [www.justsecurity.org/72439/dont-blame-privacy-for-big-techs-monopoly-on-information](http://www.justsecurity.org/72439/dont-blame-privacy-for-big-techs-monopoly-on-information). (Considering Meta’s acquisition of Instagram and WhatsApp).

## II. Antitrust/Competition Concerns Related to Digital Platforms’ Market Dominance in the Digital Ad Space

### A. Concerns Related to the Data Monopoly of Big Platforms and the Lack of Transparency

The consumer data dominance held by Google and Meta acts as an important entry barrier since potential competitors do not have access to equivalent data sources, which prevents them from effectively competing.<sup>25</sup> The lack of competition not only impacts the innovation of digital advertising but also reduces the resources allocated to publishers and website producers.<sup>26</sup> While monetizing and collecting data from publishers’ content, digital platforms may have incentives to display valuable advertising on their own services rather than on publishers’ websites, creating a competitive advantage over publishers.<sup>27</sup> At the same time, news publishers have little access to the data that platforms collect from the use of their content, preventing publishers from knowing the profile of their users for purposes of selling targeted advertising on their websites.<sup>28</sup>

In addition, the digital advertising space has little transparency regarding the effectiveness and true value of user data.<sup>29</sup> Because online platforms are the only ones that know the true value of the data, they have greater freedom to set their fees for hosting ad placement, at the expense of news media and others which rely on Google and Meta for ad placement. The lack of transparency extends to the basic functions of digital advertising as well, as the pricing and ad verification is all contained within Google and Meta.<sup>30</sup>

### B. Vertical Integration and Conflicts of Interest in the Ad Market

Although vertical integration in the digital ad market can generate efficiencies, it can also create competition issues that can offset those efficiencies.<sup>31</sup> Specifically, vertical integration can give rise to conflicts of interest and allow companies with market power at one stage of the value chain to leverage it in other parts of the industry, potentially foreclosing providers from competing.<sup>32</sup> Platforms may have the ability to leverage their power in their core markets (such as search engines or social networks) to force publishers to use their ad tech services.<sup>33</sup> Also, vertically integrated platforms possess a competitive advantage in access to data over non-vertically integrated advertising business models used by news publishers.<sup>34</sup>

In the open display ad market, vertical integration poses unique problems. Conflicts of interest of vertically integrated platforms can appear both when platforms give preference to the use of their own

<sup>25</sup> Competition and Markets Authority, *supra* note 7, at 290.

<sup>26</sup> Natasha Lomas, *Google’s adtech practices targeted in UK, ED antitrust damages suits*, TECH CRUNCH (Sept. 13, 2022), [www.techcrunch.com/2022/09/13/google-adtech-antitrust-damages-lawsuits-uk-netherlands](http://www.techcrunch.com/2022/09/13/google-adtech-antitrust-damages-lawsuits-uk-netherlands).

<sup>27</sup> OECD, *supra* note 8, at 18.

<sup>28</sup> OECD, *supra* note 8, at 18.

<sup>29</sup> Simen Moen, *How Marketers Can Topple the Tech Giants’ Monopoly on Personal Data for Good*, ADVERTISINGWEEK (Nov. 13, 2022) [www.advertisingweek.com/how-marketers-can-topple-the-tech-giants-monopoly-on-personal-data-for-good](http://www.advertisingweek.com/how-marketers-can-topple-the-tech-giants-monopoly-on-personal-data-for-good).

<sup>30</sup> Moore, *supra* note 9.

<sup>31</sup> Comisión Nacional de los Mercados y la Competencia, *supra* note 2, at 9.

<sup>32</sup> Competition and Markets Authority, *supra* note 7, at 308.

<sup>33</sup> OECD, *supra* note 8, at 21.

<sup>34</sup> Competition and Markets Authority, *supra* note 7, at 295.

advertising buying tools and when these tools divert demand to favor the ad inventory of the same platforms.<sup>35</sup> Furthermore, the vertical structure of this market may increase the lack of transparency in the ad tech supply chain,<sup>36</sup> specifically with regard to the remuneration received by publishers, the price paid by advertisers, and the share obtained by intermediary tools.

In the case of Google, its market power throughout the entire supply chain enables it to force more publishers and advertisers to use its products while disrupting their ability to use competing products effectively.<sup>37</sup> Vertical integration also enables Google to charge higher fees for ad intermediation services, which can result in news publishers receiving a lower share of the advertising revenue than they would with more competition.<sup>38</sup>

### C. Media Dependence on Platforms' Algorithms and Free-Riding on Publishers' Content

Due to their dependence on platforms, news media are subject to changes to the algorithms platforms use to rank content, especially when they act as aggregators or curators of third-party content. The platforms' algorithms are opaque and unpredictable, and each change to the algorithms can have a significant effect on the size of news outlets' audiences.<sup>39</sup> Algorithms can also be used to favor platforms or their affiliated parties at the expense of news publishers.<sup>40</sup> This can have unintended consequences on publishers' traffic and the monetization of news content.

In addition, news media's lack of bargaining power and dependence on platforms enables platforms to free-ride on publishers' content.<sup>41</sup> Platforms' publication formats of third-party content and the use of snippets encourage users to stay in the platforms' ecosystem and reduce incentives for users to access news content on the publishers' websites.<sup>42</sup> This allows platforms to appropriate consumer attention and ad revenues to the detriment of news publishers.<sup>43</sup> By free-riding on original content platforms limit the revenues that media outlets could obtain through advertising and collect the user data needed to place targeted advertising on their own webpages.

Reducing news media traffic through changes in platforms' algorithms or free-riding news content could lead to exploitation, with firms using their market power to impose unfair commercial terms. The result may be a decrease in the quality of the services provided by publishers and a rise in their costs.<sup>44</sup>

<sup>35</sup> Comisión Nacional de los Mercados y la Competencia, *supra* note 2, at 10.

<sup>36</sup> *Id.*

<sup>37</sup> Department of Justice, *Justice Department Sues Google for Monopolizing Digital Advertising Technologies* (Jan. 24, 2023) [www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies](http://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies).

<sup>38</sup> OECD, *supra* note 8, at 19; Competition and Markets Authority, *supra* note 7, at 9.

<sup>39</sup> Fiona S. Morton et al., *supra* note 1, at 17.

<sup>40</sup> OECD, *supra* note 8, at 19.

<sup>41</sup> Competition and Markets Authority, *supra* note 7, at 319.

<sup>42</sup> Giangaspero, Matteo, *supra* note 21.

<sup>43</sup> OECD, *supra* note 8, at 21.

<sup>44</sup> OECD, *supra* note 8, at 17.

## III. Comparative Policy Responses

Currently, most legislative antitrust or competition frameworks have failed to adequately grapple with the structural power of big platforms over data monetization and the ad market, and have focused more on news media getting fair remuneration for the use of their content by platforms.

### A. USA

The Journalism Competition and Preservation Act ("JCPA") is a bill that was proposed in October 2021, and that focused on providing fair remuneration to news organizations to combat platform dominance over the ad space. The act would have allowed news providers to create joint negotiation entities by giving an antitrust exemption to news sites. They would also be able to use it as a collective bargaining mechanism to battle the dominance of platforms regarding the distribution of and access to digital news. Creation of such entities would be safe from objection under antitrust laws that otherwise would prevent the collaboration of large news organizations.<sup>45</sup>

This legislation is concerned with antitrust only to the extent that it creates an exception for news media organizations. However, a package of antitrust bills have been proposed that could support stronger regulatory responses against the big platforms' dominance, allowing enforcers to pursue anti-competitive mergers of technology companies while also giving state attorneys more power to bring antitrust lawsuits.<sup>46</sup> These include the Merger Filing Fee Modernization Act 2022 which increases the fees that corporations must pay to federal agencies for a large merger deal. Along with the fees, it sets dual requirements of notice to the FTC and the Department of Justice. The package also includes the Foreign Merger Subsidy Disclosure Act 2022, which requires merging corporations to disclose subsidies by foreign adversaries to federal agencies, and the State Antitrust Enforcement Venue Act 2022, which gives state attorneys a choice over which court would hear their antitrust cases.<sup>47</sup>

Another important antitrust bill is known as the American Innovation and Choice Online Act 2022. This legislation would prevent the self-preferencing of platforms' own products and content,<sup>48</sup> limiting another's products to compete against the platform's own, and restricting business owners from operating with services from different platforms. It would also prevent the use of non-public data generated on the platform by the activities of a business user or by the interaction of the platform user with the products of a business user to offer the platform's own products.<sup>49</sup> The bill is aimed at the antitrust sphere to strengthen enforcement against platforms' arbitrary practices.<sup>50</sup>

<sup>45</sup> Amy Klobuchar, *Klobuchar, Kenned, Cicilline, Buck, Durbin, Nadler Release Updated Bipartisan Journalism Bill* (Aug. 22, 2022), [www.klobuchar.senate.gov/public/index.cfm/2022/8/klobuchar-kennedy-cicilline-buck-durbin-nadler-release-updated-bipartisan-journalism-bill](http://www.klobuchar.senate.gov/public/index.cfm/2022/8/klobuchar-kennedy-cicilline-buck-durbin-nadler-release-updated-bipartisan-journalism-bill).

<sup>46</sup> Lauren Feiner, *'Big Tech never loses a legislative fight – and they just did' as package of new bills passes*, CNBC (Oct. 6, 2022) [www.cnn.com/2022/10/06/tech-critics-see-hope-for-new-antitrust-laws-after-win-in-the-house.html](http://www.cnn.com/2022/10/06/tech-critics-see-hope-for-new-antitrust-laws-after-win-in-the-house.html).

<sup>47</sup> *Id.*

<sup>48</sup> Matt Wille, *Big Tech antitrust bill finds new support in Mozilla, DuckDuckGo, INPUT* (Sept. 14, 2022), [www.inputmag.com/culture/american-innovation-choice-online-act-mozilla-duckduckgo-brave-proton](http://www.inputmag.com/culture/american-innovation-choice-online-act-mozilla-duckduckgo-brave-proton).

<sup>49</sup> Tom Romanoff, *The American Innovation and Choice Online Act: What it Does and What it Means*, BIPARTISAN POLICY CENTER (Jan. 20, 2022) [www.bipartisanpolicy.org/explainer/s2992](http://www.bipartisanpolicy.org/explainer/s2992).

<sup>50</sup> Emily Birnbaum, *New Antitrust Bill Will Bolster US Fight Against Tech Giants With Small Reforms*, BLOOMBERG (Sept. 29, 2022), [www.bloomberg.com/news/articles/2022-09-29/house-passes-bills-that-will-bolster-antitrust-battles-against-tech-giants](http://www.bloomberg.com/news/articles/2022-09-29/house-passes-bills-that-will-bolster-antitrust-battles-against-tech-giants).

Thus far, more than 200 newspapers in the US have filed suits against Google and Meta claiming a monopolization over the digital advertising market and citing the lack of revenue sharing owed to local news.<sup>51</sup> Regarding the open display advertising market, recently the Department of Justice, along with several state Attorneys General, filed a suit against Google for monopolizing multiple digital advertising tools from the “ad tech stack.” According to the lawsuit, Google has engaged in anticompetitive and exclusionary conduct with the aim of neutralizing or eliminating ad tech competitors through acquisitions, wielded its dominance across digital advertising markets to force more publishers and advertisers to use its products, and thwarted other entities’ ability to use competing products.<sup>52</sup>

## B. European Union

The European Parliament introduced the Digital Markets Act (“DMA”) in 2022 to regulate gatekeeper platforms like Google and Meta.<sup>53</sup> The legislation was introduced with the intention of reducing the dominance of large technology platforms within the global information space,<sup>54</sup> in addition to existing regulations for online platforms.<sup>55</sup>

The DMA aims to curb unfair business practices of large platforms by designating them as “gatekeeper” platforms. A company would qualify as a “gatekeeper” if its ‘core platform service’ serves as a gateway for businesses to reach end users, including online search engines, online social networks, and video-sharing platforms, among others. These must be companies with a “significant impact on the internal EU market” and an “entrenched and durable” position.<sup>56</sup> The law can help tackle platforms’ power over news media as it is aimed at preventing gatekeeper platforms from leveraging their inter-connected services and resources to prevent competition through boxing users within their ecosystems.<sup>57</sup> An example of its practical implication is the restriction on Google from collating data from its diverse services to offer targeted ads without users’ consent.

Of importance to the news media, the DMA mandates access to the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by gatekeepers. It also provides business users with access to the data generated by their activities on the gatekeepers’ platforms.<sup>58</sup> Additionally, the legislation bans gatekeepers from using the data of business users when gatekeepers compete with them on their own platform or ranking the gatekeeper’s own products or services in a more favorable manner than those of third parties.<sup>59</sup> These provisions could

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<sup>51</sup> Fischer, *Scoop: Over 200 papers quietly sue Big Tech*, AXIOS (Dec. 7, 2021) [www.axios.com/2021/12/07/1-local-newspapers-lawsuits-facebook-google](http://www.axios.com/2021/12/07/1-local-newspapers-lawsuits-facebook-google).

<sup>52</sup> Department of Justice, *supra* note 41.

<sup>53</sup> Alyssa Boyle, *AdExplainer: The Digital Services Act v. the Digital Markets Act*, ADEXCHANGER (Aug. 30, 2022), [www.adexchanger.com/adexplainer/adexplainer-the-digital-services-act-vs-the-digital-markets-act](http://www.adexchanger.com/adexplainer/adexplainer-the-digital-services-act-vs-the-digital-markets-act).

<sup>54</sup> Adam Satariano, *E.U. Takes Aim at Big Tech’s Power With Landmark Digital Act*, NEW YORK TIMES (Mar. 24, 2022) [www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html](http://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html).

<sup>55</sup> European Commission, *The Digital Services Act Package*, European Commission, [www.digital-strategy.ec.europa.eu/en/policies/digital-services-act-package](http://www.digital-strategy.ec.europa.eu/en/policies/digital-services-act-package) (last visited Nov. 13, 2022).

<sup>56</sup> Bill Batchelor et al., *EU Digital Markets Act Enters Into Force on November 1, Creating New Regulatory Regime for Large Tech Platforms*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, (October 12, 2022) [www.skadden.com/insights/publications/2022/10/eu-digital-markets-act-enters-into-force](http://www.skadden.com/insights/publications/2022/10/eu-digital-markets-act-enters-into-force).

<sup>57</sup> Satariano, *supra* note 58.

<sup>58</sup> European Commission, *Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets* (Oct. 31, 2022) [www.ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2349](http://www.ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349).

<sup>59</sup> *Id.*

help address big platforms’ monopoly over consumer data in the ad space, as well as ensure more competitive behavior from platforms when interacting with content providers in horizontal terms.

### 1. France

The French competition authority ordered Google to negotiate with snippet publishers whose content was being used on its platforms (i.e., Google News or the Google search engine).<sup>60</sup> Google had responded to revised copyright rules by only displaying URLs instead of snippets, thereby avoiding the need to offer payments. The tactic was not successful for long, as the French competition authority found that it constituted an abuse of Google’s dominant market position. Ultimately, the French authority accepted legally binding commitments from Google to pay local media organizations when it utilizes content not created by them in online search results, along with a requirement to share information that would help decide whether the proposed remuneration is fair.<sup>61</sup>

### 2. United Kingdom

The Competition & Markets Authority (CMA) in the United Kingdom (UK) has recommended the adoption of an enforceable code of conduct that would require platforms with “strategic market status” funded by digital advertising to “act in a way that ensures that consumers and businesses dealing with them are fairly treated and vigorous competition can take place.”<sup>62</sup> The CMA further noted that this code would address concerns on “transparency over fees and ranking algorithms, access to user data, restrictions on publishers’ ability to monetise their content and forewarning of significant changes to algorithms.”<sup>63</sup> The CMA also called for the establishment of a Digital Market Unit (DMU) with the power to suspend, block, and reverse decisions of the platforms and to achieve compliance with the code.<sup>64</sup> In July 2021, the UK government set out proposals for a new pro-competition regime that included asking the DMU and the UK communication regulator (Ofcom) to work on such a code.<sup>65</sup>

## C. India

The Indian government is working on a law aimed at protecting Indian media in their dealings with online platforms. Government officials have stated that monetization of data must occur in a manner that benefits Indians and revenue sharing with news media seems to be one route for that.<sup>66</sup> Due to an antitrust complaint filed before the Competition Commission of India,<sup>67</sup> the agency opened an investigation against Google for abusing its dominance in news aggregation.<sup>68</sup> Prior to this investigation,

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<sup>60</sup> Natasha Lomas, *France’s competition watchdog orders Google to pay for news reuse*, TECH CRUNCH (Apr. 9, 2020) [www.techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse](http://www.techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse).

<sup>61</sup> Giorgio Leali & Mark Scott, *France accepts Google’s truce with publishers*, POLITICO (June 21, 2022) [www.politico.eu/article/french-competition-authority-greenlights-google-pledges-over-paying-news-publishers/](http://www.politico.eu/article/french-competition-authority-greenlights-google-pledges-over-paying-news-publishers/).

<sup>62</sup> *Online platforms and digital advertising – Market study final report*, Competition & Markets Authority 328 (2020).

<sup>63</sup> *Id.* at 347.

<sup>64</sup> OECD, *supra* note 8, at 33.

<sup>65</sup> OECD, *supra* note 8, at 33.

<sup>66</sup> Aishwarya Paliwal, *Centre working on law to protect Indian media from Big Tech: Rajeev Chandrasekhar*, India Today (July 16, 2022), [www.indiatoday.in/india/story/centre-working-on-law-to-protect-indian-media-from-big-tech-rajeev-chandra-sekhar-1976488-2022-07-16](http://www.indiatoday.in/india/story/centre-working-on-law-to-protect-indian-media-from-big-tech-rajeev-chandra-sekhar-1976488-2022-07-16).

<sup>67</sup> *Id.*

<sup>68</sup> Manish Singh, *India hits Google with antitrust investigation over alleged abuse in news aggregation*, TECH CRUNCH (Jan. 7, 2022).

Google was fined heavily for a similar charge of abusing its dominance through AndroidOS due to its contracts with a significant number of companies within the Android ecosystem.<sup>69</sup>

## V. Policy Recommendations

### A. How and Why Antitrust Solutions Can Support News Media Sustainability

Because data monopolization, vertical integration, and exploitation are inherently competition problems, antitrust solutions may be well suited to directly solve these issues in the digital advertising market. For instance, antitrust solutions aimed at the acquisition and exclusive use of large sets of data by large technology platforms could directly address the biggest competitive advantage that these platforms have over news media and original content creators.<sup>70</sup>

Tackling platforms' monopoly on data related to viewership of content and advertisements could prevent them from imposing artificially high prices on digital ads and claiming the lion's share of the revenue.<sup>71</sup> Therefore, antitrust requirements mandating that platforms change the way that they handle data and their advertising businesses may be effective in preventing platforms from taking advantage of their dominance over user data to unfairly compete against other businesses, including news media. These solutions may involve requiring platforms to share data with content creators, preventing them from using nonpublic data from other businesses, and requiring prior consent of third parties before using data collected by third party services, among others.<sup>72</sup>

### B. Qualities for a Successful Antitrust Response

One quality of potential antitrust solutions that may be important to their success is the need to target the few large technology platforms that have attained dominance over data and advertising markets, without harming news media, original content creators, consumers, or potential competitors.<sup>73</sup> Laws that do not distinguish dominant platforms from other entities (such as potential entrant platforms or content creators that also use their consumers' data to provide ad services) could harm the very people and businesses that they are intended to protect.<sup>74</sup> This failure could also allow platforms to actually increase their dominance by eliminating potential rivals, thus exacerbating the problem.

Antitrust solutions may be most effective when paired with new privacy laws.<sup>75</sup> Advertising markets

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<sup>69</sup> Prasad Banerjee, *CCI may take a year more to clear third antitrust case against Google*, LIVEMINT (Nov. 04, 2022) [www.livemint.com/companies/news/cci-may-take-a-year-more-to-clear-third-antitrust-case-against-google-11667503948246.html](http://www.livemint.com/companies/news/cci-may-take-a-year-more-to-clear-third-antitrust-case-against-google-11667503948246.html).

<sup>70</sup> Agnieszka Stefanowicz-Barańska & Maciej Marek, *Digital Markets Act – Are the Internet Giants Facing a Revolution?*, DENTONS (May 17, 2022) [www.dentons.com/en/insights/alerts/2022/may/17/digital-markets-act--are-the-internet-giants-facing-a-revolution](http://www.dentons.com/en/insights/alerts/2022/may/17/digital-markets-act--are-the-internet-giants-facing-a-revolution).

<sup>71</sup> Jarsulic, Marc, *Using Antitrust Law To Address the Market Power of Platform Monopolies*, CENTER FOR AMERICAN PROGRESS (July 28, 2020) [www.americanprogress.org/article/using-antitrust-law-address-market-power-platform-monopolies](http://www.americanprogress.org/article/using-antitrust-law-address-market-power-platform-monopolies).

<sup>72</sup> Competition and Markets Authority, *Online Platforms and Digital Advertising* (July 1, 2020).

<sup>73</sup> Cory Doctorow, *The Internet is Facing a Catastrophe For Free Expression and Competition: You Could Tip The Balance*, Electronic Frontier Foundation (January 13, 2019) [www.eff.org/deeplinks/2019/01/internet-facing-catastrophe-free-expression-and-competition-only-europeans-can](http://www.eff.org/deeplinks/2019/01/internet-facing-catastrophe-free-expression-and-competition-only-europeans-can).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

have a surveillance problem, which is closely related to its competition problem.<sup>76</sup> Platforms have vast repositories of personal information currently sitting on their balance sheets as assets to be monetized.<sup>77</sup> Prohibiting data-processing without consent would strand those assets.<sup>78</sup> New privacy laws, when paired with appropriate antitrust laws and regulation, can therefore weaken the platforms' data-based monopolies on digital advertising. From an antitrust perspective, regulatory agencies could mandate third-party access to data, separate and silo data as needed to increase competition, and increase consumer control over data.<sup>79</sup>

Antitrust solutions in this space must also be able to adjust to new anticompetitive practices that may occur in the future.<sup>80</sup> To do this, they need to establish sufficient flexibility in enforcement mechanisms and effective penalties that will apply to novel anticompetitive practices that may arise in the future.<sup>81</sup>

### C. Policy Recommendations and Tradeoffs

While successful antitrust legislation and regulation will likely include various combinations of these recommendations, they each express a key solution to the anticompetitive concerns raised above. At the same time, each response may generate unintended consequences that should be addressed.

#### 1. Establish enforceable codes of conduct

One potential policy response is to create enforceable codes of conduct. Similar to the Australian regulations described above, and discussed in more detail in the chapter on copyright, licensing and collective bargaining, codes of conduct could enable eligible news publishers to bargain individually or collectively with digital platforms over obtaining a greater share of the revenues from the use of their content on platforms' services. Although "fair remuneration" requirements would not resolve structural concerns in the ad market, they could address digital platforms' alleged exploitative conduct described in section II of this chapter, by reducing the bargaining imbalance with specific regard to news media.<sup>82</sup>

Codes of conduct could also be useful tools to establish transparency requirements on advertisement value, settle content providers' access to user data, and mandate notifications for changes in platforms' algorithms. One example of this is the code of conduct recommended by the CMA in the UK, which could include requirements on transparency over fees and ranking algorithms, access to user data and restrictions on publishers' ability to monetise their content.<sup>83</sup> In this same line of reasoning, some have argued that codes of conduct should go further than just establishing economic terms, and also include "a description of what types of user data the platforms will share with publishers and what efforts platforms are taking to distribute meaningful and relevant journalism within their ecosystems."<sup>84</sup> As

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<sup>76</sup> Bennett Cyphers & Gennie Gebhart, *Behind the One-Way Mirror: A Deep Dive Into the Technology of Corporate Surveillance*, Electronic Frontier Foundation (December 2, 2019) [www.eff.org/wp/behind-the-one-way-mirror](http://www.eff.org/wp/behind-the-one-way-mirror).

<sup>77</sup> Doctorow, ^ note 77.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *DMA Proposal: How to Improve It?*, Electronic Frontier Foundation, [www.eff.org/pages/dma-proposal-effs-perspective](http://www.eff.org/pages/dma-proposal-effs-perspective).

<sup>81</sup> *For a general discussion of this tension in regulatory design, see Michael Karanicolas, 27 Building the Plane While Flying It: Technology and Legal Scholarship*, J. of L. & Tech. 4 (2022).

<sup>82</sup> OECD, *supra* note 8, at 31.

<sup>83</sup> Competition and Market Authority, *supra* note 7, at 347.

<sup>84</sup> Fiona S. Morton et al., *supra* note 1, at 33.

noted by the CMA, these codes of conduct are aimed at protecting competition rather than tackling the underlying causes of market power.<sup>85</sup>

While codes of conduct could face retaliation from large platforms, as happened with Google and Meta in Australia, mechanisms to avoid such retaliation could be established. In Australia, the code establishes arbitration and mediation processes in case of failed negotiations, and transparency and oversight requirements to avoid potential retaliation. Another way to avoid retaliation is to establish specialized agencies in charge of overseeing compliance with the code of conduct. The CMA recommendation of empowering the DMU is one example of this potential solution.

### 2. Establish antitrust safe harbors

Another initiative to be considered by regulators is to encourage news media to collectively bargain with digital platforms through antitrust safe harbors in order to rebalance their bargaining power. This is the type of intervention envisioned by the Journalism Competition and Preservation Act in the U.S.

While this is a popular solution advocated for by some in the news media industry, others have argued against this type of exemption, especially if the concerns with regard to the commercial relationship with digital platforms revolve around competition policy.<sup>86</sup> Another concern to be considered is the scope of this potential exemption, as regulators would need to determine whether it should be limited to small publishers. In that case, some criteria for a size threshold would need to be determined.<sup>87</sup> There have also been concerns that this kind of exemption would be inappropriate given the broader problems with concentration in the news market, which themselves have been faulted for the shutdown of news outlets and layoffs of journalists.<sup>88</sup>

### 3. Establish data-related interoperability obligations for digital platforms

Imposing data-related interoperability obligations on large digital platforms may help to remedy the asymmetry of bargaining power that is caused by the platforms' access to far more user data than publishers.<sup>89</sup> Specifically, regulators could mandate that platforms share the data that they acquired through the publication of third-party content on their own services. Additionally, data separation or data silos could be used by public authorities to limit platforms' ability to combine publishers' data for ad arbitrage.<sup>90</sup>

Data-based solutions could also be useful if applied to the open display advertising market. For example, the CMA has recommended that data on fees charged by ad tech intermediaries be provided to contracted parties. It has also encouraged a move to a more widespread publication of data on average fee or take rates in this space.<sup>91</sup> An investigation by the French competition authority against Google in 2021 found that Google's publisher ad server tools favored its own auction platforms, and that Google's auction platforms favored its own publisher ad servers. To end the investigation, Google proposed

<sup>85</sup> Competition and Market Authority, *supra* note 7 at 22.

<sup>86</sup> Chin, Caitlin, *How to Balance the Scales between Newspapers and Technology Giants*, CSIS (May 5, 2022), [www.csis.org/analysis/how-balance-scales-between-newspapers-and-technology-giants](http://www.csis.org/analysis/how-balance-scales-between-newspapers-and-technology-giants).

<sup>87</sup> *Id.* at 32.

<sup>88</sup> *Id.* at 33.

<sup>89</sup> *Id.* at 35.

<sup>90</sup> D. Jeon, *Market Power and Transparency in Open Display Advertising – A Case Study*, TOULOUSE SCHOOL OF ECONOMICS 25 (2021).

<sup>91</sup> Competition and Market Authority, *supra* note 7, at 28.

commitments to ensure interoperability of other auction platforms with its ad servers and to allow other ad servers to access information on real-time demand.<sup>92</sup> To prevent platforms like Google from engaging in practices to promote its own advertising intermediation tools, a likely solution is mandating interoperability of other auction platforms with large platforms' ad servers to access information on real-time demand.<sup>93</sup> Though the French agency mandated this solution after investigating Google, this could be most effective as a solution if it is imposed on all large technology platforms.

Data-based interoperability solutions may introduce privacy concerns, as it would force platforms to disclose more user information. These challenges would need to be addressed, or at least mitigated as far as possible. However, it is worth noting that some of these proposals have already been included in the DMA in Europe. Among other things, this legislation allows the platforms' business users to access the data that the end users engaging with the products or services of those business users generated in the gatekeeper's platform. It also mandates platforms to provide publishers to which they supply online advertising services data about the remuneration and the fees paid by the publishers and the price paid by advertisers for the ads displayed on the publishers' inventory. This data also includes the metrics on which these prices and remunerations are calculated by gatekeepers.<sup>94</sup>

### 4. Structural reforms and breaking platforms' vertical integration

A more aggressive antitrust response would involve separating large platforms' businesses. The Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives has recommended structural separations and line of business restrictions to deal with the market power of technology platforms across the digital markets in which they participate. Structural separations prohibit a dominant intermediary from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure. Line of business restrictions, meanwhile, generally limit the markets in which a dominant firm can engage.<sup>95</sup>

A similar approach could be used to tackle platforms' dominance in the ad market and their control over data. Regulators could mandate separating digital platforms' core business from their ad businesses<sup>96</sup> or restricting platforms' lines of businesses within the open display ad market. There seems to be some consensus over separating Google's businesses across the open display ad market.<sup>97</sup> As Google simultaneously controls publisher ad servers, ad exchange tools and advertisers' ad networks, it creates a conflict of interest. To resolve the monopolization of Google in this market, the Department of Justice is asking for this type of solution in the lawsuit it recently filed with several state attorneys. Specifically, the agency is asking for a divestiture of Google's publisher ad server and ad exchange tool.

Compared to other solutions, these types of remedies interfere to a greater extent in the platforms' property rights.<sup>98</sup> It is also not clear whether more structural remedies aiming at breaking platforms'

<sup>92</sup> *Id.* at 27.

<sup>93</sup> *Id.* at 27-28.

<sup>94</sup> European Parliament, Regulation (EU) 2022/1925 (Digital Markets Act) (2022), [www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925)

<sup>95</sup> Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets*, US House of Representatives 320 (Jul. 2022), [www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf](http://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf).

<sup>96</sup> OECD, *supra* note 8 at 35.

<sup>97</sup> Competition and Market Authority, *supra* note 7, at 27-28.

<sup>98</sup> Competition and Market Authority, *supra* note 7 at 354.

dominance over data and the ad market could effectively generate greater remuneration for news media. For example, one potential outcome of bringing more competition in the ad market could be a decrease in ad cost.<sup>99</sup> This may be good news for advertisers, but while such an increase in competition may increase news media revenue in the short term, over time, if the ad prices fall significantly, news media could end up with lower ad revenues than they currently have, despite having a greater proportion of the total revenues.

## Conclusion

Overall, policy responses to promote news media sustainability by encouraging a more competitive ad market have both benefits and downfalls. While codes of conduct may help address these issues more rapidly,<sup>100</sup> they lack the ability to tackle the more structural concerns related to big platforms' market power. The same can be said for antitrust safe harbors for news media bargaining organizations. Data-based solutions may have the ability to address the concerns related to platforms' monopoly on data and news media' lack of data more directly. However, they can also raise privacy concerns. Structural approaches to the problem, such as dismantling platforms' data monopoly and breaking vertical integration within the ad market are the most aggressive options. While they are the only responses that tackle the problem at its source, it is unclear whether they would help to resolve the sustainability challenges currently facing news media. By making the digital advertising market more competitive, they could help lower the prices for advertisements, which may ultimately mean less revenue for everyone.

The bottom line is that antitrust solutions are most effective when combined with complementary interventions, such as schemes to provide public funds to news organizations or impose transparency requirements on online platforms.<sup>101</sup>

While lawmakers debate the trade-offs of this set of policy proposals, antitrust agencies should remain vigilant in detecting abusive behavior by digital platforms over news media in the digital advertising space and applying their existing tools. As the recent lawsuit filed by the DOJ and state attorneys general against Google illustrates, the existing enforcement powers of antitrust agencies provide the flexibility needed to evaluate anticompetitive conduct on a case-by-case basis<sup>102</sup> and should not be set aside.

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<sup>99</sup> Maurice E. Stucke, *Here Are All the Reasons It's a Bad Idea to Let a Few Tech Companies Monopolize Our Data*, HARVARD BUS. REV. (Mar. 27, 2018) [www.hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data](http://www.hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data).

<sup>100</sup> Competition and Market Authority, *supra* note 7 at 23.

<sup>101</sup> Fiona S. Morton et al., *supra* note 1, at 3.

<sup>102</sup> Comisión Nacional de los Mercados y la Competencia, *supra* note 2, at 161.