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PLATFORMIZATION AND MEDIA CAPTURE: A FRAMEWORK FOR REGULATORY ANALYSIS OF MEDIA-RELATED PLATFORM REGULATIONS

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This article analyses the challenges of regulating the digital technology sector to support journalism in the era of platformization. It examines the interdependence between three categories of policy interventions proposed by regulators worldwide to rebalance the dynamics between journalism and online platforms: taxation and subsidies, copyright and licensing, and competition and anti-trust. By examining the theory of change driving each intervention, the benefits to publishers, and the potential for government intervention, this paper explores the risks of capture inherent in different approaches. It analyses the potential for media capture in each regulatory approach and with respect to further tying the future of journalism to the infrastructure provided by tech platforms. Capture through platformization is not well understood or considered by policymakers, and many debates over regulation rightly focus on the potential for political influence, but they fail to consider the broader implications of specific policy interventions on infrastructure capture. This article argues that policymakers must establish a transparency framework to provide better data and understanding of the relationship between online platforms and news media. Without it, interventions will be ineffective,

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and dependency ensured. It concludes with a discussion on the importance of defining the objectives of new laws and crafting them in ways that minimize threats to media independence and sustainability. This article provides a theoretical contribution to the broader emerging discourse on platformization and media capture and offers practical recommendations for policymakers based on comparative analysis and an assessment of evidence and impact.

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INTRODUCTION

The urgency with which experts, regulators, and economists have been considering how to support local journalism and govern the digital technology sector has increased in recent years, propelled by shifts in technology, rising populism and authoritarianism, and a global pandemic. The challenge of addressing the regulatory disparity in how media are regulated as compared to the most popular digital platforms has led to a wave of new laws and proposed regulations around the world that seek to rebalance journalism-platforms dynamics and “make big tech pay for the news they use.”¹ The platformization of journalism, that is, the penetration of digital platforms and their economic, political, and infrastructural logic into information communications ecosystems,² not only led to the decoupling of advertising and journalism, which has decimated revenues, but has also forced the news industry to adapt to algorithmic intermediation and the pervasive “forcing logic” of the platform era. Attendant questions about how to design policy interventions and financial support that ensure editorial independence and minimize political influence and media capture have thus become increasingly important.

This platformization of journalism and the tenuous sustainability of most independent news media threatens the existing foundation of commercial news media model and the public interest role of journalism around the world. With fewer resources, less influence over public opinion, and more dependency on platforms, there is growing concern that news media will not be capable of resisting capture by the state and the private sector.³ This Article is the first to compare the current range of policy interventions and place them in the context of broader concerns about media capture. To that end, it examines three categories of policy interventions that have been tried or proposed by regulators around the world and analyzes the evidence of their effectiveness and

¹ Courtney C. Radsch, *Making Big Tech Pay for the News They Use*, *CTR. FOR INT’L MEDIA ASSISTANCE* (July 7, 2022), <https://www.cima.ned.org/publication/making-big-tech-pay-for-the-news-they-use>.

² David B. Nieborg & Thomas Poell, *The Platformization of Cultural Production: Theorizing the Contingent Cultural Commodity*, 20 *NEW MEDIA & SOC’Y* 4275, 4276 (2018); Courtney Radsch, *Digital Information Access*, in *A NEW GLOBAL AGENDA: PRIORITIES, PRACTICES, AND PATHWAYS OF THE INT’L CMTY.* 72 (D. Ayton-Shenker ed., 2018); Kelly Fincham, *Business as Usual: How Journalism’s Professional Logics Continue to Shape News Organization Policies Around Social Media Audiences*, *JOURNALISM PRAC.*, Nov. 2, 2021 at 1.

³ Paul Starr, *An Unexpected Crisis: The News Media in Postindustrial Democracies*, 17 *THE INT’L J. OF PRESS/POL.* 234, 234, 240 (2012).

susceptibility to various forms of capture. These categories include taxation and subsidies through taxes; copyright and licensing; and competition and anti-trust. I explore the theory of change driving each intervention, the benefits that accrue to publishers, the potential for government intervention, and the impact on platformization. This analysis further underscores the interdependency between the three interventions.

This Article therefore contributes to immediate policy discussions, at one level, through comparative analysis and an assessment of evidence and impact of these approaches. Second, the article makes a more theoretical contribution by situating these policies within a broader emerging discourse on platformization and media capture.

The Article proceeds as follows: Part I begins with an analytical description of platformization of journalism and digital advertising. Drawing from infrastructure platforms studies, it focuses on the role played by Meta (via Facebook) and Alphabet (via Google Search and YouTube) in shaping priorities and practices in newsroom and what I call journalism's adtech problem⁴.

Part II examines the main types of interventions that policymakers are taking to redress perceived economic imbalances and rebalance power dynamics between these platforms and the news media. The first involves tax interventions, such as taxing digital advertising or other tech intermediaries and allocating those funds to support journalism or providing indirect subsidies through tax benefits via citizens. The second approach involves rethinking intellectual property rights to give news publishers the right to claim copyright protections, and thus the right to license snippets and other content that is often used for free by news aggregators and other online services. The third approach involves using competition law to correct market failures. This includes leveling the playing field by increasing news media bargaining power through anti-trust exemptions or imposing transparency requirements that aim to address market distortions caused by information asymmetries. The last proposal draws on infrastructural theory to rethink platforms as public utilities to support journalism.

Part III examines the risks of capture embedded in different approaches and decision points that show up for the efficacy of each approach and the interdependence between them. In particular, it reviews the available evidence on the link between online traffic and revenue for news publishers. And it argues that without a transparency framework to

⁴ Radsch, *Making Big Tech Pay for the News They Use*, *supra* note 1, at 3–4.

provide better data and understanding of the relationship between online platforms and news media, policymakers will be unable to make information-based interventions.

There is a perception that lax regulation and enforcement of existing laws have created regulatory disparities between tech platforms and publishers that are compounded by market power differentials and public interest orientation. Given that the law not only reacts to sociotechnical change, but also constructs it,⁵ it is important to define the objectives of these new laws and craft them in ways that minimize threats to independence and sustainability. Restructuring financial support to the news industry could have profound and unknown ramifications for journalism and the news industry. Thus, a regulator must consider the potential that these shifts have for media capture and independence.

I. PLATFORMIZATION OF JOURNALISM AND DIGITAL ADVERTISING

Over the past two decades, news production has been severed from news distribution and monetization while digital advertising has replaced much traditional advertising. And although social media platforms have enabled new and creative forms of journalism and public participation, this intermediation also binds journalists and the news industry to a platform logic. News media must adapt to the technical requirements for each platform and the forcing function of algorithms while navigating the complex and evolving community standards and terms of service to ensure that they optimize engagement but do not violate the rules.⁶ This platform logic is based on a business model designed around datafication, engagement, and profit maximization,⁷ not public interest, accuracy, newsworthiness, or other values that define the logic of journalism.⁸

⁵ Margot E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C. DAVIS L. REV. 589, 592 (2017).

⁶ Jean-Christophe Plantin et al., *Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook*, 20 NEW MEDIA & SOC'Y 293, 297 (2018); see also Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech* 131 HARV. L. REV. 1598 (2018).

⁷ Nathalie Maréchal et al., *Getting to the Source of Infodemics: It's the Business Model*, NEW AMERICA, <http://newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model>, (last updated May, 2020).

⁸ See MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* ch. 1 (2003); see also Pierre Bourdieu, *The Political Field, the Social Science Field, and the Journalistic Field*, in BOURDIEU AND THE JOURNALISTIC FIELD 29 (Rodney Benson & Erik Neveu eds., 2005).

A focus on platforms considers how digital systems and networked media enable and constrain communication and expression, specifically the role of major social media and adtech on journalism.⁹ News organizations are dependent on platforms for access to their networks, audiences, data, publishing protocols, advertising revenue, and funding. This dependency influences editorial, organizational, and business choices. Platforms provide technical infrastructures to media organizations, but as “builders of infrastructure...[they] are aggressive companies with their own interests, business models, and bottom lines.”¹⁰ The concept of infrastructure is important here because infrastructures are ubiquitous, reliable and durable and thus generate dependency and habituation, and they are often provided for or regulated by governments in the public interest.¹¹ Grafting together concepts from infrastructure studies and platform studies gives us platformization. Platformization thus refers to the penetration of digital platforms and their economic, political, and infrastructural logic into the web and app ecosystems, fundamentally affecting the operations of industries like journalism. It inevitably and coercively creates new dependencies, which are reflected in business models, professional and institutional practices, and norms that shape the journalism field.¹²

Although there are a wide range of digital infrastructures and platforms¹³ that intersect with the journalism field, this Article focuses on the two primary platforms for journalism and advertising, which are also the two primary targets of regulatory intervention: Meta, which owns Facebook, Instagram and WhatsApp, and Alphabet, which also owns Google and YouTube¹⁴. Understanding how

⁹ Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, COLUM. UNIV. TOW CTR. FOR DIGIT. JOURNALISM (Mar. 29, 2017), https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php; Plantin et al., *supra* note 6.

¹⁰ JOSHUA A. BRAUN, THIS PROGRAM IS BROUGHT TO YOU BY . . . DISTRIBUTING TELEVISION NEWS ONLINE 90 (2015).

¹¹ Plantin et al., *supra* note 6; Jean-Christophe Plantin & Aswin Punathambekar, *Digital Media Infrastructures: Pipes, Platforms, and Politics*, 41 MEDIA, CULTURE & SOC’Y 163 (2019).

¹² Nieborg & Poell, *supra* note 2, at 4276; Radsch, *Digital Information Access*, *supra* note 2, at 70; Fincham, *supra* note 2, at 1.

¹³ Plantin & Punathambekar, *supra* note 11, at 164; *see also* Ethan Zuckerman, *The Case for Digital Public Infrastructure*, KNIGHT FIRST AMEND. INSTI. AT COLUM. UNIV. (2020), <https://s3.amazonaws.com/kfai-documents/documents/7f5fdaa8d0/Zuckerman-1.17.19-FINAL-.pdf>.

¹⁴ *See generally* Nic Newman et al., *Digital News Report 2022*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2022), <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022>.

platformization affects the news industry provides context and rationale for the legal regulatory interventions discussed in Part II.

A. The Forcing Logic of Platforms

Publishers and journalists must contend with platform policy, design, and algorithmic intermediation as they navigate the complex and evolving community standards and terms of service to ensure that they optimize engagement and monetization, while also not violating the rules. This is the coercive forcing logic of platformization, which of course also shapes editorial choices and strategies. Both Facebook and Google, for example, launched formats specifically aimed at publishers in 2015. Facebook's Instant Articles format was designed to load faster, drive engagement, and allow publishers to access its Audience Network ad network rather than inserting their own ads;¹⁵ However, the format also obscured information like the original URL that could identify publishers (and help them build brand recognition) and help users and algorithmic systems alike evaluate the associated content.¹⁶ Google's Accelerated Mobile Pages (AMP) used a proprietary markup language and were cached on Google servers, allowing the pages to load faster.¹⁷ While use of AMP was voluntary, Google's search algorithm prioritized pages that used the service, giving publishers a compelling reason to use the product, and allowing the platform to garner valuable traffic insights from the pages.¹⁸ For several years, the companies encouraged publishers to

Facebook changed its name to Meta but remains the target in some countries seeking to impose social media regulations, as these have typically been distinct from that for messaging apps. In other countries, however, Meta is the focus of antitrust and competition regulation that targets Meta as well as Facebook. *Id.*

¹⁵ See *Meta for Media: Instant Articles*, META, <https://www.facebook.com/formedia/tools/instant-articles> (last visited Jan. 22, 2023).

¹⁶ See Mack DeGeurin, *RIP Facebook Instant Articles: 2015-2023*, GIZMODO (Oct. 14, 2022), <https://gizmodo.com/facebook-meta-news-instant-articles-1849660590>; Jane Lytvynenko, *Big Publishers Are Abandoning Instant Articles but Fake News Spammers Are All In*, BUZZFEED NEWS (Feb. 7, 2018, 7:43 AM), <https://www.buzzfeednews.com/article/janeltyvynenko/fake-news-in-instant-articles>.

¹⁷ Leon Yin & Adrienne Jeffries, *How We Analyzed Google's Search Results*, THE MARKUP (July 28, 2020, 8:00 AM), <https://themarkup.org/google-the-giant/2020/07/28/how-we-analyzed-google-search-results-web-assay-parsing-tool>; Alessandro Bonatti et al., DIGITAL REGULATION PROJECT MORE COMPETITIVE SEARCH THROUGH REGULATION 30, (2021).

¹⁸ Bonatti et al., *supra* note 17, at 30 n. 75.

use their formats to improve page loading time and allow content to appear in certain sections¹⁹; but recently they announced major changes to these formats, forcing publishers to once again adapt to new platform priorities. These types of changes impose adaptation costs on publishers and require technical knowledge and new algorithmic optimization strategies.

Similarly, major tweaks to platform algorithms or priorities can have massive financial and editorial impacts on news organizations, including closures and layoffs.²⁰ For example, when Facebook decided to prioritize video in 2015 because it claimed data showed that users preferred video content, publishers pivoted to video.²¹ They reoriented their editorial priorities, aligning with platform priorities, and made relevant staffing changes.²² Publishers saw steep drops in revenue as they found that they were less able to monetize video content amid measurement gaps, coercive revenue-sharing deals, and advertising that paid a fraction of the rate

¹⁹ Google dropped the requirement that articles be built in the custom Accelerated Mobile Pages (AMP) format and Facebook stopped support for Instant Articles. See Dieter Bohn, *Google Search Results Will Take 'Page Experience' into Account Next Year*, THE VERGE, (May 28, 2020, 9:00 AM), <https://www.theverge.com/2020/5/28/21272543/google-search-results-page-experience-load-time-contentfu-paint-layout-shift-top-stories-amp>; see also Jay Peters, *Meta's Instant Articles for Facebook Will Be Going Away*, THE VERGE (Oct. 14, 2022, 10:32 AM), <https://www.theverge.com/2022/10/14/23404626/meta-facebook-instant-articles-end-support>.

²⁰ Alexis C. Madrigal & Robinson Meyer, *How Facebook's Chaotic Push into Video Cost Hundreds of Journalists Their Jobs*, THE ATLANTIC (Oct. 18, 2018), <https://www.theatlantic.com/technology/archive/2018/10/facebook-driven-video-push-may-have-cost-483-journalists-their-jobs/573403/>; Lucia Moses, *Uh-Oh, Some Publishers See a Drop in Facebook Traffic*, DIGIDAY (Apr. 8, 2016), <https://digiday.com/media/publishers-just-saw-decline-facebook-traffic/>; Max Willens, *Hope Springs Eternal for Publishers Trying Yet Again with Facebook News*, DIGIDAY (Oct. 24, 2019), <https://digiday.com/media/more-long-term-commitment-hope-springs-eternal-for-news-publishers-on-the-eve-of-facebook-news-launch/>.

²¹ Cale Guthrie Weissman, *Facebook Tells Us How Great Video Is After Forcing Everyone to Pivot to It*, FAST CO. (July 21, 2017), <https://www.fastcompany.com/4044130/facebook-tells-us-how-great-video-is-after-forcing-everyone-to-pivot-to-it>.

²² Heidi N. Moore, *The Secret Cost of Pivoting to Video*, COLUM. JOURNALISM REV. (Sept. 26, 2017), https://www.cjr.org/business_of_news/pivot-to-video.php; Will Oremus, *The Big Lie Behind the 'Pivot to Video'*, SLATE (Oct. 18, 2018), <https://slate.com/technology/2018/10/facebook-online-video-pivot-metrics-false.html>.

²³ Lucia Moses, *Pivoting-to-Video Publishers Face a Big Monetization Gap*, DIGIDAY (Sept. 28, 2017), <https://digiday.com/future-of-tv/pivoting-video-publishers-face-big-monetization-gap/>.

publishers could charge on their website.²³ It was only later discovered that the company inflated its metrics, according to a lawsuit.²⁴ Later, when Facebook decided in 2018 to deprioritize media in favor of “meaningful” content from friends, news organizations suffered²⁵ and some went out of business.²⁶ These incidents on Facebook are just a few examples of how the way platforms engage in content moderation has a profound impact on the visibility, monetization, and sustainability of media outlets around the world.²⁷

B. The Platformization of Advertising

Platformization has given rise to a new advertising infrastructure built by ad tech firms and founded on programmatic advertising and behavioral targeting that rely on complex. It relies on automated exchanges that commodify audience attention even as it disassociates it from editorial value. There are two primary types of digital advertising: contextual advertising and targeted programmatic advertising. The first defined much of modern media advertising, but has grown out of favor with the shift toward behavioral microtargeting that dominates the digital adtech system. Targeted programmatic advertising has two primary types, display and search, both of which are served to users

One publisher was quoted as saying that native publishing on its own site could get a \$70 CPM, but this dropped to an effective ad rate of around \$20 on Facebook and YouTube. *Id.*

²³ Kelsey Sutton, *Facebook Video Ad Metric Lawsuit Prompts Publishers to Revisit the ‘Pivot to Video,’* AD WEEK (Oct. 19, 2018), <https://www.adweek.com/performance-marketing/facebook-video-ad-metric-lawsuit-prompts-publishers-to-revisit-the-pivot-to-video/>; Oremus, *supra* note 22.

²⁵ Mark Zuckerberg, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>; Kevin Tran, *Publishers Are Trying to Navigate Facebook’s Algorithm Change*, BUS. INSIDER (June 27, 2018), <https://www.businessinsider.com/publishers-navigate-facebooks-algorithm-change-2018-6>.

²⁶ Anthony Ha, *LittleThings Blames Its Shutdown on Facebook Algorithm Change*, TECHCRUNCH (Feb. 18, 2018), <https://social.techcrunch.com/2018/02/28/littlethings-shutdown/>.

²⁷ See Courtney Radsch, *Weaponizing Privacy and Copyright to Silence Independent Media*, CTR. FOR INT’L GOVERNANCE INNOVATION (CIGI) (forthcoming); Courtney Radsch, *Tweaking a Global Source of News*, COLUM. JOURNALISM REV. (2018), https://www.cjr.org/special_report/internet-intermediary-news.php/; Courtney C. Radsch *The Politics of Labels: How Tech Platforms Regulate State Media*, in 2020 ANNUAL REPORT: DYNAMIC COALITION ON THE SUSTAINABILITY OF JOURNALISM AND NEWS MEDIA 37-49 (Daniel O’Maley et al., eds., 2020), <https://gfmd.info/h-content/uploads/2021/11/DC-Sustainability-Annual-Report-2020-FINAL-gfmd.pdf>.

via a complex network of intermediaries and algorithmically driven systems that are designed to prioritize relevance and engagement.

The infrastructure of digital advertising is built on personal data, behavioral targeting, automated real-time auctions, and a complex system of intermediaries playing to the rules set by the major platforms and their APIs, which act as gateways for a two-way flow of traffic that traps them in the platform's walled garden.²⁸ The transition of the advertising market from contextual to targeted behavioral programmatic advertising has created a complicated market based on micro targeting individuals through the use of cookies and precise user tracking. This adtech system has resulted in a new advertising ecosystem that redirects revenue that previously went directly to publishers to an array of intermediaries, particularly Google and Facebook.²⁹

Thus, Google and Facebook have not only become the main way that publishers reach their readers, but they also control significant infrastructural aspects of the adtech system. Google has long dominated the search advertising market, capturing 90 percent of search advertising revenues and charging significantly higher prices than its competitors, while Facebook accounts for more than half of all display advertising revenues and similarly earns higher revenues per user than its competitors.³⁰ Together, they dominate 60 percent of all digital ad revenue,³¹ though in individual countries this may be much greater.³² Digital advertising makes up more than 55 percent of advertiser budgets, a

²⁸Julian Thomas, *Programming, Filtering, Adblocking: Advertising and Media Automation*, 166 MEDIA INT'L AUSTL. 34-43 (Feb. 2018); ISBA, ISBA PROGRAMMATIC SUPPLY CHAIN TRANSPARENCY STUDY LONDON (May 2020), <https://www.isba.org.uk/system/files/media/documents/2020-12/executive-summary-programmatic-supply-chain-transparency-study.pdf>.

²⁹ Amazon is also becoming a key platform in the advertising ecosystem.

³⁰ *Big Tech Says Publishers Keep Majority of Ad Revenue, but Experience Suggests Otherwise*, NEWS MEDIA ALL. (Nov. 16, 2020), <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/>; *Final Report Regarding Digital Advertising: Fact-Finding Survey Report on Digital Platform Operators' Trade Practices*, JAPAN FAIR TRADE COMM'N (Feb. 21, 2021), <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/211012-2.pdf>.

³¹ Ethan Cramer-Floor, *Duopoly Still Rules the Global Digital Ad Market, but Alibaba and Amazon Are on the Prowl*, INSIDER INTEL. (May 10, 2021), <https://www.emarketer.com/content/duopoly-still-rules-global-digital-ad-market-alibaba-amazon-on-prowl>.

³² In Australia, for example, the Australian Competition and Consumer Commission found that Google and Facebook (now Meta) accounted for more than 80 percent of the country's digital advertising market. *Id.*

proportion that is only growing.³³ With Google, Meta and Amazon absorbing more than half of all ad money this year,³⁴ the rest of the internet ecosystem is left to compete for the remaining portion based on a market logic shaped by platformization.

The share that news and magazines have of this half-a-trillion dollar digital advertising market has dropped precipitously as their competition from myriad content creators has exponentially expanded – in just over a decade news and magazine went from hosting half of all advertising spending globally to less than 10 percent.³⁵ While there are disagreements about to what extent platforms should be held responsible (some would label them liable) for either claiming responsibility for the situation of the news media or responsible for proactively supporting and funding the media, many policymakers see a role for platforms to address some of the challenges facing news media and the important role they play in the democratic public spheres. And regardless of whether platforms are to blame, the facts are the same and are marshalled to defend policy interventions. News media advertising revenue fell to \$49 billion in 2019, half of what it had been a decade earlier, with a further 25 percent decline in 2020 due to COVID-19 even though online advertising is up overall by more than 20 percent.³⁶ Meanwhile, revenue from digital subscriptions and circulation has not come anywhere close to closing the gap - in 2019 it was estimated at just five billion dollars and combined revenues from advertising and circulation is expected to decline by about 20 percent through 2024.³⁷

Furthermore, the disintermediation of the advertising market by Google, Facebook, and a labyrinth of data management platforms and exchanges means that publishers keep a fraction of the money spent by advertisers. A

³³ NEWS MEDIA ALL., *Big Tech Says Publishers Keep Majority of Ad Revenue, but Experience Suggests Otherwise*, *supra* note 30.

³⁴ Seb Joseph, *The Rundown: Google, Meta and Amazon Are on Track to Absorb More than 50% of All Ad Money in 2022*, DIGIDAY (Feb. 4, 2022), <https://digiday.com/marketing/the-rundown-google-meta-and-amazon-are-on-track-to-absorb-more-than-50-of-all-ad-money-in-2022/>.

³⁵ The Editorial Board, *Big Tech's Reckoning over Paying for News*, FIN. TIMES (Jan. 27, 2021), <https://www.ft.com/content/989f2837-16cb-4614-aa75-183eacd88fa6>; Fernando N. Van der Vlist & Anne Helmond, *How Partners Mediate Platform Power: Mapping Business and Data Partnerships in the Social Media Ecosystem*, 8 BIG DATA & SOC'Y 1-16 (Jan. 1, 2021).

³⁶ GLOBAL FORUM FOR MEDIA DEVELOPMENT, ANNUAL STRATEGY (2021).

³⁷ Alex Webb, *Can Google Fix the \$108 Billion News Industry It Helped Break?* BLOOMBERG (Jan. 18, 2021), <https://www.bloomberg.com/opinion/articles/2021-01-18/can-google-facebook-fix-the-108-billion-news-industry-it-helped-break>.

benchmark study found that publishers received an average of just 51 percent of the advertiser spend, with the remainder going to various intermediaries in the supply chain, a third of which was unaccounted for.³⁸ Experts in India estimate that small publishers give upwards of 25 percent of ad revenue to Google alone³⁹ while authorities in Japan and the UK estimated that, on average, 35 percent of the value of advertising went to intermediaries rather than publishers⁴⁰, though it is hard to verify this because the platform is not required to share revenue or data with publishers.

The opacity and complexity of the adtech supply chain compounds the difficulty for publishers to create sustainable and reliable revenue streams, while experiments with media outlets forgoing adtech suggest that a reversion to contextual advertising could reduce the amount of ad spend seepage.⁴¹ This has prompted lawmakers to consider how to impose a transparency requirement that could help redress the imbalance. However, given that the vast majority of users get their information on these platforms and these platforms dominate the digital advertising ecosystem, publishers have limited alternatives⁴² and are therefore subject to infrastructural capture.

These market dynamics have led policymakers around the world to consider how to address the competition issues at the heart of the system and how to rectify the perceived imbalances between online platforms and publishers. They have empowered news media to negotiate collectively with platforms and pursued anti-trust and transparency interventions in the platform economy. They have imposed new taxation, new copyright and licensing approaches and are legislating transparency requirements. But despite the growing interest in pursuing Australia's approach, there are fundamental data

³⁸ ISBA, *supra* note 28, at 8.

³⁹ Imran Fazal, *Digital Publishers vs. Google*, IMPACT (Jan. 25, 2022), <https://www.impactonnet.com/amp/cover-story/digital-publishers-vs-google-7772.html>.

⁴⁰ COMPETITION AND MKTS. AUTH., *Online Platforms and Digital Advertising: Market Study Final Report*, (July 1, 2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf. In Japan the estimate was 30-40%. JAPAN FAIR TRADE COMM'N, *supra* note 30.

⁴¹ Augustine Fou, *Marketers and Publishers Are Making More Money by Using Less Adtech*, FORBES (Aug. 7, 2020), <https://www.forbes.com/sites/augustinefou/2020/08/07/marketers-and-publishers-are-making-more-money-by-using-less-adtech/>.

⁴² COMPETITION AND MKT.'S AUTH., *supra* note 40.

1. *What is the relationship between traffic and revenue?*

Competition or copyright law may be used to force tech platforms to remunerate publishers, if the assumption is correct that platforms derive a benefit from news content and that publishers are not adequately compensated for use of their content. The main way that people come across news is on social media and via search; the rest access news sites directly and a far smaller number use news aggregators.⁴³ Researchers posit different potential effects on the news industry from news aggregators in terms of discoverability, visibility, and revenue generation. The ‘substitution effect’ posits that news aggregators reduce visits to publishers’ website whereas the complementary and ‘market expansion’ effects posit an overall stasis or increase in news consumption.

Two studies from more than six years ago indicated that news aggregators appeared to have a substitution effect, leading to declines in visits to newspapers’ homepages.⁴⁴ The studies in Germany and Spain were conducted following implementation of new publisher copyrights and found that Google News had in fact expanded the market for news, driving traffic to websites.⁴⁵ This was especially true for small publishers.⁴⁶ According to the law of unintended consequences, those neighboring rights resulted in a two-fold decline in traffic to small publishers while further entrenching Google’s dominance by putting competing news aggregators out of business.⁴⁷ In Germany, where publishers negotiated a free license with Google, the country’s largest publisher held out for just two weeks, giving in and licensing its content after

⁴³ The use of the term “people” obscures the fact that the most global survey of digital news does not cover much of the Global South or any Least Developed Countries (LDCs). Nic Newman et al., *Reuters Institute Digital News Report 2021*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2021), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf.

⁴⁴ Eleonora Rosati, *Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?* 47 IIC – INT’L REV. INTEL. PROP. AND COMPETITION L. 569–94 (Aug. 1, 2016).

⁴⁵ Giuseppe Colangelo & Valerio Torti, *Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform*, 27 INT’L J. L. AND INFO. TECH. 75–90 (Mar. 1, 2019); Anna Solana, *The Google News Effect: Spain Reveals the Winners and Losers from a ‘Link Tax,’* ZDNET (Aug. 14, 2015), <https://www.zdnet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/>.

⁴⁶ Susan Athey et al., *The Impact of Aggregators on Internet News Consumption* 3 (Nat’l Bur. of Econ. Rsch., Working Paper No. 28746, 2021).

⁴⁷ Solana, *supra* note 45; Athey et. al., *supra* note 46.

a 40 percent drop in traffic from Google search results and an 80 percent drop from Google News referrals.⁴⁸

But while data from actual news viewing habits in the immediate aftermath of these natural experiments and the experience of publishers backed up the idea that referrals from Google and Facebook were a net win for traffic to publisher websites, these effects appear to be limited in duration and the revenue implications remain unknown. A longer-term study by Spanish publishers and a news industry group found that reduction in traffic was low, temporary, and offset by increased higher-quality organic traffic.⁴⁹ Organic traffic allows publishers to directly collect revenue and data from its news consumers while improving brand recognition and turning visitors into subscribers. Furthermore, the few examples of news organizations that have opted out of Facebook entirely show minimal impact on traffic or revenue, or even improvement in time spent reading articles.⁵⁰

A summary of studies into the impacts on traffic to Spanish news sites following its 2014 copyright law and Google News closure offer contradictory evidence for the impact experienced by news outlets, and suggest that research into the duration of initial traffic and revenue effects and how these are experienced by different types of outlets is needed. Such research underscores the need for data and the role that transparency mandates could play in improving access to such information. For example, Spanish news sites saw a 10 to 15 percent reduction in traffic in the immediate aftermath of Google News' closure, with fewer external referrals but a rise in internal traffic from other publishers, indicating that readers were moving between sites rather than coming from

⁴⁸ Harro Ten Wolde & Eric Auchard, *Germany's Top Publisher Bows to Google in News Licensing Row*, REUTERS (Nov. 5, 2014), <https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105>; Michael Filtz, *Major German News Sites Stay in Google News, Despite Protesting Against It*, ZDNET (Aug. 2, 2013), <https://www.zdnet.com/article/major-german-news-sites-stay-in-google-news-despite-protesting-against-it/>.

⁴⁹ *The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure*, NEWS MEDIA ALL. (Nov. 2019), https://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report_11-7-19.pdf.

⁵⁰ *Facebook and the News: It's Complicated*, NPR (Mar. 24, 2021), <https://www.npr.org/2021/03/24/980931358/facebook-and-the-news-its-complicated>; Jessica Davies, *After It Stopped Posting to Facebook, a Danish Broadcaster Saw Its Traffic Stability Improve*, DIGIDAY (Feb. 7, 2018), <https://digiday.com/media/cutting-ties-facebook-danish-broadcaster-saw-traffic-stability-improve/>.

aggregators.⁵¹ A study commissioned by the Spanish Association of Publishers and Periodicals (AEEPP) found that in early 2015 Spanish news sites saw an average traffic declined by six percent, with smaller publications experiencing a 14 percent drop.⁵² Two academic papers found similar reductions in visits to news sites of about 10 percent, with small publishers seeing more significant falls than large publishers who say increased traffic to their home pages offset less traffic to article pages.⁵³ However, a longer-term study by Spanish publishers and a news industry group found that this reduction in traffic was low and temporary and offset by increased higher-quality organic traffic.⁵⁴ A core problem is that referral traffic often doesn't translate into revenue. Studies show that publishers are making less money even though traffic remains the same.⁵⁵ Facebook claimed that Australian news media received free referrals from traffic generated on the platform that were worth \$350 million in 2020.⁵⁶ Google claimed in 2013 that it sent more than 10 billion visits per month to news publishers around the world, with publishers receiving more than \$9 billion through AdSense alone.⁵⁷ This rose to 24 billion visits to news websites each month in 2022, according to the company.⁵⁸ Facebook has

⁵¹ Mathew Ingram, *External Traffic to Spanish News Sites Plummets After Google Move*, GIGAOM (Dec. 16, 2014), <https://gigaom.com/2014/12/16/traffic-to-spanish-news-publishers-plummets-after-google-move/>; *Spanish News Sites Down up to 12% After Google News Closure*, TELECOMPAPER (2015), <http://www.telecompaper.com/news/spanish-news-sites-down-up-to-12-after-google-news-closure--1062419>.

⁵² Alberto Gutiérrez García & Hugo Hernández Cobos, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual: Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)*, NERA ECON. CONSULTING (July 9, 2015).

⁵³ Athey et al., *supra* note 46.

⁵⁴ NEWS MEDIA ALL., *The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure*, *supra* note 49.

⁵⁵ ISBA, *supra* note 28; NEWS MEDIA ALL., *Big Tech Says Publishers Keep Majority of Ad Revenue, but Experience Suggests Otherwise*, *supra* note 30.

⁵⁶ Richard Waters et al., *Big Tech Versus Journalism: Publishers Watch Australia Fight with Bated Breath*, FIN. TIMES (Feb. 18, 2021), <http://www.proquest.com/docview/2503121052/citation/A65CB21A0FD945D4PQ/1>.

⁵⁷ Luis Collado, *Google y los Editores*, GOOGLE (Feb. 28, 2014), <https://espana.googleblog.com/2014/02/google-y-los-editores.html>.

⁵⁸ Sundar Pitchai, *Our \$1 Billion Investment in Partnerships with News Publishers*, GOOGLE NEWS INITIATIVE (Oct. 1, 2020), <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/>.

recently claimed that only one in every 25 News Feed posts contain links to news stories.⁵⁹

But these industry-sponsored studies are at odds with other research and empirical evidence that shows minimal loss in publisher revenue and the value creation of direct traffic. However, more independent research is needed to understand the medium and long-term links between referral traffic and revenue. Given the limited access to platform data, the lack of transparency and accountability with respect to the company's own research, their retaliation against employees who seek to share research findings, and the over reliance on whistleblowers and investigative journalists to find out what companies know, self-reporting and internal research is inadequate.⁶⁰

II. POLICY OPTIONS & TYPES OF INTERVENTIONS

Part II analyzes the main legal regulatory efforts that various governments are pursuing, including the context and underlying theory of change behind them, the benefits that are expected to accrue to publishers, the potential for government intervention or capture, and the impact on platformization, that is, to what extent do these proposals tie media sustainability and independence to specific platforms as opposed platform-agnostic policies? Understanding how these policies have been implemented and the political issues surrounding various proposals can illuminate key areas where risk of capture is greatest.

Policymakers have coalesced around interventions focused on taxation, intellectual property, and competition or antitrust. The building blocks include:

⁵⁹ Nick Clegg, *The Real Story of What Happened with News on Facebook in Australia*, META (Feb. 24, 2021), <https://about.fb.com/news/2021/02/the-real-story-of-what-happened-with-news-on-facebook-in-australia/>.

⁶⁰ Karen Hao, *Inside the Fight to Reclaim AI*, MIT TECH. REV. (June 14, 2021), <https://www.technologyreview.com/2021/06/14/1026148/ai-big-tech-timnit-gebru-paper-ethics/>; Queenie Wong, *Facebook Disables Accounts Tied to NYU's Research into Political Ads*, CNET (Aug. 4, 2021), <https://www.cnet.com/news/facebook-disables-accounts-tied-to-nyus-research-into-political-ads/>; Craig Silverman et al., *'I Have Blood On My Hands': A Whistleblower Says Facebook Ignored Global Political Manipulation*, BUZZFEED NEWS (Sept. 14, 2020), <https://www.buzzfeednews.com/article/craigsilverman/facebook-ignore-political-manipulation-whistleblower-memo>; Susan Benesch, *Nobody Can See Into Facebook*, THE ATLANTIC (Oct. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/facebook-oversight-data-independent-research/620557/>.

- Allowing publishers to collectively bargain without violating antitrust laws
- Requiring platforms negotiate with publishers for the use of news snippets
- Requiring platforms to pay licensing fees to publishers
- Taxing digital advertising and using the resulting revenues to subsidize news outlets
- Mandating transparency from platforms
- Subsidies paid directly or indirectly to news outlets

This Part of the Article analyzes these approaches in greater depth.

A. Taxation

One idea that shows up in various policies is subsidizing the news industry via taxes or levies imposed on various parts of the technology sector.⁶¹ Targets range from the hardware or infrastructure used to connect to the internet and digital networks to services like digital advertising. Another approach would be to distribute subsidies at the local citizen level to support journalism or to alleviate tax burdens for online news, bypassing platforms altogether. The collection of taxes to support local independent journalism is distinct from questions about distribution, which I discuss in PART III.

1. *Taxing the Tech Stack*

There are two types of taxes on technology companies that have been proposed to subsidize the news media: a levy where funds are collected and redistributed by a non-governmental entity to beneficiaries, or a tax in which government collects and distributes the revenue.⁶² These taxes can focus on different layers of the tech stack — the

⁶¹ A levy refers to a flat or fixed rate imposed on a specific item, service or transaction where funds are collected and redistributed by a third-party, like a collecting society or fee collection agency, whereas a tax refers to revenue collected and distributed by the government for public goods that do not necessarily benefit a specific taxpayer. See Kit Kowol & Robert G. Picard, *Content Taxes in the Digital Age: Issues in Supporting Content Production with Levies on ISPs, Telecoms, Search and Aggregator Firms, and Digital Products*, OXFORD UNIV.: REUTERS INST. FOR THE STUDY OF JOURNALISM at 11 n. 5 (2014), <https://www.apmadrid.es/wp-content/uploads/2014/02/Content%20taxes%20in%20the%20digital%20age.pdf>.

⁶² For similarity I use tax and taxation to refer to both types of government-imposed fiscal interventions. Kowol & Picard, *supra* note 61.

application level, the infrastructure level, or the hardware — and target different groups for raising revenues including: consumers, advertisers, device manufacturers, digital platforms, and service providers. Taxes have effects on behavior and the broader economy outside the immediate monetary transactions,⁶³ and thus it is important to consider how taxation could impact news consumption.

Taxing hardware focuses on the devices that are used to consume the news, such as smartphones, computers, or tablets. Some countries use hardware taxes to support public goods, like public service media. In the UK, television consumers pay a license fee for each television which goes to support the British Broadcasting Corporation (BBC), the UK's public service broadcaster, though with the shift toward streaming on computers and mobile phones it is unclear how sustainable this is. Kenya has levied special taxes and import duties on mobile phones and SIM cards, though there was concern that this approach could limit mobile adoption and the economic growth associated with rising connectivity.⁶⁴

The infrastructure level refers to companies such as telecommunications firms or Internet Service Providers (ISPs). Proponents justify a tax on ISPs because content drives people to want internet connections. Taxing telecom providers could be justified because they benefit from the general flow of content, including news content.⁶⁵ The US, for example, levies a federal surcharge on telephone services and telecoms are required to pay a percentage of their revenues into a Federal Universal Service Fund, which provides subsidized programs to public institutions like schools and libraries.⁶⁶ Kenya, for example, set up a Universal Service Fund through an imposition of taxes on mobile network

⁶³ See Titos Ritsatos, *Tax Evasion and Compliance; from the Neo Classical Paradigm to Behavioural Economics, a Review*, 10 J. OF ACCT. & ORGANIZATIONAL CHANGE 244 (2014); see also Njuguna Ndung'u, *Taxing Mobile Phone Transactions in Africa: Lessons from Kenya*, BROOKINGS INST. (Aug. 5, 2019). <https://www.brookings.edu/research/taxing-mobile-phone-transactions-in-africa-lessons-from-kenya/>.

⁶⁴ *Mobile Telephony and Taxation in Kenya*, DELOITTE LLP (2011), <https://www.gsma.com/publicpolicy/wp-content/uploads/2012/03/mobiletelephoneandtaxationinkenya.pdf>.

⁶⁵ The U.S., for example, levies a federal surcharge on telephone services and telecoms are required to pay a percentage of their revenues into a Federal Universal Service Fund, which provides subsidized programs to public institutions like schools and libraries. Telephone service users also pay a surcharge. Kenya set up a Universal Service Fund through an imposition of taxes on mobile network operators that were added on top of a license fee to increase access. See *id.*

⁶⁶ *Universal Service*, FED. COMM'N COMM'N (Nov. 18, 2010), <https://www.fcc.gov/general/universal-service>.

operators that were added on top of a license fee to increase access.⁶⁷ In 2008, France started levying a tax on ISPs to fund the development of public service digital content.⁶⁸ However, if ISP taxes were simply passed on to the consumer in the form of higher service charges, then increasing connectivity in poor countries could become even harder, detracting from another important objective of getting the “last billion” connected.

The application, or platform, layer refers to technology companies that provide access to the airwaves, social media or aggregation services, and digital advertising. Platforms that host user-generated content, such as social media sites or very large online platforms (VLOPs) as the EU terms it, are typically found at this layer of the Internet (also referred to as the content and social layers). The option that focuses most directly on the platform-publisher relationship is the idea of taxing digital services and advertising.

2. Taxing Digital Advertising

Given record-breaking profits for the Google-Meta duopoly that dominates the adtech industry and rising awareness about the profitability of surveillance capitalism, there is a growing interest in taxing digital advertising and redistributing some of that revenue to media. There is precedent for this idea as broadcast license fees are already an established practice in many parts of the world, particularly in Europe, where they are used to raise funds for public service or state broadcasting. Proposals to impose a tax on targeted ads would likely need to separate out the various services in the adtech supply chain – like ad serving from analytics from distribution– to mitigate anti-competitive behavior.⁶⁹

The National Association of Journalists in Brazil launched a campaign in 2021 calling for taxes on digital platforms and the creation of a National Fund for the Support

⁶⁷ DELOITTE LLP, *supra* note 64.

⁶⁸ Kowol & Picard, *supra* note 61.

⁶⁹ Timothy Karr & Craig Aaron, *Beyond Fixing Facebook: How the Multibillion-Dollar Business behind Online Advertising Could Reinvent Public Media, Revitalize Journalism and Strengthen Democracy*, FREE PRESS (Feb. 2019) https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final_0.pdf; Simon Zekaria, *Google, Facebook Targeted by UK Watchdog's Fightback over Adtech Power*, MLEX (July 1, 2020). <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/google-facebook-targeted-by-uk-watchdogs-fightback-over-adtech-power>.

and Promotion of Journalism (Funajor).⁷⁰ The proposal would impose a graduated tax of up to 5 percent on large digital platforms based on gross revenue through a Contribution for Intervention in the Economic Domain (CIDE).⁷¹ The US-based domestic NGO FreePress has proposed that revenue generated from a new tax on targeted advertising could be used to fund a public interest media system comprising diverse, local, independent and noncommercial journalism and new news-distribution models that don't rely on data harvesting.⁷² There would be a certain threshold imposed so that for-profit journalism outlets would not be affected and an independent endowment could use grant making to distribute funding. The group has likened its proposal for a three percent tax on advertising revenue from commercial providers to a carbon tax since both impose obligations on pollution - whether with respect to civic discourse or to the climate.

However, taxing adtech could have the unintended impact of further entrenching surveillance capitalism and the dominant digital advertising model. A growing chorus of groups advocate for banning targeted advertising⁷³ and some companies are moving away from using the digital cookies that enable cross-platform tracking and targeting.⁷⁴ There is also growing awareness that disinformation, polarization, and violent extremism are implicated in this system, meaning

⁷⁰ FENAJ lança campanha pela taxação de grandes plataformas digitais, FENAJ (Feb. 8, 2022), <https://fenaj.org.br/fenaj-lanca-campanha-pela-taxacao-de-grandes-plataformas-digitais/>.

⁷¹ FENAJ defende taxação de até 5% para grandes plataformas digitais, FENAJ (July 29, 2021), <https://fenaj.org.br/fenaj-defende-taxacao-de-ate-5-para-grandes-plataformas-digitais/>.

⁷² Karr, *supra* note 69.

⁷³ Emma Roth, *European Parliament Approves Initial Proposal to Ban Some Targeted Ads*, THE VERGE (Jan. 23, 2022), <https://www.theverge.com/2022/1/23/22897574/european-parliament-eu-digital-services-act-big-tech>; Alex Woodie, *The 'Banning Surveillance Advertising Act' Draws Support, Fire*, DATANAMI (Jan. 28, 2022), <https://www.datanami.com/2022/01/28/the-banning-surveillance-advertising-act-draws-support-fire/>;

Gilad Edelman, *Can Killing Cookies Save Journalism?*, WIRED (Aug. 5, 2020), <https://www.wired.com/story/can-killing-cookies-save-journalism/>;

Tim Libert et al., *Third-Party Cookies down by 22% on Europe's News Sites since GDPR*, REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM, <https://reutersinstitute.politics.ox.ac.uk/news/third-party-cookies-down-22-europes-news-sites-gdpr> (last accessed Feb. 2, 2022).

⁷⁴ Tim Keary, *Google's Privacy Changes: The War on Cross-App Tracking, Cookies and Third-Party Advertising*, VENTUREBEAT (Feb. 23, 2022), <https://venturebeat.com/2022/02/23/googles-new-privacy-changes-the-war-on-cross-app-tracking-cookies-and-third-party-advertising/>.

that efforts which further entrench it could be seen as hypocritical or in opposition to the broader issue.

Such proposals to tax adtech, however, are now taking place against the backdrop of a growing consensus about the need to tax tech platforms in the places where they do business and not just where they are legally registered. To this end, the OECD and G20 group of the world's advanced economies have agreed on multinational tax reforms to impose a global minimum corporate tax on the biggest firms that is aimed squarely at Big Tech.⁷⁵ Some smaller countries are concerned, however, that the rules set to go into effect in 2023 would disproportionately benefit large countries.⁷⁶ While the details are not yet fully agreed, the momentum for one of the biggest tax overhauls in the past century is likely to impact national level advocacy for specific digital taxes. Governments could then divert new revenue to support news media and public interest journalism. On the other hand, some countries, like Chile, prohibit assigning tax revenue to a specific beneficiary, meaning they would have limited ability to use digital taxation specifically to support media.⁷⁷

Proposals to allocate general capital raised from taxes on digital monopolies to support public service journalism or to require digital monopolies to pay into an independent public interest media fund have already emerged.⁷⁸ The International Federation of Journalists (IFJ), a global trade union with members around the world, is working with counterparts in Brazil and Jordan on a draft law to create a media support fund, though the efforts remain nascent.⁷⁹

B. Vouchers and Income Tax Deduction/Credit

Some countries have adopted or are exploring systems to subsidize news through citizen vouchers or tax breaks,

⁷⁵ Richard Partington, *OECD Deal Imposes Global Minimum Corporate Tax of 15%*, THE GUARDIAN (Oct. 8, 2021), <https://www.theguardian.com/business/2021/oct/08/oecd-deal-imposes-global-minimum-corporate-tax-of-15>.

⁷⁶ Alex Cobham, *A Corporate Tax Reset by the G7 Will Only Work If It Delivers for Poorer Nations Too*, THE GUARDIAN, (June 3, 2021), <https://www.theguardian.com/commentisfree/2021/jun/03/corporate-tax-reset-g7-poorer-nations>.

⁷⁷ In Chile, for example, a constitutional amendment would be required to allow mandated revenue assignation. Interview with Juan Carlos Lara, Exec. Dir., Derechos Digitales (Oct. 26, 2021).

⁷⁸ Victor Pickard, *Public Investments for Global News*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 28, 2019), <https://www.cigionline.org/articles/public-investments-global-news/>.

⁷⁹ Interview with Jeremy Dear, Deputy Gen. Sec'y, Int'l Fed'n of Journalists (Jan. 31, 2022).

which would put the decision of which news outlets to fund in the hands of individuals rather than government. These systems could have the added benefit of improving news consumption.

The idea is to provide citizens with a voucher or tax break that subsidizes the cost of subscribing to a news outlet. Canada has already operationalized this idea, providing citizens with a \$75 annual tax credit for subscribing to an approved news outlet.⁸⁰ And lawmakers in both Australia and the United States are considering similar legislation. The proposed Local Journalism Sustainability Act in the US would provide three types of tax breaks with five-year sunset clauses, to taxpayers for subscriptions, news outlets for hiring, and small businesses for advertising in local media.⁸¹

Such approaches depend on an existing tax infrastructure and the widespread payment of taxes. However, experts have found that fiscal capacity to extract revenues through taxation is considerably less developed in poor countries and influenced by the strength of political institutions.⁸² Personal Income Taxes (PIT) account for a relatively small percentage of tax revenue: accounting for less than 10 percent in low-income countries and among the poorer segments of higher-income countries.⁸³ Less than five percent of the African population pay PIT as compared to 50 percent in developed countries.⁸⁴ In many countries in Sub-Saharan Africa, financial inclusion is limited and hovers at just about half of the population.⁸⁵ This implies that efforts to support the news industry at the individual level would be more difficult to implement and achieve in less developed countries, as well as in authoritarian or weak democracies.

⁸⁰ *About the Digital News Subscription Tax Credit*, CAN. REVENUE AGENCY, <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/deductions-credits-expenses/digital-news-subscription.html> (last modified July 27, 2017).

⁸¹ Local Journalism Sustainability Act, S.2434, 117th Cong. (2021).

⁸² Esteban Ortiz-Ospina & Max Roser, *Taxation*, OUR WORLD IN DATA (2016), <https://ourworldindata.org/taxation>.

⁸³ MICK MOORE ET AL., TAXING AFRICA: COERCION, REFORM AND DEVELOPMENT 132-134 (2018).

⁸⁴ *Id.*

⁸⁵ Ndung'u, *supra* note 63.

C. Rethinking IP and Competition for Publishers: Copyright, Licensing and Anti-Trust for Publishers

Policymakers and civil society groups have proposed requiring platforms to pay licensing fees for the use of news snippets. In some cases, this means allowing news media to collectively bargain without violating anti-trust prohibitions. These efforts to redistribute power to the news industry primarily pursue two types of legal frameworks: copyright law and competition policy.

Copyright law focuses on the rights of publishers to benefit as rights holders, whereas competition law focuses on whether market imbalances give rise to unfair business practices. Some countries, including Australia and Canada, see this as a package, whereas others, like the US, are pursuing a single approach. This section begins by describing the new approaches to copyright law and competition policy.

1. *Rethinking Intellectual Property Rights: Copyright for Publishers*

Search engines, timelines, and news aggregators are filled with snippets of news, headlines and images that are culled from publisher websites without express permission or payment. Copyright law's "fair use" exception typically permits the use of small amounts of protected material under certain conditions without permission from the copyright holder. But there is widespread disagreement about whether news snippets like those found on news aggregators, search, or social media feeds are indeed covered by fair use.

Granting news publishers an "ancillary" or "neighboring" copyright for their content allows publishers to control the licensing of their content. Under such a framework, tech platforms could then be required to obtain licenses and potentially to pay licensing fees for using headlines, snippets, or other copyright protected content from publishers. Opponents have dubbed this a "link tax" that could break the internet,⁸⁶ while supporters argue that aggregating headlines and snippets infringe on the intellectual property rights of publishers and undermines their economic sustainability.

⁸⁶ See Submissions to Senate Standing Committees on Economics, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions (where submissions to the Australian inquiry from technology lobbying groups, as well as internet pioneers such as Tim Berners Lee and Vint Cerf, argued that the Code and its approach were "deeply flawed").

Critics of ancillary copyright and licensing requirements express concern about the expansion of copyright beyond its intended and legitimate purpose with respect to protecting creative works, protecting the rights holder (and whether the rights holder is the publisher, the journalist, or both), and inability to redress the fundamental economic logic of commercial media and the current digital advertising market. As the Electronic Frontier Foundation noted in its submission to the U.S. copyright office, “Headlines, even if they contain some creativity, are so predominantly factual that permitting them to be copyrighted would effectively create a copyright in facts.”⁸⁷ While this may apply to hard news, this is unlikely to be the case for features, specialty, and other types of journalism. Similarly, leads and other snippets, including images and video, are not purely factual, and news aggregation often includes information other than the headline.

Furthermore, some facts are not known until they are uncovered by journalists. Often investigative outlets spend many years and a lot of money just to have their revelatory headlines reposted immediately. From the Panama Paper and Lux Leaks to countless examples of bootstrap investigative reporting, it is clear that news media play an important role in creating new knowledge from facts. Over the past decade or so there have been a handful of attempts to apply copyright law to online news with mixed success and limited evidence of its impact on revenue or audience. Several of those national efforts were preempted by industry-specific agreements with Google, and more recently, were superseded by the EU copyright directive.

a. The EU Copyright Directive

The EU Copyright Directive, which came into force in 2019, gives press publishers the right to claim copyright.⁸⁸ The Directive gives publishers the same rights granted to authors and other creators, but for a shorter period of two years, to authorize reproduction of their press publications by “online

⁸⁷ Comments of the Electronic Frontier Foundation on Publisher’s Protections Study: Notice and Request for Comment Docket No. 2021-5, <https://www.regulations.gov/comment/COLC-2021-0006-0036> (Nov. 26, 2021).

⁸⁸ This gives publishers the right to exploit and enforce copyright based on the rights transferred to them by authors. Giuseppe Colangelo & Valerio Torti, *Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform*, 27 INT’L J.L. & INFO. TECH 75, 78 (2019).

content-sharing service providers.”⁸⁹ It is specifically aimed at giving media greater bargaining power and strengthening their position vis à vis services like news aggregators or other “media monitoring services.”⁹⁰ It aims to create a fair copyright marketplace by enabling publishers to negotiate republication of their content and require online service providers to pay for use of their content.⁹¹ Article 15 expressly exempts the non-commercial or private use of press publications by individuals, hyperlinking, “individual words or short extracts” of a press publication, and use of quotations for purposes such as criticism or review from the right to claim revenue.⁹² A general provision also establishes that states must ensure that journalists themselves will benefit from the new right to address a key concern of journalist unions and advocacy organizations such as the International Federation of Journalists (IFJ).⁹³

The Directive emerged after a decade of experiments with similar frameworks in Germany, Spain, and other European countries, which I cover briefly here to underscore the complicated relationship and the missing data and information to understand the long-term implications on revenue.

In 2013, after extensive lobbying by Axel Springer and other major German news outlets, Germany’s amended its Copyright Act to give press publishers the exclusive right to commercially exploit their content for one year unless a third-party obtained a license.⁹⁴ Publishers then sued Google for failing to negotiate payments for use of their news snippets. In response, Google stopped using snippets and reverted to using just headlines and links unless a publisher opted into the Google News aggregator. Axel Springer, the country’s largest publishing group, refused to sign a free licensing deal with Google and saw a 40 percent drop in traffic from search results and an 80 percent drop from Google News referrals.⁹⁵

⁸⁹ These are defined by their main purpose of providing storage and public access to large amounts of copyright-protected work uploaded by users that it organizes and promotes for profit-making purposes. See Council Directive 2019/790, art. 15, 2017 O.J. (L 130) 92, 118 (EU).

⁹⁰ Council Directive 2019/790, 2017 O.J. (L 130) 92, 103 (EU).

⁹¹ *Questions and Answers – New EU copyright rules*, EUROPEAN COMM’N (June 4, 2021) https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2821.

⁹² See Council Directive 2019/790, art. 15, 2017 O.J. (L 130) 92, 118 (EU).

⁹³ Dear, *supra* note 79.

⁹⁴ Rosati, *supra* note 44, at 5.

⁹⁵ Harro Ten Wolde & Eric Auchard, *Germany’s Top Publisher Bows to Google in News Licensing Row*, REUTERS (Nov. 5, 2014) <https://www.reuters.com/article/us-google-axel-sprngr/germanys->

After two weeks, the publisher gave in and joined the other German news organizations that ended up making deals with the platform to license their content for free rather than give up referral traffic.⁹⁶

The following year, Spain adopted a new copyright law that similarly required news aggregators to pay publishers for inclusion. But it also created an “inalienable right” for publishers to receive compensation to ensure that publishers would not feel compelled to let platforms use their content for free. Unlike in Germany, publishers in Spain were required to receive compensation and were prohibited from refusing the use of “non-significant fragments” of their articles.⁹⁷ By making compensation compulsory it foreclosed the option to opt-out⁹⁸, a decision that divided the publishing community.⁹⁹ The largest Spanish newspaper association and several digital-only publishers initially supported the law, but ultimately joined forces with Google and the main local news aggregator Menéame to lobby against it.¹⁰⁰ Nonetheless, the law passed and Google News pulled out of the Spanish market before it went into effect in 2014.

top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105

⁹⁶ The European Court of Justice determined in 2019 that the German law was invalid due to a procedural error. See Tom Hirshe, *ECJ Rules German Ancillary Copyright for Press Publishers to Be Ineffective!*, IGEL (Dec. 9, 2019), <https://ancillarycopyright.eu/news/2019-09-12/ecj-rules-german-ancillary-copyright-press-publishers-be-ineffective>.

⁹⁷ *Argumentación económica sobre la propuesta de modificación de la LPI en lo relativo a la agregación de contenidos informativos*, COALICIÓN PRO INTERNET (July 2014), <https://static.eldiario.es/eldiario/public/content/file/original/2014/0703/14/20140703-analisis-economico-de-la-modificacion-de-la-lpi-afi-9b42c00.pdf>;

Glyn Moody, *Spain's Ill-Conceived 'Google Tax' Law Likely To Cause Immense Damage To Digital Commons And Open Access*, TECHDIRT (Aug. 12, 2014), <https://www.techdirt.com/articles/20140811/05564728172/spains-ill-conceived-google-tax-law-likely-to-cause-immense-damage-to-digital-commons-open-access.shtml>.

⁹⁸ The Spanish approach also undermined Creative Commons licensing and imposed fines on infringing websites. See Moody, *supra* note 97.

⁹⁹ María González, *PRISA dice que renuncia a Cobrar el Canon AEDE... Que, por cierto, es irrenunciable*, GENBETA, (July 6, 2015), <https://www.genbeta.com/actualidad/prisa-dice-que-renuncia-a-cobrar-el-canon-aede-que-por-cierto-es-irrenunciable>.

¹⁰⁰ *Nace la Coalición Pro Internet*, COALICIÓN PRO INTERNET, https://www.coalicionprointernet.com/?page_id=7#APOYOS (last accessed Jan. 30, 2023); gallir, *Posicionamiento de Menéame sobre la «tasa a agregadores» de la nueva Ley de Propiedad Intelectual*, (Feb. 16, 2014), <https://blog.meneame.net/2014/02/16/posicionamiento-de-meneame-sobre-la-tasa-a-agregadores-de-la-nueva-ley-de-propiedad-intelectual/>.

Similar conflicts between publishers and platforms emerged around the same time in Belgium, France, and Italy, but no new legislation was adopted after Google reached financial agreements with publisher groups in each country. For example, a year after a Belgian court found that Google had violated copyright law, the company reached an agreement with the association of Francophone Belgian publishers and the journalist association to compensate publishers two to three percent of their turnover and remunerate journalists.¹⁰¹ In Italy and France, Google agreed to invest in domestic media and established grant programs to support media innovation.¹⁰²

However, with the ratification of the EU Copyright Directive all Members States were required to transpose this framework into national law by June 2021, thereby superseding any prior legislation. Only 20 of the 27 Member States had met this deadline as of the time of writing, and the initial experience of French publishers is instructive in terms of underscoring the need for additional measures, such as good faith negotiation mandates found in the news media bargaining codes.¹⁰³

France was the first country to transpose the Directive in 2020. Its law, under the Directive, includes holding online content sharing service responsible for “unauthorized acts of exploitation of copyrighted works” absent explicit authorization from the rights holders or good faith efforts to prevent exploitation. Google promptly stopped displaying news snippets in an attempt to avoid having to pay publishers. But the French competition authority intervened “deeming Google’s unilateral withdrawal of snippets to be unfair and damaging to the press sector, and likely to constitute an abuse of a dominant market position.”¹⁰⁴ It fined the company \$500 million and ordered Google to negotiate in

¹⁰¹ *Belgian Court Says Google News Violates Copyright Law*, INT’L FED’N OF JOURNALISTS (May 10, 2011), <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/belgian-court-says-google-news-violates-copyright-law.html>.

¹⁰² Dominique Vidalon, *Google Resolves French Copyright Dispute over Online Content*, REUTERS (June 21, 2022, 1:23 PM), <https://www.reuters.com/technology/french-anti-trust-body-accepts-google-pledges-over-remunerating-news-publishers-2022-06-21/>.

¹⁰³ *Implementation Status of the DSM Directive Across the EU*, COMMUNIA, <https://eurovision.communia-association.org/> (last visited Feb.12, 2023).

¹⁰⁴ Natasha Lomas, *Google Inks Agreement in France on Paying Publishers for News Reuse*, TECHCRUNCH (Jan. 21, 2021), <https://social.techcrunch.com/2021/01/21/google-inks-agreement-in-france-on-paying-publishers-for-news-reuse/>.

good faith with the publishers.¹⁰⁵ After losing on appeal, Google implemented a licensing framework with publishers that both sides approved.¹⁰⁶ Google agreed to pay \$76 million over three years to the group of 121 national and local news publishers that were part of the framework deal,¹⁰⁷ which included commitments “to end all present and future potential litigation tied to copyright claims” during that period.¹⁰⁸ The Alliance de la Presse D’Information Generale, which signed the deal, also negotiated an agreement with Facebook to allow its members to receive remuneration through participation in Facebook News, though the terms were not made public.¹⁰⁹

Not everyone on the media fraternity is on board with this approach. Journalist organizations worry about the lack of transparency in the commercial deals negotiated between publishers and the platforms, whether small and alternative sources will be left out, and whether the deals leave out people who report and create the news - the journalists themselves. To implement this type of regime, there needs to be a digital rights management system and collecting agency to negotiate, monitor, collect, and distribute the licensing fees. The directive could provide a global template similar to other major pieces of European digital legislation.¹¹⁰

The United States Copyright Office launched a consultation in 2021 to consider whether the US should adopt

¹⁰⁵ Laura Kayali, *Google Slapped with €500M Fine in French Press Publishers Case*, POLITICO (July 13, 2021), <https://www.politico.eu/article/french-competition-authority-fines-google-500m-euros-press-publishers-case/>.

¹⁰⁶ L’Équipe Google France, *L’Alliance de la Presse d’Information Générale et Google France signent un accord relatif à l’utilisation des publications de presse en ligne*, BLOG GOOGLE FR. (Jan. 21, 2021), <https://blog.google/intl/fr-fr/nouveautes-produits/explorez-obtenez-des-reponses/apig-google/>.

¹⁰⁷ *L’Alliance et Google France signent un accord relatif à l’utilisation des publications de presse en ligne*, ALLIANCE DE LA PRESSE D’INFORMATION GÉNÉRALE (Jan. 21, 2021), <http://www.alliancepresse.fr/actualite/lalliance-et-google-france-signent-un-accord-relatif-a-lutilisation-des-publications-de-presse-en-ligne/>.

¹⁰⁸ Mathieu Rosemain, *Google’s \$76 Mln Deal with French Publishers Leaves Many Outlets Infuriated*, REUTERS (Feb. 12, 2021), <https://www.reuters.com/business/media-telecom/exclusive-googles-76-mln-deal-with-french-publishers-leaves-many-outlets-2021-02-12/>.

¹⁰⁹ Lisa Kim, *Facebook Inks Deal with French Publishers to Pay for News Content*, FORBES (Oct. 21, 2021, 11:54 AM), <https://www.forbes.com/sites/lisakim/2021/10/21/facebook-inks-deal-with-french-publishers-to-pay-for-news-content/>.

¹¹⁰ See generally ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020); Simon Gunst & Ferdi De Ville, *The Brussels Effect: How the GDPR Conquered Silicon Valley*, 26 EUR. FOREIGN AFF. R. 437 (2021).

a similar approach. However, last year the office determined publishers in the United States already enjoy some copyright protections under the work-for-hire doctrine¹¹¹ and that additional ancillary rights could infringe on First Amendment accommodations embedded in existing copyright law.¹¹² It highlighted that any fruitful intervention would require accompanying anti-trust changes.

Copyright is a prerequisite for attempts to impose licensing fees on Google, Facebook, and tech companies for using news content, but it does not address the imbalances in the negotiating relationship, as the Germany example illustrated, or address information asymmetries that enable proper valuation for licensing.

D. Competition and Anti-Trust Solutions: Collective Bargaining (Media) and Transparency

Policymakers are looking to competition and anti-trust law, from two vantage points, the publishers and the platforms. One approach involves removing anti-competition barriers to collective bargaining to enhance the power of publishers when negotiating licensing fees with large tech platforms for the use of their content. This approach compels tech platforms to license content from publishers and to negotiate in good faith, with various conditions for arbitration.

Another approach involves anti-trust, including pro-competition interventions aimed at reducing information asymmetries or dominance in particular aspects of the marketplace. These interventions focus on algorithmic transparency and the digital advertising market.

This section first examines anti-trust exemptions for news media¹¹³ and second looks at competition interventions aimed at the platforms.

¹¹¹ U.S. COPYRIGHT OFF., COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS 52 (2022), <https://www.copyright.gov/policy/publishersprotections/?loclr=eanc> o.

¹¹² *Id.* at 54–55.

¹¹³ These interventions rely on the recognition of ancillary copyright for publishers, giving them intellectual property rights that can then be monetized through licensing.

1. *Collective Bargaining to Address Competition Dynamics and Support Licensing Interventions: News Media Focused Anti-Trust/Competition Interventions*

News media bargaining codes are illustrative of attempts to rebalance the journalism-platform relations by removing competition barriers to collective bargaining by news outlets. Australia’s News Media Bargaining Code (NMBC), Canada’s Online News Act (C-18), and the U.S. Journalism Conservation and Preservation Act (JCPA) are illustrative of policy interventions that relieve domestic news publishers from anti-trust restrictions when negotiating licensing fees with content sharing platforms.¹¹⁴ There is a related challenge of getting Big Tech to the negotiating table, which regulators have addressed through designation authority, mandatory arbitration, and good faith clauses.

a. Australia’s News Media Bargaining Code (NMBC)

Australia’s NMBC was the first such law passed and prompted other countries to consider similar legislation to help their own struggling news publishers. The NMBC was adopted in 2021 following a landmark 2018 report by the Australian Competition and Consumer Commission (ACCC) that found big tech platforms were benefiting from the content provided by news publishers without paying for it while simultaneously controlling much of the advertising market amid plummeting revenues in the media industry.¹¹⁵ The NMBC gave publishers the right to bargain individually and collectively with big platforms and imposed baseball-style arbitration and algorithmic transparency requirements on the digital platforms.

Under the Australian law, the Treasurer has the right to “designate” a digital platform as subject to the obligations under the code if it does not voluntarily negotiate with publishers.¹¹⁶ No platform has been designated yet, and both

¹¹⁴ The JCPA imposes a time limit of four years on publishers’ “safe harbor” exemption from anti-trust regulation. Journalism Competition and Preservation Act of 2022, S. 673, 117th Cong. § 2(b) (as introduced in Senate, Mar. 10, 2021).

¹¹⁵ AUSTRAL. COMPETITION AND CONSUMER COMM’N, DIGITAL PLATFORMS INQUIRY: PRELIMINARY REPORT (2018), <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/preliminary-report>.

¹¹⁶ See DEP’T OF THE TREASURY, AUSTL. GOV’T, REVIEW OF THE NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE 2 (2022),

Facebook and Google have negotiated some voluntary commercial deals with publishers. “The threat of designation has been in most part enough to get people to the table,” according to an Australian MP involved in negotiating the legislation.¹¹⁷ But she and others, including a former ACCC commissioner, think the Treasurer will have to use the power of designation if the companies hold out thinking they can avoid the threat.¹¹⁸

The laws all use mandatory arbitration clauses for cases where a negotiated agreement cannot be reached, anti-discrimination clauses, and anti-retaliation provisions to create a more equal playing ground and insulate news organizations from platform pressure. Having learned from the Australian law, Canada’s draft C-18 bill, for example, would allow news organization to join a negotiated deal after the fact as a safeguard aimed at small publishers who might otherwise be left out.¹¹⁹

As the first country to pass and implement a news media bargaining code, Australia created a template that has been used as a jumping off point for several other countries that are considering similar legislation. Countries also learned from the backlash spurred by a lack of transparency and perceived shortcomings of the Canadian law. These shortcomings include criticism that the law benefitted large news outlets rather than small, local, and specialty news outlets; a lack of transparency into the specific value of deals with publishers; and a perceived failure to ensure that funding generated through licensing would go toward journalism rather than stock buybacks or paying down debt. For example, Australia explicitly included public service media in its framework, a provision that has garnered support in Canada, in exchange for a pledge that it would spend the money received on journalists in rural and regional areas, according to one of the negotiators.¹²⁰

b. Size Matters and Secret Deals

https://treasury.gov.au/sites/default/files/2022-04/c2022-264356_0.pdf.

¹¹⁷ Sen. Sarah Hanson-Young, Comments at the Columbia University Saving Journalism Part II Conference (Oct. 23, 2022).

¹¹⁸ *Id.*

¹¹⁹ Bill C-18, *An Act Respecting Online Communications Platforms that Make News Content Available to Persons in Canada*, 1st Session, 44th Parl, § 32 (2) (as of First Reading on Apr. 5, 2022), <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/first-reading>.

¹²⁰ Hanson-Young, *supra* note 117.

Australia faced criticism that its Code amounted to Big Tech giving a subsidy to Big Media given media mogul Rupert Murdoch's extensive lobbying and reports that News Corp and other traditional news conglomerates were the primary beneficiaries.¹²¹ The Australian process did indeed result in secret multi-million dollar deals with the country's largest publishers while local news outlets got about \$30,000 to \$60,000 a year.¹²² News Corp and Nine media were reported to have secured licensing deals with Google, with the later securing around \$20 million for itself and News Corp even more.¹²³ Other media outlets, including specialty news and the multicultural public service broadcaster, SBS, were denied deals.¹²⁴ However, estimates that the Code has injected more than \$200 million into the Australian news industry has led to funding for many smaller media outlets, and resulted in significant hiring in several media outlets, making this "a great time to be a journalist."¹²⁵ While it may not have been perfect, lawmakers see the NMBC as a jumping off point and have mandated a review and assessment process, which is a useful approach to such a new and unprecedented regulation. In France, Google signed a framework deal with a group of 121 national and local news publishers to pay \$76 million over three years after signing individual licensing agreements with each that included commitments "to end all present and future potential litigation tied to copyright claims" during that period.¹²⁶ However, the deal only applied to general and political information publications and excluded specialty

¹²¹ Chua Mui Hoong, *The Battle between Big Tech and Big Media (with Big Govt Backing)*, THE STRAITS TIMES (Mar. 19, 2021), <https://www.straitstimes.com/opinion/the-battle-between-big-tech-and-big-media-with-big-govt-backing>; Rahul Matthan, *The Big Tech + Media Bargain*, EX MACHINA (Feb. 23, 2021), <https://exmachina.substack.com/p/the-big-tech-media-bargain>.

¹²² Bill Grueskin, *Australia Pressured Google and Facebook to Pay for Journalism. Is America Next?*, COLUM. JOURNALISM R. (Mar. 9, 2022), https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php.

¹²³ Richard Waters et al., *Big Tech Versus Journalism: Publishers Watch Australia Fight with Bated Breath*, FIN. TIMES (Feb. 18, 2021), <https://www.ft.com/content/2fed6b2a-01ba-4c7e-8e95-d50f74c316bf>.

¹²⁴ Grueskin, *supra* note 122; Public Interest Publishers Alliance, *Public-Interest Publishers Band Together to Seek Deal with Google and Facebook*, AUSTL. RURAL & REGIONAL NEWS (Nov. 23, 2021), <https://arr.news/2021/11/23/public-interest-publishers-band-together-to-seek-deal-with-google-and-facebook/>.

¹²⁵ Rod Sims, *Australia's News Media Bargaining Code Led the World. It's Time to Finish What We Started*, THE CONVERSATION (Aug. 11, 2022, 2:33 AM EDT), <http://theconversation.com/australias-news-media-bargaining-code-led-the-world-its-time-to-finish-what-we-started-188586>.

¹²⁶ Rosemain, *supra* note 106.

publications, magazines, broadcast and digital-only online publications.¹²⁷ The Alliance de la Presse D'Information Generale, which signed the deal, also negotiated an agreement with Facebook to allow its members to receive remuneration through participation in Facebook News, though the terms were not made public.¹²⁸

Concerns that small outlets will get left behind in the commercial deals negotiated between large publishing conglomerates and Big Tech have plagued efforts to pass similar laws elsewhere, illustrating how deciding who will benefit is a critical political decision where the threat of capture is significant. In Australia, a perception that Murdoch's media empire was the main beneficiary of the NMBC has hampered and shaped efforts around the world. In Brazil, independent media were convinced to align with Google and Facebook to oppose similar legislation there, according to a journalist for the country's leading daily.¹²⁹ In Canada a coalition of small, independent publishers called out "secret, back-room deals" in its push for amendments to the Canadian Online News Act.¹³⁰ The current draft Canadian bill doesn't impose a cap on the size of a news organization but requires that a qualifying news organization employ at least two full-time journalists.¹³¹ The JCPA in the US sought to remedy these concerns by capping qualifying publications at 1,500 full-time employees.¹³²

Given that concerns about who benefits, and how much, have become a pivotal decisions defining the success of these types of interventions, policymakers have realized that pairing this approach with transparency requirements can help alleviate the concerns created by opacity and information asymmetries.

¹²⁷ ALLIANCE DE LA PRESSE D'INFORMATION GÉNÉRALE, *supra* note 105.

¹²⁸ *Id.*

¹²⁹ Patricia Campos Mello, *An Unholy Coalition Torpedoes Social Media Reform Legislation in Brazil*, POYNTER (May 17, 2022), <https://www.poynter.org/business-work/2022/an-unholy-coalition-torpedoes-social-media-reform-legislation-in-brazil/>.

¹³⁰ *Canada's Online News Act Must Be Transparent, Fair, and Include News Innovators*, FRASER VALLEY CURRENT (May 31, 2022, 8:24 AM), <https://fvcurrent.com/article/bill-c18-online-news-act/>.

¹³¹ Online News Act, H. Commons Canada C-18, 44th Parl. (as passed by H. Commons, Dec. 14, 2022).

¹³² Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. §2 (as reported by S. Comm on the Judiciary, Nov. 28, 2022).

E. Transparency to Address Ad-Tech, Licensing Deals, Algorithmic Curation: Platform Focused Anti-Trust/Competition Interventions

Information asymmetries are pervasive in the platform economy generally, and specifically within the new media-platform relationship as underscored in Part I and II. There is a concerning lack of data and information about dynamics at the center of these policy interventions. Unanswered questions include the link between traffic and revenue; how money flows through the adtech system; details on the deals being struck with individual media outlets; how the lack of data plays out in different countries; and how content moderation and algorithmic curation impacts news media visibility and viability.

Transparency requirements can help address these asymmetries. However, there is disagreement on what types of mandates are reasonable, meaningful, and possible. Until recently, most platform reporting and transparency requirements have been voluntary. But media-related legislation and broader frameworks like the EU's Digital Services Act are starting to require mandatory participation. For the first time we are seeing algorithmic transparency requirements because unilateral decisions by online platforms have a significant impact on news publishers, and their ability to develop successful strategies for their online businesses, as noted in Part I.

The Australian NMBC specifically recognized the role that algorithmic design plays in driving traffic and mandated advance notification to news media of significant changes.¹³³ Giving advance warning to media organizations that are covered by the Code may be impractical and unfair to all the other news organizations, especially small ones who are not covered by the law or who do not have staff devoted to retooling news offerings to cater to each platform's whim.¹³⁴ Japan's competition authority similarly suggested that publishers should be notified and "sufficient information" should be disclosed about algorithmic changes that could

¹³³ Philip Dearman & Paula Pyburne, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Parliament of Australia Bill Digest No. 48, 2020–21 (2020), https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7808228/upload_binary/7808228.pdf.

¹³⁴ Courtney C. Radsch, *Australia's Journalist Union on Facebook, Google, and Who Should Pay for News*, COMM. TO PROTECT JOURNALISTS (Sept. 8, 2020, 3:10 PM), <https://cpj.org/2020/09/australias-journalist-union-on-facebook-google-and-who-should-pay-for-news/>.

have a “significant impact on their business activities.”¹³⁵ The EU Digital Services Act, which is not news-media specific but aims to govern content moderation on platforms, imposes transparency requirements for recommender systems¹³⁶ and other content moderation and usage data.¹³⁷

Similarly in India, the competition authority announced in early 2022 that it opened an inquiry into whether Google had abused its dominance in news aggregation.¹³⁸ The CCI investigation was prompted by complaints from the main associations for digital publishers (DNPA), newspapers (INS), and television that claim that Google unfairly dominates the news aggregator business and does not allow publishers to competitively earn revenue on ads due to what the DNPA called a “lack of transparency and information asymmetry.”¹³⁹ The logic of the investigation hinges on whether Google’s use of snippets is a result of imbalanced bargaining power between the tech firm and the news publishers, whether the referral traffic to news publisher websites is affected, and if this affects revenue. It will also consider whether publishers are compelled “to implement Google’s Accelerated Mobile Pages (AMP) standard or lose critical placement in mobile search.”¹⁴⁰

Interestingly, Spain’s competition authority rejected a similar argument made by news publishers citing the technical solutions available to news publishers to avoid being indexed by search and news aggregators.¹⁴¹ It noted the

¹³⁵ JAPAN FAIR TRADE COMMISSION, *Final Report Regarding Digital Advertising* 149-150 (Feb. 2021), <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/211012-2.pdf>.

¹³⁶ Council Regulation 2022/2065 of Oct. 19, 2022, On a Single Market for Digital Services and amending Directive 2000/31/EC, art. 27, 2022 O.J. (L 277) 1 (EU).

¹³⁷ *See id.* at arts. 15, 20, & 24.

¹³⁸ Shrimi Choudhary, *Competition Commission of India Orders Google Inquiry After News Publishers Complain*, THE ECON. TIMES (Jan. 7, 2022, 11:06 AM), <https://economictimes.indiatimes.com/industry/media/entertainment/media/competition-commission-of-india-orders-google-inquiry-after-news-publishers-complain/articleshow/88762265.cms>.

¹³⁹ *Id.*; *see also* Akansha Srivastava Delhi, *How INS Joining DNPA in Fight Against Google Impacts News Publishers*, BEST MEDIA INFO (Apr. 5, 2022), <https://bestmediainfo.com/2022/04/how-ins-joining-dnpa-in-fight-against-google-impacts-news-publishers>; Author interview with Tanmay Maheshwari and Sujata Gupta, Digital News Publishers Association, in India (Sept. 13, 2022).

¹⁴⁰ ENS ECON. BUREAU, *‘Unfair Terms’ for Digital News Publishers: CCI to Probe Google*, THE INDIAN EXPRESS (Jan. 8, 2022, 4:10 AM), <https://indianexpress.com/article/business/companies/digital-news-publishers-cci-probe-google-7712396/>.

¹⁴¹ Such reindexing can be accomplished by a simple command in the code of a website, including robots.txt and meta tags.

lack of evidence of harm and called the proposed measure disproportionate.

F. Transparency in Licensing Deals

There is no agreement about the level of transparency that should be required with respect to licensing deals. On one side, some argue that such private commercial deals are not usually disclosed. On the other hand, some argue that without this information publishers lack the information needed to negotiate effectively and public oversight is difficult. The NMBC requires that details of each registration and endorsement be published on ACMA's website,¹⁴² creating a single place to gather and publicize this information. The ACMA also publicizes its list of registered arbitrators.¹⁴³

As noted in Part II, the Australian NMBC imposes no transparency or reporting requirements on either relevant platforms or news media with respect to the licensing agreements struck, nor to any other financial support provided by a platform to a specific media outlet. This appears likely to change given that the current review has requested that publishers provide information and examples as to how they have spent the money, with the goal of promoting the creation of core news content.¹⁴⁴ As noted earlier, based on criticism about who benefits and how much they benefit from platform licensing deals, reporting and transparency requirements are being actively debated by those working on the JCPA and C-18. At the very least, a centralized list of beneficiaries should be published, a relatively easy requirement for Canada since it already publishes list of media outlets that benefit from other government support mechanisms. An updated draft of the JCPA called for the FTC to publish this list on its website.¹⁴⁵ It is unclear, however, whether these requirements will include specific dollar amounts, parallel reporting by platforms and

¹⁴² Phillip Dearman & Paula Pyburne, *Treasury Law Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, Parliament of Australia Bills Digest No. 48, 2020-21 (2020), https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7808228/upload_binary/7808228.pdf.

¹⁴³ *Mediators and Arbitrators*, AUSTRALIAN COMMUNICATIONS & MEDIA AUTH. (Oct. 13, 2022), <https://www.acma.gov.au/mediators-and-arbitrators>.

¹⁴⁴ ANYA SCHIFFRIN ET AL., *SAVING JOURNALISM 2* (2022).

¹⁴⁵ This author advised senate offices to create a central repository for this information as an improvement upon an earlier draft that would have required media organizations to self-report without specifying where such information should be published.

media outlets to enable cross-referencing and verification, or central reporting to a governmental agency.

One aspect of transparency that none of these proposals address is transparency around platform support for news media more broadly. By negotiating directly with publishers, Google and Facebook have been able to undercut the argument that the government should step in with regulatory intervention.¹⁴⁶ For example, a Facebook spokesperson referenced the company's \$11 million investment in Australian journalism separately from the Code to justify the fact that "the law does not apply to Meta" since it has not been designated.¹⁴⁷ But such agreements exclude many in news publishing and have been shrouded in secrecy, meaning that the public and industry itself have had to rely on investigative journalism to report the details of such deals.¹⁴⁸

G. Public Utilities/Common Carriers

In light of the infrastructural role played by platforms, there is discussion in the United States about treating "Big Tech" platforms as public utilities or common carriers. A related idea is to impose public interest mandates on major, dominant platforms, or very large online platforms (VLOPs) as the EU terms them. Proposals to treat major internet platforms as essential infrastructure, public goods, or common carriers are based on the fact that participation in the modern economy, society and public sphere depends on access to, and intermediation by, these platforms, which wield a significant amount of power in those realms.¹⁴⁹ Unlike taxation, these approaches could "alter the revenue-generating strategy of the firms themselves," as well as the structural problems created by private informational

¹⁴⁶ Charis Papaevangelou, *Funding Intermediaries: Google and Facebook's Strategy to Capture Journalism*, DIGITAL JOURNALISM, Jan. 2023, at 1, <https://halshs.archives-ouvertes.fr/halshs-03748885>.

¹⁴⁷ Bill Grueskin, *Australia Pressured Google and Facebook to Pay for Journalism. Is America Next?*, COLUM. JOURNALISM REV. (Mar. 9, 2022), https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php.

¹⁴⁸ William Turvill, *Google News Shh-owcase: Publishers Break Silence Over Secret Deals Behind \$1bn Scheme*, PRESS GAZETTE (Sept. 30, 2021), <https://www.pressgazette.co.uk/google-news-showcase/>; Grueskin, *supra* note 122.

¹⁴⁹ See generally K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Feb. 4, 2020), <https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure>.

infrastructure.¹⁵⁰ Reconceptualizing platforms as “information utilities” could diminish the power of a handful of multinational platforms.¹⁵¹

Free Press, for example, has proposed the creation of a superfund to “clean up” the internet and support local media and factchecking.¹⁵² A mandatory fee would be imposed on VLOPs based on their number of total monthly active users. This revenue would then be redistributed to fund factchecking by news and other organizations. The Superfund would be created and administered by the government but funded by platforms, with benefits allocated by an independent body subject to audits.¹⁵³ The proposal seeks to minimize the potential for influence and capture by granting the trust fund no role in identifying, reviewing, analyzing, or actioning content, while incentivizing platforms to get rid of fraudulent, unidentified, corrupting accounts, which are often implicated in disinformation and propaganda campaigns.

Such an approach, however, lacks legislative support.¹⁵⁴ Recategorizing platforms in this way would address the problems at the heart of the commercial media model and the contemporary information disorder¹⁵⁵, but would likely raise significant First Amendment challenges.¹⁵⁶ Similarly, tying the funding of factchecking and local journalism to fees based on platform usage maintains and deepens platformization.

¹⁵⁰ *Id.*

¹⁵¹ See Petros Iosifidis & Leighton Andrews, *Regulating the Internet Intermediaries in a Post-Truth World: Beyond Media Policy?*, 82 INTL COMM’N GAZETTE 211, 220 (Apr. 1, 2020).

¹⁵² Karr, *supra* note 69.

¹⁵³ Lisa H. Macpherson, *Addressing Information Pollution With a “Superfund for the Internet,”* in TACKLING THE “FAKE” WITHOUT HARMING THE “NEWS”: A PAPER SERIES ON REGULATORY RESPONSES TO MISINFORMATION 50 (Michael Karanicolas, ed., 2021).

¹⁵⁴ Rahman & Teachout, *supra* note 149; see also Josh Simons & Dipayan Ghosh, *Utilities for Democracy: Why and How the Algorithmic Infrastructure of Facebook and Google Must Be Regulated*, BROOKINGS (Aug. 2020), <https://www.brookings.edu/research/utilities-for-democracy-why-and-how-the-algorithmic-infrastructure-of-facebook-and-google-must-be-regulated/>; Mark Scott, *Coronavirus Crisis Shows Big Tech for What It Is – a 21st Century Public Utility*, POLITICO (Mar. 25, 2020), <https://www.politico.eu/article/coronavirus-big-tech-utility-google-facebook/>.

¹⁵⁵ See Claire Wardle & Hossein Derakhshan, *Thinking About ‘Information Disorder’: Formats of Misinformation, Disinformation, and Mal-Information, in JOURNALISM, ‘FAKE NEWS’ & DISINFORMATION* 43 (Cherilyn Ireton & Julie Posetti eds., 2018).

¹⁵⁶ See generally Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 377 J. FREE SPEECH L. 377, 414-460 (2021).

III. RISK OF CAPTURE

Capture is a longstanding concern when it comes to media freedom and independence and the design of regulatory systems that enable editorial autonomy and impede political intervention. Media capture distorts the public service role of the media and undermines its editorial autonomy. Additionally, it has typically focused on government or corporate control of news organizations to influence editorial judgement in ways that impede their ability to perform their societal role of providing public information and checks and balances on power. As Mungiu-Pippidi put it, “captured media outlets exist to trade influence and manipulate information rather than to inform the public.”¹⁵⁷

The literature on media capture identifies five primary mechanisms of capture: ownership, financial incentives, censorship, infrastructure, and cognitive capture.¹⁵⁸ The platformization of journalism has created multidimensional forms of capture that reinforce and compound each other while highlighting the centrality of infrastructure¹⁵⁹ and what Papaevangelou calls “a situation of networked capture”¹⁶⁰ by platforms. Given the intermediation by technology platforms throughout the entire journalistic and publishing process as well as the networked digital infrastructure they provide,¹⁶¹ networked infrastructure capture poses an existential threat to independent and sustainable journalist. The conceptualization of infrastructure capture is relatively nascent but highly relevant when evaluating policy interventions given that technology platforms are both subjects of coverage as well as infrastructure providers for both publishers and advertisers. Ironically, a Facebook backgrounder said the company did not support Australia’s legislation because it “grants publishers an unprecedented level of control over how we operate many of Facebook’s products and features.”¹⁶²

¹⁵⁷ Alina Mungiu-Pippidi, *How Media and Politics Shape Each Other in the New Europe*, ROMANIAN J. OF POL. SCI., no. 1, 2008, at 69, 73..

¹⁵⁸ Joseph E. Stiglitz, *Toward a Taxonomy of Media Capture*, in IN THE SERVICE OF POWER: MEDIA CAPTURE AND THE THREAT TO DEMOCRACY 9 (Anya Schiffrin ed., 2017).

¹⁵⁹ See Plantin et al., *supra* note 6, at 295.

¹⁶⁰ Papaevangelou, *supra* note 146, at 5.

¹⁶¹ See generally Efrat Nechushtai, *Could Digital Platforms Capture the Media Through Infrastructure?*, 19 JOURNALISM 1043, 1052–53 (2018); see also Plantin et al., *supra* note 6, at 293–310.

¹⁶² FACEBOOK’S RESPONSE TO AUSTRALIA’S PROPOSED NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE, FACEBOOK (Sept. 2020), <https://about.fb.com/wp-content/uploads/2020/08/Facebooks->

As discussed earlier, platforms wield significant financial influence over media outlets. They set the rules for online publishing and digital advertising, while also controlling the infrastructure for publishing, monetizing and connecting with audiences. Nechushtai defines infrastructure capture as “circumstances in which a scrutinizing body is incapable of operating sustainability without the physical or digital resources and services provided by the business it oversees and is therefore dependent on them.”¹⁶³ Capture through censorship takes place through content moderation practices and policies, which can influence news coverage in myriad ways.¹⁶⁴ As “content cartels”¹⁶⁵ these platforms decide what can be said or not said in the public sphere. They often work together. For example, Meta cut off services Facebook in Australia and threatened to do the same in Canada and the U.S. in retaliation for news-related regulation.¹⁶⁶

Cognitive capture is a pervasive threat when news media build entire teams to figure out how to best play to the platform, enhance engagement, maximize distribution, and improve monetization. For many years journalistic coverage reflected the excitement and promise of tech and was generally positive, and has focused on Google and Facebook (and Apple and Twitter) to the exclusion of other tech behemoths.¹⁶⁷ Coverage has since evolved, become more nuanced and wide-ranging as outlets have created entirely new beats devoted to covering Big Tech platforms and their

response-to-Australias-proposed-News-Media-and-Digital-Platforms-Mandatory-Bargaining-Code.pdf.

¹⁶³ Nechushtai *supra* note 161, at 1043.

¹⁶⁴ See Radsch, *Digital Information Access*, *supra* note 2; see also Radsch, *Tweaking a Global Source of News*, *supra* note 27; Radsch, *On the Frontlines of the Information Wars - How Algorithmic Gatekeepers and National Security Impact Journalism*, in *NAT'L SEC. AND JOURNALISM* (Marc Ambinder, Jennifer Henrichson & Connie Rosati eds., forthcoming).

¹⁶⁵ See generally Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels>.

¹⁶⁶ Adam Smith, *Meta Threatens to Ban News on Facebook and Instagram in Canada*, THE INDEPENDENT (Oct. 24, 2022, 1:49 PM), <https://www.independent.co.uk/tech/meta-facebook-instagram-news-ban-canada-b2209246.html>; see also Emma Roth, *Facebook Threatens to Ban News in the US Over Journalism Bill*, THE VERGE (Dec. 5, 2022, 2:03 PM), <https://www.theverge.com/2022/12/5/23495067/facebook-threat-ban-news-us-journalism-bill>.

¹⁶⁷ See *When Technology Makes Headlines*, PEW RSCH. CTR. (Sept. 27, 2010), <https://www.pewresearch.org/journalism/2010/09/27/when-technology-makes-headlines/>.

socioeconomic impacts. However, access to these companies, their staff, and the like still shapes these dynamics.¹⁶⁸

Financial incentives are one of the most insidious and challenging aspects of media capture that threaten not only publishers' editorial independence but also reinforce infrastructure capture. This threat comes from the array of financial support, training, "mentorship" and other ways that Meta and Google provide resources directly to media outlets and individual journalists. These direct deals bypass regulatory frameworks and further entrench media outlets in the infrastructure and logic created by the platforms.

A. Direct Deals: Bypassing Regulatory Frameworks

Amid the increasing regulatory furor, Google and Facebook launched a plethora of new initiatives to curate news, pay publishers, and subsidize access to news behind paywalls including Google News Showcase and Facebook News. These funding programs include licensing deals, direct grants and subsidies, training, and fellowships. An analysis of publicly available information about these programs culled from their websites and blogs show that Google has provided more direct assistance through grants whereas Facebook has overwhelmingly focused on providing training.¹⁶⁹

Many of these programs were rolled out incrementally in a handful of countries where regulators have threatened legislation to mandate licensing, along with hundreds of millions of dollars in journalism support aimed at aiding news outlets during the COVID-19 pandemic. According to an investigation by Press Gazette, Google News Showcase contracts with Australian publishers were larger than its deals made with publishers in other countries with larger economies.¹⁷⁰ Specific details are unknown, however, due to confidentiality clauses and a lack of transparency by Google into its formula for determining compensation. Google and

¹⁶⁸ See generally Melinda McClure Haughey et al., *On the Misinformation Beat: Understanding the Work of Investigative Journalists Reporting on Problematic Information Online*, 4 PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION, Oct. 2020, art. 133 at 1; see also Philip M. Napoli, *The Platform Beat: Algorithmic Watchdogs in the Disinformation Age*, 36 EUR. J. COMM'N 376 (2021).

¹⁶⁹ Based on a manual compilation and analysis of all publicly available information about support provided by Facebook and Google to news organizations and journalists as collected from their websites.

¹⁷⁰ Turvill, *supra* note 148.

Facebook did not respond to multiple requests for additional information.

Google News Showcase is a licensing program it launched in 2020 to pay publishers and subsidize free access to paywalled content. It claims to be a \$1 billion “investment in partnerships with news publishers and the future of news” that gives publishers greater control over how their content is displayed and will eventually appear on Google Search and Discover.¹⁷¹ At the time of publication, Showcase had launched in 15 countries¹⁷², including Argentina and Colombia, which thus far have not waded into the ancillary copyright debate. According to Google, 90 percent of the more than 1,200 news publishers it has deals with represent local or community news.¹⁷³

B. The Risk of Capture and Platformization in Legal Regulatory Approaches

This Part of the Article analyses the objectives embedded in legal regulatory approaches and the recurring elements, such as definitions of beneficiaries, thresholds, and transparency, that give rise to contestation and consensus building and provide opportunities for capture. It also considers their impact on platformization including how closely they bind journalism to specific platforms and the implications for infrastructure capture.

The risk of capture is higher in countries with high levels of cronyism or political interference in the news industry, or low levels of press freedom more broadly.¹⁷⁴ Governments around the world have a long track record of using their budgetary influence —via taxation, subsidies, and

¹⁷¹ Sundar Pitchai, *Our \$1 Billion Investment in Partnerships with News Publishers*, GOOGLE NEWS INITIATIVE (Oct. 1, 2020), <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/>.

¹⁷² India, Japan, Germany, Poland, Portugal, Brazil, Austria, the U.K., Australia, Czechia, Italy, Colombia, Argentina, Canada and Ireland. Magdalena Kotlarczyk, *News Showcase Is Launching in Poland*, GOOGLE NEWS (Feb. 9, 2022), <https://blog.google/products/news/google-news-showcase-poland/>.

¹⁷³ *Id.*

¹⁷⁴ See Timothy Besley & Andrea Prat, *Handcuffs for the Grabbing Hand? Media Capture and Government Accountability*, 96 AM. ECON. REV. 720 (2006); see also Olga Dovbysh & Esther Somfalvy, *Understanding Media Control in the Digital Age*, 9 MEDIA AND COMM’N 1 (2021); Andrea Prat, *Chapter 16 - Media Capture and Media Power*, in HANDBOOK OF MEDIA ECONOMICS 669 (2015); ANYA SCHIFFRIN ET AL., IN THE SERVICE OF POWER: MEDIA CAPTURE AND THE THREAT TO DEMOCRACY (Anya Schiffrin, ed., 2017).

advertising — to influence or capture media.¹⁷⁵ For example, in many countries government advertising is allocated to reward and punish news outlets¹⁷⁶, and can be particularly acute in small markets with a limited number of advertisers to complement governmental advertising.¹⁷⁷ Even countries with a relatively strong tradition of independent news recognize the risk that “[p]oorly designed government policies would undermine editorial independence and threaten the free press.”¹⁷⁸ Therefore any effort to redirect tax revenues to support media would need to be designed in a way to preserve editorial independence.

It stands to reason that the risk of media capture is diminished the further the intervention is from content-related products and the greater the independence of the mechanisms for defining beneficiaries is from the government. However, this does not apply to infrastructure capture, since all beneficiaries are dependent on platforms, meaning that considerations about the degree of platformization that a given intervention encourages should also be part of the policy discussion.

Taxing adtech, granting new licensing rights to generate news media revenue, or improving collective bargaining for publishers risks further entrenching platforms and reinforcing infrastructural dependency by linking publisher revenue even more directly to platform profits. Policymakers have not sufficiently grappled with the implications of tying financial sustainability of news media even more closely to the platforms in which they are embedded. As Taylor Owen noted about the Canadian approach, it could very likely lead to a scenario where close to 50 percent of newsroom costs are subsidized by a combination of platform and government funding.¹⁷⁹ “That is a major structural change to the industry of journalism that has potentially some real implications in the long run,” according to Owen. “Is it sustainable? What bias does that

¹⁷⁵ SCHIFFRIN ET AL., *supra* note 169.

¹⁷⁶ ANYA SCHIFFRIN ET AL., *MEDIA CAPTURE: HOW MONEY, DIGITAL PLATFORMS, AND GOVERNMENTS CONTROL THE NEWS* (Anya Schiffrin, ed., 2021); SERVET YANATMA, *MEDIA CAPTURE AND ADVERTISING IN TURKEY: THE IMPACT OF THE STATE ON NEWS*, (2016), <https://reutersinstitute.politics.ox.ac.uk/our-research/media-capture-and-advertising-turkey-impact-state-news>.

¹⁷⁷ Radsch, *Making Big Tech Pay for the News They Use*, *supra* note 1.

¹⁷⁸ *Rebuilding Local News*, REBUILD LOCAL NEWS, <https://www.rebuildlocalnews.org/our-plan> (last visited Oct. 14, 2022) (Rebuild Local News is a U.S. coalition of 3,000 plus local news outlets).

¹⁷⁹ Taylor Owen, Comments at the Columbia University Saving Journalism Part II Conference (Oct. 23, 2022).

pose on journalistic organizations? How does that compete with entrants into the market?”¹⁸⁰

There is a tension between agency and architecture¹⁸¹ inherent in these efforts to rebalance the relationship. Tying the financial future of journalism even more tightly to the economic logic of Facebook and Google, regulators are reinforcing the platformization of journalism, which has typically been considered a fundamental pillar of democracy. The challenge with revising copyright and licensing regimes or collective bargaining rights in response to the dominance of Google and Facebook, or taxing adtech to subsidize news media is that they reflect a regulatory “capitulation”¹⁸² to the platformization of both journalism and advertising.

Laws and regulations must define beneficiaries, and thus define which news outlets, publishers, journalists, or other entities are protected and able to benefit from the specific provisions. These are decisions that are fundamental to defining the objective of the legislation and which are particularly susceptible to capture.

Definitions are a key focal point for mitigating the potential of media capture. Government definitions may seek to reward or punish news organizations or prevent some types of news outlets from claiming new rights. The challenge for regulators is not only to consider how to define what they are taxing, but also who the beneficiary is and how that is defined. Defining “press publishers,” the news industry, journalism, and public interest are at the core of ensuring the objective of the legislation and in determining who benefits from any taxation, subsidy, or licensing scheme.

Copyright law depends on defining who the rights holder is and defining which publications count as news. The National Writers Union, for example, argued that journalists and not publishers are actually the creators of the works that would be subject to these types of taxes, and should receive some of the benefits.¹⁸³ With the introduction of AI-produced news, the concept of author will undoubtedly become even more blurred.

By definition, ancillary copyright and licensing are policy frameworks that should only apply to a limited set of publishers, making the determination of who benefits subject to controversy and potential political cooptation. With taxation interventions, the challenge for regulators is not only to define who and what they are taxing, but also who the

¹⁸⁰ *Id.*

¹⁸¹ Plantin et. al., *supra* note 6, at 297.

¹⁸² *Id.* at 303.

¹⁸³ NATIONAL WRITERS UNION, COMMENTS ON FR DOC. 2021-22077 (Publishers’ Protection Study) (2022), <https://www.regulations.gov/comment/COLC-2021-0006-0040>.

beneficiary is and how it is defined. Regulators must consider which platforms to involve and what thresholds to impose. For example, any revenue-based digital advertising tax would need to contain specific carve outs for commercial journalism outlets and funds reclaimed would need to be allocated in a way to minimize influence peddling, such as creating an endowment or block grants to distribute funds at the local level and creating a governance structure that promotes independence and accountability and facilitates transparency.

These definitional decisions can be put in the hands of individual taxpayers, granted to professional journalism and self-regulatory bodies, delegated to an independent government agency, or written into statute. They are flashpoints for influence and contention, as can be seen in the criticism of Australia's NMBC, Brazil's failed proposal, and ongoing debates in Canada, the US and elsewhere. Entrusting this gatekeeping responsibility to self-regulatory bodies such as independent industry or professional associations may help insulate the process from government influence and media capture. But it can also reinforce traditional media and existing power dynamics in the news industry unless specific attention is given to intentional design.

Similarly, distributing the responsibility among a large number of people (as with vouchers or tax credits) diffuses the potential for media capture and does not contribute to platformization. One of the benefits of subsidy programs that are implemented through vouchers or income tax deductions or credits is that they link new outlets to their audiences and link their revenues to the "votes" expressed through subscriptions. Indirect subsidies that are allocated without government oversight or approval are less susceptible to government or platform capture since the power is provided to the citizen or resident. While the definition of a legitimate news organization for this type of subsidy would still be an issue susceptible to capture, the potential for government interference in the decision about who benefits is relatively insulated from political interference through the delegation of this choice to the taxpayer. These programs also have the benefit of being platform agnostic, meaning that they do not require beneficiaries to use a certain platform, and thus do not contribute to either platformization or infrastructure capture.

C. Towards a Consensus on the Definition of News: Report, Investigate, Explain Issues and Events of Public Interest

One of the most politically challenging issues with all of these approaches is defining “news organization” in the law. An analysis of all publicly available adopted and proposed legislation to regulate the platform-publisher relationship indicates a significant level of consensus around the definition of news. For example, the ANBC, JCPA, and Canada’s draft Online News Act all define news content as reporting, investigating, or explaining current events or issues of public interest and their definitions cover print, broadcast, and digital-first online media. Developing consensus on how to define news has required extensive negotiations between policymakers and the news industry, and has been less susceptible to platform capture than concerns about which news outlets should benefit.

Despite consensus on how to define news, each country takes a different approach in terms of their emphasis on original reporting, size, publication frequency, and geographic orientation. The thresholds in these definitional provisions shape the objective of the legislation. For example, does the legislation protect journalism or the news industry? The business of news or the practice of journalism? Local journalism or any journalism? And are there any qualifiers like “Australian” or “competition” or “public interest”? These determinations involve contestation and negotiation over how to define the objective of legislation, which is ultimately a theory about the role of news media in democracy or and authoritarianism.

Threshold requirements provide guidelines that will have a normative and structuring effect on the news industry. Thresholds will require new ways of measuring and categorizing professional roles. For example, which roles in a news organization will be categorized as journalistic or qualify as a news creator? One of the challenges with defining this too precisely is that it may miss out on the reality of how journalism and newsrooms operate. If the goal is to promote the hiring of more journalists or increase local news coverage, what does that mean for the costs involved in the full production cycle, not to mention the administrative staff who ensure these new people get onboarded, trained, and equipped to do their job safely? How will media outlets show that reporting is original, and how will this be verified? And how will these new incentives and reporting requirements influence editorial coverage?

For example, the JCPA markup required at least 25 percent original reporting and imposes a weekly minimum creation and distribution requirement to meet the beneficiary

threshold.¹⁸⁴ The NMBC qualifies that it is dealing with news content of public interest to Australians¹⁸⁵ while Brazil's proposal would have imposed a requirement that journalistic beneficiaries have a physical address and chief editor in Brazil and have been established at least two years. Canada's C-18 similarly requires that operations, including design and editing, occur in Canada and applies only to qualified Canadian Journalism organizations as defined by the Income Tax Act Law.

In the Italian transposition of the EU Copyright directive journalistic publishers are covered "even if they are established in another member state."¹⁸⁶ The question of how to geographically bound these national regulations in a communications ecosystem characterized by transnational platforms raises jurisdictional questions that have yet to be addressed.

Meaningful transparency should be an important part of each legal framework or new regulation because it provides information needed to make informed choices and policies, and because it can help build trust, which is in short supply in the news media, politicians, and social media.¹⁸⁷ This means requiring the collection of certain types of data and their publication in publicly available and ideally machine-readable databases.¹⁸⁸

However, there is a risk of platform capture even in the use of self-regulatory bodies and associations to determine or validate beneficiaries. Google and Meta (Facebook) fund journalist associations, press freedom groups, and media development organizations, around the world, especially in countries threatening them with regulations.

IV. CONCLUSION

The various policy interventions to rebalance the platform-publisher relationship are interdependent and raise broader issues that need to be considered, namely the implications for various types of media capture and the

¹⁸⁴ Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. §2 (as reported by S. Comm. On the Judiciary, Nov. 28, 2022).

¹⁸⁵ Australia News Media Bargaining Code § 52A

¹⁸⁶ Council Directive 2019/790 of April 17, 2019, On Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 3, 2019 O.J. (L 130) 113.

¹⁸⁷ EDELMAN, EDELMAN TRUST BAROMETER (2022), https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf.

¹⁸⁸ Courtney Radsch, *Transparency Reporting: Good Practices and Lessons from Global Assessment Frameworks*, in GIFCT WORKING GROUP OUTPUT 2022 at 8 (2022), <https://gifct.org/wp-content/uploads/2022/07/GIFCT-22WG-ResearchAgendaScopingPaper-1.1.pdf>.

implications for enhancing the platformization of journalism. Several of these approaches — copyright, licensing, and taxation of digital advertising — are premised on the relationship between referral traffic and revenue but lack sufficient data to make policy informed decisions. This should lead regulators to pursue transparency approaches in conjunction with the other approaches to inform evidence-based policymaking. The precarious economic conditions that news media face amid the platformization of journalism also mean they are susceptible to media capture by governments. Unless adequate safeguards are legislated to ensure the independent definition and determination of beneficiaries and allocation of subsidies there is a risk of political interference.

These approaches raise fundamental questions about how to define news media beneficiaries, how to distribute benefits, and how these decisions are made. To this end, policymakers need to be clear about the objectives of their intervention, their theory of change, and seek to create processes that insulate news media from political interference or further dependence on platforms for funding and capacity building.

Capture through platformization is not well understood or considered by policymakers, and many debates over regulation rightly focus on the potential for political influence but do not consider the broader implications of specific policy interventions on infrastructure capture. For nearly a decade the risk that targeted advertising and the transformation of the advertiser-media relationship would “risk eliminating the connective media necessary for an effective democracy”¹⁸⁹ has been inadequately addressed. So reconceptualizing platforms as public infrastructure is an intervention that would target the broader context in which publishers operate but more research is needed into the potential short- and long-term implications on journalism and the news media industry.

¹⁸⁹ Nick Couldry & Joseph Turow, *Advertising, Big Data, and the Clearance of the Public Realm: Marketers’ New Approaches to the Content Subsidy*, 8 INT’L J. COMM’N 1710, 1710 (2014).