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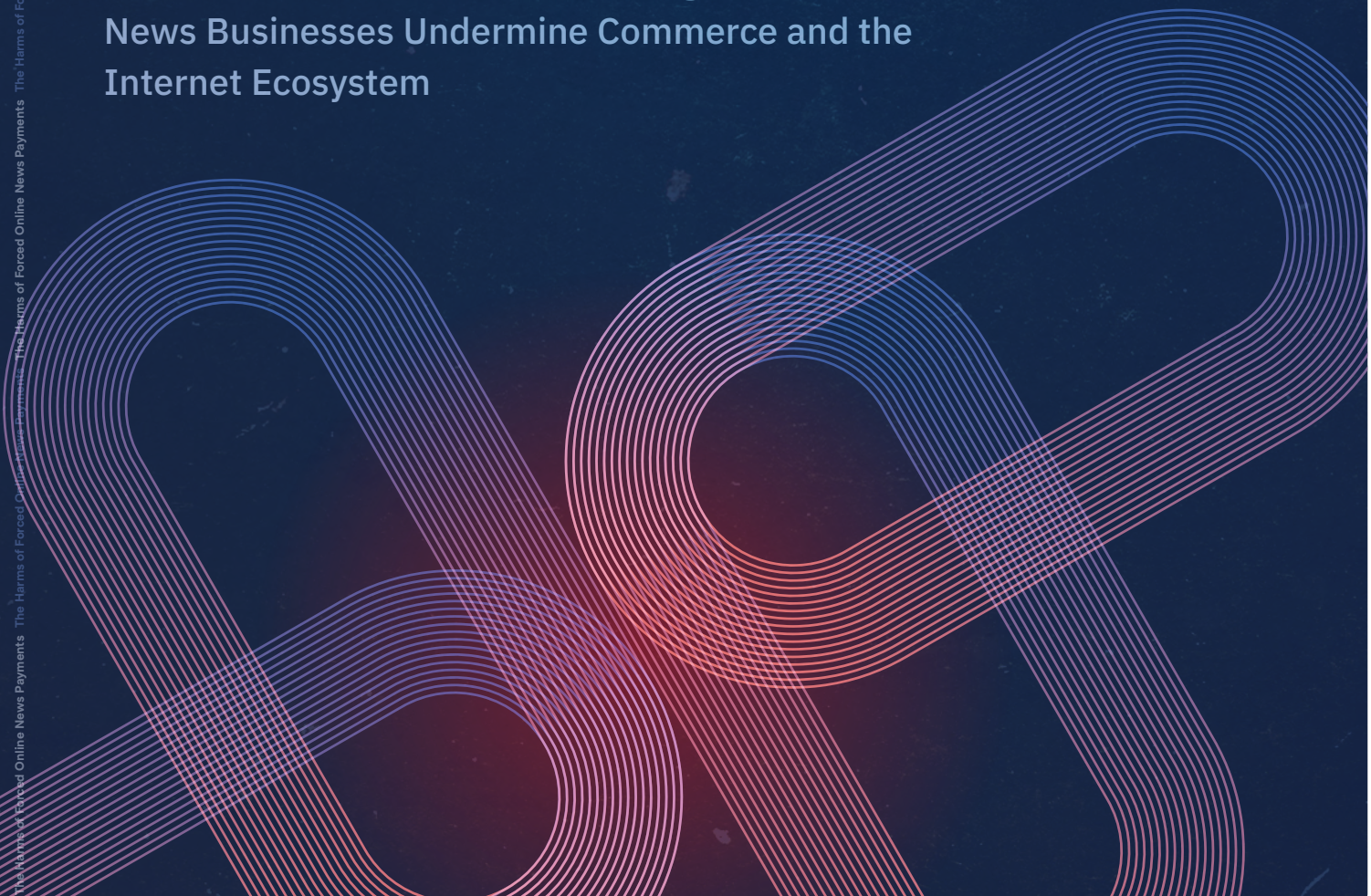
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The Harms of Forced Online News Payments

How Mandatory Payments From Digital Services to
News Businesses Undermine Commerce and the
Internet Ecosystem

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Executive Summary

Compelling online digital services to pay for links to new content is unsound public policy. “Must-carry, must-pay” requirements would not achieve the results policymakers seek, and would inevitably confront substantial legal barriers. In short:

- ❖ Given the dearth of evidence that hyperlinks from digital services to news articles has caused the local journalism crisis, forced inter-industry subsidies are not appropriate.
- ❖ Such payments would benefit large media conglomerates at the expense of their smaller competitors, and would incentivize high-volume, low-quality journalism.
- ❖ Mandatory payment schemes for links or quotes also contradict federal copyright law and precedent, and would likely run afoul of international commitments and trade agreements.

Given these challenges, policymakers should reassess the incentives created by such proposals, and existing legal frameworks and international commitments, and pursue alternatives that more directly reach the root cause of news publishers’ business model problems.

Introduction

Over the past nine years, several jurisdictions have passed laws to force revenue transfers from digital services to news corporations and now half a dozen countries and counting are in the process of considering or advancing similar rules. This concerning trend has gained momentum. The idea circumvents free market dynamics to force a select few online platforms to enter into negotiations and pay news publishers for all news content that publishers allow to be indexed or that are posted on their platforms. These forced payments mechanisms vary in structure and design, but in all of them news organizations are seeking to extract revenues from digital firms simply for displaying quotes or headlines, and linking to news content. These mandatory payment regimes ignore the fact that news publications themselves actively post on social media services or allow their content to be indexed to obtain referral traffic. They choose to do so because the resulting traffic represents a significant source of revenue. These are actions that news media entities control and can restrict if they so wish. Policies to overlay such interactions with forced revenue transfers impose significant negative externalities on online services providers as well as for the broader internet ecosystem.

Although these efforts are often motivated by legitimate policy goals of protecting local journalism and promoting its sustainability, they generally overlook or discount the substantial value that digital platforms generate for news businesses through the hosting or indexing of content. Instead of objectively evaluating the value exchange between online services providers—such as search engines and social media companies—and the news publishers, some governments developing these plans simply presume payments are owed only in one direction and set a floor based on a percentage of platforms’ total revenues. This is reflected by the rhetoric of lawmakers, who often point to the strength of digital firms in the advertising space as justification for establishing these forced payment schemes.

One variant of this revenue transfer scheme is publisher subsidies styled as so-called “neighboring rights.” These are related to copyright and may be invoked against online news search and aggregation services, as well as others. A report from the U.S. International Trade Commission also observed that these laws tend to have “generated unintended consequences” for small online publishers.¹ Service providers of online search, news aggregation, and social media platforms are compelled to pay for the “privilege” of quoting from news publications. This is often referred to as a “snippet tax.” It is also at times formally described as “ancillary copyright” in that it is allegedly an “ancillary” intellectual property (IP) right. However, it is in fact inconsistent with international IP law, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The EU Directive on Copyright in the Digital Single Market creates an EU-wide version of this neighboring right.

Meanwhile, other jurisdictions have pursued regulations forcing analogous revenue transfers that are unrelated to copyright policy, with two recent notable iterations signed into law in Australia in 2021 and Canada in 2023. A list of key examples is found in the Appendix of this paper.

Although the bargaining obligations of the Australian and Canadian laws have not taken effect and thus remain untested, it is clear that both these existing and proposed laws fail to acknowledge the true direction of value generation in the relationship between news businesses and digital platforms. News publishers seek to maximize readership through various methods. Platforms enhance these commercial goals and are sometimes a key driver of them. In this manner, online platforms directly support news businesses' efforts to commercialize news content through advertising obtained through referral traffic. Platforms achieve this by expanding readership which can increase subscriptions and by facilitating the publicizing of events, sponsored content, and other partnerships. News outlets gain vast benefits—both through direct revenue from additional page views and subscriptions, and indirect through broadened brand visibility—from social media and search engine websites. That internet intermediaries impart value is evidenced by the fact that news businesses proactively seek to leverage these services to improve readership and expand their reach. News websites often prompt readers to reshare content on social platforms to further enhance their visibility and readership. Separately, news businesses create pages on social media platforms and post links, snippets, and visuals from their news stories to promote their content and increase traffic. In fact, one study found that 90% of organic views of news links on Facebook are from links posted by news businesses, not by independent users.² For search engines, news businesses often implement search engine optimization to ensure they are among the first results for consumer searches.

Analyses conclude that digital platforms provide hundreds of millions of dollars in revenue from referral traffic to news publishers.³ The behavior of news businesses in utilizing both these services to increase page views demonstrates that regardless of the specific amount, the news industry does view the platforms as value generating. Further, search engines and social media websites are available to news businesses at no cost. If, on the other hand, news publishers truly did not see value in search engines bringing up their links, headlines, and snippets in the results, they could choose not to participate. They could easily deploy a widely accepted internet convention, the insertion of robots.txt into their website code to remove their content from search engines' results. However, as evidenced in several countries, publishers appear unwilling to accept a solution where the snippets would be taken down, which suggests that the value publishers ascribe to them is less than the remuneration they hope to extract from the platforms, but still a lucrative source of referral traffic. Publishers appear to conceive of these rights as creating a “must-carry must-pay” obligation,

where intermediaries must carry the content and in addition pay for it even if economically unjustified.

Elsewhere, other countries are in the process of creating their own payment regimes. These developing efforts have built upon past approaches to impose obligatory payments to news companies for the right to index and host links or short snippets of news content. Legislation has been introduced in New Zealand's Parliament⁴ and at the federal⁵ and state⁶ level in the United States. Regulators in Malaysia,⁷ the United Kingdom,⁸ Indonesia,⁹ Japan,¹⁰ Brazil,¹¹ and South Africa¹² are analyzing this issue and/or creating frameworks that may end up forcing digital platforms into negotiations to pay for the presence of online news on their services.

This paper begins by detailing the flaws of forcing digital platforms to pay news publishers for the presence of news content on their services and the harms such regulations carry for a wide range of stakeholders as the policy continues to spread globally. The paper then compares the details of several pieces of legislation on the topic internationally and highlights the legal conflicts created. Finally, the paper offers recommendations to policymakers reviewing such pieces of legislation to support their local news markets and the sustainability of journalism.

Forcing Online Platforms to Pay for the Presence of News Content Is Deeply Flawed Policy

1. There Is Insufficient Evidence That Online Services Linking to News Articles Caused the Crisis in Local Journalism.

A competitive news media landscape contributing to strong journalism is an essential part of a democratic society. While journalism faces financial challenges in many markets, these hardships have developed alongside an evolving landscape of advertising and consumption patterns for information and news. These changes are generational and the negative effects on a legacy news model cannot be attributed to digital platforms linking to news articles or displaying snippets from them. In reality, the relative strength of newspapers' advertising was an anomaly in the history of a market that has always been dynamic—there is nothing inherent about the news industry playing a prolific role in the sector.¹³

The changes to the news industry—unrelated to the sharing of links or news snippets—were chronicled by a 2022 U.S. Copyright Office report.¹⁴ The lack of acknowledgement of these shifting market dynamics, detailed in this section, by the governments seeking this type of intervention reflect the fact that often, the legislators have not precisely identified and demonstrated a market failure rendering this approach necessary to promoting local journalism.

Similarly, newspapers used to host a plethora of advertising content that generated funding sources that have since migrated elsewhere or evolved into other services altogether. Most prominently, newspapers have gradually lost their classified advertising—which used to represent large portions of newspapers’ revenue, particularly at the local level—due to the rise of online alternatives such as Craigslist and Kijiji in Canada. The decline of classified advertising played a key role in the declining earnings of newspapers in Western Europe, North America, and parts of the Asia-Pacific.¹⁵ The shifting of such advertising away from newspapers greatly affected their revenue.

The history of classified advertising’s demise highlights the absurdity of blaming the decline of journalism and media company revenue solely on digital firms’ ability to link to and share pieces of news articles given the importance of classified advertising to newspapers’ bottom lines in prior decades. Internet firms’ success in creating entire new markets for digital advertising is a convenient scapegoat but a historical fallacy—and their success has little or nothing to do with solutions to news media’s fundamental challenges.

However, classifieds are just one piece of the advertising story that has abandoned newspapers. News businesses have in the past relied on classified advertising, department stores, food coupons, and automotive dealers to provide advertising revenue. All of these advertising methods have moved elsewhere due to changes in consumer behavior unrelated to search engines or social media use.¹⁶

Elsewhere, the changing landscape of consumer behavior as it relates to news and general information access has left newspapers with fewer readers. Newspapers’ hold on their readers was not simply for news, but as a uniquely efficient means of aggregating and distributing timely and topical information, providing value consumers were willing to pay for. News readers used to find sports box scores, TV and movie showtimes, weather, stock prices, marriage and death announcements, legal notices, crossword puzzles and other general information through newspapers that the companies would leverage as cross-subsidies for news gathering.¹⁷ However, consumers no longer need to have newspaper subscriptions, nor even check newspapers, for this information. This change is largely attributable to the growing prominence of the internet that has shifted consumer behavior across all services.

The development of new media services and technologies has meant that newspapers’ prior status as a literal “front page” for entire cities, communities, or regions has dwindled—there are a myriad of ways for advertisers to reach audiences beyond the use of newspapers. The internet has played a key role in this, but before it, this trend was already beginning to take shape with television.¹⁸

Further, the consumption of news has changed alongside the shifts in media advertising and is continuing to evolve. In 2020, only 3% percent of all U.S. adults and 9% of adults aged 18-29 years reported getting their news regularly from TikTok. Those numbers have shot up to 14% of all adults and 32% of 18-29 year olds in 2023.¹⁹ That means that in the short time that Australia first introduced its law, the News Media Bargaining Code, to today, a major change in news consumption has already begun to take hold. These constant movements in the market demonstrate how blaming any particular service for the news industry’s hardships fails to account for the dynamic nature of the news media marketplace.

As Sue Gardner, an academic in Canada who is also a former journalist, told parliamentarians in the House of Commons, “this is a tragedy without a villain. It is normal for technologies to evolve and open up new capabilities, for innovation to happen as a result, players to compete, and winners and losers to emerge. That’s how markets work, and it is not usually deserving of intervention by the federal government.”²⁰

2. Big Media Conglomerates Benefit at the Expense of Smaller News Players.

Although policymakers often trumpet mandatory online news payment schemes to support small, local, and independent journalism, the benefits of these schemes tilt grossly in favor of the largest media conglomerates at the expense of the smallest entities. By requiring digital platforms to pay for the permission to index and/or host news content—either explicitly for the volume of news content or based on the costs, size, prominence, number of journalists employed, or reach of the news outlet—these regimes reinforce the consolidating market dynamics of the media sector. Mandatory payments benefit the largest newspaper and broadcasting media conglomerates that need little help navigating the modern advertising ecosystem. By artificially diverting revenue streams, these policies threaten to leave local, community, and other independent news sources in jeopardy. Although some smaller outlets would receive funds through these forced payment mechanisms, the majority of payments that would go to incumbent conglomerates will help cement their dominance, at the expense of smaller players and the competitive opportunities they might have sought to pursue, based on a more innovative approach to news.

In jurisdictions where forced transfer laws have been passed, it appears that the policy unevenly benefits the largest news companies. Instead of representing a lifeline to independent media, mandatory online news remuneration reflects a cross-industry subsidy whereby large tech companies are directed to support large media companies, with the results doing little to help the sustainability of local or regional journalism. This stands to reason—

in an artificial ‘market’ where online services providers are required to negotiate with news publishers, bargaining costs are fixed and larger news companies will always dominate thanks to their resource advantage. Any formulation of this mandatory revenue transfer from digital platforms to news businesses—even if not pinned to the concept of news business costs—would likely most benefit the largest news companies, either due to their outsized ability to create content, their greater resources to take advantage of a new regulatory process, or a combination of the two.

In Spain, a levy on snippets for news content was enacted in 2014 that targeted news aggregators. An economic report from Spanish publishers showed that the Spanish law “that was passed in the name of helping news publications, ended up doing tremendous harm to many online publications — especially smaller sites that frequently (and happily) relied on Google News and other aggregators for a significant amount of traffic.”²¹ The Spanish government tested the theory subsequently pursued in Australia, Canada, and other jurisdictions taking similar action: based on the theory that digital platforms were unduly profiting from news content, Spain imposed a fee, but the high cost of compliance and such low value in carrying and paying for the content induced Google News to retreat from the market outright. The result of the regulatory experiment was that each of the 84 major Spanish online newspapers experienced declines in traffic and revenue, with the smaller outlets experiencing the most dramatic declines.²² In fact, the EU Commission requested a study on the issue of neighboring rights and the relationship between news corporations and online services suppliers that concluded that “newspapers actually benefit from news aggregation platforms in terms of increased traffic to newspaper websites and more advertising revenue,” which “explains why publishers are eager to distribute their content through aggregators.”²³

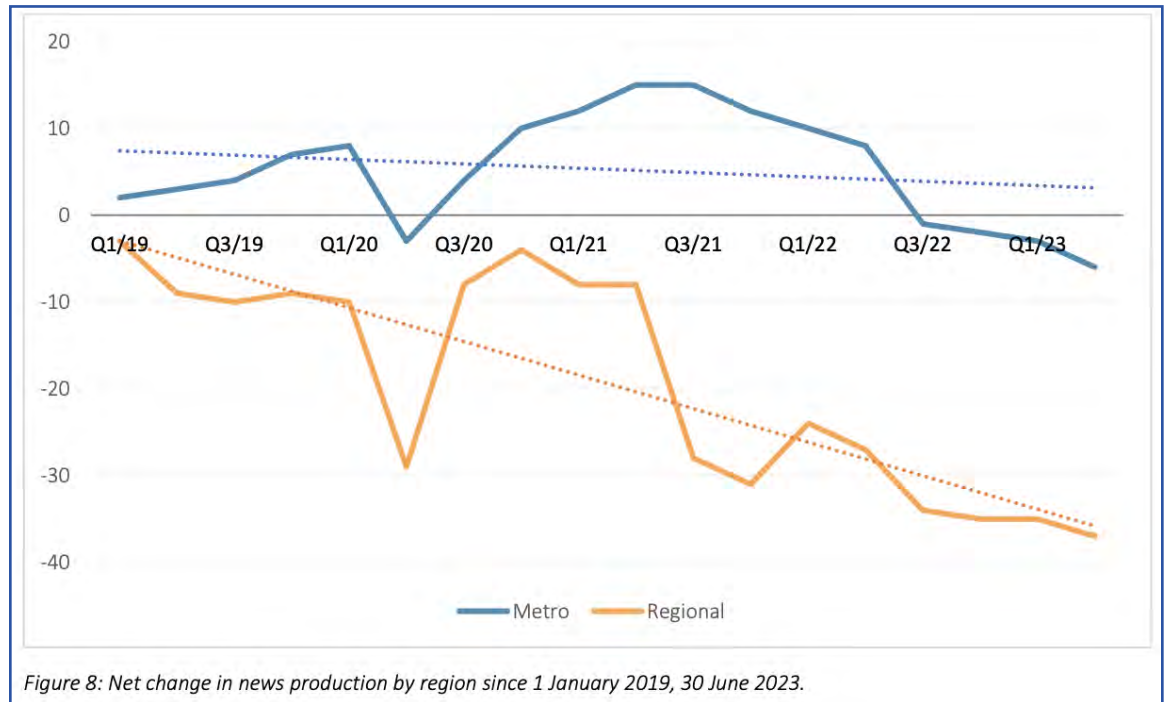
Since then, evidence shows that the newer iterations of this policy also disproportionately harm smaller outlets. In Australia, the regulator has so far declined to “designate” any digital platforms under the law as a result of the online platforms striking deals with news businesses—thereby achieving the goals of mandatory payments via regulatory threat. However, 90% of the funds distributed by the platforms reportedly at least initially went to the largest three media companies, who between them accounted for 80% of industry revenues.²⁴ News Corp reportedly received a deal worth over \$100 million, the company Nine received \$50 million, and the company Seven gained at least \$30 million.²⁵

News production initially increased in the urban metropolitan areas in Australia following the passage of the News Media Bargaining Code in February 2021, while it plummeted in non-metropolitan areas. By 2023, news production began to slightly decline even in urban areas despite the forced payments, while regional news declined at much higher rates.²⁶

The Public Interest News Foundation and Impress, the United Kingdom’s independent press regulator, detailed the harms caused by the Australian law in response to a proceeding related to UK digital markets regulation, noting that the journalism sector “has shrunk considerably with twice as many permanent contractions as expansions” since the Australian legislation was passed, with “nearly every single outlet that decreased its service or shut down were in regional and rural areas,” leading to “small, independent publishers to become even less competitive than they were before the code was introduced, causing damage to them and to the underrepresented communities they serve.”²⁷

The trend lines for news production in Australia from the figure below, produced by the Public Interest Journalism Initiative’s Australian News Data Project, highlight how the passage of the Australian News Media Bargaining Code not only failed to bridge the gap in news production between urban and regional outlets—measured by outlets opening/expanding or closing—but coincided with a deepening of the divide between the two.

Figure 1: Net change in Australian news production (y-axis) over time (x-axis), metropolitan vs. regional areas



Source: Public Interest Journalism Initiative Australian News Data Project²⁸

In Canada, the government’s Parliamentary Budget Officer estimated in 2022 that 75% of the C\$329.2 million annual revenue contribution from digital platforms would go to broadcasters, a sector where five companies control 88% of the market.²⁹ The newspaper sector in Canada, while not as extreme,

is highly concentrated: the top six firms control 79% of daily newspaper circulation in Canada.³⁰ PostMedia, which is 49% owned by a U.S. hedge fund, owns 43% of all daily newspaper titles in Canada, by far more than the next largest share (Torstar Corp./Metroland Media Group with 9%).³¹

Similarly, one analysis found that in California, a proposal that is ostensibly designed to benefit local and smaller outlets would actually most benefit large, out-of-state entities such as Fox News and the New York Post more than even the largest California newspapers.³²

Further, the very premise of these laws contradicts the direction of value generation of online services for small news companies. Social media platforms and search engines provide a resource for smaller media outlets to compete against the larger newspapers and broadcasters. The availability of their links on social media websites and search engines helps drive traffic to smaller news sources; the absence of those online services would likely have resulted in consumers otherwise seeking such information directly from the larger, more recognizable names. As one journalist from Canada who works at an independent outlet notes:

The first major problem with [the Online News Act] is that it is predicated on a lie. The bill adopts an ancient complaint of newspaper publishers: that aggregation-based news websites and social media networks are unduly profiting by “publishing” our content. But, of course, we know this isn't true. In fact, the value proposition runs in exactly the opposite direction. We publishers are the ones who benefit when a user posts a link to our content on Facebook, Twitter or the like; this free distribution drives traffic to our sites which we can then try to monetize through subscriptions or advertising. This is why major media organizations encourage link sharing below all articles; it's why they have spent untold sums on maximizing [search engine optimization]. It's why they literally spend money with digital news intermediaries to boost stories on these platforms.³³

Since Canada passed the Online News Act and Meta subsequently exited the market due to compliance costs and regulatory uncertainty, small and independent media outlets have deeply felt the harms of losing the resource at an existential level and reported vast losses, reflecting the value online services bring to media outlets.³⁴ One independent outlet, the Village, told Canadian Heritage that they believe the government has “caused much more harm than the potential outcome the Online News Act will allow for.” One social-first outlet said in the same consultation: “As a result of this bill, the Department of Canadian Heritage is inadvertently blocking the distribution and propagation of reliable digital news content on social platforms, which will result in more misinformation and disinformation for millions of Canadians.

This is a disaster for our democracy.”³⁵ The Reuters Institute investigated this phenomenon and reported that “for independent local news business, which the Bill aimed to protect, this new media ecosystem can be a death sentence.”³⁶ Meanwhile, there has been no significant change in the use of Facebook since Meta removed news content in Canada, demonstrating how the service is not reliant on news to maximize its use.³⁷

Many news businesses see value in the sharing of their links online, particularly smaller and independent outlets that would stand to lose when digital firms exit the market. When implicated in mandatory payments for online news, these publishers should be able to invoke a safe harbor that would exempt both themselves and the digital intermediaries they engage with from the obligations of the law. Such a safe harbor would have the effect of allowing the linking and quotation of their news content on search engines and social media websites for publishers that still want that resource.

3. Forced Payments for Links Incentivize Poor-Quality Journalism.

Rules that require digital platforms to pay news publishers for the permission to host links, quotes, and other pieces of otherwise legal and non-infringing news content establish perverse incentive structures that generally promote low-quality content and clickbait over quality journalism.

By instituting a mandatory revenue transfer mechanism available to news organizations, these frameworks incentivize quantity over quality in news production and reward media outlets able to leverage legal teams rather than those that connect with readers and the greater public more effectively. In other words, news publishers would be rewarded through these regulatory regimes depending on their lobbying success rather than their relationship with readers cultivated through the quality of their journalism. For example, Canada’s initial proposed implementing regulations for its Online News Act would have ensured that payments to news businesses remained within a narrow band, which in turn would explicitly disincentivize quality and incentivize quantity as a metric for payment.³⁸

Where news businesses can force digital platforms to pay for links and quotes that the digital platforms index and host, negotiations will focus on the access generated through linking to their articles or content made available. The more news articles that an entity can publish, the more value they can claim they provide the digital platforms. Whether a formula based on number of links and views is included or not, the laws promote the equivalent of “clickbait” farms set up to extract revenues from specific digital platforms. For example, in cases such as California, where the legislation establishes a formula whereby publishers would be rewarded with higher mandatory payments if they create more web pages, there may be direct incentives for news businesses to publish poor-quality but high-volume journalism.

If news businesses are rewarded by being able to demand more money from digital platforms for receiving more clicks or simply having more web pages to index, this could lead to media companies prioritizing lower-quality journalism and demanding payments for content. In turn, this would incentivize the news supplier to excessively prioritize creating content optimized for engagement, rather than quality. This is not an effective way of promoting sustainable journalism. Further, it incentivizes news businesses to post more links on social media services themselves for which they can subsequently demand payment from the digital platform which never solicited that content.

Additionally, these policies could also create the problematic scenario whereby digital platforms could be required to enter into paid agreements with outlets publishing outright disinformation due to some arbitrary definitions regarding eligible news organizations. If a business meets the thresholds of an eligible news business—whether that be one defined by employees, revenue, location, or focus of reportage—they are able to demand payment even if they are posting misinformation.

Further, there is a danger that the incentive structure created through these rules would divide the information landscape between domestic and foreign sources. In cases where the laws mandate privileged treatment for domestic content creators, the likely practical implications would be that citizens could have their visibility of competing perspectives and sources that may offer valuable alternatives and a more informed world view restricted.

While platforms might have terms of service enabling them to screen such content, the non-discrimination clauses in many of these laws may restrict the ability of platforms to moderate content and downgrade misinformation or poor-quality journalism if it is created by a publisher eligible for mandatory bargaining. In such cases, these laws effectively impose a “must-carry, must-pay” obligation on the digital platforms. This harms not only the digital services supplier but also the presence of reliable information on the internet. In the United States, such mandates run afoul of free speech protections due to the fact that online services suppliers are required to both carry and fund news companies’ content while also precluding the online services suppliers from exercising their editorial rights and autonomously conducting content moderation on their own platforms.³⁹

4. Placing a Tax on Linking Undermines the Fundamental Internet Ecosystem.

Mandatory bargaining and forced payment schemes undermine the very core of the information-sharing function of the internet by requiring payment for the presence of hyperlinks, headlines, and other brief snippets, including those posted by users on a social media website. As Tim Berners-Lee stated

in testimony to the Australian Parliament as the government considered its mandatory bargaining law, the ability to “link freely — meaning without limitations regarding the content of the linked site and without monetary fees — is fundamental to how the web operates, how it has flourished till present, and how it will continue to grow in decades to come.”⁴⁰

The internet depends on linking, and if one jurisdiction (at a national or sub-national level) imposes mandatory payments for hyperlinks that subsidize a favored constituency, it is likely to lead to both additional jurisdictions and additional favored constituencies pushing for taxation of analogous links. This is not a hypothetical threat: in both the United Kingdom’s Digital Markets, Competition, and Consumers Bill⁴¹ and a 2023 draft of Brazil’s so-called “Fake News Bill,”⁴² legislators expanded the idea of remuneration for online content beyond just news. The same arguments pursued by the news media sector could be appropriated by other constituencies that seek payment for online links. If financially unsustainable subsidies become the norm, digital services may exit the relevant markets, which would subsequently make access to information more difficult for everyone.

As detailed further below, attacking this core characteristic of the internet is inconsistent with the principle of allowing quotation online, a long-established right memorialized in the Berne Convention and related trade rules.

The incentive structure instituted by these regulations could lead to a “Splinternet” effect, as the Internet Society argued in a brief detailing the threat of Canada’s Online News Act. The law, as the organization argues, could lead to a fragmented internet—in other words, there would be different online services offered in Canada compared to those offered in other markets. This would develop as platforms are unwilling to subject themselves to arbitrary and unjustified payments and exit the submarket for Canadian news. As the Internet Society details:

[A] service on the Internet will work one way when outside the Canadian context and a different way within it—with a likely outcome that Canadians will have less access to relevant content than people in other countries... A likely result is that content providers that are available in Canada, but not primarily aimed at Canadian audiences, will have incentives to simply block access to the sites in Canada. This, in turn, would lead to limiting the material available to students, journalists, lawyers, and all other users seeking to conduct research over the Internet in Canada.⁴³

Legal Conflicts Implicated by Online News Payment Mandates

1. Mandatory Payment Schemes for News Links and Quotes Contradict Copyright Law and Precedent.

Even when ancillary rights are not explicitly invoked in the pursuit of mandatory payments to news businesses (i.e., the approach of Australia and Canada), the laws detailed above implicate principles established in the earliest versions of international copyright legal precedents, starting with the Berne Convention in 1886.⁴⁴ Berne made it clear early on in Article 2(8) that “protection shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information”. The information linked and displayed by news aggregators is often a simple iteration of these facts which never enjoyed copyright protection to begin with. Since its inception, Berne has guaranteed the right to quote from newspaper articles against newspaper copyright holders.⁴⁵ Article 10(1) of the Berne Convention details:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.⁴⁶

As Canadian copyright law and internet policy expert Professor Michael Geist explains in the context of Canada’s Online News Act, the right of quotation is not predicated on compensation: the Convention provides that it “shall be permissible to make quotations from a work.” This is exactly the behavior in which digital services suppliers engage themselves and/or allow consumers to by using their platforms and for which governments are now seeking required payment.⁴⁷

Notably, the placement of “quotations” and “press summaries” after the provisos illustrates that these two items cannot be limited by the fair practice or ‘exceeding the purpose’ requirement. Rather, they are inherently exemplary of what satisfies these requirements. This interpretation is reaffirmed in the preparatory documents to the 1967 Stockholm Conference.⁴⁸ There, experts concluded after “exhaustive discussion” that these uses be included “by way of an example” of what was unambiguously permissible.

This interpretation also flows from the heading of Article 10, which refers to “Free Uses of Works.” “Free,” of course, is distinct from the “Permissible But Remunerated” uses contemplated by compulsory license schemes.⁴⁹

Consistent with this, the World Intellectual Property Organization characterized Article 10(1) as permitting use “without the authorization of the owner of the copyright, and without payment of compensation.”⁵⁰ The history of the Article’s development illustrates the intent of policymakers to achieve this goal.⁵¹

In sum, these efforts to force digital platforms to pay for links and snippets of news upend long-established international copyright law. The majority of governments allow for the display of a short quotation or snippet because: (1) it may be too short to qualify for copyright protection; (2) it may fall under an exception to copyright law such as a quotation right, fair use, or fair dealing of the copyrighted work; or (3) the copyright owner is considered to have granted its implied consent to showing such snippets as it has allowed its work to be indexed by search engines and made it available online.

Focusing more domestically on the United States, copyright legal precedent clearly precludes these proposals. U.S. law has historically denied copyright protection to facts and titles, while protecting the display of news snippets and even lengthy quotations in news reporting.

In the United States, as in other countries that have followed similar paths on copyright law, the fair use doctrine imposes certain limitations on a copyright holder’s exclusive rights. Congress codified the fair use doctrine in the Copyright Act of 1976, allowing the use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching[], scholarship, or research.” Courts have recognized that websites have fair use rights related to thumbnail images or snippets “based on the transformative nature of a search engine and its benefit to the public.”⁵²

The active choice to protect facts and news that is found in the U.S. legal system has also characterized the laws of many other countries, including European nations that are contemplating or have implemented ancillary rights provisions. Many countries’ copyright laws contain firmly established prohibitions against copyright protection for facts. Laws throughout higher-income countries provide explicit limitations and exceptions for news reporting, as well as quotations for various purposes. Developing countries also have provisions in their laws excluding protection of facts and permitting quotations for news reporting and other purposes.⁵³

2. Trade and International Agreements Could Be Implicated by Mandatory Payment Schemes.

Because established international copyright rules prohibit nations from restricting the right to quote, national legislation that conflicts with these obligations breaches commitments made under the WTO.⁵⁴ This is because

the provisions of Berne discussed here are incorporated in the TRIPS Agreement,⁵⁵ which is part of the WTO Agreement. Thus, WTO Members have a mandatory, affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available.⁵⁶ All of the jurisdictions mentioned in this paper that are currently contemplating or have passed legislation in this space are signatories to the TRIPS Agreement.⁵⁷ An ancillary right or any other form of snippet tax would abrogate this right in violation of TRIPS obligations.

A dispute brought by the European Union against the United States in 1999 underscored the fact that Berne obligations are enforceable under the WTO.⁵⁸ European rights-holders objected to Section 110(5) of the U.S. Copyright Act, which permits the public performance of music and television in certain public places (chiefly, small businesses, bars, and restaurants), without any royalty being paid. European trade authorities took up the complaint at the WTO, arguing that the provision violated Berne, and therefore TRIPS. While the U.S. Government argued that Section 110(5) was consistent with Berne, a WTO dispute resolution panel disagreed, and the United States agreed to pay \$3.3 million to the European Union to seek to resolve the dispute.⁵⁹

Further, in cases where the United States is a signatory to a free trade agreement with the country pursuing such mandatory payment schemes and the frameworks target U.S. firms, other provisions of such FTAs (in addition to the cross-referenced Berne obligations) may be implicated as well. CCIA has previously raised Canada's Online News Act design as potentially contravening the national treatment, most-favored nation, and performance requirement provisions of the U.S.-Mexico-Canada Free Trade Agreement (USMCA). These provisions could be violated by the law due to the rules specifically targeting U.S. platforms while sparing local and other foreign companies and requiring payment for local inputs—in this case, news content—as a condition of market access.⁶⁰

Recommendations

Given the importance of news media and the viability of high-quality journalism, it is understandable that policymakers would seek to find methods to ensure the sustainability of local news.⁶¹ However, seeking mandatory payments from digital platforms for quotes and links—whether through mandatory bargaining or ancillary rights—will not achieve the goal of supporting quality journalism and will bring sweeping harms to the information-sharing ecosystem of the internet. Therefore, policymakers should not pursue such mandatory revenue transfer schemes to force digital platforms to subsidize news businesses.

Nevertheless, for jurisdictions that pursue analyses or interventions into the relationship between digital platforms and news businesses, here are some key issues policymakers should consider as they craft responses:

- ❖ The mutual benefits created both for platforms and news media businesses, as a result of their interaction, and the flow on effects for consumers.
- ❖ The harms caused by the recent phenomenon of “must-carry, must-pay” requirements. Digital platforms that are targeted by these laws should be given valid exemption mechanisms, and/or governments should permit digital firms to first attempt to reach voluntary agreements with news businesses and be able to exit the market if an exemption is not granted.
- ❖ An objective review of the incentives created by a proposal and whether it will have a generative impact consistent with the stated objective.
- ❖ The effects of a given intervention on the broader information ecosystem, particularly if requirements could be deemed excessively intrusive by industry participants.
- ❖ The established legal frameworks—such as the Berne Convention—and trade commitments that bind together the exchange of digital services.
- ❖ Alternative policy solutions that could catalyze journalism that go more to the root of the issue of providing news businesses with sustainable revenue bases.

Appendix

Comparing Mandatory Online News Payment Regulations

Australia

News Media Bargaining Code

Key Provisions:

- Targets digital platforms that are deemed to have significant bargaining power over news businesses.
- Requirement for designated digital platforms to not differentiate between registered news operators when indexing and making available news content.
- Obligation for digital platforms to negotiate payment agreements with news businesses (individual or collectives), with final offer arbitration the backstop if no deal is reached.
- Although not explicitly written into the law, the regulator has allowed digital operators to temporarily avoid designation and application of the law if deals are voluntarily struck with news publishers.

Timeline:

February 2021– passed and currently in effect.

Status:

No digital platform companies are designated or subject to the law.

European Union

Directive on Copyright in the Digital Single Market⁶²

Key Provisions:

- Article 15 confers a new neighboring right to excerpts from articles longer than a “snippet” and requires licensing agreements for such activity.

Timeline:

May 2019– the Directive was published in the Official Journal of the European Union, with Member States having until June 7, 2021, to implement the law.

Status:

Almost every country—apart from Bulgaria and Poland—have codified the Directive into national law. Several have implemented particularly problematic versions of the press publisher right nationally as of 2023, including France, Germany, the Netherlands, Malta, Belgium and Czechia.

Canada

The Online News Act⁶³

Key Provisions:

- ✦ Applies to digital platforms with “strategic advantage” in the online news market. Companies must self-designate. Thresholds in proposed regulations target only two U.S. companies.
- ✦ News businesses can be as small as only two part-time journalists. No cap on size for news companies’ participation.
- ✦ Prohibits “undue preference”, thereby potentially interfering in platforms’ ability to moderate content and prevent misinformation.
- ✦ Obligation for digital platforms to negotiate payment agreements with news businesses (individual or collectives), with final offer arbitration the backstop if no deal is reached.
- ✦ Requirement for deals struck between digital platforms and news businesses to dedicate “appropriate portions” for specific uses by the news businesses.
- ✦ Initial proposed implementing regulations contained insufficient clarity and certainty for digital platforms to gain exemptions— including a minimum of 4% of global revenue from all sources prorated for Canada’s share of global GDP, a requirement for all deals to remain within a 20% range of the average of all the deals, and veto power given to any group of 10 small outlets that state they have been excluded from the collection of deals with the digital platform.

Timeline:

June 2023– entered into law.

Status:

Implementation and regulatory process under way.

New Zealand

Fair Digital News Bargaining Bill⁶⁴

Key Provisions:

- ✦ Targets and designates digital platforms as privy to the law if “there is likely to be a bargaining power imbalance” with news companies, along with a host of other considerations.
- ✦ News businesses are able to apply to the regulator to get a digital platform designated to be subject to the law.
- ✦ Obligation for digital platforms to negotiate payment agreements with news businesses (individual or collectives), with final offer arbitration the backstop if no deal is reached.
- ✦ Digital platforms can apply for an exemption from the law.
- ✦ Explicitly states that the mandatory bargaining process cannot be used to undo or renegotiate an existing deal.
- ✦ Obligations for the regulator to share information with and act on requests for information or investigation from foreign regulators.

Timeline:

August 2023– introduced.

Status:

Open consultation at the Parliament with comments sought from the public until Nov. 1, 2023.

Indonesia

Presidential Decree on Quality Journalism⁶⁵

Key Provisions:

- Obligation for digital platforms to pay news businesses for hosting content.
- Empowers a body known as the “Press Council”—made up primarily of representatives from the media industry—to oversee the negotiations between digital and news firms.
- Includes obligations for digital platforms to engage with news companies and requirements for taking down news if deemed to violate ethical rules.

Timeline:

N/A

Status:

Still in the drafting process, yet to be published or enacted.

United Kingdom

Digital Markets, Competition and Consumers Bill⁶⁶

Key Provisions:

- Empowers the Digital Markets Unit of the Competition and Markets Authority to designate certain online services providers as having “Strategic Market Status” (SMS), thereby opening them up to a wide set of requirements under a firm-specific ‘code of conduct’.
- Under these codes of conduct, news publishers could be empowered to demand payment for news content hosted on the SMS provider—if such payment is not agreed, a “Final Offer Mechanism” would be in place.⁶⁷

Timeline:

April 2023– introduced.

Status:

Still in the Report stage in the House of Commons.

United States Congress

Journalism Competition and Preservation Act⁶⁸

Key Provisions:

- Applies to digital platforms that meet specific thresholds including 50 million U.S.-based monthly active users or is owned or controlled by an entity with a market cap or U.S. annual net sales of \$550 billion.
- Includes a minimum threshold of \$100,000 in annual revenue and a maximum threshold of 1,500 full-time employees for news business eligibility.
- Obligation for digital platforms to negotiate payment agreements with news businesses (individual or collectives), with final offer arbitration the backstop if no deal is reached.
- No exemption from obligations available to digital platforms.

Timeline:

March 2023– Re-introduced in the Senate.

Status:

Passed out of the Senate Judiciary Committee, not yet reintroduced in the House.

California California Journalism Preservation Act⁶⁹

Key Provisions:

- Targets digital platforms with at least 50 million U.S.-based monthly active users and \$550 billion in U.S.-based annual sales.
- Obligation for digital platforms to negotiate payment agreements with news businesses (individual or collectives), with final offer arbitration the backstop if no deal is reached.
- Includes a specific requirement for digital platforms to pay a percentage (to-be-determined) of the covered platform's quarterly advertising revenue multiplied by the California share of the news business's web pages.
- Must-carry provision by prohibiting the "refusing to index content or changing the ranking, identification, modification, branding, or placement of the content of" digital journalism providers.
- No exemption from obligations are made explicitly available to digital platforms.
- Any compensation received by a digital journalism provider from a platform through a commercial agreement before the commencement of arbitration must be deducted from their allocation accordingly.

Timeline:

July 2023– became a two-year bill.

Status:

Expected to be heard in the Senate Judiciary Committee in 2024, with an interim hearing in Fall 2023

Endnotes

- 1 <https://www.usitc.gov/publications/332/pub4716.pdf> at 291-92 (“Small online publishers have been reluctant to demand fees from online platforms because they rely on traffic from those search engines, and industry experts have stated that ancillary copyright laws have not generated increased fees to publishers; rather, they have acted as a barrier to entry for news aggregators.”).
- 2 <https://www.nera.com/publications/archive/case-project-experience/meta-and-the-news--assessing-the-value-of-the-bargain-.html>
- 3 <https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>; <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/>; <https://blog.google/around-the-globe/google-asia/australia/8-facts-about-google-and-news-media-bargaining-code/>; <https://blog.google/intl/en-ca/company-news/outreach-initiatives/an-open-letter-to-canadians/>; <https://about.fb.com/news/2022/10/metis-concerns-with-canadas-online-news-act/>.
- 4 <https://www.legislation.govt.nz/bill/government/2023/0278/latest/whole.html#LMS819926>
- 5 <https://www.congress.gov/bill/118th-congress/senate-bill/1094/text>
- 6 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202302040AB886
- 7 https://www.mcmc.gov.my/skmmgovmy/media/General/PressRelease/MS_MCMC-CONSIDERS-REGULATORY-FRAMEWORK-TO-ADDRESS-ONLINE-HARM-AND-IMBALANCE-MEDIA-ADEX.pdf
- 8 https://assets.publishing.service.gov.uk/media/6273af6be90e0746c882c361/Platforms_publishers_advice_A.pdf
- 9 <https://dewanpers.or.id/berita/detail/2454/Dewan-Pers-Minta-Pemerintah-Percepat-Prioritas-Pemberlakuan-Publisher-Rights>; <https://www.centennialasia.com/the-asian-pulse/daily-news/indonesia-to-require-google-and-meta-to-prioritize-verified-news-outlets/>; <https://www.kompas.id/baca/english/2023/08/19/en-rancangan-perpres-jurnalisme-berkualitas-dan-pengalaman-negara-lain>; <https://indonesia.googleblog.com/2023/07/rancangan-peraturan-untuk-masa-depan-media-di-Indonesia.html>
- 10 <https://www.jftc.go.jp/en/pressreleases/yearly-2023/September/230921EN2.pdf>
- 11 <https://www1.folha.uol.com.br/poder/2023/05/relator-acena-a-religiosos-ao-fatiar-pl-das-fake-news-texto-fixa-criterios-para-remunerar-jornalismo.shtml>
- 12 <https://www.compcom.co.za/wp-content/uploads/2023/03/Media-Statement-Terms-of-Reference-to-establish-a-Media-and-Digital-Platforms-Market-Inquiry-17-March-2023.pdf>
- 13 <https://www.pewresearch.org/journalism/chart/sotnm-newspapers-newspaper-industry-estimated-advertising-and-circulation-revenue/>
- 14 <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>; <https://www.gao.gov/assets/gao-22-105405.pdf>
- 15 https://newsmediaanalysis.s3-ap-southeast-2.amazonaws.com/accnture_analysis_WesternEuropeNewsMedia.pdf (showing that a 2021 Accenture study of Western European countries found that 44% of the €16.2 billion decline in revenue for newspapers between 2003 and 2019 could be attributed to the loss of classified ads. In 2003, classified advertising generated €9.9 billion for Western European newspaper revenues, representing almost a quarter of their total revenues); <https://nmc-mic.ca/wp-content/uploads/2021/10/NAV2012YTD-10012013-FINAL.pdf>; https://nmc-mic.ca/wp-content/uploads/2023/03/2021-Net-Ad-Volume_Feb_2023.pdf (showing that the story is similar in North America—in Canada, classified advertising revenue for daily newspapers went from C\$875 million in 2005—comprising 33% of the total ad revenue that year—to C\$55 million in 2021—10% of total ad revenue); https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/091201transcript.pdf (In 2009 testimony before the Federal Trade Commission, Mark Contreras of the Newspaper Association of America detailed how classified advertising revenue made up between 40-60 percent of all revenue and was “the lion’s share” of newspapers’ profits and further opined that “there are two reasons for the decline of classified advertising: First the advent of interactive tools that efficiently connected buyers and sellers and the increasing penetration of broadband Internet access in the United States.”);

<https://www.google.com/url?q=https://accesspartnership.com/wp-content/uploads/2023/03/australian-media-landscape-report.pdf&sa=D&source=docs&ust=1699653968175677&usg=AOvVaw2C17iZAUOWhNkktPBGzCzPO>

- 16 <https://www.ourcommons.ca/DocumentViewer/en/44-1/CHPC/meeting-75/evidence> (“If I might address the disruption of the newspaper business model, the Internet obviously changed everything. If you look at the primary sources of advertising for news organizations back 30 years ago, there were four categories that were dominant, representing more than three-quarters of their revenue. One was classified ads, which went online, as you know, and not to Google. Another was department stores, which have been a shadow of their former selves with e-commerce. Another was food coupons, which now are loyalty programs by supermarkets. The other was automotive dealers, which have also gone online. So unfortunately, yes, the Internet did, indeed, disrupt the business model. It also provided tremendous opportunities for small businesses.”).
- 17 <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>
- 18 <https://www.cato.org/sites/cato.org/files/2023-08/policy-analysis-956-update.pdf> (“Advertisers once poured incredible sums of money into the newspaper industry, not because they cared about subsidizing the news per se, but because it was one of the only mechanisms for reaching a mass audience. That is why the beginning of the end for the ad-dependent financial model of newspapers was not the advent of the internet, but the rise of television, and thus the perceived need for the Newspaper Preservation Act of 1970. Only a small fraction of television ad spending was tied to news-related programming, with most ads pegged to various forms of entertainment content. The internet has merely exacerbated the trend that began with television. Newspapers now have to compete with every other form of content that is trawling for consumers’ attention, from sponsored makeup tutorials on social media to underwritten livestreams from professional video gamers.”).
- 19 <https://www.pewresearch.org/short-reads/2023/11/15/more-americans-are-getting-news-on-tiktok-bucking-the-trend-seen-on-most-other-social-media-sites/>
- 20 <https://www.mcgill.ca/maxbellschool/max-policy/c-18>
- 21 <https://www.techdirt.com/2015/07/29/study-spains-google-tax-news-shows-how-much-damage-it-has-done/>
- 22 <https://communia-association.org/2015/09/09/research-confirms-new-spanish-ancillary-copyright-is-actually-good-for-no-one/>
- 23 <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf> at 25 (“The German and Spanish cases show that the law can create a right but market forces have valued this right at a zero price. Explanations may be found in the economics of platforms or multi-sided markets. Platforms benefit from network effects and data aggregation across many users. This results in wider reach and lower transactions costs that individual newspaper websites cannot match.”).
- 24 <https://www.cato.org/policy-analysis/link-tax-wont-save-newspaper-industry>; <https://www.crikey.com.au/2021/02/24/media-diversity-hit-old-media-big-tech-cash/>
- 25 <https://www.cato.org/policy-analysis/link-tax-wont-save-newspaper-industry>; <https://www.crikey.com.au/2021/02/24/media-diversity-hit-old-media-big-tech-cash/>
- 26 <https://piji.com.au/wp-content/uploads/2023/10/2306-Report-v2.pdf> at 20-21 (“[D]espite the opening of new outlets in regional areas, the impact of other market contractions – outlet and newsroom closures and decreases in service – negates that growth overall. On this measurement, metropolitan areas have a -6 variance in outlets and service, while regional areas end the current quarter with a -37 variance since 1 January 2019.”).
- 27 <https://bills.parliament.uk/publications/51757/documents/3633> at 4-5
- 28 <https://piji.com.au/wp-content/uploads/2023/08/2306-AND-Report-June-2023.pdf>
- 29 <https://www.pbo-dpb.ca/en/publications/RP-2223-017-M--cost-estimate-bill-c-18-online-news-act--estimation-couts-lies-projet-loi-c-18-loi-nouvelles-ligne>; https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf at 10; <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2021/rad.htm#a4>
- 30 https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf

- 31 https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf
- 32 <https://medium.com/chamber-of-progress/californias-online-journalism-bill-would-be-a-windfall-for-fox-news-and-other-disinfo-outlets-54d95a4636b4>
- 33 <https://theline.substack.com/p/jen-gerson-c-18-will-hurt-journalism>
- 34 <https://www.politico.com/news/2023/11/08/tech-giant-battle-doom-small-news-outlets-trudeau-00126198>
- 35 <https://canadagazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html>
- 36 <https://reutersinstitute.politics.ox.ac.uk/news/canadas-battle-big-tech-smaller-publishers-are-caught-crossfire>
- 37 <https://www.reuters.com/technology/metas-canada-news-ban-fails-dent-facebook-usage-2023-08-29/>
- 38 <https://canadagazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html>
- 39 <https://ccianet.org/wp-content/uploads/2023/06/CCIA-CJPA-Legal-Analysis-Memorandum.pdf> at 3.
- 40 <https://www.aph.gov.au/DocumentStore.ashx?id=a9823801-565b-4833-8515-ea4fd57b3d01&subId=700056>
- 41 <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf>
- 42 <https://www.project-disco.org/21st-century-trade/the-global-threat-to-information-sharing-online-posed-by-link-taxes/>
- 43 <https://www.internet-society.org/resources/doc/2023/internet-impact-brief-how-canadas-online-news-act-will-harm-the-internet-restricting-innovation-security-and-growth-of-the-digital-economy/>
- 44 The United States joined the Berne Convention in 1989. Other major countries with this law in effect also are part of the Convention, with Australia joining in 1972 and Canada joining in 1998.
- 45 See Berne Convention (as of 1886), art. 7 (reprinted in 3 William F. Patry, Copyright Law & Practice Appx. F, at 1947 (1994 ed.)). The right originally authorized reproduction of entire articles.
- 46 Berne Convention, art. 10(1).
- 47 <https://www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/> (“The Convention states that it shall be permissible to make quotations from a work. That is precisely what Internet platforms are doing and the right the government is seeking to remove for the purposes of mandatory payments. It is an approach not found in Europe or Australia for the obvious reason that it is not consistent with international copyright law. The government should not be picking and choosing which users are entitled to user rights within copyright law and derogating from a mandatory obligation in international copyright law.”).
- 48 <https://ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf> (“Whereas prior to 1967 the right existed only to make ‘short quotations,’ the 1967 revision consciously deleted the word ‘short.’ This was not accidental; the change was specifically recommended by nations’ international copyright experts.”).
- 49 See, e.g., Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, WIPO Standing Committee on Copyright and Related Rights, SCCR/9/7 (Apr. 5, 2003) at 27 (“It is therefore clear that exceptions under Article 9(2) may take the form of either free uses or compulsory licenses, depending essentially on the number of reproductions made.”).
- 50 See WIPO, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.
- 51 <https://ccianet.org/wp-content/uploads/2015/02/CCIA-Understanding-Ancillary-Copyright.pdf>
- 52 <https://ccianet.org/library/ccia-california-journalism-preservation-act-legal-memo/>; <https://infojustice.org/archives/44775> (“The Copyright Office declared that “a new press publishers’ right that set aside traditional copyright limitations could [] raise questions regarding to consistency with the United States’ international obligations.” The Office noted that article 10(1) of the Berne Convention provides a quotation right, and stated that

“some scholars have argued that this is a mandatory ‘right of quotation,’ and must be permitted even with respect to sui generis protections such as ancillary copyright.” In support of this proposition, the Office cited Tanya Aplin and Lionel Bently’s 2020 book “Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works.”).

- 53 <http://infojustice.org/wp-content/uploads/2013/08/Masterlist-11262012.pdf>, at 9-18.
- 54 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596
- 55 TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971)”).
- 56 This position has been advanced previously by CCIA in the USTR Special 301 process. See, e.g., Comments of CCIA, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, at 5, <https://www.ccianet.org/wp-content/uploads/library/CCIA-2010-Spec301-cmts.pdf> (if a Berne Contracting Party “were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of ‘adequate and effective protection’ under § 2242(a)(1), possibly necessitating identification as ‘acts, policies, or practices’ having actual or potential impact on relevant United States products.”); see also Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, at 11-12, [http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20\[2013\].pdf](http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20[2013].pdf) (“By virtue of Berne’s incorporation in TRIPS, Article 10(1) imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available”).
- 57 https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm
- 58 Panel Report, United States -- Section 110(5) of US Copyright Act, WT/DS160/R, adopted July 27, 2000, ¶ 6.63 (finding not only that certain articles of the Berne Convention are incorporated into the TRIPS Agreement by way of Article 9.1, but also certain elements of the Berne Convention’s *acquis*).
- 59 Office of the U.S. Trade Representative, Section 110(5) of US Copyright Act Dispute Settlement Proceeding Summary, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/united-states-%E2%80%94-section-1105-us-copyright-ac>.
- 60 <https://ccianet.org/library/2022-09-06-ccia-white-paper-on-canada-bill-c-18-the-online-news-act/>
- 61 <https://www.washingtonpost.com/opinions/2023/10/05/leonard-downie-local-news-solutions/>.
- 62 <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>
- 63 <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/royal-assent>
- 64 <https://www.legislation.govt.nz/bill/government/2023/0278/latest/LMS814468.html>
- 65 <https://www.reuters.com/world/asia-pacific/indonesia-drafts-law-enabling-media-receive-payments-digital-platforms-content-2023-02-09/>; <https://www.benarnews.org/english/news/indonesian/new-media-law-may-harm-press-google-says-07262023133956.html>; <https://dewanpers.or.id/berita/detail/2454/Dewan-Pers-Minta-Pemerintah-Percepat-Prioritas-Pemberlakuan-Publisher-Rights>; <https://www.centennialasia.com/the-asian-pulse/daily-news/indonesia-to-require-google-and-meta-to-prioritize-verified-news-outlets/>; <https://www.kompas.id/baca/english/2023/08/19/en-rancangan-perpres-jurnalisme-berkualitas-dan-pengalaman-negara-lain>; <https://indonesia.googleblog.com/2023/07/rancangan-peraturan-untuk-masa-depan-media-di-Indonesia.html>
- 66 <https://publications.parliament.uk/pa/bills/cbill/58-03/0350/220350.pdf>
- 67 <https://newsmediauk.org/wp-content/uploads/2023/05/2023.05.15-NMA-DMCCB-2nd-Reading-Briefing-1.pdf>
- 68 <https://www.congress.gov/bill/118th-congress/senate-bill/1094/text>
- 69 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB886