The Harms of Mandatory Online News Payments

Over the past eight years, three governments 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 advancing similar rules. The proposals circumvent free market dynamics to force a select few U.S. online businesses to pay news publishers for displaying quotes or headlines and linking to news content. These regimes ignore the fact that news publications post on social media services and allow their content to be indexed to obtain referral traffic, which represents a significant source of revenue. While these efforts are cast as a means to help journalists and the media, the real-world results have been the opposite.

MYTHS vs. FACTS

Forcing Digital Services to Pay for the Presence of News Content Is Deeply Flawed Policy

Myth

Online Services Have Caused a Decline in Journalism Production

Fact

The crisis in local journalism's business model began well before the emergence of the digital economy, based on technological change affecting both consumption of news and a restructuring of the advertising market. In fact, online services have been critical in helping news sites manage this transition and sustaining journalism, by driving traffic to news sites. In some jurisdictions, ill-advised mergers led to the assumption of unsustainable levels of debt.

Myth

The Technology Industry Has Stolen News Businesses' Revenue

Fact

News businesses' advertising dominance was a historical anomaly in a market that has always been dynamic—a century-old evolution that has integrated the emergence of radio, television, and now the internet. Advertising market changes in the internet era are complex and fast-moving. Media advertising revenue has migrated across the ecosystem, not just to the services that are the targets of legislation, with no discernable connection to linking and quoting online.

MYTHS vs. FACTS

Forcing Digital Services to Pay for the Presence of News Content Is Deeply Flawed Policy

Myth

Requiring Payments for Online News Links and Quotes Is a Reasonable Intervention That Will Improve Independent Journalism, Media Competitiveness, and Production of Quality Journalism

Fact

Big media conglomerates, weighed down by high legacy costs, will disproportionately benefit from mandatory payments at the expense of smaller news players.

Fact

Forced payments for links incentivize poor-quality journalism and can lead to compensation for misinformation.

Fact

Placing a tax on linking undermines the internet ecosystem.

Legal Conflicts For Online News Payment Mandates

International Copyright Law Obligations

Efforts to force websites to pay for links and snippets of news upend long-established international copyright law. The majority of governments allow for the displaying 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 the 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.

Trade and International Agreements

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,[1] and where applicable, bilateral free trade agreements.

U.S. Constitutional and Legal Protections

In addition to these international considerations, proposed U.S. regulations that would require digital services providers to pay news corporations for the linking and quotation of news content raises many domestic concerns, including contravening federal copyright law, the First Amendment freedom of speech protections, granting antitrust exemptions that would permit favored businesses to form cartels contrary to U.S. antitrust principles, and due process protections.[2]

Recommendations

Policymakers should not pursue mandatory revenue transfer schemes to force digital services to subsidize news businesses. However, for jurisdictions that pursue policy interventions, here are some key considerations for policymakers:

- Digital services and news media businesses generate vast benefits for one another and for consumers.
- “Must-carry, must-pay” mandates harm the online ecosystem.
- Established legal frameworks and trade commitments facilitate the exchange of digital and digitally-enabled services.
- There are alternative policy solutions that could catalyze journalism that go more to the root of the issue of providing news businesses with sustainable revenue bases.
- Similar attempts to impose these rules have failed elsewhere, such as in Spain, where obligatory payments led to sweeping harms for small news outlets.

[1] The provisions of the Berne Convention are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), 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: https://infojustice.org/archives/44775; https://infojustice.org/archives/42925.

[2] https://ccianet.org/library/ccia-california-journalism-preservation-act-legal-memo/.

Existing Frameworks Requiring Payment for Online News

Below is a collection of the most prominent recent examples of legislation. Each version requires targeted digital services providers to negotiate payment agreements with news businesses, with final offer arbitration the backstop if no deal is reached.

Jurisdiction & Legislation	Online Services Providers Targeted	Content Moderation Restrictions	Exemption Process
Australia: News Media Bargaining Code (enacted 2021)	Those deemed to have significant bargaining power over news businesses.	Digital providers cannot differentiate between registered news operators when indexing and making available news content.	Digital operators can receive temporary exemption from the law by the minister if deals are voluntarily struck with news publishers.
Canada: Online News Act (enacted 2023)	Online services providers with “strategic advantage” in the online news market. The Canadian government has stated that at least initially, the regulations will capture only two companies, both from the United States.	Prohibits “undue preference”, thereby potentially interfering in online services providers’ ability to moderate content and prevent misinformation.	The definitions and thresholds are to be finalized by the Canadian Radio-television and Telecommunications Commission.
U.S. Congress: Journalism Competition and Preservation Act (reintroduced 2023)	Specific thresholds including 50 million U.S.-based monthly active users or a market cap or U.S. annual net sales of $550 billion.	Prohibits covered online services providers from “retaliating” against publishers seeking negotiations for payment, including “refusing to index content” or “changing the ranking” of content, both of which are key to general moderation of content.	None.
California: California Journalism Preservation Act (introduced 2023)	Specific thresholds including 50 million U.S.-based monthly active users or a market cap *and* U.S. annual net sales of $550 billion	Prohibition on “refusing to index content or changing the ranking, identification, modification, branding, or placement of the content of” digital journalism providers.	None, though any compensation received by a news corporation from an online services supplier through a deal before the mandatory arbitration begins must be deducted from their allocation accordingly.