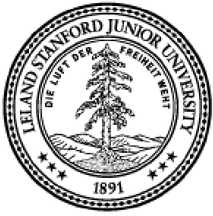

Stanford – Vienna
Transatlantic Technology Law Forum
A joint initiative of
Stanford Law School and the University of Vienna School of Law

TTLF Working Papers

No. 66

Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms

Giuseppe Colangelo

2020

TTLF Working Papers

Editors: Siegfried Fina, Mark Lemley, and Roland Vogl

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Suggested Citation

This TTLF Working Paper should be cited as:
Giuseppe Colangelo, Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms, Stanford-Vienna TTLF Working Paper No. 66, http://ttlf.stanford.edu.

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Abstract

The emergence of the multi-sided platform business model has had a profound impact on the news publishing industry. By acting as gatekeepers to news traffic, large online platforms have become unavoidable trading partners for news businesses, and exert substantial bargaining power in their dealings. Concerns have been raised that the bargaining power imbalance between online platforms and content producers may threaten the viability of publishers' businesses. Notably, digital infomediaries are accused of capturing a disproportionate share of advertising revenue relative to the investments made in producing news content. Moreover, by affecting the monetization of news, the dominance of some online platforms is deemed to have contributed to the decline of trustworthy sources of news.
Against this background, governments have been urged to intervene in order to ensure the sustainability of the publishing industry. The EU has decided to address publishers' concerns by introducing an additional layer of copyright as a means to encourage cooperation between publishers and online content distributors. And the French Competition Authority has recently accused Google of adopting a display policy aimed at frustrating the objective of the domestic law implementing the EU legislation, hence requiring Google to conduct negotiations in good faith with publishers and news agencies on the remuneration for the reuse of their protected content. The Australian Competition and Consumer Commission has instead embraced a regulatory approach, developing a mandatory bargaining code. This paper analyzes different solutions advanced to remedy these problems in order to assess their economic and legal justifications as well as their effectiveness.

JEL: K21, L40, L82, O34

Keywords: Digital platforms; publishing industry; digital advertising; neighboring rights; abuse of dominant position; bargaining code

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1. Introduction.

Within the heated debate on the role played by digital platforms, complaints by the news publishing industry have drawn particular attention. The crisis in the publishing industry is not a new phenomenon. The advent of the Internet had a significant impact by lowering costs of distribution and enhancing access to information, hence favoring changes in consumer consumption habits.[1] However, the emergence of the multi-sided platform business model seems to have completely disrupted the sector by enabling new intermediaries, providing algorithm-driven access to unbundled news articles, to enter the information value chain.[2]

Digital platforms have become the gateways to online news media for many consumers and provide news referral services for media businesses.[3] Notably, media aggregation

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[1] See European Commission, 'Impact Assessment on the modernization of EU copyright rules', SWD(2016) 301 final, §5.3.1, reporting that newspapers and magazines' websites and apps are the main services used to access news for 42% of users in the EU and that the proportion of consumers who indicate that the Internet is their main source to access news largely outweighed those for whom the favorite source is printed newspapers. See also OECD, 'The Evolution of News and the Internet' (2010) <http://www.oecd.org/sti/ieconomy/45559596.pdf> accessed 11 September 2020; and U.S. Federal Trade Commission, 'Potential Policy Recommendations to Support the Reinvention of Journalism' (2010) <https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf> accessed 11 September 2020.

[2] See Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, (2019) OJ L 130/92, Recital 54, reporting that the wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. See also Bertin Martens, Luis Aguiar, Maria Estella Gomez-Herrera, and Frank Mueller-Langer, 'The digital transformation of news media and the rise of disinformation and fake news - An economic perspective', (2018) JRC Technical Reports, Digital Economy Working Paper 2018-02, <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/digital-transformation-news-media-and-rise-disinformation-and-fake-news> accessed 11 September 2020; Martin Senftleben, Maximilian Kerk, Miriam Buiten, and Klaus Heine, 'New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era', (2017) 48 IIC 538.

[3] Australian Competition and Consumer Commission, 'Digital platforms inquiry', (2019) 206 <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry> accessed 11 September 2020; U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law, 'Investigation of Competition in Digital Markets', Majority Staff Reports and Recommendations, (2020) 63 <https://judiciary.house.gov/uploadedfiles/investigation_of_competition_in_digital_markets_majority_staff_report_and_recommendations.pdf> accessed 8 October 2020.

platforms, search engines and social networks attract readers, offering a combination of short texts, images or videos from several publishers, with links to original content (so-called snippets). As a result, the traditional newspaper industry is experiencing a sharp fall not only in sales and subscriptions but also in press advertising revenue, despite the growing consumption of online news content. Therefore, digital infomediaries are accused of capturing a huge share of the advertising revenue by free-riding on the investments made in producing news content, which takes advantage of the value created by the distribution of content that distributors do not produce and for which they do not bear the costs.

However, the relationship between digital platforms and news publishers is characterized by a two-way exchange of value.[4] Provided that there is a positive relationship between website visits and advertising revenue generated and that consumers are increasingly accessing news websites via digital platforms, if digital platforms are more attractive to consumers by excerpting content from news publishers and providing outbound links to their sites, at the same time legacy publishers may benefit from digital infomediaries by receiving inbound links which may increase audience and traffic to their websites.[5] Construed in this way, media aggregation services, online search services, and social media services play a complementary role to newspapers' original websites. Such complementarity does not occur when users are satisfied with the preview information available on digital platforms and neglect to click through to the original source.

[4] Australian Competition and Consumer Commission, *supra* note 3, 8-9.

[5] See Jason M.T. Roos, Carl F. Mela, and Ron Shachar, 'The Effect of Links and Excerpts on Internet News Consumption', (2020) 57 Journal of Marketing Research 395, finding that links change the way experienced consumers browse for news to the benefit of both consumers and news sites.

To summarize, the impact of digital platforms on the revenue of original news publishers is the result of the net effect of two opposing forces: these being substitution and market expansion. While, according to the former, digital infomediaries negatively impact on legacy publishers by displacing online traffic, the market expansion effect argument maintains that aggregation services increase the total number of site visits since they allow consumers to discover news outlets' content that they would not otherwise be aware of, and reduce search times, enabling readers to consume more news. Determining whether the referral traffic compensates for the direct visits lost by the substitution effect is an empirical question.

Against this backdrop, it has been argued that the potential mutually profitable relationship between news publishers and digital infomediaries has been undermined by the emergence of large technology platforms.[6] Under this argument, Google and Facebook's market positions have a profound impact on news publishers and a profound influence on the relationship between news producers and the public. Indeed, these platforms act as gatekeepers of the news and represent unavoidable trading partners, hence exerting substantial bargaining power in their dealings with media businesses.[7] As a consequence of the reliance by publishers on Google and Facebook for traffic, the

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[6] Stigler Center, 'Protecting Journalism in the Age of Digital Platforms', (2019) <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/media---report.pdf> accessed 11 September 2020; The Cairncross Review, 'A sustainable future for journalism', (2019) <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism> accessed 11 September 2020; U.S. House of Representatives (n 3) 57-73. See also Damien Geradin, 'Complements and/or Substitutes? The Competitive Dynamics Between News Publishers and Digital Platforms and What It Means for Competition Policy', (2019) TILEC Discussion Paper No. 3, 21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338941> accessed 11 September 2020, arguing that, while news publishers and digital platforms are mutually interdependent and provide each other with substantial benefits, the digital platforms' substantial market power in the supply of news media referral services gives them the upper hand and could be a source of abuses.

[7] Australian Competition and Consumer Commission, *supra* note 3; UK Competition and Markets Authority, 'Online Platforms and Digital Advertising', (2020) Market Study Report <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> accessed 11 September 2020.

imbalance of bargaining power allows these BigTechs to control the distribution of publishers' content online and impose their own policy for displaying news content.[8] In this regard, the opacity of the algorithms that rank and distribute news content, the lack of transparency in the advertising intermediation (so-called ad tech stack), and the imposition of publishing formats and the lack of sharing of individual data collected from consumers, have been cited as evidence of Google and Facebook's bargaining power vis-à-vis media businesses.

Finally, concerns have been raised over the impact that the digital platform business models have on the quality of news, since, by altering the incentives for the production of high-quality journalism, the structure and the economics of new intermediaries are deemed to negatively affect the public debate and the proper functioning of a democratic society, promoting the spread of fake news and the decline of the local press.[9]

For all these reasons, governments have been urged to intervene in order to ensure the sustainability of the publishing industry. The aim of this paper is to analyze the different solutions advanced in order to assess their economic and legal justifications as well as their effectiveness.

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[8] See e.g. Australian Competition and Consumer Commission, *supra* note 3, 232: "If media businesses had control over snippets, it would be expected that they would experiment to optimize the length and content of snippets to maximize the number of users clicking through to their websites without diminishing the value of that content. Google offers media businesses a binary choice: the ability to opt in or out of snippets. Google does not allow media businesses to negotiate any other terms in relation to the provision of snippets"; UK Competition and Markets Authority, *supra* note 7, 17, reporting that newspapers are reliant on Google and Facebook for almost 40% of all visits to their sites and arguing that, by squeezing their share of digital advertising revenues, this dependency potentially undermines their ability to produce valuable content; and U.S. House of Representatives, *supra* note 3, 63, arguing that, due to their outsized role as digital gateways to news, a change to one of dominant platforms' algorithm can significantly affect the online referrals to news publishers, directly affecting their advertising revenue.

[9] Australian Competition and Consumer Commission, *supra* note 3, 280; Emily Bell and Taylor Owen, 'The Platform Press. How Silicon Valley Reengineered Journalism', (2017) Tow Center for Digital Journalism, Columbia Journalism School, <https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php> accessed 11 September 2020; Directive 2019/790 (n 2) Recital 54; Stigler Center, *supra* note 6; The Cairncross Review, *supra* note 6; UK Competition and Markets Authority, *supra* note 7, 9; U.S. House of Representatives, *supra* note 3, 57.

The paper is structured as follows. Section 2 illustrates the issues posed by the neighbouring right on online uses of press publications introduced by the EU copyright reform. Section 3 assesses the limits of antitrust law in securing copyright enforcement by analyzing the recent French Competition Authority decision against Google's display policy. Section 4 explores alternative solutions provided by regulatory interventions aimed at addressing the imbalance of bargaining power between large online platforms and media businesses. Specific attention will be given to the Australian mandatory bargaining code, comparing benefits and drawbacks with those of the European approach. Section 5 concludes.

2. The European way: twisting copyright laws.

The EU has decided to address the concerns of publishers and the sustainability of the publishing industry by intervening on rights, notably introducing an additional layer of copyright as a means to encourage cooperation between press publishers and online services. Indeed, according to the European Commission, the current EU copyright rules cannot guarantee the equitable sharing of the value generated by some of the new forms of online content distribution along the value chain.[10] Notably, the fact that publishers are not protected as right holders at EU level but rely on the rights of the authors being transferred to them has contributed to the situation of legal uncertainty concerning their ability to receive compensation. As argued in the Commission's impact assessment on the modernization of EU copyright rules, the gap in the current EU rules "further weakens

[10] European Commission, Communication 'Towards a modern, more European copyright framework', COM(2015) 626 final, §4; Communication 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COM(2016) 592 final, §4.

the bargaining power of publishers in relation to large online service providers and contributes to aggravate the problems faced by press publishers as regards the online exploitation of, and enforcement of rights in, their content."[11] Online service providers often have a strong bargaining position and this makes it difficult for press publishers to negotiate with them on an equal footing, including reference to the share of revenues related to the use of their content.

Since press publishers are facing problems in licensing the online use of their publications, making it more difficult for them to recoup their investments, the European institutions considered it necessary to provide, at the European Union level, harmonized legal protection for press publications in respect to online uses. Such standards were designed to reign in content distributors by putting content producers in a better negotiating position in their contractual relations.[12] Therefore, Article 15 of the DSM Directive has introduced a new neighbouring right for publishers to directly reproduce and distribute their content. Publishers must be established in a Member State to have this protection in respect to online uses of their content by information society service providers.[13] The new neighboring right lasts for two years from first publication, does not extend to acts of hyperlinking and cannot be invoked in respect of the use of individual words or very short extracts.[14]

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[11] European Commission, 'Impact assessment on the modernization of EU copyright rules', SWD(2016) 301 final, §5.3.1.
[12] Directive 2019/790, *supra* note 2, Recitals 54 and 55.
[13] *Id.*.
[14] *Id.*, Recital 58, arguing that the use of individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers in the production of content.

The EU copyright reform has experienced a tortuous birth and the new neighbouring right on digital uses of press publications has been declaimed by critics questioning its economic and legal justifications.[15]

From the economic perspective, it has been argued that the European reform is not guided by an evidence-led approach since there is no empirical evidence in support of the free-riding distributor narrative.[16] As the same European Commission acknowledged, neither of the previous ancillary rights solutions enacted at the national level (in Germany and Spain) have proven effective, as they have not resulted in increased revenues for publishers from the major online service providers.[17] Looking at German and Spanish attempts, empirical results show no evidence of a substitution effect, but rather demonstrate the existence of a market-expansion effect, therefore showing that online news aggregators complement newspaper websites and may benefit them in terms of increased traffic and more advertising revenue.[18] Furthermore, the Spanish copyright law reform has proven that a neighboring right is not only ineffective for publishers'

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[15] See Giuseppe Colangelo and Valerio Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform', (2019) 27 International Journal of Law and Information Technology 75.

[16] See e.g. Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, Maria Del Carmen Calatrava Moreno, and Alfred Radauer, 'Strengthening the position of press publishers and authors and performers in the Copyright Directive', (2017) Study commissioned by the European Parliament, (2017) <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf> accessed 13 September 2020; Cristophe Geiger, Oleksandr Bulayenko, and Giancarlo Frosio, 'The introduction of a neighbouring right for press publisher at EU level: the unneeded (and unwanted) reform', (2017) 39 EIPR 202; Reto M. Hilty and Valentina Moscon, 'Protection of Press Publications Concerning Digital Uses', (2017) Position Statement of the Max Planck Institute for Innovation and Competition, 79 <https://pure.mpg.de/rest/items/item_2470998_12/component/file_2479390/content> accessed 13 September 2020.

[17] European Commission, *supra* note 11, §5.3.1. It is also worth noting that the lawfulness of creating neighbouring rights by national legislation has been questioned and the CJEU has recently shared these concerns by stating that the provisions in question constitute a technical regulation within the meaning of Directive 98/34, hence considering the German press publishers' right unenforceable (see CJEU, 12 September 2019, Case C-299/17, *VG Media v Google Inc.*).

[18] Joan Calzada and Ricard Gil, 'What do News Aggregators Do?', (2020) 39 Marketing Science 134; Joint Research Centre for the European Commission, 'Online News Aggregation and Neighbouring Rights for News Publishers', (2017) <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf> accessed 13 September 2020.

economic interests, but may even clash with them. Unlike the German version, the Spanish ancillary right cannot be waived, hence while the German model permits voluntary negotiation, the Spanish provisions, by introducing a compulsory fee, do not allow publishers to opt out and negotiate over their right to be remunerated, even if they want their content to be available on a more permissible basis. As a result, Google pulled Google News out of Spain. Finally, there is no evidence to support the alleged link between the additional legal protection at stake and the promotion of good quality journalism.[19]

In short, from an economic point of view, the European approach merely relies on evidence of the newspaper industry crisis, regardless of the lack of proof of any causal relationship between the introduction of a press publishers' neighboring right and the increase in the revenues for the press.

The reform also raises several legal issues. First, the scope of the protection is overbroad, covering any digital use of insubstantial parts that do not meet the originality requirement. Furthermore, some definitions appear contentious and will likely result in substantial uncertainty, especially because the new right would be territorial, hence each national legislator would be free to adopt different approaches in implementing the new provision. Notably, both the definition of "press publication" contained in the Directive and the lack of guidance about the notion of "very short extracts" will raise issues of interpretation.

With regard to the former, it has been noted that the interpretation of the definition of a press publication contained in the Directive is far from unambivalent and that the diverse

[19] See Doh-Shin Jeon and Nikrooz Nasr, 'News aggregators and competition among newspapers in the internet', (2016) 8 American Economic Journal - Microeconomics 91, suggesting that aggregators and search engines can positively affect content quality due to the competition they generate among content websites.

definitions of press or press publications which are binding in the individual Member States may or may not overlap with the new EU definition.[20] Regarding the exception represented by "very short extracts", the lack of quantitative and qualitative criteria will generate disputes over the boundaries of this exception, as shown by the recent French Competition Authority proceedings against Google.[21] Indeed, evaluating Google's policy of displaying the headlines of news articles, the French Competition Authority noted that it is not clear whether all headlines of articles are covered in principle by the exception, since the text could militate in favor of an assessment *in concreto* based, for example, on the length or informative content of the headlines of press articles.[22] Recital 58 of the EU Directive adds further doubt stating that, taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in the Directive.[23] Transposing the EU Directive, Article 2 of the French Law 2019-775 specifies that the effectiveness of the new publishers right is particularly affected when the use of very short extracts replaces the press publication itself or removes the need for the reader to reference the original source.[24]

Moreover, it should not be overlooked that press publishers already have significant rights as regards their publications. Indeed, EU law recognizes copyright in creative material

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[20] Elzbieta Czarny-Drozdzejko, 'The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market', (2020) 51 IIC 624.

[21] Autorité de la concurrence, 9 April 2020, Decision 20-MC-01 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

[22] *Id.*, para. 98.

[23] Directive 2019/790, *supra* note 2, Recital 58.

[24] Law 2019-775 of 24 July 2019 creating a related right for the benefit of news agencies and press publishers.

such as articles, photographs, illustrations, and even snippets. According to the *Infopaq* decision, the extraction of eleven words may infringe copyright law, since small parts of literary works are eligible for protection if they are original in the sense that they are their author's own intellectual creation.[25] Furthermore, press publishers benefit from the *sui generis* right in databases and copyright in newspapers as databases. Some Member States even recognize copyright in newspapers as collective works and related rights in non-original photographs and typographical arrangements of published editions. In summary, the introduction of an additional layer of copyright overlaps existing authors' rights and expands the array of tools that press publishers may exploit.

For all these reasons, several academics have considered the EU reform as unjustified, ineffective, and damaging.[26] The French dispute over Google's display policy adopted in response to the entry into force of the national legislation implementing the EU Directive confirms these concerns.

3. The French Competition Authority decision against Google: antitrust law to the rescue of copyright enforcement?

France is the testing ground for EU copyright reform. Indeed, it did not wait for the June 7, 2021 deadline granted to transpose Article 15 of the EU Directive and was the first Member State to implement the new press publishers' right.[27] Article 4 of French Law 2019-775 establishes that the remuneration for related rights arising from the reproduction and communication to the public of press publications in digital format shall

[25] CJEU, 16 July 2009, Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*.
[26] Academics Against the Press Publishers Right, (2018) <https://www.ivir.nl/academics-against-press-publishers-right/#sig08> accessed 13 September 2020.
[27] Law 2019-775, *supra* note 24.

be based on “income from their use, of whatever kind, whether direct or indirect or, failing that, shall be assessed on a flat-rate basis.” The amount of this remuneration is determined by “taking into account factors such as the human, material and financial investments made by publishers and news agencies, the contribution of press publications to political news and current affairs and the extent of the use of press publications by online public communication services.”

In response, Google announced that it would no longer display article extracts, photographs, infographics and videos within its various services (Google Search, Google News and Discover), unless the publishers granted the authorization free of charge.[28] In line with this announcement, Google has implemented new code fragments (tags) that publishers and news agencies can insert into the source code of their web pages to allow Google to take excerpts from their editorial content.

Once a quasi-replica of the Spanish nightmare seemed to materialize, antitrust law apparently came to the rescue of copyright enforcement. The news agency Agence France-Presse and several unions representing press publishers (the Syndicat des Éditeurs de la Presse Magazine, the Alliance de la Presse d’Information Générale, the Syndicat de la Presse Quotidienne Nationale, the Syndicat de la Presse Quotidienne Régionale, the Syndicat de la Presse Quotidienne Départementale and the Syndicat de la Presse Hebdomadaire) lodged complaints before the French Competition Authority accusing Google of abuse of a dominant position (as well as of an economic dependence) by imposing unfair trading conditions under the threat of de-indexing. In its decision of April 9, 2020, the Autorité de la concurrence granted requests for urgent interim measures

[28] Google, ‘How We’re Complying With France’s New Copyright Rules’, (2020) <https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html> accessed 15 September 2020.

requiring Google, within three months, to conduct negotiations in good faith with publishers and news agencies on the remuneration for the reuse of their protected content.[29] Negotiations must retroactively cover the fees due as of the point of entry into force of the French Law on October 24, 2019 and indexing, classification and presentation of the protected content used by Google on its services should not be affected.

According to the French Competition Authority, the dominant position that Google holds in the market of general search services could allow the tech company to impose unfair trading conditions on publishers and news agencies, to circumvent the new French Law and to implement a discriminatory practice.

Notably, by implementing a zero-price policy to all news publishers, Google is causing a serious and immediate harm to the press sector, depriving publishers and news agencies of a revenue source vital to ensure the sustainability of their activities. Indeed, evidence gathered during the investigation has highlighted a causal link between the presence of a publisher's protected content on Google's services and the rate of click-throughs to the publisher's content.[30] Therefore, publishers and news agencies cannot cope with the loss of traffic that would be caused if their protected content were no longer displayed within Google's services.[31] Under these conditions, the alternative offered to publishers between the different ways in which Google displays their content and the absence of reuse of this content is in fact non-existent. Because of the threat of downgrading from the display, publishers and news agencies are placed in a situation where they have no other choice but to comply with Google's display policy without financial counterpart: "This unilateral and systematic conduct places news publishers in a situation of extreme coercion, even

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[29] Autorité de la concurrence, *supra* note 21.
[30] *Id.*, para. 111.
[31] *Id.*, para. 201.

though the aim of the Law on Related Rights was, on the contrary, to place negotiations, from both a legal and an economic viewpoint, at the forefront of relations between online public communication services and publishers and news agencies."[32]

Insofar as Google derives an economic interest from the reuse of protected content and the French Law on related rights is intended to transfer part of that benefit to news publishers and news agencies, Google's display policy does not appear to constitute a reasonable measure, but rather is likely to be qualified as the imposition of unfair trading conditions.[33]

Moreover, the changes made by Google to its display policy appear likely to contravene the spirit of the new French Law which is aimed at redefining the sharing of value in favor of news publishers within a negotiated framework.[34] Indeed, they enable Google to obtain the consent of the vast majority of news publishers to systematically reuse publisher content, without any form of individualized negotiation or meaningful remuneration. In a nutshell, because of its dominant position on the market for general search services, and of the share of traffic directed by it to the websites of news publishers, Google, through its policy, is in a position to deprive the law of much of its effectiveness.[35]

Finally, Google may have abused its dominant position by implementing a discriminatory practice, namely by imposing a principle of zero remuneration on all publishers without examining their respective situations, and the corresponding protected content, according to the criteria laid down by Article 4 of the French Law.[36]

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[32] *Id.,* para. 200.
[33] *Id.*, paras. 203 and 237.
[34] *Id.*, para. 243.
[35] *Id.*, para. 254.
[36] *Id.*, para. 240.

The decision of the Autorité de la concurrence raises serious doubts about Google's compliance with the spirit of the new regulation.

Essentially, the conflict revolves around the claim that Google is exploiting its dominant position to frustrate the objective of the domestic law creating a related right for the benefit of news agencies and press publishers. The goal of the new related right is to rebalance the relationship of power between digital distributors and press operators by redefining the sharing of value in favor of the latter. Indeed, the European legislator has expressed its "wish" to allow publishers and news agencies to receive appropriate remuneration for use of their work by information society service providers.[37]

However, the wish expressed in the DSM Directive does not amount to a right to receive appropriate remuneration for news agencies and press publishers nor to a duty to deal for digital platforms. As pointed out by Google, both the domestic law and the EU Directive create a right to prohibit the use of protected content, but do not establish a right to obtain remuneration or to require the conclusion of license agreements for the use of the protected content.[38] Therefore, neither is there a duty to display protected content, as one of the interim measures imposed by the French Authority seems to suggest.

Even antitrust law cannot transform a wish into a duty, hence into an allegation of unfair trading conditions. Indeed, none of the doctrines endorsed by the case law is helpful in the case at stake.[39]

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[37] *Id.*, para. 205.
[38] *Id.*, para. 204.
[39] Nicolas Petit, 'France v Google: Antitrust as Complement to Copyright Law?', (2019) <https://www.linkedin.com/pulse/france-v-google-antitrust-complement-copyright-law-nicolas-petit/?articleId=6590267769609048064> accessed 18 September 2020.

Notably, any antitrust intervention directed at imposing a duty to deal requires the proof of an essential facility pursuant to the *Bronner* criteria, in particular the existence of an indispensable input and the elimination of competition downstream.[40] As noted by the Advocate General Jacobs in his Opinion, the key issue is whether access at the upstream level constitutes a prerequisite for effective competition downstream.[41] However, the set of circumstances does not meet these requirements. Neither do the facts of the case at issue fit with the departures from the orthodoxy of *Bronner* that can be found in the case law concerning self-preferencing and margin squeeze practices.[42]

Moreover, as a matter of fact, the essential facility doctrine represents the main antitrust tool in the EU for overseeing intellectual property rights (IPRs), rather than enforcing them. In particular, the aim of the 'exceptional circumstances', as elaborated in *Magill*[43] and reshaped in *IMS*[44] and *Microsoft*[45], is to ensure a fair balance between antitrust concerns and IPRs protection by limiting the potential exclusionary and exploitative effects of the exclusivity and imposing a compulsory license on right holders. The same rationale has led the Court of Justice (CJEU) to define a new set of exceptional circumstances for standard essential patents (SEPs) in *Huawei.*[46] Indeed, the so-called "willing licensee test" aims at limiting SEP owners' ability to assert their rights in order to avoid the risk of hold up: if a SEP owner has submitted a commitment to license its

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[40] CJEU, 26 November 1998, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others.*

[41] AG Jacobs, 28 May 1988, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others,* para. 33

[42] See Pablo Ibáñez Colomo, 'Indispensability and abuse of dominance: from Commercial Solvents to Slovak Telekom and Google Shopping', (2019) 10 Journal of Competition Law & Economics 532; and Niamh Dunne, 'Dispensing with indispensability', (2020) 16 Journal of Competition Law and Economics 74.

[43] CJEU, 6 April 1995, Joined Cases C-241/91 P and 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. European Commission*.

[44] CJEU, 29 April 2004, case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG.*

[45] General Court EU, 17 September 2007, Case T-201/04, *Microsoft Corp. v. European Commission*.

[46] CJEU, 16 July 2015, Case C-170/13, *Huawei Technologies c. ZTE.*

patents on the basis of FRAND terms and implementers/infringers are willing licensees, then the former is precluded from seeking an injunction. In all these judgments, the concerns behind the exceptional application of antitrust rules are related to the risk of over-remuneration of IPRs holders, rather than their under-remuneration. Therefore, the essential facility doctrine does not provide useful insights for the case at issue since Google is not an IPR holder and it is not charging excessive fees, but it is accused of implementing a zero-price policy.

On different grounds, namely with regard to a potential abuse of right, the reference to the *AstraZeneca* judgment does not seem compelling.[47] The Autorité de la concurrence relies on it to support the claim that Google may have abused its dominant position to circumvent French Law, mentioning the principle affirmed by the CJEU that an undertaking in a dominant position may be guilty of an abuse when, without formally infringing a law, it circumvents its purposes without any objective justification.

However, the argument simply does not hold water. Relevant differences in the economic and legal context and in the conducts at issue cannot be disregarded and prove a scenario not comparable with the publishers' neighboring right. The CJEU has stressed several times that, with respect to the implementation of antitrust law in the pharmaceutical sector, due account must be taken of the specific features of competition and of the regulatory constraints that are characteristic of that sector.[48] In *AstraZeneca,* the abuse involved the misuse of regulatory procedures applied by national regulatory authorities and consisted in selective deregistration of capsule marketing authorizations (without objective justification and after the expiry of the exclusive right to make use of the results

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[47] Autorité de la concurrence, *supra* note 21, para. 242, citing CJEU, 6 December 2012, Case C-457/10, *AstraZeneca v. European Commission*, paras. 129-141.
[48] See recently CJEU, 30 January 2020, Case C-307/18, *Generics (UK) Ltd v. CMA*, paras. 39-40.

of the pharmacological and toxicological tests and clinical trials) to hinder the introduction of generic products and parallel imports. In that scenario, the CJEU held that the fact that withdrawing marketing authorizations is lawful under the relevant EU legislation does not prevent the application of antitrust provisions since the illegality of abusive conduct is unrelated to its compliance with other legal rules.[49]

Finally, with regard to the abuse for implementing a discriminatory practice, the French Competition Authority's analysis does not meet the standard of proof established by the CJEU in *MEO*.[50] Notably, it is not apparent how the alleged discrimination, implemented by imposing a principle of zero remuneration on all publishers without examining their respective situations and the corresponding protected content, hinders the competitive position of the publishers of protected content in relation to publishers whose content is not protected.[51] Indeed, according to *MEO*, antitrust provisions do not prohibit a dominant firm from engaging in price discrimination, but rather forbid only price discrimination that tends to distort competition on the downstream market, i.e. tends "to hinder the competitive position of some of the business partners of that undertaking in relation to the others."[52] Furthermore, "the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted."[53] Moreover, in order to be capable of creating a competitive disadvantage, the price discrimination must affect the interests of the operator which was

[49] *AstraZeneca*, *supra* note 45, para. 132.
[50] CJEU, 19 April 2018, Case C-525/16, *MEO — Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*.
[51] Vikas Kathuria and Jessica C. Lai, 'The Case of Google 'Snippets': An IP Wrong that Competition Law Cannot Fix', (2020) Max Planck Institute for Innovation and Competition Research Paper No. 13, 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693781> accessed 19 September 2020.
[52] *MEO, supra* note 50, para. 25.
[53] *Id.,* para. 26.

charged higher tariffs compared with its competitors.[54] Finally, one cannot assume that price discrimination will have that prohibited effect simply because competing customers are paying different prices, but instead one must examine the circumstances of each case to determine whether the challenged practice has a prohibited effect. Hence, anticompetitive effects cannot be ruled out *ex ante,* but rather need to be established on a case-by-case basis by assessing the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.[55]

After all, the French Competition Authority decision is ultimately confirming doubts about the effectiveness of the EU reform and concerns about its potential side effects. Indeed, even the unorthodox antitrust intervention may not secure the final result. In late August 2020, Google and French publishers failed to reach an agreement on how the former should pay to display news content, missing the deadline set by the French Competition Authority. As a consequence, new complaints have been filed from publishers regarding compliance with interim measures. The apparent limits of the solution purportedly put the Authority in a thorny situation, and the failure of negotiations raises questions about whether and how the Authority will impose on Google a duty to pay.

[54] *Id.,* para. 30.
[55] *Id.,* para. 31.

However, the Paris Court of Appeal has affirmed the French Competition Authority's order on Google to negotiate in good faith with press publishers.[56] According to the French Court, although the new press publishers' right does not amount to a right to receive a remuneration, because it is not imposing on digital platforms a duty to pay the license requested by publishers and news agencies, nonetheless it requires the latter to be able to demand a fair remuneration for the online use of their content and implies a negotiation between the parties.[57] Moreover, Google cannot justify its unilateral and systematic position by the fact that its display methods in the form of very short extracts would, in principle, fall outside the scope of the law.[58] Indeed, by making this exception a general principle, Google is likely to have subjected publishers and news agencies to inequitable conditions by depriving them of the benefit of the law. Therefore, the Court is backing the French Competition Authority on using the threat of antitrust liability as a lever to compel Google to arrive at terms with publishers and news agencies.

On the eve of the Court's ruling, news broke that a deal had been struck between Google and the Alliance de la Presse d'Information Générale which would include the acceptance of the neighboring right as well as the French groups' participation in the new product launched by Google (News Showcase).[59]

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[56] Paris Court of Appeal, 8 October 2020, *Google v. Syndicat des éditeurs de la presse magazine and others* <https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf> accessed 9 October 2020.
[57] *Id.*, para. 96.
[58] *Id.*, para. 99.
[59] Reuters, 'Google poised to strike deal to pay French publishers for their news', (October 7, 2020) <https://www.reuters.com/article/us-alphabet-france-publishing-idUKKBN26S33C> accessed 8 October 2020. See also Google, 'Our $1 billion investment in partnerships with news publishers', (2020) <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/> accessed 2 October 2020, announcing the launch of News Showcase, which would give publishers the ability to package the stories that appear within Google's news products, along with a $1 billion global investment in partnerships with nearly 200 leading publications across Germany, Brazil, Argentina, Canada, the U.K. and Australia.

Interestingly, a similar dispute was handled by the German Competition Authority a few years ago.[60] As already mentioned, Germany introduced an ancillary right for press publishers well before the EU Directive which covered the smallest text excerpts and permitted voluntary negotiation. In reaction, Google started to show abridged versions of press publication snippets, unless the publishers had provided free access (opt-in declaration). Notably, if the publishers did not opt-in, Google would curtail the display of hits on their websites. Google's results would show only the linked headline, but no snippets or preview images, Google justified its policy by claiming that greater displays would put it at risk of being sued for breaching the ancillary copyright. Following a complaint filed by a collecting society (VG Media) and various press publishers, the Bundeskartellamt decided not to open formal proceedings against Google concluding that it was highly probable that neither the opt-in declaration required by Google nor the alternative curtailed presentation of search results by omitting snippets and preview images fulfils the requirements of discrimination and unfair hindrance.

The differences in the reasoning of the German and the French Competition Authorities are striking. Indeed, the Bundeskartellamt clearly stated that the ancillary right did not impose an obligation to use and remunerate protected content. Further, a refusal to buy could not be equated with a refusal to supply and a company must be entitled to decide not to acquire any rights or products which are not wanted or are incompatible with its business model. More generally, the search engine must be allowed considerable scope of action, namely considerable leeway in the compilation, ranking and presentation of its

[60] Bundeskartellamt, 8 September 2015, Decision B6-116/14 in the dispute Google versus various press publishers and VG Media about the use of the ancillary copyright of press publishers. The case summary is available at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf?__blob=publicationFile&v=2> accessed 18 September 2020. A detailed analysis of the case is provided by Kathuria and Lai, *supra* note 50.

search results, since, like any other company, a search engine is in principle free to design its product.

Against this background, the German Competition Authority found the policy of displaying abridged results not only justified because the risk of copyright infringement could thereby be avoided, but also procompetitive because it discarded the complete delisting of publishers who did not opt-in. For the same reason, the Bundeskartellamt rejected the application of the essential facility doctrine arguing that there was no refusal to access since Google was allowing even unwilling publishers to see abridged snippets displayed on its platform. As expressly stated by Andreas Mundt, President of the Bundeskartellamt, “[t]his dispute is not so much about competition law but about the scope of the ancillary copyright. This is a question which is mainly for the civil courts to answer. In the case at hand the limits of what is still permissible under competition law have not been overstepped. Due to Google’s market position an objective justification would be needed for any changes made to the results list that go beyond the pure relevance for the search query. Such an objective justification existed, however, in the case at hand. We made it clear, on the other hand, that a complete delisting of individual publisher websites from Google’s results could be an infringement of competition law.”[61]

In summary, while the Autorité de la concurrence is suggesting a duty to remunerate press publishers and is considering the display of headlines as a way to circumvent the law, the Bundeskartellamt took the opposite position.

[61] Bundeskartellamt, ‘Bundeskartellamt takes decision in ancillary copyright dispute’, (2015) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html> accessed 18 September 2020.

Finally, it is worth noting that this is not the first-time that antitrust law has been invoked as a possible response to the crisis faced by the press. However, quite paradoxically the solution offered by press publishers to address the problems affecting the industry has so far been an antitrust exemption. Indeed, in 2017 the German legislator amended the Act Against Restraints of Competition, introducing an exemption from the cartel prohibition for certain forms of collaboration between publishers of newspapers and magazines "to strengthen their economic base for intermedia competition", provided that the coverage is only national and does not include editorial work.[62] Similarly, in the US, publishers have suggested the introduction of a new law granting a safe harbor under antitrust to negotiate collectively with online platforms.[63] And, in 2019, Congressman Cicilline introduced a bill (the Journalism Competition and Preservation Act) that would have created a four-year exemption from antitrust liability for joint efforts by professional news organizations to withhold content from large online platforms.[64] The proposal has been endorsed by the recent report released by the U.S. House Judiciary Committee's Antitrust Subcommittee which, in order to create an even playing field, has recommended to consider legislation to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.[65]

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[62] German Act Against Restraints of Competition, §30, para. 2b.

[63] See U.S. Federal Trade Commission, *supra* note 1; and David Chavern, 'How Antitrust Undermines Press Freedom', (2017) Wall Street Journal, July 9.

[64] H.R. 2054, <https://www.congress.gov/bill/116th-congress/house-bill/2054/text?q=%7B%22search%22%3A%5B%22Hr+2054%22%5D%7D> accessed 25 September 2020.

[65] U.S. House of Representatives, *supra* note 3, 389-390.

4. Outside the copyright box: the new regulatory approach.

On a comparative note, doubts about the effectiveness of the European approach seem to be shared by legislators around the world tackling the issue of the sustainability of the publishing industry.

The US solution has traditionally been found outside the scope of copyright protection. By designing the hot news doctrine as a variant of the common law tort of misappropriation a century ago the Supreme Court stressed the peculiar time value of the news[66] and recognized a quasi-property right on the facts gathered and distributed in order to protect news organizations' efforts and investments against competitors' free-riding. In *National Basketball Association v. Motorola,*[67] the Second Circuit outlined a five-step test necessary to invoke the hot news doctrine: "(i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened." However, the applicability of the hot news doctrine has been significantly challenged in *Barclays Capital v. Theflyonthewall.com* where the court did not consider the conduct scrutinised as free-riding.[68]

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[66] *International News Service v. Associated Press,* 248 U.S. 215 (1918).
[67] 105 F.3d 841 (2nd Cir. 1997).
[68] 650 F.3d 876 (2nd Cir. 2011).

During a series of workshops hosted in 2010, the Federal Trade Commission collected several proposals aimed at supporting the reinvention of journalism.[69] Some addressed means to increase revenues to news organizations by creating additional IPRs to support claims against news aggregators, introducing antitrust exemption for news organizations, or increasing direct government funding. Notably, with regards to copyright issues, proposals submitted by stakeholders included amending the Copyright Act to specifically recognize hot news protection, to limit the fair use doctrine, or to adopt an industry-wide licensing arrangement. However, the FTC noted that the likely effects of a more vigorous hot news doctrine are controversial because it would entail difficult line-drawing between proprietary facts and facts in the public domain, and it would be unclear how to draw the scope of hot news protection broadly enough to provide significant incentive for news gathering, but narrowly enough to permit competition in the news. Overly broad restrictions might also become an impediment to free public discourse.[70] Moreover, the FTC reported similar concerns about the unintended consequences of mandatory licensing fees for news content, which would place an effective tax on certain conduct, raising questions about what conduct, entities, or utilities to tax, at what rate, and on behalf of what entities.[71]

More recently, in Canada, inspired by the European approach, the Fédération Nationale des Communications proposed granting news publishers a remuneration right under the Copyright Act. However, the Canadian Parliament's Standing Committee on Industry, Science and Technology has come to the conclusion that there is a lack of evidence for

[69] U.S. Federal Trade Commission, *supra* note 1.
[70] *Id.*, 10.
[71] *Id.*, 13.

an EU-style press publishers right.[72] Instead, it called for a study on remuneration of journalists, the revenues of news publishers, the licenses granted to online service providers and copyright infringement on their platforms, the availability and use of online services, and competition and innovation in online markets.[73] However, according to journalistic rumors, Canada may soon enact rules to force digital platforms to pay news outlets, but it is unclear whether this would happen following the European copyright approach.[74]

The limits of the copyright approach have been also stressed by the Australian Competition and Consumer Commission (ACCC).[75] Indeed, digital platforms' use of article headlines and snippets are unlikely to infringe copyright protections and, even if copyright was found to subsist, copying headlines or snippets may represent a fair dealing exception.

However, the ongoing debate over the capability of current antitrust rules and tools to handle the emergence of large technology platforms is supporting a wave of regulatory interventions for the digital economy which may also affect the relationship between publishers and online platforms. Some of the reports and policy papers recently released specifically address the dominance of Google and Facebook in the digital advertising

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[72] Canadian Parliament's Standing Committee on Industry, Science and Technology, 'Statutory Review Of The Copyright Act', (2019) <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> accessed 14 September.
[73] *Id.*, 53.
[74] Ryan Tumilty, 'Canada may soon enact rules forcing Facebook to pay news outlets for content', (2020) National Post <https://nationalpost.com/news/politics/canada-may-soon-enact-rules-for-facebook-to-pay-news-outlets> accessed 25 September 2020. Canada's news media publishers called on all political parties in Parliament to support the adoption of Australia's approach with mandated payments for news links: see News Media Canada, *Levelling the Digital Playing Field*, (2020) <https://nmc-mic.ca/wp-content/uploads/2020/10/Levelling-the-Digital-Playing-Field-2020.10.19-1.pdf> accessed 22 October 2020.
[75] Australian Competition and Consumer Commission, *supra* note 3, 258-261.

markets and the imbalance of bargaining power between these platforms and media businesses. Indeed, since for content providers, such as online newspapers, digital advertising is a vital source of revenue, weak competition in this market may undermine the ability of newspapers to produce valuable content.[76]

In particular, the UK Competition and Markets Authority (CMA) has welcomed the proposals advanced by the UK Digital Competition Expert Panel for the development of a pro-competitive *ex ante* regulatory regime for advertising-supported platforms.[77] The CMA supports the appointment of a dedicated regulatory body (Digital Markets Unit) to implement an enforceable code of conduct that would govern the behavior of platforms enjoying a strategic market status and to introduce a range of pro-competitive interventions aimed at tackling the sources of market power in search and social media and promoting competition and innovation.[78] The code is to be based on a set of core principles aimed at ensuring that business users are: (i) provided with access to designated platforms on a fair, consistent and transparent basis; (ii) provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and (iii) not unfairly restricted from utilising alternative platforms or routes to market.

The newly-established digital market unit should have powers not only to implement a range of data-related remedies, including data mobility, systems with open standards and open data, but also to introduce different forms of separation.[79] Therefore, the CMA is open to exploring the separation (namely, a range of options from accounting and

[76] UK Competition and Markets Authority, *supra* note 7, 5.
[77] UK Competition and Markets Authority, *supra* note 7; UK Digital Competition Expert Panel, *Unlocking digital competition*, (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 20 September 2020.
[78] UK Competition and Markets Authority, *supra* note 7, 21-22.
[79] *Id.*, 24.

management separation to full ownership separation) of Google and Facebook as a remedy to address concerns around transparency, conflicts, and market power in the advertising intermediation.[80] Because content providers are reliant on digital advertising as an essential source of revenue, the lack of transparency in the ad tech supply chain exacerbates issues with revenue shares received by publishers and raises concerns about the long-term sustainability of high-quality and plural news content.[81] Moreover, since intermediaries capture at least 35% of the value of advertising bought from newspapers and other content providers in the UK, greater competition would put downward pressure on these intermediaries' fees, helping publishers to receive a larger share of this value.[82]

The Cairncross Review, commissioned by the UK Secretary of State for Digital, Culture, Media and Sport to examine the sustainability of high-quality journalism, has also recommended the introduction of codes of conduct to rebalance the relationship between publishers and online platforms.[83] However, according to its proposal, digital platforms should be required to set out their own codes of conduct to govern their commercial arrangements with news publishers and the regulator should just provide guidance and oversee the process. Once approved by the regulator, these codes could form the basis for individual negotiations between publishers and online platforms; and vice versa, if the

[80] See also Damien Geradin and Dimitrios Katsifis, "Trust me, I'm fair": analyzing Google's latest practices in ad tech from the perspective of EU competition law', (2020) 16 European Competition Journal 11; Id., 'An EU competition law analysis of online display advertising in the programmatic age', (2019) 15 European Competition Journal 55; Fiona M. Scott Morton and David C. Dinielli, 'Roadmap for a Digital Advertising Monopolization Case Against Google', (2020) <https://omidyar.com/wp-content/uploads/2020/09/Roadmap-for-a-Case-Against-Google.pdf> accessed 20 September 2020. Finally, the U.S. Senate has recently held hearings into potential anticompetitive conduct by Google in its display advertising business: see U.S. Senate, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 'Stacking the Tech: Has Google harmed competition in online advertising?', (2020) <https://www.judiciary.senate.gov/meetings/stacking-the-tech-has-google-harmed-competition-in-online-advertising> accessed 17 September 2020.

[81] UK Competition and Markets Authority, *supra* note 7, 318-320.

[82] *Id.*, 9.

[83] The Cairncross Review, *supra* note 6.

regulator believes the codes are not sufficient or do not conform to its guidance, it should be empowered to develop a statutory code. In contrast, the enforceable code proposed by the CMA would cover a much broader range of relationships and would have a statutory basis, with powers for the regulator to suspend, block and reverse decisions of platforms, and to order conduct so as to achieve compliance with the code.

The UK Government has accepted the analysis contained in these reports and is supportive of their recommendations recognizing the need for clearer arrangements to define the relationships between publishers and platforms to ensure that content creators are fairly treated.[84] In particular, the UK Government agrees that publishers have become increasingly dependent on search and social media platforms for driving traffic to their websites and that codes of conduct formalizing the relationships between news publishers and online platforms may help to rebalance this unequal relationship.

Similar findings are reported in Australia by the ACCC with regard to the market power of Google and Facebook in the supply of search advertising and display advertising services respectively. Moreover, the Australian inquiry has revealed that Google and Facebook exert substantial bargaining power in their dealings with media businesses[85]. Indeed, because of the size of their online audience, a significant number of media businesses rely on news referral services from Google and Facebook to such a degree that they are each unavoidable trading partners.[86] While bargaining power imbalances exist in several contexts, in this case intervention is needed because of the public benefit provided

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[84] UK Department for Digital, Culture, Media and Sport, 'Government response to the Cairncross Review: a sustainable future for journalism', (2020) <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism/government-response-to-the-cairncross-review-a-sustainable-future-for-journalism> accessed 20 September 2020.

[85] Australian Competition and Consumer Commission, *supra* note 3, 99-105.

[86] *Id.*, 217-221.

by the production and dissemination of news and the importance of a strong independent media in a well-functioning democracy.

The bargaining power imbalance significantly affects the manner in which media businesses deal with Google and Facebook and the outcomes of those dealings. Notably, these platforms exploit their bargaining position vis-à-vis press publishers by imposing publishing formats and snippet size, adopting policies and practices that may be detrimental to the interests of news publishers (such as Google's former First Click Free Policy, which required companies to provide five articles per day for free to Google users), denying access to user data.[87] Furthermore, media businesses have expressed concerns about a lack of transparency in relation to how digital platforms' algorithms rank and distribute news content, reducing the level of control a media company can exercise in relation to how their news content is distributed to consumers.

As a solution, the ACCC has suggested the adoption of a code of conduct to encourage negotiation between the parties, at the same time allowing the Commission to intervene in order to "equalize the bargaining imbalance."[88] The ACCC considered the code of conduct as the most appropriate approach because it would provide some flexibility for different arrangements to be reached between each digital platform and media businesses, also allowing platforms to balance their own interests with those of media businesses in drafting the codes of conduct, and flexibility for the codes to be changed if they do not achieve their initial objectives.[89] Hence, in the ACCC's intention the code of conduct was firstly a form of industry self-regulation. Digital platforms should have nine months to develop a code; if they were unable to submit an acceptable code to the Australian

[87] *Id.*, 227-228.
[88] *Id.,* 255.
[89] *Id.*, 256.

Communications and Media Authority (ACMA) within this deadline, the Authority should create a mandatory standard.[90]

However, once the ACCC started working with Facebook, Google, and news media businesses to develop and implement voluntary codes of conduct, it reported to the Government that the core issue of payment for content was highly unlikely to be resolved through this voluntary process. As a result, the Government asked the ACCC to develop a mandatory code of conduct.[91]

The shift towards a mandatory bargaining code has sparked a heated debate. Google published an open letter warning Australia that the proposed law will put its services at risk[92], Facebook threatened to remove news from the platform in Australia.[93]

Because the Australian bargaining code surfaces as a regulatory solution alternative to the European approach by forcing digital platforms to strike a deal with news businesses, it is worth analyzing it to evaluate comparative benefits and drawbacks and assess its potential effectiveness in addressing bargaining power imbalances and helping to preserve high-quality journalism.

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[90] *Id.*, 257.
[91] Australian Treasurer, Press release, (2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/accc-mandatory-code-conduct-govern-commercial> accessed 22 September 2020.
[92] Google, 'Open letter to Australians', (2020) <https://about.google/intl/ALL_au/google-in-australia/aug-17-letter/> accessed 23 September 2020; and 'Update to our open letter to Australians', (2020) <https://about.google/intl/ALL_au/google-in-australia/an-open-letter/> accessed 23 September 2020.
[93] Facebook, 'An Update About Changes to Facebook's Services in Australia', (2020) <https://about.fb.com/news/2020/08/changes-to-facebooks-services-in-australia/> accessed 22 September 2020.

4.1 The Australian mandatory bargaining code.

In July 2020 the ACCC released a draft of the News Media and Digital Platforms Bargaining Code which is currently under consideration by the Australian parliament.[94] While the draft code would initially apply only to Google and Facebook, other digital platforms may be added if they attain a bargaining power imbalance with Australian news media businesses in the future.

The key feature of the code is represented by the provision of a binding final offer arbitration process. In particular, news media organizations would notify digital platforms of their intention to bargain in relation to their content. News businesses can bargain either individually or collectively. Parties are required to negotiate in good faith and, if an agreement is not reached within three months, the matter will be subject to compulsory arbitration. Arbitration will only take place if the bargaining parties have attended at least one day of mediation. If those preconditions are met, an arbitral panel chosen by the bargaining parties (or by the ACMA if the parties fail to agree on panel members) will select between two final offers made by the parties. Notably, within ten days of compulsory arbitration being triggered, each party must submit a final offer on the remuneration amount to be paid by the digital platform and the arbitral panel must accept one of those offers, unless it considers that each final offer is not in the public interest, in which case the arbitral panel may amend the more reasonable of the two offers.

Under the terms of the code, in deciding which offer to accept, the panel must consider the direct and indirect benefit that the content of news businesses provides to the digital

[94] Australian Competition and Consumer Commission, 'Draft news media bargaining code', (2020) <https://www.accc.gov.au/media-release/australian-news-media-to-negotiate-payment-with-major-digital-platforms> accessed 25 September 2020.

platform's service, the cost to the news businesses of producing news content, and whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform. Furthermore, when considering the indirect benefit, the panel must consider the total indirect benefit of Australian news to the digital platform service (including increased usage of that service and public perception benefits arising from the inclusion of Australian news) and the extent to which that total indirect benefit is attributable to the content of the news business.

According to the ACCC, by acting as a backstop to voluntary negotiations, a final offer arbitration (also known as baseball-style arbitration) provides two significant benefits in comparison to a conventional commercial arbitration.[95] First, it leaves it to the parties to determine a suitable price and the fact that the arbitration panel would be choosing from one of two offers, rather than attempting to determine a price, would discourage ambit claims and provide a strong incentive for both parties to submit their most reasonable offers.[96] Further, final offer arbitration would ensure quick outcomes, with the arbitrator required to make a decision within 30 business days of receiving offers and comments from the parties, i.e. a maximum of 45 business days after arbitration commences.

These features of the Australian code are also its main comparative advantages against the EU copyright approach. Indeed, the Australian regulatory approach provides a swift solution to the ongoing disputes between news publishers and digital platforms by guaranteeing a payment to the former without twisting copyright laws or involving

[95] Australian Competition & Consumer Commission, 'Q&As: Draft news media and digital platforms mandatory bargaining code', (2020) §4.8 <https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf> accessed 25 September 2020.

[96] See also Cristina Caffarra and Gregory Crawford, 'The ACCC's 'bargaining code': A path towards 'decentralised regulation' of dominant digital platforms?', (2020) <https://voxeu.org/article/accc-s-bargaining-code-path-towards-decentralised-regulation-dominant-digital-platforms> arguing that the Australian solution has desirable properties in line with bargaining theory.

antitrust enforcement. Therefore, the mandatory baseball arbitration is consistent with the aim of ensuring a sharing of revenues between platforms and news media organizations and is more effective in quickly securing the result.

The baseball-style arbitration has been previously advanced as an efficient tool for tackling SEPs disputes over FRAND licensing terms. According to its proponents, mandatory baseball arbitration manages to strike a reasonable balance between the concerns of licensees and licensors by channeling their interests towards reasonable royalty determination.[97] Indeed, parties would have a strong incentive to put forward workable proposals capable of meeting the arbitrator's favor instead of advancing unreasonably high or low requests.[98] However, within the SEP scenario the proposal has also raised comment. Some scholars pointed out that mandatory baseball arbitration would be one-sidedly biased to the detriment of right holders who would be doomed to be under-compensated by implementers, hence judicial litigation of FRAND commitments would not decrease because the parties would be prevented from reaching a satisfactory agreement in the first place.[99] Further, it has been questioned whether baseball arbitration is a solution at all as it collapses into a single damage appraisal

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[97] Mark A. Lemley and Carl Shapiro, 'A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents', (2013) 28 Berkeley Technology Law Journal 1135. See also Jorge L. Contreras and David L. Newman, 'Developing a Framework for Arbitrating Standards-Essential Patent (SEP) Disputes', (2014) Journal Dispute Resolution 23.

[98] See U.S. Federal Trade Commission, 'In the Matter of Evanston Northwestern Healthcare Corporation', (2008) <https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopiniononremedy.pdf> accessed 26 September 2020 quoting Steven J. Brams, *Negotiating Games: Applying Game Theory to Bargaining and Arbitration*, (2003) Routledge 264: "We consider Final Offer Arbitration to be attractive here because it has the "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."

[99] Pierre Larouche, Jorge Padilla, and Richard Taffet, 'Settling FRAND Disputes: Is Mandatory Arbitration A Reasonable and Nondiscriminatory Alternative?', (2014) 10 Journal of Competition Law & Economics 581.

different questions of infringement, essentiality, and validity of patents involved.[100] Somewhat ironically, under mandatory baseball arbitration, the arbitrator may end up with a forced choice between options that are actually not FRAND-compliant. On top of this, it has been stressed that compulsory disclosure of awards reached under baseball arbitration would facilitate oligopsonistic collusion by implementers.[101] Recently, the European Commission has acknowledged that alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, can offer swifter and less costly dispute resolution and that the potential benefits of these tools are currently underexploited.[102] However, the Commission argued that ADR should not be mandatory for parties.

Some of the aforementioned concerns about the use of mandatory baseball arbitration in the SEP scenario also seem to pertain to the Australian bargaining code. Indeed, by envisioning a one-way payment from digital platforms to news media organizations, the code instructs the arbitrator to proceed in a one-sided evaluation of the offers presented. Despite the ACCC's inquiry having acknowledged that the relationship among digital platforms and news publishers is characterized by a two-way exchange of value[103], under the code the arbitral panel is required to consider only the direct and indirect value that the content of news businesses provides to the digital platform's service. Similarly, the French Law 2019-775, in enlisting factors that should be considered to define the

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[100] See J. Gregory Sidak, 'Mandating Final-Offer Arbitration of FRAND Royalties for Standard — Essential Patents', (2014) 18 Stanford Technology Law Review 1 arguing that mandatory baseball arbitration "would address neither the objectives of setting open standards nor what makes FRAND commitments distinctive, and it would prevent the parties from agreeing on the meaning of FRAND prices, terms, and conditions." On a critical note, see also Edward F. Sherry, David J. Teece, and Peter Grindley, 'FRAND Commitments in Theory and Practice: A Response to Lemley and Shapiro's "A Simple Approach"', (2015) Tusher Center Working Paper Series No. 3 <https://haas.berkeley.edu/wp-content/uploads/2019/03/Tusher-Center-Working-Paper-3.pdf> accessed 26 September 2020.

[101] Sidak, *supra* note 101.

[102] European Commission, 'Setting out the EU approach to Standard Essential Patents', COM (2017) 712 final, 11.

[103] Australian Competition and Consumer Commission, *supra* note 3, 8-9.

remuneration for related rights arising from the reproduction and communication to the public of press publications in digital format, only refers to human, material, and financial investments made by publishers and news agencies, the contribution of press publications to political news and current affairs, and the extent of the use of press publications by online public communication services.

A further concern regards the scope of application of the code. Unlike the EU Directive, the Australian approach revolves around the role of media producers, rather than around the notion of press publication. In order to be eligible to participate in the code, a news media business must register with the ACMA and nominate its news sources that predominantly produce "core news." The latter include journalism about publicly significant issues, journalism that engages Australians in public debate and informs democratic decision making, and journalism relating to community and local events. However, once a news media business is eligible to participate in the code, it would be able to negotiate with digital platforms over all news produced by its nominated news sources (so-called "covered news content"), rather than just core news. Hence, even if news related to sport and entertainment were not core news, it would still be covered by the code if reported by an eligible news media business. For these reasons it has been argued that the Australian news law would create a "state-sponsored media regime"[104], where a government requires platforms to pay publishers to carry their content and also determines what content they must carry.

Moreover, it would appear that no consideration has been given to the definition of 'use' of news media. As the European and French analysis has shown, the lack of guidance

[104] Matt Perault, 'Governments Shouldn't Choose the News in Your Feed', (2020) <https://www.wired.com/story/opinion-governments-shouldnt-choose-the-news-in-your-feed/> accessed 26 September 2020.

about the notion of very short extracts raises significant interpretative issues. Indeed, services provided by digital platforms interact with news content in different ways, including featuring headlines, hyperlinks, snippets, and images. Therefore, as acknowledged by the ACCC in its concept paper seeking the views of stakeholders to inform the development of the bargaining code, the implementation of a bargaining framework to address remuneration would need to determine which of these interactions would constitute a use of news content that triggers obligations for remuneration.[105]

5. Concluding remarks. Chronicle of a failure foretold.

The dispute between news media organizations and digital platforms has anticipated the ongoing debate on how competition policy should evolve in the digital age, namely on whether the distinctive features of digital markets require a rethinking of current rules and tools. The role played by large online platforms acting as gatekeepers and regulators within their ecosystem apparently also requires intervention aimed at safeguarding the sustainability of the publishing industry. Indeed, according to news media organizations, some digital platforms represent unavoidable trading partners able to exploit substantial bargaining power in their dealings and this imbalanced relationship is the main source of the publishing industry's crisis.

From this viewpoint, despite the growing consumption of online news content, the industry is struggling because large digital platforms are free-riding over their content and capturing a significant share of the advertising revenue. These issues are exacerbated

[105] Australian Competition and Consumer Commission, 'Mandatory news media bargaining code – concepts paper', (2020) 14 <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/concepts-paper> accessed 26 September 2020.

by the lack of transparency in the ad tech supply chain, the opacity of the algorithms that rank and distribute news content, the imposition of publishing formats and the lack of sharing of individual data collected from consumers, which, overall, confirm the bargaining power vis-à-vis news businesses. In particular, dominating both digital advertising and key communication platforms, Google and Facebook are deemed to have outsized power over the distribution and monetization of trustworthy sources of news online, creating an uneven playing field in which news publishers are beholden to their decisions.[106]

Although the free-riding narrative seems not to be supported by empirical evidence, some countries have decided to intervene with the specific goal of rebalancing the relationship of power between digital players and press operators in order to allow the latter to negotiate on an equal footing. Among the different solutions advanced, the European copyright approach has been harshly criticized on several grounds. Alongside the lack of economic justification, doubts have been raised about the scope of protection and the opaqueness of relevant notions, as well as its very effectiveness.

The national implementation in France has proven the limits of the European approach. Moreover, it has shown its perils. With the aim of ensuring that the press publishers' right is an enforceable negotiation tool to rebalance out relations between press content producers and online distributors, the French Competition Authority is forcing a negotiation in the shadow of competition law. Indeed, in order to avoid the risk that the display policy adopted by Google may frustrate the objective of the new law enacted, the French Competition Authority attempted to fill the copyright gap by granting interim

[106] U.S. House of Representatives, *supra* note 3, 389.

measures requiring Google to conduct negotiations in good faith on the remuneration for the reuse of publishers' protected content. However, the reasoning of the French Competition Authority seems not supported neither by the text of the EU Directive nor by the doctrines endorsed by the antitrust case law.

Instead of twisting copyright laws or involving antitrust enforcement, the Australian Government has opted for a mandatory code of conduct which includes a binding baseball-style arbitration as a backstop to voluntary negotiations. Although significant doubts about the scope of application and the relevant factors in the evaluation of the offers presented have been raised, at least the Australian code appears effective in swiftly securing the result of guaranteeing a payment to news publishers.

Supporting journalism may serve a broad public interest, hence it may be sound policy for governments to help publishers to adapt to the new world, increasing public funding or even forcing a payment from digital platforms. However, it is a goal far removed from both intellectual property and competition policy.