Saving the News

A survey of initiatives around the world to constrain the growing power of Facebook and Google over independent journalism.
Australia has drawn international attention for exploring new approaches to clawing back revenue from the Facebook and Google duopoly. In July 2019, the Australian Competition and Consumer Commission released its final report of its six-month Digital Platform Inquiry. The report began by noting the limitations of using copyright action against digital platforms. The ACCC stressed Google’s and Facebook’s dominant market power and international reach: “Rightsholders can face particular challenges in enforcing copyright against digital platforms because of the cost, delay, uncertainties regarding authorisation liability, and potentially low value of remedies associated with bringing court proceedings against overseas-based defendants hosting content outside Australia.”
The business model that has long sustained a free press in the United States is imperiled. More than one in five papers have closed over the past decade and a half, transforming more and more communities into news deserts. Thousands of other publications ranging from well-capitalized digital magazines with large audiences to popular blogs have also increasingly become financially nonviable.

The largest single reason for this trend is the loss of advertising revenues to the online advertising duopoly of Google and Facebook. Advertising has been the backbone of the news industry for more than a century. But from 2008 to 2018, the newspaper industry saw a staggering 68% drop in advertising revenue due primarily to the two ad tech behemoths. In 2016, Facebook and Google together collected 77 cents of each new dollar spent on online ads in the U.S. market. By 2017, the duopoly accounted for as much as 86% of all growth in digital ad sales.

In 2020, Google and Facebook took in more than half of total digital ad spending in the U.S. without bearing the financial cost of gathering the news or creating the editorial content needed to sustain a free press. Instead, both corporations are getting a free ride on the investments others make in journalism. The trend holds globally, too: A report by Australia’s competition regulator found that Google pocketed 53% and Facebook 28% of global ad spending in 2019, leaving just 19% for the world’s news publishers and other ad tech platforms.

A year later, after a temporary dip in advertising tied to the spreading coronavirus, digital advertising took off. In 2020, $147 billion — or more than 80% of parent Alphabet’s total revenue — came from Google ads; likewise, the vast majority of Facebook’s revenue comes from ads, specifically 97 percent, or $84 billion. In loose contrast, Gannett, the largest newspaper chain in the U.S., recorded $796 million in digital advertising and marketing services, or 23% of total revenue.

“Few people in the industry understood just how potent Google and Facebook would become in online advertising,” according to a Wall Street Journal analysis of the news industry’s advertising woes. “Google and Facebook have siphoned ad dollars away from all publishers.” Making the damage to the free press even worse, Google and Facebook have largely avoided paying for the content they appropriate from journalists and publishers even as they use that content to attract users and deliver them to advertisers.
Publishers and governments in many different countries have launched initiatives to claw back ad revenues from Google and Facebook. The first initiatives were led by wire agencies and other publishers harmed by Facebook and Google’s dominance of ad tech — an arena starting to attract government scrutiny. In recent years, governments increasingly have acted to recapture the revenue collected by the duopoly and redirect it into the hands of the people and institutions that create and pay for journalism. Legal tactics have changed; countries such as Australia and France have relied more on competition policy to address the duopoly, rather than the use of copyright law and tax measures deployed in earlier efforts. This report surveys these efforts and takes the measure of their effectiveness.

II. Publishers Pursue Copyright Lawsuits

The first efforts to recoup advertising revenue focused on copyright violations in Google News. This aggregation service, which Google has offered in various iterations since 2002, has long been at the center of debates about the search giant’s dominance. Google News organizes and presents a continuously updated stream of articles from around the world and operates in more than 140 countries. It typically lists articles with a headline, a thumbnail image, and a snippet of text or brief summary of their content, with a hyperlink that allows readers to click through to the article’s host site.

Importantly, Google News does not produce original content, but features other publishers’ articles on its platform, including summaries of stories written by journalists. This structure makes the service controversial, with publishers arguing that Google profits from content they pay reporters to produce while steering advertising revenue away from them. In response, Google and its supporters argue that the service helps drive traffic to publications’ sites, which can in turn boost those sites’ profits.

In lawsuits filed in 2005, global news agencies Agence France-Presse and The Associated Press charged that Google News infringed on their copyrights. In AFP’s lawsuit — filed both in France and in the U.S. District Court for D.C. — the agency sought $17.5 million in damages and an order barring Google from displaying AFP content, including images, headlines, and initial paragraphs, on Google News.
During 2006 and 2007, Google settled these suits and others by agreeing to enter into licensing deals with wire services. The financial details were not disclosed. Google said at the time that it was paying for AP content, but that didn’t last long. Its partnership with AP roughly spanned from 2007 to 2009, when Google News quietly stopped publishing AP stories. It is not clear what, if anything, Google ever paid other wire services for content.

During this period, a group of French- and German-language news outlets, represented by the Belgian publishing consortium Copiepresse, also tried unsuccessfully to get Google to pay at least some share of the cost of the content appearing in Google search results. In 2006, the group sued Google for copyright infringement, arguing that by previewing small photos and excerpts, the search engine was stealing traffic — and value — from their sites.

A Belgian court ordered Google to remove links to Belgian newspaper articles that the search engine had posted without first seeking permission or paying fees. In response, Google pulled Belgian newspapers’ content from its search index and from Google News while flouting the court’s requirement that it post the text of the ruling prominently on its sites.

Google’s actions made the legal victory a Pyrrhic one for the publishers. After pulling the content, Google said that unhappy outlets could either be featured on Google’s terms — meaning without remuneration — or leave the platform entirely: “If a newspaper does not want to be part of Google News, we remove their content from our index; all they have to do is ask,” Google representative David Collins said.

After suffering a painful drop in traffic, the publishers resumed talks with Google in 2007, hoping to be included in search results again. Google responded by adding back links to member newspapers in its main web search, while keeping them off Google News as the case proceeded through appeal. The issue of compensation for content remained unresolved.

In 2012, Belgian publishers and Google announced that they had reached an agreement with Google under which they would work with Google on a variety of initiatives. These included what Google framed as mutual promotion. “Google will advertise its services on the publishers’ media,” the platform promised, “while the publishers will optimize their use of Google’s advertising solutions, in particular AdWords, to attract new readers.” Publishers also agreed to make increased use of Google advertising and social tools, such as AdSense, AdExchange, Google+, Hangouts, and YouTube.
Belgian publishers never secured a licensing agreement, however, and Google took pains to stipulate that it was not remunerating Belgian outlets for their work.29 It may have in fact paid some licensing fees. *Le Monde* reported that Google would begin compensating publishers at 2% to 3% of sales turnover, or around €5 million (about $5.8 million).30 But the payments were never confirmed.31 Another interpretation is that by agreeing to advertise on publishers’ destination sites, Google effectively offered compensation for their content, but in a way that disguised the payout as an altruistic advertising partnership. That way, Google could build soft power in a hostile European climate — and avoid the undesirable precedent of copyright levies.32

In the aftermath of the Belgian suit, European media law analysts sympathetic to the plight of local news expressed skepticism that discrete copyright infringement charges like Copiepresse’s effort would be able to compel payment or yield more than hollow victories. As one digital media lawyer told The Guardian, Google “wants to keep publishers happy, but it is likely to draw the line at paying.”33

**III. France, Germany, Spain, and the EU Try Mandates and Taxes**

A second phase of efforts concentrated on using the threat of government mandates or taxes to claw back advertising revenue from Google. In early 2012, France’s then-President Francois Hollande threatened to tax the ad revenue that Google earned from aggregating articles produced by others.34 The French tax proposal was part of a wider array of digital taxes designed to capture revenue from an increasingly dominant American tech presence.

“We want to work to ensure that Europe is not a tax haven for a certain number of internet giants,” said Fleur Pellerin, Hollande’s digital economy minister.35 French Budget Minister Jerome Cahuzac pointed out that other French lawmakers discussed the issue in connection with Europe’s value-added tax, saying that Google profited from the value generated by publishers when linking to their content. “How long can the international community accept the evaporation of value-added, whether it’s in France, Germany, and Spain?” Cahuzac asked.36
Hollande met secretly with Google executive chairman Eric Schmidt about the proposed tax, which became known as the snippet tax. Meanwhile Google’s European executives met with the heads of French publishing organizations, such as the National Daily Press Union and the Association of the Political and General Information Press.\textsuperscript{37}

Several months of wrangling followed. In October 2012, Google sent a letter threatening to drop French media from its search results. The letter asserted that making search engines pay for linking to news sites is like “asking a taxi driver to pay for taking a customer to a restaurant.”\textsuperscript{38} The letter angered lawmakers and evidently heightened tensions. “You don’t deal with a democratically elected government with threats,” Aurelie Filippetti, France’s then-culture minister, told AFP. One media group called the move “a complete refusal by the dominant actor on the market … of all dialogue.”\textsuperscript{39}

The heated back-and-forth seemed to cool only when Schmidt paid a personal visit to the French capital to discuss the issue with Pellerin.\textsuperscript{40} Following those discussions, Google offered an annual €50 million payment ($59 million) to news publishers to settle the ongoing copyright dispute.\textsuperscript{41} The deal was reportedly in three tiers: The first involved Google paying for direct advertising on the newspapers’ platforms; Google then promised publishers additional ad revenue if they agreed to use Google’s AdSense platform for the marketing of digital ads; and finally, Google promised unspecified “commercial collaboration.”

French publishers countered with a demand for €70 million to €100 million per year ($80 million to $118 million) with no contingencies. At that point Hollande publicly told Google that if it did not reach a satisfactory deal with the publishers, the French government would impose one: “There are ongoing negotiations. If [they] don’t succeed, legislative and fiscal provisions will be introduced,” he said.\textsuperscript{42}

Google ultimately settled the dispute by establishing the Digital Publishing Innovation Fund, a €60 million ($71 million) fund tied to Google’s AdSense platform.\textsuperscript{43} DPIF, which distributed grants and Google AdTech software to selected publishers, was a precursor to what would become a wider effort known today as the Google News Initiative.\textsuperscript{44} In public statements about the DPIF, French media representatives stressed their wariness of the American company’s continued dominance in the advertising market. “The deal has come at the right time for the weakest daily newspapers,” said Louis Dreyfus, president of \textit{Le Monde}. “But we shouldn’t fool ourselves; this agreement changes nothing about the media business model, and those who count on the Google fund or public aid to get out of this problem are wrong.”\textsuperscript{45}
Germany also experimented with using government mandates to claw back more revenue from Google and other online service providers and news aggregators. In 2012, Germany’s governing coalition, led by Chancellor Angela Merkel, proposed legislation that would have required internet companies to pay publishers for any display of publishers’ content — including the snippets in search engine results. In response, tech lobbyists launched an advertising blitz, including Google’s “Defend Your Net” campaign, which framed the issue as a problem of fair use.

Faced with Google’s intense lobbying, Merkel’s coalition considerably watered down the bill. The updated version still required search engines to pay publishers but only for the use of longer excerpts. Critics said the bill’s more moderate version also included vague language that would have required case-by-case rulings. Ahead of August 1, 2013, when the legislation came into effect, Google News switched its aggregation service to an opt-in model, under which publishers could choose for their stories to be aggregated — without compensation.

Many publishers initially opted in and saw little change in the number of people viewing their content. But other publishers, including Axel Springer, which publishes Bild, the top-selling newspaper in Europe, decided to opt out and evaluate the effect on their readership. Google responded by running only Springer’s headlines in article previews, stripping the additional chunks of text and images that usually accompany search returns. The results were devastating: Without Google acting as an intermediary, traffic plummeted. Site visits from Google search fell by 40%, while clicks from Google News plunged by 80%, Springer said. The company quickly scrapped the effort, granting Google a temporary exemption from having to pay. CEO Mathias Doepfner said Springer would have “shot ourselves out of the market” if it had persisted with the demand for snippet licensing fees.

A Spanish effort to require Google to pay for content met a harsher fate. Spain passed legislation that required aggregators such as Google to compensate publishers for original content — through payment to the Association of Editors of Spanish Dailies, a media industry group. Unlike under the German law, individual publishers could not grant exemptions to aggregators. Google responded by shutting down its news service in the country entirely.

Within hours of Google News’ exit, external traffic to Spanish sites dropped by 10% to 15%, web analytics firm Chartbeat found. In a more sweeping study after the law went into effect, the Spanish Association of Publishers of Periodical Publications found that the ancillary copyright requirement devastated web traffic, with small papers hit the hardest. Unable to reverse Google’s decision not to list them in search results, many publications simply folded. Seeing these results, Austria, which had been expected to introduce a law, chose not to do so.
Since then, the European Union has attempted to accomplish what individual member states could not. In March 2019 the European Parliament passed a directive, known as Article 11, aimed at making Google and other news aggregators pay for news content. The directive gives publishers the option — but not the requirement — to demand licensing fees when services such as Google News reproduce headlines and snippets of text from their articles.

The scope of the directive is vague, however. Hyperlinks by themselves don’t count as content, and news aggregators also are not required to pay for the use of “very short extracts.” Some say the exemption of hyperlinks and snippets makes the directive toothless. The law also allows new, small publishers to give away their content to Google in return for being listed in Google’s search engine.

Will the pan-European directive go forward where Spain and Germany floundered? As a bloc, European countries have more negotiating power, making it less likely that Google News would simply switch off its service across the continent, as it did in Spain. The increasing importance of mobile search may also shift the balance of power at least a bit. Nieman Lab’s Joshua Benton has argued that the growing premium placed on mobile search, where the browser is downsized and the top results count for more, makes less plausible Google’s threat to pull the plug on Google News for a whole continent.

But collective action problems remain for Europe’s publishers. Article 11 grants but doesn’t mandate news organizations the ability to demand licensing fees. Rather than bargaining as a bloc, publishers may well choose individually to sign away their copyright claims and to continue letting platforms link to their content for free.

Recent developments also suggest that EU member states increasingly are interested in taking a new approach that specifically targets Google and Facebook rather than all news aggregators. Though France passed a law in 2019 designed to implement Article 11, the government has since announced it has “switched its approach to competition law.” This means a shift in focus to antitrust enforcement, supplementing enforcement of copyright laws. The French competition watchdog has ordered Google to negotiate “in good faith” with the French press, specifying that the injunction required the negotiations to result in a proposal from Google to remunerate publishers. Isabelle de Silva, the head of France’s competition authority, said on Twitter that the agency had “found that Google’s practices vis-à-vis publishers and news agencies were likely to constitute an abuse of a dominant position.”

The French Competition Agency, in a move described as having profound global consequences, in July 2021 levied a $594 million fine on Google for not completing copyright changes in search results. While Google largely agreed with the stipulated changes to its ad tech, it has appealed the size of the fine, claiming deals with expanded offers to 1,200 publishers and improved sharing of data and technology with competitors.
Australia has drawn international attention for exploring new approaches to clawing back revenue from the Facebook and Google duopoly. In July 2019, the Australian Competition and Consumer Commission released its final report of its six-month Digital Platform Inquiry. The report began by noting the limitations of using copyright action against digital platforms. The ACCC stressed Google’s and Facebook’s dominant market power and international reach: “Rightsholders can face particular challenges in enforcing copyright against digital platforms because of the cost, delay, uncertainties regarding authorisation liability, and potentially low value of remedies associated with bringing court proceedings against overseas-based defendants hosting content outside Australia.”

In December 2019, officials announced “a roadmap to action” that included full support of seven of the 23 ACCC recommendations, including 11 others “in principle.”

The ACCC inquiry proposed an enforceable code aimed at limiting the market power of the duopoly. It differs from the European approaches discussed above in four key respects:

- It employs competition policy, as opposed to copyright law.
- It is considerably broader in its definition of news.
- It includes comprehensive anti-discrimination agreements to prevent Google from favoring publishers not included in the code.
- It allows Google and Facebook a seat at the table in designing the code, backstopped by the threat of forced arbitration if parties can’t reach an agreement.

Although publishers would participate in negotiations with platforms, news would be defined broadly, and nonparticipants in the code would be covered by robust nondiscrimination requirements.

The platforms would not be permitted to favor news publishers participating in the code — for example, by ranking their stories higher in social media feeds or search results. This applies at the international level, too: “A decision by digital platforms to place more reliance on international news and lower the ranking of,
or cease carrying, Australian news content on the basis of participation in the code would also be considered discrimination.” Enforcement would include notice of infringement for minor breaches; for major violations, the ACCC threatens to fine up to 10 million Australian dollars ($7.1 million) per breach; or three times the benefit obtained; or 10% of a platform’s annual turnover in Australia in the last year, whichever is greater.85

**Cooperative design**

Negotiations with tech companies, touted as a virtue of the soft-power Australian approach — promising to distinguish ACCC chair Rod Sims’ plan and make it binding where others have frayed — have become a sticking point.86 It’s not clear that talks would have succeeded, even absent a global pandemic. The ACCC has said that negotiations ran aground on the question of content payment.87 “On the fundamental issue of payment for content,” Treasurer Josh Frydenberg wrote in an op-ed justifying the move to a mandatory code, “there was no meaningful progress and, in the words of the ACCC, ‘no expectation of any even being made.’”88 The government ordered the competition authority to move forward with writing a mandatory code, a draft of which was released on July 31, 2020.

Google argued that the draft code was “unworkable.” While stating that shuttering its Australian operations is not an available option,89 it warned users that “the way Aussies search every day on Google is at risk from new Government regulation.”90 Meanwhile, Google has tried to reframe the fight as a battle with media powerhouses such as Rupert Murdoch’s News Corp.91

To resolve the thorny central issue of content payment, the draft code does not set out a precise amount that platforms must pay publishers. Instead, it frames a negotiating process in which Google and Facebook are required to participate. The giants have a three-month negotiation phase; if no agreement is reached, a government-appointed panel will step in.92 Apart from requiring Google and Facebook to remunerate publishers, the mandatory code will also regulate issues such as data sharing and news ranking, and it will require platforms to give news publishers 28 days’ notice when algorithm changes are likely to change the amount of traffic driven to their websites.93 Australia has directly focused on journalism, whereas the EU’s schemes have been conducted as grand-scale efforts to tax Big Tech.

In early 2021, Google reached agreements with major Australian publishers in the rollout of a service called Google News Showcase,94 95 But Facebook has fully resisted the reform process. In late February, it banned news from its platform in Australia,96 setting up a showdown with the government. The government largely backed down,97 altering the code to allow the tech giants more time to negotiate with publishers98 even though this prolongs the challenge publishers face in trying to stay in business without receiving their fair share of advertising revenue.99
No single tactic has emerged as an effective strategy for ending the free ride Google, Facebook and other platforms take on the content produced by journalists and financed by publishers. At most, the threat of antitrust action and private litigation has compelled Google and Facebook to increase their so-called philanthropic support for different media organizations — a consequence that in many ways even further imperils independent journalism.

Facebook in 2019 committed $300 million over three years to a variety of news-related initiatives, including groups that place journalists in local newsrooms, pledging $100 million more as the pandemic decimated news advertising in the early stages. While facing scrutiny from local and federal authorities in the U.S. and abroad, Google announced in October 2020 that it planned to pay publishers more than $1 billion over three years to launch its Google News Showcase.

Skeptics deride such payments as efforts to stave off more aggressive regulation and to retain control. Google’s payments for News Showcase have gone only to news organizations in countries where it is the target of antitrust actions. As Nieman Lab’s Benton has written, Facebook and Google also limit their grants to a small number of publishers as recipients of their grants because “[t]hey don’t want this to become an obligation owed equally to everyone who publishes anything on the Internet.” Adds Angela Mills Wade, executive director of the European Publishers Council, Google has also used new product launches to shift the conversation away from regulation of existing products. “By launching a product,” she observes, “they can dictate terms and conditions, undermine legislation designed to create conditions for a fair negotiation, while claiming they are helping to fund news production.” Open Markets Institute senior fellow Nikki Usher has detailed how Google and Facebook also use corporate grants to media organizations to gain influence over their editorial decisions and forestall independent coverage.

No single strategy has so far proved adequate to resolve the problem. True reform will require more than just threats to enforce copyright law or break up the Facebook/Google ad duopoly, but use of antitrust action and other competition policies that actually do so.
About The Authors

Phillip Longman, policy director at the Open Markets Institute and Jody Brannon, director of Open Markets’ Center for Journalism and Liberty, contributed to this report, along with former managing editor Michael Bluhm and former intern Lee Harris.

Endnotes


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82 Note: This was true prior to the coronavirus outbreak. Under mounting pressure, legislators eventually opted to skip the bargaining phase and move ahead with a mandatory code.

83 Australia’s public broadcasters, ABC and SBS, initially were excluded from remuneration in the draft code because they were funded by taxes. They will still benefit from other, nonmonetary standards, such as the requirement that Facebook and Google provide adequate notice of algorithmic changes.


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