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Meta and the News: Assessing the Value of the Bargain

Jeffrey A. Eisenach

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About the Author

Dr. Eisenach is a Managing Director and Co-Chair of NERA's Communications, Media and Internet Practice. He is also an Adjunct Professor at George Mason University Law School, where he teaches Regulated Industries, and a Visiting Scholar at the American Enterprise Institute, where he focuses on policies affecting the information technology sector, innovation and entrepreneurship. Previously, Dr. Eisenach served in senior policy positions at the US Federal Trade Commission and the White House Office of Management and Budget, and on the faculties of Harvard University's Kennedy School of Government and Virginia Polytechnic Institute and State University.

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I. Introduction

Technology has transformed the way people gather and process information and disrupted entire sectors of the global economy. One of the sectors most profoundly affected is the news industry, where reduced costs of gathering and distributing information have lowered entry barriers, the proliferation of content has increased competition for audiences, and technological changes in the advertising industry have challenged traditional business models.

The news industry has responded to these changes in various ways, with many publishers seeking to improve the depth and timeliness of their content, embracing new approaches to online delivery and monetization, and adopting a variety of new business models. Nonetheless, revenues and employment at many traditional news outlets have declined. In this context, some in the traditional news industry have alleged that digital platforms are profiting unfairly from the use of journalistic content on their platforms.[1] In response, policymakers in several major economies – including Australia, Canada, the European Union (EU) and the United Kingdom (UK) – have adopted or are considering adopting policies designed to enable news publishers to extract compensation from major online platforms, primarily Google and Facebook. Such legislation typically takes the form of forced arbitration schemes, antitrust exemptions to allow publishers to form a bargaining cartel, changes to copyright rules, or a combination of the three.

To assess whether such measures represent sound public policy requires an accurate understanding of the economic and institutional relationships between online platforms, on the one hand, and the news industry, on the other. In this context, this paper examines the economic relationships[2] between Meta and its largest social media platform, Facebook, and the news industry.[3] Specifically, we apply generally accepted economic approaches to the valuation of intellectual property to analyze the value created by the sharing of news content on Facebook. Further, we assess whether, under the current institutional and commercial circumstances – i.e., in a market-based system – each party is receiving an economically reasonable share of the value being created, that is, a share that reasonably approximates what economists refer to as fair market value.

The evidence presented here indicates that publishers reap considerable economic benefits from their use of Facebook, including by exposing their content links to Facebook users, which drives traffic to their web sites. This results in both more subscribers and higher advertising revenues for

[1] The terms "news publishers," "news industry," "traditional news industry" and "traditional news outlets" as used here refer to the news publishers seeking government intervention or, in the case of countries where interventions have already been adopted, the publishers identified as eligible for preferred treatment.

[2] As used herein, the phrase "economic relationships" refers to all economic transactions between the parties, with or without a bespoke "commercial agreement." Thus, for example, when publishers voluntarily post content on their Facebook Pages under Facebook's standard Terms of Use, they are engaging in an "economic relationship" with Facebook.

[3] While this paper makes references to other online platforms, the analysis applies specifically and exclusively to Meta and Facebook. As the UK's Competition and Markets Authority and Ofcom observed in a recent report, bargains between specific platforms and publishers are likely to "vary significantly depending on the nature of the content and the business models of the firms." Competition and Markets Authority and Ofcom, *Platforms and Content Providers, Including News Publishers: Advice to DCMS on the Application of the Code of Conduct* (November 2021) at ¶3 (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073411/Platforms_publishers_advice._A.pdf) (hereafter "CMA/Ofcom (2021)").

publishers. While Meta also benefits to a relatively small extent – in that some Facebook users enjoy the ability to share and engage with news publisher content – the evidence suggests news content is highly substitutable with other content on the Facebook platform, meaning that the loss of news content would not significantly reduce user engagement on Facebook. Overall, the evidence suggests that the market-based economic relationships between publishers and Meta reasonably reflect the value of the bargain to each party. Thus, the economic evidence contradicts publishers' contentions that Meta is benefiting disproportionately from the use of their content on Facebook, and there is no basis for government interventions designed to tip the scales in favor of publishers. To the contrary, such interventions have the potential to distort the news industry and harm all participants, including news publishers and consumers. Moreover, such proposals do not address the fundamental issue of how publishers can best alter their business models to respond to the economy-wide technological transformations – just as other industries have adjusted to changing business conditions.[4]

Specifically:

- The appropriate economic standard for judging the division of value between Meta and news publishers is the "willing buyer/willing seller" ("WBWS") or "fair market value" standard, which is widely recognized and applied in the valuation of intellectual property rights in advanced economies. The underlying principle behind the WBWS concept is that the price of a good reflects fair market value if it is consistent with the result of an arms-length negotiation in which both parties are well-informed and neither party is compelled to act.

- The evidence demonstrates that the economic relationships engaged in voluntarily by Meta and news publishers meet the WBWS standard. The primary mechanism by which content from news publishers appears on Facebook is through the voluntary actions of the publishers themselves: The vast majority of publishers choose to host Facebook Pages where they post short-form versions of their content with links to their web pages. The decisions of thousands of publishers voluntarily to post their content on the Facebook Pages they create under Facebook's standard terms of service, and Meta's voluntary decision to allow them to do so without charging them a fee, reflect a *de facto* recognition by both parties that the value of the bargain to each of them is reasonably balanced. The evidence shows that the value of referrals generated by sharing content on Facebook corresponds to a small, but not immaterial, proportion of news publisher revenues, approximately 1.0 to 1.5 percent. The evidence also fails to support publisher contentions that posting links to or "snippets" of news content on Facebook materially harms publishers by causing users to forego visiting publisher web sites for the full story.

- There is no economic foundation for news publishers' contentions that Facebook is a "must have" platform for publishers or that it possesses an "imbalance of bargaining power" that would allow it to extract an unreasonable share of the value of the bargain. For example, data relied upon by the UK's Competition and Markets Authority (CMA) indicate that Facebook

[4] This paper focuses on news publishers' contentions that they are undercompensated by Meta as a result of some form of market failure. It does not attempt to address comprehensively the complex set of issues associated with promoting a healthy market for journalistic content and civic discourse nor to fully assess the social and consumer welfare effects of all of the various policy options.

drives only about 13 percent of traffic to publisher web sites,[5] and other data suggest that share is declining. Thus, while exposure on Facebook is valuable to publishers, Facebook is not a "must-have" platform for publishers and does not have sufficient bargaining leverage to impose unreasonable terms.

- News publisher content plays an economically small and diminishing role on the Facebook platform, with news links accounting for less than three percent of what users see in their Facebook Feeds. Thus, there is no basis for believing that a reduction of news content on Facebook would materially affect the number of users, user engagement, advertising revenues or any other commercially meaningful metric. The fact that Meta derives little economic value from the sharing of news content on Facebook explains why its willingness to pay for news content is, in most cases, zero.

- The economic relationships between Meta and news publishers are broadly comparable to those between Meta and other parties that provide content on Facebook. Like other content providers, news publishers have the option to post content and links on Facebook for free, which allows them to reach existing and new audiences; they are able to monetize that traffic via ads or subscriptions and in some instances are able to monetize directly on Facebook (by sharing in applicable ad revenue). Publishers may also sometimes negotiate specific terms and conditions for particular content not otherwise on Facebook that may be of value to Facebook users and Meta. In other words, there is no evidence that Meta discriminates against news publishers relative to others who share content on Facebook.

- If, as publishers argue, Meta's refusal to compensate them for shared content is a result of Meta's disproportionate bargaining power, one would expect that publishers would be successful in obtaining compensation for their content from other online platforms – such as LinkedIn and Twitter – which are not alleged to have such power. Yet publishers have produced no evidence that this is the case.

- The economic challenges facing the news publishing industry began well before the emergence of Facebook; and, while Meta is one of many companies that compete with news publishers for advertising revenue, there is no material economic nexus between Meta's success in the online advertising business and the economic challenges facing news publishers. To the contrary, publishers benefit considerably from the traffic generated by their presence on Facebook, which is why thousands of publishers voluntarily choose to have a presence there and to post links to their content.

The remainder of this report is organized as follows. Section II discusses the public policy context of the current policy debate, including reviewing the specific proposals being put forward by news publishers and discussing the challenges facing the news business. Section III describes the ways in which news content is shared on Facebook and the economic relationships involved in such

[5] Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report, Appendix S: The Relationship Between Large Digital Platforms and Publishers* (July 1, 2020) at S6, Table S.3 (available at https://assets.publishing.service.gov.uk/media/5efb22fbd3bf7f768fdcdfae/Appendix_S_-_the_relationship_between_large_digital_platforms_and_publishers.pdf) (hereafter "CMA 2020 Market Study, Appendix S").

sharing. Section IV presents an assessment of the value generated by the sharing of news content on Facebook and the way that value is divided between the parties. Section V discusses the implications of these findings for public policy. Section VI presents a brief conclusion.

II. The Public Policy Context: Addressing Challenges to the News Business

The public policy proposals that are the focus of this paper are motivated at least in part by concerns among policymakers that the economic challenges facing some segments of the traditional news industry as it functions today could lead to a reduction in "civic journalism," with potential knock-on effects on civic society and democratic governance. While the precise mechanisms vary, one asserted intent of these proposals is to mitigate these effects by increasing the ability of publishers to extract payments from online platforms.

In this context, the first subsection below describes the main proposals that have been adopted or considered in several major jurisdictions. It focuses in particular on the foundational question of how best to define the terms "news" or "journalistic content" in this context, and thus determine precisely which "publishers" would be eligible to receive the payments that the policies are designed to elicit. Answering this question has proven problematic, and different jurisdictions have addressed it in different ways.

The second subsection addresses another aspect of the public policy debate, namely the nature and causes of the economic challenges facing traditional publishers in the digital age, including whether and to what extent those challenges can be attributed to online platforms. The subsection begins by briefly describing salient economic characteristics of the news business, and then turns to assessing, in broad terms, how the news industry has adapted to the technological and market forces faced by all industries in the 21st century.

A. Defining the News: The Challenge of Identifying News Publishers

The proposals at issue in this paper are framed in economic terms – that is, they seek to elicit payments by online platforms to news publishers on the grounds that the platforms have an imbalance of bargaining power.[6] The relevant question for that debate is whether market-based commercial arrangements between online platforms (and, in the context of this paper, Meta specifically) and a particular subset of content creators ("news publishers") reasonably reflect the value to each party, or, alternatively, whether there is some form of market failure that causes one side to capture an unreasonable share of the value of the bargain.[7]

[6] See e.g., CMA/Ofcom (2021) at ¶5.27 ("The question that should be asked is, if there weren't a significant imbalance of bargaining power, what share would the platforms keep and what would the publishers receive?").

[7] Facebook distinguishes between news publishers and other Facebook users based on its News Page Index, which allows self-identified news publishing entities such as newspapers, e-magazines and news television shows to register in order to get access to additional tools designed for publishers, including the ability to respond to user requests for information about topics such as a breaking news event, eligibility for inclusion in Facebook created spaces such as the COVID-19 Information Center, and potential exemption from certain policies regarding ads about social issues, elections and politics. The criteria for inclusion on the News Page Index include authenticity and accountability (i.e., that the Page is tied to a verified web site of a news provider with a multi-person editorial staff)

At the same time, the public policy debate around these proposals is intertwined with concerns about the role of journalism in civic society.[8] Policymakers rightly wrestle with questions relating to the value of investigative reporting and "public interest journalism" to civic society and, conversely, the potentially corrosive impact of "misinformation" or "disinformation," while at the same time recognizing the value of "citizen reporting" and the growing ability of ordinary citizens to make their opinions known to a wide audience.[9] To the extent the policy objective is to provide financial support for journalism that positively affects civic discourse and advances other social objectives, how is such journalism (and thus eligibility for support) to be defined? And how (if at all) does such a definition correspond to the other stated policy objective, remedying a purported imbalance of bargaining power?

In the jurisdictions where interventions have been adopted or seriously proposed, these questions have proven to be problematic, and different jurisdictions have answered them in different ways. However, one persistent theme is that the proposals that have been adopted appear to favor large, incumbent publishers over smaller outlets and citizen journalists.

In Australia, the News Media and Digital Platforms Mandatory Bargaining Code (Australian Media Bargaining Code, or AMBC; also "the Code") requires digital platforms designated under the Code to bargain in good faith with registered news publishers (which can include newspapers, magazines, television and radio broadcasters, web sites and any other "program of audio or video content designed to be distributed over the Internet")[10] who have notified them of their intention to bargain. It also allows registered publishers to bargain collectively and with recourse to compulsory binding final offer arbitration if an agreement cannot be reached. In order to register, publishers must apply to the Australian Communications and Media Authority (ACMA) for registration and satisfy four sets of criteria relating to (1) revenue, (2) professional standards, (3)

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and a requirement that content primarily report on current events or timely information, not be user-generated or aggregated from other web sites, and contain more news content than advertising. See Meta, "Meta Business Help Center: About News Page Index" (available at https://www.facebook.com/business/help/377680816096171?id=644465919618833) (last accessed January 11, 2023); Meta, "Meta Business Help Center: Registration Guidelines for the News Page Index" (available at https://www.facebook.com/business/help/270254993785210?id=644465919618833&locale=en_US&draft=270254993785210) (last accessed January 11, 2023).

[8] See e.g., Frances Cairncross, *The Cairncross Review: A Sustainable Future for Journalism*, Department for Digital, Culture, Media & Sport (February 2019) at 25 (available at - https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism) (hereafter "Cairncross Review"); Australian Competition and Consumer Commission, *Digital Platform Inquiry* (June 2019) (available at https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf); United States Copyright Office, *Copyright Protection for Press Publishers* (June 2022) (available at https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf); Congressional Research Service, *Stop the Press? Newspapers in the Digital Age* (January 27, 2022) at 2 (available at https://sgp.fas.org/crs/misc/R47018.pdf); Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report* (July 1, 2020) at 59 (available at https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf) (hereafter "CMA 2020 Market Study").

[9] For further discussion of these issues, see Cairncross Review at 16; Henry Ergas et al, *The Crucial Role of Public Interest Journalism in Australia and the Economic Forces Affecting It* (August 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433489).

[10] Australian Communications and Media Authority, *News Media Bargaining Code Eligibility Guidelines* (July 2022) at 11 (available at https://www.acma.gov.au/register-eligible-news-businesses).

content, and (4) Australian audience.[11] The revenue, professional standards, and Australian audience tests are relatively straightforward and not directly related to the definition of "news."[12] The content test is more involved and requires news publishers to demonstrate that their "primary purpose" is to create content that "reports, investigates, or explains: issues or events that are relevant in engaging Australians in public debate and in informing democratic decision making; or current issues or events of public significance at a local, regional or national level."[13]

While a limited number of publishers have registered under the Code, the major publishing companies (including News Corporation, Nine Entertainment, and Seven West Media) have refrained from doing so.[14] Moreover, neither Facebook nor Google – the two platforms proposed for designation under the Code – have been designated.[15] Rather, both Facebook and Google reached voluntary agreements with certain major publishing groups,[16] and these agreements have been deemed sufficient to satisfy the Code's exemption for platforms that have made "significant contribution[s] to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content)."[17]

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[11] *Ibid*.

[12] The revenue test requires annual revenues greater than AUD $150,000 in the most recent year or for at least three of the five most recent years. News publishers satisfy the professional standards test if they have editorial independence from the subjects of their news coverage and are subject to professional editorial standards, including standards related to accuracy and impartiality as well as a mechanism for handling consumer complaints about the compliance of news content with those standards. The Australian audience test requires publishers to demonstrate that they operate predominantly in Australia for the dominant purpose of serving Australian audiences. See *id.* at 12-15.

[13] *Id.* at 13-14. In evaluating whether core news content is the "primary purpose" of the news publisher, the ACMA considers: (1) the amount of core news content created; (2) the frequency with which the publisher creates core news content; (3) the degree of prominence given to core news content compared with other content, and (4) other relevant matters, including but not restricted to: (a) the typical presentation of news content by comparable publishers; (b) how the news publisher is promoted, and (c) the publisher's publication and distribution of news content online. Given variation in the types of content published over time, the ACMA provides the following example of how it assesses a publisher's "primary purpose": "a publication that publishes primarily core news but occasionally publishes entertainment content would satisfy the content test unless, over a reasonable period of time, its core news becomes secondary to its entertainment content."

[14] See Australian Communications and Media Authority, "Register of Eligible News Businesses" (available at https://www.acma.gov.au/register-eligible-news-businesses) (last accessed January 10, 2023) (hereafter "Register of AMBC-Eligible News Businesses").

[15] See Australian Government, The Treasury, *News Media and Digital Platforms Mandatory Bargaining Code: The Code's First Year of Operation* (November 2022) at 3 (available at https://treasury.gov.au/sites/default/files/2022-11/p2022-343549.pdf) (hereafter "AMBC First Year Report").

[16] The Australian government reports that Google has reached "over 30 agreements" with news businesses while Meta has reached agreements with 13. See *id.* at 5-6.

[17] Australian Government, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021: An Act to Amend the Competition and Consumer Act 2010 in Relation to Digital Platforms, and for Related Purposes*, Act No. 21 of 2021 (March 2, 2021) at Schedule 1, Part 1, Amendment to Competition and Consumer Act 2010, Part IVBA, Division 2, 52E (available at https://www.legislation.gov.au/Details/C2021A00021) ("(1) The Minister may, by legislative instrument, make a determination that: (a) specifies one or more services…in relation to a corporation as designated digital platform services of the corporation; and (b) specifies the corporation as a designated digital platform corporation…. (3) In making the determination, the Minister must consider: (a) whether there is a significant bargaining power imbalance between Australian news businesses and the group comprised of the corporation and all of its related bodies

While the Australian government argues that these agreements demonstrate that the Code has been successful, others have argued that it has unfairly advantaged some news businesses relative to others,[18] and in particular, that it has benefited large and politically powerful news organizations at the expense of smaller ones since "90% of revenues negotiated as a result of the new law have gone to Australia's three largest media companies."[19] Moreover, of the 24 named news organizations reported by the Australian government as having entered into contracts with either Google or Meta, only eight are registered under the Code.[20]

In 2019 the European Parliament voted in a new Directive on Copyright and Related Rights in the Digital Single Market (EU Directive), giving news publishers the right to authorize or prohibit third-party online services from reproducing news articles or making them publicly available for two years following initial publication.[21] Notably, the right does not apply to "acts of hyperlinking" or the use of "very short extracts," though the EU Directive does not precisely define "very short extracts."[22] The EU Directive provides this right to "publishers of press publications," and defines "press publication" to cover only "journalistic publications, published in any media, including on paper, in the context of an economic activity that constitutes a provision of services under [EU] law."[23] This definition includes "daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites," but excludes "[p]eriodical publications published for scientific or academic purposes" and "websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider."[24]

corporate; and (b) whether that group has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content)…. (5) Before making the determination, the Minister must give the corporation notice in writing that the Minister intends to make a determination under subsection (1) specifying the corporation and a particular service or particular services. (6) The Minister must not make the determination before the end of the period of 30 days starting on the day on which the notice under subsection (5) is given.").

[18] AMBC First Year Report at 10.

[19] Sue Gardner, "Sue Gardner: Bill C-18 is Bad for Journalism and Bad for Canada," McGill University Max Bell School of Public Policy (October 12, 2022) (available at https://www.mcgill.ca/maxbellschool/article/max-policy/c-18) (hereafter "Gardner (2022)").

[20] Register of AMBC-Eligible News Businesses. In December 2022, New Zealand announced its intentions to adopt legislation similar to the Australian Code. See Hon Willie Jackson, "Big Online Platforms to Pay Fair Price for Local News Content," New Zealand Government (December 4, 2022) (available at https://www.beehive.govt.nz/release/big-online-platforms-pay-fair-price-local-news-content).

[21] European Parliament and Council of the European Union, Directive (EU) 2019/790: On Copyright and Related Rights in the Digital Single Market (April 17, 2019) at Article 15 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN) (hereafter "EU Directive 2019/790"); European Parliament and Council of the European Union, Directive 2001/29/EC: On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (May 22, 2001) at Article 2 and Article 3(2) (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN).

[22] EU Directive 2019/790 at Article 15.

[23] *Id.* at ¶56, Article 15.

[24] *Id.* at ¶56.

In July 2019 France became the first country to vote the EU Directive into national law, updating the French Intellectual Property Code (IPC).[25] In response, Google decided to refrain from displaying excerpts of content from European press publishers in search results in France, unless publishers gave permission for Google to do so free of charge.[26] After being fined €500 million by the French Competition Authority for not entering "good faith" negotiations,[27] Google proposed to negotiate in "good faith" with news agencies and online press services recognized by the Joint Commission for Publications and Press Agencies (Commission Paritaire des Publications et Agences de Presse (CPPAP)).[28] However, during a review of Google's initial commitments, the French Minister of Economy criticized the commitments for excluding the magazine press, whose web sites are not comprehensively recognized by the CPPAP. The Agence France-Presse and the Fédération Française des Agences de Presse claimed the commitments lacked clarity on the rights of news agencies whose content is included in third-party publications.[29] In response, Google expanded its commitments to include all press publishers that fall under article L. 218-1 of the IPC, which is identical to the definition of press publications in the EU Directive, and explicitly

[25] Journal Officiel de la République, Loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse (1) (July 26, 2019) (available at https://www.legifrance.gouv.fr/download/pdf?id=v1P1M3GXaBwvKuWy0CMq43EkAp4FIizANS-DxD8-Hjk=).

[26] Autorité de la concurrence, 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 (April 9, 2020) at 3 (available at https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf) (hereafter "Autorité de la concurrence, Decision 22-MC-01"); United States Government Accountability Office, *Local Journalism: Innovative Business Approaches and Targeted Policies May Help Local News Media Adapt to Digital Transformation* (January 2023) at 73 (available at https://www.gao.gov/assets/gao-22-105405.pdf).

[27] According to the French Competition Authority (Autorité de la concurrence), the vast majority of news publishers granted Google free use of their content without negotiation or any remuneration, effectively giving Google the rights to more content than before the law came into force. News publishers sued, and the French Competition Authority issued interim measures ordering Google to enter into "good faith" negotiations. In July 2021, the French Competition Authority fined Google €500 million for not complying with the interim measures by negotiating in "good faith." Autorité de la concurrence, Decision 22-MC-01 at 3-5; Autorité de la concurrence, Decision 21-D-17 on Compliance with the Injunctions Issued Against Google in Decision 20-MC-01 of 9 April 2020 (July 12, 2021) at 3-6 (available at https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2022-02/21-d-17_en.pdf).

[28] Autorité de la concurrence, Decision 22-D-13 Regarding Practices Implemented in the Press Sector (June 21, 2022) at 23, ¶91 (available at https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/2022-10/Decision%2022D13%20V%20EN.pdf) (hereafter "Autorité de la concurrence, Decision 22-D-13"). The CPPAP is an entity that manages a list of news publishers that are eligible for fiscal benefits. It also decides on the status of news agencies and online publishers. Notably, to be included in the CPPAP list, a news publisher must meet a sales condition (over 50 percent of its publications must be sold rather than freely distributed), publications must be regularly distributed (at a minimum quarterly), newspaper pages must have at least one third of the content that is not advertisements, they must also have at minimum one third of content for "general interest," and it must not incite negative behaviors such as violence. Certain categories of publications have additional eligibility criteria, such as publications edited by an association or publications that cover political content. See Commission Paritaire des Publications et Agences de Presse, "Présentation de la CPPAP" (available at http://www.cppap.fr/presentation-de-la-cppap/) (last accessed January 11, 2023); Commission Paritaire des Publications et Agences de Presse, "Critères d'admission" (available at http://www.cppap.fr/criteres-dadmission/).

[29] Autorité de la concurrence, Decision 22-D-13 at 26, ¶¶113-114.

recognized the rights of news agencies whose content is reproduced identically in third-party press publications.[30]

The question of which publishers should receive preferential treatment is also controversial in countries where interventions are still being considered. In Canada, for example, proposed Bill C-18 would create a framework requiring digital platforms to enter into agreements to compensate news businesses in cases where a platform is found to have a significant bargaining power imbalance. The proposed framework aims to facilitate negotiations through bargaining or mediation sessions between digital platforms and news outlets, failing which a final offer arbitration process would be utilized. News publishers would be defined as "an undertaking or any distinct part of an undertaking, such as a section of a newspaper, the primary purpose of which is to produce news content," meaning "content – in any format, including an audio or audiovisual format – that reports on, investigates or explains current issues or events of public interest."[31] Broadcasters licensed by the Canadian Radio-television and Telecommunications Commission as a campus station, community station, or native station are automatically eligible for coverage.[32] Other news publishers are eligible for coverage if they meet the following criteria: (1) produce news content of public interest that is primarily focused on matters of general interest and reports of current events and not primarily focused on a particular topic; (2) employ two or more journalists in Canada; (3) operate in Canada; (4) follow a code of ethics with standards of professional conduct that require adherence to the recognized processes and principles of the journalism profession.[33] The coverage provisions are a topic of controversy, with some critics pointing out that a high proportion of any resulting fees would go to broadcasters (including public broadcasters which already receive significant subsidies),[34] and others complaining that the provision requiring employment of at least two full-time Canadian journalists would exclude small publishers.[35] Others have expressed concerns that subsidies could flow to publishers of opinion and commentary rather than producers of "hard news."[36]

[30] *Id.* at 36, ¶177; Code de la propriété intellectuelle, Article L218-1 (July 24, 2019) (available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826730/2022-04-07).

[31] House of Commons of Canada, Forty-Fourth Parliament, First Session, Bill C-18: An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada as Passed by the House of Commons December 14, 2022 at 2. Note that the definition also includes Indigenous news outlets.

[32] *Id.* at 10. Indigenous news outlets producing news content that includes matters of general interest are also automatically eligible. See *id.* at 11.

[33] *Id.* at 10-11; Income Tax Act (Revised Statutes of Canada, 1985, c. 1 (5th Supp.)) (last amended November 17, 2022) at 3102-3103.

[34] Marie Woolf, "Online News Bill C-18 Would Pump Most Funds into CBC and Other Broadcasters – Not Newspapers," *The Globe and Mail* (October 2022) (available at https://www.theglobeandmail.com/politics/article-bill-c-18-broadcasters-funding/); Michael Geist, "How the Government is Using Bill-18 to Pick Media Winners and Losers" (December 6, 2022) (available at https://www.michaelgeist.ca/2022/12/winnersandlosers/).

[35] See e.g., Anja Karadeglija, "Liberals Consider Amending Bill C-18 So Smaller News Outlets Qualify for Big Tech Revenue Sharing," *National Post* (November 2, 2022) (available at https://nationalpost.com/news/politics/liberals-consider-amending-bill-c-18-so-smaller-news-outlets-qualify-for-big-tech-revenue-sharing). See also Vancouver Tech Journal Staff, "Canada's Online News Act Must Be Transparent, Fair, and Include News Innovators," *Vancouver Tech Journal* (May 31, 2022) (available at https://www.vantechjournal.com/p/canadas-online-news-act-must-be-transparent); Gardner (2022).

[36] See Michael Geist, "Dismissing Digital News Outlets: Liberal MP Claims Online News Services Don't Report News" (November 24, 2022) (available at https://www.michaelgeist.ca/2022/11/dismissing-digital/).

The UK government's proposed "Pro-Competition Regime for Digital Markets" would enforce codes of conduct for digital firms designated as having Strategic Market Status (SMS).[37] In April 2021, the Digital Secretary asked the Digital Markets Unit (DMU) in the CMA to work with Ofcom to "look at how a code would govern the relationships between platforms and content providers such as news publishers, including to ensure they are as fair and reasonable as possible."[38] The resulting CMA-Ofcom Report advised the Department for Digital, Culture, Media & Sport (DCMS) on how to apply a code of conduct.[39] The report covers a broad range of content providers, including news publishers, and specifically recommends that platforms designated as having SMS be required to negotiate with news publishers and, if such negotiations were unsuccessful, that the DMU have the authority to mandate payments either by direct regulation or through mandated final offer arbitration.[40] The CMA-Ofcom Report proposed specifically that the amount of payments from each SMS platform to publishers be determined jointly for all publishers "of a particular type of content," with the payments then distributed among publishers on a "non-discriminatory" basis.[41] However, it does not explain either which "particular types of content" would qualify publishers for payments or what precisely would constitute a "non-discriminatory" division of proceeds, though it does note that "certain types of content such as news content may be more valuable than other types of content,"[42] and expresses concern about unintended consequences such as the possibilities that "[e]xtending protection to content providers may also help producers of harmful content monetise that content more effectively" or that protection might "favour incumbent news providers over smaller firms or new entrants."[43]

Similar issues were addressed in the United States (US) during the 2022 debate over the Journalism Competition and Preservation Act (JCPA; S. 673 in the Senate, H.R. 1735 in the House), which would have created an exemption from US antitrust laws to allow news publishers – including non-network broadcasters – to negotiate jointly with online platforms. Specifically, the bill would have:

- Allowed news publishers with more than $100,000 in revenue, fewer than 1,500 full-time employees, and 25 percent or more of their editorial content consisting of information on topics of public interest and non-network broadcasters to negotiate jointly with online platforms over the terms and conditions under which content could be shared;

[37] Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy (BEIS), "A New Pro-Competition Regime for Digital Markets," GOV.UK (May 6, 2022) (available at https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets) (hereafter "DCMS/BEIS (2022)").

[38] Department for Digital, Culture, Media & Sport, Competition and Markets Authority, The Rt Hon Kwasi Kwarteng MP, and The Rt Hon Oliver Dowden CBE MP, "New Watchdog to Boost Online Competition Launches," GOV.UK (April 7, 2021) (available at https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches--3).

[39] CMA/Ofcom (2021).

[40] See *id.* at 4, 6, 12, 24. In May 2022, the government announced that it would put forward legislation to require mandated final offer arbitration. See DCMS/BEIS (2022).

[41] See CMA/Ofcom (2021) at ¶¶5.29-5.30.

[42] See *id.* at ¶5.32.

[43] See *id.* at ¶7.17.

- Applied to online platforms that have at least 50 million US-based users or subscribers and are owned or controlled by an entity with net annual sales or market capitalization of more than $550 billion or at least 1 billion worldwide monthly active users;

- Allowed news publishers (but not broadcasters) to demand final offer arbitration if their joint negotiation with a covered platform fails to result in an agreement after six months;

- Suspended antitrust laws by allowing publishers jointly to withhold their content from covered platforms.[44]

Critics of these provisions expressed concerns that they would advantage large broadcasters, which are exempt from both the employee cap and the requirement that at least 25 percent of their content be news content which apply to other news publishers.[45] Others noted that the eligibility criterion of a minimum of $100,000 in annual revenue would exclude small outlets, nonprofits and niche local news organizations.[46] An anti-content-moderation amendment to the Act garnered concerns over policing and spreading of misinformation, extremist content, networked disinformation and hateful speech.[47] Ultimately, the JPCA failed to win passage in the 117th Congress and, as of March 2023, has not been reintroduced in the 118th Congress.

The debates over publisher eligibility illustrate both the practical difficulties of designing policies to promote socially constructive journalism and the absence of a clear nexus between that objective and proposed solutions that hinge on an alleged imbalance of bargaining power. Indeed, as explained below, the evidence fails to support the finding that *any* group of publishers, however defined, receives less than fair compensation from online platforms in general, or Meta in particular.

Rather, the evidence demonstrates that some types of publishers, particularly publishers of daily newspapers, have been adversely affected by technological and market changes, that those publishers have been successful in raising concerns among policymakers about the need for economic support, and that those concerns are a primary motivation for the interventions that have

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[44] United States Senator Amy Klobuchar, "Klobuchar, Kennedy, Cicilline, Buck, Durbin, Nadler Release Updated Bipartisan Journalism Bill" (August 22, 2022) (available at https://www.klobuchar.senate.gov/public/index.cfm/2022/8/klobuchar-kennedy-cicilline-buck-durbin-nadler-release-updated-bipartisan-journalism-bill); 117th Congress, 2nd Session, Bill S. 673: To Provide a Temporary Safe Harbor for Publishers of Online Content to Collectively Negotiate with Dominant Online Platforms Regarding the Terms on Which Content May Be Distributed (March 10, 2021, amended November 28, 2022) at 10 (available at https://www.congress.gov/117/bills/s673/BILLS-117s673rs.pdf).

[45] Lisa Macpherson, "Strange Bedfellows: Why Advocates from Across the Spectrum Still Oppose the JCPA," *Public Knowledge* (November 7, 2022) (available at https://publicknowledge.org/strange-bedfellows-why-advocates-still-oppose-the-jcpa/).

[46] Jeremy Littau, "Congress' Best Idea to Save Local Journalism Would Actually Hurt It," *Slate* (December 9, 2022) (available at https://slate.com/technology/2022/12/jcpa-journalism-competition-preservation-act.html).

[47] Shiva Stella, *Public Knowledge Warns Congress Against Adopting Controversial Journalism Competition and Preservation Act*, Public Knowledge (September 22, 2022) (available at https://publicknowledge.org/public-knowledge-warns-congress-against-adopting-controversial-journalism-competition-and-preservation-act/); Benjamin F. Chavis, "Proposed Journalism Competition Preservation Act Negative Impact on Small Minority-Owned Newspapers," *The Madison Times* (December 10, 2022) (available at https://themadisontimes.themadent.com/article/proposed-journalism-competition-preservation-act-negative-impact-on-small-minority-owned-newspapers/).

been undertaken and are under consideration. As the next section explains, however, the economic challenges facing the traditional news business predate the growth of the Internet and their causes go well beyond the online platforms that are the targets of the publishers' efforts to extract additional payments.

B. Economic Challenges Facing the News Business

While a complete analysis of the economic challenges facing news publishers is beyond the scope of this paper, it is important to recognize that those challenges are not primarily, or even materially, related to the rise of platforms like Facebook. Rather, they grow out of the fundamental economic characteristics and business models of the publishing business and the decades-long "information revolution" that has reduced the costs of both gathering and disseminating knowledge.[48] The first subsection below explains some relevant economic characteristics of the publishing business model. The second subsection details how publishers, and newspapers in particular, have been affected by and, in many cases, failed to effectively adapt to technological and market changes.

1. Economic Characteristics of the Publishing Business

Like many media and information technology industries, the news business is characterized by (1) economies of scale and scope; (2) multi-sidedness; and, (3) dynamic competition. Furthermore, the global reach of information facilitated by the Internet has redefined the "geographic" market for any single news publisher. Each of these characteristics has played a role in the ways market and technological changes have affected the news industry. The presence of strong economies of scale, for example, has made it difficult for smaller publishers to withstand declines in circulation; the need to attract revenues from both sides of the market (circulation and advertising) has placed newspapers at a disadvantage relative to other media; and, dynamic competition has led to rapid entry by new types of publishers. Newspapers that in the pre-Internet age did not compete with each other for the same subscriber (and advertiser) base due to geographic boundaries, faced new competition from news publishers which established an online presence as well as from new apps which targeted specific segments of readers of news (jobs, real estate, classified, personals/dating, obituary, entertainment, sports, weather, etc.). These changes occurred before the rise of Facebook.

<u>Economies of Scale and Scope</u>: The production and distribution of media content are characterized by economies of scale and scope. Like certain other forms of intellectual property, the production of media content is governed by what is frequently referred to as the "first copy property" – that is, the first copy of an article or publication is expensive to produce, but subsequent copies cost relatively little to produce and distribute, especially when distribution occurs digitally. In economic terms, the fixed cost of production is high, but the marginal cost (the cost of producing an additional unit) is low, approaching zero.

[48] The concept of an "information revolution" transforming the media sector predates the Internet by many years. See e.g., Alvin Toffler, *The Third Wave* (New York: William Morrow and Company, Inc., 1980) at Chapter 13 ("De-Massifying the Media"). For a useful discussion of the economics of the information revolution, see Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (Boston: Harvard Business School Press, 1999).

In a "traditional" market where production is characterized by constant or increasing marginal cost over the relevant range of output, economic efficiency – that is, the maximization of economic welfare – is achieved by setting price equal to marginal cost. However, in industries in which marginal cost is below average cost, marginal cost pricing is not feasible because the firm would lose money (and ultimately go out of business). The fundamental economic challenge facing such industries is to find a way to cover their fixed costs, i.e., to charge at least some customers prices that exceed marginal costs. Thus, firms in such markets engage often in a variety of pricing strategies, including "two-part pricing," "differential pricing," and "bundling." News publishers have engaged in all of these practices, but as discussed below their ability to do so has in some ways been hampered by technological and market changes. In particular, the traditional newspaper business model of bundling different types of content (e.g., news, sports, classified ads) has been challenged by the rise of specialized online platforms, many of them offering content for free.

<u>Multi-Sidedness</u>: News publishing is a paradigmatic example of a multi-sided market – a market in which value is created by matching demand from different types of customer groups. In the case of publishers, the two main customer groups are readers/subscribers on the one hand, and advertisers, on the other. In such markets, suppliers set prices to optimize the "mix" of customers, and hence, the overall value of the platform to both groups. For example, if advertisers place a high value on readers (often referred to as "eyeballs"), they will pay relatively high prices, allowing the publisher to charge relatively low subscription prices, and hence, maximize the number of readers. If the value advertisers attach to readers declines (for example, because of increased competition in the market for advertising), the mix of prices must shift, reflecting the reduced willingness of advertisers to pay for audiences.

<u>Dynamism</u>: Dynamic markets are characterized by rapid change, including changes in the products delivered and in markets and market structures. Competition in such markets often takes the form of new entry and the development of new products and business models. Dynamic competition refers to the process by which firms seek to adapt to market and technological changes, e.g., by developing new products and business models. In such markets, firms differentiate their products through innovation and, when successful, gain the ability to set prices above marginal costs – and thus earn a return on their investments in innovation. Dynamism has affected the news business in multiple ways, but perhaps most fundamentally through the rapid entry of new types of services (e.g., online advertising) that have challenged traditional business models.

2. The Effects of Market and Technological Changes

Market and technological changes over the last century have had profound effects on the news business, and especially on newspapers. On the upstream (advertising) side of the industry, newspapers have faced increased competition from broadcast media (radio and then television), other traditional news publishers and, more recently, from online advertising. On the downstream side, print circulation has declined significantly as a result of competition from these same sources and from the rapid growth of online content. As the CMA-Ofcom Report sums it up, "[p]rint media has been in structural decline since the early 2000s, fuelled by new advertising models, changes to consumer behaviour and the move to online news consumption."[49]

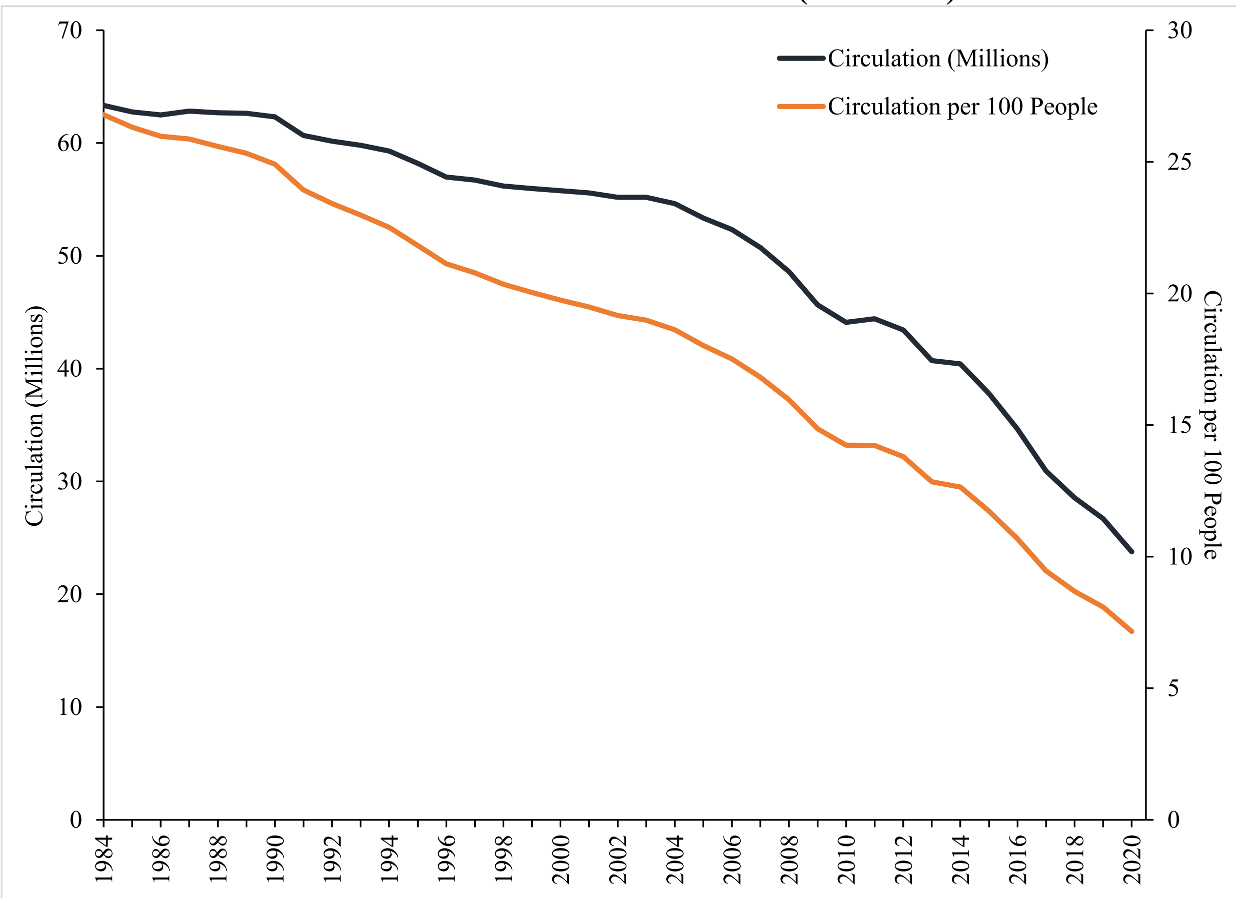
[49] CMA/Ofcom (2021) at ¶1.15.

While the rise of large online platforms like Google and Facebook is one part of the changing technological landscape that has challenged the newspapers' traditional business models, they have not in any material way "caused" those challenges. Indeed, the secular decline in newspaper circulation in the US began long before the Internet was invented, and the economic challenges newspapers have faced in the Internet era are far too diverse and multifaceted to be attributed to a handful of competitors.[50]

Figure 1 shows US daily newspaper circulation from 1984 through 2020.

[50] While the data below focuses on the US, similar changes have occurred – with some variations in terms of timing and specific impacts – in virtually all advanced economies. For a comprehensive discussion of challenges to the journalism business over the past several centuries, see Richard R. John and Jonathan Silberstein-Loeb eds., *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (Oxford: Oxford University Press, 2015). As the editors explain, "The decline of the print-and-paper newspaper predated the Internet. In both Britain and America, per capita newspaper circulation had been declining for decades, partly due to shifting social norms and partly due to the rise of broadcast news. The internet accelerated this downward trend, not only because it provided audiences with a cheaper news source, but also because it has emerged as a superior vehicle for classified advertisements." (*Id.* at 5.) In this context it is useful to recall that Facebook did not overtake MySpace as the leading social network in the US until 2009. See The Associated Press, "Timeline: Key Dates in Facebook's 10-Year History" (February 4, 2014) (available at https://apnews.com/article/ac9ec5689b5b43509b925756e8549a43).

FIGURE 1:
US DAILY NEWSPAPER CIRCULATION (1984-2020)



Sources: S&P Global Market Intelligence, 10-Year US Newspaper Projections (December 2020) (available at https://www.capitaliq.spglobal.com/apisv3/docviewer/documents?mid=151608944) (hereafter "S&P Global US Newspaper Data"); US Bureau of Economic Analysis, "National Data: National Income and Product Accounts, Table 2.1 Personal Income and Its Disposition" (available at https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDMsM10sImRhdGEiOltbIkNhdGVnb3JpZXMiLCJTdXJ2ZXkiXSxbIk5JUEFfVGFibGVfTGlzdCIsIjU4Il0sWyJGaXJzdF9ZZWFyIiwiMTkyOSJdLFsiTGFzdF9ZZWFyIiwiMjAyMiJdLFsiU2NhbGUiLCItNiJdLFsiU2VyaWVzIiwiQSJdLFsiU2VsZWN0X2FsbF95ZWFycyIsIjEiXV19).

As the figure shows, the secular decline in daily newspaper circulation began long before the creation of the Internet in the mid-1990s, though the decline did accelerate: circulation per 100 people declined at an average compound annual rate of 1.8 percent between 1984 and 1995 compared with 4.4 percent in the 1995-2020 period.[51] As Matthew Gentzkow explained in a 2014 article published in the *American Economic Review:*

[51] Circulation revenues followed a similar pattern. After peaking in 1987, inflation-adjusted circulation revenues declined at annual rate of 1.8 percent from 1987 through 1995, accelerating to 3.0 percent in the 1995-2020 period. See S&P Global US Newspaper Data; US Bureau of Labor Statistics, "CPI for All Urban Consumers (CPI-U): All Items in U.S. City Average, All Urban Consumers, Not Seasonally Adjusted (Series ID: CUUR0000SA0)" (available at https://www.bls.gov/cpi/data.htm) (hereafter "US CPI-U").

> Contrary to most popular accounts, the growth of the Internet has not obviously caused a large decline in newspaper readership. Readership has fallen steadily since the Internet was introduced in the mid-1990s, but it had been falling at almost the same rate since 1980, and the small acceleration of this trend accounts for a drop in readership of only about 10 percent.[52]

Of course, the Internet has played a significant role in the commercial challenges facing newspapers, but the nature of that role is complex. On the one hand, the Internet has reduced the costs of both creating and publishing news, thereby lowering barriers to entry and leading to an explosion of online information sources that compete with newspapers for readers' attention.[53] On the other hand, it has led to increased competition in the market for advertising not only between newspapers and online news providers but also between newspapers themselves, which are now able to reach a global audience.

One primary cause of the commercial challenges newspapers have faced is the virtual disappearance of classified advertising revenues:

> The recent downturn in newspapers' fortunes has thus been almost entirely driven by the declining price of attention in print. A key component is the large drop in classified advertising revenue, which seems clearly related to competition from Craigslist and other online competitors….[54]

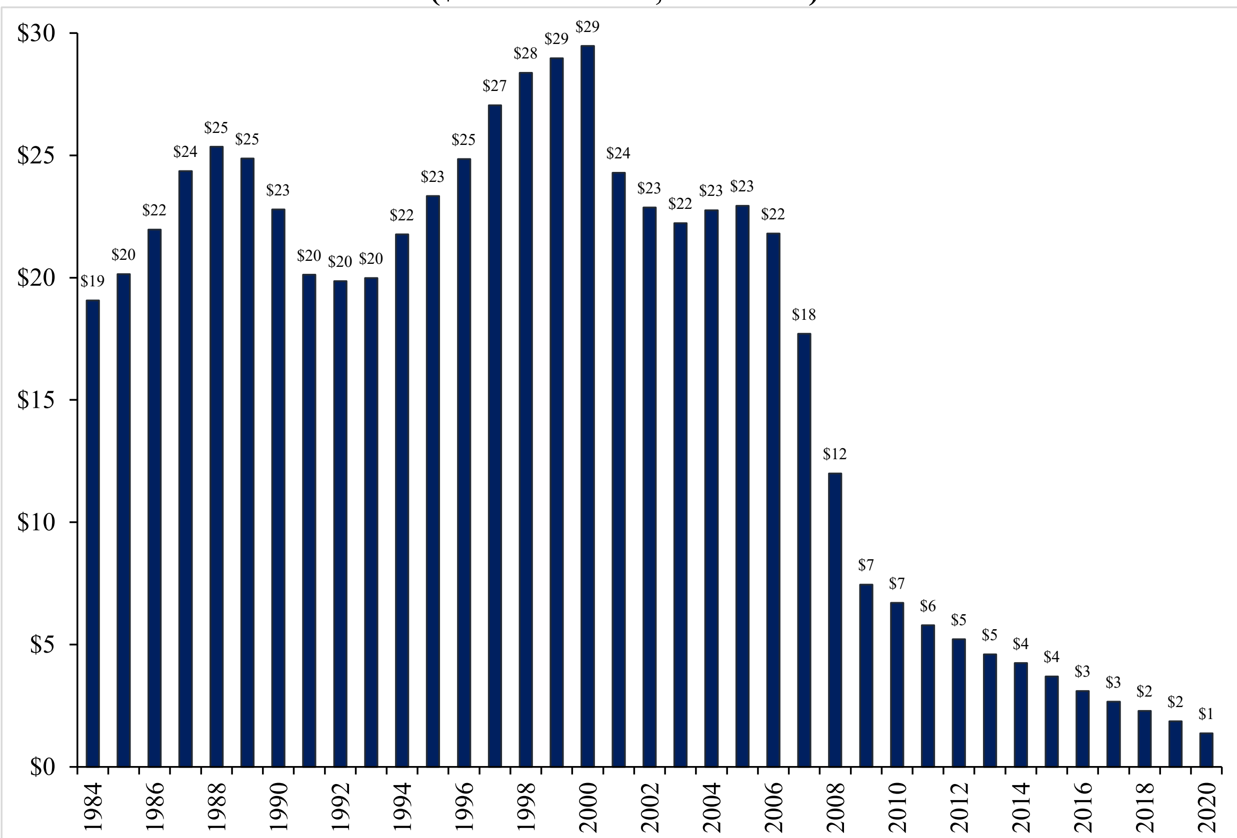
Figure 2 shows US daily newspaper classified advertising revenue from 1984 through 2020.

[52] Matthew Gentzkow, "Trading Dollars for Dollars: The Price of Attention Online and Offline," *American Economic Review: Papers & Proceedings* 104;5 (2014) 481-488 at 482 (hereafter "Gentzkow (2014)").

[53] Cairncross Review at 139.

[54] Gentzkow (2014) at 482.

FIGURE 2:
US DAILY NEWSPAPER CLASSIFIED ADVERTISING REVENUE
($2020 BILLIONS; 1984-2020)



Sources: S&P Global US Newspaper Data; US CPI-U.

The data in Figure 2 illustrate the impact of the Internet on classified ad revenue, which peaked in real terms (2020 dollars) at $29.5 billion in 2000 – the same year Craigslist, which allows users to post classified ads online free of charge, expanded to cover the entire US. As the figure shows, US daily newspaper classified ad revenue declined to just $1.4 billion by 2020.

The rise of online advertising has also affected the advertising market in general because online advertising is both more plentiful and, because of its ability to target ads more accurately to consumers' interests, can be more efficient than offline advertising. In real terms (2020 dollars), the total advertising revenue of US daily newspapers peaked in 2000 at $73.2 billion in 2000 and has declined to just $9.3 billion in 2020.[55]

Newspapers have responded to these challenges in several ways, including making their content available online and monetizing their online editions through a mix of advertising and subscription revenues. As one recent analyst report explains:

[55] S&P Global US Newspaper Data; US CPI-U.

> Most newspapers publish online, but their business models vary. Some require paid access; some allow access only to hardcopy subscribers; others offer the current issue free, but charge for access to archives. Digital native news publishers (those that originated online, without "legacy" print publications) are also growing in number. Multimedia content, including slideshows and videos, has become popular, along with mobile apps, blogs, and podcasts. In the US, roughly nine in ten adults get at least some news online, according to Pew Research. [56]

The same report notes that digital advertising now makes up more than one third of newspaper advertising revenues, up from 17 percent in 2011.[57] At many newspapers, digital subscriptions now account for the bulk of subscription revenues. For example, The New York Times Company recently reported that 10.3 million of its nearly 11.0 million subscriptions are digital-only, representing over 93 percent of its subscription base and over 63 percent of subscription revenues.[58] Digital-only subscriptions to the company's news products grew from 1.1 million in 2015 to 5.9 million in 2021, rising as a share of overall subscription revenues from 23 percent in 2015 to 51 percent in 2021.[59]

While the move to digital has created significant value for businesses and consumers, newspapers have faced competition in the digital space from traditional as well as non-traditional news sources. According to the Pew Research Center, one third of US adults prefer to get news content through television, compared to one quarter who say they prefer a news web site, and one in ten who prefer a social media web site.[60] Most notably, television and radio broadcasters have also moved aggressively to develop their online presences, and in most developed countries have built larger online audiences than traditional publishers. For example, the Reuters Institute reports that newspapers account for only two of the top ten US online news brands as measured by online audience reach (*The New York Times* and *The Washington Post*) compared with six broadcast brands (CNN, Fox, NBC and CBS plus local TV and local radio).[61] In the UK, there are seven newspapers in the top ten – but none comes close to the reach of BBC News, which at 43 percent has more than twice as many viewers as the largest newspaper (*The Guardian* at 18 percent).[62] In

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[56] First Research, *Newspaper Publishers* (August 29, 2022) at 3.

[57] *Ibid.*

[58] The New York Times Company, *Form 10-K for the Fiscal Year Ended December 31, 2022* (February 28, 2023) at 34-35 (available at https://www.sec.gov/Archives/edgar/data/71691/000007169123000006/nyt-20221231.htm).

[59] The New York Times Company, *Form 10-K for the Fiscal Year Ended December 31, 2017* (February 27, 2018) at 29-30 (available at https://www.sec.gov/Archives/edgar/data/71691/000007169118000004/a201710-k_q4project.htm#s408937C7EE40540DAD9538367FCA78E3); The New York Times Company, *Form 10-K for the Fiscal Year Ended December 26, 2021* (February 23, 2022) at 34-35 (available at https://www.sec.gov/Archives/edgar/data/71691/000007169122000006/nyt-20211226.htm). Subscriptions and subscription revenue specific to the company's news products were reported on its 2021 10-K but not in its 2022 10-K.

[60] See Elisa Shearer, "More Than Eight-in-Ten Americans Get News from Digital Devices," Pew Research Center (January 12, 2021) (available at https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/).

[61] The other two are Yahoo! News and BuzzFeed News. See Nic Newman et al, *Reuters Institute Digital News Report 2022*, Reuters Institute for the Study of Journalism, University of Oxford (2022) at 113 (available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-06/Digital_News-Report_2022.pdf) (hereafter "Reuters Institute Digital News Report 2022").

[62] *Id.* at 63.

the case of the UK, nearly three-quarters (£3.80 billion) of the BBC's 2022 £5.33 billion operating income was subsidized by license fee revenues, according to the House of Commons.[63] Newspapers face similar levels of competition from broadcasters in Australia, where three of the top four online news brands are broadcasters, led by the Australian Broadcasting Company (ABC) with 26 percent reach; and, in Canada where the only newspaper brand in the top ten is *The Globe and Mail*, which places seventh with a 12 percent reach (compared with the Canadian Broadcasting Company (CBC) at 23 percent and CTV News at 22 percent).[64]

In summary, while the Internet has created challenges for newspapers, it is now central to their going forward business strategies. As a recent report from J.P. Morgan's media industry analysts concluded, "the best path forward for news publishers is to grow their digital subscriptions to further the transition from print to digital, and not necessarily rely on payments from digital platforms to fund their success."[65]

III. Sharing of News Content on Facebook

News content appears on Facebook in four ways. First, publishers may – and thousands do – voluntarily choose to post content on their own Facebook Pages. This content may be accessed directly (from the publishers' Pages) or incorporated in users' social Feeds.[66] Second, publishers may also – and many do – pay to advertise their content on Facebook. Third, users sometimes include links to online news content on their Facebook profiles, which are then available for other Facebook users to see and may be shared with other users in their Facebook Feeds. Fourth, in the US, the UK, Germany, Australia and France, Facebook provides a "Facebook News" surface that presents a distinct feed of news article links either posted directly by publishers to Facebook or otherwise licensed by publishers to Meta. This surface gives users more access to links to online news content than available in Facebook Feed. The subsections below describe the commercial and practical terms under which this content is shared.

[63] See UK Parliament House of Commons Library, "Research Briefing: TV Licence Fee Statistics" (March 9, 2023) (available at https://commonslibrary.parliament.uk/research-briefings/cbp-8101) (last accessed March 13, 2023).

[64] Reuters Institute Digital News Report 2022 at 119.

[65] Alexia S. Quadrani et al, *Licensing Fees for Digital News Publishers: Unlikely to Be a Retrans Opportunity*, J.P. Morgan (March 19, 2021) at 2 (hereafter "J.P. Morgan Media Equity Research Report"). Exposure on digital platforms is a key part of this strategy. As the CMA concluded in its 2020 Digital Platforms Market Study, "Platforms such as Google and Facebook have made it substantially easier for businesses to reach and serve adverts to consumers all around the world, in a way that was only previously possible for large companies. This has opened up greater advertising possibilities for a long tail of small businesses, and enabled large numbers of predominantly online businesses to thrive that may otherwise not have been viable." See CMA 2020 Market Study at ¶2.9.

[66] Historically, publishers have also posted content using Facebook Instant Articles, which allows online content to be loaded more quickly on mobile devices since it does not require opening a new web page. Advertising revenues from ads shown in Instant Articles have been shared between the publisher and Meta. In October 2022, Meta announced that the Instant Articles service will no longer be available effective in mid-April 2023. See Meta, "Meta for Media: Instant Articles" (available at https://www.facebook.com/formedia/tools/instant-articles) (last accessed March 22, 2023). See also Jay Peters, "Meta's Instant Articles for Facebook Will Be Going Away," *The Verge* (October 14, 2022) (available at https://www.theverge.com/2022/10/14/23404626/meta-facebook-instant-articles-end-support) (hereafter "Peters (2022)").

A. News Content on Publishers' Facebook Pages

The primary mechanism by which content from news publishers appears on Facebook is through the voluntary actions of the publishers themselves: The vast majority of publishers choose to host Facebook Pages where they post short-form versions of their content with links to their web pages.[67] Clicking on a link in a publisher's post – whether directly from the publisher's Facebook Page or from a Facebook user's Facebook Feed – takes the user to the publisher's web page, where she may view the full content (typically some combination of text, pictures or video) or, for publishers that have implemented paywalls, a solicitation to subscribe.[68]

Publishers have full control over the content they post on their Facebook Pages. As Meta has explained:

> Publishers may actively choose to upload and post links to their content to their Facebook Page in order to build an audience, engage a community, monetize the content directly on Facebook via customized monetization tools, or to drive traffic back to their owned and operated sites where they can monetize using their own ads and/or convert the reader to a paying subscriber. This opportunity exists for all businesses that wish to publish their content on Facebook, subject to complying with the Facebook Terms of Service.[69]

Thus, publishers who choose to create a Facebook Page do so at no charge from Facebook, have complete control over what content to make public, and can remove previously posted content at any time.[70] Typically, publishers post previews of text/articles with links back to their web site. Since Facebook does not charge publishers for referral traffic, they can redirect users to their web site and serve their own ad experience to users, and thereby monetize the traffic.[71]

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[67] One example of a publisher that chose not to post on Facebook is New Zealand's *Stuff*. See Shannon Bond, "This News Publisher Quit Facebook. Readership Went Up," *NPR* (April 2, 2021) (available at https://www.npr.org/2021/04/02/983211972/this-news-publisher-quit-facebook-readership-went-up).

[68] As discussed above, publishers have embraced a variety of business models. For example, some publishers allow readers to access a certain number of articles per month in return for registering, but require a subscription once the limit is reached.

[69] Meta Platforms, Inc., *In re: Study on Ancillary Copyright Protections for Publishers*, *Comments of Meta Platforms, Inc.*, Docket No. COLC-2021-0006 86 FR 56721 (November 26, 2021) at 4 (available at https://downloads.regulations.gov/COLC-2021-0006-0027/attachment_1.pdf). See also Facebook, "Terms of Service" (available at https://www.facebook.com/legal/terms) (last accessed February 16, 2023); Facebook, "Meta Commercial Terms" (available at https://www.facebook.com/legal/commercial_terms) (last accessed February 16, 2023); Meta for Developers, "Meta Audience Network Policy" (available at https://developers.facebook.com/docs/audience-network/optimization/best-practices/an-policy) (last accessed February 16, 2023); Facebook, "Meta Audience Network Terms" (available at https://m.facebook.com/ads/manage/audience_network/publisher_tos) (last accessed February 16, 2023).

[70] Meta, "Facebook Page" (available at https://www.facebook.com/business/tools/facebook-pages) (last accessed January 12, 2023).

[71] Meta, "Meta Journalism Project: How Facebook Feed Works for Publishers" (June 15, 2021) (available at https://www.facebook.com/journalismproject/learn/news-feed-for-publishers) (last accessed January 12, 2023); Meta, "Publishing" (available at https://www.facebook.com/business/help/752342858243518) (last accessed January 12, 2023).

Many publishers use sophisticated tools to maximize the volume of traffic driven to their web pages from Facebook, for example, utilizing artificial intelligence to decide what types and formats of content will generate the most click-throughs[72] and employing third-party advisors and consultants to assist in optimizing their social media marketing efforts.[73] Facebook also provides an array of free analytical tools designed to help publishers maximize the value from Facebook users' engagement with their content.[74]

B. News Publisher Advertising

A second way in which links to news content appear on Facebook is in the form of promoted content, i.e., advertising, paid for by news publishers.[75] While neither Facebook nor other online platforms publish financial data on advertising revenues by sector or from particular publishers,[76] the media sector in general is a large consumer of online advertising. For example, as shown in Figure 3, in 2022 the media industry was the ninth largest category of online advertiser in the US, spending $10.8 billion – more than twice the spend of the next largest industry, travel, at $4.1 billion.

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[72] See e.g., Meta, "Meta Journalism Project: The Globe and Mail's AI Platform Works with Facebook to Help News Publishers" (March 29, 2021) (available at https://www.facebook.com/journalismproject/the-globe-and-mail-sophi).

[73] See e.g., Echobox, "Echobox Factsheet: Echobox Social" (available at https://www.echobox.com/resources/factsheets/echobox-social/).

[74] Meta, "New Tools and Insights for Publishers" (available at https://www.facebook.com/formedia/blog/new-tools-and-insights-for-publishers) (last accessed at January 12, 2023).

[75] For information about Meta's paid media offerings for publishers, see Meta, "Meta for Media: News Subscriber Acquisition & Retention" (available at https://www.facebook.com/formedia/tools/subscriber-acquisition-and-retention) (last accessed March 10, 2023).

[76] Beginning in 2018, Meta has published comprehensive data on ads on all Meta properties (including Instagram, for example, as well as Facebook) about social issues, elections or politics. The data includes the name of the advertiser, the amount spent, and the number of different ads. See Meta, "Meta Ad Library Report" (available at https://www.facebook.com/ads/library/report/).

FIGURE 3:
US SPENDING ON DIGITAL ADVERTISING, BY INDUSTRY ($BILLIONS; 2022)

Source: Insider Intelligence, "US Digital Ad Spending, by Industry, 2019-2023" (June 2021) (available at https://www.insiderintelligence.com/content/cpg-sector-spends-over-30-billion-on-digital-advertising-70-devoted-mobile).

While financial data on publisher advertising on Facebook is not available, the nature and extent of their Facebook advertising can be understood by examining information made available by Facebook as part of its Ad Transparency program. Specifically for each Facebook Page, Facebook provides information on the ads being run on Facebook, Instagram and Messenger by that Page's owner.[77] As of February 2023, that data shows that the vast majority of major news publishers are active advertisers on Meta's platforms. For example, seven of the top ten newspapers (by circulation) in the UK were running ads that included links to online content. The same was true for eight of the top ten in Canada, eight of the top ten in France and all ten of the top ten in the US.[78]

[77] For a general description, see Kerry Flynn, "Goodbye Dark Posts: How Facebook's and Twitter's Ad-Transparency Tools Work," *Digiday* (June 29, 2018) (available at https://digiday.com/marketing/goodbye-dark-posts-facebooks-twitters-ad-transparency-tools-work/); Max Willens, "Here's How Many Facebook Ads Some Publishers Are Running on Their Main Pages," *Digiday* (July 2, 2018) (available at https://digiday.com/media/heres-many-facebook-ads-publishers-running-main-pages/).

[78] As part of its Ad Transparency program, Facebook records the history of paid ads run on the platform in an "Ad Library." A publisher's Ad Library can be accessed from its "Page transparency link" or from the "About" tab of its Facebook Page. See e.g., Meta, "Ad Library: The Times and The Sunday Times" (available at https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=ALL&view_all_page_id=147384458624178&search_type=page&media_type=all). A news publisher was determined to be running ads that included links to online content if there were ads in its Ad Library that included links to the publisher's sites or content. The

C. News Content Posted by Facebook Users

A third way in which news content appears on Facebook is through sharing by Facebook users.[79] Users can upload and share links by simply copying and pasting a web address from a browser or by clicking on a Facebook "like" or "share" button which many publishers choose to place on their web pages. As discussed below, sharing by Facebook users constitutes only a small proportion of all links to news content that appear on Facebook.

D. Facebook News

Beginning in 2019 Meta has engaged in a limited number of product-specific commercial partnerships with news publishers in Australia, France, Germany, the US and the UK to launch Facebook News, which incorporates "net new content" (that is, links and snippets in addition to what publishers were already posting on their Facebook Pages). This content does not appear in users' Facebook Feeds, but instead is made available in a "Facebook News" surface available on Facebook users' menus. As Meta has explained:

> Meta was initially interested in developing a news tab for the subset of Facebook users interested in news…. Facebook News was created for a more personalized news experience so people can explore a wider range of their favorite sources and news interests. It is comprised of publisher-posted links (not user-posted links) and links provided through … commercial partnership agreements. In some cases, as part of agreements related to "Facebook News", publishers may agree to provide paywall access to some Facebook users. In these cases Facebook agrees to bespoke licensing agreements in order to ensure a better user experience in the Facebook News product.[80]

In July 2022, Meta announced that it would not renew its agreements for Facebook News in the US.[81]

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lists of top ten newspapers in each country were sourced from the following: Agility PR Solutions, "Top 10 U.K. Newspapers by Circulation" (July 2022) (available at https://www.agilitypr.com/resources/top-media-outlets/top-10-uk-newspapers-by-circulation/); Agility PR Solutions, "Top 10 English Canadian Newspapers by Circulation" (July 2022) (available at https://www.agilitypr.com/resources/top-media-outlets/top-10-canadian-print-outlets/); L'Alliance Pour Les Chiffres de la Presse et des Medias, "Classement Diffusion Presse Quotidenne Nationale 2022" (available at https://www.acpm.fr/Les-chiffres/Diffusion-Presse/Presse-Payante/Presse-Quotidienne-Nationale); Agility PR Solutions, "Top 10 U.S. Newspapers by Circulation" (July 2022) (available at https://www.agilitypr.com/resources/top-media-outlets/top-10-daily-american-newspapers/).

[79] See e.g., Meta Platforms, Inc., *In re: Study on Ancillary Copyright Protections for Publishers*, *Comments of Meta Platforms, Inc.*, Docket No. COLC-2021-0006 86 FR 56721 (November 26, 2021) at 4-5 (available at https://downloads.regulations.gov/COLC-2021-0006-0027/attachment_1.pdf).

[80] *Id.* at 8-10.

[81] See e.g., Alexandra Bruell, "Facebook to End Payments to U.S. News Publishers," *Wall Street Journal* (July 28, 2022) (available at https://www.wsj.com/articles/facebook-to-end-payments-to-u-s-news-publishers-11659019262) (hereafter "Bruell (2022)").

IV. Assessing the Value of the Bargain

As explained above, the case for intervention to enhance the bargaining power of publishers relative to platforms in relation to the sharing of journalistic content is that platforms possess disproportionate bargaining power that allows them to extract an unreasonable share of the value created by such sharing. This section assesses that claim, presenting evidence on the value generated by the economic relationships between Meta and news publishers and the way that new value created is divided between them under the current, market-based system of voluntary exchange. The first subsection presents the framework of analysis used here and explains why that approach – the "fair market value" or WBWS framework – is appropriate in this case. The second subsection presents evidence on the value of news content to Meta and, conversely, the value of the Facebook platform to news publishers. The third subsection discusses evidence relating to bargaining power, and explains why that evidence does not support publishers' contentions that Meta possesses disproportionate bargaining leverage.

A. Framework for Analysis

In their November 2021 report, CMA and Ofcom provide a clear and broadly correct explanation of the value created through collaboration between online platforms and UK news publishers.

> When platforms and content providers collaborate, value is created for both the platform and the content provider through their relationship. The use of content by platforms increases consumer and advertiser demand for their services. It also drives demand for the content providers' own services where customers click through to the providers' websites. In both cases valuable data and advertising revenue are generated. There will also be incremental costs incurred by the platform and news publisher associated with the use of content, such as the cost of adapting the service, and the content itself, so that it is in a form that is suitable for use within the platforms' services. The joint value that is created is the sum of the incremental benefits of both parties generated by the use of content, less the sum of any incremental costs incurred.[82]

Economic theory identifies three factors that determine how the value created through such collaborations is divided: (1) the buyer's maximum willingness-to-pay (WTP); (2) the seller's minimum willingness-to-accept (WTA); and (3) the relative bargaining strength of the parties. The difference between the seller's minimum WTA and the buyer's maximum WTP determines the range of possible outcomes from voluntary transactions and defines the total economic value (or "surplus") created. The relative bargaining strength of the parties, which is determined by factors like risk aversion and business acumen, determines how the surplus is divided.[83]

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[82] CMA/Ofcom (2021) at ¶5.7.

[83] See e.g., John F. Nash, "The Bargaining Problem," *Econometrica* 18;2 (April 1950) 155-162; Ariel Rubinstein, "Perfect Equilibrium in a Bargaining Model," *Econometrica* 50;2 (1982) 97-109; Ken Binmore, Ariel Rubinstein and Asher Wolinsky, "The Nash Bargaining Solution in Economic Modeling," *The RAND Journal of Economics* 17;2 (1986) 176-188 (hereafter "Binmore et al (1986)").

1. Approaches to Establishing Fair Market Value

While there are multiple approaches to assessing whether the division of value is fair (that is, whether it represents "fair market value"), a preferred approach is the so-called "market approach," which relies on the use of voluntary marketplace transactions between "willing buyers and willing sellers."[84] As an authoritative text by professors Robert Holhausen and Mark Zmijewski explains, fair market value is appropriately understood as:

> [T]he cash equivalent value at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell...when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information.[85]

This WBWS standard is widely accepted as an appropriate and preferred method for valuing intellectual property rights. For example, the WBWS standard is the explicit statutory standard for reasonable rate determinations for music copyrights by the US Copyright Royalty Board;[86] it is embraced by the Australian Copyright Tribunal, which considers a copyright royalty rate "reasonable" if it reflects "the rate which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee;"[87] and, the UK Copyright Tribunal has repeatedly found that "the correct royalty rate is generally the rate that would have been freely negotiated between a willing licensor and a willing licensee at arm's length."[88]

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[84] Other methods include estimating discounted future cash flows (DCF), applying game theoretic models to model "hypothetical bargains," and assessing the opportunity costs of the licensor. See e.g., Australian Competition and Consumer Commission, *ACCC Guidelines to Assist the Copyright Tribunal in the Determination of Copyright Remuneration* (April 2019) (available at https://www.accc.gov.au/system/files/ACCC%20Copyright%20Guidelines.pdf); CMA/Ofcom (2021) at Appendix D.

[85] Robert W. Holthausen and Mark E. Zmijewski, *Corporate Valuation: Theory, Evidence and Practice*, 1st Ed. (Cambridge Business Publishers, 2014) at 4. As the authors further note: "This definition suggests some important characteristics about the valuation context – 'arms length,' time-frame constraints, information set, and specific use. For example, a willing and unrelated buyer and seller suggests that the transaction is 'arms length'; that is, it does not include 'side payments' or other remuneration beyond the transaction price…. Neither party being compelled suggests a time-frame context – that is, the time frame for the parties to identify and negotiate with each other is such that, whatever it happens to be, it does not affect the price at which a transaction would take place. In addition, this suggests this is not a forced transaction such as might be compelled by a court or government agency. The definition also indicates the importance of the availability of information – that is, the value is based on an information set that is assumed to contain all relevant and available information. Lastly, part of the relevant information is the specific use of the assets being purchased." (*Id.* at 5.)

[86] See e.g., 17 U.S.C. § 115(c)(1)(F).

[87] *Re Phonographic Performance Company of Australia Ltd under s 154(1) of the Copyright Act 1968 (Cth)* [2016] ACopyT 3; (2016) 125 IPR 1.

[88] *ITV Network Ltd vs. Performing Right Society Limited Mechanical-Copyright Protection Society Limited* (CT 127/14) June 27, 2016 ("We were referred to a number of decisions of the Tribunal concerning licenses other than TV broadcasting. We think it is sufficient to note only one principle which emerges from these and indeed goes no further than emphasizing a point made in the TV broadcasting decisions: the correct royalty rate is generally the rate that would have been freely negotiated between a willing licensor and a willing licensee at arm's length. An existing tariff freely negotiated between the parties to a reference is likely to provide a particularly helpful starting point (and possibly a finishing point if, as ITV argued in the present case, there have been no relevant changes in the interim).

The main reason the market approach is preferred over other valuation methodologies (such as those based on the cost of production) is that it is grounded in actual transactions between market participants, and thus reflects the value attached to the bargain by actual buyers and sellers in real market conditions. Furthermore, because WBWS agreements are, by definition, voluntary agreements between willing parties, the market approach reflects a valuation under which *both* parties, the buyer and the seller, are better off as a result of the bargain – that is, a valuation that attributes to each party a share of the total value of the bargain that reasonably reflects its actual contribution.[89]

2. Comparable Bargains and the Role of Bargaining Power

In applying the market approach to valuation it is important to take into account and, if necessary, make adjustments to reflect two sets of factors. First, it is important to assess the extent to which bargains (or "benchmarks") being used to value a particular good are comparable to the target good (that is, the good for which one is seeking to establish a value). In general, a "comparable bargain" is one in which the good itself, the parties, the jurisdiction and the uses to which the good is being put are similar to the good being valued; and, to the extent there are differences, it is possible to reasonably assess the impact of those differences on valuation. For example, in the case of music copyright valuation, the value of recording rights (which belong to artists and record labels) are sometimes used as benchmarks to value musical works rights (which belong to songwriters), though adjustments are made to reflect differences in the nature of the rights and the parties involved.[90]

The second set of factors involves potential imbalances in the bargaining power of the parties.[91] Factors that can affect the distribution of bargaining power include information asymmetries, "business acumen," risk preferences and the ability to withstand the costs of a bargaining impasse.[92] In particular, if one of the parties is in a position where it cannot survive without entering into an agreement, even if it is not beneficial in the long run to do so, it is said to be

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By way of example, in British Phonographic Industry Ltd.v Mechanical Protection Society Ltd [2008] E.M.L.R. 5 the Tribunal said this:

> The willing buyer/willing seller test. This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensor and a willing licensee of the copyright repertoire. Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter - and even better, if it was freely negotiated (rather than being as it were, 'imposed' by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below 'Comparators')."")

[89] See e.g., World Intellectual Property Organization, *Monetization of Copyright Assets by Creative Enterprises* (August 2013) (available at https://www.wipo.int/edocs/pubdocs/en/copyright/955/wipo_pub_955.pdf).

[90] United States Copyright Royalty Judges, *In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, *Final Determination*, Docket No. 16-CRB-0003-PR (2018-2022) (November 5, 2018) at 70-75 (available at https://app.crb.gov/document/download/3510).

[91] The phrase "bargaining power" is sometimes used to refer to the parties' relative contribution and sometimes to an imbalance of negotiating leverage. Here and throughout this paper, the phrase is used to refer to negotiating leverage resulting from the differences in the parties' ability to withstand a bargaining impasse.

[92] See Binmore et al (1986).

compelled to act, and the agreement is thus not consistent with the WBWS standard. Such situations are sometimes described as "must-have" – that is, one party is said to be in a position where it must have a bargain with the other, and thus cannot negotiate compensation that reasonably reflects their contribution to the value created by the transaction.[93] As discussed at length below, while the publishers argue that at least some digital platforms are "must have" partners for publishers, the evidence does not support that conclusion with respect to Facebook.[94]

B. Assessing the Evidence on Fair Market Value

The question of whether publishers are receiving fair market value from their economic relationships with Meta turns on the value generated by those relationships for each of the parties. The first subsection below presents evidence on the value of news content to Meta, finding that while Meta receives some value from the sharing of news content on Facebook, that value is both limited and falling. The second subsection evaluates the evidence regarding the value received by publishers. It demonstrates that publishers receive meaningful value from the sharing of their content on Facebook – a rough estimate suggests benefits are on the order of 1.0 to 1.5 percent of news publishers' total revenues. Thus, the evidence shows that publishers benefit at least as much as Meta and that there is thus no economic case for forcing Meta to pay additional compensation to the publishers.

1. Value of News Content to Meta

The evidence demonstrates that the value of news content on Facebook is both low and declining.

First, links to news content constitute a very small proportion of what Facebook users see in their Facebook Feed. This is true in part because the vast majority of Facebook posts do not contain *any* links to outside content. For example, Table 1 below provides data from Facebook's quarterly Widely Viewed Content Report on the proportions and sources of Facebook Feed posts with links to external content, including news content, in the US.

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[93] *Ibid.*

[94] See CMA/Ofcom (2021) at ¶11 ("Large platforms are 'must have' partners for individual publishers in a way that individual publishers cannot be to the platforms. Such concerns underlie the proposed establishment of the new digital markets regime and hence the consideration of how its proposed codes for firms with SMS would address its impact for publishers."). See also *id.* at ¶12 (listing three sources of platform market power).

TABLE 1:
SHARE OF POSTS VIEWED IN US FACEBOOK FEEDS (Q4 2022)

	Share of Posts Viewed in US Facebook Feeds Q4 2022					
Type of Post	**Posts from Friends and People Followed**	**Posts from Groups Joined**	**Posts from Pages Followed**	**Unconnected Posts**	**Other**	**Total**
Posts with a Link	1.8%	0.4%	2.6%	2.6%	0.2%	7.5%
Posts with No Links	48.9%	15.3%	5.6%	14.2%	8.5%	92.5%
Total	**50.7%**	**15.6%**	**8.2%**	**16.8%**	**8.7%**	**100.0%**

Source: Facebook Transparency Center, "Widely Viewed Content Report: What People See on Facebook: Q4 2022 Report" (available at https://transparency.fb.com/data/widely-viewed-content-report/) (last accessed March 21, 2023). Note: "Unconnected posts" are posts from sources to which users are not connected, but which Facebook includes in users' Feeds as recommendations, thinking they might be interested.

As the figure shows, in the fourth quarter of 2022, 92.5 percent of the organic items appearing in the Facebook Feed of US users contained no links to external content.[95] Of the 7.5 percent of posts that did have links to external content, about 1.8 percent were from friends and people followed by the Facebook user, 0.4 percent were from groups to which the Facebook member belonged, 2.6 percent were from Pages the Facebook user was following, and 2.6 percent were from unconnected posts which Facebook's algorithms predicted might be of interest to the user.

The Widely Viewed Content Report also notes that even the most popular content on Facebook is seen by only a small fraction of Facebook users. For example, in the fourth quarter of 2022, the top 20 Facebook Pages, ranked by number of viewers, accounted for just 1.2 percent of all US content views, while the top 20 posts accounted for just 0.04 percent of all content views. As Facebook explains, "the content seen by the most people… comprise[s] only a small portion of the total number of content views, because, given the customized nature of Feed, most of what people see on Facebook is uniquely personalized."[96]

Moreover, other data reported by Facebook indicates that less than three percent of what people around the world see in their Facebook Feeds are posts with links to news articles.[97] While this percentage fluctuates with the changing news cycle, and can vary from person to person, jurisdiction to jurisdiction, etc., the fact that news constitutes so little of the content that draws some people to Facebook is a strong indicator that news is not – contrary to the opinion offered by economist Hal Singer on behalf of the News Media Alliance – "must have" content for Facebook.[98]

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[95] "Organic" content on Facebook is content which is not advertiser-supported.

[96] Facebook Transparency Center, "Widely Viewed Content Report: What People See on Facebook: Q4 2022 Report" (available at https://transparency.fb.com/data/widely-viewed-content-report/) (last accessed March 21, 2023).

[97] Based on Meta internal data for the last 90 days ending August 2022. "News articles" include content about current events and other timely information which follows journalistic standards such as citing sources and having a byline. For additional information, see Meta, "Meta Business Help Center: News Content on Facebook" (available at https://www.facebook.com/business/help/2240997727192283) (last accessed 13 March 2023). See also Peters (2022).

[98] Hal J. Singer, *Second Round Comments in Response to U. S. Copyright Office's Publishers' Protection Study: Notice and Request for Public Comment, Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers*, Docket No. 2021–5

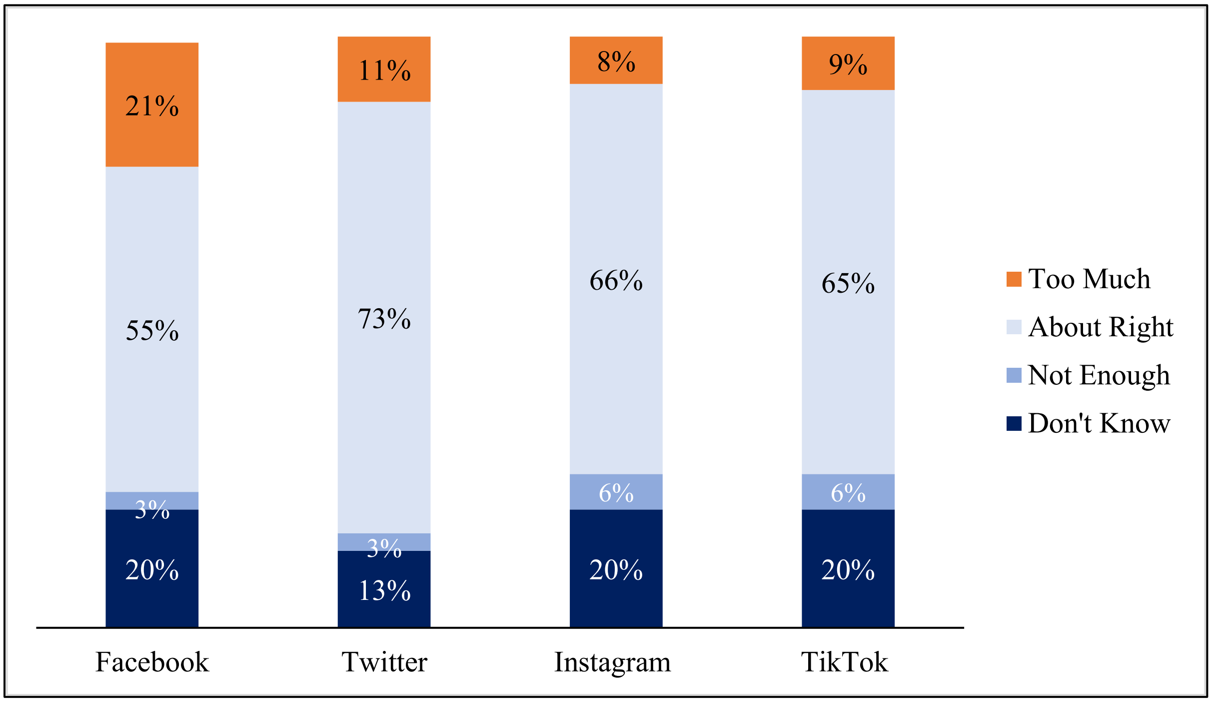
Second, both Meta's internal research and data from independent sources indicates that Facebook users in general believe that there is *too much* news content on the Facebook platform, especially political content. As a Meta executive explained in a recent blog post, in 2021 Meta undertook a series of surveys and tests designed to assess the effects of reducing the weight placed on comments and shares when ranking political content. As the blog reported, "[w]hen surveyed, people who experienced these changes said they saw less of the content they did not find valuable."[99]

This conclusion is consistent with independent survey research. For example, Figure 4 presents data from a 2022 survey conducted by Reuters in conjunction with Oxford University which asked social media users in several countries whether they felt the amount of news content shared on major social media platforms was "about right," "too much" or "too little."

(December 13, 2021) at 6 (available at https://downloads.regulations.gov/COLC-2021-0006-0038/attachment_1.pdf). Dr. Singer's comment was made in the context of his argument that the value of news content on Facebook is comparable to the value of broadcast television signals to cable and satellite video distributors in the US, which cable and satellite operators argue are "must have," and that the substantial payments made by cable and satellite operators (called "retransmission consent" payments) are therefore a reasonable benchmark for the amounts Meta should be paying to publishers. Dr. Singer's argument is faulty on several levels, but most notably because the evidence demonstrates beyond any doubt that the value of news on Facebook is very limited while the value of broadcast signals (which include exclusive access to major sporting events such as NFL football) to cable and satellite operators is in the billions of dollars. See e.g., J.P. Morgan Media Equity Research Report.

[99] Anna Stepanov, "Reducing Political Content in News Feed," Meta Newsroom (February 10, 2021) (available at https://about.fb.com/news/2021/02/reducing-political-content-in-news-feed/).

FIGURE 4:
PERCENTAGE OF UK USERS WHO THINK THEY SEE TOO MUCH NEWS, BY PLATFORM (2022)



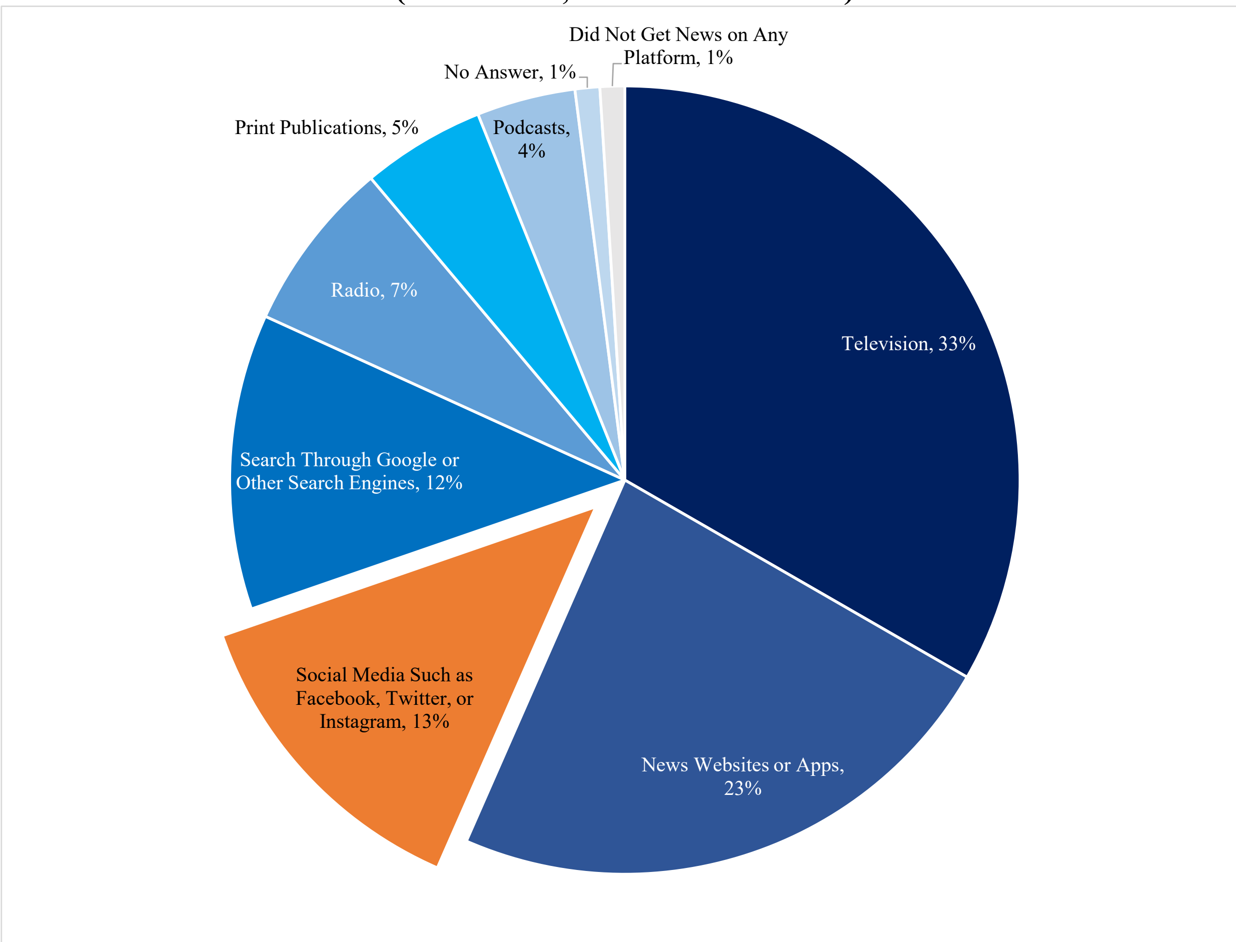
Source: Reuters Institute Digital News Report 2022 at 26.

As the figure shows, 21 percent of UK Facebook users responded that they see "too much" content from news outlets on the platform, about double the proportion of Twitter, Instagram and TikTok users. Responses from Facebook users in other countries surveyed were similar: 22 percent of Americans, 20 percent of Australians and 20 percent of Canadians report seeing "too much" content from news outlets on Facebook.[100]

Data from the Pew Research Center provides further support for the conclusion that social media is not a preferred source of news content. Figure 5 presents data from a Pew survey of US adults from July-August 2022.

[100] Reuters Institute Digital News Report 2022 at 26. This data is consistent with data compiled by analyst firm Echobox, which reports click through rates for publisher content on Facebook are highest for content relating to sports (3.85 percent), health (3.82 percent) and lifestyle (3.55 percent). Local news, national news and international news rank fourth (3.39 percent), seventh (3.19 percent) and eighth (3.03 percent), respectively. See Echobox, *2022 Publisher Benchmarks: Facebook CTRs* (2022) at 5. See also Reuters Institute Digital News Report 2022 reporting that the proportion of survey respondents who "sometimes or often" avoid seeing online news rose from 29 percent in 2017 to 38 percent in 2022. Reuters Institute Digital News Report 2022 at 13.

FIGURE 5:
PREFERRED SOURCES FOR NEWS
(US ADULTS; JULY -AUGUST 2022)



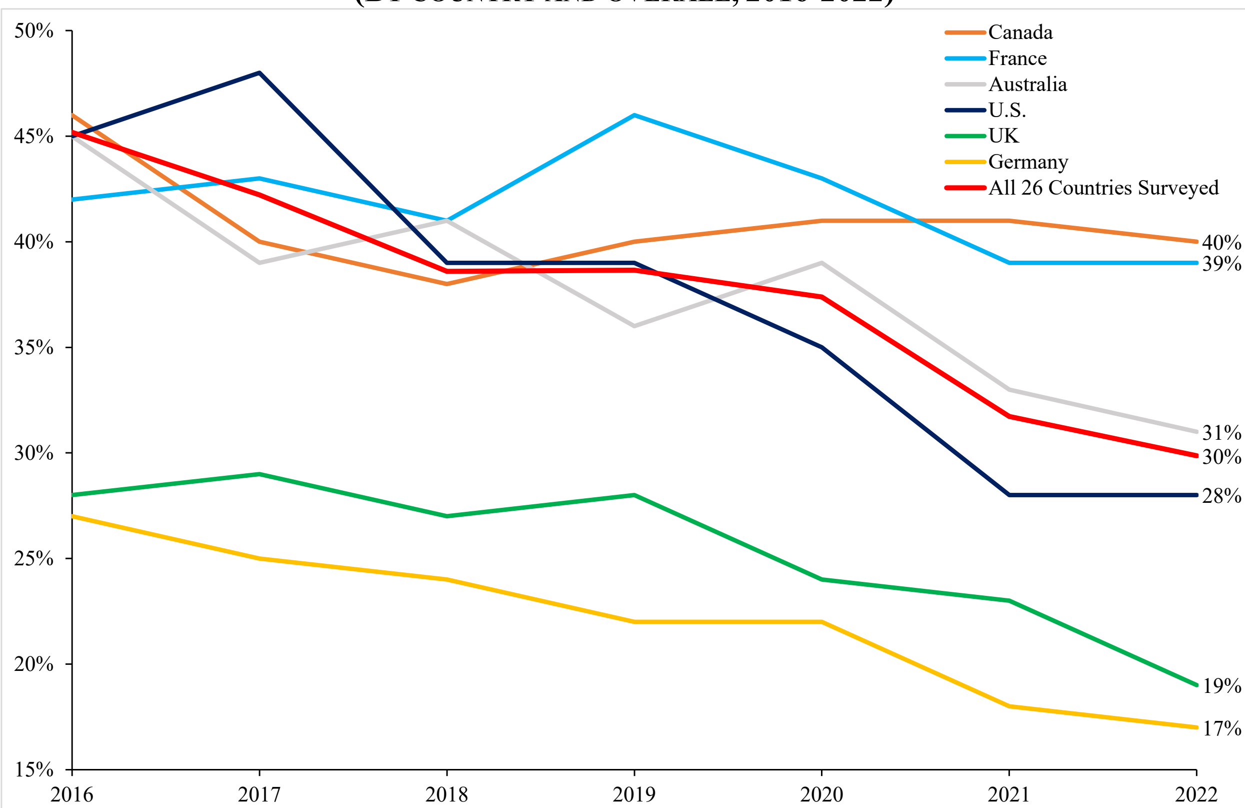
Source: Pew Research Center, 2022 Pew Research Center's American Trends Panel Wave 112 Social Media and Platform Survey Final Topline July 18-Aug 21, 2022 at 2 (available at https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2022/09/Social-media-and-platform-fact-sheet-TOPLINE.pdf). Notes: [1] Figures are based on the share of survey respondents responding that the given platform was their preferred platform among those listed in response to the question "Which do you prefer for getting news?" [2] Figures do not add to 100 percent due to rounding.

As the figure shows, only about 13 percent of US adults list social media (from any social media platform) as their preferred source of news, compared with 33 percent who prefer television, 23 percent who prefer news web sites or apps, and 12 percent who prefer radio (7 percent) or print (5 percent). Thus, while many people list social media as *one* source of news, very few say it is their *preferred* source.

Third, the evidence also shows that the proportion of people who use Facebook to access news content is declining. and that Facebook has determined that its future success depends on alternative forms of content – including, in the immediate future, video and, in the longer-term future, the Metaverse.[101]

Figure 6 summarizes survey data on the proportion of the population in Australia, Canada, France, Germany, Spain, the UK and the US who reported using Facebook for "finding, reading, watching, sharing or discussing news" from 2016 to 2022.

FIGURE 6:
PROPORTION OF THE POPULATION USING FACEBOOK FOR NEWS
(BY COUNTRY AND OVERALL, 2016-2022)



Source: Reuters Institute for the Study of Journalism, University of Oxford, "Digital News Reports 2016-2022: Interactive" (available at https://www.digitalnewsreport.org/); World Bank, "Data: Population, Total" (available at https://data.worldbank.org/indicator/SP.POP.TOTL). Note: Percentage is the share of respondents who selected "Facebook" in response to the question "Which, if any, of the following have you used for finding, reading, watching, sharing or discussing news in the last week? Please select all that apply."

As the figure shows, the proportion of the population who report using Facebook to access news has declined significantly in recent years, from 45 percent to 30 percent for all 26 countries

[101] Bruell (2022) ("Reallocating resources from News and Bulletin is part of a broader shift within the company toward the metaverse and short-form video content creators that can compete with ByteDance Ltd.'s TikTok."); Alex Heath, "Facebook Is Changing its Algorithm to Take On TikTok, Leaked Memo Reveals," *The Verge* (June 15, 2022) (available at https://www.theverge.com/2022/6/15/23168887/facebook-discovery-engine-redesign-tiktok) (hereafter "Heath (2022)"); Joshua Benton, "Facebook Looks Ready to Divorce the News Industry, and I Doubt Couples Counseling Will Help," Nieman Lab (June 16, 2022) (available at https://www.niemanlab.org/2022/06/facebook-looks-ready-to-divorce-the-news-industry-and-i-doubt-couples-counseling-will-help/) (hereafter "Benton (2022)"); Reuters Institute Digital News Report 2022 at 13, 23-24.

surveyed over the period, from 45 percent to 28 percent in the US, and from 28 percent to 19 percent in the UK.[102]

Given the data reported above, it is not surprising that Meta has over time chosen to reduce the emphasis on news content and elected, instead, to accelerate its move into short-form online video content in the form of Reels, and, in the longer run, developing for the Metaverse. This trend away from emphasizing news content dates to at least 2016, when Facebook changed its algorithm to reduce the amount of news content shared in user Feeds.[103] That trend has continued with recent announcements that it would end payments to US news publishers for Facebook News and, most recently, that it was discontinuing its "Instant Articles" offering, which facilitated rapid access to news content on mobile devices.[104]

Lastly, it is important to note that – contrary to arguments and analyses put forward by news publishers – the amount of news content on Facebook Feeds overstates the value of that content to Meta because it ignores substitution effects. For example, a study authored by British economist Matthew Elliott and commissioned by the British News Media Association assumes (incorrectly) that news accounts for six percent of the content on Facebook in the UK and then calculates the economic value of news to Facebook by multiplying Facebook's UK advertising revenues by six percent.[105] One of the many problems with this approach is that it ignores substitution effects on at least two levels.[106] First, Facebook users would, in the absence of news content, switch to viewing other kinds of content, thereby attenuating any impact on user engagement. Second, Facebook advertisements – which are not linked to specific content being viewed but rather on

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[102] The proportion using Facebook for news declined in all but two of the 26 countries surveyed in each year over the period: Greece, where it rose by one percentage point, and Hungary where it was unchanged. Furthermore, for TikTok, which is the fastest growing social media platform, only a small proportion of news engagement (14 percent) is associated with "mainstream news outlets" or "mainstream journalists," while the combination of "Internet Personalities" and "Ordinary people" accounts for 59 percent. See Nic Newman, *How Publishers Are Learning to Create and Distribute News on TikTok*, Reuters Institute for the Study of Journalism, University of Oxford (2022) at 23 (available at https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-12/Newman_How_Publishers_are_Learning_to_Create_and%20Distribute_News_on_TikTok.pdf). While the Reuters Institute data reported above are sometimes cited as evidence that a large proportion of consumers "rely on" social media for "news," that interpretation is at best misleading. Rather, the Reuters Institute data represent the proportion of respondents who, when presented with a list of social media and messaging platforms, list each service *as one* of the sources they have "used…for finding, reading, watching, sharing or discussing news in the last week." Moreover, the definition of "news" used in the survey includes "mainstream news outlets/mainstream journalists," "smaller or alternative news sources," and content from "politicians/political activists," "personalities (incl. celebrities and influencers)" and "ordinary people." Thus, the Reuters Institute data do not support the contention that consumers "rely on" or even "use" social media to access the types of "civic journalism" publishers argue is deserving of special treatment.

[103] Lars Backstrom, "Helping Make Sure You Don't Miss Stories from Friends," Meta (June 29, 2016) (available at https://about.fb.com/news/2016/06/news-feed-fyi-helping-make-sure-you-dont-miss-stories-from-friends/).

[104] See e.g., Bruell (2022); Heath (2022); Benton (2022); Peters (2022).

[105] Matthew Elliott, *Value of News to Digital Platforms in the UK*, News Media Association (May 12, 2022) (available at http://www.newsmediauk.org/write/MediaUploads/PDF%20Docs/Value_of_UK_News_to_Digital_Platforms_-_Final.pdf).

[106] For a complete discussion of the flaws in Dr. Elliott's study, see Jeffrey A. Eisenach and David Matthew, *Assessing Whether Meta and UK Publishers Share a Fair Market Bargain*, NERA Economic Consulting (2023) at Annex.

user characteristics – would switch from being displayed near news content to being displayed near alternative content. Given the limited interest Facebook users have demonstrated in news content, both forms of substitution are likely to substantially attenuate the economic impact of eliminating news sharing on Facebook.

To summarize, while Meta's willingness to allow news content to be shared on Facebook at no charge to publishers suggests it receives some value from the bargain, the evidence demonstrates that the value is limited and declining. News content makes up a very small proportion of what is shared on Facebook, and many users now consider even the current amount to be "too much." Indeed, users are indicating their preferences by embracing social media platforms with less emphasis on news and more emphasis on individual content creators. As a result, the evidence shows that the value Meta receives from the sharing of news on Facebook is declining in both relative and absolute terms.

2. Value of Facebook to Publishers

As discussed above, news publishers monetize their content in two primary ways – advertising and subscriptions. Both revenue streams are directly dependent on traffic, typically measured by the number of visits and visitors to a publisher's web site. Each visit creates an opportunity to expose visitors to advertising, and each exposure generates advertising revenue. Further, each visit generates an opportunity to sell a subscription or, even if the visitor is already a subscriber, increases "engagement" and thus the likelihood of renewal or purchase of additional services offered by the publishers of the news web site. The evidence demonstrates that, while Facebook is only one of many sources of traffic to publisher web sites, publishers benefit considerably from sharing their content on Facebook.

The first and most obvious evidence that publishers benefit from sharing content on Facebook is the fact that they voluntarily expend resources to make their content available there, not only by maintaining and posting content to their own Pages, but also by paying for advertising to further expand their reach. As explained above, publishers are not required to share any of their content on Facebook, and they have substantial control over how their content is shared. Moreover, as also explained above, publishers expend significant resources to optimize their presence on Facebook in order to maximize the amount of traffic they receive and their ability to monetize that traffic. The only economically sound explanation for this observed behavior is that publishers are getting considerable economic benefits from sharing their content on Facebook, which exceed the costs they incur in doing so.

Moreover, the evidence on this point is further supported by the fact that the vast majority of news content shared on Facebook comes from the publishers' own Facebook Pages. For example, Meta reports that more than 90 percent of organic views on article links from news publishers globally were on links posted by the publishers, not by Facebook users.[107] In other words, Facebook users

[107] Meta internal data for the last 90 days ending August 2022 worldwide. News publishers are defined as those registered in Facebook's News Page Index. See Meta, "Meta Journalism Project: Indexing News Pages on Facebook" (17 August 2020) (available at https://www.facebook.com/journalismproject/indexing-facebook-news-pages-ad-archive).

who view news publisher content on Facebook are primarily viewing content selected and posted by the publishers themselves.[108]

Further evidence on the value of Facebook to publishers comes from the natural experiment that occurred in Australia when, during the public policy debate over the enactment of Australia's Media Bargaining Code, Facebook temporarily stopped sharing links to publisher content on Facebook.[109] During that period, which lasted from February 18 to February 25, 2021,[110] traffic to Australian news sites declined by about 13 percent,[111] which is consistent with other data on traffic to publisher web sites.[112] While the magnitude of this effect would be expected to decline somewhat over time as a result of substitution effects – that is, some people would learn to discover news content from alternative sources – it nevertheless represents a reasonable estimate of the magnitude of the amount of traffic publishers currently generate as a result of sharing content on Facebook.[113]

While the evidence does not support a precise estimate of the monetary value of click through traffic to publisher web sites, research does suggest it is considerable. For example, a 2019 study by Deloitte (with support from Google) developed an econometric model of the value of web traffic to news publishers in France, Germany, Spain and the UK for 2015-2017. The study found that, on average, the economic value of web traffic was approximately ten percent of total publisher revenues.[114] If, as the data suggests,[115] Facebook referrals drive between 10 and 15 percent of that traffic to publisher web sites, then a rough estimate of the value of Facebook traffic to news publishers is between 1.0 and 1.5 percent of total revenues.

One important implication of this body of evidence is that it refutes publisher claims that online platforms diminish traffic to their web sites because, they argue, the information contained in the

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[108] Publishers have explicitly acknowledged the value of the click-through traffic they get from Facebook. See e.g., Jeff Elgie, CEO, Village Media Inc. ("This is something we all get for free, and I thought 'What if I had to pay for this distribution?' The cost to me, compared to what we get today, would be astronomical."). Meta, "How Meta Supports News Providers in Canada" (May 12, 2022) (available at https://about.fb.com/news/2022/05/how-meta-supports-news-providers-in-canada/).

[109] See generally Nick Clegg, "The Real Story of What Happened with News on Facebook in Australia," Meta Newsroom (February 24, 2021) (available at https://about.fb.com/news/2021/02/the-real-story-of-what-happened-with-news-on-facebook-in-australia/).

[110] James Putrill, "These Graphs Tell the Story of the Facebook News Ban – and What Happened After," *ABC News* (March 3, 2021) (available at https://www.abc.net.au/news/science/2021-03-03/facebook-news-ban-australian-publisher-page-views-rebound/13206616).

[111] J.P. Morgan Media Equity Research Report at 1.

[112] See e.g., *infra*, n. 5 and *infra*, n. 120.

[113] There is also some evidence that readers referred to news publishers by Facebook are less engaged than other users. See e.g., Catarina Sismeiro and Ammara Mahmood, "Competitive vs. Complementary Effects in Online Social Networks and News Consumption: A Natural Experiment," *Management Science* 64;11 (2018) 5014-5037 at 5026; Sagit Bar-Gill, Yael Inbar and Shachar Reichman, "The Impact of Social vs. Nonsocial Referring Channels on Online News Consumption," *Management Science* 67;4 (2021) 2420-2447 at 2427.

[114] Deloitte, *The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers* (September 2019) at 5 (available at https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf) (estimating the value of total web traffic to news publishers in 2018 across the four countries at €1.646 billion, which is 10.2 percent of total publisher revenues across the four countries).

[115] See *infra*, Table 2 and n. 5, 111, 120.

snippets that appear on online platforms satisfies users' demand for information, such that they fail to click through to the full story.[116] While this is undoubtedly the case for some subset of users, the fact that publishers voluntarily post their content on Facebook indicates that, on net, the effect of online platforms is to increase traffic to news publishers web sites.

C. Evidence Relating to Bargaining Power

As explained in Section IV.A above, a willing buyer/willing seller agreement is one in which neither party is under undue pressure to enter into an agreement, where undue pressure is associated with the relative costs of a bargaining impasse: If the costs of an impasse to Party A are so high that it has no choice but to accede to Party B's demands, there is said to be an imbalance in bargaining power.

The existence of such an imbalance is central to the publishers' case for government intervention. For example, as noted above, CMA and Ofcom acknowledge they have not determined that current commercial arrangements between Meta and UK news publishers reflect an unfair or unreasonable division of value, but nevertheless recommend in favor of intervention on the grounds that "[t]here is an imbalance in bargaining power between large platforms and content providers, including news publishers."[117]

As this subsection explains, a careful review of the evidence does not support this conclusion for Meta, for three main reasons: First, the traffic Meta sends to news publishers, while valuable, does not constitute a sufficient share of their total traffic to give Meta disproportionate bargaining power. Second, Meta's commercial relationships with publishers are broadly similar to the commercial relationships between publishers and other platforms, like LinkedIn and Twitter which are not alleged to have disproportionate bargaining power. Third, while Meta is an important player in the advertising business, there is no evidence that its presence there translates into disproportionate bargaining power in its commercial agreements with publishers.

1. Meta's Share of Publisher Referral Traffic Does Not Give It Undue Bargaining Leverage

Publishers base their contentions regarding bargaining leverage mainly on what they say is the large share of referral traffic to their web sites originating with Google and Facebook. For example, in its 2020 Market Study, the CMA reported that publishers based their argument that Google and Facebook are "must have" partners "primarily" on the "substantial" proportion of traffic referred to their web sites coming from Google and Facebook."[118]

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[116] This issue is sometimes referred to as "complements vs. substitutes" – that is, do platforms "complement" publisher content by making it easier to discover or "substitute" for it by deterring people from actually visiting publisher web sites.

[117] CMA/Ofcom (2021) at ¶2.17.

[118] See CMA 2020 Market Study, Appendix S at ¶21 ("Publishers have told us that they view Google and Facebook as 'must have' partners. This is primarily due to a substantial proportion of the traffic referred to their websites coming from Google and Facebook properties and a degree of reliance on prominence on Google and Facebook properties for content discovery and brand awareness."). See also CMA/Ofcom (2021) at ¶2.2 ("Third, Google and Facebook account for nearly 40% of the traffic to large publishers. Fourth, Facebook is the highest reaching intermediary service used for accessing a variety of news sources, and Google is second-highest.").

The facts do not support this argument. While it is true, as explained above, that Facebook generates value for news publishers by helping to drive referrals to their web pages, its share of total news publisher traffic is far too small to create an imbalance of bargaining power.

One source of data on the sources of traffic to publisher web sites is the publishers themselves. Specifically, a subset of UK publishers provided CMA with data on the sources of traffic to their web sites in 2018 and 2019. Table 2 presents a summary of that data, as published by the CMA in its report. [119]

TABLE 2:
SOURCES OF UK WEB SITE TRAFFIC FOR ONLINE PUBLISHERS (2018-2019)

Year	Google	Facebook	Direct	Other
All Traffic				
2018	26%	10%	44%	20%
2019	25%	13%	43%	19%
Mobile				
2018	25%	14%	40%	21%
2019	25%	17%	38%	20%
Desktop / Laptop				
2018	29%	4%	52%	15%
2019	26%	4%	55%	15%

Source: CMA 2020 Market Study, Appendix S at S6, Table S.3.

As the table shows, the publishers' traffic data indicate that in the UK in 2019, the largest share of traffic to publisher web sites was direct traffic (43 percent), followed by Google (25 percent), other referral traffic (19 percent) and Facebook (13 percent). Put differently, Facebook accounted for only about an eighth of the all traffic to UK publisher web sites in 2022.

The 13 percent figure is consistent with data reported by analyst firm Echobox, whose "Social Media Index" finds that Facebook referrals represented about 13 percent of traffic to content creator web sites in 2022.[120] Moreover, as shown in Figure 7, Echobox also reports that Facebook's

[119] See CMA 2020 Market Study, Appendix S at ¶19 ("Based on publisher submissions, in 2018 and 2019 (up until June) the average proportion of traffic to their websites that was referred via Google properties was 26% and 25% respectively (for 2019, the lowest proportion across publishers was 8% and highest was 57%). Referrals from Facebook properties were responsible on average for 10% of website visits in 2018 and 13% in 2019 (for 2019, the proportion ranged between 2% and 47% among publishers). Direct website visits were the most important source of traffic, with 44% of visits being direct in 2018 and 43% being direct in 2019 (ranging, in 2019, between 6% and 57%). Other visits come from what are termed 'other third-party referrals', for example referrals from Snapchat or Instagram.").

[120] See Echobox, "The Social Media Index (SMI)" (available at https://showcase.echobox.com/smi/) (last accessed January 20, 2023) (hereafter "Echobox SMI"). Echobox also reports that "the percentage of traffic coming from Facebook and Twitter has plateaued in recent years [resulting in] greater focus on Instagram [which] may be an indication that publishers see not only the potential for significant growth on platforms other than Facebook and Twitter, but also, beyond traffic, the ability to gain access to a younger demographic and build brand loyalty." See Echobox Team, "4 Insights into Social Media Traffic from Our Social Media Index," Echobox (May 18, 2021) (available at https://www.echobox.com/resources/blog/social-media-is-driving-traffic-to-news-websites-and-one-source-dwarfs-all-others/).

share of referral traffic has declined significantly from a peak of nearly 19 percent in 2015; and, according to the most recent data, for January 2023, now stands at under 11 percent.

FIGURE 7:
FACEBOOK REFERRAL TRAFFIC AS A PERCENTAGE OF ALL WEB TRAFFIC TO CONTENT CREATORS' WEB SITES (WEEKLY, JANUARY 2014-JANUARY 2023)

Source: Echobox SMI. Note: Figures represent pageviews from Facebook-derived visitors as a percentage of total pageviews for a sample of more than one hundred content creators globally, covering news, economics, business, technology, culture, science, entertainment, and specialist subjects.

As an economic matter, these data provide strong support for the conclusion that Facebook lacks the bargaining power to impose uneconomic terms on news publishers, for at least two primary reasons. First, the referral shares cited above overstate Facebook's economic relevance for publishers. Indeed, as discussed above, the evidence suggests that the value of Facebook referrals to publishers is on the order of 1.0 to 1.5 percent of publisher revenues, which is not consistent with "must have" status.[121] And, as noted above, much of the traffic that is currently referred from Facebook would still arrive at news publisher sites even if links were not available on Facebook.

[121] The implausibility of arguing that the threat of losing one percent of revenues would place publishers in an untenable bargaining position is demonstrated by the fact revenues *routinely* fluctuate by much greater amounts. For example, between 2013 and 2022, year-over-year changes in US newspaper publisher revenues averaged 3.6 percentage points, and exceeded one percentage point in seven out of the eight years. See US Census Bureau, "Service Annual Survey Tables: Service Annual Survey Latest Data (NAICS-Basis): 2021" (November 22, 2022) (available at https://www.census.gov/programs-surveys/sas/data/tables.html).

Second, even if the referral shares relied upon by the publishers to support their arguments were accepted as meaningful measures of market share, which they are not, they fall far below the thresholds which, under established competition doctrine, would create a presumption of market dominance. To the contrary, competition regulators typically consider market shares below 25 to 30 percent to be direct evidence of <u>the absence</u> of substantial market power or "dominance" and often find market shares as high as 40` to 50 percent to be inconsistent with a finding of substantial market power. For instance, in the US, firms with market shares of 30 percent or less are presumed not to have substantial market power and claims of substantial market power for firms with market shares from 30 to 50 percent are typically rejected.[122] In the EU, dominance is only presumed at market shares of 50 percent or more.[123] In Canada the Competition Tribunal has found that "a market share of less than 50 percent would not give rise to a *prima facie* finding of dominance."[124]

2. Meta's Commercial Arrangements with Publishers are Comparable to Those of Other Platforms Which Are Not Alleged to Have Market Power

A second way to think about the balance of bargaining power is to ask whether news publishers are compensated for their content by online platforms that are not alleged to have market power.

While compensation agreements between publishers and online platforms are as a general matter confidential, the available evidence suggests the answer to this question is "no." For example, both LinkedIn and Twitter, which are often considered as competitors to Facebook, allow the sharing of news publisher content in ways that are analogous to sharing on Facebook – that is, both allow news publishers to post their own content and also permit users to share links to content, just as they do on Facebook. Yet there is no evidence that either platform compensates news publishers for doing so. Rather it appears that the economic relationships between news publishers and these online platforms (which are not asserted to have market power or disproportionate bargaining leverage) are comparable to those between news publishers and Meta. From an economic perspective, the clear implication is that the existing relationship between publishers and Meta fully satisfies the WBWS standard and is not caused by Meta's supposed disproportionate bargaining power.[125]

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[122] Herbert J. Hovenkamp, *The Legal Periphery of Dominant Firm Conduct*, Faculty Scholarship at Penn Law 1763 (September 24, 2007) at 9 (available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2765&context=faculty_scholarship).

[123] *Id.* at 10.

[124] Competition Bureau of Canada, *Abuse of Dominance Enforcement Guidelines* at 12, n. 21 (available at https://ised-isde.canada.ca/site/competition-bureau-canada/sites/default/files/attachments/2022/CB-ADEG-Eng.pdf).

[125] It is also worth noting the instances in which publishers receive compensation for their content from online platforms typically involve making available entire articles or curated content. For example, Apple offers compensation to publishers which agree to curate and make available news content for Apple News. Kif Leswing, "As It Faces More Scrutiny, Apple Will Reduce App Store Fees If Publishers Provide Apple News Content," *CNBC* (August 26, 2021) (available at https://www.cnbc.com/2021/08/26/apple-to-reduce-fees-if-publishers-provide-apple-news-content.html). Similarly, it has been reported that Yahoo! – which carries full-text articles from news publishers – sometimes pays for content. See Quora, "Does Yahoo pay for the news content that it hosts from content providers on sites like Yahoo Finance, Yahoo News and Yahoo Sports?" (available at https://www.quora.com/Does-Yahoo-pay-for-the-news-content-that-it-hosts-from-content-providers-on-sites-like-Yahoo-Finance-Yahoo-News-and-Yahoo-Sports) (last accessed January 20, 2023).

3. Meta's Presence in the Advertising Business Does Not Give It Bargaining Leverage Over Publishers

While an analysis of all competition issues associated with Meta is beyond the scope of this paper, there appears to be no basis for publishers' allegations that Meta's engagement in the online advertising business somehow gives it the incentive or ability to impose unreasonable terms on news publishers with respect to compensation for content. Specifically, it is sometimes suggested that Facebook's policies regarding transparency of algorithms, access to data on user engagement, and control over content presentation (all of which have been the subject of complaints by news publishers) are affected by the fact that Meta competes with news publishers for advertising revenues.[126]

The central problem with this thesis is that there is no apparent nexus between the fact that Meta is engaged in the advertising business, on the one hand, and its incentives with respect to compensation to publishers for content, on the other. To the contrary, firms that compete in some markets often collaborate in others because of the opportunity – as here – to create value which accrues to the benefit of both. Moreover, there is no plausible basis to believe that the amount of compensation news publishers receive from Meta could materially affect their ability to compete with Meta for advertising, let alone enhance Meta's competitive position in any relevant market. Indeed, as the CMA-Ofcom Report concluded, "the direct financial gains to news publishers from the adoption of a code would be a relatively small percentage of their existing advertising revenues."[127]

V. Implications for Public Policy

As noted above, questions relating to the role of news reporting in promoting a healthy civic dialogue are both important and salient. Unquestionably, technological and marketplace changes have challenged the news business and raised legitimate questions about whether changes in public policy should be considered to preserve and promote public interest journalism. Such policies would hardly be unprecedented. Indeed, most countries have traditionally pursued policies to support the journalism business, for example through direct support of public broadcasting entities like the BBC in the UK, the CBC in Canada, ABC in Australia, and the Corporation for Public Broadcasting in the US.[128]

The analysis in this paper focuses on a particular set of policies which have been put forward by traditional news publishers as a remedy to what they argue is a significant and direct cause of the economic challenges they face: the uncompensated sharing of their content by online platforms. While the proposed policies vary somewhat by jurisdiction, in broad terms they are designed to transfer resources from online platforms to news publishers by forcing platforms to meet publisher' financial demands or, if they fail to do so, setting the level of "compensation" through government process – e.g., binding arbitration. The underlying premise for these policies is that online

[126] See e.g., CMA/Ofcom (2021) at ¶¶15-16. It is important to note that the practices about which publishers complain are not presumptively anticompetitive.

[127] CMA/Ofcom (2021) at ¶7.4.

[128] For a discussion of such policies, see David Blackburn, Jeffrey A. Eisenach and Bruno Soria, *The Impact of Online Video Distribution on the Global Market for Digital Content*, NERA Economic Consulting (May 2018).

platforms, and specifically Facebook, possess disproportionate bargaining power that allows them to dictate the terms and conditions under which news is shared on their platforms. As this paper demonstrates, the evidence does not support this premise. To the contrary, publishers receive at least as much value from the sharing of their content on Facebook as does Meta.

The central implication of this finding for public policy is that forcing Meta to make payments to publishers that are not justified by the underlying economics of their commercial relationship is not an appropriate policy response to the challenges facing the news industry. Indeed, the policies being advocated by publishers are likely to have a multitude of unintended effects. Most obviously, as discussed in Section II above, the proposed policies are almost certain to create distortions in the market for news resulting from mandates that favor certain types of publishers (e.g., large incumbents) or certain types of content (e.g., "clickbait") over others. Such effects are both economically undesirable and potentially counterproductive to policymakers' objectives of promoting quality journalism and a healthy civic discussion. Other potential distortions include: the potential that Meta could limit or eliminate the sharing of news content on Facebook altogether, thereby reducing or eliminating the benefits publishers currently receive; reducing the market's ability to adjust to changing circumstances as rates and terms become "locked in" by arbitration proceedings; and, reduced innovation in the market for news.[129]

VI. Conclusion

The sharing of news content through links on Facebook represents a voluntary exchange between publishers, who choose to allow such sharing, and Meta, which chooses to allow publishers and users to do so at no charge to either party. It is a fundamental principle of economics that such voluntary exchanges between willing buyers and willing sellers are under very general circumstances economically efficient and beneficial to both parties. Further, it is a fundamental principle of valuation analysis that whatever compensation arrangements emerge from such exchanges represent fair market value. Proposed government interventions designed to force Meta to provide monetary compensation to publishers based on allegations of market power or disproportionate bargaining power are thus not justified by the available evidence.

[129] All of these potential distortions are noted, for example, in the CMA-Ofcom Report. See CMA/Ofcom (2021) at ¶7.17.

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NERA Economic Consulting
2112 Pennsylvania Avenue, NW
4th Floor
Washington, DC 20037
www.nera.com