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## Social Media and Online News: Analysis of the effect of the Australian law on usage of news articles by the Big Tech

Anshita Sidhanta<sup>a</sup>

<sup>a</sup>KIIT University, Bhubaneswar, India

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*Increased regulation is a solution that governments throughout the world are attempting to implement to counteract the market dominance of technology corporations. When the Australian News Media and Digital Platforms Mandatory Bargaining Code was passed in 2021, the Australian Federal government found itself at the forefront of platform regulation. The controversy surrounding the legislation's introduction and Facebook's ensuing Australian "news blackout" exposed the shortcomings of a regulatory framework that previously relied on the internet sector to regulate itself. In this article, we contend that governments are transitioning from a reactive regulation paradigm to targeted interventions regarding the governance of digital media spaces, with the introduction of the Code serving as an important example of this worldwide trajectory. My article talks about how to most effectively assess the achievements and failings of this more interventionist paradigm using a case study of the Code's adoption in Australia. We also evaluate whether the change serves as an effective regulatory model for other national governments to follow, as well as how international platforms have reacted.*

**Keywords:** *market dominance, technology, corporations, media, digital platforms.*

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### INTRODUCTION

The value chain via which goods or services are delivered to customers has changed as a result of digital markets. Although this transition has generally benefited users, the rebalancing of

incentives between producers and distributors has raised questions for public policy. The inequitable distribution of incentives is illustrated by the digital journalism sector, which is battling to remain viable in the face of financial pressure.<sup>1</sup>

The news industry has gone digital; therefore, it stands to reason that the majority of readers look up news stories online. Two phenomena have resulted from this: First, most people are moving to online news sources, particularly in the wake of the COVID-19 outbreak. The number of unique visitors to digital platforms surged during the lockdown due to safety worries and mobility restrictions, and experts predict that between 50 and 60 percent of this influence will last long after the pandemic has passed. Second, a lot of online consumers access news content via social media sites like Facebook, Google, and WhatsApp. While the first factor encouraged traditional print media to go online more frequently, the second factor is more recent and has threatened journalism's predominately advertisement-driven business model. Many people who encounter news pieces on digital platforms do not click on the links to go to the publisher's website. Such readers don't feel the need to click the link to the publisher's page because they are happy with the "preview" on platforms. As a result, digital platforms seize the chance to profit by displaying adverts.

Although this transition has generally benefited users, the rebalancing of incentives between producers and distributors has raised questions for public policy. The University of Canberra's News and Networking Research Centre discovered that 62% of consumers questioned access to online news through unofficial channels such as social media, news aggregators, email newsletters, and smartphone alerts. Only 18% of users in India choose direct access to publications' websites as their primary online news source. The most popular mediums are Facebook and WhatsApp, which are utilised by 75% and 82% of respondents, respectively.<sup>2</sup>

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<sup>1</sup> Vikas Kathuria, 'India must take cue from Australian model of maintaining power balance between Big Tech, digital news media' (*First Post*, 8 March 2021) <<https://www.firstpost.com/india/india-must-take-cue-from-australian-model-of-maintaining-power-balance-between-big-tech-digital-news-media-9390561.html>> accessed 25 July 2022

<sup>2</sup> Diana Bossio, 'Australia's News Media Bargaining Code and the global turn towards platform regulation' (*Wiley Online Library*, 23 February 2022) <<https://onlinelibrary.wiley.com/doi/full/10.1002/poi3.284>> accessed 25 July 2022

This article sees the creation of the NMBC as a positive illustration of a policy "corrective" to the regulatory paradigm that had previously been left up to the discretion of digital media organisations. The introduction of the Code, in my opinion, represents a shift away from ad hoc regulation and reliance on international platforms to "do the right thing" and toward more interventionist approaches to the regulation and governance of social and digital media, which include formalised rules, policies, and procedures as well as sanctions for noncompliance. The degree to which the frequently lofty ideals that underpin new rules achieve their intended purposes will likely be constrained by the continued substantial dependence on "soft law" measures and market-based behavioural incentives for digital platforms. In the case of the NMBC, this has involved creating long-term plans for sustaining public interest journalism in the wake of the failure of the advertiser-funded model.

#### **GOVERNMENT ACTION TO ADDRESS THE IMBALANCE**

The State typically steps in to intervene in the market when there has been a market failure or when wealth redistribution is required. The income disparity between news publishers and service providers for the information society (digital platforms) may not be the cause of market failure in the form of free-riding. Instead, there is a mutually beneficial relationship: News publishers (especially small ones) receive indirect traffic from digital platforms, who in turn exploit the news content to attract visitors to their platforms. This relationship is unbalanced in favour of digital platforms, which receive the lion's share of advertising money, it is also true. The devout desire to protect and support a healthy society by guaranteeing a healthy and diversified media industry serves as the reason for intervention. A healthy democracy and human society depend heavily on the journalism industry. Therefore, the State cannot take a neutral stance when journalism is not commercially viable. In light of this, the argument for involvement is the pious wish to safeguard and support a wholesome society by guaranteeing a wholesome and varied media sector.

## WHAT HAS BEEN ATTEMPTED IN THE PAST

A number of legislative measures have been contemplated to encourage digital journalism. The EU's creation of a new "neighbouring right" in press publications, which includes "snippets," was one concrete step toward enabling publishers to monetize their IP-protected content when it is used by digital platforms. "Snippets" are excerpts of articles, images, infographics, and videos from publisher websites that are hyperlinked. Before the EU, Germany had already made a similar move. In both instances, the goal was to make it possible to licence content to digital platforms by recognising a novel class of property rights in "snippets. "Typically, there are no property rights recognised in "snippets" under intellectual property law. Despite its good intentions, the following issues rendered this legislation mainly ineffective.<sup>3</sup>

Typically, 'snippets' do not have any property rights recognised under intellectual property law.

- The development of the new "neighbouring right" cannot be justified from the perspective of intellectual property (IP) law because digital platforms do not rely on publishers' content for free. The primary reason for granting intellectual property protection has been a market failure in the form of free-riding. Legal scholars as a result harshly criticised the new laws for failing to recognise the boundaries of intellectual property law while assuring redistribution.
- Unlike another type of sui generis or neighbouring right, database protection, the presented press publishers' rights do not necessitate a major investment. This was another divergence from established IP law.

It's interesting to note that Google refused to utilise snippets at all in a few EU Member States unless they were offered for free. Publishers said that Google was abusing its dominating position in the online search business in response to this dilemma. The Bundeskartellamt,

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<sup>3</sup> Aline Blankertz, 'What the European DSA and DMA proposals mean for online platforms' (*Brookings*, 14 January 2021) <<https://www.brookings.edu/techstream/what-the-european-dsa-and-dma-proposals-mean-for-online-platforms/>> accessed 25 July 2022

Germany's competition watchdog, did not deem Google's behaviour to be harmful. In contrast, Google's actions were deemed to be abusive by the French competition authority, Autorité de la concurrence. It may be argued that the French authority's conclusion was not founded on competition law precedent, but rather on the legislative goal of ensuring "fair" redistribution of incentives. The effectiveness of the EU device, whose implementation was left to competition law, is called into question by the Bundeskartellamt and Autorité's opposing viewpoints.

### THE AUSTRALIAN MODEL

On February 25, 2021, Australia passed the News Media and Digital Platforms Mandatory Bargaining Code.<sup>4</sup> The motivation behind developing this code, which calls for mandatory negotiation of a maximum of 90 days to determine appropriate compensation, if parties are unable to reach an agreement, then they must proceed to arbitration, is the bargaining power imbalance between Australian news media businesses and Facebook and Google (individually). Previously, Facebook had prohibited its users from sharing and viewing news pieces in response to the required Code. Google had previously expressed a similar warning. The overall value that news content generates for digital platforms is the foundation of the Australian Code. By doing this, the Code avoids the problem surrounding the granting of a new "neighbouring" right to snippets, which, despite the best efforts of the legislators, encountered difficulties in enforcement. A party's market strength results in a "bargaining imbalance," which is frequently remedied by using competition law by bringing up the misuse of dominating position. There were issues with the enforcement of "neighbouring rights" in snippets through competition law, as the European experience had shown. A party's market strength results in a "bargaining imbalance," which is frequently remedied by using competition law by bringing up the misuse of dominating position. It appears that Google and Facebook were already negotiating because of the upcoming Code. For the usage of Nine Entertainment Co's news content, Google recently agreed to pay the company more than US\$ 30 million yearly.

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<sup>4</sup> Bulbul Dhawan, 'Google, Facebook must pay for news in Australia: What is media bargaining code, how it effects Big Tech' (*Financial Express*, 1 March 2021) <<https://www.financialexpress.com/industry/technology/google-facebook-must-pay-for-news-in-australia-what-is-media-bargaining-code-how-it-effects-big-tech/2204286/>> accessed 25 July 2022

## **SALIENT FEATURES OF THE CODE**

- It establishes a framework for negotiations in good faith for monetary compensation for the use and replication of news content between designated digital platform businesses and registered news business corporations.
- If a business agreement is negotiated outside of arbitration, the general requirements, bargaining rules, and compulsory arbitration rules are not applicable.
- Registered news business corporations must receive a variety of information from designated digital platform corporations, such as early notice of planned changes to an algorithm that would significantly affect referral traffic to or advertising related to covered news content.
- In cases where the parties are unable to agree on compensation through negotiation, an arbitral panel will choose between the two final proposals submitted by the parties.
- Because of issues relating to their participation or non-participation in the Code, responsible digital platform corporations must not make distinctions between the news enterprises participating in the Code or between participants and non-participants.
- Standard offers from digital platform companies to news organisations may be made, with the aim of reducing the time and expense of discussions, especially for smaller news organisations.

## **EUROPEAN UNION LEGISLATION: DIGITAL MARKETS ACT AND DIGITAL SERVICES ACT**

The European Union (EU) has recently passed a new law that includes rules for e-commerce platforms, material monitoring, and removal, etc. On July 4, the "Digital Services Act package" was passed with the support of EU members. A safer and more competitive online environment is what the Digital Services Act (DSA) and the Digital Markets Act (DMA) are designed to achieve.<sup>5</sup>

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<sup>5</sup> Dan Cooper, 'European Parliament and Council Strike Deal on DSA and DMA' (*Inside Privacy*, 26 April 2022) <<https://www.insideprivacy.com/dark-patterns/european-parliament-and-council-strike-deal-on-dsa-and-dma/>> accessed 25 July 2022

*According to the European Union, the DSA and DMA have two primary aims:*

- To promote a level playing field to encourage innovation, growth, and competitiveness, both in the European Single Market and internationally.
- In making the internet a guarded place where all users' fundamental rights are upheld.

## CONCLUSION

- *Lessons for other jurisdictions:*

It is clearly evident that the advertising-based business model of journalism has been negatively impacted by digitalization. Although it has been acknowledged that actions should be made to guarantee a robust and diverse news media industry, there aren't many examples to draw from when creating the ideal policy tool. Two distinct models—one from the EU and the other, more recent, from Australia—have been compared in this article. Although both have the same goal of ensuring redistribution, the former has a number of drawbacks. India and other countries can learn the following insights from this comparison. It can be challenging to use a specific statute to accomplish a public policy goal. One adds in its legal restrictions, which could result in a fresh issue. The Australian Code is better than the EU model in this regard. The fact that it has already brought internet platforms to the negotiating table demonstrates its effectiveness. The Australian Code's potential flaws can be improved along the way. It is especially crucial to guarantee a fair distribution of marketing incentives in developing nations like India, where many users would not be able to choose a paid membership. As a result, people paying for news (pay walling), the second option to ad revenue, seems to be a less than ideal solution in developing nations. Sadly, The Times of India, The Hindu, and Dainik Jagran have already paid for access to their material in India. India should therefore act quickly and adopt the Australian strategy.

### *Analysis:*

Despite threats to ban Facebook and Google Search from Australia, the News Media Bargaining Code (NMBC) was approved by the Australian Parliament in February 2021. The

goal of the NMBC was to rectify the enormous disparity in bargaining strength between the platforms and Australia's news media enterprises. To maximise user attention and hence increase their advertising revenue, Google and Facebook need news on their platforms, but they do not require the content of any one news firm. On the other hand, every media company must be present on each platform. Due to this disparity, or market failure, commercial agreements cannot be reached to ensure appropriate compensation for the advantages platforms receive from news media content. As a result, less journalism can be funded. Even people who do not have access to journalism nonetheless benefit society since it serves as a forum for ideas, a journal of record, and a tool to hold the powerful accountable. Even though not all market failures require attention, the NMBC was able to provide it in this case.

Before the Australian NMBC was passed, news media businesses were unable to negotiate with the platforms for any payment for their content; with it, they would be able to demand that the platforms negotiate and would be able to initiate arbitration in the event that those negotiations did not produce the desired outcome. It is far better to have this than a take-it-or-leave-it offer from a monopoly, but much better to settle a commercial arrangement. The threat of arbitration evens out the bargaining power because all parties want to avoid having an arbitrator decide commercial arrangements.

The NMBC in Australia has had great success in accomplishing its declared goal. The Australian news media businesses that have agreements under the NMBC are at ease with them despite not being able to interact with the platforms, and these agreements are bringing in more than \$200 million (Australian) annually for the news businesses. Furthermore, it's likely that the platforms have agreements with media companies that employ well over 95% of Australian journalists. A business plan that relies on the government deciding how the media's financial security will be determined is similarly rife with difficulties. The Australian Code's guiding idea is to deal with the anomaly in digital revenues that has harmed news organisations. It is hoped that the new money streams streaming in from Silicon Valley would revitalise every stream of excellent reporting. That is also the main difficulty. More so in

democracies and markets with fragile legal and political firewalls protecting free speech; where much of the media serves as a megaphone for those in power, and where shutting down the internet is as easy as issuing an executive order. Digital corporations are not entitled to the billions that depend on news material that they did not produce. Although the government will be the main regulator, news organisations also need to carefully consider their next steps. How to be independent in the media both editorially and financially has been a difficulty.