

Failing to Save the Press: What Should Be Next?

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Introduction

Liberal democracy cannot survive without a vibrant, free, and pluralist press. The venerable Fourth Estate has long served to hold the powerful to account, inform the electorate, and provide a forum for debate about vital issues of the day.¹ Of course, legacy news media do not always live up to that Fourth Estate ideal. But in an increasingly “post-truth” age awash in social media disinformation, pumped-up outrage, authoritarian populism, and influencer “bullshit,” we have as great a need as ever for politically independent newsrooms resolutely committed to professional norms of factual accuracy and fairness and to providing citizens with information and commentary vital to democratic governance.²

Yet, unlike the “cheap speech” that populates social media, such “public service journalism” is a highly resource-intensive enterprise.³ It requires teams of trained reporters, editors, and fact-checkers; distribution networks for communicating journalists’ work product; and the means to stand firm in

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1. See Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J.L. & TECH 473, 483–86 (2021) [hereinafter Netanel, *Mandating Digital Platform Support*] (describing the press’s historic role as a pillar of liberal democracy); MICHAEL SCHUDSON, *WHY DEMOCRACIES NEED AN UNLOVABLE PRESS* 28–48 (2008) (describing the functions of journalism that support democracy).

2. While disinformation constitutes knowing lies and distortions of truth, “bullshit” is speech intended to persuade without any regard for truth. See generally HARRY G. FRANKFURT, *ON BULLSHIT* (2005) (presenting a philosophical exegesis of the term). See also Kaitlyn Tiffany, *I Really Can’t Tell if You’re Serious*, THE ATLANTIC (Sept. 18, 2024), <https://theatlantic.com/technology/archive/2024/09/confusion-is-the-new-clickbait/679916> [https://perma.cc/9J9A-73YN] (describing social media influencers’ use of “bullshit” to maximize user engagement).

3. See RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS – AND HOW TO CURE IT* 21–24 (2022) (defining and describing the deleterious impact of “cheap speech”). See also Jackie Harrison, *Public Service Journalism*, in OXFORD RESEARCH ENCYCLOPEDIAS, COMMUNICATION *1, at *2–3 (Sept. 20, 2023), <https://doi.org/10.1093/acrefore/9780190228613.013.867> [https://perma.cc/46RR-B7KG] (defining and describing various types of public service journalism).

the face of oligarchic intimidation.⁴ Newsrooms cannot engage in sustained evidence-based reporting without sufficient financial wherewithal and stability.

However, the news industry's economic foundations have collapsed in recent years. U.S. newspaper advertising revenue is estimated to have plummeted 75% between 2008 and 2020.⁵ During that period, U.S. newsroom employment fell 26%, and some three thousand newspapers closed between 2005 and 2024.⁶ By the end of 2024, the U.S. will have lost a third of its newspapers.⁷

News industries in other advanced democracies have similarly suffered precipitous financial decline. In Western Europe, total annual newspaper advertising revenues fell by two-thirds, from some \$27 billion to \$9 billion, between 2000 to 2021.⁸ In Australia, journalism jobs declined by 25% between 2012 and 2017.⁹

In that regard, once-prominent regional and local newsrooms suffered particularly calamitous losses.¹⁰ The U.S., E.U., and Australia are now dotted with news deserts with little or no local coverage.¹¹ This decline in local

4. Nicholas Lemann, *Thinking the Unthinkable about the First Amendment*, DAEDALUS, Summer 2024, at 105, 113–14 (describing public service journalism's need for financial wherewithal and a professional work force).

5. See *Newspapers Fact Sheet*, PEW RSCH. CTR. (Nov. 10, 2023), <https://www.pewresearch.org/journalism/fact-sheet/newspapers> [https://perma.cc/67EF-DA5W] (charting the “[e]stimated advertising and circulation revenue of the newspaper industry”).

6. Mason Walker, *U.S. newsroom employment has fallen 26% since 2008*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/short-reads/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/> [https://perma.cc/TUL7-LSSK]; Clare Malone, *Is the Media Prepared for an Extinction-Level Event?*, NEW YORKER (Feb. 10, 2024), <https://newyorker.com/news/the-weekend-essay/is-the-media-prepared-for-an-extinction-level-event> [https://perma.cc/ZSG6-Q2NS].

7. Malone, *supra* note 6.

8. J.G. Navarro, *Newspaper advertising expenditure in Western Europe from 2000 to 2024*, STATISTA (June 8, 2023), <https://www.statista.com/statistics/799726/newspaper-ad-spend-in-western-europe> [https://perma.cc/VR32-5KP4].

9. Terry Flew & Derek Wilding, *The Turn to Regulation in Digital Communication: The ACCC's Digital Platforms Inquiry and Australian Media Policy*, 43 MEDIA, CULTURE & SOC'Y 48, 52 (2021) (citing Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, 5 Feb. 2018 (Report) (Austl.)).

10. See David Deacon, David Smith & Dominic Wring, *Why Mainstream News Media Still Matter*, 46 MEDIA, CULTURE & SOC'Y 874, 877 (2024) (discussing “calamitous” losses in advertising income and circulation revenue among local news media).

11. See ZACHARY METZGER, THE STATE OF LOCAL NEWS 8 (2024) (presenting an annual report overseen by Northwestern University's Medill Local News Initiative and finding that 206 U.S. counties now have no local news source and 1,561 U.S. counties have just one local news source); Sora Park, *Australia*, in REUTERS INST. DIGIT. NEWS REP. 2024, at 132 (Nic Newman et al. eds., 2024) (reporting that Australia now has 29 local government areas with no local news outlets); see generally CENTRE FOR MEDIA PLURALISM AND MEDIA FREEDOM, UNCOVERING NEWS DESERTS IN EUROPE (Sofia Verza et al. eds., 2024) (presenting a country-by-country survey

reporting weakens local governance by diminishing citizen engagement and letting public corruption go unchallenged.¹²

Indeed, only a handful of prestigious legacy news publishers, including The New York Times, Le Monde, The Guardian, and Die Zeit, have been able thus far to sidestep their losses in print circulation and website traffic.¹³ They have built on their quality reputations and brand loyalty to garner an international readership, sell digital subscriptions (albeit often at heavily discounted prices), and diversify product offerings to include podcasts, online games, and consumer goods.¹⁴ Yet even elite newsrooms have laid off journalists and reduced coverage.¹⁵

Lawmakers in leading democracies have expressed great concern over the news industry's economic distress. They have concluded, with good reason, that nothing short of government intervention can stave off what one commentator has morosely labelled the news media's looming "extinction-level event."¹⁶ The key question is what forms of government intervention would be most effective in lending critical support to politically independent public service journalism.

In recent years, lawmakers in several countries have adopted, or considered adopting, an intellectual property approach to bringing the news industry desperately needed revenue. That approach aims to shore up news

published by the European University Institute documenting news deserts across the European Union).

12. Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 493 (describing and citing studies on the deleterious impact of local news deserts).

13. See Deacon et al., *supra* note 10, at 878 (discussing how major newspaper publishers such as the *The New York Times*, *Le Monde*, *The Guardian*, and *Die Zeit* are "significant stories of financial recovery").

14. See Nic Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024, *supra* note 11, at 11, 22–24 (2024) (finding that "a large portion of digital subscriptions go to just a few upmarket national [news] brands" and that even those subscriptions are sold at heavily discounted prices); Michael Lipka & Elisa Shearer, *Audiences Are Declining for Traditional News Media in the U.S.—with Some Exceptions*, PEW RSCH. CTR. (Nov. 28, 2023), <https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions/> [<https://perma.cc/LB9L-T73Z>] (finding that The New York Times and The Wall Street Journal have enjoyed "substantial increases in digital subscriptions" even while facing declines in print subscriptions and website traffic).

15. See JILL ABRAMSON, *MERCHANTS OF TRUTH: INSIDE THE NEWS REVOLUTION* 191 (2019) (describing layoffs and reduced coverage at *The New York Times*); Alexander Nazaryan, *Over Tacos and Beer, Journalists Mourn the Loss of their Jobs*, N.Y. TIMES, Feb. 9, 2024, <https://www.nytimes.com/2024/02/06/style/journalism-media-layoffs.html> [<https://perma.cc/6CU9-BZMV>] (reporting on layoffs at *Bloomberg*, *The Washington Post*, *The Los Angeles Times*, and *The Wall Street Journal*); Paul Starobin, *Martin Baron's Plan to Save the Washington Post*, NEW REPUBLIC, Dec. 16, 2012, <https://newrepublic.com/article/111173/martin-barons-plan-save-washington-post-invest-metro-coverage> [<https://perma.cc/85KK-XZXG>] (describing planned layoffs and reduced international coverage at the *Boston Globe* and *Washington Post*).

16. Malone, *supra* note 6.

publishers' ability to recover licensing income by enforcing intellectual property rights in original news content. In particular, lawmakers have targeted online search and social media platforms' unlicensed display and distribution of news story headlines and extracts as a primary cause of news publishers' woes. They have sought to obligate online platforms—principally Meta and Google—to negotiate with news publishers for licenses that would require that the platforms pay news publishers for displaying and distributing such news content.

Yet, as this Essay highlights, bolstering news publishers' intellectual property rights has proven to be a fatally ineffective means of underwriting public service journalism. Basically, news publishers are in an exceedingly weak bargaining position vis-à-vis the online platforms. Google, Meta, and other online platforms have become critical gateways for readers to access news sites.¹⁷ In turn, news publishers have come to be heavily reliant on the platforms for reader traffic. By contrast, news content comprises only a fraction of the platforms' business. Moreover, even if platforms reap some benefit from providing their users access to news, they can typically avoid displaying news stories from any given publisher while still satisfying their users' general demand for news of the day. Indeed, Meta and Google seem poised to dispense with the display and distribution of legacy news media content altogether.

The intellectual property approach is also off-target. The news industry does not face economic calamity because the platforms display headlines and extracts of news content without due compensation. Indeed, the display of links, headlines, and short story ledes spurs at least some readers to click through to the news publisher's website.¹⁸ Rather, the industry's economic collapse stems primarily from reasons unrelated to unlicensed uses of news publishers' intellectual property. These range from the major platforms' overwhelming dominance in the market for digital advertising to social media engagement algorithms that favor emotional outrage, conspiracy theories, short-form video, friends' comments, and seemingly "authentic" influencers over professional, evidence-based journalism.¹⁹

17. See Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024, *supra* note 11, at 21 (reporting that only 22% of survey respondents who recently used online news accessed the news directly from news publisher websites, with the remainder accessing news through social media (29%), search engines (25%), news aggregators (8%), mobile alerts (9%), or email (5%)).

18. See Jason M.T. Roos, Carl F. Mela & Ron Shachar, *The Effect of Links and Excerpts on Internet News Consumption*, 57 J. MKTG. RSCH. 395, 417–18 (2020) (proposing a new perspective on the relationships between online news publishers and their interactive behavior).

19. See Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 475, 479–81 (discussing Google and Meta's dominance over digital advertising); Neil Netanel, *Applying Militant Democracy to Defend Against Social Media Harms*, CARDOZO L. REV. 489, 507–10 (2023)

With these developments in mind, Part I of this Essay examines the enactment, regulatory framework, and ultimate failure of the stand-alone IP right that the European Union accorded to news publishers with the object of providing newsrooms with desperately needed revenue.²⁰ Part II then evaluates a hybrid IP right-competition law model subsequently adopted in Australia, Canada, the U.K., and some EU countries.²¹ The hybrid model, which has been proposed in the United States as well, provides for mandatory arbitration to compel platforms to compensate news publishers for displaying news content.²² As Part III describes, the hybrid model initially succeeded in bringing revenue to newsrooms but has recently frayed. Part IV provides some explanation for why the intellectual property and hybrid models have failed to save public service journalism. It surveys the principal causes for the news industry's financial crisis and ongoing challenges. Finally, Part V enumerates alternative proposals for government intervention to underwrite public service journalism and assist it in meeting the challenges it faces.

I. The EU Press Publishers' Right

Legislative efforts to save the news industry reached initial fruition in April 2019, when the European Union accorded news publishers an intellectual property right in the online display of news content. Article 15 of the EU's Directive on Copyright in the Digital Single Market (the CDSM

[hereinafter Netanel, *Applying Militant Democracy*] (discussing how social media amplifies and propagates disinformation); NIC NEWMAN & FEDERICA CHERUBINI, THE REUTERS INST. FOR THE STUDY OF JOURNALISM, JOURNALISM AND TECH. TRENDS AND PREDICTIONS 2025, at 22–24, 28 (2025) (reporting on influencers and news fatigue); GALEN STOCKING, LUXUAN WANG, MICHAEL LIPKA, KATERINA EVA MATSA, REGINA WIDJAYA, EMILY TOMASIK & JACOB LIEDKE, AMERICA'S NEWS INFLUENCERS 19 (2024), <https://www.pewresearch.org/journalism/2024/11/18/americas-news-influencers> [<https://perma.cc/5TM6-LKKT>] (discussing the appeal of news influencers); EMILY HUND, THE INFLUENCER INDUSTRY: THE QUEST FOR AUTHENTICITY ON SOCIAL MEDIA 168–70 (2023) (describing how “authenticity” is a commodity, constructed by the influencer industry).

20. See *infra* Part I.

21. Australia became the first country to adopt that hybrid model when its Parliament enacted the Treasury Laws Amendment. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) (Austl.). Canada followed suit in 2023. Online News Act, S.C. 2023, c. 23 (Can.). In the U.K., the Digital Markets, Competition, and Consumers Act was passed. Digital Markets, Competition and Consumers Act 2024, c. 13 (UK). This empowered the U.K. Competition and Markets Authority to issue and enforce a similar “code of conduct” that would require online platforms to pay news publishers “fair and reasonable” compensation for displaying news story content. OFCOM & CMA, PLATFORMS AND CONTENT PROVIDERS, INCLUDING NEWS PUBLISHERS 4 (2021) [hereinafter U.K. Advice], https://assets.publishing.service.gov.uk/media/6273af6be90e0746c882c361/Platforms_publishers_advice_A.pdf [<https://perma.cc/3ACL-8U46>]. For discussion of adoption of aspects of the hybrid model in EU countries see *infra* subpart II(B).

22. Legislation adopting the hybrid model has been proposed in Congress and in some states. *E.g.*, Journalism Competition and Preservation Act of 2023, S. 1094, 118th Cong. (2024); Assemb. B. 886, 2023–2024 Leg., Reg. Sess. (Cal. 2023); S.B. 3591, 103d Gen. Assemb., Reg. Sess. (Ill. 2024).

Directive) provides that EU Member States must grant European news publishers an exclusive right vis-à-vis “information society service providers” to reproduce and make available to the public copies and extracts of “press publications” online.²³ The CDSM Directive defines “press publications” as news stories published in any media as part of a newspaper or magazine under the “initiative, editorial responsibility and control of a service provider.”²⁴

Under that intellectual property framework, platforms that wish to display copies or extracts of news articles must negotiate with news publishers for a license to do so. At the same time, to avoid unduly restricting the free flow of information, the EU press publishers’ right does not extend to the facts reported in a news story, or to displaying hyperlinks or “very short extracts” of a news story.²⁵

The CDSM Directive’s Recitals set out the rationale and purpose of the press publishers’ right. Recital 54 first highlights the vital role of the press in democratic governance: “A free and pluralist press is essential to ensure quality journalism and citizens’ access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society.”²⁶ The Recital then targets online services as a cause for the news publishers’ financial woes:

The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments.²⁷

23. Council Directive 2019/790, art. 15(1), 2019 O.J. (L 130) 92, 118 [hereinafter “CDSM Directive”].

24. *Id.* at art. 2(4).

25. *Id.* at recital 58, art. 15(1). The “very short extracts” limitation has been interpreted inconsistently in Member States’ implementation of Article 15. See Tito Rendas, *Taking freedom of information seriously: the “very short extracts” limitation in Article 15 CDSM Directive and how not to implement it – Part 1*, KLUWER COPYRIGHT BLOG (Mar. 30, 2022), <http://copyrightblog.kluweriplaw.com/2022/03/30/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-1> [https://perma.cc/SYS6-RJC8]; Tito Rendas, *Taking freedom of information seriously: the “very short extracts” limitation in Article 15 CDSM Directive and how not to implement it – Part 2*, KLUWER COPYRIGHT BLOG (Mar. 31, 2022), <http://copyrightblog.kluweriplaw.com/2022/03/31/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-2> [https://perma.cc/B5LD-BX7G].

26. CDSM Directive, *supra* note 23, at recital 54.

27. *Id.*

The European Commission Staff's Impact Assessment accompanying the 2016 proposal for the CDSM Directive pointed to the dramatic multi-year decline in print circulation of daily newspapers and in news publishers' total revenue.²⁸ The Impact Assessment noted that digital audiences of newspapers and magazines had been growing exponentially, and that 42% of EU Internet users looked to newspapers' and magazines' websites and apps as their primary means to access those publications online.²⁹ Nonetheless, as the EC Staff reported, publishers' digital revenues had not come close to making up for the decline of print: "Between 2010 and 2014, news publishers' total print revenues decreased by €13.45 billion and digital revenues rose by €3.98 billion: a net revenue loss of €9.47 billion (–13%)."³⁰

The Impact Assessment highlighted that social media, online news aggregators like Google News, and search engines had become the primary gateway to online news in the EU.³¹ "The relation between these online services and press publishers," the Assessment concluded, "is complex."³² On one hand, the services are complementary to the newspapers. "[T]hey increase the visibility of press content and bring new traffic—and thus advertising revenues—to newspaper websites."³³ But at the same time, the services that display headlines and extracts from news stories often act as substitutes for accessing the newspaper website.³⁴ Nearly half of EU consumers, the Assessment concluded, read news extracts on the platform websites without clicking through to access the article on the newspaper page.³⁵ As the Assessment maintained, that substitution effect substantially "erodes [press publisher] advertising revenues."³⁶

Press publishers, the Staff added, had not been able to demand that online services obtain—and pay for—publishers' permission to feature copies and extracts of news content.³⁷ The primary reason for this inability, the Staff opined, was that press publishers did not own the copyright in their news stories under applicable copyright law in the EU member states. Rather, press publishers stood only as licensees of each of the many journalists, photographers, and other contributors to news story content, thus rendering

28. *Commission Staff Working Document, Impact Assessment on the Modernization of EU Copyright Rules*, at 156, SWD (2016), 301 final (Sept. 14, 2016) [hereinafter *EC Impact Assessment*].

29. *Id.*

30. *Id.*

31. *Id.* at 157.

32. *Id.*

33. *Id.*

34. *See id.* (discussing how website visitors can read excerpts from newspapers without ever navigating to the newspaper website itself).

35. *Id.*

36. *Id.*

37. *Id.*

copyright enforcement against mass infringement burdensome and time-consuming.³⁸ Further, rulings of the Court of Justice of the European Union left unclear whether publisher-licensees could insist that online platform pay them for displaying news stories—or whether only the journalists and photographers who create the story content may do so.³⁹ The solution, the Staff concluded, was to grant press publishers their own free-standing neighboring right, akin to that enjoyed by broadcasters, film studios, and record labels under European law.⁴⁰ That intellectual property right would stand independently from any copyright in news content and could be used by press publishers to require digital platforms to obtain publisher permission for online uses of news content.⁴¹

As the EC Staff was well-aware of, similar press publishers' rights previously enacted in Germany and Spain had spectacularly failed to benefit news media.⁴² In Germany, most news publishers acceded to Google's demand that they grant Google a royalty-free license to display extracts of their news articles, lest Google remove them from Google News altogether.⁴³ In Spain, where the new law provided for mandatory remuneration to news publishers, Google simply closed its entire Google News site to avoid that obligation.⁴⁴

News publishers' experience in Germany and Spain presented a cautionary tale for the EC Staff. Yet, the EC Staff recommended EU adoption of a press publishers' right, nonetheless. In so doing, the Staff surmised that the EU would be too big a market for online platforms to close their services or to insist on royalty-free licenses.⁴⁵ Indeed, such a right, the Staff opined, would give press publishers room to negotiate various types of agreements with platforms and thus to develop new business models in a flexible way.⁴⁶

38. *Id.* at 166.

39. *See id.* at 158–60 (describing the “legal uncertainty” surrounding publishers' rights to receive compensation under EU copyright laws).

40. *See id.* at 166–70 (discussing the proposed solution and the likely impacts on relevant groups). In EU law, film studios and record labels are referred to, respectively, as film and phonogram producers.

41. *See id.* at 166, 168–69, 173 (“[T]he question whether certain uses, including hyperlinking and browsing, are today copyright relevant under EU law, would not be affected by this option.”). However, the press publishers' right may not be asserted against journalists or other rights holders who have independently licensed an information services provider to distribute a news story. *See* CDSM Directive, *supra* note 23, at art. 15(1)–(2).

42. *EC Impact Assessment*, *supra* note 28, at 161.

43. *See* Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 502–03 (describing failure of German law).

44. *Id.* at 503 (describing failure of Spanish law to bring remuneration to news publishers).

45. *See EC Impact Assessment*, *supra* note 28, at 161–62, 167–68 (describing the Staff's conclusion).

46. *Id.* at 167.

II. The Hybrid IP-Competition Law Model

A. *Outside the EU*

Since the EU press publishers' right was adopted, Australia, Canada, the U.K., and the U.S. have considered whether to follow suit. Yet, while each has adopted or considered regulatory action to compel online platforms to compensate news media, none have assumed that news publishers can simply rely on intellectual property rights in news content to require platforms to pay them meaningful remuneration for displaying and distributing news story links and extracts. Indeed, in implementing the CDSM Directive, even some EU Member States have veered substantially from the Directive's reliance on sustaining the news media by providing press publishers a *sui generis* intellectual property right. Contrary to the EU and the EC Staff Impact Assessment, country after country has concluded that such a neighboring right would fail to accord press publishers sufficient bargaining power to compel platforms to pay them meaningful compensation for displaying news content.

The alternative model adopted by those countries thus centers on addressing the fundamental imbalance in bargaining power between large online platforms and news publishers.⁴⁷ It presupposes that news, as a whole, is one of the key reasons why consumers go online and thus that the availability of news content on large platforms like Google and Meta provides those platforms with a significant benefit. But it recognizes that each individual news publisher provides but a small fraction of that benefit and, indeed, is largely substitutable from the platforms' perspective. By contrast, news publishers are heavily dependent on large platforms for traffic and financial viability.

As the U.S. Copyright Office opined in a June 2022 report recommending against enacting a press publishers' right in the U.S., such "ancillary copyright protections . . . would likely be ineffective so long as publishers depend on news aggregators for discoverability."⁴⁸ As the Report states: "News aggregators, including search engines and social media platforms, have now become the preferred or initial source of news for a majority of news consumers."⁴⁹ In that regard, "[n]ews aggregators drive a significant amount of traffic to news sites," even if the aggregation of headlines and news story extracts might also substitute for visiting the news

47. *E.g.*, U.K. Advice, *supra* note 21, at 22–25.

48. U.S. COPYRIGHT OFF., COPYRIGHT PROTECTIONS FOR PRESS PUBLISHERS, REP. OF THE REG. OF COPYRIGHTS 2 (2022), <https://copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf> [<https://perma.cc/XZ64-YPQH>].

49. *Id.* at 14.

site for some readers in some instances.⁵⁰ Studies from other countries come to similar conclusions.⁵¹

To address that fundamental imbalance in bargaining power, the hybrid model grounds news publishers' rights in a combination of competition law and intellectual property concepts. While there are some differences in particulars from country to country, the regulatory frameworks generally (1) obligate platforms to negotiate with news media to compensate news publishers for the value that the platforms obtain, directly or indirectly, from displaying news content;⁵² (2) require platforms to provide press publishers with all information needed to assess the value of platform use of the press publisher content;⁵³ (3) allow news publishers to bargain collectively;⁵⁴ and (4) provide for mandatory arbitration before a government regulator should the parties fail to reach agreement.⁵⁵

Yet, while couched as competition law measures, the hybrid regimes do not aim simply to offset the platforms' market power and the resultant inequality in bargaining power between the platforms and news publishers. Rather, they effectively require the major digital platforms to subsidize news publishers' production of original news in amounts that probably far exceed the net benefit to platforms and net cost (if any) to news publishers from platform access to news content.⁵⁶ As such, the regimes require platforms to pay remuneration to news publishers in excess of a fair market value amount that would likely be the result of a commercial agreement between entities of relatively equal bargaining power taking into account the costs and benefits that accrue to each from platform access to news content.

For example, the proposed U.S. legislation, aptly titled the "Journalism Competition and Preservation Act," provides that platform compensation to news publishers should account for the publishers' investment in producing original news and related content, including the number of journalists they

50. *Id.* at 14–15.

51. See, e.g., AUSTRAL. COMPETITION AND CONSUMER COMM'N, DIGIT. PLATFORMS INQUIRY FINAL REPORT 227, 254 (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [<https://perma.cc/6EDK-DQL3>]; U.K. Advice, *supra* note 21, at 15, 22.

52. See, e.g., Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth). §§ 52ZF–52ZG (Austl.); Online News Act, S.C. 2023, c. 23, art. 21 (Can.); U.K. Advice, *supra* note 21, at 9; S. 1094, 118th Cong. § 3(a)(1)(A) (2023); Assemb. B. 886, 2023–2024 Leg., Reg. Sess. §§ 3273.81(a)–(b) (Cal. 2023).

53. See, e.g., Treasury Laws Amendment § 52ZT; S.C. 2023, c. 23, art. 7(2); U.K. Advice, *supra* note 21, at 38; S. 1094 § 4(d)(5)(A); Assemb. B. 886 § 3273.84(f)(1)(a)(i).

54. See, e.g., Treasury Laws Amendment § 52ZD(4); S.C. 2023, c. 23, art. 18; U.K. Advice, *supra* note 21, at 60; S. 1094 § 3(a)(1)(C); Assemb. B. 886 § 3273.80.

55. See, e.g., Treasury Laws Amendment § 52ZS; S.C. 2023, c. 23, art. 19(3); U.K. Advice, *supra* note 21, at 9–10; S. 1094 § 4(a)(1); Assemb. B. 886 § 3273.81.

56. See *infra* notes 57–59 and accompanying text.

employ.⁵⁷ Moreover, compensation shall not be offset by any value conferred on the news publishers by the platform for aggregating or distributing their news content. Similarly, Canada's Online News Act provides that the arbitration panel must dismiss any compensation offer that "would be highly likely to result in serious detriment to the provision of news content to persons in Canada" or "is inconsistent with the purposes of enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability."⁵⁸ Likewise, Australia's law requires that the arbitrator reject offers that would be "highly likely to result in serious detriment" to the "provision of covered news content in Australia."⁵⁹

At the same time, despite apparently requiring platforms to subsidize news production even in excess of whatever benefit the platform reaps from featuring news content, the hybrid model still retains the basic concept that platforms have no obligation to compensate news publishers unless they misappropriate the publishers' intellectual property by displaying news content without news publisher permission. For example, the U.K. Competition and Markets Authority Advice regarding a proposed code of conduct for platforms and publishers states that the platforms should be required to pay fair and reasonable compensation only "for use of content . . . that is currently covered by U.K. copyright law."⁶⁰ Other regulatory regimes, including Australia's Mandatory Bargaining Code, Canada's Online News Act, and the proposed Journalism Competition and Preservation Act in the U.S., require platform compensation for any display or distribution of news content, including very short extracts and providing links to news stories.⁶¹

57. The JCPA provides that a joint negotiation entity representing news publishers may consider its members' respective spending on news journalists in determining how to distribute remuneration among its members. S. 1094 § 4(d)(5)(F)(ii). The JCPA further provides that news publishers that receive funds pursuant to an agreement or arbitration under the Act must provide to the Federal Trade Commission an annual report specifying the publisher's use of those funds "during the prior year to support ongoing and future operations to maintain or enhance the production and distribution of news or information that concerns local, regional, national, or international matters of public interest[.]" *Id.* § 6(c)(1). The report must include "a good-faith estimate of the amount of funds that went to news journalists employed for an average of not fewer than 20 hours per week." *Id.*

58. Online News Act, S.C. 2023, c. 23, art. 39 (Can).

59. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Cth) § 52ZX(7) (Austl.).

60. U.K. Advice, *supra* note 21, at 50. The Advice reasons that "it is only likely to be considered fair and reasonable for content providers to be paid compensation for content over which they have a property right." *Id.* at 50–51.

61. Treasury Laws Amendment, §§ 52B, 52C (applying the law's provisions to platforms that make news content available in any way, including through linking and any display of extracts); S.C. 2023, c.23, art. 2(2) (defining "making available news content"); S. 1094 §§ 2(3), 4(a)(1) (providing any large digital platform that displays, provides, or distributes digital news content to users would be subject to mandatory arbitration under the Act).

As we have seen, the EU publishers' right does not extend to displays of links or very short extracts of news content, leaving platforms the option of displaying short, bare listings of news articles to avoid infringing the publishers' right.⁶² The hybrid approach aims to remedy that limitation by providing that displays of very short extracts and links are sufficient to give rise to an obligation to pay "fair" compensation to the news publishers. But, following a broadly defined IP approach, even those regimes require at least the display or distribution of some minimal portion of news content to impose liability on the platform. Significantly, platforms that do not extract or link to news content at all are exempt from obligation under those regimes, just like under the EU publishers' right.

B. Within the EU

As outside the EU, it has become evident to EU Member States that merely implementing the Article 15 press publishers' right without some competition law component is inadequate to afford press publishers with sufficient bargaining power to demand compensation for major platforms' reproduction and display of the publishers' news content.⁶³ Roughly half of EU Member States have already adopted strategies to attempt to level the playing field. Enacted measures include (1) imposing on platforms a duty of transparent, good-faith bargaining,⁶⁴ (2) enabling publishers to engage in collective licensing,⁶⁵ (3) enumerating factors (e.g., the number of journalists that a publisher employs) that must be taken into account in determining platform remuneration,⁶⁶ and (4) providing for mandatory arbitration before an administrative agency in the event the parties cannot agree on fair

62. CDSM Directive, *supra* note 23, at art. 15(1).

63. See generally Ula Furgal, *The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings*, 72 GRUR International 650 (2023) (arguing that Member States' competition-based implementation demonstrates the failings of the narrow intellectual property approach).

64. See CHRISTINA ANGELOPOULOS, ARTICLES 15 & 17 OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET – COMPARATIVE NATIONAL IMPLEMENTATION REPORT 33 (2023), <https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-Dr-Angelopoulos.pdf> [<https://perma.cc/X77G-FYA4>] (discussing, among other provisions, Dutch "transparency obligations" and a Belgian requirement to "negotiate in good faith").

65. See Anna Despotidou, Implementing Article 15 of the CDSMD into the Greek legal order: "creative" or further confirmation of the EU press market's fragmentation, KLUWER COPYRIGHT BLOG (Mar. 8, 2023), <https://copyrightblog.kluweriplaw.com/2023/03/08/implementing-article-15-of-the-cdsmd-into-the-greek-legal-order-creative-or-further-confirmation-of-the-eu-press-markets-fragmentation> [<https://perma.cc/N7KL-W7AC>] (describing the Greek system for collective management of copyright).

66. Eleonora Rosati, *BREAKING: First CJEU referral on press publishers' related right (Italian-style)*, THE IPKAT (Dec. 13, 2023), <https://ipkitten.blogspot.com/2023/12/breaking-first-cjeu-referral-on-press.html> [<https://perma.cc/KK9W-88HB>] (describing how Italian regulations implementing Article 15 determine fair compensation owed to press publishers through enumerated factors like the "market share of the press publisher and the number of journalists employed").

compensation.⁶⁷ Of note, those Member States have sought effectively to mandate platform compensation to press publishers even though, as suggested by two recent referrals to the Court of Justice of the European Union, such “gold-plating” deviations from the bare intellectual property approach set out in Article 15 might be incompatible with the CDSM Directive and with basic EU principles of freedom of contract.⁶⁸

Meanwhile, news publishers also lobbied for a right to mandatory remuneration in EU legislation, given the failure of their CDSM Directive press publishers right to generate meaningful licensing revenue. The last round of negotiations over the EU Digital Markets Act, which took place on March 24, 2022, was dominated by a proposed amendment, backed by news publishers and supported by the European Commission, that would have required search engines and social media to pay press publishers “fair” remuneration, pursuant to uniform tariffs, for “press snippets displayed in search results or social media posts.”⁶⁹ Under the proposal, those platforms would have been obligated to negotiate in good faith with the press publishers at the publishers’ request. If a platform failed to do so, publishers could turn to an independent arbitration mechanism and the Commission would monitor compliance with the rule.⁷⁰ Ultimately, however, the Commission and news industry failed in their effort to incorporate a competition law-based framework obligating platforms to pay for displaying news content. The Digital Markets Act was adopted without the European Commission’s proposed amendment for “fair” remuneration to press publishers.⁷¹

67. See, e.g., Czech Law of 8 December 2022 Amending Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright, and on the Amendment of Certain Laws (Copyright Act), Section 87b(11) (providing for mandatory arbitration under Czech law); Lutz Riede, Oliver Talhoff, Nicolai Fornoff & Verena Kirchmair, *Transposition of press publishers’ rights into national law: A story of gold-plating?*, FRESHFIELDS (Nov. 27, 2024, 3:57 AM), <https://technologyquotient.freshfields.com/post/102jp7t/transposition-of-press-publishers-rights-into-national-law-a-story-of-gold-plat> [https://perma.cc/CCX3-MP4U]; ANGELOPOULOS, *id.* at 32-33 (describing mandatory arbitration provisions in Italian and Belgian laws); (describing mandatory arbitration provisions in Belgium, Greece, Italy, and the Czech Republic); Despotidou, *supra* note 65 (describing mandatory arbitration under Greek law).

68. Riede, Talhoff, Fornoff & Kirchmair, *supra* note 67 (describing referrals to the CJEU from national courts in Italy and Belgium regarding implementing legislation and supplemental regulation in those countries).

69. *Digital Markets Act: Dispute over press publishers shows what’s wrong with EU Legislation*, FELIX REDA (Mar. 31, 2022), <https://felixreda.eu/2022/04/digital-markets-act-publishers-ancillary-copyright> [https://perma.cc/5CTV-X6J5]; Luca Bertuzzi, *Publishers’ last-minute attempt to secure ‘fair’ remuneration in the Digital Markets Act*, EURACTIV (Mar. 24, 2022), <https://www.euractiv.com/section/digital/news/publishers-last-minute-attempt-to-secure-fair-remuneration-in-the-digital-markets-act> [https://perma.cc/DHG4-J2BW].

70. Bertuzzi, *supra* note 69.

71. See generally Commission Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 Sept. 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) (detailing the

III. The Rise and Fall of the Hybrid Model

A. *Seeming Initial Success*

At first, the incorporation of competition law precepts seemingly succeeded in inducing platforms to compensate news publishers. France and Australia provide key examples.

1. *France.*—France implemented Article 15 into national law in July 2019, when it enacted a free-standing news publishers’ and press agencies’ neighboring rights law.⁷² The French law entered into force in October 2019.⁷³ As provided in CDSM Article 15, the French law provides news publishers and press agencies with a licensable neighboring right in the display, reproduction, and adaptation of news content.⁷⁴

Soon after the French law was enacted, Google announced that, as a default rule, it would display only bare listings of its French news search results. By displaying only bare listings, Google would fall within the “very short extracts” exception to the press publishers’ right, thus obviating any need for Google to procure licenses from news organizations for its news listings.⁷⁵ Further, Google announced that any news publisher that wished to have Google display a longer extract, such as a story lede and/or image, would have to grant Google a royalty-free license to do so.⁷⁶

Ultimately, France adopted a competition law approach to remedy the ineffectiveness of the new press publishers’ right given news publishers’ lack of bargaining power versus the major platforms. In November 2019, an alliance representing some 300 French news publishers and the Agence France-Press “launched complaints with the French Competition Authority (AdLC), asserting that Google had abused its dominant market position by refusing to negotiate” for a license to display extracts of news content.⁷⁷ In April 2020, the French Competition Authority issued an interim ruling

agreement between the European Parliament and the European Council over the Digital Markets Act) (EU).

72. 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 [Law No. 2019-775 of July 24, 2019, tending to create a neighboring right for the benefit of press agencies and press publishers], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2019.

73. *Id.*

74. *Id.* at art. L. 218-2.

75. Laura Kayali, *Google refuses to pay publishers in France*, POLITICO (Sept. 25, 2019, 1:30 PM), <https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google/> [https://perma.cc/FR79-JTBT].

76. Sam Schechner, *Google Refuses to Pay for News Links in France*, WALL ST. J. (Sept. 25, 2019, 7:24 AM), <https://www.wsj.com/articles/google-refuses-to-pay-for-news-links-in-france-11569409735> [https://perma.cc/56BA-BKPK].

77. Furgal, *supra* note 63, at 656.

holding that Google's take-it-or-leave-it strategy indeed amounted to an unlawful abuse of its dominant market position and ordering Google to negotiate transparently and in good faith for the remuneration of the publishers and press agencies under the Authority's supervision.⁷⁸

The Competition Authority ruling prompted Google to enter into a framework agreement with the news industry alliance. Under the framework agreement, signed in January 2021, Google committed to negotiate with alliance members for licenses to display extracts from members' news stories in accordance with the Authority's order.⁷⁹ The Competition Authority approved the framework agreement and suspended its ruling that Google had unlawfully abused its dominant market position.

However, that initial success in using competition law to compel Google to negotiate in good faith appears to have been short-lived. In March 2024, the Competition Authority held that Google had failed to abide by its commitments to negotiate transparently and fairly with the news publishers.⁸⁰ In particular, the Authority found that Google violated the good faith negotiation requirements through its opaque methodology, inadequate disclosure of calculation methods (particularly for indirect revenues), discriminatory treatment among publishers, and failure to update or properly adjust remuneration in the majority of publisher contracts.⁸¹ The Competition Authority fined Google €250 million for breaching the framework agreement.⁸²

78. Thibault Larger & Laura Kayali, *French publishers win decisive battle against Google*, POLITICO (Apr. 9, 2020, 4:46 PM), <https://www.politico.eu/article/french-publishers-win-decisive-battle-against-google> [https://perma.cc/2J7A-5ADF]; Autorité de la concurrence [French Competition Authority], Decision No. 20-MC-01 (Apr. 9, 2020) (Fr.), <https://www.autoritedelaconcurrence.fr/en/decision/requests-interim-measures-syndicat-des-editeurs-de-la-presse-magazine-alliance-de-la> [https://perma.cc/RV2T-UDW2].

79. Natasha Lomas, *Google inks agreement in France on paying publishers for news reuse*, TECHCRUNCH (Jan. 21, 2021, 4:18 AM), <https://techcrunch.com/2021/01/21/google-inks-agreement-in-france-on-paying-publishers-for-news-reuse> [https://perma.cc/F9L4-CWU5].

80. Autorité de la concurrence [French Competition Authority], Decision No. 24-D-03 (Mar. 15, 2024), <https://www.autoritedelaconcurrence.fr/fr/decision/relative-au-respect-des-engagements-figurant-dans-la-decision-de-l'autorite-de-la-0> [https://perma.cc/XBM7-8PKE]; see also Press Release, Autorité de la concurrence, Related Rights: The Autorité Fines Google €250 Million for Non-Compliance with Some of Its Commitments Made in June 2022 (Mar. 20, 2024), <https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-fines-google-eu250-million-non-compliance-some-its> [https://perma.cc/3W77-6TH9].

81. Autorité de la concurrence, Press Release, *supra* note 80.

82. *French regulator fines Google €250 million*, LE MONDE (Mar. 20, 2024, 9:11 AM), https://www.lemonde.fr/en/economy/article/2024/03/20/french-regulator-fines-google-250-million_6636843_19.html [https://perma.cc/89K3-QSD5]. Google has also entered into interim agreements with collective licensing organizations representing news organizations in Denmark and Germany. It is unclear whether they will lead to final agreements or whether the publishers' banding together in collective bargaining will be sufficient to successfully demand long-term meaningful remuneration for the publishers. See *Google to pay German publishers 3.2 million euros per year*

2. *Australia*.—Like the EU, Australia has sought to enable news media to insist upon a meaningful share of the revenues that platforms generate from displaying news content. And parallel to the EU’s stated goal of underwriting a “free and pluralist press,” Australia’s legislation aims to “help sustain public interest journalism in Australia.”⁸³ But, as we have seen, Australia’s regulatory framework aspires to achieve that objective through principles of competition law, not a stand-alone intellectual property right.

The Australian Parliament enacted the News Media and Digital Platforms Mandatory Bargaining Code in February 2021. The legislation “seeks to address a bargaining power imbalance that exists between digital platforms and Australian news businesses.”⁸⁴ The law subjects digital platforms and news media to a mandatory bargaining regime under Australia’s Competition and Consumer Act 2010.⁸⁵ The law requires that the parties negotiate in good faith for a voluntary agreement for sharing revenue generated by the platforms’ display of Australian news content.⁸⁶ If the platforms and news publishers fail to come to terms, affected parties may bring the matter to compulsory arbitration under the auspices of the Australian Communications and Media Authority.⁸⁷

Australia’s mandatory bargaining code arguably has less teeth as enacted than as originally proposed. Facebook reacted to the proposed legislation by removing all Australian news content from its platform.⁸⁸ In response, the Australian government revised the proposed legislation to provide that the Australian Competition and Consumer Commission may

on interim basis, REUTERS (Oct. 23, 2023, 9:54 AM) (describing German agreement), <https://www.reuters.com/technology/google-pay-german-publishers-32-mln-eur-per-year-interim-basis-2023-10-12> [<https://perma.cc/8PPB-ATSD>]; see Karen Ronde, *DPCMO and Google enter into a license agreement*, DPCMO (May 9, 2023) (describing Danish agreement), <https://dpcmo.dk/dpcmo-and-google-enter-into-a-license-agreement> [<https://perma.cc/D45G-KZYF>]; Austin Ahlman, *Citing Existential Threat, Danish Publishers Band Together Against Platform Giants*, CTR. FOR JOURNALISM & LIBERTY (Nov. 27, 2023) (describing creation and challenges of news publisher collective licensing organization in Denmark), <https://www.journalismliberty.org/publications/citing-existential-threat-danish-publishers-band-together-against-platform-giants> [<https://perma.cc/798Z-ZPWP>].

83. CDSM Directive, *supra* note 23, at recital 54; THE TREASURY, NEWS MEDIA AND DIGIT. PLATFORMS MANDATORY BARGAINING CODE: THE CODE’S FIRST YEAR OF OPERATION 5 (Nov. 2022) (Austl.) [hereinafter Treasury Review Consultation Paper].

84. Department of Parliamentary Services (Cth), *Bills Digest* (Digest No. 48, 2020–21, 15 Feb. 2021) 4. The Code came into effect on March 3, 2021.

85. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code 2021) Bill 2021 (Cth) §§ 52ZF–52ZI (Austl.).

86. *Id.* §§ 52ZD–52ZH.

87. *Id.* §§ 52ZK–52ZL.

88. Kelly Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations between News Media and Digital Platforms over Payments for Content*, GLOB. LEGAL MONITOR (Feb. 26, 2021), <https://www.loc.gov/law/foreign-news/article/australia-new-legislation-establishes-code-of-conduct-for-negotiations-between-news-media-and-digital-platforms-over-payments-for-content/> [<https://perma.cc/KUV8-C6QH>].

exempt from mandatory bargaining those digital platforms that reach voluntary commercial agreements with news businesses outside the mandatory code.⁸⁹ Provisions that would have required the platforms to share with news publishers information about the platforms' algorithms and revenue from news content were also pared back.⁹⁰

To qualify for the exemption, Google and Facebook each entered into commercial agreements to feature content from many Australian news sites, thus evading the mandatory bargaining and arbitration requirements of the Code.⁹¹ In the first year after the Code went into effect, the digital platforms reportedly paid the equivalent of about \$150 million (U.S. dollars) to Australian news organizations, including, among others, Rupert Murdoch's News Corp., the Nine Entertainment media empire, the Guardian's Australia newsroom, 160 regional newspapers whom the government gave permission to bargain collectively, and the public Australian Broadcasting Corporation.⁹² The commercial agreements resulted in considerable, and generally welcome, financial support for Australian news businesses. But given confidentiality provisions, there is virtually no information available regarding how much each news producer has been paid, what is the basis for determining the amount of payment, or whether the news organizations have allocated the funds to public service journalism or merely to increasing executive salaries or shareholder dividends.⁹³

B. *Downhill from Here?*

1. *Undoing of Legislation.*—Whatever the initial successes in France and Australia in bringing news organizations licensing revenue, the platforms have since made clear that they will now staunchly resist any regulatory effort to compel them to compensate news publishers. In Canada, Meta removed all

89. *Id.*

90. See BILL GRUESKIN, ONE YEAR OF THE NEWS MEDIA BARGAINING CODE 6 (Judith Neilson Inst. for Journalism and Ideas 2022) 6 (noting that by threatening to deplatform Australian news content, Google and Facebook enacted concessions from Australia's lawmakers regarding obligations to share information about their algorithms and data).

91. *Facebook to pay News Corp for content in Australia*, BBC NEWS (March 16, 2021), <https://www.bbc.com/news/world-australia-56410335> [<https://perma.cc/54JR-9YHP>]; Alex Hern, *News Corp agrees Deal with Google over payments for journalism*, THE GUARDIAN (Feb. 17, 2021, 12:11 PM), <https://www.theguardian.com/media/2021/feb/17/news-corp-agrees-deal-with-google-over-payments-for-journalism> [<https://perma.cc/L5PK-WK5K>]; Amanda Meade, *Nine agrees to join Google News Showcase in Australia for reported \$30m a year*, THE GUARDIAN (Feb. 17, 2021, 9:05 PM), <https://www.theguardian.com/media/2021/feb/17/nine-agrees-to-join-google-news-showcase-in-australia-for-reported-30m-a-year> [<https://perma.cc/B47L-9BRQ>].

92. See GRUESKIN, *supra* note 90, at 3–4 (detailing the amounts of various agreements between tech platforms and news companies). See also THE TREASURY, *supra* note 83, at 6 (providing a list of news businesses that have entered into commercial deals with Google and/or Meta).

93. See GRUESKIN, *supra* note 90, at 6–7 (explaining that, although there are estimates of money flow, there is a lack of public accounting regarding specific allocations).

news content from Facebook and Instagram rather than be subject to the Online News Act, which took effect on December 18, 2023.⁹⁴ In June 2023, Google similarly threatened to block all links to Canadian news articles from its search engine and other services in Canada once the Act took effect.⁹⁵ Ultimately, Google applied for and was granted a five-year exemption from the Act in return for its commitment to contribute \$100 million annually to a new fund to support Canadian news publishers, an amount far less than what Google would likely have to pay under mandatory arbitration.⁹⁶ In the meantime, Meta continues to block news from its services in Canada.

Meta has taken similar steps in Australia. It announced in February 2024 that it would not renew or enter into new commercial deals for news content in Australia and that no new Facebook products would be offered for Australian news publishers in the future.⁹⁷ Meta's announcement reiterates its claim that providing access to news comprises but a miniscule fraction of Facebook's business:

We know that people don't come to Facebook for news and political content — they come to connect with people and discover new opportunities, passions and interests. As we previously shared in 2023, news makes up less than 3% of what people around the world see in their Facebook feed, and is a small part of the Facebook experience for the vast majority of people.⁹⁸

In fact, studies present a more complex picture. It appears that there is substantial consumer demand for news on social media, even if it is unclear whether the presence of news is a critical factor for why consumers use social media. Recent studies of social media news consumption indicate that roughly a third of U.S. adults report regularly getting news on each of

94. Gretel Kahn, *In Canada's battle with Big Tech, smaller publishers are caught in the crossfire*, REUTERS INST. (Nov. 7, 2023), <https://reutersinstitute.politics.ox.ac.uk/news/canadas-battle-big-tech-smaller-publishers-are-caught-crossfire> [<https://perma.cc/Z49A-EPY4>] (reporting that traffic and engagement to independent press outlets plummeted after Meta blocked Canadian news from its platforms).

95. Bobby Allyn, *Google says it will start blocking Canadian news stories in response to new law*, NPR (June 29, 2023, 3:38 PM), <https://www.npr.org/2023/06/29/1185087587/google-says-it-will-start-blocking-canadian-news-stories-in-response-to-new-law> [<https://perma.cc/Q4PT-N3D6>].

96. Canadian Radio-television and Telecommunications Commission, *Online News Decision CRTC 2024-262: Exemption Order from the Online News Act Granted to Google* (Oct. 28, 2024); Nojoud Al Mallees, *Google exempt from Online News Act for 5 Years, must pay news outlets \$100M: CRTC*, CTV NEWS (Oct. 28, 2024), <https://www.ctvnews.ca/politics/google-exempt-from-online-news-act-for-5-years-must-pay-news-outlets-100m-crtc-1.7089739> [<https://perma.cc/DZ8E-HDXS>].

97. *An Update on Facebook News*, META (Feb. 29, 2024), <https://about.fb.com/news/2024/02/update-on-facebook-news-us-australia> [<https://perma.cc/Z7MC-NHTJ>] [hereinafter *Meta Announcement*].

98. *Id.*

Facebook and YouTube.⁹⁹ Moreover, roughly half of Facebook, TikTok, and X users report regularly getting news on those platform.¹⁰⁰ Similarly, 49% of Australians report using social media to access news.¹⁰¹ Indeed, contrary to Facebook's assertion that its users don't come to Facebook for news, 32% of Australians report using Facebook to access news, making Facebook the top social media platform for news among Australians.¹⁰² Further, 68% of Australian Facebook users under thirty-five and 53% of Australian Facebook users thirty-five and older report paying most attention to mainstream news brands or journalists, considerably more than those who look to ordinary people, celebrities, or influencers for information on current events.¹⁰³

In any event, Meta and Google have apparently determined that the costs they would incur in mandatory bargaining, arbitration, and compensation to news publishers in multiple countries would exceed the benefits they reap from providing access to public service news content. To that end, Meta has also discontinued its Facebook News tab in the U.S., Australia, the U.K., France, and Germany.¹⁰⁴ At least for now, Facebook users may still view news in their Facebook feed. But, in line with online platform trends, Meta platforms are increasingly designed to keep users on the platform, rather than facilitating user visits to news publisher websites by displaying clickable links to news stories. Data from 2,000 news sites around the globe indicate that in the last two years Facebook referral traffic to those sites declined by a startling 67%, while referrals from X declined by 50%.¹⁰⁵

99. *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sept. 17, 2024), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet> [https://perma.cc/5XSL-MEDW].

100. *Id.*

101. SORA PARK, CAROLINE FISHER, KIERAN MCGUINNESS, JEE YOUNG LEE, KERRY MCCALLUM, XIAOLAN CAI, MONA CHATSKIN, F.X. LILIK DWI MARDJIANTO & SHENGAN (PINKER) YAO, NEWS AND MEDIA RESEARCH CENTRE, DIGITAL NEWS REPORT: AUSTRALIA 2024, at 10 (2024).

102. *Id.* at 95.

103. *See id.* at 100 (explaining that in 2024, 68% of Australian Facebook users under thirty-five and 53% of Australian Facebook users thirty-five and older rely on mainstream news brands or journalists as their source of news on Facebook). At the same time, it is not clear that the availability of news on Facebook is crucial to user demand for platform. Data from independent tracking firms indicate that Meta's deplatforming of news in Canada following introduction of the Online News Act has had virtually no impact on the use of Facebook in that country. Katie Paul & Steve Scherer, *Exclusive: Meta's Canada news ban fails to dent Facebook usage*, REUTERS (Aug. 29, 2023, 10:15 AM), <https://www.reuters.com/technology/metanews-canada-news-ban-fails-dent-facebook-usage-2023-08-29> [https://perma.cc/J6JE-RXM3].

104. *Meta Announcement*, *supra* note 97.

105. NEWMAN & CHERUBINI, *supra* note 19, at 9. *See also* Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024 *supra* note 11, at 12 (reporting that traffic referrals to news publishers from Facebook plummeted by 48% in 2024 and from X by 27%.); David F. Carr, *Social Referrals to News Sites Sliced Nearly in Half Since 2020*, SIMILARWEB BLOG (Oct. 17, 2023), <https://www.similarweb.com/blog/insights/social-media-news/news-social-media>

Meta's decision to abandon the agreements it had reached with Australian news publishers loomed large in an Australian parliamentary committee's recent acknowledgment that given the limitations of the News Media Bargaining Code, the Australian Government should "explore alternative revenue mechanisms" to fund Australian journalism.¹⁰⁶ Likewise, the Journalism Competition and Preservation Act has languished in Congress despite its bipartisan sponsorship. Of note, the proposed Act was omitted from a bicameral agreement on Congress's defense-spending legislation a day after Meta announced that "it would 'consider removing news from [the] platform' if lawmakers moved ahead with the measure[.]"¹⁰⁷

A parallel state bill, the California Journalism Preservation Act, met a similar fate in August 2024. Contributing to the bill's defeat, Meta spokesperson, Andy Stone, threatened to "remove news from Facebook and Instagram rather than pay into a slush fund that primarily benefits big, out-of-state media companies under the guise of aiding California publishers."¹⁰⁸ For its part in the run up to the vote, Google removed links to local news sites for some California users.¹⁰⁹ Ultimately, the bill was withdrawn when, somewhat like in Canada, Google agreed to commit a minimum of \$55 million over the next five years to a newly created fund to support local journalism, with the state contributing a minimum of \$70 million during the same time period.¹¹⁰

2. *Further Platform De-prioritization of Journalism.*—Thus far, Google has ultimately backed off from Meta's aggressive stance of deplatforming news

[<https://perma.cc/J66T-M427>] (detailing declines generally and with respect to particular leading news publishers).

106. JOINT SELECT COMM. ON SOCIAL MEDIA AND AUSTL. SOC'Y., SECOND INTERIM REPORT: DIGIT. PLATFORMS AND THE TRADITIONAL NEWS MEDIA 98 (2024) [hereinafter SECOND INTERIM REPORT]. See also Lisa Macpherson & Morgan Wilsman, *Is the Australian Bargaining Code Over?*, PUB. KNOWLEDGE (Oct. 30, 2024), <https://publicknowledge.org/is-the-australian-bargaining-code-over> [<https://perma.cc/4S3R-UEGD>] (detailing the Second Interim Report's recommendation "for a levy as an alternative revenue mechanism").

107. Cristiano Lima-Strong, *Congress drops media bargaining bill amid Facebook, industry blowback*, WASH. POST (Dec. 6, 2022), <https://www.washingtonpost.com/technology/2022/12/06/ndaa-jcpa-newspapers-fail/> [<https://perma.cc/KAB7-S4EH>].

108. See Sarah Scire, *Meta threatens to remove news from Instagram and Facebook over proposed California law*, NIEMANLAB (May 31, 2023), <https://www.niemanlab.org/2023/05/meta-threatens-to-remove-news-from-instagram-and-facebook-over-proposed-california-law> [<https://perma.cc/5PA2-7FPX>] (quoting Stone and finding that his threat contributed to the rejection of a previously popular bill).

109. Lisa Macpherson, *The Debate About "Journalism Preservation" Just Got More Confusing*, PUB. KNOWLEDGE (Apr. 28, 2024), <https://publicknowledge.org/the-debate-about-journalism-preservation-just-got-more-confusing> [<https://perma.cc/6ZY3-2WTY>].

110. Alex Frandsen, *California's Close-Door Deal & the Fight for Local Journalism*, FREE PRESS (Sept. 9, 2024), <https://www.freepress.net/blog/californias-closed-door-deal-fight-local-journalism> [<https://perma.cc/2UZQ-LE2B>].

publisher content and refusing to pay for it altogether. But Google, like Meta, continues to threaten to deplatform news, at the very least as a negotiating tool to drive down the amount of remuneration that Google must pay news publishers. In November 2024, Google announced that, for an unspecified period of time, it will “remove EU news articles from search results, Google News, and Discover for one percent of users in Belgium, Croatia, Denmark, France, Greece, Italy, the Netherlands, Poland, and Spain.”¹¹¹ Although Google characterized its move as an experiment, Danish government ministers have sharply criticized Google for “gambling with [their] democracy” and have launched an investigation into possible legal action.¹¹² Further, critics charge that the amounts that Google has agreed to pay news publishers in France, Canada, California, and Australia are far lower than what Google would have been required to pay under those jurisdictions’ respective mandatory remuneration provisions.¹¹³

C. *Sum*

In sum, the hybrid model aims to address news publishers’ lack of bargaining power to demand meaningful compensation for online platforms’ display of use news content. But major platforms appear increasingly willing to walk away from their display of legacy news content altogether rather than undergoing the mandatory, good-faith bargaining, arbitration, and remuneration that the hybrid model requires. Despite Meta’s protestations to the contrary, there remains user demand for mainstream news content on social media. But as we now explore, ongoing technological developments

111. Emma Roth, *Google is testing the ‘impact’ of removing EU news from search results*, THE VERGE (Nov. 13, 2024, 9:07 AM) <https://www.theverge.com/2024/11/13/24295463/google-eu-test-news-outlets-removing-results> [<https://perma.cc/5FXN-E27U>].

112. *Ministre vil have Google til at stoppe eksperiment, der ‘gambler med vores demokrati’* [Ministers Want Google to Stop Experiment That “Gambles with Our Democracy”], DR.DK (Dec. 7, 2024), <https://www.dr.dk/nyheder/politik/ministre-vil-have-google-til-stoppe-eksperiment-der-gambler-med-vores-demokrati> [<https://perma.cc/DS6D-PBR7>].

113. See Frandsen, *supra* note 110 (discussing the results of bargaining with Google in California and Canada); *CRTC Approves Google’s \$100 Million Online News Act Exemption Deal*, MICHAEL GEIST (Oct. 31, 2024), <https://www.michaelgeist.ca/2024/10/crtc-approves-googles-100-million-online-news-act-exemption-deal> [<https://perma.cc/BBU6-HSF6>] (commenting on the CRTC’s exemption deal with Google and its effect on Canadian publishers); *Salvaging Bill C-18: Government Upends Legislation to Bring Google Onside the Online News Act*, MICHAEL GEIST (Nov. 29, 2023), <https://www.michaelgeist.ca/2023/11/salvaging-bill-c-18-government-upends-legislation-to-bring-google-onside-the-online-news-act> [<https://perma.cc/YW6F-W24V>] (noting that Google was already paying millions in deals for its Google Showcase program with many Canadian news outlets and that those obligations would be folded into its \$100 million annual funding commitment); Anya Schiffrin, *Would a tech tax be a fair way to make Google and Meta pay for the news they distribute and profit from?*, NIEMANLAB (Sept. 3, 2024, 9:49 AM), <https://www.niemanlab.org/2024/09/would-a-tech-tax-be-a-fair-way-to-make-google-and-meta-pay-for-the-news-they-distribute-and-profit-from> [<https://perma.cc/C4RG-6UPR>] (criticizing the pullback on News Media Bargaining Code in Australia and exploring alternatives).

and young users' embrace of social media influencers and short-form video platforms portend weaker demand for legacy news and thus diminished need for platforms to display news-publisher content.

IV. The IP and Hybrid Models Fail to Address the Principal Causes for Newsrooms' Financial Collapse

The IP and hybrid models for saving the press have been off-target from their very inception. Newsrooms have not suffered catastrophic financial harm because platforms have displayed news content without payment, particularly when platform displays of news story extracts have included links to news publisher websites. Rather, commercial news media have suffered financial devastation because online platforms—initially, Craigslist, and, subsequently, Google and Meta—have devoured their advertising revenue.¹¹⁴ Google and Meta overwhelmingly dominate the market for digital display ads and for brokering advertising to third parties.¹¹⁵ News publishers cannot compete with their unparalleled advantages in digital advertising.

Further, to add to newsrooms' financial distress, social media increasingly substitute for legacy news media as a favored source for information and opinion about current events. Social media engender the erroneous perception that the “news finds me,” “that all the news I need to know will appear in my feed.”¹¹⁶ Relatedly, social media design, user affordances, and engagement algorithms play upon our desire for immediate emotional gratification, eroding our perceived need to seek fact-based expertise and test arguments against opposing evidence and understandings. The attention economy promotes user outrage, salacious gossip, out-group hostility, and the human tendency to embrace information that reinforces one's preexisting beliefs.¹¹⁷ It tends to favor social media influencers,

114. See Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 475, 479–81 (explaining that commercial news media outlets' loss of classified advertising to Craigslist was a factor that has contributed to journalism's tailspin, and how Google and Meta “reap over half of U.S. digital advertising revenue”).

115. *Id.* Indeed, a district court recently held that Google has violated federal antitrust law by willfully acquiring and maintaining monopoly power in the open-web display publisher ad server market and the open-web display ad exchange market, and by tying its publisher ad server (DFP) and ad exchange (AdX). *United States v. Google*, --- F.Supp.3d ---, 2025 WL 1132012 (ED Va. 2025).

116. See Netanel, *Applying Militant Democracy*, *supra* note 19, 491–92, 492 n.7 (2023) (collecting studies uncovering the “news finds me” phenomenon).

117. See *id.* at 500–06 (describing the negative intrapersonal effects of social media); Charlie Warzel & Mike Caulfield, *The Internet Is Worse Than a Brainwashing Machine*, THE ATLANTIC (Jan. 6, 2025), <https://www.theatlantic.com/technology/archive/2025/01/january-6-justification-machine/681215> [<https://perma.cc/ZZXC-M7QF>] (proposing a subconscious desire to justify one's own beliefs through social media content production and consumption).

conspiracy theories, short-form video, and friends' comments over the nuanced, fact-based coverage of public service journalism.¹¹⁸

Accentuating that cultural shift, users have been moving from primarily text-based platforms like Facebook and X to video-based networks like TikTok, YouTube, Snapchat, and Instagram.¹¹⁹ As this takes place, Facebook and X are increasingly aiming to keep users ensconced within their platforms, both by enhancing their own video offerings and, as noted above, by drastically reducing outlinks to news publishers.¹²⁰ Further, while legacy news media journalists have often lead conversations on Facebook and X, video platforms favor online influencers and celebrities.¹²¹

Partly for that reason, social media users are increasingly turning to celebrity influencers rather than journalists for content that passes as “news.” A 2024 Pew Research Center study finds that about one-in-five Americans—and 37% of adults under 30—say they regularly get news from influencers on social media.¹²² That trend further undermines the power of public service journalism to fulfill its Fourth Estate role. The vast majority of leading influencers (77%) have no affiliation or background with a news organization.¹²³ And unlike public service journalists whose professional ethics demand that they subordinate personal political beliefs to ethics of even-handed, fact-based reporting, influencer culture is predicated on a carefully constructed “authenticity” that flaunts seemingly casual, uninhibited expression of personal observations, feelings, and beliefs.¹²⁴ Not

118. See Netanel, *Applying Militant Democracy*, *supra* note 19, at 507–10 (discussing how social media amplifies and propagates disinformation); NEWMAN & CHERUBINI, *supra* note 19, at 22–25, 28–30 (reporting on influencers and news fatigue); STOCKING ET AL., *supra* note 19, at 18–19 (discussing the appeal of news influencers).

119. See Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024, *supra* note 11, at 11–12 (reporting on those developments).

120. See *supra* note 105 and accompanying text.

121. Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024, *supra* note 11, at 14–15.

122. STOCKING ET AL., *supra* note 19, at 16–17.

123. *Id.* at 34.

124. See *id.* at 31–33 (providing statistics for the political affiliation of influencers across media sites as cross referenced with other proclaimed identity factors); MICHAEL SCHUDSON, WHY JOURNALISM STILL MATTERS 14 (2018) (explaining that “[i]n journalism, professionalism is the effort to step outside a personal or political standpoint and into a professional mission”); HUND, *supra* note 19, at 168–70 (explaining that influencer “authenticity” is an “industrial construction”); Jessica Maddox, *Influencers Become Journalists*, NIEMAN LABS: PREDICTIONS FOR JOURNALISM, 2025, <https://www.niemanlab.org/2024/12/influencers-become-journalists> (noting that influencers sell casual familiarity, feelings, personal beliefs, and lifestyles, and tend to throw in political information and opinion as a byproduct of that approach).

surprisingly, leading influencers constitute a potent source of misinformation, authoritarian populist conspiracy theory, and propaganda.¹²⁵

Finally, Google, Meta, and other online platforms have begun to replace linked extracts from news stories with AI-generated summaries of up to a couple paragraphs in length, drawn from a range of sources, including news stories, websites, and blogs.¹²⁶ Those AI-generated news summaries are likely to further devalue professional journalists' reporting and are likely to serve as substitutes for clicking to original news stories even when the AI summary includes buttons that users can click to view sources for statements that appear in summary.¹²⁷ So long as the AI summaries continue to feature links to original news content, they would give rise to mandatory remuneration obligations under Australia's and Canada's hybrid model. But using news stories as input data for AI training would require platform remuneration only if required by copyright law. That question is now being litigated in U.S. courts and is beyond the scope of this Essay.¹²⁸

125. See Michael J. Socolow, *How you can tell propaganda from journalism – let's look at Tucker Carlson's visit to Russia*, THE CONVERSATION (Feb. 22, 2024, 8:44 AM EST), <https://theconversation.com/how-you-can-tell-propaganda-from-journalism-lets-look-at-tucker-carlsons-visit-to-russia-223829> [<https://perma.cc/9UJF-ZQ6P>] (using leading influencer Tucker Carlson's dispatches from Russia to draw distinctions between journalism and propaganda); Tiffany, *supra* note 2 (describing social media influencers' use of "bullshit" to maximize user engagement); Marie Heřmanová, "We Are in Control": Instagram Influencers and the Proliferation of Conspiracy Narratives in Digital Spaces, 70 SLOVAK ETHNOLOGY 349, 351, 355–56 (2022) (analyzing Czech female spiritual influencers and COVID conspiracy theories); Keith A. Spencer, *The authoritarianism at the heart of influencer culture*, SALON (May 26, 2019, 2:00 PM EDT), <https://www.salon.com/2019/05/26/are-influencers-inherently-authoritarian/> [<https://perma.cc/7TBV-XG48>] (arguing that influencer culture's propagation of the belief that follower counts render an influencer inherently believable is fundamentally authoritarian).

126. See Casey Newton, *A better way for platforms to fund journalism*, PLATFORMER (May 21, 2024), <https://www.platformer.news/platform-sales-tax-california-sb1327-glazer> [<https://perma.cc/32U4-TWD6>] (detailing the problems that Google AI Overviews pose for publishers). Upstart competitors, like Arc Search, are also featuring AI-generated summaries of website content in response to search queries. See Casey Newton, *Scenes from a dying web*, PLATFORMER (Feb. 5, 2024), <https://www.platformer.news/arc-search-quora-poe-perplexity-journalism-web-future> [<https://perma.cc/9NEC-9A68>] (discussing one user's experience with Arc Search AI summaries). Emerging third-party AI search and automated news aggregation services, including Open AI's News GPT, Perplexity, ProRata, Particle, and Grok Stories, similarly provide AI-generated summaries of news publisher content with links to select news publisher sources that users must scroll down to view. NEWMAN & CHERUBINI, *supra* note 19, at 10–11 (discussing the similar approach these AI search and news aggregators take with regarding to linking third party sources).

127. See Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 531 (discussing studies showing that users are unlikely to click on links that do not appear prominently at the top of search results).

128. For a description of and links to 39 U.S. copyright infringement lawsuits against AI companies, see *Status of all 39 copyright lawsuits v. AI*, CHAT GPT IS EATING THE WORLD (Feb. 18, 2025) (Feb. 19, 2025), <https://chatgptiseatingtheworld.com/2025/02/19/status-of-all-39-copyright-lawsuits-v-ai-feb-18-2025-judge-bibas-rejects-fair-use-in-ai-training-in-stunning-reversal>. For

V. Measures to Save the Press

In an age awash in social media misinformation, self-aggrandizing influencers, and epistemic uncertainty, public service journalism remains a vital institution for producing, curating, and disseminating knowledge, calling the powerful to account, and serving as a platform for fact-based, reasoned debate. The Fourth Estate’s professional commitment to fairly and accurately surfacing new, previously unavailable, information on issues of public importance and promoting deliberative debate across political and social divides remains a critical, if much embattled, “connective tissue . . . necessary to sustain the underlying values of freedom of speech.”¹²⁹

In that regard, despite declining readership—and drastically declining referrals from social media—a quarter of American adults who get news online still turn directly to legacy news sites for their source of news.¹³⁰ Further, even many who do not consume legacy news stories believe that the press is vital to democracy. According to a 2024 survey of American adults, 45% agreed with the statement that “journalists are essential to protecting democracy.”¹³¹ As commentators have observed, weak consumer demand for public service journalism may represent a suboptimal market failure. Individual consumers often succumb to news fatigue or otherwise remain “rationally ignorant” regarding public affairs, even while believing that voters in general should be well-informed about issues of public importance.¹³² Further, alongside our vulnerability to social media engagement algorithms that promote salacious, polarizing, and outrageous content, most nationals of leading democracies report wanting “news to be

discussion of copyright issues arising from the use of copyrighted works in AI training in the EU, see generally João Pedro Quintais, *Generative AI, Copyright and the AI Act*, 56 COMPUT. L. & SEC. REV.: INT’L J. TECH. L. & PRAC. (forthcoming April 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912701.

129. Jack M. Balkin, *Free Speech versus the First Amendment*, 70 UCLA L. REV. 1206, 1272 (2023). See also SCHUDSON, *supra* note 1, at 28–38 (describing the journalism’s role in supporting democracy).

130. Christopher St. Aubin & Jacob Liedke, *News Platform Fact Sheet*, PEW RSCH. CTR. (Sept. 17, 2024), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/> [<https://perma.cc/7ZNU-YHDR>] (finding news websites/apps are the most preferred digital news source at 23%, outranking social media, search, and podcasts).

131. Syracuse University/Ipsos Poll [Roper #31121125] Question 23, ROPER CTR. FOR PUB. OP. RSCH., <https://ropercenter.cornell.edu/ipoll/study/31121125/questions#f525fdf6-98bb-4ff1-9bef-d0ba1737d82d> [<https://perma.cc/BXM4-JYK4>].

132. See JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 18–25 (2016) (discussing inconsistency between consumer demand and citizen understandings of public issues and the role of news media); FEDERAL TRADE COMMISSION STAFF, *FEDERAL TRADE COMMISSION STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM* 4–5 (2010) (explaining why consumers choose to be “rationally ignorant”); see also Newman, *Executive Summary and Key Findings*, in REUTERS INST. DIGIT. NEWS REP. 2024, *supra* note 11, at 26–27 (reporting survey results regarding news avoidance due to news fatigue).

accurate, fair, avoid sensationalism, be open about any agendas and biases including lack of diversity, own up to mistakes—and not pull punches when investigating the rich and powerful.”¹³³ Put another way, our preferences as consumers of information and entertainment often diverge from what we rightly understand to be our needs as democratic citizens.¹³⁴

Awarding intellectual property rights is a venerable means by which governments can overcome what would otherwise be the market failure to generate sufficient creative and informative expression.¹³⁵ But as we have seen, given current market conditions, intellectual property rights alone cannot sustain public service journalism today. Indeed, government intervention is likely required not merely to counter the news media’s economic collapse but to enable the press to reconstitute itself as a trustworthy source of news in the digital age.¹³⁶

The news media’s dire financial straits have sparked calls for various means of public funding and support for public service journalism.¹³⁷ Given the press’ vital watchdog role in our democracy, such measures should be seen as a government obligation, embedded in the structure of our Constitution. As Stephen Gillers cogently argues, government funding for newsrooms’ investigations of illegal conduct and other abuses of power, “should be no different from funding the judiciary, the Library of Congress, or the National Institutes of Health.”¹³⁸

Scholars and policymakers have considered a number of alternative mechanisms by which democratic countries can ensure the financial viability

133. Newman, *Executive Summary and Key Findings*, in REUTERS INSTIT. DIGIT. NEWS REP. 2024, *supra* note 11, at 25.

134. Serving citizen needs rather than merely consumer preferences is a primary lodestar of politically independent, publicly funded broadcasting in European countries. *See* KAREN DONDEES, PUBLIC SERVICE MEDIA IN EUROPE: LAW, THEORY AND PRACTICE 1 (2021) (noting that “most Western and Northern European governments cling to the idea of an informing, educating and entertaining public broadcaster”).

135. *See* William F. Shughart II & Diana W. Thomas, *Intellectual Property Rights, Public Choice, Networks, and the New Age of Informal IP Regimes*, 23 S. CT. ECON. REV. 169, 172–74 (2015) (describing the necessity for property rights on intellectual creations because they are inherently non-rival resources).

136. *See* Balkin, *supra* note 129, at 1272–73 (advocating for the need to improve knowledge-forming institutions in a new, algorithmically driven, epistemological environment); MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 100 (2021) (observing a moral and constitutional duty for the government to support journalism).

137. *See* Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 514 n.189 (citing sources for such proposals).

138. STEPHEN GILLERS, JOURNALISM UNDER FIRE: PROTECTING THE FUTURE OF INVESTIGATIVE REPORTING 159 (2018).

of the press.¹³⁹ This Part briefly discusses the fundamental principles that must inform such measures and then surveys some leading proposals.

A. *Fundamental Principles*

Government support must be designed to underwrite the practice of politically independent, public-service journalism from a variety of sources, including local news. It must not serve merely to prop up a failing news media industry. Moreover, measures to save the press must employ criteria to target support to fact-based, public service journalism as opposed to ersatz news sites like Breitbart and One America News.¹⁴⁰

Canada's Online News Act provides a worthwhile starting point. The Act requires online platform payments only to news businesses that are "qualified Canadian journalism organizations," which requires, among other things, that the organization (1) is "engaged in the production of original news content" that is "primarily focused on matters of general interest and reports of current events, including coverage of democratic institutions and processes" and (2) "regularly employs two or more journalists who" enjoy editorial independence.¹⁴¹ In addition, to qualify, the news business must follow "the code of ethics of a recognized journalistic association" or have its own equivalent code of ethics that "require[s] adherence to the recognized processes and principles of the journalism profession, including fairness, independence and rigour in reporting news and handling sources."¹⁴²

Beyond such requirements, government measures must ensure that recipient news media allocate government subsidies to paying the salaries of news journalists, as opposed to providing perks to management and shareholders. In that regard, the proposed JCPA provided that any joint negotiation entity representing news publishers in collective bargaining or mandatory arbitration should consider its members' respective spending on news journalists in determining how to distribute online platform license fees

139. See generally, e.g., ALESSIA ZORNETTA & THOMAS ASH, UCLA INST. FOR TECH. L. & POL'Y, SHEARING THE SHEEP WITHOUT SKINNING IT: POLICY OPTIONS FOR EXTRACTING REVENUES FROM ONLINE PLATFORMS (2024) (discussing issues caused by the digital economy and cataloging three potential solutions: taxation, user fees, and mandated collective bargaining); ANYA SCHIFFRIN, HANNAH CLIFFORD & THEODORA DAME ADJIN-TETTEY, SAVING JOURNALISM 2: GLOBAL STRATEGIES AND A LOOK AT INVESTIGATIVE JOURNALISM (2022) (reporting on and analyzing efforts in various countries to combat these issues).

140. In the United States, far-right radio, television, and print news comprises an insular information ecosystem that is far less tethered to empirical fact and far more willing to pedal conspiracy theories than are liberal, centrist, and moderate right news organizations. See YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 54–56, 59–60 (2018).

141. Online News Act, S.C. 2023, c. 23, § 27(1)(a)–(b) (Can.); Income Tax Act, R.S.C. 1985, c. 1, § 248(1) (Can.) (defining "qualified Canadian journalism organization").

142. Online News Act, S.C. 2023, c. 23, § 27(1)(b) (Can.).

among its members.¹⁴³ Additional means to ensure that funds are earmarked for public service journalism include (1) funding a grant-awarding, professional nonpartisan entity charged with dispensing the proceeds for particular journalistic projects; (2) favoring publicly funded and nonprofit newsrooms over commercial news publishers; and (3) providing journalist payroll tax credits.¹⁴⁴

Finally, funding agencies must be structured to ensure that they are “nonpartisan, expert, diverse, free from conflict of interest, and transparent.”¹⁴⁵ The National Council on the Humanities, Corporation for Public Broadcasting, and British Broadcasting Corporation suggest that it is possible to attain a considerable degree of insulation from partisan intermeddling and thus to safeguard the political independence of the government subsidized press.¹⁴⁶

B. *Proposals for Supporting the Press*

1. *Funding from the General Public Fisc.*—Some commentators have proposed increased public funding for news media out of general public funds. Victor Pickard, for example, calls for a new autonomous public media system, generously backed by public funds and devoted to public service, which would stand alongside commercial and nonprofit, benefactor-supported news media.¹⁴⁷

The United States has a long history of funding news media, harkening back to the early Republic. Beginning with the Post Office Act of 1792, Congress accorded newspapers a postal subsidy that reduced postage fees by as much as 90%.¹⁴⁸ Congress also provided for free newspaper delivery, maintained postal roads for printers’ use, and awarded newspaper publishers

143. S. 1094, 118th Cong. § 4(d)(5)(F)(ii) (2023). Likewise, the EU Digital Single Market Directive requires that EU Member States must provide that journalists receive “an appropriate share” of the press publisher’s revenue from exercise of press publishers’ right. CDSM Directive, *supra* note 23, art. 15(5).

144. For example, the proposed Local Journalism Sustainability Act of 2021 would have provided for payroll tax credits for local news reporting. H.R. 3940, 117th Cong. §§ 2–3 (2021).

145. Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 519.

146. *See id.* at 519–21 (proposing and describing a “Fourth Estate Fund” to fulfill such functions); SUE GARDNER, KNIGHT FOUNDATION, PUBLIC BROADCASTING: ITS PAST AND ITS FUTURE 5–6 (n.d.), <https://knightfoundation.org/public-media-white-paper-2017-gardner> [<https://perma.cc/D84F-KETZ>] (extolling public broadcasting’s continued worth and ability to create public media that is not “hyperpartisan”).

147. VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY 156, 161–62 (2020).

148. Will Meyer, *The American experiment was built on a government-supported press*, COLUM. JOURNALISM REV. (May 7, 2018), <https://www.cjr.org/opinion/government-subsidy-facebook.php> [<https://perma.cc/DN5H-TWB2>].

lucrative government printing contracts.¹⁴⁹ In today's dollars, those subsidies would amount to several billion dollars a year.¹⁵⁰

News publications still enjoy a limited postal subsidy—and broadcasters continue to receive free use of the broadcast spectrum. But direct federal fiscal support for the domestic news media today is largely limited to the Corporation for Public Broadcasting, which currently receives congressional appropriations of \$535 million a year.¹⁵¹ Of note, U.S. funding for news media pales in comparison to other democratic countries' funding of public media. Congressional appropriations for the Corporation of Public Broadcasting amount to approximately \$1.40 per capita per year.¹⁵² On the other hand, Japan spends almost \$60, and the United Kingdom spends more than \$80 per capita for funding public media.¹⁵³ The annual public media subsidies of Denmark and Finland amount to nearly \$100 per citizen.¹⁵⁴

The minimal public funding of news media in the United States comports with the negative liberty understanding of free speech and, more generally, the strong libertarian streak in this country.¹⁵⁵ Many Americans would deeply distrust extensive public funding of the media, particularly of newspapers. They would strongly suspect that public funding would entail direct government involvement in independent news reporting—possibly with good reason. As media scholars are aware, U.S. government patronage of antebellum newspapers was, indeed, thoroughly partisan.¹⁵⁶

However, studies of post-World War II publicly funded media in other democracies largely belie concerns of untoward government entanglement or of public media timidity towards those in power. The studies show, indeed, “that public media tend to be more independent, ideologically diverse, and critical of dominant policy positions compared to commercial news organizations.”¹⁵⁷ Research also finds that strong public media systems

149. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MASS COMMUNICATIONS* 83–94 (2004) (narrating the evolution of newspapers in early America and the role that Congress played).

150. PICKARD, *supra* note 147, at 158 (citing Ed Baker's calculation that the early postal subsidies alone would equal approximately \$6 billion per year in today's dollars).

151. *CPB Operating Budget*, CORP. FOR PUB. BROADCASTING, <https://cpb.org/aboutcpb/financials/budget> [<https://perma.cc/P499-PU4V>].

152. Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 516.

153. *Id.*

154. *Id.*

155. See Netanel, *Applying Militant Democracy*, *supra* note 19, at 524–33 (explaining the effect liberal models have had on free speech as it relates to digital media).

156. See STARR, *supra* note 149, at 141–42 (discussing the thoroughly partisan history of U.S. newspapers).

157. See PICKARD, *supra* note 150, at 159–60 (discussing comparative research regarding the use and treatment of public media in the U.S. versus that in other democratic countries).

promote greater knowledge of public affairs and of social trust, correlating with higher levels of voting and democratic engagement.¹⁵⁸

2. *Excise Tax on Digital Advertising.*—As noted above, if Google and Meta can be said to have caused significant harm to news publishers, that harm stems largely from platforms' siphoning off advertising revenue from the publishers. The advertiser-dependent news industry cannot compete with the platforms' market power, superior technology, vast access to user data, and self-dealing in the advertising market. Importantly, moreover, the platforms would divert substantial advertising revenue from the publishers even if the platforms did not display any news content whatsoever.

Accordingly, rather than insisting that platforms compensate newsrooms for platform appropriation of news content, it would make more sense to impose an excise tax on digital advertising revenues and to allocate those funds to supporting public service journalism. In 2023, U.S. digital advertising revenue amounted to \$225 billion.¹⁵⁹ Of that amount, Google earned \$60.3 billion (26.8%), Meta \$47.5 billion (21.1%), and Amazon \$28.1 billion (12.5%).¹⁶⁰ Earning significant U.S. digital advertising revenue, but less than 5% of the total, were Microsoft (3.6%) and TikTok (2.8%).¹⁶¹ If the U.S. federal government were to impose an excise tax of 2.5% on digital advertising revenue earned in the United States, with an exemption for companies earning less than 5% of the total, the tax would yield some \$3.4 billion per year.¹⁶²

That sum pales in comparison to total advertising revenue losses suffered by U.S. newspapers during the last two decades. Newspapers suffered a stunning decline of \$34.4 billion in annual advertising revenue between 2002 and 2022.¹⁶³ Nonetheless, \$3.4 billion per year would provide nontrivial support for public service journalism. By comparison, the relatively well-heeled New York Times earned total revenues from all sources of \$2.536 billion during the twelve months ending September 30,

158. *Id.*

159. Statista Research Department, *Online advertising revenue in the U.S. 2000 to 2023*, STATISTA (Apr. 18, 2024), <https://www.statista.com/statistics/183816/us-online-advertising-revenue-since-2000> [https://perma.cc/EDS3-Z38L].

160. Statista Research Department, *Share of major ad-selling companies in digital advertising revenue in the United States from 2021 to 2026*, STATISTA (June 25, 2024), <https://www.statista.com/statistics/242549/digital-ad-market-share-of-major-ad-selling-companies-in-the-us-by-revenue> [https://perma.cc/NCK7-BSNA].

161. *Id.*

162. I have previously proposed such a tax, with the proceeds earmarked to fund investigative and local journalism. See Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 516–17; DARON ACEMOGLU & SIMON JOHNSON, *THE URGENT NEED TO TAX DIGITAL ADVERTISING* 1–2 (2024) (advocating digital advertising tax to counter social media harms).

163. *Newspapers Fact Sheet*, PEW RSCH. CTR. (Nov. 10, 2023), <https://www.pewresearch.org/journalism/fact-sheet/newspapers> [https://perma.cc/F3Q3-HRV9].

2024, representing a 4.88% increase over the Times' annual revenue from 2023, which was a 5.1% increase from 2022.¹⁶⁴ Further, as noted above, Congressional appropriations for the Corporation for Public Broadcasting currently amount to a relatively paltry \$535 million per year.¹⁶⁵

Of note, a number of countries, including Austria, Belgium, the Czech Republic, France, Hungary, Italy, Spain, and Turkey, have implemented or are considering imposing taxes on digital advertising, ranging from 3% to 8% of such revenue.¹⁶⁶ Tax proceeds in those countries do not appear to be earmarked for subsidizing journalism per se, although Austria has allocated a part of its digital advertising tax proceeds to funding the modernization of Austrian media companies.¹⁶⁷

3. *Excise Tax on Social Media.*—A number of countries have enacted digital services taxes. For example, the U.K. levies a 2% tax on revenues of search engines, social media platforms, and online marketplaces and France levies a 3% tax on revenue from digital interfaces, in addition to its tax on targeted digital advertising.¹⁶⁸ Such taxes might simply be a means for governments to earn more tax revenue, but they might also be viewed as a vehicle for discouraging services that create negative externalities and mitigating the harm of those externalities.¹⁶⁹ In that regard, to the extent that platforms supplant public service journalism, digital service taxes could help to align the provision of digital services more closely with socially optimal levels, and all the more so if tax proceeds are allocated to subsidizing public service journalism.

Further, of relevance to platforms' corrosive effect on the press, social media inflict multiple harms on liberal democracy. Online platforms thrive on propagating emotionally inflammatory content that maximizes user engagement.¹⁷⁰ Too often that entails amplifying disinformation, hate speech, online extremism, and deep-seated partisan animosity.

164. *New York Times Revenue 2010–2024*, MACROTRENDS, <https://macrotrends.net/stocks/charts/NYT/new-york-times/revenue#:~:text=New> [<https://perma.cc/9CBG-MNEQ>].

165. *CPB Operating Budget*, *supra* note 151.

166. ZORNETTA & ASH, *supra* note 139, at 36.

167. Daniel Bunn, *Austria Makes Mid-Stream Adjustment on Digital Tax Efforts*, TAX FOUND. (Apr. 3, 2019), <https://taxfoundation.org/austria-digital-tax-efforts/> [<https://perma.cc/83SN-Y43T>].

168. ZORNETTA & ASH, *supra* note 139, at 18.

169. *Id.* at 19; ACEMOGLU & JOHNSON, *supra* note 162, at 1–2 (favoring a tax on digital advertising rather than platform revenues generally on the assumption that it would be “too easy for these multinational companies to hide profits in low tax offshore jurisdictions”).

170. See SAMUEL WOOLLEY, *MANUFACTURING CONSENSUS: UNDERSTANDING PROPAGANDA IN THE ERA OF AUTOMATION AND ANONYMITY* 120–22 (2023) (discussing the use of bots to maximize engagement with inflammatory political content).

More broadly, social media erode the critical foundations of democracy.¹⁷¹ As the social science literature concludes, “social media are a significant factor in emergent autocratic populism, dwindling political and social trust, and growing polarization in established democracies.”¹⁷² A meta-analysis also finds that “the contribution of social media toward a more politically informed citizenry is minimal.”¹⁷³ Among other factors, as noted above, social media foster a misperception that the “news finds me.”¹⁷⁴

A digital services tax targeting social media platforms and earmarking proceeds to public service journalism might thus serve a dual function of reducing (at least on the margins) the propagation of disinformation, hate speech, and partisan intolerance on social media, while subsidizing fact-based reporting on issues of public importance. Of note, Australia’s parliamentary committee reviewing the Mandatory Bargaining Code recommends that the Government explore “alternative revenue mechanisms to supplement the Code,” including the imposition of a digital platform levy with tax proceeds earmarked to sustaining public service journalism, including “small, independent and digital only publishers, as well as those operating in underserved communities and rural, regional and remote areas.”¹⁷⁵

4. *Must-Carry*.—As I have argued elsewhere, digital platforms should be required to display—and give prominence to—public interest news content from eligible news publishers, at least as a default setting that could be altered by users who wish to do so.¹⁷⁶ Further, platforms that display or summarize such news content should be required to include a prominently placed hyperlink

171. Netanel, *Applying Militant Democracy*, *supra* note 19, at 491.

172. *Id.* at 491. See generally Philipp Lorenz-Spreen, Lisa Oswald, Stephan Lewandowsky & Ralph Hertwig, *A Systematic Review of Worldwide Causal and Correlational Evidence on Digital Media and Democracy*, 7 NATURE HUM. BEHAV. 74 (2023) (examining digital media, including websites and general internet access, as well as social media platforms to conclude that digital media has negative effects on trust, participation, and polarization).

173. See Eran Amsalem & Alon Zoizner, *Do People Learn About Politics on Social Media? A Meta-Analysis of 76 Studies*, 73 J. COMM’N 3, 4, 10 (2022) (reporting the detrimental effect of social media on political aptitude and ability to remain informed).

174. See Chang Sup Park, *Reading a Snippet on a News Aggregator vs. Clicking Through the Full Story: Roles of Perceived News Importance, News Efficacy, and News-Finds-Me Perception*, 23 JOURNALISM STUD. 1350, 1357–58, 1369 (2022) (explaining the detriment of the false narrative that “news finds me”).

175. SECOND INTERIM REPORT, *supra* note 106, at 98–99.

176. See Netanel, *Mandating Digital Platform Support*, *supra* note 1, at 526–32 (maintaining that platforms should be required to prioritize and give prominence to original reporting and to include links to news publisher websites). Australia’s parliamentary committee reviewing the shortcomings of the Mandatory Bargaining Code similarly “recommends that the Australian Government investigate the viability and effectiveness of ‘must carry’ requirements for digital platforms in relation to Australian news content from large and small news providers.” SECOND INTERIM REPORT, *supra* note 106, at 99.

identifying the news publisher and enabling the user to click to the full news story on the publisher's own website. Such must-carry obligations would serve the dual purpose of enhancing trustworthy, fact-based information online and providing revenue to news publishers by increasing reader traffic to publishers' sites.

Must-carry obligations would necessarily take different forms for different platforms. For social media they might require that for every five items of sponsored content that appear on a user's feed, the platform must include an excerpt and link to a news story on a topic that its recommendation algorithm has identified would be of likely interest to the user. For search engines, must-carry rules might require that links that identify relevant news content and enable the user to click to the publisher's website must appear on the first search result page and among the top three organic results on that page. Further, Google and other platforms should be obligated to include such links within AI-generated news summaries.

Platforms configure their systems to keep users on their own sites. Indeed, news aggregation apps are frequently designed to keep readers within the app when they click on an article rather than transporting the reader to the news publisher's site.¹⁷⁷ But the public interest in facilitating newsrooms' ability to reap advertising revenue from user traffic on news publishers' own websites should override that incentive.

The must-carry obligations I have described might run afoul of the First Amendment in the United States. However, to the extent they aim to save the news industry from extinction, they may well qualify as a permissible content-neutral speech restriction on online platforms, roughly akin to the federal rule obligating cable operators to carry local broadcasters' channels that the Supreme Court upheld in *Turner Broadcasting System, Inc. v. FCC*.¹⁷⁸ In other democratic countries, any free speech rights of platforms would be balanced against users' right to be free from disenfranchising hate speech and to receive factually accurate information from a diversity of sources as required to exercise effective participation in the democratic process.¹⁷⁹ Indeed, EU regulations require large platforms to adjust their recommender algorithms to prioritize authoritative information, such as news media content verified as trustworthy by independent third parties, while minimizing the prominence of disinformation.¹⁸⁰

177. *Id.*

178. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 622 (1994); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 180 (1997).

179. See GIOVANNI PITRUZZELLA & ORESTE POLLICINO, DISINFORMATION AND HATE SPEECH: A EUROPEAN CONSTITUTIONAL PERSPECTIVE 56–59, 69 (2020) (analyzing the parameters of the exercise of freedom of speech that will be protected by European Convention on Human Rights).

180. Netanel, *Applying Militant Democracy*, *supra* note 19, at 566–67.

Conclusion

Democratic countries share the desire—indeed, the compelling need—to ensure the sustainability of public service journalism. The European Union’s intellectual property approach and the hybrid intellectual property-competition law approach adopted elsewhere were crafted to serve that objective, but both fall fatally short of providing news media with anything close to the sufficient, stable remuneration required to stave off the press’s demise. It is thus incumbent on democratic countries to subsidize public service journalism through a combination of general tax revenues and proceeds from targeted excise taxes, whether on digital advertising or digital platform income generally. Democratic countries should also impose on digital platforms must-carry obligations designed to enhance the prominence of news publisher content and channel reader traffic to news publisher websites.

Public service journalism faces daunting challenges in an era of news fatigue and an influencer-dominated media environment that undermines individuals’ willingness to turn to newsrooms’ fact-based, investigative reporting for information about matters of public importance. The proposed regulatory measures described above can provide sustenance for public service journalism as it adapts to meet those challenges without compromising its foundational mission and commitment to journalistic ethics.

Since this Essay was initially drafted, the already embattled free and independent press has come to face an aggressive campaign of attempted subjugation at the hands of the current Administration – a grave threat to liberal democracy that was previously beyond this author’s most dire imaginings.¹⁸¹ We can only remind ourselves that “despair is not a work plan.”¹⁸²

181. See *One Month of Trump: Press Freedom Under Siege*, REPORTERS WITHOUT BORDERS, Feb. 19, 2025 (enumerating systematic intimidation and attacks), <https://rsf.org/en/one-month-trump-press-freedom-under-siege>.

182. I borrow this phrase from the oft-repeated call to action of Israel’s pro-liberal-democracy activists. See Amir Ben David, *Otzar Milim; Musagey Yesod Le-Havant Ha-Mitzeeut Ha-Yisraelit: Ye’ush* [Vocabulary: Fundamental Terms for Understanding Israeli Reality: Despair], ZMAN YISRAEL, Nov. 8, 2024, <https://www.zman.co.il/536246/popup/> (noting the refrain’s use to shake off despair).