Hal J. Singer
Managing Director of Econ One
and Adjunct Professor of Georgetown's McDonough School of Business

Written Comments in Response to U. S. Copyright Office's *Publishers' Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021)

Submitted via regulations.gov Docket No. 2021–5

Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers

Hal J. Singer[1]

---

[1] Managing Director of Econ One and Adjunct Professor at Georgetown's McDonough School of Business. Funding for this report was provided by the News Media Alliance. The opinions here represent those of the author and not those of his affiliated institutions. The author would like to thank Madeleine Bowe, Kevin Caves, Omer Gold, Jacob Linger, and Augustus Urschel for their contributions to the report. The author is currently engaged in an antitrust case involving Google unrelated to news publishers.

Introduction and Executive Summary

The purpose of this study is to explore the underpayment to newspapers from Facebook and Google attributable to the power imbalance between individual news publishers and the dominant platforms, and to describe how a pending bill in Congress, the Journalism Competition and Preservation Act (JCPA),[2] could effectuate competitive payments to news publishers, effectively simulating a world in which the power imbalance were removed. Facebook and Google (the "dominant platforms") appropriate the value added of news publishers generally—and newspapers specifically[3]—by reframing articles in rich previews containing headlines, summaries, and photos; and by curating the content alongside advertisements. This reframing and curation decreases the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms.[4] By exploiting their monopsony power over newspapers, Facebook and Google effectively pay a price of zero for accessing and "crawling" the newspapers' content.

This study finds that allowing current market forces to dictate the newspapers' "pay shares"—that is, the portion of platform revenues that redounds to newspaper publishers—ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to

[2] H. R. 5190 (March 7, 2019), § 3(b)(1)(A).
[3] I use the term "news publishers" to refer to any publisher of legitimate news content, through any medium. I use the term "newspapers" to refer to the subset of news publishers in the newspaper industry.
[4] Damien Cave, *An Australia With No Google? The Bitter Fight Behind a Drastic Threat*, NEW YORK TIMES, Jan. 22, 2021 (citing Tama Leaver, a professor of internet studies at Curtin University in Perth).

local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions,[5] as contemplated in the JCPA.

The report is not intended to isolate that portion of the underpayments to news publishers that can be attributable to the platforms' exclusionary conduct. Facebook and Google engage in a host of potentially anticompetitive strategies vis-à-vis news publishers—both within a platform's firm boundaries and across the platform's firm boundaries with third parties—that likely sustain the power imbalance and contribute to the suppression of payments to news publishers. For example, Facebook's algorithm rewards click-worthy stories, an attribute of stories not produced by legitimate news publishers, by moving them to the top of users' news feed.[6] Facebook also co-mingles sponsored content or ads alongside user-generated content in its news feed, thereby equating the quality of legitimate news and potentially fake news (not all sponsored content is fake news).[7] Both strategies tend to commodify legitimate news, diminishing its value. Prior to introducing its Instant Articles program, Facebook defaulted users to an in-app browser that degraded the download speeds of news publishers.[8] News publishers care about download speeds because users are quick to abandon a story that takes too long to download; news publishers can avoid this degradation by complying with Facebook's porting requirement, but at a cost of losing clicks (that would have occurred on their own sites) and thus advertising dollars.[9] Because legitimate news organizations need advertising revenues to staff reporters and editors, Facebook's

---

[5] *See, e.g.*, Sanjutka Paul & Hal Singer, *Countervailing Coordination Rights in the News Sector Are Good for the Public (A Response to Professor Yun)*, COMPETITION POLICY INTERNATIONAL (2019), *available at* https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun/.

[6] Postings with comments and likes on a person's status are given more weight in the Facebook algorithm. *See, e.g.*, *The Facebook Algorithm Explained*, BRANDWATCH, Jan. 9, 2019, *available at* https://www.brandwatch.com/blog/the-facebook-algorithm-explained/. A change to Facebook's algorithm in January 2018 to prioritize content based on audience engagements has been estimated to have decreased referral traffic from Facebook to news publishers' sites by one third. *How Much Have Facebook Algorithm Changes Impacted Publishers?*, MARKETING CHARTS, Apr. 4, 2019, *available at* https://www.marketingcharts.com/digital/social-media-107974.

[7] Christopher Mims, *Facebook Is Still In Denial About Its Biggest Problem*, WALL STREET JOURNAL, Oct. 1, 2017 ("On a network where article and video posts can be sponsored and distributed like ads, and ads themselves can go as viral as a wedding-fail video, there is hardly a difference between the two."), *available at* https://www.wsj.com/articles/facebook-is-still-in-denial-about-its-biggest-problem-1506855607.

[8] Sally Hubbard, *Why Fake News Is an Antitrust Problem*, FORBES, Jan. 10, 2017, *available at* https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/?sh=70b171930f1e ("In a test by The Capitol Forum, Facebook's in-app browser loaded on average three seconds slower than regular Safari on iOS. Studies show that 40 percent of desktop users and 53 percent of mobile users abandon websites that take more than three seconds to load.").

[9] *See* Ryan Mack, *Facebook Said It's Developing A Tool To Read Your Brain*, BUZZFEED NEWS, Dec. 15, 2020, *available at* https://www.buzzfeednews.com/article/ryanmac/facebook-news-article-summary-tools-brain-reader.

policies discriminate in favor of intentionally fabricated news, which has only minimal quality and managerial costs, and against legitimate news. In December 2020, Facebook unveiled an AI assistant tool called "TLDR," which reportedly "could summarize news articles in bullet points so that a user wouldn't have to read the full piece," further depriving news publishers of traffic.[10] Although Facebook has yet to release it, the new tool reportedly could also provide audio narration,[11] which conveniently would not include a link to the original article.

Google employs a different set of potentially anticompetitive strategies against news publishers. For example, it inserts snippets of news stories from legitimate news sites on its search results page, which induces some users to forgo clicking on the link and thereby deprives news sites of clicks and the associated advertising revenues.[12] Like Facebook, Google also aggregates news sources with and without editorial oversight; such commodification (or "atomization") of news can also cause reputational harm to news publishers by signaling no quality difference between replicators of news and the original source.[13] Google's placement of news on accelerated mobile pages (AMP) required the creation of costly and otherwise unnecessary parallel websites by publishers that are hosted, stored and served from Google's servers rather than the publishers.[14] To the extent that Google and news publishers are horizontal competitors for the same readership and advertisers, this conduct can be understood as a form of raising rival's costs.[15] When a publisher attempts to avoid this AMP-related incremental cost by moving its content behind a paywall, its rise in subscriptions is offset by declines in traffic from Google and other platforms.[16]

According to a complaint filed by ten state attorneys general in December 2020, Google and Facebook conspired to prevent the ascendancy of a process called "header bidding," which was used by news publishers as a workaround to reduce their reliance on Google's ad platforms and thereby capture a larger pay share on their sites.[17] In particular, header bidding permitted news publishers to solicit bids

---

[10] Facebook appears to reward content that appears on Instant Articles. *See id*. ("According to Facebook, users click on Instant Articles 20 percent more than other articles, and they share Instant Articles 30 percent more than mobile web articles on average.").

[11] *Id*.

[12] Majority Staff Subcommittee on Antitrust, Commercial and Administrative Law, Investigation of Competition in Digital Markets, Oct. 2020, at 70 (discussing Google's incentives to minimize outbound referrals) [hereafter *Majority Report*], *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[13] *Id.* at 309.

[14] *Id.* at 308.

[15] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

[16] *Majority Report* at 308 (citing News Media Alliance white paper). Some news publishers assert that this practice results in inferior rankings in search results as compared to other search platforms.

[17] Complaint, The State of Texas, et al. v. Google LLC, (E.D. Tex.) ¶¶9-14 (filed Dec. 16, 2020) [hereafter *Texas Complaint*]. *See also* Daisuke Wakabayashi and Tiffany Hsu, *Behind a Secret Deal Between Google and Facebook*, NEW YORK TIMES, Jan. 17, 2021, *available at*

for ad placements from multiple ad exchanges at once. In March 2017, Facebook announced it was testing a header-bidding program with several major publishers; but by September 2018, those plans were abandoned, as Google and Facebook entered into an agreement not to compete for news publishers.[18] As part of the agreement, Facebook allegedly received special information and speed advantages to help it succeed in the auctions, as well as a guarantee that Facebook would win a fixed percentage of auctions that it bid on, in what appears to be a market-allocation scheme.[19]

Although these strategies and restraints are consistent with the claim that Facebook and Google enjoy monopsony power vis-à-vis news publishers,[20] and although they likely support the platforms' ability to underpay news publishers, isolating the incremental harms flowing from a *particular* anticompetitive restraint is outside the scope of this report.[21] In contrast to an antitrust matter, which would focus on a set of restraints, this report focuses on the underpayments to news publishers flowing from the power imbalance between the platforms and individual news publishers *generally*, whether achieved by natural barriers or artificial barriers (restraints) or some combination of the two. In a competitive input market for online news content, where news publishers enjoyed free agency and could play one platform against another, payments to news publishers would approach the incremental contribution of news publisher content (legitimate news) to the platforms' advertising revenues.

This report is organized as follows. **Part I** assesses the significant buying (monopsony) power of Facebook and Google in the acquisition of news publisher content generally. Monopsony is the flip side to monopoly, or selling power in the output market. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their respective

---

https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html?referringSource=articleShare.

[18] *Behind a Secret Deal, supra.*

[19] *Id*.

[20] Other regulators have found that Facebook and Google enjoy significant buying power vis-à-vis newspapers. *See, e.g.*, Australian Competition & Consumer Commission, Draft News Media Bargaining Code, Q&As: Draft news media and digital platforms bargaining code, *available at* https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code ("The code seeks to address the fundamental bargaining power imbalance between Australian news media businesses and major digital platforms.").

[21] Indeed, the Department of Justice and Federal Trade Commission recently sued Google and Facebook, respectively, under the antitrust laws, alleging restraints in support of monopolization in some of the same markets (such as advertising and search advertising) as those studied here. Complaint, U.S. et al. v. Google LLC, Oct. 20, 2018, ¶1 ("For many years, Google has used anticompetitive tactics to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising—the cornerstones of its empire.") [hereafter *Google Complaint*]; Complaint, Federal Trade Commission v. Facebook Inc., Dec. 9, 2020, ¶28 [hereafter *Facebook Complaint*] ("By monopolizing personal social networking, Facebook thereby also deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.").

platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets. The platforms' massive buying power can be demonstrated *indirectly*, via evidence of high market shares combined with high barriers to entry. For example, Facebook and Google accounted for over half of U.S. digital display advertising in 2019;[22] combined shares in excess of 50 percent are consistent with collective market power under U.S. antitrust jurisprudence. Buying power also can be proven *directly* via evidence of payments below competitive levels or the ability to exclude rivals. Direct evidence of the platforms' buying power includes: (1) payments to news publishers significantly below competitive levels, (2) news publishers are compelled to accept these take-it-or-leave-it terms by the platforms, indicating the power imbalance; (3) the platforms have used exclusive agreements with third parties to exclude horizontal rivals, and they have prevented rivals from acquiring news content via acquisition.

Part II explores how payments to newspapers would be measured in a "but-for" world where the platforms' buying power were removed, thereby making the news content (input) market competitive. Economic theory dictates that in competitively supplied input markets, input providers tend to capture 100 percent of their marginal revenue product (MRP). Fortunately, the three measures of incremental revenue generated by newspapers for the platforms serve as a reasonable approximation for the newspapers' collective MRP. By compelling the dominant platforms to pay newspapers the fair-market value of their value added, Congress could replicate payments to news publishers in a world absent Google and Facebook's buying power. Newspapers are a "must-have" input for the platforms, as news drives most of the conversation. Must-have inputs, such as broadcasting and sports networks, command something closer to their MRP, as their selling power counteracts a portion of cable's buying power. These must-have input providers capture pay shares of between seven and eleven percent of the cable operators' total revenue; pay shares that vastly exceed the pay shares currently captured by newspapers from Google and Facebook.

In **Part III**, I assess the myriad social harms of newspapers not receiving competitive compensation. The news industry has incurred losses in advertising revenue every year since 2006,[23] around the time that the platforms solidified their

[22] eMarketer, Leading Digital Display Ad Sellers in the US, June 2020, *available at* https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending

[23] *Id*.

market power over digital advertising. This is not to say that Facebook's and Google's domination of digital advertising came entirely at the expense of newspapers. Rather, it is to provide context as to how *any* underpayment to newspapers can exacerbate an environment that is already quite dire. The effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.[24] As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy.[25] The elimination of local news threatens democracy. Another critical role of traditional news outlets is providing fact-based journalism in the face of disinformation campaigns. The reduction in traditional newspapers has coincided with more Americans using social media platforms to access news. Moreover, the negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms, can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there. Finally, there are also social harms of news publisher closure on a community, including the lack of social cohesion and a reduction in the diversity of viewpoints.

These findings support a proportionate intervention to effectuate competitive payments to newspapers and thereby mitigate these social harms.[26] At a high level, and as contemplated by the JCPA, the solution to the power imbalance is to permit newspapers to collectively bargain for payments from platforms, with voluntary negotiations between the platform and newspaper collective, followed by, if necessary, an adequate enforcement mechanism that ensures equitable payment to all news publishers. **Part IV** provides a prebuttal of anticipated economic criticisms of this proposal. Detractors from this proposal, including but not limited to the platforms, will likely argue that: (1) This effort is meant to enrich the largest newspapers; (2) it is better to attack platform power with antitrust intervention; and (3) newspapers derive significant value via referrals from platforms, which

---

[24] Mason Walker, U.S. newsroom employment has fallen 26% since 2008, Pew Research Center, July 13, 2021, available at https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/.

[25] Penelope Muse Abernathy, Univ. N.C. Sch. Of Media And Journalism, The Expanding News Desert 33 (2018), *available at* https://www.cislm.org/wp-content/uploads/2018/10/the-expanding-news-desert-10_14-web.pdf.

[26] Social harms are a form of "negative externalities": costs not fully borne by parties to the transactions at issue—the news publishers and dominant tech platforms—but instead by society at large. Degradation in fact-based news coverage has been found to impose substantial long-term costs to society. *See, e.g.,* Roberto Cavazos, *The Economic Cost Of Bad Actors On The Internet: Fake News In 2019*, *available at* https://www.cheq.ai/fakenews (estimating that "the epidemic of online fake news is costing the global economy $78 billion each year.").

should be deducted from the value added by newspapers to platforms when determining compensation. I address each of these arguments and explain why they are not persuasive as a matter of economics or competition policy.

I. Google and Facebook Possess Significant Buying Power in the Acquisition of Newspaper Content

Monopsony, or buying power in the input market, is the flip side to monopoly, or selling power in the output market. Some firms, like single-company towns, might enjoy power on the buying side for labor, but lack selling power in any output market. Other firms, like Apple, might enjoy selling power in the sale of laptops due to brand prestige, but lack buying power over office supplies or any other standard inputs used by thousands of other firms. And still other firms possess both buying power and selling power. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their respective platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets.

A. Indirect Measures of Buying Power: High Market Shares and Barriers to Entry

In April 2020, Facebook and other social media groups were a source of news for 47 percent of Americans, and 73 percent reported getting news from any online source (including from social media).[27] Indeed, Facebook has become the world's most popular source of news.[28] According to testimony submitted to the Antitrust Judiciary Subcommittee, news publishers feel extremely beholden to Google and Facebook for accessing viewers and advertisers.[29] The Judiciary Report concludes that "several dominant firms have an outsized influence over the distribution and monetization of trustworthy sources of news online, undermining the availability of high-quality sources of journalism."[30] A small change in an

---

[27] Oxford University's Reuters Institute for the Study of Journalism, Digital News Report 2020, at 10 *available at* https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf.

[28] Farhad Manjoo, *The Frightful Five Want to Rule Entertainment. They Are Hitting Limits,* NEW YORK TIMES, Oct. 11, 2017, *available at* https://www.nytimes.com/2017/10/11/technology/the-frightful-five-want-to-rule-entertainment-they-are-hitting-limits.html.

[29] *Majority Report* at 62.

[30] *Id.* at 62-63.

algorithm by either platform can materially decrease traffic to news publishers sites.[31]

In interviews with staff of the Judiciary Antitrust Subcommittee, "numerous businesses described how dominant platforms [including Google and Facebook] exploit this gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market."[32] News publishers in particular testified that "dominant firms can impose unilateral terms on publishers, such as take-it-or-leave-it revenue sharing agreements."[33] This evidence is consistent with monopsony power. In addition to the House Antitrust Subcommittee, which found Facebook is a monopolist over social networks, the UK's Competition and Markets Authority (CMA),[34] the UK's House of Lords,[35] Germany's Federal Cartel Office,[36] and the Australian Competition and Consumer Commission (ACCC)[37] have all found Facebook enjoy monopoly power in the output market for social networks. Indeed, the ACCC concluded that Facebook and Google have significant buying power over the distribution of news online: "Google and Facebook are the gateways to online news media for many consumers."[38]

As demonstrated below, buying power can be proven directly via evidence of payments below competitive levels or the ability to exclude rivals. Buying power can also be demonstrated indirectly, via evidence of high market shares combined with high barriers to entry.

---

[31] *Id.* at 63.
[32] *Id*. at 39.
[33] *Id*. at 64 (citing Submission of Source 140).
[34] Competition & Mkts. Auth., Online Platforms and Digital Advertising, Market Study Final Report 26 (July 1, 2020) (finding that Facebook's "market power derives in large part from strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms.").
[35] House of Lords Communications and Digital Committee, *Breaking News? The Future of UK Journalism*, 1st Report of Session 2019–21 (HL Paper 176) (Nov. 19, 2020) ("This change in the business model of journalism has created an existential threat to the industry, particularly combined with a host of other challenges ranging from a surge in 'fake news' to the ability of giant technology platforms such as Facebook and Google to undercut the power of publishers and their revenues.") *available at* https://committees.parliament.uk/publications/3707/documents/36111/default/.
[36] See Bundeskartellamt, B6-22/16, Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, 8 (Feb. 15, 2019) ("The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist."), *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22- 16.pdf?__blob=publicationFile&v=4.
[37] Austl. Competition & Consumer Comm'n Report at 9; 78.
[38] *Id*. at 226.

1. High Market Shares

In a competitive market for online search, news publishers could play one platform against another in an effort to extract as high a payment as possible for their input (legitimate news). But there are simply no other viable alternatives, as Google controls the vast majority of searches, and thus eyeballs. As of July 2020, Google accounted for a combined 89 percent of the U.S. desktop search (81 percent) and mobile search (94 percent) markets.[39] Impressively, Google has built upon this market share for more than a decade:[40] A 2009 internal Google document estimated Google's share of general search in the United States to be 71.5 percent, followed by Yahoo with 17.0 percent, and Bing with 7.5 percent.[41] The United Kingdom's CMA estimated that, as of mid-2020, Google's index of the web is three to five times the size of Bing's.[42] Google's dominance in online search gives it dominance over the search advertising market: As of 2019, Google controlled nearly three quarters of the search advertising market.[43]

Similarly, Facebook (including its acquisitions of Instagram and WhatsApp) is by far the most popular social networking platform on the planet. As of December 2019, Facebook had 1.8 billion monthly active persons (MAP), WhatsApp had 2.0 billion MAP, and Instagram had 1.4 billion MAP.[44] Its closest social networking competitors had far fewer monthly active users: Snapchat had 443 million MAP, Twitter had 582 million MAP, and LinkedIn had 260 million MAP.[45] Facebook reports 2.5 billion daily active users across its family of social networking platforms.[46] According to an internal report obtained by the House Subcommittee, from September 2017 to September 2018, Facebook alone reached more than 75 percent of U.S. Internet users.[47] Based on Facebook's production to the

---

[39] *Id*. at 78 (citing Desktop & Mobile Search Engine Market Share United States Of America, January 2009 to September 2020, Statcounter, *available at* https://gs.statcounter.com/search-engine-market-share/desktop-mobile/unitedstates-of-america/#monthly-200901-202009).
[40] *Id*. at 177.
[41] *Id*. at 179 (citing Marissa Mayer email).
[42] Competition & Mkts. Auth. Report at 89.
[43] Megan Graham, *Amazon Is Eating into Google's Most Important Business: Search Advertising*, CNBC (Oct. 15, 2019), *available at* https://www.cnbc.com/2019/10/15/amazon-is-eating-into-googles-dominance-in-search-ads.html).
[44] *Majority Report* at 132.
[45] *Id*. at 92. The House Report does not consider TikTok to be a social media platform. *Id*. at 93 ("Although it meets the broad definition of social media as a social app for distributing and consuming video content, TikTok is not a social network."). And LinkedIn has been relegated to a "niche strategy" of appealing to professional connections. *Id*. at 91. It bears noting that the FTC's recent antitrust complaint against Facebook does not include LinkedIn in the relevant market definition. *Facebook Complaint* ¶ 58 ("Personal social networking is distinct from, and not reasonably interchangeable with, specialized social networking services like those that focus on professional connections."). I nonetheless reference LinkedIn's statistics here to be over-inclusive.
[46] *Id*. at 132.
[47] *Id*. at 137 (citing Cunningham Memo).

Subcommittee, social media users spent more time on Facebook (48.6 minutes per day) than on Snapchat (21 minutes) or Twitter (21.6 minutes) in 2018.[48]

The two platforms monetize access to their users via the sale of advertising. Given their control over end users, the market for digital advertising also is highly concentrated. According to eMarketer, Facebook accounted for 42.2 percent U.S. digital display advertising in 2019, while Google accounted for 10.6 percent.[49] The UK's CMA similarly found that Facebook and Instagram generated over half of display advertising revenues in 2019 in the United Kingdom.[50] Combined shares in excess of 50 percent are consistent with collective market power under U.S. antitrust jurisprudence.[51] Moreover, their combined shares are growing: As of 2017, Google and Facebook accounted for 99 percent of year-over-year growth in U.S. digital advertising revenue.[52] According to Morgan Stanley, in the first quarter of 2016, 85 cents of every new dollar spent in online advertising went to Google or Facebook.[53] This level of dominance implies that the two platforms can push down payments to news publishers below competitive levels.

Facebook and Google have leveraged their platform power into vertical markets that match advertisers to publishers, formerly occupied by independent "ad tech" intermediaries such as LiveRamp. CMA estimates that Google captures over 50 percent of the search and digital display advertising market across the ad tech stack.[54] This power over the ad tech stack allows Google to exercise buying power

---

[48] *Id*. at 138.

[49] eMarketer, Leading Digital Display Ad Sellers in the US, June 2020, *available at* https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenue-share-2019-2022-of-us-digital-display-ad-spending

[50] Competition & Mkts. Auth. Report at 10.

[51] The concept of collective market power is well-understood in antitrust. *See, e.g*., Remarks of J. Thomas Rosch Commissioner, Federal Trade Commission, June 1, 2009 ("But firms who are participants in a duopoly or a tight oligopoly market collectively enjoy power that is akin to monopoly power in the sense that that they have the power to increase prices and reduce output in the market as a whole."); Daniel Crane, 90 *Market Power Without Market Definition*, NOTRE DAME LAW REV. 31-79 (2014) ("The Justice Department's high-profile case against Apple220 and five major book publishers concerning e-book pricing rests on seemingly obvious evidence of the exercise of collective market power creating anticompetitive effects."); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, HARVARD BUS. LAW. REVIEW 207-286 (2020) ("To whatever extent one thinks managers do pay attention to vote share or re-election odds, this new economic analysis mathematically proves that prices will be increased by high levels of horizontal shareholding across a set of firms that have collective market power.").

[52] Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUSINESS INSIDER, Apr. 26, 2017, *available at* https://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4l; Sarah Sluis, *Digital Ad Market Soars To $88 Billion, Facebook And Google Contribute 90% Of Growth*, AD EXCHANGER (May 10, 2018), https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebookand-google-contribute-90-of-growth.

[53] John Herrman, *Media Websites Battle Faltering Ad Revenue and Traffic*, NEW YORK TIMES, Apr. 17, 2016, *available at* https://www.nytimes.com/2016/04/18/business/media-websites-battle-falteringad-revenue-and-traffic.html?_r=0.

[54] Competition & Mkts. Auth. Report at 10.

vis-à-vis all publishers, including news publishers, as noted at the Senate Judiciary Committee Hearing in September 2020.[55] And in December 2020, ten states brought an antitrust suit against Google alleging monopolization of the ad tech stack.[56] The House Antitrust Judiciary Subcommittee attributes these high shares of digital advertising to high barriers to entry, specifically to behavioral data online, which can be used in targeted advertising; advertisers can only access these data through engagement with Facebook's and Google's ad tech.[57] Their advantage also derives from the aforementioned network effects—the larger the platform, the more efficient for the advertiser who can measure frequency to particular consumers and can buy larger segments efficiently.

2. Barriers to Entry

The discussion in the Introduction pertained to artificial barriers to entry or tactics employed by the dominant platforms, some of which likely contribute to the power imbalance between platforms and news publishers. Other barriers to entry that limit outside options for news publishers derive from natural forces. For example, Facebook and Google enjoy strong network effects that keep would-be rival social network platforms at bay. As the number of users on Google's online search platform increases, advertisers gain access to a larger trove of consumer data, which cannot be offered by a rival. And as more users engage with Facebook's social network, rival social networks have a harder time attracting customers, as no one wants to be alone on a network. Social network platforms must attract a critical mass of users to become attractive to advertisers.[58] Social *network* platforms "facilitate their users finding, interacting, and networking with other people they already know online;" in contrast, social *media* platforms "facilitate the distribution and consumption of content."[59] Unlike a social media sites such as YouTube, social *network* platforms have a "robust social graph" connecting content among a group of friends—that graph is extremely difficult to assemble for a social networking entrant.[60] Accordingly, the Majority Report concludes that YouTube and other social *media* sites do not compete against Facebook in any meaningful sense.

Switching costs also prevent competition for these platforms vis-à-vis news publishers. Facebook's users cannot take their photos and personal information to an upstart.[61] Google and Facebook also enjoy strong data advantages arising from their incumbency, providing further user lock-in.[62] Because website performance degrades with additional "crawlers" obtaining data to create a webpage index, most

---

[55] Stacking the Tech: Has Google Harmed Competition in Online Advertising? Hearing Before S. Subcomm. on Antitrust and Consumer Rights of the S. Comm. on the Judiciary, 116th Cong. (2019).
[56] *Texas Complaint*, *supra*.
[57] *Majority Report* at 131.
[58] *Id.* at 89.
[59] *Id.* at 91.
[60] *Id*. at 91.
[61] *Id*. at 144 (citing Omidyar Network Report and Production of Facebook).
[62] *Id.* at 43-44.

websites only allow one crawler, which is Google's "Googlebot," blocking any new search engine crawler. [63] The only English-language search engines that maintain their own comprehensive webpage index are Google and Bing; Yahoo and DuckDuckGo purchase access to the index from Google or Bing.[64] Finally, online search and social networking markets are prone to tipping towards monopoly because incumbents can exploit economies of scale and scope. Facebook can spread its fixed costs over a billion worldwide monthly active users,[65] a massive scale economy. Because Google offers complementary services in addition to general search (e.g., maps, local business answers, news, images, videos, definitions, and "quick answers"), Google enjoys additional scope economies; a rival search engine would have to offer a similar suite of products to compete effectively.

B. Direct Measures of Monopsony Power: Ability to Push Payments to Publishers Below Competitive Levels or Exclude Rival Search Engines (Google) or Rival Social Network Platforms (Facebook)

At the Judiciary Antitrust Subcommittee's sixth hearing, Rep. Pramila Jayapal (D-WA) noted that Google's control over both the buy-side and sell-side of the ad stack allowed Google to "set rates very low as a buyer of ad space from newspapers, depriving them of their ad revenue, and then also to sell high to small businesses who are very dependent on advertising on your platform."[66] In Part II.C., I review the actual payments and offers made by Facebook and Google to newspapers to date; that the two platforms are able to impose payments significantly below competitive levels (in many cases, a payment of zero) and below the pay shares for other "must-have" input providers in comparable industries is direct evidence of their monopsony power.

In 2020, the ACCC found that the power imbalance between platforms and news publishers has "resulted in news media businesses accepting *less favourable* terms for the inclusion of news on digital platform services than they would otherwise agree to."[67] That news publishers are compelled to accept these take-it-

---

[63] *Id*. at 79 (citing research by Zack Maril).
[64] *Id*. at 79.
[65] Statista, Leading Countries Based on Facebook Audience Size as of October 2020, *available at* https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/ (estimating 2.7 billion monthly active users worldwide and 190 million in the United States). The House Judiciary Committee estimates Facebook has 1.8 billion "monthly active persons" (MAPs), not including the MAPs of Instagram and WhatsApp. *Majority Report* at 92 ("The social network marketplace is highly concentrated. Facebook (1.8 billion users) and its family of products—WhatsApp (2.0 billion users), Instagram (1.4 billion users)— have significantly more users and time spent on its platform than its closest competitors, Snapchat (443 million users) or Twitter (582 million users).").
[66] CEO Hearing Transcript at 169 (Rep. Pramila Jayapal (D-WA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).
[67] AUSTL. COMPETITION & CONSUMER COMM'N, DRAFT NEWS MEDIA BARGAINING CODE, July 31, 2020, *available at* https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code (emphasis added).

or-leave-it terms is also consistent with the claim that platforms' enjoy significant buying power; if news publishers had alternative pathways to advertisers and viewers, and if other parameters of the contract such as pricing were held constant, they might not accept these "less favorable" terms.

Another form of direct evidence of monopsony power is the ability to exclude rival platforms, which would otherwise put upward pressure on payments to news publishers. Google has used exclusive agreements to ensure its prime real estate on the browser and home page of the mobile user screen. In particular, Google imposed exclusionary terms in contracts effectively requiring phone and tablet makers that used its Android operating system to pre-install both Chrome and Google Search.[68] Among desktop browsers, Google Search enjoys default placement in 87 percent of browsers, equal to the sum of Chrome (51 percent of the U.S. browser market), Safari (31 percent), and Firefox (5 percent).[69] Among mobile phones, Google Search is the default on Android and on Apple's iOS mobile operating system, accounting for nearly all smartphones in the United States.[70] According to the House Subcommittee's review, as well as antitrust analyses,[71] Google conditioned access to the Google Play Store on Android devices on making Google Search the default search engine, a requirement that gave Google a significant advantage over competing search engines; Google also used revenue-sharing agreements to establish default positions on Apple's Safari browser (on both desktop and mobile) and Mozilla's Firefox.[72] In October 2020, the Department of Justice Antitrust Division commenced litigation to challenge several of those exclusionary agreements.[73]

The platforms also excluded rivals from acquiring news content via acquisition. Facebook acquired two large rival social network platforms, Instagram in 2012 and WhatsApp in 2014. According to internal documents produced to the House Subcommittee, Facebook "acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market."[74] Similarly, Google acquired DoubleClick in 2007 and AdMob in 2010 in their infancies, both of whom could have evolved into serious horizontal rivals to Google in the market for

---

[68] *Majority Report* at 177.
[69] *Id*. at 81.
[70] *Id.* at 82.
[71] Benjamin G. Edelman & Damien Geradin, *Android and Competition Law: Exploring and Assessing Google's Practices in Mobile*, 12 EUROPEAN COMPETITION JOURNAL 159-194 (2016) (" … Google's MADA strategy leverages the company's market power in certain services and apps for which there is no clear substitute (most notably Google Play and YouTube) in order to compel device manufacturers wishing to manufacture commercially-viable devices to install other services and apps (including Google Search and Google Maps) for which there are substitutes. This is a clear case of tying.").
[72] *Majority Report* at 82.
[73] Complaint, U.S. v. Google, Case 1:20-cv-03010, Oct. 20, 2020, *available at* https://www.justice.gov/opa/press-release/file/1328941/download.
[74] *Majority Report* at 149.

digital advertising; indeed, DoubleClick arguably had reached significant scale to impose meaningful price discipline on Google at the time of its acquisition.[75]

Potential horizontal competitors to Facebook often enter as a complement to Facebook's offering by relying on the Facebook's application programming interfaces (APIs) called Facebook's Open Graph. When Facebook detects that an app is too close of a substitute or presents a threat to Facebook's monopoly, it can deny access to its API to foreclose competition. For example, Facebook restricted API access to Pinterest, a visual discovery engine for finding ideas like recipes or style inspiration, and Facebook's CEO admitted that Pinterest was a competitor to Facebook during the House hearings.[76] Internal documents reveal that Facebook perceived that Vine, a video-sharing app acquired by Twitter, had "replicated Facebook's core News Feed functionality," and cut off Vine's access to Facebook APIs;[77] Twitter shuttered the app in 2016. Other perceived rivals that lost access to Facebook's API include MessageMe (competing with Facebook Messenger) and Arc (competing with Facebook).[78]

Similarly, the most likely horizontal competitors to Google's search, such as local restaurant reviews, begin as complements in vertical search. When Google spies a potential threat, it can invade the vertical space and use its gatekeeping power to steer searches to its affiliated clone. Not only is this strategy effective at extending its monopoly into the edge for vertical search, but also at preserving its monopoly in general search. Google also demanded that certain verticals permit Google to scrape their user-generated content,[79] further impairing competition.

II. Newspapers Would Capture Nearly All of Their Incremental Revenue Contribution in the Absence of the Platforms' Buying Power

This section demonstrates, using economic theory, that newspapers would capture something close to their MRP in the absence of Facebook's and Google's buying power. Using standard economic principles, I show how a buyer of news, such as Facebook or Google, can still earn substantial profit from the deployment of news, even when it obliged to compensate newspapers at a competitive rate, defined by the MRP.

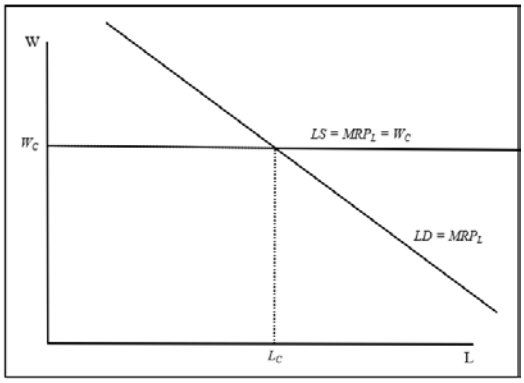
---

[75] See, e.g., Robert Hahn & Hal Singer, An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick, AEI-Brookings Joint Center Related Publication No. 07-24, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016189.
[76] Hal Singer, *Top 10 Admissions from Tech CEOs Secured at the Antitrust Hearing*, PROMARKET, July 30, 2020.
[77] *Majority Report* at 167.
[78] *Id*. at 168-69.
[79] *Id*. at 84.

A. Payments to Input Providers Under Competitive Conditions

Under competitive conditions, standard economic models predict that each input to production receives compensation (the "factor price") equal its MRP, which in turn predicts the share of revenue paid to that input.[80] As illustrated in Figure 1 below, a firm that lacks monopsony power faces a *horizontal* (or "perfectly elastic") supply curve for each factor of production. For example, if the factor in question is labor—meaning that the employer is buyer—and if the employer faces a perfectly competitive labor market, then the employer takes the market wage as given, and can hire as much labor as it requires at the market wage, w_C. Accordingly, the price of labor cannot be affected by changes in the quantity demanded (purchased) by the employer, *LD*. As illustrated in Figure 1, the buyer has a downward-sloping demand curve for the factor of production, reflecting declining marginal productivity as more and more of the factor is used. As long as the demand curve for the factor is above the (horizontal) supply curve, it is economically rational for the employer to continue purchasing more of the factor, because the marginal benefits of doing so exceed the marginal costs.

FIGURE 1: COMPETITIVE ("PERFECTLY ELASTIC") FACTOR SUPPLY CURVE



The same principles apply to any perfectly fungible, competitively supplied factor of production, such as paper clips: Virtually any businesses can presumably purchase as many perfectly interchangeable paper clips as it requires at the market price. Because the supply of paperclips is (from the point of view of any individual buyer) effectively unlimited, an individual business cannot bid up the market price of paperclips by purchasing "too many" of them, nor can it suppress the market price of paperclips by purchasing "too few."

---

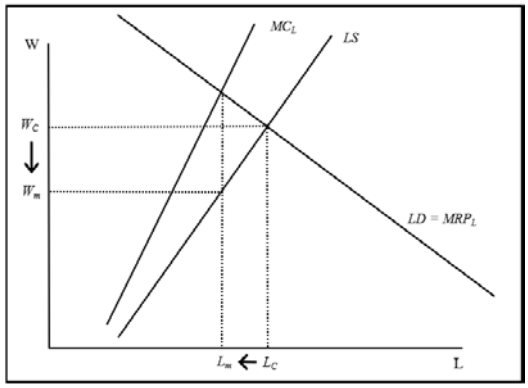
[80] Elementary economics shows that competitive firms pay labor a share of revenue commensurate with labor's productivity, based on the marginal product of labor. *See, e.g.,* ROY RUFFIN & PAUL GREGORY, PRINCIPLES OF MICROECONOMICS 331-36 (Harper Collins 5th ed. 1993) (explaining that standard economic theory makes predictions regarding the share of payments made to labor that are borne out in the data; economic theory explains why the share of payments going to labor remained relatively constant over several decades (from 1948 to 1990) even though the capital stock more than doubled over this time period). *See also* MICHAEL KATZ & HARVEY ROSEN, MICROECONOMICS 264-265 (Irwin McGraw-Hill 3rd ed. 1998)

Importantly, that the factor price is equal to MRP does not necessarily imply that the buyer earns zero profit from the factor. As illustrated in Figure 1, whenever the factor demand curve is downward-sloping, the buyer can earn profit on the *inframarginal* units of the factor (to the left of competitive output along the labor demand curve, where the buyer is willing to pay more than the competitive wage). Even under perfect competition, the inframarginal units of the factor generate more revenue than they are paid. The buyer's profit on the inframarginal units is given by the area of the triangle under the factor demand curve. It bears noting that even if newspapers were to capture 100 percent of their incremental revenue contribution under a regulated outcome, the platforms would continue to earn margins—equal to the difference between MRP and payments—on all of the other (non-newspaper) input providers to their platform.

B. Payments to Input Providers Under Monopsony Conditions

In markets with monopsony power, buyers maximize profits by depressing factor prices below the MRP. This means that there is a gap between the amount that a factor is compensated and the amount of revenue the factor generates for the buyer at the margin. The more monopsony power that a buyer has, the larger is the gap, and the more compensation is suppressed below the competitive level.

FIGURE 2: IMPERFECTLY COMPETITIVE (UPWARD-SLOPING) FACTOR SUPPLY CURVE



As illustrated in Figure 2, a buyer with monopsony power faces an *upward-sloping* factor supply curve. The extent to which a buyer can push down factor prices is dictated by its monopsony power. Monopsony power can be measured using the elasticity of supply, which measures the responsiveness of the quantity of the factor supplied to changes in the factor price. A lower elasticity of supply implies a greater exercise of monopsony power—that is, a greater gap between a worker's wage and her MRP. To illustrate, note that the degree of factor price suppression in Figure 2 depends on how steep the factor supply curve is. Steeper factor supply curves are

associated with lower supply elasticities, and thus greater suppression of factor prices.[81]

There is a direct parallel between a monopolist—a *seller* with market power—and a monopsonist—a *buyer* with market power. Just as the monopolist's optimal markup over marginal cost varies inversely with the elasticity of consumer *demand*, the monopsonist's optimal markdown below MRP is inversely related to the elasticity of factor *supply*. The solution to the monopolist's problem of what price to charge is given by $(p\text{-}c)/p = 1/E_D$, where p is the price, c is the marginal cost, and E_D is the elasticity of consumer demand. By symmetry, the solution to the monopsonist's problem of what factor price to pay is $(MRP\text{-}w)/w = 1/E_S$, where w is the factor price, MRP is the worker's marginal revenue product, and E_S is the elasticity of factor supply.[82] Buyers can suppress factor prices below (or further below) competitive levels by engaging in conduct that has the effect of dampening the factor supply elasticity.

C. Evidence That Payments to Newspapers Are Below Competitive Levels

In a competitive factor market, economic theory dictates that newspapers' compensation would approach their MRP. That is clearly not happening today, as indicated by public records of payments to newspapers.

1. Current Payments to Newspapers

Facebook SEC Form 10-Ks show its maximum payment for content across all content providers, including newspapers. The 10-K includes information of Facebook's "cost of revenue," which includes, among other things, costs associated with partner arrangements, including traffic acquisition and content acquisition costs, credit card and other transaction fees related to processing customer transactions, and cost of consumer hardware device inventory sold. Between 2016 and 2018, Facebook's cost of revenue ranged between 13 and 17 percent of its total revenue.[83] Accordingly, Facebook's payment for content acquisition, a subset of this share, was *less* than 13 to 17 percent of its revenues. And Facebook's payment for newspaper content would be even smaller.

Facebook reportedly made a deal in 2019 with a number of newspapers to pay "trusted news sources" an undisclosed amount for their services. According to *MarketWatch*, these deals could range from a couple hundred thousand dollars for smaller, regional publications to $3 million for larger, national publications.

---

[81] For a linear factor supply curve such as that depicted in Figure 2, the elasticity of supply varies with movements along the curve. Nevertheless, for any given point on the curve, an increase in the steepness of the curve implies a lower supply elasticity.

[82] *See*, *e.g.*, ROGER BLAIR, SPORTS ECONOMICS 354 (Cambridge University Press 2012).

[83] Securities and Exchange Commission, Form 10-K, Facebook Inc. 2018, *available at* https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm.

According to the *Wall Street Journal*, Facebook was only offering payment to roughly 50 out of the 200 news providers on Facebook News.[84]

Google reportedly offered a total of $1 billion over three years to a number of news providers in Germany, Brazil, Argentina, Canada, the U.K., and Australia. While many companies accepted this deal, one major German news source, Axel Springer, refused.[85] In the cases of France and Belgium, Google made indirect deals by putting money into a "Special Fund for French Media" and through supposedly buying ads on Belgian media websites as a fix to Belgian demands for copyright fees. Neither of these cases suggests an outright deal or offer to publishers.[86] Following France's implementation of a new rule enacted under a recent European Union law that creates "neighbouring rights," in February 2021, Google agreed to pay $76 million over three years to a group of 121 French news publishers to settle a dispute.[87] In October 2021, Facebook reached an agreement with the French press alliance to pay national and regional newspapers for "using excerpts of their articles when they are shared on the social network."[88]

2. Converting Payment Levels to Pay Shares

Economists recognize that "[i]n a world of perfect competition, the output contribution of individual production factors equals their respective revenue shares."[89] Thus, under competition, the share of total revenue that each factor receives is proportional to the relative importance of that factor in generating output. When factor markets are less than perfectly competitive, the share of revenue paid to the noncompetitive factor(s) may fall because (1) a monopsonist pays compensation below the competitive level; and (2) a monopsonist uses less of the factor than would be employed under competition.

---

[84] Lucas Alpert, *Facebook, Wall Street Journal publisher and others reach deal for news section*, MARKET WATCH, Oct. 10, 2019, *available at* https://www.marketwatch.com/story/facebook-wall-street-journal-publisher-and-others-reach-deal-for-news-section-2019-10-18; Paris Marineau, *Facebook Tries Again With News, This Time Paying Publishers*, WIRED, Oct. 25, 2019, *available at* https://www.wired.com/story/facebook-tries-again-news-paying-publishers/.

[85] David Meyer, *Why Google's $1 billion deal with news publishers isn't the end of their war*, FORTUNE, Oct. 1, 2020, *available at* https://fortune.com/2020/10/01/google-billion-dollar-news-showcase-axel-springer/

[86] Harro Ten Wolde & Eric Auchard, *Germany's top publisher bows to Google in news licensing row*, REUTERS, Nov. 5, 2014, *available at* https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105; Jeffrey Roberts, *Did Google pay Belgian newspapers a $6M copyright fee? Sure looks like it*, GIGAOM, Dec. 13, 2012, *available at* https://gigaom.com/2012/12/13/did-google-pay-belgian-newspapers-a-6m-copyright-fee-sure-looks-like-it/.

[87] Mathieu Rosemain, *Google's $76 million deal with French publishers leaves many outlets infuriated*, REUTERS, Feb. 12, 2021, *available at* https://reut.rs/3jrG74t.

[88] Benoit Berthelot, *Facebook Will Pay French Newspapers for Using Their News*, YAHOO! FINANCE, Oct. 21, 2021, *available at* https://yhoo.it/3E75YX9.

[89] Sabien Dobbelaere & Jacques Mairesse, *Panel Data Estimates of the Production Function and Product and Labor Market Imperfections,* 28 JOURNAL OF APPLIED ECONOMETRICS 1-46, 2 (2013).

For example, noted economist Professor Alan Manning has explained that, in professional sports, there is "a clear link between the removal of anti-competitive labor practices and rises in the share of revenue going to athletes."[90] The same principles can be applied to the broader economy. A 2013 paper observes that "the constancy of the share of income that flows to labor has been taken to be one of the quintessential stylized facts of macroeconomics,"[91] but that in recent years "prominent measures of labor's share in the United States have declined significantly."[92]

More recent research has reached similar conclusions for both labor *and* capital, two critical inputs to production: A recently published paper in the *Journal of Finance* concludes that, in sectors throughout the economy, "the shares of both labor and capital are declining and are jointly offset by a large increase in the share of pure profits," and that observed "increase[s] in industry concentration can account for most of the decline in the labor share."[93] Similarly, a 2020 study published in the *Quarterly Journal of Economics* concludes that rising market power "can account for a number of secular trends in the past four decades, most notably the declining labor and capital shares as well as the decrease in labor market dynamism."[94]

Conversion of newspaper payments to pay shares is straightforward. Google's annual U.S. advertising revenues in 2020 was roughly $49 billion.[95] Facebook's annual U.S. advertising revenues in 2020 was roughly $22 billion.[96] Accordingly, a one percent pay share for U.S. newspapers would amount to annual payments of $490 million by Google and annual payments of $220 million by

---

[90] Manning (2020) at 10.
[91] Michael Elsby, Bart Hobijn, & Aysegul Sahin, *The Decline of the U.S. Labor Share*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 1-42, 2 (2013).
[92] *Id.* at 2.
[93] Simcha Barkai, *Declining Labor and Capital Shares*, 75(5) JOURNAL OF FINANCE, 2421-2463, 2421 (2020).
[94] Jan De Loecker & Jan Eeckhou, *The Rise of Market Power and the Macroeconomic Implications* 135 QUARTERLY JOURNAL OF ECONOMICS (2020).
[95] Per Google's 10-K, total Google Search ad revenue in 2019 is $98 billion globally and $45 billion in the US, meaning 46% of Google Search ad revenues come from the US. Using Google's quarterly 10-Q filings, I obtain actual quarterly revenues for Q1-3 2020 and estimate Q4 based on previous Q4 performance, implying forecasted 2020 global Google Search ad revenues of $107 billion. I multiply this figure by the 46% share of global Google Search revenues that stem from the US to obtain $49 billion for 2020.
[96] Per Facebook's 10-K, total U.S. and Canada advertising revenue in 2019 is $33.5 billion, and the total active users for U.S. and Canada is $245.5 million, implying average revenue per user of $136.4. Facebook also states that there are 220 million US users in 2019. Multiplying this figure by the ARPU from the U.S. and Canada aggregate, this implies U.S.-only advertising revenues of $30 billion. Statista reports that in 2019, 31.8 percent of Facebook's advertising revenues come from Instagram, to which newspapers make no contribution. To net out the advertising revenues from Instagram, I multiply $30 billion by (1-0.318) to obtain US only, Facebook (non-Instagram) 2019 revenues of $20.5 billion. Using Facebook's quarterly reports for 2020 Q1-3, I perform a similar calculation and arrive at $21.9 billion in U.S. (non-Instagram) advertising revenues for 2020.

Facebook. Based on the reported payments to U.S. newspapers reviewed above, it is reasonable to assume that the current pay shares are less than one percent. In the next section, I examine the pay shares in comparable industries.

3. Regulatory Benchmarks

Benchmarking is a common tool used by economic scholars and practitioners.[97] A benchmark is more informative when it reflects attributes with the "but-for world" envisioned here—that is, everything is the same except for the power imbalance between newspapers and platforms. The salient characteristics of that but-for world include (1) the group seeking fair-market compensation constitutes only one of several input providers for the dominant platform; (2) the payment to the input provider is governed directly or indirectly by an enforcement mechanism as opposed to being set entirely through market forces; and (3) the group seeking fair-market value bargains collectively. Even imperfect benchmarks, which satisfy one or two of the criterion of the but-for world, can offer insight as to the reasonableness of the implied pay shares that are sought here. Table 1 presents an overview of potential benchmarks, discussed below, including the associated pay shares for the input providers.

TABLE 1: PAY SHARES IN POTENTIAL BENCHMARKS

Potential Benchmark	**Pay Shares**	**Protected Class Represents Only One of Many Inputs**	**Regulated Allocation**	**Collective Bargaining**
Artists and Publishers Under Music Streaming Royalties	65-70%	×	✓	✓
Broadcasters Under Retransmission Consent	~11%	✓	✓	×
Regional Sport Networks	~7%	✓	×	×
Athletes in Professional Sports Leagues	50-60%	×	×	✓

As Table 1 shows, none of the potential benchmarks satisfies all three salient characteristics of the but-for world. The derivation of these pay shares are provided in Appendix 1. While broadcasters and regional sports networks (RSNs) represent only one of many inputs on their respective platforms, making them a close comparable, broadcasters cannot bargain collectively vis-à-vis cable operators, and

[97] *See e.g.,* Justin McCrary & Daniel Rubinfeld, *Measuring benchmark damages in antitrust litigation*, 3(1) JOURNAL OF ECONOMETRIC METHODS 63-74, 63 (2014) ("We have found the benchmark approach to be the most commonly used damages methodology.").

RSN licensing fees are not set in a regulated environment. Yet the pay shares for broadcasters (approximately eleven percent of cable revenues) and RSNs (approximately seven percent of cable revenues) vastly exceed the pay shares currently captured by U.S. newspapers from Google and Facebook (less than one percent). Relative to these comparables, this deficit in pay shares indicates that newspapers are not capturing anything close to competitive rates, and is thus indicative of Google's and Facebook's buying power vis-à-vis newspapers.

The pay shares for music rightsholders (65 to 70 percent) and athletes in professional sports leagues with unions and free agency (60 percent) likely overstate the fair-market value of pay shares here, as those input providers account for the totality of the relevant inputs in the production process in their respective fields. Nevertheless, those benchmarks are informative of a related but-for world in which *all* content providers, including but not limited to newspapers, broadcasters, bloggers, and video services, could achieve fair-market value for their revenue contributions to the platforms. In other words, if the platforms' monopsony power over all content providers were vanquished, Facebook and Google could be forced to pay content providers more than half of their advertising revenues.

III. Underpayment to Newspapers Results in Myriad Social Harms

This section reviews the social harms flowing from the underpayments to news publishers. There are myriad social harms flowing from underpayments to newspapers, beginning with employment effects in the input market (e.g., journalism jobs).

A. Employment (Output) Effects in the Input Market

The net effect of shrinking advertising revenues—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. Employment among newspaper employees fell from 71,000 in 2008 to 31,000 in 2020.[98] The Bureau of Labor Statistics predicts that over the next decade, the total employment of reporters, correspondents, and broadcast news analysts will continue to decline.[99]

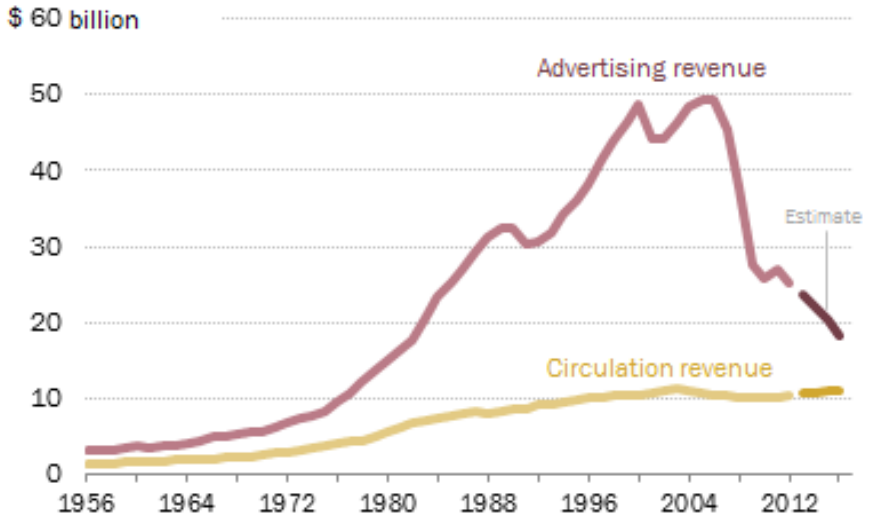
The decline in newspaper advertising revenue coincides with the rise of platform power. From 1956 through 2005, advertising revenue for U.S. newspapers

[98] Mason Walker, U.S. newsroom employment has fallen 26% since 2008, Pew Research Center, July 13, 2021, available at https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/.

[99] Occupational Outlook Handbook: Reporters, Correspondents, and Broadcast News Analysts, U.S. Dep't Of Labor: Bureau of Labor Statistics, *available at* https://www.bls.gov/ooh/media-and-communication/reporterscorrespondents-and-broadcast-news-analysts.htm.

steadily increased, peaking around $50 billion in 2005.[100] The rise of platform power was assisted by favorable legislation in the 1990s and early aughts.[101] In the mid-aughts, Facebook and Google began to consolidate their power, with competitors MySpace (Facebook's precursor), and Infoseek, Lycos, and Altavista (Google's precursors) steadily disappearing. Since 2006, U.S. newspaper advertising revenue declined from $49 billion in 2006 to $18 billion in 2016.[102] Figure 3 shows the rise and fall of newspaper advertising revenues since 1956.

FIGURE 3: TOTAL ADVERTISING REVENUES FOR U.S. NEWSPAPERS, 1956-2016



Source: Pew Research, *available at* https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/.

Platforms have contributed to shrinking newspaper advertising revenues in two ways. Platforms are not only a direct competitor to newspapers for advertising dollars (a horizontal relationship), but platform dominance can also be used to squeeze newspapers (a vertical relationship) for lower input prices. In 2016, the news industry incurred losses in total weekday circulation, despite gains for certain top-selling sites.[103] The news industry also incurred losses in advertising revenue in 2016, marking a steady decline since 2006.[104] According to one news publisher's testimony to the Antitrust Subcommittee, "digital subscription revenues remain a

[100] Michael Barthel, Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall, Pew Research Center: Facttank (June 1, 2017), https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry.

[101] For example, Congress passed the Communications Decency Act in 1996 and the Digital Millennium Copyright Act in 1998, shielding platforms from certain liabilities, and gave the new platforms generous tax incentives.

[102] *Id.*

[103] Barthel, *supra.*

[104] *Id.*

minor revenue stream and do not appear to be on a path to replace the decline in print subscriptions" for the vast majority of newspapers.[105]

Since dominant platforms aggregate content on their sites, newspapers have little choice but to permit sharing their content this way, as they are dependent on the platforms for traffic. But by providing snippets of content, the platforms permit users to obtain the news without clicking through to the underlying source, depriving the publisher of traffic and its associated ad revenues.[106] This, in turn, also creates less of a need to subscribe to the newspaper platform. The platforms do not compensate newspapers for this lost traffic.

B. Removal of Economic Stimulus to Local Economies

The negative employment trends among newspapers, exacerbated by underpayments from the dominant platforms,[107] can have ripple effects throughout local economies. When reporters, correspondents, and broadcasts news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there.[108]

Local newspapers also provide a valuable service to local businesses by creating a way to connect with community members and advertise their products and services. [109] When underpayments intensify news publisher closure, local businesses no longer have access to this mode of communication and advertising. Furthermore, research has shown that there is a causal link between local newspaper closures and higher municipal borrowing costs, likely due to the reduction in independent oversight.[110] This translates into an approximate increase of $650,000 per average municipal bond issuance.[111] Higher borrowing costs are

---

[105] Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.).
[106] News Media Alliance, How Google Abuses Its Position As A Market Dominant Platform To Strong-Arm News Publishers And Hurt Journalism 2, 12 (2020), *available at* http://www.newsmediaalliance.org/wpcontent/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.
[107] *See* Part III.B.1
[108] Josh Bivens, *Updated employment multipliers for the U.S. economy*, ECONOMIC POLICY INSTITUTE, January 23, 2019, *available at* https://www.epi.org/publication/updated-employment-multipliers-for-the-u-s-economy/.
[109] *The benefits of local newspapers*, COVINGTON NEWS, *available at* https://www.covnews.com/nie/benefits-local-newspapers/#:~:text=Small%20business%20owners%20often%20connect,strengthen%20local%20schools%20and%20infrastructure.
[110] Pengjie Gao, Chang Lee, and Durmot Murphy, *Financing dies in darkness? The impact of newspaper closures on public finance*, 135(2) JOURNAL OF FINANCIAL ECONOMICS (2020).
[111] *Id.* at 446.

ultimately borne by local taxpayers, thereby reducing real disposable incomes and removing further stimulus from local economies.[112]

C. Threats to Democracy from News Deserts

As a result of the deteriorating news media landscape described above, hundreds of local newspapers have been acquired or declared bankruptcy.[113] One study estimates that the United States has lost nearly 1,800 newspapers since 2004 either to closure or merger, leaving the majority of counties in America beholden to a single publisher of local news, and 200 counties are without any paper.[114]

The elimination of local news threatens democracy. A critical function of a local newsroom is coverage of local and state government affairs.[115] Without this coverage, Americans are more likely to rely on national news and partisan heuristics to make political decisions.[116] A robust local news business is also a natural pipeline by which government officials effectively communicate to an electorate (and vice versa). Research shows that in areas with higher local news coverage, voters are better informed on their congressmen and that politicians more actively pursue their constituents' interests through moderating their partisan voting, more frequently standing witness to committee hearings, and generating more federal funding for their districts.[117] Local newsrooms may also provide a check on local government corruption and mismanagement.[118] Moreover, robust local news coverage is positively correlated with higher rates of voter turnout,[119] more support for local services,[120] and greater levels of social cohesion.[121]

---

[112] Dermot Murphy, *When local papers close, costs rise for local governments*, COLUMBIA JOURNALISM REVIEW, June 27, 2018, *available at* https://www.cjr.org/united_states_project/public-finance-local-news.php.

[113] Penelope Muse Abernathy, Univ. N.C. Sch. Of Media And Journalism, The Expanding News Desert 33 (2018), *available at* https://Www.Cislm.Org/Wp-Content/Uploads/2018/10/The-Expanding-News-Desert-10_14-Web.Pdf.

[114] Penelope Muse Abernathy, Univ. N.C. Sch. of Media and Journalism, The Expanding News Desert 10-11 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

[115] Free and Diverse Press Hearing at 3–4 (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution).

[116] Joshua P Darr, Matthew P Hitt, & Johanna L Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68(6) JOURNAL OF COMMUNICATION 1007–1028 (2018).

[117] James M. Snyder & David Strömberg, *Press Coverage and Political Accountability*, 118(2) JOURNAL OF POLITICAL ECONOMY 355–408 (2010).

[118] Mary Ellen Klas, Less Local News Means Less Democracy, Nieman Reports (Sept. 20, 2019), *available at* https://niemanreports.org/articles/less-local-news-means-less-democracy/.

[119] Matthew Gentzkow, et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011); Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 JOURNAL OF POLITICS 447, 447 (2014).

[120] Noah Smith, *Goodbye Newspapers. Hello, Bad Government*, BLOOMBERG (June 1, 2018), *available at* https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government.

D. The Rise of Fake News and Disinformation Campaigns

As professional news dwindles, fake news fills the void. The House Judiciary Report notes that "the gap created by the loss of trustworthy and credible news sources has been increasingly filled by false and misleading information."[122] This comes as no surprise since the dominant platforms "face little financial consequence when misinformation and propaganda are promoted online."[123] Instead, these platforms incentivize publishers to gain the most attention possible, regardless of the methods or integrity.[124] Using preference-based algorithms, the platforms create echo chambers in which fragmented views of the news are reinforced, leading to further mistrust. [125] This is in contrast to traditional news outlets, which focus instead on forming audience relationships and building a reputation for quality and trust.[126]

The reduction in these traditional newspapers has coincided with more Americans using social media platforms to access news.[127] This shift is expected to lead to a greater spread of both partisanship and misinformation,[128] leading to significant social harms. For instance, misinformation could have resulted in hastening the COVID-19 epidemic by influencing citizens' behavior and response to government countermeasures.[129] In an August 2020 survey, "relatively high levels of misperception" could be found among those receiving news information from social media sources, while the "lowest levels of misperceptions" was found among those receiving information from "local television news, news websites or apps, and community newspapers[.]"[130] Underpayment to these trusted news sources has contributed to their lower prevalence, proliferating this shift to less reliable sources.

---

[121] Amy Mitchell, et al., Civic Engagement Strongly Tied to Local News Habits, Pew Research Center (Nov. 3, 2016), *available at* https://www.journalism.org/2016/11/03/civic-engagement-strongly-tied-to-local-news-habits.

[122] *Majority Report* at 62.

[123] *Id.* at 67.

[124] Michael Clay Carey, *Local News and Community Resiliency in Appalachia*, CENTER FOR JOURNALISM & LIBERTY, 23-24, Sept. 22, 2020.

[125] *Id.*

[126] Comments of News Media Alliance Before the Federal Trade Commission Regarding the Hearings on Competition and Consumer Protection in the 21st Century, August 20, 2018, 15, *available at* https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0088-155244.pdf.

[127] Peter Suciu, *More Americans Are Getting Their News From Social Media*, FORBES, October 11, 2019, *available at* https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=1eebb4723e17.

[128] Robert Faris, et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election,* BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, No. 2017-6, *available at* https://cyber.harvard.edu/publications/2017/08/mediacloud.

[129] Matteo Cinelli, et al., *The COVID-19 social media infodemic*, 10(16598) SCI REP (2020).

[130] Matthew Baum, et. al., *The State of the Nation: A 50-State COVID-19 Survey, Report #14: Misinformation and Vaccine Acceptance*, THE COVID-19 CONSORTIUM FOR UNDERSTANDING THE PUBLIC'S POLICY PREFERENCES ACROSS STATES (a joint project of Northeastern University, Harvard University,

E. Harms to Community and Culture

There are also social harms that can be harder to quantify—such as the negative impacts of news publisher closure on a community. A well-functioning media creates a shared understanding of the world. It creates a way for residents to become more active in their community and to learn about what their neighbors care about. Being informed on events like local theater productions, carnivals, and community events allow residents to not only be in close *physical* proximity to those in our area, but to be in close *social* proximity as well.[131]

Furthermore, the absence of local news reduces the diversity of viewpoints. For example, minority owned media outlets have historically focused on issues that larger news providers do not cover or have underreported.[132] However, while there are over 100 African American-owned newspapers, only one has a circulation above 50,000.[133] Small, community-oriented, local news sources are integral for reporting on issues that impact minority groups. Underpayment to these local news sources can amplify their chance of shutting down or result in consolidation, which can also general social ills. According to former Harvard Law School dean and professor, Martha Minow, "Concentrated ownership displaces local control of media and shifts editorial decisions to people without a stake in particular local communities."[134] Ultimately, the reduction of local news leaves a gap in the diversity of opinions.

IV. The Likely Arguments Against Assigning Coordination Rights to News Publishers Are Unavailing

This section anticipates and "prebuts" three economic arguments that the platforms are likely to make in opposition to this proposal offered here.

A. Argument One: The Effort Is Meant to Enrich the Largest Newspapers

One of the favorite talking points of the bill's detractors is that it would consolidate power among the largest news publishers at the expense of new

---

Rutgers University, and Northwestern University), September 2020, at 11, *available at* http://www.kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2014%20MISINFO%20SEP%202020.pdf.

[131] *The benefits of local newspapers*, COVINGTON NEWS, *available at* https://bit.ly/3og6gU2.

[132] Barack Obama & John F. Kerry, *Media consolidation silences diverse voices*, POLITICO, Nov. 7, 2007, *available at* https://www.politico.com/story/2007/11/media-consolidation-silences-diverse-voices-006758.

[133] Sara Atske, Michael Barthel, Galen Stocking, & Christine Tamir, *7 facts about black Americans and the news media*, PEW RESEARCH CENTER, Aug. 7, 2019, *available at* https://www.pewresearch.org/fact-tank/2019/08/07/facts-about-black-americans-and-the-news-media/.

[134] Judith Miller, *News Deserts: No News is Bad News*, MANHATTAN INSTITUTE, Ch.4, 60, 2018, *available at* https://media4.manhattan-institute.org/sites/default/files/MI_Urban_Policy_2018.pdf#page=71.

publishers.[135] Although it is true that large newspapers benefit by coordinating with smaller newspapers in their dealings with Google, smaller newspapers benefit by even more, as small newspapers would be subjected to even greater levels of exploitation if they were compelled to deal with Google unilaterally. A handful of the very largest newspapers have a modicum of countervailing bargaining power against the platforms. This is not so for the vast majority of newspapers. Accordingly, the largest beneficiaries of this proposal are the smallest newspapers.

The argument that this proposal is meant to enrich the largest newspapers also ignores the likely allocation mechanism of a collective, which would prevent large publishers from appropriating the entirety of the award. Even if the allocation were done purely in proportion to a newspaper's pro-rata share of clicks, no single newspaper would achieve all of the payments, as the allocation of clicks across newspapers is well distributed. To the extent newspapers elect to distribute some portion of funds according to full-time journalists, high-quality news sites that deliver informative yet non-clickworthy news could achieve payments in excess of their pro-rata share of clicks.

Finally, large news publishers are hardly flush with cash, yet deliver large social benefits. Absent any intervention, we are heading towards a dystopia in which citizens rely exclusively on tech platform for all news. The effort is not meant to enrich large publishers, but instead meant to address a power imbalance that is producing communication distortions and too few journalists.

B. Argument Two: It Is Better to Attack Platform Power with Antitrust Intervention

The resistance to allocating coordination rights to small agents in their dealing with dominant platforms is emanating from surprising quarters, including the American Antitrust Institute (AAI).[136] AAI argues that a better approach to dealing with the power imbalance is through vigorous enforcement of the antitrust laws against the platforms:

> Today, it is the news content providers seeking an industry-specific exemption from the antitrust rules to countervail the power of Big Tech. But, if they are successful, other industries will follow. Such industry-specific exemptions should be resisted. Instead of reacting to innovation that is upending traditional business models by abandoning competition, we must

---

[135] *See, e.g.*, Matthew Boyle, *House GOP Leader Kevin McCarthy Slams Establishment Media-Pushed Journalism Act: 'Antithesis of Conservatism'*, BREITBART, Apr. 1, 2021 ("the system [the JCPA] would create that essentially allows the creation of establishment media cartels that would hurt new media companies.").

[136] *See, e.g.,* Laura Alexander, Countervailing Power: a Comprehensive Assessment of a Persistent but Troubling Idea, American Antitrust Institute, Oct. 15, 2020, *available at* https://www.antitrustinstitute.org/work-product/new-aai-white-paper-analyzes-the-pitfalls-of-countervailing-power-as-a-response-to-rising-market-concentration/.

> instead adapt our competition laws, enforcement strategies, and policies to ensure they can effectively safeguard and promote competition in new and changing markets. To do otherwise risks converting the antitrust laws from a tool to foster competition into a tool for creating and maintaining monopolistic market structures.[137]

Ignoring the slippery-slope argument, AAI's suggestion that antitrust enforcement can eviscerate the power imbalance between the platforms and newspapers is naive, and if embraced by lawmakers, would effectively grant the platforms a free pass to appropriate newspaper value with impunity. A Sherman Act Section 2 complaint against a platform would require plaintiffs to (1) challenge a restraint of trade, preferably in a contract with a third-party publishers or advertiser; and (2) establish a causal connection between said restraint and the underpayment to newspapers. While restraints in contracts with publishers or advertisers might be contributing to lower newspaper pay shares at the margin, there are myriad factors, including network effects, customer lock-in, and other natural barriers to entry, also contributing to the power imbalance. At best, a successful lawsuit challenging a platform's restraints would raise payments from that platform by the increment attributable to the restraints, but not necessarily to competitive levels. And a successful suit against (say) Google would provide zero relief for publishers in their dealings with Facebook. Moreover, a successful antitrust lawsuit against Google or Facebook would require several years to adjudicate, and the appeals might not be resolved for nearly a decade. In the interim, newspapers would be left twisting in the wind. Given the newspapers' precarious financial state, it is not clear how long many could survive without an intervention today. Finally, the strategies of antitrust litigation and intervention (based on coordination rights) are complements, not substitutes. There is no reason not to pursue the platforms via antitrust while permitting collective bargaining among atomistic input providers.

C. Argument Three: Newspapers Derive Significant Value Via Referrals from Platforms, Which Should Be Deducted from the Value Added by Newspapers to Platforms When Determining Compensation

The dominant platforms might argue that they are generating traffic for newspapers, and they are thus owed payments by the newspapers, or at least such incremental benefits should be deducted from the value added by newspapers to platform advertising revenues. But the platforms are reframing news stories in rich previews containing headlines, summaries, and photos. And they are also curating the content alongside advertisements. This reframing and curation decreases the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms.[138] Put differently, the platforms permit users to obtain the news without clicking through to the underlying source,

---

[137] *Id.* at 20.

[138] Damien Cave, *An Australia With No Google? The Bitter Fight Behind a Drastic Threat*, NEW YORK TIMES, Jan. 22, 2021 (citing Tama Leaver, a professor of internet studies at Curtin University in Perth).

depriving the news publisher of traffic and its associated ad revenues.[139] This reframing and curation also creates less of a need for users to subscribe to the newspaper platform. The platforms are not compensating newspapers for any of this lost traffic or lost subscription revenues. Rather than considering these harms to newspapers from the platforms' reframing and curation, or the alleged benefits to newspapers from platform-based traffic generation, the proper focus of the inquiry should be the incremental platform advertising revenues generated by the newspapers. After all, this value added to the platforms would be the payments to newspapers in a competitive input market. Offsets in either direction should be ignored.

Conclusion

Allowing current market forces to dictate the newspapers' pay shares ensures that newspapers are compensated at rates significantly below competitive levels. This underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints, particularly among minority populations. The best way to correct this market failure is for the government to permit the news publishers (either newspapers alone, or all news publishers) to coordinate in their dealings with the digital platforms over payment terms and conditions, followed by an enforcement mechanism to ensure that fair market value is being paid for the access being granted to the publishers' content.

[139] News Media Alliance, How Google Abuses Its Position As A Market Dominant Platform To Strong-Arm News Publishers And Hurt Journalism 2, 12 (2020), *available at* http://www.newsmediaalliance.org/wpcontent/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.

Appendix 1: Pay Shares in Comparable Industries

A. Pay Shares for Music Rightsholders

Like the newspaper industry, the music industry was disrupted by new forms of digital consumption, which caused traditional revenue sources to decline significantly.[140] Music industry stakeholders (such as music publishers, record labels) worked with digital streaming platforms to establish a sustainable monetization system, which has greatly improved the health of the industry and benefited content providers.[141] Compensation for music publishers is driven by royalty rates set by the Copyright Royalty Board (CRB), a tribunal that sets rates for five-year periods. Digital streaming platforms must pay music publishers per the rates defined by the CRB. Accordingly, this benchmark entails a regulated allocation that permits collective bargaining among input providers to a dominant platform. Unlike the but-for world contemplated here, the protected stakeholders (record labels, artists, publishers, and songwriters) constituted the totality of input providers to the platform.[142]

Once collected, music publisher royalty rates result in a lump sum payout that is distributed to artists and publishers proportionally to the consumption of their music. The mechanical royalty rates for music publishers apply to all publishers simultaneously—that is, the publishers do not have to negotiate individually with the platforms covered by the statutes. In that sense, the bargaining is collective. According to the late economist Alan Krueger, streaming services such as Spotify typically pay 65 to 70 percent of their revenue in royalties to music right holders.[143]

B. Pay Shares for Broadcasters in Retransmission Consent Arrangements

In the 1980s, cable subscribers grew rapidly to more than 50 million, but cable operators did not compensate broadcasters for what has been widely

---

[140] *See* ALAN B. KRUEGER, ROCKONOMICS: A BACKSTAGE TOUR OF WHAT THE MUSIC INDUSTRY CAN TEACH US ABOUT ECONOMICS AND LIFE 31 (Crown Publishing 2019) (showing declining record industry revenue beginning in 2000).

[141] *See*, *e.g.*, Katie Jones, *Cents and Sounds: How Music Streaming Makes Money,* VISUAL CAPITALIST, Dec. 20, 2019, *available at* https://www.visualcapitalist.com/how-music-streaming-money/.

[142] Federal Register, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, A Rule by the Copyright Royalty Board on 02/05/2019, *available at* https://www.federalregister.gov/documents/2019/02/05/2019-00249/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iii.

[143] KRUEGER, *supra*, at 181 (Crown Publishing 2019) ("Streaming services such as Spotify typically pay 65 percent to 70 percent of their revenues in royalties to music rights holders (record labels, artists, publishers, and songwriters)."). *See also* Jem Award & Janko Roettgers, *With 70 Million Subscribers and a Risky IPO Strategy, Is Spotify Too Big to Fail?,* Variety, Jan. 24, 2018 ("One way to get there would be more favorable deals with labels. Its business model calls for paying out around 70% of its annual revenue in royalties.").

considered "must-have" programming.[144] Instead, cable operators were offering customers local broadcast stations via their cable subscription with no remuneration for the local broadcasters. Congress grew worried that broadcasters were subsidizing the growth of their competitors, and that the potential long-term health of the U.S. television industry could be impaired. As a result, Congress enacted retransmission consent rules in the 1992 Cable Act. Sections 531 through 537 of the Act established a regulatory mechanism to compensate broadcasters for carriage of their broadcast signals by cable operators and direct broadcast satellite providers.

The new law required all multichannel video distributors, including cable operators and digital broadcast satellite providers, to obtain permission from broadcasters before carrying their programming. It provided that once every three years, broadcast stations could elect between must-carry and retransmission consent; if the cable operator rejects the broadcaster's proposal, the station can prohibit the cable operator from retransmitting its signal. In essence, these rules altered the bargaining dynamic between a dominant platform and input providers, thereby affecting payments to input providers; thus, this benchmark can be considered a regulated allocation. But unlike the but-for world contemplated here, broadcasters—presumably because they are not atomistic relative to cable operators—were not allowed to coordinate in their dealings against cable operators.

While popular network-affiliated stations tended to opt for a retransmission fee, unaffiliated local stations tended to choose must carry and profited from advertisements only. For those that choose retransmission fees, broadcasters negotiate directly with the cable company; the Federal Communications Commission (FCC) does not specify fees or get involved in disputes.[145] Between 1992 and 2005, broadcasters were primarily paid in kind (e.g., providing advertising spots, carrying affiliate channels) by cable operators. Yet retransmission fees grew rapidly from $0.2 billion in 2006 to $12.2 billion in 2020.[146] The cable companies' revenues are estimated at $116.8 billion in 2020.[147] Accordingly, the broadcasters' implied pay share in 2020 is approximately 11 percent.[148]

---

[144] *See, e.g.*, Federal Communications Commission, General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control, MB Dkt. No. 03-124, Memorandum Opinion and Order (released Jan. 14, 2004) ¶¶ 87, 201 (finding that regional sports programming and local broadcast programming were "must-have" inputs, which if were denied to distribution rivals, would impair their ability to compete effectively).

[145] See, e.g., Jeffrey Eisenach, *The Economics of Retransmission Consent*, Mar. 31, 2009, at 24.

[146] Justin Nielson, *Broadcast Investor Retrans Projections Update: Sub Rates Continue To Rise,* Jul. 25, 2019, https://www.spglobal.com/marketintelligence/en/news-insights/research/retrans-projections-update-sub-rates-continue-to-rise

[147] Wayne Friedman, *Total U.S. MVPD Revs Up, OTT Rising Faster*, Media Post, Mar. 14, 2017. ("BMO Capital Markets says there will be 1% revenue growth for U.S. MVPDs (multichannel video program distributors) to $116.8 billion in 2020, from $115.5 billion in 2015.")

[148] Equal to $12.2B / $116.8B.

C. Pay Shares for Regional Sports Networks

Staying in the cable space, another must-have input for cable operators is local sports programming,[149] often supplied by independent regional sports networks (RSNs). Although there is no requirement that cable operators carry RSNs, independent RSNs can (and have) submitted discrimination complaints to the FCC pursuant to section 616 of the Cable Act, asserting that a cable operator that is vertically integrated into competing content afforded the RSN inferior carriage due to its lack of affiliation and horizontal rivalry. These protections also (weakly) alter the bargaining dynamics between cable operators and RSNs relative to pure market forces, and thus can be considered a regulated allocation. Unlike the but-for world contemplated here, RSNs cannot coordinate in their dealings with cable operators. Because RSNs, like broadcasters, account for only one of several input providers to a dominant platform, this benchmark can be informative. According to Kagan, the RSNs' affiliate fees averaged approximately $6 per subscriber per month in 2017,[150] while the average revenue per user per month for Comcast was $85 around the same period,[151] implying a pay share of roughly seven percent. While RSN are must-have inputs and thus have some countervailing power, RSNs' pay shares are likely deflated relative to a competitive equilibrium due to the lingering power imbalance between cable operators and RSNs that was not sufficiently addressed in the 1992 Act.

D. Pay Shares for Athletes in Professional Sports Leagues

De-unionization has been cited as a contributing factor in the long-term decline in the labor share in the U.S. economy.[152] Economists recognize that "[t]he bargaining power of unions tends to increase workers' share of the surplus generated in the production process."[153] Athletes in the major U.S. professional

---

[149] *See, e.g.*, John Ourand, *Comcast's Burke takes on critics of company's dual strategies*, SPORTS BUSINESS JOURNAL, Apr. 13, 2009.

[150] Ben Munson, *Total U.S. TV retransmission fees expected to reach $12.8B by 2023, Kagan says*, FIERCE VIDEO, June 20, 2017 ("Kagan anticipated seven RSNs—YES Network ($6.74), FOX Sports Detroit ($6.69), MSG Network ($5.69), SportsNet LA ($5.60), FOX Sports Arizona ($5.48), Comcast SportsNet Philadelphia ($5.32) and Spectrum SportsNet/Deportes ($5.08)—are projected to come in above the $5 mark.").

[151] Comcast video average revenue per user (ARPU) from 1st quarter 2010 to 4th quarter 2018, Statista, *available at* https://www.statista.com/statistics/778799/comcast-video-arpu/#:~:text=Comcast's%20video%20ARPU%20(average%20revenue,in%20the%20same%20time%20period.

[152] Anne Stansbury and Lawrence Summers, Declining worker power and American economic performance, Brookings Papers on Economic Activity, Spring 2020, *available at* https://www.brookings.edu/bpea-articles/declining-worker-power-and-american-economic-performance/.

[153] *See, e.g.*, Barry Hirsch, *Unions, Dynamism, and Economic Performance*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW (Edward Elgar Series of Research Handbooks in Law and Economics 2012).

sports leagues, by contrast, are unionized. Moreover, they have acquired free agency, which allows them to play one team against another in the quest to capture as much of their MRP as possible.[154] Scully calculated compensation as a share of revenue for Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League; for each sport, he found that compensation increased substantially to around 50 percent of league revenue after free agency was introduced.[155] Similarly, Vrooman, another sports economist, explains that "[a]s the result of internal competition among sportsman owners, monopsonistic exploitation has virtually vanished over the last decade in all [major professional sports] leagues. All leagues have similar carrying capacities for player costs at *two-thirds of revenues* and current payroll cap percentages are almost identical at about 60 percent."[156] In contrast, athlete compensation as share of revenue is substantially lower among (non-unionized) mixed martial arts (MMA) athletes, [157] or among collegiate athletes,[158] neither of which are unionized or permit free agency. Although this benchmark captures two elements of the but-for world contemplated here—regulated allocation and collective bargaining—athletes represent most if not all of the inputs (save things like venues and entertainers) into the sports platforms. Accordingly, this benchmark is informative but likely overstates the but-for pay shares for newspapers.

---

[154] Lawrence Kahn, *The Sports Business as a Labor Market Laboratory*, 14(3) JOURNAL OF ECONOMIC PERSPECTIVES 75-94, 81 (2000) ("[B]aseball salaries as a percentage of team revenues rose from 17.6 percent in 1974 to 20.5 percent in 1977 to 41.1 percent in 1982, further suggesting that free agency has had a structural effect on baseball salary determination.").

[155] Gerald Scully, *Player Salary Share and the Distribution of Player Earnings*, 25(2) MANAGERIAL AND DECISION ECONOMICS, 77-86, 77-78 (2004) ("Is 50% or so as the player share the upper bound in professional team sport? One suspects that it is not… If all players were free agents, salary as a share of revenues would rise substantially.").

[156] John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34(1) REVIEW OF INDUSTRIAL ORGANIZATION 5-44, 42 (2009) ("[a]s the result of internal competition among sportsman owners, monopsonistic exploitation has virtually vanished over the last decade in all [major professional sports] leagues. All leagues have similar carrying capacities for player costs at two-thirds of revenues and current payroll cap percentages are almost identical at about 60 percent.")

[157] *See, e.g.,* John Nash, *What we now know about the UFC's finances*, BLOODY ELBOW, Sept. 9. 2019, *available at* https://www.bloodyelbow.com/2019/9/9/20851990/what-we-now-know-about-the-ufc-finances.

[158] *See, e.g., White v. NCAA*, 2006 WL 8066803, Class Certification Order, at *5 & n.4 (C.D. Cal. Oct. 19, 2006) ("[P]layer costs are less than 15.5 percent of revenues of NCAA member institutions. This percentage is extremely low… In the NBA and NFL, player compensation is approximately 55-65 percent of total revenues. These percentages offer a reasonable comparison and estimate of player inputs in the production of sports entertainment.")