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# Digital Platform Regulation

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Global Perspectives on  
Internet Governance

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*Edited by*  
Terry Flew · Fiona R. Martin

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Terry Flew · Fiona R. Martin  
Editors

# Digital Platform Regulation

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## PRAISE FOR *DIGITAL PLATFORM REGULATION*

“When it comes to the governance of digital platforms, the question of who is regulating whom is now serious enough that scholars have begun to refer to governments as platforms, too. This volume provides a valuable sampling of how this problem looks from the side of government, with cases from around the world ranging from particular tensions raised by specific industries and practices such as those of journalism to macro-level challenges for the nature of policy-making itself.”

—Sandra Braman, *author of* *Change of State: Information, Policy, and Power*; *Texas A&M University*

“Internet regulation is now a space where everything is in question. This illuminating collection challenges not only the rule-setting powers of the global digital platforms, but also many of the key assumptions which media and internet studies scholars bring to the field. Timely, wide-ranging, and brimming with new ideas, this book will be an essential resource for students, scholars, and policy practitioners.”

—Julian Thomas, *RMIT University, Australia*

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# Introduction

*Terry Flew and Fiona R. Martin*

In recent years, questions of internet governance and digital platform regulation have moved from being a specialised niche field within internet and digital media studies to being at the forefront of scholarly, policy and community debate. The triggers for this have been many and varied. The 2013 Edward Snowden revelations about the extent of U.S. National Security Agency (NSA) monitoring of not only U.S. citizens, but platform users and political figures around the world. The close connections revealed between the NSA and many of the world's leading digital technology companies, made it clear that there was no structural separation in practice between the global internet, private capital and the surveillance agencies of democratic nation-states. This influenced Europe's eventual adoption of its General Data Protection Regulation (GDPR) (Rossi, 2018). From this time, national governments gave increasing attention to setting their own rules about data sovereignty and privacy rights, as Brazil

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did in passing its *Marco Civil da Internet* (Brazilian Civil Rights Framework for the Internet) in 2014, and as Canada did from 2015 with data localisation laws. This period also saw the birth of the global Indigenous data sovereignty movement (Kukutai & Taylor, 2016) and the European Union taking an increasingly activist role in internet regulation within its jurisdiction, first with the GDPR implementation in 2018, and then the Digital Services Act and Digital Markets Act, tabled in 2020 and designed to set stricter rules and accountability frameworks for what the European Commission termed Very Large Online Platforms (VLOPs).

Evidence of platform companies' significant market power and their negative impacts on competition have spawned long-running anti-trust cases, such as the EU's much debated action against Google's shopping search discrimination (Eben, 2018; Schechner, 2021) and led to calls for tech company breakups (Gilbert, 2021). There are certainly industry commentators who have questioned attempts to define platforms for competition purposes (O'Connor & Schruers, 2016). However, there is now academic consensus that they constitute dominant software systems with a global reach that support multi-sided markets, linking geographically dispersed parties in trade, communication, social and cultural activity, and that there is a great need to better understand these organisational forms and their impacts in order to ensure they operate in, and within, the public interest (Gawer, 2021; Gorwa, 2019; Flew et al., 2019).

Notably, the tangible harms arising from social media misinformation, hate speech, terrorism, abuse and harassment have spurred both the introduction of punitive national laws, such as Germany's Network Enforcement Act (2017) and Australia's Sharing of Violent Abhorrent Material Act (2019), and major public inquiries, such as the U.S. Select Committee on Intelligence hearings about Russian influence on the 2016 election and the UK's 2017 Online Safety and 2021 Online Harms inquiries. While the growth of national initiatives to address social media harms has fuelled concerns about the emergence of a legal 'splinternet' and increased regulatory burden on platform operations, it is now apparent that governments see the future of safe, accountable, equitable internet communications and trade as reliant on new controls on platform power and influence. The November 2021 'Facebook papers' revelations that Facebook, Instagram and WhatsApp operations prioritised profit before public safety, amplifying instead of removing harmful content, often against employee advice, has intensified calls for greater regulatory oversight (Satariano, 2021).

Speaking at the Opening Plenary of the 2018 Internet Governance Forum, French President Emmanuel Macron flagged the need for a ‘third way’ in internet governance, between the perceived libertarianism of Silicon Valley and the authoritarian statism of the Chinese internet, arguing that platform regulation to restore accountability and trust was a pre-condition for maintaining the values of freedom and democracy associated with the early vision of the open internet (Macron, 2018). One approach to this can be seen in the European Commission’s 2016 voluntary Code of Conduct on Countering Illegal Hate Speech Online, now in its fifth year (European Commission, 2021), which was introduced to stem a tide of abuse against immigrants during the 2015–2016 refugee mass migration to Europe. This content moderation monitoring governance exercise has seen all the major platforms cooperating with NGOs across Europe to act on their reports of hate speech, with the EC evaluating how well platforms are meeting their Code commitments.

The inspiration for this collection of essays came from such apparent paradigm shifts in understandings of the internet and its socio-economic and political role around the world. As the editors of this book, we are the beneficiaries of a research grant awarded by the Australian Research Council (ARC) through its Discovery Program, on Platform Governance: Rethinking Internet Regulation as Media Policy (DP190100222), along with Tim Dwyer and Chunmeizi Su (University of Sydney), Nicolas Suzor (Queensland University of Technology), Josef Trappel (University of Salzburg), and Philip Napoli (Duke University). We set out to explore the shifting balance between media policy and platform self-governance in the way digital platforms managed their commitments to both free speech and public wellbeing, and the issues arising from nation-state governance of platform content, including the prospects for developing international laws, norms and standards through multi-stakeholder approaches. We also hoped to develop an interdisciplinary understanding of how national media laws, systems and industry cultures continue to shape the practices and conduct of global platform companies operating in multiple jurisdictions.

During our research we were struck by the extent to which politicians, governments and regulators around the world had become increasingly activist towards the largest digital companies in particular, as part of what was described as the ‘techlash’ (*The Economist*, 2018) and the ‘neo-Brandeisian’ movement to revise antitrust laws to take on ‘Big Tech’ (sometimes also called ‘hipster antitrust’) (Khan, 2018; Rogoff, 2018;

Wu, 2018). It was also apparent that industry self-regulation, or ‘regulation by public apology’ (Hall, 2020; Tufecki, 2018), was seriously inadequate in the face of public shocks such as the Cambridge Analytica scandal that *The Observer* and *The Guardian* broke in 2018, and the livestreaming of the Christchurch Mosque shootings in 2019. Even Facebook (now Meta) CEO Mark Zuckerberg came to concede the need for regulation of businesses such as his own, acknowledging to the U.S. Congress in 2018 that ‘the real question, as the Internet becomes more important in people’s lives, is what is the right regulation, not whether there should be or not’ (Zuckerberg & Senate Commerce, Science and Transportation Committee, 2018).

Yet this apparent regulatory embrace belies the effort platform companies have put into fighting attempts to regulate them. As far back as 2012 they successfully encouraged their global users to protest against the proposed U.S. Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) (Benkler et al., 2015). They have marshalled support from free speech NGOs like the Electronic Frontier Foundation and Freedom House against proposals to force them to take more responsibility for what their users post and share. Both Google and Facebook have withdrawn services in response to new national legislation. Google withdrew its news services in Spain and Germany, following attempts by news publishers to negotiate payment for its display of their headlines and excerpts. Facebook withdrew services in Australia following the government’s 2021 introduction of a News Media Bargaining Code (NMBC), banning Australians from accessing news via its platform, and the world from accessing Australian news accounts. Further, the structural complexity of platform eco-systems, and their interdependence with economic, political and social systems, has made traditional approaches to media and information regulation relatively ineffective, if not obsolete, and new governance strategies essential (Van Dijck, 2021).

There is thus a ‘new regulatory field’ (Schlesinger, 2020, p. 1558) which has emerged around digital platform companies’ colonisation of the internet, our multi-faceted adoption of social media tools, and platforms’ relentless ‘datafication’ of personal information (Meijas & Couldry, 2019). Dwayne Winseck has observed ‘a dizzying number of public policy inquiries into the digital platforms’ (Winseck, this volume), seeking to understand the scope of their influence, and their potential for harm. New laws, policies and regulations are being proposed by nation-states, in the liberal democracies as much as in less democratic states, that overlay

an already complex web of standards, protocols, rules, regulations and governance structures which have been associated with the global internet since the 1990s (Mueller, 2017; Musiani et al., 2016). Even the United States, long the key advocate of the open, unregulated internet, has experienced an apparent paradigm shift, with the Biden administration giving key policy roles to critics of digital platform power such as Lina Khan and Tim Wu (Flew & Gillett, 2021), while erstwhile ‘free market’ advocates such as the Stigler Center at the University of Chicago call for stronger anti-monopoly laws in order to revive innovation in the digital economy (Stigler Center for the Study of the Economy and the State, 2019). Indeed the lines between democratic and authoritarian states are blurring in this space, with countries such as China adopting antitrust laws inspired by U.S. policy debates, in order to rein in the perceived market power of their own dominant platforms (Kasperkevic, 2021).

In this book, we focus on digital *communication* platforms. This is a difficult, yet necessary, distinction to make in discussion of platform regulation, given the platformisation of the internet (Helmond, 2015; Flew, 2019) has occurred in the wider context of the platformisation of business and trade more generally (McAfee & Brynjolfsson, 2017; Parker et al., 2016). There is a plethora of platform companies that are not in communications or media-related businesses, such as Uber, AirBnB, eBay and Upwork. However, big tech companies such as Google, Facebook and Microsoft are clearly in the businesses of communication, especially advertising, and interact with media companies in a sustained way, although this orientation may be less apparent for companies such as Apple and Amazon. Also, the technological lines between platforms and mainstream media have increasingly dissolved. Netflix has revolutionised television through the platformisation of content delivery, shaped by the analysis of connections between user preferences and behaviour, and the use of data and algorithmic selection based on behavioural targeting, which drives content commissioning decisions, but it does so in ways that are recognisably those of a media company (Lotz, 2021). In this instance all other media companies are increasingly looking like Netflix, with their on-demand and streaming video platforms (e.g. Disney+, BBC iPlayer) and data-driven decision-making processes.

While platform companies have long maintained that they are content hosts not publishers, and thus are not media companies in the traditional editorial sense, these lines have also been crossed. The Australian Competition and Consumer Commission (ACCC), in its 2019 *Digital Platforms*

*Inquiry Final Report*, observed that companies such as Google and Facebook increasingly perform ‘media-like functions’ of commissioning, editing, curating and distributing media content, thus giving them a key role in ‘shaping the online news choices of Australian consumers’ (Australian Competition and Consumer Commission, 2019, p. 173).

In this book, we are interested in the forms of regulation and governance that might be applied to those digital platforms which offer communications and media as a service. This includes both the broad-reach, multifaceted platforms such as Google and Facebook, but also the more narrowly marketed, sector-specific platforms such as Netflix. It includes companies such as Apple, Amazon and Microsoft insofar as they provide communication services and media publishing, such as iCloud, Twitch, LinkedIn and Yammer, or provide media content: think of Apple+ TV and the App Store, Amazon Video and Audible, or Microsoft’s Xbox. The argument that such platforms *are* media and communications companies (Napoli & Caplan, 2017) is not without its critics: there is debate about this question in our collection (see Pickard and Winseck’s chapters), as well as between authors such as Philip Napoli (2019) and Dwayne Winseck (2020).

The Clinton Administration’s Section 230 of the *Communications Decency Act*, passed in 1996 and one of the very few articles from that legislation to survive a Supreme Court challenge, is commonly held to be the cornerstone of the platform/publisher distinction, with the idea that ‘internet intermediaries’ (as they were then known) may act to block, remove or downgrade content on their sites without acquiring the legal status of publishers, and cannot be held legally accountable for the content posted by their users (Gillespie, 2017). The argument does, however, go further back in the internet imaginary, with Ithiel de Sola Pool’s foundational 1983 text, *Technologies of Freedom*, first crystallising the argument that new forms of electronic communication technologies required a ‘policy of freedom’ (de Sola Pool, 1983) that clearly demarcated them from regulation-bound print and broadcasting industries. He envisaged an internet that was inherently, in form and operation, resistant to legal constraint:

Electronic media...allow for more knowledge, easier access and freer speech than were ever enjoyed before...one might anticipate these technologies of freedom will overwhelm all attempts to control them. (de Sola Pool, 1983, p. 251)

Yet early ideas of the internet as a frontier territory, unconstrained and uncontrollable by the rule of law, were never accurate given the numerous international governing bodies and intertwined governance processes that have been necessary to build and maintain the network of networks—and despite John Perry Barlow’s (1996) proclamation to the contrary—never free of tyranny. Waves of regulatory concern about copyright, classification, child pornography, net neutrality and terrorism have generated continual debates about how we might best preserve the liberalising and innovative power of the internet, while acknowledging states’ territorial sovereignty *and* enabling effective international regulatory efforts (Savin, 2017).

One of the conceptual challenges we have faced in defining activity in this field is whether we are talking about digital platform *regulation* or digital platform *governance*. The concept of regulation typically refers to actions by governments and public agencies on private actors that are enabled by binding laws and which have negative sanctions for non-compliance. Koop and Lodge define regulation as ‘intentional intervention in the activities of a target population, where the intervention is typically direct – involving binding standard-setting, monitoring, and sanctioning – and exercised by public-sector actors on the economic activities of private-sector actors’ (Koop & Lodge, 2017, p. 105). By contrast, governance – derived from the Latin verb *gubernare*, meaning ‘to steer the ship’ – is taken to be associated with a more decentred conception of where power and control lies, encompassing of both the agencies and activities which shape the conduct of actors such as private companies, including those companies’ own attempts at self-rule. Mark Bevir has defined governance in these terms:

Governance draws attention to the complex processes and interactions that constitute patterns of rule. It replaces a focus on the formal institutions of states and government with recognition of the diverse activities that often blur the boundaries of states and society. Governance ... highlights phenomena that are hybrid and multijurisdictional with plural stakeholders who come together in networks. (Bevir, 2011, p. 2)

There is a certain natural affinity between the internet and digital platforms on the one hand, and governance practices based on rough consensus rather than formal rules on the other. At a conceptual level, the

proposition that decision-making power flows through multiple decentralised networks, nodes and machines sits squarely with understandings of internet culture as being informed by actor-network theories (Latour, 2007), and its reliance on forms of collective coordination (Puppis, 2010) with notions of the internet driving a shift towards network organisations (Thompson, 2003), network economies (Benkler, 2006, 2011), and network societies (Castells, 1996, 2009, 2010, 2012). The internet's international institutions have never been understood as top-down entities able to impose rules on, and enforce sanctions against, nation-states. Rather, agencies such as ICANN and the Internet Governance Forum are seen as exemplifying principles of multistakeholder cooperation. The institutions involved in global internet governance are framed around tripartite institutional representation, bringing representatives of civil society organizations (NGOs, academics, etc.) and industry bodies to the table, either alongside governments or as an alternative to them (Bray & Cerf, 2020; DeNardis, 2014; Mueller, 2010). Tripartism and multistakeholder approaches have often been preferred frameworks for addressing issues with digital platform companies, such as guiding principles for content regulation, as they avoid the perceived risks of censorship associated with direct state involvement in making decisions in such domains.

At a more general level, governance relations are at the core of platform businesses. As they operate by definition in multi-sided markets, and since the guiding principle of their business model is to enable 'core interactions between platform participants, including consumers, producers, and third-party actors' (Constantinides et al., 2018, p. 381), these companies have to establish *ad hoc* governance arrangements in order to keep all participants and stakeholders engaged and satisfied with their performance and value-adding capacities. As Flew has observed elsewhere 'a platform without governance is not possible; governance is as central to platforms as are data, algorithms, and interfaces' (Flew, 2021, p. 135).

The breadth of the governance concept is, however, both its strength and weakness. It undoubtedly captures forms of practice which aim to shape the conduct of others without direct regulation. One thinks, for instance, of the many behavioural 'nudges' that are now central to contemporary public policy, where preferred outcomes are achieved by reshaping the 'choice architecture' of individuals rather than telling them what they must and/or cannot do (Halpern, 2015; Thaler, 2015). At the same time, governance-based approaches to reshaping the conduct of



digital platforms invariably require corporate self-regulation, and raise the question of whether this internal oversight is sufficient to address issues of public concern, or whether it is time for governments to develop stronger rules that have meaningful sanctions for non-compliance.

As with debate about whether communications platforms are media companies, there is a lively debate in this collection about the pros and cons of platform self-regulation. Victor Pickard (this volume) argues that reliance upon corporate self-regulation and social responsibility is always going to be insufficient in the face of business models which promote monopolistic and ethically dubious practices, and that more radical structural reforms—such as the break-up of the big platforms—are required. Closely interrogating the concept of corporate social responsibility (CSR), Lelia Green and Viet Tho Le argue that it can only play a meaningful role if accompanied by state regulation. By contrast, Nicolas Suzor and Rosalie Gillett (this volume) argue that the content moderation decisions of digital platforms will always require a degree of discretion, and that platform self-regulation is always going to be a part of the regulatory mix, even if there are also moves towards more direct government regulation. This is because ‘content moderation and curation is the commodity that platforms offer to their users’ (Suzor and Gillett, p. 274), and the different approaches that they adopt in shaping these governance arrangements is inevitably a part of their business model and the contract they offer to their users and multiple stakeholders.

Platform companies’ increasingly tight grip on digital advertising spend, and the resulting dire consequences for both democratic communications and a news media industry already wounded by plummeting circulation and increased competition, have motivated intense regulatory debate. As the UK’s Cairncross Review argued, the platformisation of news has sponsored market failures with declines in local reporting, political coverage and expensive investigative journalism. Cairncross too found the “unbundled” experience of platform news encounters was having negative impacts on the “visibility of public-interest news and for trust in news” (2019, p. 6). With this in mind, we open our collection with reflections on the types of regulation that might counter the incursions of search and social media platforms on the advertising revenue that once supported journalism.

In the first of our contributions to this collection, North American media studies researcher Victor Pickard explores systemic approaches to supporting public interest journalism in the platform era, ranging

from platform company levies to publicly funded media alternatives. He suggests that platforms' profit first focus, their adherence to an apolitical "marketplace of ideas" conception of free speech, and their embedding in a North American discourse of negative freedoms (ie. against regulation) mean they are unlikely to self-address the structural inequities in voice and influence they entrench. Yet even as Pickard characterises platform companies as "vertically integrated monstrosities, wielding a degree of political power incompatible with a functioning democracy", he also rejects a resort to anti-monopolist, corporate breakup scenarios. Instead he favours solutions that not only curb platform power to determine news agendas, but also ameliorate the commercial drift of digital publishers to sensationalist, click-driven, socially irresponsible reporting. Amongst those he canvases are what in the neo-liberal moment might be seen as 'radical' alternatives: action from unionised platform workers, legislation that regards platforms as public utilities, and the potential creation of public social media.

U.S. media regulation scholars Philip Napoli and Asa Royal then take up the issue of the fraught relationship between platforms and news publishers from a different perspective: that of the press' legal and political battles to wrest compensation from platform companies for the snippets of news content they display and their users re-distribute. In this account, which reviews long running copyright cases in France and Germany, the EU's Directive on Copyright in the Digital Single Market has opened the door to at least one content licensing deal, but with terms that are opaque, and which do not acknowledge publishers' rights in their excerpts. In its coverage of Australian case, based on competition law, the chapter notes how government attempts to mandate platform-publisher negotiations over the value of news led to Facebook's infamous news ban, demonstrating both its market power and its disregard for civil society. Here too, as in France, we see that deals with Google and Facebook under the NMBC lack transparency and benefit larger companies or those that bargain collectively. While concluding that government intervention seems essential to secure the future of news journalism, Napoli and Royal's chapter also suggests the difficulty of approaching platform regulation from isolated, issue-based perspectives. In this respect, an integrated approach to media reform of the type proposed by the ACCC's *Digital Platforms Inquiry* can likely return better outcomes than individual legislative changes or dependence on platform self-regulation and industry support.

The need for a coherent program of reforms to meet the challenges of digitalisation and platformisation, is part of the narrative legal scholar Amélie P. Heldt presents in reviewing platform obligations under the EU's proposed Digital Services Act (DSA), and how these are monitored for compliance. Heldt notes that the driving force for the Act was member states individual moves to legislate against online harms, a patchwork of legislation that suggested the EU needed a more uniform approach to intermediary liability and user safety, and rules for removal of illegal content. Under the DSA, platforms are also obligated to provide feedback to the source of removed illegal content about the rationale for its erasure, and an internal complaints handling process for users more broadly, moves the platforms have resisted due to the administrative burden of compliance. However, this aspect of the DSA does not address a key finding of the EC's fifth hate speech monitoring trial, which found platforms also need to improve their feedback to users who notified them of illegal content, detailing actions taken (Reynders, 2020) a move which would encourage more effective flagging. Where the DSA does innovate, according to Heldt, is in the establishment of two new regulatory agents, national Digital Services Coordinators and a regional Board for Digital Services, which will work in tandem with the European Commission, and in mandating that platform companies abide by the EU Charter of Fundamental Rights in their dealings with their services' users and competitors.

The question of platform companies' 'social license to operate', and their responsibilities to the societies and communities they serve, has been brought sharply into relief by Facebook's use in the 2018 genocide of the Rohingya minority (Lee, 2019), and more recently social media's contribution to the 2021 storming of the U.S. Capitol (Schewe, 2021). In their chapter, communications scholars Lelia Green and Viet Tho Le use former President Donald Trump's deplatforming after the Washington D.C. Capitol riot on January 6, 2021 as a jumping off point to reflect on the types of social responsibility we might expect from platform companies, as well as the regulatory measures and civic action that might encourage them to better address social concerns and democratic principles. Certainly, we have seen increasing platform attention to responsibility in advertising since the establishment of GARM, the Global Alliance for Responsible Media, a World Federation of Advertisers move to explore the mitigation of "harmful content on digital media platforms

and its monetization via advertising” (GARM, 2021) and the 2020 international #StopHateforProfit campaign mobilised Coke and Unilever to support its protest. However, the debate Green and Le engage about what constitutes good corporate citizenship in content publishing and moderation underscores the extent to which platforms are making, via AI filtering and/or rapid human assessment, even more significant editorial decisions once taken by licensed media companies and monitored by national agencies. As Van Dijck et al. (2021) argue, their move to deplatformisation, the wholesale preventative removal of dangerous individuals and their organisational networks, “exposes an accountability gap” between them, governments and public. It is precisely this type of power they argue, which controls access to the essential infrastructure of global communicative participation, that demands more transparent regulatory intervention at national and supranational levels.

In this respect digital media researchers Nicolas Carah and Sven Brodmerkel, in our collection, present a persuasive case that we also need to know far more about the forms, impacts and consequential harms of platformised advertising and the influence this imparts platform companies, given Google and Facebook’s share of digital advertising spend globally accounts for 28.6 and 23.7 per cent respectively in 2021 (eMarketer, 2021). Using the case of online alcohol marketing, and its new participatory data fuelled platform model, this case study contributes significantly to our knowledge of how platform companies have transformed advertising and ad markets through data analytics and interface design. Their algorithmic brand cultures not only micro-target advertising to user preferences and behaviour, but also encourage vernacular creativity from influencers and users to boost campaign impact. While historically advertising regulation has been concerned with representation of drinking cultures, now they argue we should be more concerned about the opacity of advertising’s reach and influence, the difficulty of understanding who has been targeted, with what, and with what consequences for public health and other socially beneficial outcomes.

Throughout this collection, the contributing authors provide a lively critique of platform companies’ resistance to administrative transparency, and their reluctance to reveal exactly how they intervene in public debates, or what they do to mediate dangerous and risky content. In communications scholar Pawel Popiel’s chapter he provides us with a new lens on transparency, by tracking how the major U.S. platform companies try to influence policy debates: the issues they tackle, the policy approaches they

favour, and what their policy communications suggest about their attitudes to regulation and governance. His analysis confirms their interest in technological solutionism, and what he calls “frictionless regulation”, the self-defined, rapidly evolving territory of platforms’ community standards and issue-based (often seemingly ad-hoc) multi-stakeholder engagement. This focus, he argues simultaneously advances their business interests while avoiding structural interventions into their operations or entanglement in lengthy public deliberations as the ACCC’s Rod Simms told European policy-makers recently: “what we’ve observed...is that Facebook and Google, they really just do things on “take it or leave it” terms. They dictate the terms of the arrangement” (Sims, 2021). So while platform companies may accede to national co-regulation in certain areas such as data privacy, Popiel warns that they will move fast to set the policy agenda, with the worrying possibility of state capture by private interests.

A micro-analysis of Facebook and Google’s policy agency, by James Meese and Edward Hurcombe, then reveals how this dynamic played out during the formulation and introduction of the ACCC’s News Media and Digital Platforms Mandatory Bargaining Code. Here, we see a regulatory action that sought to make big platforms pay for news, but which avoided designating either company as actionable under the new law because they both negotiated deals with publishers before that happened. Meese and Hurcombe undertake a close read of the policy process to challenge the common view that the Code benefited big media rather than journalism or media diversity (see Warren, 2021). Their decentred analysis of institutional alignments in industry and political agendas reveals how ongoing stakeholder negotiations led to new regulatory obligations on Google and Facebook, despite their apparent economic power. Their account highlights the need for situationally and historically nuanced accounts of policy development that consider path dependencies as factors in regulatory outcomes.

Chunmeizi Su then takes up this challenge, exploring how Australia might differently consider regulating the activities of North America’s tech giants and their Chinese counterparts Baidu, Alibaba, and Tencent, in light of the latter groups’ growing base of Chinese-Australian users. She notes that while both Facebook and WeChat have generated initiatives to combat misinformation, WeChat is less likely to trigger direct government responses in Australia as it is principally a platform for the Chinese diaspora, whereas Facebook is closer to being a ‘mass’ communication medium.

The chapter focus then turns to the fate of local cultural production markets in an era of platformisation, another critical concern for policy makers with the rise of global subscription video-on-demand (SVOD) streaming services like Netflix and Disney+. Stuart Cunningham and Oliver Eklund highlight the competitive and information asymmetries between the highly regulated, territorially-bound broadcast sector and the relatively unregulated, unbound digital video “curation, aggregation and sharing” sector which have enabled SVOD companies to act as market disruptors in the screen industries, drawing parallels between the regulatory challenges raised by the market dominance of search and social media platforms and those of streaming platforms. Using three case studies, Cunningham and Eklund trace how European, Canadian and Australian regulators have sought to implement digital media policy reform that meets competition, social, cultural and public interest information goals, and differently address the contentious proposition that platforms should contribute financially to local cultural production in return for market access.

Applying a closer lens to the “Netflix Effect”, or the influential market impact of its algorithmic production model, Ramon Lobato and Alexa Scarlata then investigate ‘discoverability’, a key aspect of this model, and its implications for media and information policy. Discoverability, or the mechanisms that act to make content visible to streaming platform users, has become a hot button policy issue due to the potential for some sources and types of content formerly privileged in legacy policy (such as local, minority language and documentary content) to be marginalised on streaming services. In exploring the breadth of editorial and system design factors that govern how content recommendations are made, Lobato and Scarlata rehearse the distributive politics of visibility and then unpack their realisation in national media policies of Canada, the UK, Australia and the European Union. Importantly they question the transparency and contestability of decision-making which shapes the prominence of competing channels and public service media content in streaming delivery.

The preceding two chapters position communications platforms comfortably within the ambit of existing media policy and regulation, which more or less is the proposal that has underpinned our research over the past two years. In contrast, telecommunications researcher and political economist Dwayne Winseck argues that trying to shape platform behaviour along broadcasting principles is mere political expedience, and

ignores tech companies' closer historical alignment with telecommunications, electronics and finance sectors. For Winseck a pre-history of digital information networks suggests four principles on which we should base any future regulatory moves on platform companies: structural separation of large corporations; line of business restrictions; the imposition of public interest obligations and the provision of public service media *and* communications alternatives.

Whatever the policy framework that we may wish to apply to the conundrums of platform regulation and governance, the question of what role self-regulation and corporate governance should play looms close in a political climate dominated in the West by 'light touch' regulatory approaches, neoliberal economics and populist governments. Media law scholars Nicolas Suzor and Rosalie Gillett argue that persuading platform companies to exercise better self-regulation is a critical part of any oversight framework. After consulting a variety of regulatory experts, they argue that self-regulation provides: faster, more flexible, informal means of enforcing content standards, and acting to remove harmful material although these may suffer from a legitimacy-deficit. They also canvas the problems that civil society actors have in influencing platform decision-making and note the need for more effective platform consultation of government and civil society. Critically they note the difficulty of external parties influencing longer term, significant policy directions.

Despite the clear need for platforms to improve their self-governance, at this moment the politics of self-regulation are somewhat on the nose, especially in the wake of Facebook and Instagram's struggles with COVID19 misinformation and especially since the release of the Facebook papers with their spectacular expose of Meta's internal policy discontents. It seems fitting then that our final contribution from Terry Flew turns an interdisciplinary lamp on the reasons why debates about tech policy have wandered for decade in the discourse of governance, and now are turning regulatory with some fervour. Building on research into electoral swings and the rise of populist governments, Flew argues that technology policy, once the province of cosmopolitan tech-savvy elites, is now yielding to more conservative forces – leaving information activists torn between options that might curb human rights harms, but may equally curtail free speech.

As the European Union, the Brexited UK, and Canada look to introducing new platform-oriented policy reforms, this collection provides

invaluable insights into the lenses that can be applied to those deliberations. It canvases the variety of stakeholders that require consideration and the intricacies of their relationships, gaps in regulatory research and the complexity of the field as it emerges. Thanks to our geographical location, this work certainly foregrounds activity in Australia and its region, but we regard this as an important balance to global north perspectives, and a worthy focus on the shift to national regulatory activism that is informing approaches in Europe and elsewhere.

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# Can Journalism Survive in the Age of Platform Monopolies? Confronting Facebook's Negative Externalities

*Victor Pickard*

## INTRODUCTION

Many of the world's print news media outlets today are facing existential threats from the collapse of their advertising revenue-based business model. Much of the blame for this decline has focused on the role of platforms such as Facebook and Google, which devour the lion's share of digital advertising revenue. The sustainability of journalism in general, and local news in particular, is increasingly threatened by this duopoly. In the U.S., the duopoly controls over 70% of the total online advertising market (including roughly 85% of all new U.S. digital advertising revenue growth), leaving only a pittance for news publishers (Kafka 2018; Myllylahti 2018). Meanwhile, institutions that provide actual quality news and information are being weakened by the loss of audiences and revenues to

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platforms at a time when democratic societies desperately need reliable journalism. Thus far, however, policy measures to rebalance this market power have been limited at best.

With its massive lobbying power, Facebook wields tremendous political-economic influence over not just information and communication systems themselves, but also the debates about how to regulate these systems. This regulatory capture helps explain how Facebook has been able to deflect responsibility for its actions for so long and maintain its posture as a neutral technology platform. While many argue that Facebook should be treated as a media company and held to relevant legal duties and obligations—as well as norms of social responsibility—Mark Zuckerberg has long refused to even acknowledge that Facebook is anything more than a technology company. While this problem deserves close public scrutiny, history shows us that expecting good corporate behavior simply by shaming information monopolies is a dubious proposition at best and arrangements for self-regulated “social responsibility” are often insufficient (Pickard 2015; Nurik 2021). Building on recent work that draws from historical lessons to argue for a “new social contract” (Pickard 2021) and a “reckoning” with the predictable threats to democracy posed by a lightly regulated, highly commercialized media system (Pickard 2022), my analysis in this essay moves beyond the critique of monopoly power to consider systemic solutions for sustaining digital journalism, especially public alternatives.

After addressing key debates around the harms that Facebook inflicts upon democratic societies, I discuss proposals for platform regulation that range from compelling platform companies to fund a journalism trust to reinventing a new public media system for the digital age. I conclude by focusing on more radical proposals for alternatives to the current profit-driven system, including public ownership. While much of this analysis centers on the U.S. political economy, it holds important implications for democratic nations around the world.

## FACEBOOK’S NEGATIVE EXTERNALITIES

Given that media markets produce various externalities (Baker 2002), it is the role of government policy to manage them—to minimise the negative and maximize the positive externalities for the benefit of democratic society. As Facebook extracts profound wealth across the globe, it has generated tremendous negative externalities by mishandling users’

data, abusing its market power, spreading dangerous misinformation and propaganda, and enabling interference in democratic elections in places such as the US and the Philippines (Vaidhyanathan 2018), and even playing role in facilitating ethnic cleansing in Myanmar (Stevenson 2018). As Facebook hurts democracy around the world and disservices its nearly 3 billion users—through mass surveillance, discrimination, and amplifying dis/misinformation and hate speech—it continues to shirk the democratic responsibilities that should automatically attend to any firm that controls such far-reaching communication infrastructures (Pickard 2020b). Given its record thus far, it is now abundantly clear that the firm has garnered far too much power and must be reined in, a concern reflected in chapters across this collection. Amid all this scrutiny, one area of harm is increasingly capturing the attention of policy analysts, critics, and scholars in recent years: Facebook’s effects on news media and journalism (e.g., Bell and Owens 2017; Myllylahti 2018; Martin and Dwyer 2019; Meese and Hurcombe 2020; Napoli 2019; Pickard 2020a).

In various ways, Facebook’s monopoly power corrupts the integrity of vitally important news and information systems. It acts as an algorithm-driven gatekeeper over a primary information source for its billions of users. In the U.S., where Americans increasingly access news through the platform (Gramlich 2021), Facebook’s role in amplifying disinformation has drawn well-deserved scrutiny. Moreover, Facebook’s Basics project has made it the sole portal to the internet for some countries, creating an unhealthy dependency. And, as noted earlier, Facebook and Google are siphoning most of the digital advertising revenue and starving the traditional media publishers that provide original news and information—the same struggling news organizations that these platforms expect to help fact-check against dis/misinformation (Kafka 2018). Journalism’s financial future is increasingly threatened by the Facebook-Google duopoly. At the same time, Facebook in particular is accelerating the spread of dis/misinformation online.

Research consistently shows that commercial news organizations are increasingly relying on social media—especially Facebook—to reach audiences (Cornia et al. 2018), which has several troubling consequences. For starters, it incentivizes editors and journalists to make editorial decisions based on how news stories will likely perform on Facebook, thereby pandering to Facebook’s algorithms and users’ behavior. This exploitative and corruptive relationship pervades every aspect of journalistic labor and content. Facebook’s position as the primary news portal to millions of



readers forces precariously employed journalists to tailor their reporting according to what is essentially click-bait criteria.

Making matters worse, editors often reinforce this warped power relationship by constantly informing reporters how their work is faring on Facebook with real-time analytics flashing across their screens. Some newsrooms reportedly display wall-mounted data scoreboards provided by platforms such as Chartbeat, Parse.ly or Google Analytics that display social media metrics of specific stories and audience analytics (Petre 2021; Lamot and Van Aelst 2020; Fürst 2020). Moreover, the newsroom adoption of metrification underpins the ecosystem of companies like Chartbeat, which further intensifies and reinforces this logic (Martin and Dwyer 2019). These dynamics incentivize reporters to churn out controversial, trivial, and sensational content, that, in turn, encourages more people to engage with the Facebook platform for longer periods of time and, while under surveillance, producing more valuable information about themselves. Ultimately, this process generates more advertising revenue that mostly funnels back to Facebook instead of the news organizations and journalists who originally created the media content.

While public scrutiny of these unsavory practices continues to grow, much of it overlooks the *structural* roots of these problems, especially the commercial motives that accelerate it. Because its business model depends on user engagement and it profits handsomely from the attention paid to viral disinformation, hate speech, and other processes that cause social harm, Facebook is not incentivized to address these problems and is highly unlikely to do so to the extent that is necessary. This systemic failure underscores the need for structural reform. As this edited collection indicates, while there is no shortage of regulatory plans to address this long and growing list of negative externalities, thus far, the platforms have largely abdicated responsibility for taking action on them. One general reason the tech companies—and Facebook in particular—have been able to stave off regulatory interventions and greater accountability is their invocation of freedom of expression and other U.S. First Amendment rights. I interrogate these claims in the following section.

## FIRST AMENDMENT ARGUMENTS

In the fall of 2019, Mark Zuckerberg made a highly publicized speech at Georgetown University (Kang and Isaac 2019), where he suggested

that Facebook’s first concern is to protect freedom of expression. Zuckerberg’s speech was widely panned (and rightly so), but much of what he said reflects common contradictions of liberal democratic discourse. These ideological tensions create openings for someone like Zuckerberg to make outlandish claims that draw on common tropes but fail to withstand even the slightest scrutiny. From First Amendment absolutism to public sphere analysis, liberal/libertarian theories often ignore preexisting structural inequities and therefore often fail to acknowledge how some voices silence others. They conveniently presume a level playing field—an egalitarian “marketplace of ideas”—in which questions of power and exploitation have no purchase. And they typically conflate this marketplace of ideas with the capitalist market that directly and indirectly corrupts so many processes and practices within our communication and information systems.

According to this implicit “pay-to-play” logic, our media and communication systems function effectively if wealthy individuals and corporations can pay to be heard. Any attempt to confront this concentrated power—to create through regulation more opportunities for others to speak or to access information—is condemned as an illegitimate foray into the natural marketplace, seen as an attack on our core freedoms, and amounting to egregious censorship. But the market, itself an artificial creation, routinely censors and distorts speech and expression, especially when driven by advertising revenue (Baker 1994). For example, commercially-driven systems sort us into groups, surveil and target us with specific advertising, and ensure that some types of news information are not as readily available to certain audiences while privileging the access of others—especially those audiences most coveted by advertisers. Internet access itself is often determined by who can afford to pay for it, and according to specific corporate-friendly terms.

To pretend that the capitalist market is the best arbiter of permissible discourse is a core plank of “corporate libertarianism,” defined by the notion that government has no legitimate role in media markets other than facilitating capital accumulation for a small number of elites (Pickard 2015). Of course, the state has *always* played a key role in designing information and communication systems and remains deeply involved in their governance; pretensions to the contrary are a libertarian fantasy. Nonetheless, it has been particularly challenging to have conversations about policy interventions in the U.S., where for many years discourse

has been constrained by this corporate libertarian paradigm and First Amendment absolutism.

These inherent contradictions are rarely called out and provide cover for Zuckerberg to conflate his personal profit motives with the broader interests of democracy. The American media system’s ideological foundation relies on an impoverished view of the First Amendment as dedicated to upholding negative liberties (“freedom from”—usually translated as “freedom from state interference”) instead of positive liberties (“freedom for”), which might include protecting public access to a diverse and informative news media system (Berlin 1969). While the First Amendment encompasses *both* positive and negative liberties as essential to free expression in a democracy, the latter are easily captured by media corporations. These firms often exploit the libertarian qualities of negative liberties to use as a shield to deflect public interest regulations and public investments in alternative media infrastructures. It also naturalizes the unregulated market as the great defender of democratic discourse.

Public pressure can help steer monopolistic firms toward more responsible behavior for a time, though even that modicum of success is often contingent on a credible threat of regulatory intervention. And indeed, we have witnessed Facebook change course at times—for example, when it finally banned Trump in 2021. But the fact that it took an assault on the U.S. Capitol—an action that was in no small part organized on the platform (Mack et al. 2021)—to finally force Facebook’s hand is very telling. In the next section, I look more closely at the political economic conditions that gird Facebook’s position—and present opportunities for necessary structural reforms.

## POLITICAL ECONOMIC ARGUMENTS

Many of the harms that Facebook externalizes to societies across the globe stem from its core business model, which relies on what is essentially a massive surveillance machine.<sup>1</sup> While many observers may have once viewed Facebook positively, the American public increasingly sees the company as a monopoly intent on doing whatever it takes to make as much money as possible (e.g., Reilly 2017). Moreover, like all monopolies, Facebook has shown that it will fight tooth and nail to retain that market power, even resorting to unsavory methods. A November 2018 *New York Times* story revealed that Facebook hired a disreputable public relations firm to smear adversaries with anti-Semitic conspiracy

theories (Nicas and Rosenberg 2018). Pursuing profit to the detriment of democratic considerations, Facebook continually dodges efforts toward transparency and accountability.

At the same time, growing concerns about Facebook’s unregulated power has engendered a rare bipartisan consensus that government must rein in platform monopolies. Until recently, the concept of regulating technology firms seemed unfathomable, but now even Republican policymakers—sometimes for ill-founded reasons such as the belief that Facebook is politically biased against conservatives—believe they have become so powerful that government must intervene. Even Zuckerberg, who is notoriously reluctant to take responsibility for causing social problems, has had to shift his rhetorical strategy to concede that perhaps Facebook should be subject to certain regulations (Isaac 2019). Facebook has continued to profess a pro-regulatory stance for several years.<sup>2</sup> On Valentine’s Day 2021, Facebook even ran a full-page ad in the *New York Times* announcing that it supported “updated internet regulations.” Of course, this begs the obvious question: *what kind* of regulation? Tamping down public criticism and responsibilities for content moderation—if it preserves profits—serves Facebook quite well.

Answering the question about what regulation should look like requires us to directly confront the impact of platform monopolies on journalism. Monopoly ownership is a broad structural threat to a healthy information system, affecting everything from control of internet access to the range of voices in our news media. Fortunately, a growing anti-monopoly movement in the US, as well as stronger stances toward platforms from many countries around the world, has offered some hope that these giants might be cut down to size. Indeed, in recent years have witnessed a growing clamor of antitrust initiatives, championed by politicians such as Senator Elizabeth Warren and advocacy groups such as the Open Markets Institute.

At the ideational level, this movement benefits from a growing consensus that something must be done to confront concentrated corporate power in general and the new tech monopolies in particular, coinciding with a growing “techlash” against Silicon Valley-based internet firms (*The Economist* 2018). A lively debate has emerged in recent years—mostly on the left but also including people from across the political spectrum—that champions what is sometimes referred to as the Jeffersonian or neo-Brandeisian approach, which emphasizes breaking up monopolies.

The neo-Brandeisian approach (named after Supreme Court Justice Louis Brandeis), which sees centralized control to be the most worrisome evil that must be prevented at all costs, focuses on breaking up concentrated market power and encouraging competition, primarily through antitrust measures (Wu 2018).

This framework underpins much of the U.S. anti-monopoly movement, whose main objective is to break up monopolies into smaller units along structural lines, thus creating a much more decentralized economic environment in which numerous firms compete for consumers. Anti-monopoly activists rightly identify the Chicago School of Economics as responsible for reorienting antitrust law toward what is known as the “consumer welfare standard,” which emphasizes purported consumer benefits over public interest considerations such as unemployment and protecting small businesses. During the Reagan administration, this approach became the dominant paradigm, with the government willing to approve mergers so long as companies promised to keep prices low. Regulatory bodies exhibited less concern toward other well-known problems related to concentrated economic and political power, which led to highly concentrated industries exacting terrible social costs (Khan 2017).

There is much to admire in the anti-monopoly arguments. The platforms are, after all, simply too big. They have become vertically integrated monstrosities, wielding a degree of political power incompatible with a functioning democracy. Calls for “smashing them to bits” may sound quite appealing, even radical. But on closer examination we can see that this would not solve many of the information problems we face. While it is true that American antitrust enforcement has been overly lax for decades, leading to highly concentrated news and information industries, an over-emphasis on this strategy has drawbacks. Certainly, the ideal of maintaining robust competition among many small producers is noble—and the desire to break up vertically integrated monopolies, oligopolies, and cartels a legitimate and necessary objective.

A major limitation to the neo-Brandeisians’ anti-monopoly approach, however, is its tendency to critique the size of monopolies and the lack of competition, rather than the commercial values that drive them toward perverse incentives. Such a critique tends to overlook structural questions about whether media systems should be governed by commercial motives and relationships in the first place. Simply reducing the size and multiplying the number of commercial outlets that depend on surveillant

advertising, disseminating low-quality content, and undervaluing democratic concerns will likely not solve all our challenges. In other words, Facebook presents a capitalism problem, not just a monopoly problem.

Perhaps counter-intuitively, some progressive advocates argue for maintaining centralization. Part of this position rests on the notion that greater efficiencies stemming from scale and scope may create benefits for workers and consumers because large producers are easier to unionize and regulate. Within this regulated monopoly paradigm, big government can serve as a countervailing force against the excesses of big capital. The neo-Brandeisians, for their part, criticize this position as overly accommodationist, locking in and legitimating concentrated corporate power. The neo-Brandeisian notion that “big is bad”—or, as Brandeis himself referred to it, “the curse of bigness”—benefits from an intuitively resonant rhetoric of justice. Moreover, the desire to trust-bust monopolies has a populist appeal, connects with a rich history, and often presents itself as the radical—or at least the more progressive—option in policy debates. But in fact, the neo-Brandeisian approach is, in some ways, a deeply conservative position; it sees a fair and orderly market as the proper regulator of news media. In other words, it assumes that a highly capitalistic media system can serve democracy well, if only we managed it appropriately, especially via competitive markets.

It is becoming increasingly clear that antitrust is a necessary but insufficient intervention in designing a democratic communication and information system. While some advocates take this recognition to suggest the goal should be break-up *and* regulate (Kimmelman 2019), there is also a third way. What both the regulatory and antitrust approaches lack is a systemic critique of the market’s failure to support public goods—that is, private firms’ underproduction of the high-quality information that is fundamental for a democratic society to operate effectively. Unaccountable monopoly power is both a contributing factor to, and symptom of, this structural problem. If our ultimate goal is to create something different from the “surveillance capitalism” that drives so much of our digital news and information systems (Zuboff 2019; Foster and McChesney 2014), then it is clear that we need publicly-owned, democratic alternatives.

Much of the low-quality information that permeates through our news media system results from commercial pressures that privilege particular types of news coverage over others—not the malfeasance of a few bad

journalists or news organizations. For example, Facebook designs its algorithms to encourage its users to engage with content on the platform primarily to sell targeted ads and drive corporate profits. As users, we are more likely to engage with material that has an emotional pull—for example, if something makes us angry or scares us. Hence, Facebook’s algorithms reward content that fuels outrage—which mainstream news media produces by emphasizing social and political conflict. Consumer tracking and profiling encourages advertisers and news outlets to focus their efforts on narrowly tailored clickbait, regardless of a story’s veracity. In the end, commercial logics and, specifically, the need to maximize profits via advertising revenue over all other concerns, drive our news and information systems, thereby enabling and amplifying misinformation. Low-quality information is not a defect of these systems, it is an essential feature.

The assumption that digital media somehow magically transcended these capitalistic imperatives was always an ideological assumption, not an empirical one—as even a cursory glance at the long historical record would indicate, from telephony to broadcast media. Indeed, by now the data are incontrovertible in demonstrating what happens when corporate monopolies dominate a highly commercialized information system. These systems are typically beset with predictable harms, hazards, negative externalities, and perverse incentives that might be good for business but are often very bad for democracy. The recurring unwillingness to see something so obvious is another reminder that if we do not understand the logics of a commercial media system—and the resultant effects of capitalism on news and information systems—we will always be taken by surprise by bad actors’ bad behavior, and we will always ascribe this behavior to individuals—that of outliers and “bad apples”—instead of fundamental systemic flaws. Nonetheless, the never-ending quest for a self-regulatory fix continues apace, which I turn to next.

## THE PROBLEM WITH SOCIAL RESPONSIBILITY

The assumption that a social contract should guide corporate giants’ operations is a recurring theme in policy history (Pickard 2021). Yet, unlike “natural monopolies” or public utilities of old, Facebook has avoided close regulatory oversight and shirked meaningful public interest requirements in exchange for the many benefits that society grants it. One possible approach toward finally establishing a new social contract might

include a revamped “social responsibility” regime. On the surface, this may appear to be a positive development. And indeed, such an arrangement would likely be a marked improvement considering our current predicament. But democratic societies might consider cautionary tales and historical lessons before going too far down this path.

Social responsibility harkens back to earlier formations regarding regulation—or lack thereof—of the press. One key example is the U.S. Hutchins Commission—a blue ribbon panel tasked with defining press freedoms in the 1940s—which was famously tasked with the core question of “whether the giants should be slain or persuaded to be good.” Ultimately, they decided that it was better to try to publicly pressure media firms into good behavior instead of aggressively regulate them. Although such experiments with media self-regulation have failed in many ways (Pickard 2015), this is precisely where we seem to be headed today with the Facebook Oversight Board and similar efforts that appear to show a self-reformed Facebook take on more responsibility. The reality, however, is that Facebook’s political economic power—with all its attendant harms—remains intact.

At the same time, we are beginning to see interesting resolutions around the world that aim to recalibrate some of these power relationships. For example, the Australian approach to platform regulation recommended by the Australian Competition and Consumer Commission (ACCC 2019) has led to an instructive power struggle and gives us an opportunity to see a more aggressive standoff between platform monopolies and national governments. Generally speaking, this legislation forces platforms like Facebook and Google to compensate media companies for using their content. In actuality, however, many flaws and uncertainties compromise this plan, which has received critical scrutiny from academics and sundry critics, many of whom cast doubt on the efficacy of such policy interventions in saving local, independent journalism (Meese and Hurcombe 2020; Pickard 2019; Winseck 2020). Too often, this “platforms vs. publishers” frame emphasizes an aggrieved industry over the information needs of democratic societies. Nonetheless, this plan is serving as a default model that many countries are currently considering around the world.

While silver-bullet policy solutions are elusive, increased public scrutiny offers a fleeting opportunity to hold an international debate about what interventions are best suited to address informational deficits and social harms. Above all else, these problems necessitate *structural* reforms.



Shaming digital monopolies into good behavior or tweaking market incentives are, in the end, of limited utility. With platform monopolies accelerating a worldwide journalism crisis, a new social contract is required that, at the very least, includes platform monopolies paying into a global public media fund.

### TAXING THE PLATFORMS TO FUND JOURNALISM

Although platform monopolies have not single-handedly caused the journalism crisis—overreliance on advertising revenue and structural shifts in the transition to digital formats are the primary causes—they have exacerbated the overall precarity facing the newspaper industry by defunding and compromising news content. Not only do these firms bear significant responsibility, they also command profound resources. But thus far, the platforms have funded only modest initiatives to support journalism, mostly bound up in optimizing news outlets’ performance on Facebook (for an overview, see Pickard 2019, 2020a). Meanwhile, proposals have proliferated for more meaningful reforms that seek to redistribute revenues from the platforms to news publishers, with some seeking a more radical redress than others.

As noted earlier in discussing the ACCC plan, a general proposal that has gained much mainstream support—especially from politicians and publishers—is that the platforms should more fairly distribute their digital advertising revenues back to news media industries. At first glance, this seems fair and reasonable. But this proposal neglects the fact that there simply is not enough money in digital advertising to support the level of journalism that democratic societies require. In the U.S. alone, the newspaper industry has lost tens of billions of dollars since the early 2000s, predating the rise of Facebook. Thus, platform monopolies are responsible for only a percentage of such losses—even if the newspaper industry would argue that it is a very significant percentage (MaLoon 2019). A key concern with such schemes based on compensation to the aggrieved commercial news industry is the risk that these plans will disproportionately help incumbent big publishers who are themselves complicit in exacerbating the journalism crisis through consolidation and job cuts. Such restorationist proposals would arguably only reify the worst tendencies of commercial media, and likely make communication problems even worse, especially for disadvantaged communities (Pickard 2020a). Instead, privileging smaller independent, nonprofit organizations

is arguably a better plan to ensure that such money actually goes toward sustainable, local journalism that societies need.

Another growing argument, one that I have also made (Pickard 2018, 2019, 2020a), is that the platforms should help fund the journalism that they are depriving of resources, but to direct that money towards funding *public* media. I propose that platforms pay a small percentage of their ample profits toward a journalism trust, which would generate hundreds of millions of dollars per year. The media reform organization Free Press (Karr and Aaron 2019) has similarly called for a digital advertising tax (which, of course, would be applied almost entirely toward the two big platforms), and the advocacy group Public Knowledge has called for a creating a “super fund” that the platforms pay into to help finance public service journalism (Stella 2020). Another proposal has called for establishing a \$1 billion international public interest media fund to support investigative news organizations around the world, protecting them from violence and intimidation (Lalwani 2019). Similarly, the *Cairncross Review*, a detailed report on the future of British news media, called for a new institute to oversee direct funding for public-interest news outlets (Waterson 2019).

While all these proposed plans would be positive steps to varying degrees, ultimately such “offsets” do not strike at the core problem and could even be counterproductive for the long-term goal of taming and democratizing platform monopolies. In the following final section, I briefly discuss more radical and structural interventions.

## RADICAL IMAGINARIES AND POSSIBILITIES

Democratic societies faced with run-amok monopoly capitalism have three general tools at their disposal. First, they can break up monopolies and trust that a more competitive market will help tame destructive behavior. Second, they can regulate monopolistic firms and attempt to offset against social harms and negative externalities. Or third, they can try to create public alternatives that are not subject to the same market pressure and therefore, if designed and governed appropriately, can operate according to more socially beneficial logics. I have touched on the first two of these approaches but now will turn to the third option as I conclude this essay. While short-term reforms aimed at curbing Facebook’s power and any efforts toward bolstering journalism should be

applauded, we also must recognize that these are not, by and large, long-term, systemic solutions. In my view, only deep structural reform can assure democratic outcomes and more permanent solutions to the many problems we currently face.

To create the information and communication systems that democracy requires necessitates more radical, structural reform. While many such reforms—nationalizing the platforms, for example—are often cast out of bounds before the conversation even begins, and, moreover, the prospects of such radical futures are always remote, there are some promising signs afoot that suggest we can dare imagine more meaningful change. At the very least, it stands to argue, we should begin with attempting major structural reform before we fall back on less ambitious measures.

These more radical trajectories of change typically fall along several axes. One is the attempt to radicalize from within, especially among the tech workers themselves, who have been one the strongest vectors of political action against the platforms. For example, in recent years Google workers have made important political interventions, such as in 2018 when 20,000 employees staged a global walkout to protest sexual harassment. Given their key positions within the platform monopolies' larger power structures, tech workers could play an important role by organizing at multiple levels and democratizing these firms from the inside (Petcoff and Tarnoff 2021).

Another argument for reform—one grounded in mainstream economic theory and American history—is the notion that these platforms should be seen and treated as public utilities (Srnicek 2019; Schiller 2020; Muldoon 2020). If we start to move in that direction, we can easily imagine a host of new—and meaningful—public interest obligations (Pickard 2020b, 2021, 2022). While calls for renewed regulations from the broadcast era such as the Fairness Doctrine are likely implausible and unworkable for platforms, we could certainly argue for sensible protections and guardrails against the worst excesses (Pickard 2015; Napoli 2019). This might include “signal boosting” reliable information within Facebook news feeds and Google searches to increase its visibility in feeds and searches (Kornbluh and Goodman 2020).

Beyond regulatory measures, however, a more effective approach might be outright public ownership, including cooperative movements (see, for example, Hanna and Brennan 2020). Any move toward this direction would, over time, radically restructure labor relations and

ownership structures, ultimately democratizing not only platform monopolies but entire sectors of our news and information systems. Some discussions around such proposal have emerged—for example, talk of a “public interest social media platform” in Australia and the notion that the *BBC* can be redesigned and expanded to compete with search engines and social media in the UK by presenting a non-commercial alternative. Even if, overall, these more radical reformist proposals are still in their infancy and remain mostly discursive, they are increasingly being taken seriously and may offer glimmers of hope for a more democratic future.

Ultimately, we must recall that media corporations are a social construct and their values, design principles, and relationships to individuals and communities are malleable according to social needs and public policies. As members of democratic societies, we have the power to change platform monopolies if we collectively decide to do so and make new policies for the greater good. It is up to us to decide that our media institutions must serve democracy first and foremost as opposed to mere profit imperatives. Our concerns should not be guided by the expectations of established industry players since this ongoing debate is not really about them, it is about us.

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# Platforms and the Press: Regulatory Interventions to Address an Imbalance of Power

*Asa Royal and Philip M. Napoli*

## INTRODUCTION

A key question that any broad regulatory framework for digital platforms must address is what, if any, interventions are necessary to mediate the relationship between digital platforms and the news media. In many countries, the news media have long been subject to some form of government regulation and/or support, typically under the presumption that the cultivation and maintenance of an informed citizenry is essential to the effective functioning of the political process. But recently, digital platforms have emerged to establish a still-evolving, much-debated, and

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often unregulated position of prominence in national news ecosystems, serving as important intermediaries in the relationship between news organizations and their audiences.

Platforms' emergence into this role has had a wide range of well-documented, disruptive effects. Chief among these has been an acceleration of the unbundling of news and the further weakening of the revenue models associated with its production and distribution. Whereas would-be news readers were once forced to buy entire newspapers or visit ad-packed home pages to access stories, platforms now offer readers a smorgasbord of individual news stories they can sample (nearly) freely, empowering users to potentially reshape the nature of the news they receive (Martin and Dwyer 2019). Platforms have also tinted the windows of story discovery, guiding users' access to news with algorithmic content curation systems that favor emotionally charged and engagement-inducing content, veracity not necessarily withstanding (Ingram 2018; Rayson 2017). And though platforms' recommendation algorithms have garnered attention for their role in the propagation of disinformation, they have also created new incentive systems feeding directly into the editorial values that guide mainstream news organizations, promoting the publicisation, if not publication, of would-be viral content (Wang 2015).

Given these complexities, it is not surprising that the platform-press relationship has been rife with conflict. Nor is it surprising that policymakers across many national contexts, concerned with maintaining the robust news ecosystems essential to democracy, have increasingly turned their attention to the relationship.

This chapter focuses on efforts by policymakers to mandate that digital communications platforms (including search engines and social networks) that host or show any news content compensate the content's publishers. The approach in this chapter is cross-national and comparative, focusing on three countries (France, Germany, and Australia) that have taken the most significant regulatory actions internationally in recent years, while at the same time noting actions that have taken place in other countries such as Belgium and Spain, and at the supranational level (e.g., the European Union). This chapter will consider not only the substance of the regulatory interventions that have been proposed and implemented, but also the political dynamics surrounding them and the critiques they have generated.

## CASE STUDY OVERVIEW

The three countries we chose as case studies have approached legislating platform-publisher relationships from different angles but still, as we detail below, have ended up acting out similar plays.

Those similarities owe much to the transitional trends that have affected publishers. For the past fifteen-odd years, consumer attention and ad revenue have ebbed away from the lucrative pages of newspapers and onto the platform-dominated internet. For almost as long, publishers and (American) platforms have engaged in a struggle over whether and how platforms, which link to publishers' content, should compensate publishers. The warring has focused on "snippets", short extracts of news articles often displayed alongside links; for example, on a Facebook post or in Google searches. Digital platforms claim they owe publishers nothing for using snippets; publishers disagree, but rely on digital platforms to distribute their content and thus have little say.

Their disagreements have taken on a familiar cadence: publishers sue (or national governments legislate against) platforms to get them to cough up, ostensibly over snippets; platforms battle the lawsuits or legislation and push publishers to drop their claims, sometimes offering compensatory sums in lieu of recognizing publishers' putative rights over snippets; if publishers do not comply, platforms play hardball, rallying the public against the legislation and dropping publisher-specific snippets from their services; publishers, facing traffic drops after their snippets have been dropped from platforms, give in, and the fight goes dormant until a few years later.

## FRANCE

For the past fifteen years, French news publishers and (American) platforms have engaged in repeated iterations of the struggle just described. Only recently was the pattern broken. Following the French legislature's transduction of an E.U. directive establishing press copyrights over snippets, platforms (specifically Google) have begun inking the licensing deals with French news publishers that were once anathema to them.

French publishers' war with Google began in 2005, when the wire service Agence France-Presse (AFP) sued Google, alleging that Google News was illegally using AFP's content (Isbell 2010). As a wire service, AFP did not directly deliver news to readers, but instead offered it to news

publishers under individual licensing agreements. When Google News crawled those publishers' sites, it found and freely displayed snippets of all content, including stories and images sourced from AFP. That, AFP claimed in its 2005 lawsuit, was illegal because Google had no license agreement for the AFP content. Google rejected AFP's claim, arguing that news, facts, and small bits of text like headlines and snippets could, not be copyrighted. AFP's suit, Google argued, threatened the freedom of information on the Internet (Isbell 2010).

According to AFP however, the organization was not suing Google over sharing intangible facts or language: it was suing Google for resharing and profiting from AFP's original photographs and stories, both of which, the company said, required significant effort and money to produce (*AGENCE FRANCE PRESSE v. GOOGLE INC.*, 2007). Google and AFP settled their case in 2007, and although financial terms of the deal were not released, Google ended up acquiring a license for AFP's content, just as it had earlier that year with the Associated Press (Auchard 2007).

By 2012, French news publishers were in the midst of a financial crisis afflicting news organizations worldwide. Despite government subsidies of €1.2 billion, not a single national newspaper was profitable (*The Economist* 2012). Amidst that backdrop, French news publishers revived AFP's argument—that Google ought to compensate them for its usage of snippets from their articles.

Siding with French publishers, President François Hollande threatened to adopt neighboring Germany's *leistungsschutzrecht* (LSR), a law creating additional copyrights for the news media, should Google not pay up. That move prompted threats from Google to completely delink French news media sites from Google search results (AFP 2012; Ternisien 2013). But in February of 2013, following a new and supposedly unrelated proposal by Hollande to tax Google over its data collection practices, the company settled with French publishers, paying out a lump sum of €60 million into a digital innovation fund (Pfanner 2013). This payout framework was notably different than the Google-AFP deal. No licensing agreements were struck, and despite significant support from the national government, French publishers received no acknowledgement of their “ownership” of snippets (Schmidt 2013).

Google had reached a similar outcome with Belgian publishers three months earlier. Settling a lawsuit over snippets and content caching, the company had paid an unspecified amount (reportedly €5 million, much

of which was made up of purchases on Google’s own ad platform) while unequivocally stating that it was not compensating news publishers for the right to use their content (Geerts 2012). In Google’s persistent argument, previewing article snippets in Google Search was not illegal content appropriation, but an efficient improvement to the web, good for the end-user. And if previews deterred some searchers from visiting the snippeted site, Google theorized, those lost page views were more than made up for by the traffic its engine referred (Silva 2020a).

Despite the Google payouts, French publishers continued to struggle economically. Newspaper revenue in the country dropped by over a third from 2007 to 2017, with over two-thirds of that loss stemming from decreased advertising (Assouline 2019; Autorité de la concurrence 2020). Meanwhile, other EU countries tried and failed to funnel platform money to news publishers. In Spain, the government passed legislation that would force Google to pay publishers for displaying snippets. Google responded by shutting down Google News Spain, damaging Spanish news publishers’ traffic (Athey et al. 2017). In Germany, the government approved an ancillary press copyright, after which Google turned off snippets for publications that would not sign free licensing deals, depressing their traffic numbers until they conceded two weeks later (Fels 2014).

Change in Europe did not arrive until 2019. After a court threw out Germany’s LSR, the EU passed its Directive on Copyright in the Digital Single Market, Article 15 of which extended traditional press copyrights to include “neighboring” rights protecting snippets (*Council Directive 2019/790*, 2019), which could be wielded against large digital platforms. Notably, the EU principle of *subsidiarity* prevents the Union from enacting legislation unless the goals of the legislation cannot be achieved by individual member states acting alone (*Consolidated Version of the Treaty on European Union—TITLE 1, Article 5*, n.d.). Thus, the directive’s passage demonstrated the European Parliament’s belief that it would take a consolidated union rather than a few lone states to coerce platform compliance on copyrights.

Before the EU Directive passed, France, where licensing battles had begun nearly 20 years earlier, had already queued up press copyright legislation; and in July of 2019, three months after the directive’s passage, the country ratified its new copyright law as a transduction of the directive (Assouline 2019; Piquard 2019). In response, as it had done in Germany and Spain before, Google refused to bargain with French news publishers, instead asking all of them for free licenses to use snippeted content. The

company's line to publishers was essentially "We don't value your snippets enough to pay for them. Give them to us for free, or we'll drop them and you'll face the traffic crashes German holdouts did." Google's VP of News published a blog stating, in general terms, that the company would not pay publishers for people clicking on links, though the EU/French legislation dealt with the display of snippets, not the clicking of links (Gingras 2019).

French publishers sued Google, arguing the company was ignoring the spirit of the new law (as captured in its title, *Proposal for a law to create a neighboring right for the benefit of press agencies and press publishers*). The law, publishers claimed, explicitly stated it was designed to protect the press' financial investments in producing news, to uphold the public's interest in a free and pluralist news ecosystem (*Council Directive 2019/790*, 2019). The French Competition Authority agreed. In its decision, the Authority accused Google of using its dominant market position (the company controlled 93% of the national search market at the time) to dictate terms to publishers, who were reliant on the company's irreplaceable referral services. The Authority argued that by asking companies to give up content rights in exchange for those services and universally refusing negotiation, Google was abusing the economic dependence of others, a breach of European competition law (Autorité de la concurrence 2020). Moreover, the Authority noted, the EU directive article on press copyrights was written with the explicit purpose of shifting bargaining power away from platforms and to news publishers, a group the directive hailed as essential to information availability and democracy (*Council Directive 2019/790*, 2019). The Authority's decision ordered Google to bargain in good faith with publishers over license compensation, and after a failed legal appeal by Google, was upheld by a French court (Rosemain 2020).

In November of 2020, a handful of French news publishers became the first in the world to sign government-mandated content licensing agreements with a digital platform—in this case, Google (Missoffe 2020; Rosemain 2021). By January of 2021, a major French press union representing nearly 300 titles announced it had reached a framework finalizing agreements with Google on behalf of nearly half its members, with more to come (L'Alliance Presse 2021).

These licensing agreements supposedly require Google to compensate news publishers for the company's use of content falling under the publishers' neighboring rights, though Google and the publishers

disagree on whether that means Google is paying for snippets. APIG, the press union, has pointed out that Google only signed the licensing agreements after being sued under new EU/French laws (as the company admitted in a blog post) (Lomas 2021; Missoffe 2020) that established copyrights for snippets (Reda, n.d.). Therefore, the union says, the neighboring rights deals obviously cover snippets (Lomas 2021). A January 2021 statement by Google showed that the company officially begs to differ (Lomas 2021).

The deals are opaque, at least to the public. Individual news publishers will reportedly be paid pre-calculated amounts on three-year contracts, but remuneration for their copyright licensing will be subsumed into payments from Google's News Showcase program, which compensates publishers for their "editorial expertise" and for allowing Google's customers beyond-the-paywall access to news content (Bender 2020; European Publishers Council 2020; Lomas 2021). Such legal legerdemain obscures how much Google is paying for what and explains how the company, even after signing licensing deals that stemmed from lawsuits over snippet appropriation, can still maintain that they are not compensating publishers for snippets.

Google has long maintained that Google Search is more of an information conduit—a platform—than a content service (Silva 2021b). The former designation, based on Section 230 of the U.S. Communications Decency Act, has more neutral connotations than the latter and, at least in the US, confers a number of legal protections (Kosseff 2019); as such, Google has clear incentives to maintain that it will not pay for content (Silva 2021b). Additionally, were Google to pay news publishers, other content creators might well come knocking for their own share.

As of June 2021, France is the only EU country that has implemented the press publisher section of the EU copyright directive (The International Association On the Digital Public Domain 2020). The supposedly mandatory deadline for doing so has, in fact, passed by, as EU member states wrestle with other sections of the directive. But if and when countries do transduce the new press laws, they may well walk the path paved by France and Google, wherein compensation for publishers' neighboring copyrights is subsumed into a larger program like Google's News Showcase, and publishers accept a much-needed money line in exchange for not pressing copyright issues.

## GERMANY

In 2011, German Chancellor Angela Merkel delivered a speech to the Federal Association of German Newspaper Publishers (BDZV), calling for the government to pass new copyrights protecting press publishers in the digital world. Thus began a tussle with Google.

In trying to protect publishers, the government pursued a legalistic path that would update copyright laws to include a *leistungsschutzrecht*—or ancillary copyright—for news snippets. The LSR offered news publishers a one-year copyright term, during which they would have the exclusive right to license snippets for commercial use by search engines and similar services (Achttes Gesetz Zur Änderung Des Urheberrechtsgesetzes 2013). Under the LSR, if Google wished to display snippets from *Der Spiegel* stories in its search service, it would be up to the outlet to decide whether and how much Google should pay.

As Germany's intercession on behalf of news publishers came through copyright law, protests, unsurprisingly, came not just from platforms, but from advocates of information freedom like Wikimedia Deutschland and Creative Commons (Abrell, n.d.; *Unterstützer*, n.d.). Some critics decried the ambiguity of the law—it did not explicitly set a minimum length of content qualifying for copyright, nor did it clearly define the types of companies who would have to pay copyright fees (Kreutzer et al. 2011). Others claimed that meaningful news copyrights were encapsulated by existing copyright law and that the LSR, because it covered small bits of text, gave publishers a newfound and dangerous power to copyright facts and chunks of the German language (Max-Planck-Institut für Ibender 2013).

Google, the main target of the LSR, called the day of its passage a “black day for the Internet in Germany” (“Google lehnt Lizenzierungspflicht ab,” 2012). A spokesman expressed the company's belief that economic partnerships were a better path forward than laws (a foreshadowing of Google's deal making in France eight years later) (“Google lehnt Lizenzierungspflicht ab,” 2012).

As the LSR wound its way through the Bundestag, Google began its hardball routine. Before the bill passed, Google set up an anti-LSR website titled “Defend Your Net” and urged users to lobby politicians in opposition to the law (Google 2012). Then, after the LSR became law, Google asked German news publishers to sign a waiver allowing the company to freely use snippets extracted from their articles. A group of



publishers (notable exceptions included *Der Spiegel*) refused and banded together under a collection society, VG Media (now Corint Media) to demand payment for snippeting. Google, in turn, decided that the cost of paying for snippets was not worth their value, or that it could bully news publishers into submission; when the LSR became active, the company stopped showing snippets from the rebellious publishers in its search engine and news service. Traffic to the news publishers of VG Media subsequently plummeted. Axel Springer, a German media giant, reported a loss of 40% of Google Search traffic and 80% of Google News traffic to its properties during the snippet abstention period (Fels 2014). And so two weeks after revoking Google's free snippeting rights, Springer and most of the publications under VG Media relented, allowing Google to resume snippeting (ten Wolde and Auchard 2014).

For years after Google's triumph, the LSR existed in a phantom state, challenged by lawsuits, and ineffective in helping publishers claim licensing fees. That lasted until 2019, when the LSR was felled by the European Court of Justice over a technicality: Germany had not notified the EU of the legislation, rendering it illegal (*VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC, successor in law to Google Inc.*, 2019).

In 2018, the LSR's principles were formally adopted by the EU in its Directive on Copyright in the Digital Single Market (*Council Directive 2019/790*, 2019). A short while later, preempting German transduction of the EU directive into national law, Google began dispersing funds to news publishers. In June of 2020, the company signed licensing agreements totaling \$300M with publishers in Germany (as well as publishers in Australia and Brazil), heralding in its press release, a quote from the head of Spiegel Group, one of the publishers that had originally allowed Google to freely use snippets and did not join the bargaining collective (Bender 2020). Then, in October of 2020, Google launched News Showcase, another product that would allow publishers to license content to the company. Its announcement once more hailed three German publications that had declined to join VG Media and bargain against Google (Pichai 2020; *VG Media*, n.d.).

Google News Showcase was in fact open to all publishers, but some, including Germany's Axel Springer, stayed away, arguing that Google's largesse came with contractual strings and might be yanked away if news publishers participated in legal claims under the EU directive (European Publishers Council 2020). Indeed, Axel Springer signed a content

licensing deal with Facebook in May of 2021, only on the explicit grounds that the deal would not cover future copyright claims (Wienker 2021).

Most news publishers have neither the clout nor the capital of Axel Springer. Just as they did in France, publishers in Germany have signed on in large number to Facebook and Google’s news licensing schemes, eschewing fights about the legal position of snippets to gain access to cash infusions.

## AUSTRALIA

In 2019, when the Australian government first announced it would draft legislation to support news publishers in their fight to claim compensation from digital platforms, it had already witnessed the nearly decade-long travails of European governments making similar attempts.

Perhaps because of the troubles European governments had faced, the Australian government sharply diverged from their model of legislation. Rather than pursuing a press copyright that would give publishers a narrow avenue to extract payment from digital platforms, the Australian government took a broader approach. Citing antitrust and public interest philosophies, it brought forth a mandatory news bargaining code governing platform-publisher relationships, the final version of which included provisions forcing platforms to, among other things:

1. Pay news publishers for the right to link to or show snippets from news stories at a rate subject to final offer arbitration.
2. Turn over data to news publishers about platform users’ interactions with their content.
3. Notify news publishers in advance about platform algorithm updates that might affect the ranking or display of their content (*Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 2020).

The introduction of Australia’s mandatory bargaining code followed over a decade of complaints by domestic publishers that digital platforms (which Australian media baron Robert Murdoch once called “content kleptomaniacs”) effectively steal content by displaying snippets and previews of news without paying licensing fees (Dawber 2011; Sarno 2009).

Three years prior to the bargaining code's introduction, then-treasurer (now Prime Minister) Scott Morrison announced an inquiry into digital platforms' effect on competition in media and advertising. One goal of the inquiry was to investigate the impact of digital platforms on the public supply of news and journalism (Australian Competition and Consumer Commission 2019). The Digital Platforms Inquiry report found that platforms' dominant position as information distributors had given them significant bargaining power over the news companies whose content they displayed. The report resolved that given the news industry's vital importance to democracy, the major platforms should each establish a code of conduct addressing that bargaining imbalance (Australian Competition and Consumer Commission 2019). After giving platforms and publishers about a year to negotiate over what such a code might look like, the Australian government announced in 2020 that it had lost confidence in their talks (Australian Competition and Consumer Commission 2021). Thus, the mandatory bargaining code was born.

In the past, Google had responded to legislative forays in Germany and Spain by pressuring news publishers to ignore the legislation and give the company free license to display snippets. The Australian legislation attempted to tie Google's hands. Under the bargaining code, platforms could no longer just eliminate certain publishers' snippets to avoid paying them, because links, too, would require a license to display (*Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, 2020). And because the code contained a non-discrimination clause, links from certain publications could not simply be delisted (Australian Competition and Consumer Commission 2021): the legislation rolled must-pay and must-carry provisions together. At any rate, it would be difficult for Google to run a search engine without linking to news content, especially given the term's loose definition. For the company, the legislation presented a binary nuclear option: bargain on new terms with publishers or leave the Australian search market.

Australian government intervention in the platform-publisher relationship came during a challenging time for the country's news publishers. Following global trends, Australian newspaper revenue had collapsed over the prior two decades. From 2002 to 2018, Australian papers lost 23% of their subscription revenue and 87% of their classified ad revenue, the latter of which, lost to online specialist sites like *Carsales* (an auto advertising website) and *seek* (a job advertising site), made up 92% of papers'

overall revenue decline (AlphaBeta Australia 2020). Between 2008 and 2018, the number of local and regional papers in the country declined by 15%, a loss of 106 outlets, the closures of which left 21 local government areas with no local or regional paper. The fall of papers, noted the Australian government, had been deleterious to democracy. In 2018, the ACCC (Australian Consumer and Competition Commission) found that in surviving papers, reporting on local government and local courts had dropped by 26 and 40% respectively (Australian Competition and Consumer Commission 2019).

The government's abrupt timing in imposing the mandatory bargaining code—abrogating the voluntary negotiating period—was brought on by a period of especially acute pain for Australian news publishers (Crowe 2020). Reduced advertising due to the Covid-19 pandemic led many Australian news organizations to close or cut back operations, even as the pandemic and an unusually active bushfire season spiked domestic demand for news (Helliker 2020). News Corp, Australia's most prominent publisher, announced that 36 of its papers in the country would shut down, and another 76 would fully migrate online. Australian Community Media, the country's largest owner of regional and rural publications, cut back operations at 77 papers over the course of the pandemic (The Public Interest Journalism Initiative, n.d.).

Strikingly, as Australian newspapers' revenue declined, international demand for news increased. From 2013 to 2018, the global number of online news subscriptions rose 307%, growing by 26 million and eclipsing the 0.5% (3 million) decrease in print subscriptions (AlphaBeta Australia 2020).

Growing demand for news has coincided with massive growth for platforms like Facebook and Google, which have expanded to capture a dominant share of the digital advertising revenues in Australia (AlphaBeta Australia 2020; Hunter and Samios 2020). Some have linked the rise of platforms to the fall of newspapers (Cantwell 2020; Kang 2020; Stoller 2019; Sullivan 2021). Data, however show that newspaper display ad revenue rose approximately 6% from 2002 to 2018 (AlphaBeta Australia 2020). Of course, as more advertising dollars migrate online, the proportion controlled by the largest platforms dwarfs the share that news organizations are able to capture. Further, as submissions to the ACCC's Digital Platform Inquiry note, many news organizations contend that platform growth has been built on the backs of publishers, with the

platforms' dominant market position enabling them to bully news organizations into ceding free content. As that bargaining imbalance was the impetus for government action, payouts from platforms to publishers under the bargaining code are meant as compensation for platforms' display of publishers' news content.

Of course, in redistributing power to news organizations, the government took it away from platforms companies, which responded with umbrage. Immediately after the draft bargaining code's announcement, Google and Facebook both cited internal figures suggesting that news content is responsible for only small portions of their traffic and revenue (Barrett and Kaye 2020; Silva 2020b), and, moreover, that platforms delivered outsized referral benefits to the news media (Facebook 2020; Google 2021). Facebook announced that should the legislation pass, it would block all news sharing on the platform (Cheik-Hussein 2020). Google launched an offensive in the public sphere, displaying pop-up ads on its services that asked users and content creators to lobby the Australian government against the bargaining code (Zhou 2020). The company also made repeated reference to its contributions to the Australian economy, stressing that it provides a platform to 1.3 million domestic businesses, contributes "\$53 billion in benefits" to the Australian economy, and "supports 116,000 jobs across the country" (Google 2021; Silva 2019, 2021b).

The platforms were not the only stakeholders that were critical of the bargaining code. A number of analysts raised concerns that by allowing compensation to be determined via negotiations between platforms and individual news organizations, the Australian system would ultimately favor large, established, national news organizations relative to smaller, local, or independent news organizations with even less bargaining power (Hui and Tripti 2021). Many small publishers are not eligible for compensation from the platforms under the code (Samios 2020). Outside the media, others raised concerns that allowing entities to charge others for the ability to display a hyperlink would fundamentally undermine the web (McGuirk and Chan 2021; Visentin 2021a).

As debate over the bargaining code continued, in June of 2020, Google announced the launch of News Showcase, a licensing program through which the company would pay news publishers in exchange for editorial curation and offering Google users access to normally paywalled articles (Bender 2020). Citing its example in France, Google offered to compensate Australian publishers through News Showcase (in place of

arbitrated bargaining), but Australian officials and publishers expressed skepticism (Samios and Visentin 2021). Nonetheless, in late January of 2021, Google accelerated the timeline for rolling out News Showcase in Australia (Samios and Visentin 2021). At the same time, Google threatened to wholly remove Google Search from the Australian market should the bargaining code not change (Cave 2021a; Silva 2021a). According to the company, its breaking points included the mandate of compensation decided by final offer arbitration, restrictions on linking, and the requirement to detail algorithm updates in advance to news publishers (Silva 2021b).

Facebook took its objections one step further, blocking the viewing and sharing of all news links for Australian users in February 2021 (Cherney 2021). This Facebook news blackout was short-lived, lasting about a week, until the Australian government made some concessions in the terms of the bargaining code, including giving platforms more time to negotiate with publishers and also allowing platforms to avoid the bargaining code if they struck enough deals with individual news publishers (Australian Competition and Consumer Commission 2021; Isaac and Cave 2021; Meade et al. 2021). And so, concurrently with the concessions and the lifting of the blackout, Google and Facebook began signing licensing deals with Australian publishers (News Corp 2021; Visentin 2021b). The legislation officially passed immediately after (Boom 2021).

The eight day Facebook news blackout served as a catalyst for a more intensive analysis of the role of large digital platforms in news ecosystems. On the one hand, the bulk of the news blocked from being posted and shared on Facebook was still directly accessible online, which highlights the importance of not conflating large digital platforms with the broader Internet. On the other hand, research showed immediate and substantial drops in traffic to Australian news sites as a result of the blackout (Purtill 2021). Most news organizations are not in a financial position to absorb such traffic (and associated revenue) losses for any prolonged period of time. However, there is evidence that news consumers respond to the loss of news sources on Facebook by accessing them directly, such that initial traffic losses can be overcome over time (Mercer 2021; Napoli 2019).

Also, as some analysts have pointed out, for some segments of the population, accessing news outlets directly is a costlier proposition than doing so through a platform. Specifically, a small (generally lower-income) subset of the population relies primarily on mobile devices for their

Internet access and often has pre-paid rate plans in which Facebook access is cheaper than general web access (Chanel 2021). For this segment of the population, the Facebook news blackout may have deprived them of their most affordable mechanism for accessing news online.

The other issue that the Facebook blackout brought to the forefront is how dominant digital platforms define news. When Facebook instituted its news blackout, analysts quickly noted that the platform's operational definition of news was both expansive and idiosyncratic (Cave 2021b). In addition to news organizations, Facebook blocked the posts of state health departments and emergency and weather services. Posts for some political candidates were blocked, as were those of some unions and nonprofit groups working with victims of poverty and domestic violence. But despite this expansive (and difficult to justify) definition of news, posts by conspiracy theorists and anti-vaccine groups remained up (Cave 2021b).

And while some of the pages that Facebook blocked were quickly restored, others took over week, prompting questions from some of the company's critics as to whether the initial expansiveness of the blackout was an intentional show of force in their negotiations with the Australian government (Cave 2021b). Such accusations, if true, are troubling; as is the alternate explanation—that the company is that ill-equipped to effectively define a news organization. The end result, in any case, has been additional fuel to the fire of concerns about the massive gatekeeping power wielded by a select few digital platforms (see, e.g., Scola 2021).

## CONCLUSION

The ripple effects of what has taken place in France and Australia have been widespread, with policymakers in the United States and Canada vowing to follow Australia's lead (Espinoza and Barker 2021; Klar 2021; Ljunggren 2021), even in light of how disruptive and contentious the situation became. Should the government efforts described in this chapter's three case studies migrate to other countries, then it would seem that the question of whether dominant digital platforms *should* compensate news organizations will be one of the past, and the questions left will be about *how* that will transpire.

As of June 2021, the Australian Treasurer has signaled that as long as Facebook and Google continue making side payments to publishers,

the other requirements of the News Media and Digital Platforms Mandatory Bargaining Code can be forgotten (Isaac and Cave 2021). Likewise, the French government has been silent on arguments about the copyright-worthy sanctity of snippets. There, it seems that so long as Google compensates publishers, the government will overlook whether or not the company is specifically paying for (or says it is paying for) snippets. For all intents and purposes, both laws have become elaborate mechanisms for extracting money from platforms to deliver to the struggling news media. But even if the laws are meant to be throwaway tools for leveraging money, they still shape its dispersion amongst outlets, potentially distorting the laws' public interest goals.

As noted above, one primary critique of the Australian model has been that it favors large, national news organizations over local and/or independent outlets, a side-effect of provisions which see Google and Facebook paying out money in part according to traffic (Missoffe 2021) and require the companies to simply sign “enough” deals before being freed of the code (Meade et al. 2021). Another critique holds that the Australian and French models prop up old-school journalism outfits, disincentivising evolution of the press (Ingram and Jarvis 2021), and perhaps also undermining access to diverse viewpoints.

But other approaches, potentially better at supporting diverse, locally-oriented sources of news, exist. One such proposal suggests taxing platforms and placing funds in an endowment tasked with equitably supporting local, independent, and non-commercial journalism, or supporting a network of local fact-checking organizations (see, e.g., Karr and Aaron 2019; *Superfund for the Internet Proposal Summary*, n.d.). Another proposal advocates using national infrastructure funds to provide media vouchers to citizens, thus allotting support to news media along grassroots preference lines (Waldman 2021). But it remains to be seen whether these alternative approaches will gain traction in subsequent national contexts given the prominence of competition law as a contemporary instrument in media regulation. Much will depend, in all likelihood, on how the situations in Australia and Europe play out in the short term.

A key goal in any approach should—from a freedom of the press standpoint—be to minimize to the extent possible the role that governments play in determining which news organizations receive platform funding and how the available funds are distributed across them. An independent news media demands as much. But, as in so many aspects of platform



governance, the platforms have not engendered confidence in terms of their ability to make decisions that are well-attuned to serving communities' information needs (Napoli 2019). Ultimately, as these case studies have illustrated, platforms possess tremendous leverage in their relationships with even the largest news organizations, and so, in the absence of an existential redefinition of the news media or a massive transition to a primarily non-commercial model of journalism (probably the preferred outcome in all of this; see Pickard 2019), government mandates of some type seem essential to assuring that at least some of the advertising revenues that platforms have diverted from the news ecosystem find their way to the news organizations that are so vital to an informed citizenry.

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# EU Digital Services Act: The White Hope of Intermediary Regulation

*Amélie P. Heldt*

## ONLINE HARMS AS THE LINCHPIN OF INTERMEDIARY REGULATION

Intermediaries, mostly social media platforms, were at first been perceived as enablers of free speech online and as facilitators of a certain democratization of the public discourse (Tucker et al. 2017). Behind this appearance, their architecture and their algorithmic recommender systems have soon led to problems with illegal and harmful content (Gillespie 2014, p. 175; O’Callaghan et al. 2015). Indeed, critics soon identified that many intermediaries did not act against the dissemination of hate crime as well as non-criminal but harmful hate speech (Citron 2014). Neither did they prevent the spread of mis- and disinformation (Schulz 2019). Instead, their business model allegedly facilitates political micro-targeting and dark ads and amplifies conspiracy ideologies (Zarouali et al. 2020).

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Until now, the primary law for intermediary regulation in the EU has been the E-Commerce-Directive. Under Art. 14 and 15 E-Commerce-Directive, intermediaries have no obligation to monitor user-generated content. They benefit from a liability exemption as long as they have no knowledge of illegal activities and act promptly upon notification. So far, this safe harbor regime protected intermediaries from regulation specifically targeting content moderation, and it substantially shaped the EU's digital market. All the more so because this has unleashed synergy effects with a similar law in the U.S., Sec. 230 of the Communication Decency Act, and created a *de facto* transatlantic market for platforms with user-generated content.

However, for the past four years, an amendment of this directive became an obvious priority due to the sequence of events. Since the first reports on the alleged voter manipulation via Facebook for the UK Brexiteer campaign, EU Member States respectively experienced the adverse effects of online speech harms (e.g., Germany with hate speech against refugees; France disinformation during the 2017 elections). Moreover, the self-regulatory efforts of platforms against online harms were considered neither efficient nor satisfactory by lawmakers. Consequently, single Member States pressed ahead and adopted laws targeting specific online harms. As the probably most discussed example, Germany passed the Network Enforcement Act (NetzDG), which forces platforms provide users with a complaint procedure for unlawful content (under German criminal law) and remove 'manifestly unlawful content' within 24 hours. Adopted in summer 2017, the NetzDG was an (explicit) reaction to self-regulatory initiatives' lack of efficiency.<sup>1</sup> Although this law and its implementation are highly criticized (Citron 2017; Kaye 2018), the call for more effective regulation against harmful online communication and subsequently limiting the platforms' power over free speech has become louder. France passed a law against information manipulation during election campaigns and introduced a new form of interim injunction. Furthermore, France also adopted a law against hate crime (Loi Avia), but the Constitutional Council overturned it for violations

<sup>1</sup> Speech by the then Federal Minister of Justice and Consumer Protection, Heiko Maas, on the bill to improve law enforcement in social networks (Network Enforcement Act) before the German Bundestag in Berlin on June 30, 2017, retrieved from <https://www.bundesregierung.de/breg-de/service/bulletin/rede-des-bundesministers-der-justiz-und-fuer-verbraucherschutz-heiko-maas--793138>.

of the proportionality test. Similarly, Austria adopted a Communication Platform Act (KoPIG). If more Member States followed the lead, the chances of a fragmentation of intermediary regulation within the EU would have increased, which partially explains the EU's eagerness to develop a common proposal (Cornils 2020, p. 77). The E-Commerce-Directive's provisions regarding intermediary liability in place were no longer considered sufficient and adequate (De Streele et al. 2020, p. 57).

## GENESIS OF THE DSA

In October 2019, the then-candidate for President of the EU Commission, Ursula von der Leyen, mentioned the Digital Services Act as a means to 'upgrade liability and safety rules for digital platforms' in her political agenda.<sup>2</sup> She also underlined the need to 'tackle issues such as disinformation and online hate messages' to protect democracies.

A leaked note in December 2019 revealed that the Commission considered the E-Commerce-Directive 'outdated' and that it needed to be replaced by a more comprehensive set of rules for digital services (Fanta and Rudl 2019). Regarding content moderation, the leaked note proposed to make uniform rules for the removal of illegal content binding across the EU and possibly include harmful (not necessarily unlawful) content. On a more technical side, the authors suggested maintaining the ban on general content monitoring in Art. 15 E-Com-Dir but re-consider special provisions for filter technologies.

The lawmaking process started in 2020 and is still ongoing. So far, it can be described as relatively speedy and as 'the biggest update of digital regulations for around two decades' (Lomas 2020). Several committees within the EU Parliament produced meaningful reports and developed recommendations.<sup>3</sup> Finally, the Commission presented its first 'Proposal

<sup>2</sup> Von der Leyen, U. (2019). *A Union that strives for more—My agenda for Europe*, retrieved from [https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf).

<sup>3</sup> The JURI committee proposed standards and procedures for content moderation, and guaranteed access to remedies; as well as the establishment of a European Agency tasked with monitoring and enforcing compliance. The IMCO report called on the COM to propose concrete legislative measures including notice-and-action mechanisms; as well as a central regulatory authority for oversight and compliance; transparency requirements for advertising, nudging etc. The LIBE report also proposed the creation of an independent EU body to exercise effective oversight.

for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' on December 15, 2020 (hereinafter DSA). This first proposal will serve as the basis for further deliberation and is, therefore, at the center of this paper. According to the Commission's proposal, the DSA ought to counteract the risks and problems that have arisen for both individuals and society as a whole from the use of information intermediaries, against the dependence of the economy and society on single providers, and the power of these providers over public discourse. Its goal is not to 'break' platforms but rather to constitute a common European rulebook to increase legal certainty for companies in the Digital Single Market, and, subsequently, better protect fundamental freedoms.

### THE EU COMMISSION'S PROPOSAL

The DSA's application scope expands from mere hosting service (based on Art. 14 E-Com-Dir) to a more nuanced definition of addressees. According to Art. 2 (f) DSA, intermediary services include mere conduits, caching services, and hosting services. Art. 2 (h) defines online platforms as 'a provider of hosting service which, at the request of a recipient of the service, stores and disseminates to the public information'. According to Art. 25 (1) 'platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million' are considered Very Large Online Platforms (VLOPs). Under Art. 16 DSA micro and small enterprises are excluded from the scope of application. By doing so, the Commission keeps its initial classification of intermediaries as neutral infrastructure providers laid out in Art. 14 and 15 E-Com-Dir but, at the same time, follows a gradual approach.

#### *Enforcing National Laws*

The DSA does not include an obligation for platforms to proactively review user content. Instead, Art. 7 DSA maintains the duty for the Member States to 'not impose a general obligation on providers monitoring obligation' (Art. 15 E-Com-Dir). The liability privilege remains as long as the platforms have no knowledge of illegal content. The decision to maintain this regime is probably due to the high risk of negative consequences for both the companies and the users' fundamental rights. The DSA proposal stipulates more exceptions, such as the obligation to

act ‘upon the receipt of an order to act against a specific item of illegal content, issued by the relevant national judicial or administrative authorities’ ‘without undue delay’ (Art. 8 (1) DSA). Intermediaries are expected to deliver an immediate response expected, but the DSA does not spell out a concrete timeframe. However, it does include an obligation to act against users who regularly upload illegal content (Art. 20 DSA) and to report ‘serious’ crimes involving a threat to the life or safety of persons (Art. 21 DSA).

Most importantly, the DSA provides rules for the moderation of illegal content solely (Art. 2 (p) DSA), not for content that does not violate a legal prohibition. It leaves at the service’s discretion whether to implement the measures for the enforcement of their respective content rules (community guidelines/standards). According to Art. 2 (g) DSA ‘illegal content’ means ‘any information, which, in itself or by its reference to an activity, including the sale of products or provision of services, is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law’. Under Art. 14 DSA, providers of hosting services have to ‘put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content.’ If providers choose to remove or block content, they have to inform the user who posted the content and state the reasons for their decisions (Art. 15 DSA). Moreover, according to Art. 17 DSA, providers of online platforms need to provide users with an internal complaint-handling system.

### *Oversight and Enforcement*

To monitor the addressees’ compliance with the new rules and possibly enforce them, the DSA introduces two new oversight institutions: Digital Services Coordinators at the national level, and the Board for Digital Services at the EU level. These new public agencies would have specific supervisory rights with regard to the DSA—something the committee reports by the EU Parliament have been strongly advocating for.

Under Art. 38 (2) DSA each Member State shall designate a Digital Services Coordinator (hereinafter DSC) responsible for ‘all matters relating to application and enforcement’ of the DSA. For supervision, investigation, and enforcement, the DSC shall have special rights awarded by the DSA and common to all Member States. Moreover, they will

have the authority to impose fines, to impose measures against a service's management, and, as ultima ratio, to decide over the interruption of a service if the DSC identifies repeated infringements (Art. 41 DSA). To allow for a harmonized approach within the EU, the DSCs shall cooperate with each other and with other competent authorities. The DSA lays the cornerstone for this new authority (Art. 39 DSA) but leaves any further development of the task at the Members States' discretion. States that already adopted a similar law could, for instance, merge the already existing competent authority at the national level with the DSC.

The DSCs will cooperate within an independent group and form the European Board for Digital Services (hereinafter the Board). The Board shall serve as an advisory body to the DSCs and the EU Commission (Art. 47 DSA) and form a superordinate structure intended to serve the purpose of better consultation and more effective application of the new rules. It will essentially facilitate the better coordination of supervision activities by the DSCs. Also, the Board will receive its special supervision rights for VLOPs. Under Art. 50 DSA, the enhanced supervision aims at avoiding systemic risks originating from the size of VLOPs and their subsequent influence on the public sphere. Altogether, the EU Commission, the Board, and the DSC have a wide range of measures at their disposal to enforce the rules set in the DSA. Additional interventions by the EU Commission in Art. 51, 58, and 59 DSA stipulate an active role for the DSC and the Board. This leads to a distribution of supervisory rights among different institutions in proceedings against VLOPs. Thereby, the imposition of the most severe sanctions is not only at the mercy of one competent authority.

### *Tools to Enhance Transparency and Accountability*

Beyond concrete rules against the spread of hate speech and illegal content, European lawmakers also considered the need for more transparency about the intermediaries' activities and ways to possibly hold them accountable. Both aspects are essential for a better understanding of how intermediaries generally function and how they apply the new rules. At the individual level, users are the first beneficiaries of procedural guarantees regarding content moderation. According to the current proposal, their right to complain against illegal content and better understand corporate content moderation procedures are at the core of this

regulation (Art. 12 (1) DSA).<sup>4</sup> This transparency right for users affected by content restrictions is concomitant to operational terms. According to Art. 12 (2) DSA, providers of intermediary services ‘shall act in a diligent, objective and proportionate manner’ when applying content restrictions on users. This includes a duty to respect the ‘applicable fundamental rights of the recipients of the service as enshrined in the Charter.’ Previously, the E-Com-Dir mentioned the importance of freedom of expression in its preamble. Intermediaries were expected to provide their ‘information society services’ in light of Art. 10 ECHR. The provisions, however, did not explicitly mention the ECHR.<sup>5</sup> This explicit obligation for intermediaries to take the fundamental rights enshrined in the EU Charter of Fundamental Rights into account is quite a novelty. It illustrates that lawmakers see the responsibility that should come along with the potential influence of intermediaries.

This leads us to the question of transparency at the corporate level: According to Art. 13 DSA, intermediaries will have to publish transparency reports at least once a year. Required information includes the number of orders received from MS, the number of notices submitted per Art. 14 DSA, content moderation activities engaged at the provider’s initiative, and the number of complaints received in compliance with Art. 17 DSA. The reporting obligation increases in relation to the type and the size of the service. Under Art. 23, 33 DSA online platforms and VLOPs have to disclose additional information than mere intermediary services. VLOPs additionally have to provide an annual risk assessment (Art. 26 DSA), focusing on the usage of their services to disseminate illegal content, negative effects for fundamental rights arising out of their services, and the ‘intentional manipulation of their service.’ The latter is another novelty in terms of platform regulation: VLOPs are asked to assess their negative effect on the protection of public goods and, among others, their ‘foreseeable impact related to electoral processes and public safety.’ These obligations are paired with an annual independent audit at their own expense (Art. 28).

All in all, such reports can inform the public about the policies and practices of services that are heavily used all over the world but quite

<sup>4</sup> The right to access personal data under GDPR will not be affected; the rights can be cumulative.

<sup>5</sup> The EU Charter of Fundamental Rights did not exist when the E-Com-Dir was adopted.



opaque to most users so far. The effects could, therefore, not be limited to the EU but potentially inform stakeholders worldwide. Both types of instruments, at the individual and at the corporate level, can serve as information sources for complaints (Art. 43 DSA) and are, therefore, serving not only transparency but also accountability.

### *Interim Conclusion*

At first look, the DSA proposal submitted by the EU Commission is more than a mere update of the E-Com-Directive. Under the new provisions, information and data would no longer be perceived only from the perspective of goods and markets. Instead, the DSA could become a human-rights-infused regulation (Llansó 2020) because not only does it explicitly mention the Charter of Fundamental Rights, it also builds in the values of the Charter in the provisions themselves. One fear (preceding the proposal) was that it would change the liability rules and force platforms to introduce “pro-active” measures against illegal content (Fanta and Rudl 2019), but following the heated discussion on upload-filter in the DSM-Directive (Heldt 2019), the Commission refrained from implementing such obligation in the DSA.

It is also worth noticing that the DSA is part of a larger package including, the Digital Market Act and the Democracy Action Plan. The latter is of particular interest for the questions regarding content moderation and fundamental rights in democratic societies. The EU Democracy Action Plan ought ‘to ensure that citizens are able to participate in the democratic system through informed decision-making free from unlawful interference and manipulation.’ With regard to the role of online platforms, the DAP includes six objectives (section 4.2):

1. monitoring the impact of disinformation and the effectiveness of platforms’ policies;
2. supporting adequate visibility of reliable information of public interest and maintaining a plurality of views;
3. reducing the monetization of disinformation linked to sponsored content;
4. stepping up fact-checking;
5. developing appropriate measures to limit the artificial amplification of disinformation campaigns; and
6. ensuring an effective data disclosure for research on disinformation.

Ideally, the rules proposed in the DSA would serve as means to achieve the objectives set in the DAP. This interplay should be kept in mind when evaluating the single-out measures.

## POTENTIAL FRICTIONS

### *Formal Matters*

As mentioned in the history of the DSA, the setting is complicated due to pre-existing regulations by the Member States and matters of competency at the EU level. Generally, the EU is competent for the single market's realization (Art. 26 TFEU). According to Art. 114 TFEU, the EU Parliament, and the Council adopt legislation to harmonize the rules necessary to build and ensure the functioning of the single market. The EU does however, not have the legislative competency for criminal law. Hence, the definition of illegal content is left at the Member States' discretion. In the course of the DAP, the EU Commission plans to propose an amendment to Art. 83 TFEU 'to cover hate crime and hate speech, including online hate speech' in 2021 (On the European Democracy Action Plan 2020, p. 10). According to Art. 83 TFEU, the EU legislators can set 'minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension.' Such offences are thereby considered criminal and punishable in all Members States. The Commission's goal is to substantially enhance the protection of citizens and journalists and, therefore, to hamper further coarsening and polarisation within the public debate.

One should also carefully examine the necessity of new measures in the light of potential risks at the individual and collective level. In light of the developments in recent years, the legislator clearly needed to address contemporary issues of the digital sphere. One can measure the estimated need for harmonization at the EU level by the form chosen to legislate. Indeed, the DSA proposal comes as a regulation, which means that it will be applicable to all jurisdictions within the EU without any transposition legislation by the Members States. (As opposed to its predecessor, the E-Commerce-Directive.) This form limits the ability of Member States to deviate and to potentially dilute certain rules. The Commission seems to follow the GDPR's path (Wagner and Janssen 2021) based on the idea that a regulation will be more suitable for such a cross-border topic as the Digital Single Market than a directive.

### *Collision Risk*

The DSA might collide with already existing laws. It remains unclear if the DSA should replace the Member States' existing laws like the German NetzDG or be considered supplementary to the DSA. The question is actually twofold. The DSA and pre-existing laws could either collide/diverge, or; they could respectively address aspects not mentioned by the other one. In the latter case, I believe that the DSA will serve as a minimum standard, allowing the Member States to adopt additional laws as long as it does not hollow out the DSA. This has to do with the principle of subsidiarity within the EU regarding the Member States' sovereignty. Even more so, because the DSA would not just contain new rules for the Digital Single Market but also overlaps with criminal law and media law. In cases where the DSA and national regulation could potentially contain contrary or very different rules for the same issue, the DSA would prevail. According to the precedence principle by the CJEU in the case *Costa v Enel* (1964), if a national rule is contrary to a European provision, Member States' authorities must apply the European provision.<sup>6</sup> National law is neither rescinded nor repealed, but its binding force is suspended. It is undisputed that this principle is indispensable for the functioning of European integration as a community based on the rule of law (Haltern 2020, p. 818). At the same time, Member States try to preserve a relevant influence over legislation as much as possible. The DSA could become yet another example of a tug of war between Brussels and national regulators.

### *Countering the Consolidation of Power Structures*

The DSA's primary goal is to equilibrate the power structures in the digital economy, hence, to even out the dominant position of certain intermediaries over their users and their competitors (note, it is not an anti-trust law). Of course, the "big players," large companies from Silicon Valley, are in the "first line" because they developed a significant influence over the market by gathering data. Since the rise of the social web in the early 2000s, social media platforms have become a relevant communicative infrastructure. For most parts, they were the only

<sup>6</sup> Judgment of the Court of Justice of the European Communities of 15 July 1964. *Flaminio Costa v E.N.E.L.* Case 6/64.

arbiters of permissible expressions within their network (Suzor 2019) and have subsequently gained considerable power over their users' media diet. The modular setting of social media platforms (Schulz and Dreyer 2020, p. 31) makes it difficult to regulate them, that is, to use already existing frameworks or categories. Lawmakers are therefore compelled to conceive new regulatory approaches. After a long period of the self-regulation regime under Art. 14 E-Com-Directive (Buiten et al. 2020, p. 145), the EU decided to focus on stricter rules (Scott et al. 2020). That is why the DSA aims to strengthen the users' rights to be better informed, appeal certain decisions, and lodge complaints—regardless of the country and the laws restricting speech.

Does this approach really strengthen the platforms' power over online speech? One could argue that they will in the future still be the ones deciding over the removal of content, its distribution, and algorithmic recommendation systems. The new rules could perhaps consolidate their dominant position over the public discourse because it gives them more legitimacy. Two things can be said against this hypothesis. First, selection, prioritization, and recommendation are inherent to the service users look for: intermediaries provide this exact service, and users see “only” a selection of content. Second, the safeguards provided by the DSA on different levels will challenge the platforms in an unprecedented way. It might not be exhaustive in all aspects, yet it will constitute a tipping point.

### *Avoiding Collateral Censorship*

One pressing question is whether the DSA could potentially be a means of collateral censorship (Balkin 2014). Indeed, this type of regulation can be considered as a way to impose content-related rules, although, from a constitutional law perspective, speech-restricting laws should be kept to a strict minimum. Some argue that the exception to Art. 14 e-Com-Directive, that is, Art. 6 DSA, could be a threat to freedom of expression because it incentivizes intermediaries to act against illegal content and, potentially, their own content rules (Kuczerawy 2021). This viewpoint builds on the over-removal phenomena, when platforms enforce more rules than necessary to avoid liability and the additional costs of nuanced content moderation practices (Keller 2019). While the risk of extensive enforcement of the DSA is a point to be taken seriously, the current draft clearly builds on balancing intermediary liability and fundamental

rights under Art. 12 (2) DSA. This provision does not introduce a horizontal effect of freedom of expression between platforms and users, but it makes it mandatory to enforce only clear and unambiguous content rules (Kuczerawy 2021). A stricter liability regime would most certainly lead to the unwanted effect of collateral censorship (Buiten et al. 2020, p. 161). Ultimately, intermediary liability for illegal content is a constant dilemma (Helberger et al. 2018, p. 2; Heldt 2020).

## CONCLUSION

More duties, more oversight, more transparency, and a systemic approach—the current proposal of the DSA provides answers on several levels. It addresses a wide range of issues and builds in safeguards at the individual and collective levels. Will it become the rulebook of reference for the digital sphere? It remains to be seen to what extent the final version of the DSA will contain crucial provisions or if the upcoming negotiations will delude them. One thing, however, is clear: the times of self-regulation are over—at least in the EU.

The DSA and other upcoming EU regulations could herald a new period for digital platforms and indirectly for users worldwide due to another perpetuation of the “Brussels effect” (Bradford 2012, 2020). According to Bradford, the EU developed a strong regulatory power at a global scale through its legal institutions and standards. Indeed, the EU aims for high standards in the Digital Single Market and could potentially develop what lawmakers consider a gold standard for platform regulation—beyond the EU’s borders. This, however, presents them with another challenge: are they regulating for the EU or for the world (Heldt and Hennemann 2021)? In any case, one needs to also be aware of the developments across the Atlantic. On May 14th 2021, US-President Joe Biden revoked an Executive Order of former President Trump that targeted Sec. 230 CDA (Lyons 2021). Nonetheless, experts still expect the Biden administration to amend the current liability regime providing intermediaries with large immunity (Edelman 2021).

Meanwhile, the EU’s main responsibility is to protect the European Union’s values and rights (Art. 2 and 3 TEU), and, regarding “exporting” the DSA, there are two possible approaches. Either law-makers interpret this as an opportunity to develop the EU’s power as a regulator beyond the EU’s borders or, instead of generic rules which could be potentially adopted outside the EU, the DSA would be tailored-made

for the EU and rely on rule-of-law guarantees provided by the Treaties. Hence, European lawmakers now might have to carefully gauge while keeping in mind that regulation like the DSA can be replicated by other countries.

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# Holding the Line: Responsibility, Digital Citizenship and the Platforms

*Lelia Green and Viet Tho Le*

## INTRODUCTION

“[T]he current context is now fundamentally different, involving the use of our platform to incite violent insurrection against a democratically elected government,” pronounced Facebook founder Mark Zuckerberg in relation to Donald Trump’s use of the platform. Following pro-Trump protesters’ storming of the US legislature on 6 January 2021, tech giants Facebook and Twitter decided that Donald Trump should be locked

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This paper is based on a conversation with the late Professor Tom O’Regan, and a seminar delivered by Lelia Green at Tom’s invitation at the University of Queensland in June 2019. It is dedicated to Tom’s memory with gratitude, acknowledging his role as Principal Supervisor of Lelia’s Ph.D.

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out of the social network accounts he operated. These actions intensified longstanding debates around the risks that digital platforms may pose to democratic processes (Colarossi 2021). Critics on both the left and the right of the political spectrum have sought to curtail the legal protections that shield internet platforms from being held liable for content posted by people using social media. More recently, also reflecting Facebook and Twitter's ban on Trump, the platforms are being questioned around their decisions to ban everyday citizens, too. The essential point here is what duty of care is owed by big corporations when platforms operate as integral elements of the public sphere, but cannot be held publicly accountable?

On one side of the argument, the ban applied to Trump operates as a kind of pre-censorship. It raises concerns regarding platforms' power to moderate online content, their capacity for censorship, and protections for free speech on the internet (Oxford Analytica 2021a, 2021b). The opposing viewpoint argues that big tech has the right to censor content under their terms of service, which operate effectively as a contract between the platform and the people who use it. From this perspective, the platforms should take responsibility for preventing the promulgation of hate speech and disinformation. The polarising of debate concerning Trump's social media accounts serves as an example that highlights regulatory gaps, and the blurring of policies, governing social media platforms. It also raises the issue of corporate social responsibility (CSR) in terms of digital platforms' handling of hateful and/or violent messages (Hern 2021).

The aforementioned controversies around power wielded by the tech giants align with related concerns about surveillance capitalism (Holloway 2019; Zuboff 2019), and human and civil rights (Wagner 2018; Katyal 2019). They reinforce long-standing and widespread concerns about personal information privacy and the datafication of society (Van Dijck 2014). Further, such issues are not restricted to the corporate sector and it has become increasingly apparent that the corporate sector is being co-opted into state surveillance practices. PRISM, for example, was a code name assigned to a project run by the United States National Security Agency (NSA) which collected information and data with the support of US internet companies. Leaks by Edward Snowden in 2013 provided ample evidence that Americans' online interactions, as well as digital data relating to non-US citizens, had been monitored, collected and shared by many US-based digital companies. These organisations

provided NSA operatives with direct access to their servers, allowing the collection of personal information relating to billions of people around the globe (Landau 2013; Stoycheff 2016). More recently the Cambridge Analytica scandal, revealed by whistle-blower Christopher Wylie in 2018, demonstrated platforms' complicity in manipulating users' perspectives upon politics and democratic processes, potentially impacting actions and behaviours, ethics and political outcomes (Cadwalladr and Graham-Harrison 2018; Isaak and Hanna 2018). Such examples of information, or grey-zone, warfare (Hughes 2020) demonstrate platforms' significant potential to exacerbate social fragmentation and polarise voters along ideological lines (DiFranzo and Gloria-Garcia 2017).

This chapter explores whether and how civil society in Western democracies can require platforms to take greater responsibility for power they wield in informing democratic deliberation and debate. It asks: what changes would platform media need to make to 'take responsibility' in the digital landscape? Exploring existing regulation and legislation, the argument adopts a Corporate Social Responsibility (CSR) perspective to deliver a more robust engagement with human rights and digital citizenship, benefiting individual citizens, and the societies in which they live. It suggests that the platforms and companies supporting major social media sites be constructed as 'publishers', and required to take responsibility for harmful content they carry. Specifically, the discussion addresses the following questions:

- (i) What changes would platform media need to make to 'take responsibility' in the digital landscape?
- (ii) How might the future formation of corporate social responsibility support a more constructive, pro-social engagement with information, data and knowledge?
- (iii) Can platforms be held responsible for upholding individuals' rights? and
- (iv) Do emerging understandings of CSR support more responsible practices by tech platforms?

## THE 'BIG FIVE' DIGITAL TECHNOLOGY COMPANIES

It comes as no surprise to learn that the world's 10 most valuable publicly listed corporations include the five largest Big Tech companies,

all of which are US based: Google (Alphabet, since a 2015 restructure), Amazon, Facebook, Apple, and Microsoft (GAFAM) (Frost et al. 2019; Clement 2021). Together, these corporations comprise what is known as ‘the Big Five’ (Van Dijck 2020). Beyond market value, the Big Five have gained “rule-setting power” (Van Dijck 2020, p. 2), which is to say they operate as the gatekeepers for almost all the western world’s online social traffic and economic activities. Their services influence the very texture of society and impact the processes of democracy. In other words, online platforms are at the core of significant social change and development. They affect—and effect—institutions, economic transactions, and social and cultural practices (Chadwick 2014; Van Dijck et al. 2018).

This is not to say that these five tech companies start from, or pursue, the same approaches to their business models. Facebook and Google are essentially advertising driven and package users’ data to build market share. While they have very different corporate cultures and individual responses to regulatory intervention—most recently illustrated in their responses to the 2021 Australian News Media and Digital Platforms Mandatory Bargaining Code (Leaver 2021)—their income streams depend upon the commodification of their users’ information. Arguably, Apple is predominantly a hardware tech corporation, with Microsoft the dominant player in the software area. Amazon, in contrast, is a digital distribution behemoth, but it’s also willing to enter niche markets (such as the carriage of high-end food retailer Whole Foods) in order to gather more data about particularly wealthy groups of customers, as well as to trial new modes of delivery. Since all these conglomerates are data-driven, there is some business-model slippage across products and services. Amazon’s Alexa is an information-gathering device with a business model more aligned with Facebook and Google, while Apple TV + is more about cementing a hardware market than it is about taking on Netflix. There is some less-than-friendly rivalry between the Big Five. As this chapter goes to press, for example, Apple is in contestation with Facebook about its use of users’ information. Apple has highlighted the different approaches by explicitly seeking users’ consent to share some of their information with third parties (Statt 2021).

The Big Five have all developed from a single ‘big idea’ into huge conglomerates of interconnected platforms, going on to become dominant market players. Historically they built a core product, established its popularity and quickly disseminated it, adding value with aligned services and expanding operations to other sectors, while moving to dominate the

market by acquiring potential competitors (e.g. Newton and Patel 2020). Given the cross-border, multi-market scale at which these companies operate, using national policies and laws to effect governance over these companies proves challenging. Further, the power and profit of these platforms operating in and across free market economies allows them to profit from outdated laws and inexact rules that fail the fit-for-purpose test when it comes to regulating digital environments and activities. The significant role that digital platform-driven companies play in the “heart of societies” (Van Dijck et al. 2018, p. 2) forces governments to second guess legal interventions, continually anticipating the next innovation and activity. Conventional regulatory approaches and instruments struggle to safeguard public interests (Nooren et al. 2018).

The European Commission, for example, has attempted a range of regulatory options, including self-regulatory and co-regulatory models (Finck 2017). A recent regulatory attempt proposed by the European Commission is founded upon “principles-based self-regulatory/co-regulatory measures, including industry tools for ensuring application of legal requirements and appropriate monitoring mechanisms” (2016). More recently, their regulation has been backed by significant sanctions and a threat of exclusion from one of the world’s largest consumer markets (~450 million: the world’s third largest population, after China and India). The EU’s General Data Protection Regulation has been law since 2016 (Hoofnagle et al. 2019), and in force since 2018. It is supported by EU Regulation 2019/1150 promoting fairness and transparency for business users of online intermediation services (Anagnostopoulou 2020). These two regulatory tools aim to increase citizens’ control of personal data and to protect civic society from the negative impacts of exploitative and predatory activities by digital platforms and services.

The General Data Protection Regulation changed the European privacy landscape (Hoofnagle et al. 2019) but also propted regulatory ripples worldwide. Among other reasons for this, the EU has a growing track record of enforcing regulation with respect to Big Tech. According to Keane (2015), Google is the world’s largest and most dynamic media conglomerate and its revenue amounted to US\$181.69 billion in 2020 (Johnson 2021a), with an operating income of US\$49 billion in that year (Johnson 2021b). The platform may seem too big to regulate, but Google was subject to almost US\$10 billion worth of fines between 2018 and 2020 for anticompetitive practice in the EU (Whalen 2020). Those

kinds of penalty are one way to make platforms take notice. They also offer lawyers and regulators an opportunity to highlight the importance of a CSR ethics in the ways that platforms conduct themselves.

In October 2018 Facebook was fined £500,000 by UK regulators for its shortcomings as revealed in the Cambridge Analytica scandal. In July 2019 the platform, which includes Instagram, WhatsApp and Oculus, also settled a US Federal Trade Commission suit regarding Cambridge Analytica and other privacy issues, agreeing to pay a record-breaking US\$5 billion fine while also implementing enhanced privacy measures (FTC 2019). This fine was big enough to see Facebook's net income drop in 2019, even though revenue increased from US\$56 billion to US\$71 billion (Tankovska 2021).

In 2018 Google, Facebook, Microsoft, Twitter and others, had joined together to form the Data Transfer Project (DTP 2018a), an initiative of the Google Data Liberation Front (a team of Google engineers), with the supposed aim of creating “an open-source, service-to-service data portability platform so that all individuals across the web could easily move their data between online service providers whenever they want” (DTP 2018b). The idea was that an individual's content posted on Facebook, for example, could be seamlessly moved to Google + .

While such an initiative might sound impressive, and would be welcomed by many users, it is yet to be delivered. Further, the Data Transfer Project would not address the privacy and data control issues highlighted by the Cambridge Analytica scandal. Users remain subject to unregulated advertising that is driven by the Online Behavioral Advertising model (OBA) which underpins digital platforms such as Google and Facebook, providing ‘free’ services funded without explicit, informed consent by the monetisation of users' data (Edelman 2020; Torbert 2021). Arguably, given its progress, the Data Transfer Project is little more than window dressing to make the platforms appear to be doing more with respect to CSR ideals.

The operation of digital advertising/surveillance capitalism (Holloway 2019) belies any apparent improvements in platforms' ethical standards. It does more than construct audiences as “a commodity produced and sold to advertisers to use”, Smythe's (1981) famous aphorism. OBA allows platforms to construct an image of a specific user's profile, forming what is termed ‘like-minded audiences’ articulated around features of specific importance to advertisers, including the shadowy covert operations influencing the Trump election campaign and the Brexit Referendum, both in

2016. Effectively a psychographic profiling technique, such ‘digital experience’ services are central to the targeted information delivery approach revealed in the Cambridge Analytica scandal, and integral to hidden, unregulated advertising. Users cannot capture the advertisements they have seen, interrogate them, or examine impacts upon them: which are essentially subliminal (Wachter 2020). This model of advertising operates without clarity or accountability, raising issues around the “overpassing [of] ethical limits in terms of respect for the persuadee, equity of the persuasive appeal, and social responsibility for the common good” (Belanche 2019, p. 685).

The Western policy agenda now reflects global concern around digital platforms’ role and impact relating to the digital economy, privacy and personal data exploitation, misinformation and harmful content, etc., (Flew et al. 2020). Australia’s Digital Platforms Inquiry report (ACCC 2019) is just one example of this concern, and particularly interrogates the impact of digital platforms upon consumer access to quality news and journalism.

This section of the paper has indicated that regulation, backed by sizeable fines, can help make platform media ‘take responsibility’ in the digital landscape (question i), and that corporate social responsibility, including around the regulation of the OBA model, could support a more constructive, pro-social engagement with information, data and knowledge (question ii). The EU’s General Data Protection Regulation actions against Google, and the FTC’s actions against Facebook, both indicate ways in which platforms may be held responsible for upholding peoples’ rights (question iii). Question iv, ‘Do emerging understandings of CSR support more responsible practices by tech platforms’, is addressed in the sections that follow.

## CORPORATE ENTITIES, CAPITALISM AND DEMOCRATIC IDEALS

The Australian Competition and Consumer Commission defines digital platforms as “applications that serve multiple groups of users at once, providing value to each group based on the presence of other users” (ACCC 2019, p. 41). The rapid growth of digital platforms highlights issues pertaining to CSR with an emphasis on the intersection between businesses, digital citizenship, and ways in which such entities are shaped by mutual interaction and mediated engagement with technology (Adi



et al. 2015; Gold and Klein 2019; Schultz and Seele 2020; Stancu et al. 2018). The tech giants' operations necessarily raise issues requiring a CSR response (Grigore et al. 2018). A new CSR model for the digital age, where big tech companies face sanctions if they fail to adhere to a robust Code of Conduct, or an appropriate Code of Ethics, would add value to the implied commitment to CSR in digital discourse permeating the digital economy.

CSR has been defined as “an evolving business practice that incorporates sustainable development into a company’s business model. It has a positive impact on social, economic and environmental factors” (Schooley 2020). Carroll (1991, 2016) suggests conceptualising it as a pyramid model constructed from four (deemed) constituent elements of CSR: Economic responsibility, legal responsibility, ethical responsibility, and philanthropic responsibility. There is no agreed definition of CSR, however. It operates as an umbrella term, in many senses as a buzzword or catch phrase, and is sometimes substituted for, or treated as if it were also referring to, environmental, social, and governance (ESG) aspects of corporate activity. Arguably, there are corporations that might continue to suggest that their only legitimate role is to maximise shareholder value. If they wish to have a social mandate to operate in a post-industrial information society, however, corporations need to be seen to be minimally ethical and avoid flouting standards of acceptable business behaviour. Flagrant disregard of public expectations can exact a significant toll on a company’s balance sheet.

Beck (2019) argues that, nowadays, boycotts are a significant means of social protest against companies. Such boycotts can be called for in response to environmental pollution, violations of standards for workers, mistreatment of animals, etc. As a result, low CSR standards or performance have the power to undermine both profitability and share price, wiping out years of productive work to maximise shareholders’ equity. In the alternative, positive CSR is perceived as supporting sustainability.

Consumers are increasingly aware of their buying power, and the value of their goodwill. Over the years they have become ever more inclined to call for, and participate in, mass boycotts. The 2015 Cone Communications/Ebiquity Global CSR Study found that 91% of global consumers expect companies to operate responsibly, with 84% saying that they seek when possible to consume goods made by responsible companies (Cone Communications 2015). On the investment side, 25% of organisations

claim they operate in accordance with best practice standards of environmental, social, and governance principles (Flood 2019). The proportion of companies making such claims is expected to increase by more than double, to between 50 and 65% of all publicly reporting companies, by 2024 (Flood 2019).

When the Cambridge Analytica scandal broke, implicating Facebook in anti-democratic activities, that corporation lost US\$45 billion in value over five days (*Economist* 2018). Although this value was subsequently regained, and retained, despite the FTC fine (FTC 2019; Davies and Rushe 2019), the initial precipitous drop in share valuation is a cogent indication of the risks that corporations run when they lose public trust. As a result of this and other examples, such as Rio Tinto's Juukan Gorge debacle (Verrender 2020), people working in finance and investments within western contexts cannot ignore the growing zeitgeist that mandates incorporation of CSR criteria into an evolving value equation. This dynamic also reflects the fact that low CSR commitment is an increasing regulatory and legislative risk. The Australian News Media and Digital Platforms Mandatory Bargaining Code, arising from the ACCC's Digital Platforms Inquiry (2019), is just one recent example. In a world first, it forced tech giants to pay Australian news outlets for their proprietary content when it is accessed, read and shared on social media and by search engine users.

The theoretical foundations of CSR are deeply interconnected with the idea of stakeholder engagement and, according to Freeman and Dmytriyev, it is "part of [the] corporate responsibilities oriented toward all stakeholders" (2017, p. 14). Carroll (1991) argues that, "the concept of stakeholder personalizes social or societal responsibilities by delineating the specific groups or persons business should consider in its CSR orientation" (p. 43). Such obligations impact digital platforms, as they do all other commercial entities. Platforms need to engage end users as well as investors. Given that digital platforms aim to build sustainable businesses, thereby taking economic responsibility, they also need to meet the expectations of their stakeholders, with a particular focus on two core categories of end-user – platform users/audiences and advertisers. Rieder and Sire conceptualise this process as a requirement for businesses to get stakeholders "on board" (2014, p. 199). For digital platforms, this means that the connection between CSR and stakeholders is, if anything, of greater importance because digital platforms operate in the context of a service industry, rather than providing tangible goods. In the same way that CSR

forms a nexus for delivering social goods along with economic profits, so CSR connects stakeholders, markets, regulators and digital platforms.

Arguably, CSR has different implications for different market segments and operating conditions. Within the digital environment, CSR may imply that the platforms and related organisations operate to develop and support a conscious sense of an engaged citizenship, within the context of which the platform and its users work with each other to support democracy, free speech and principles of transparency and accountability. Facebook Australia's decision to restrict news publishing and sharing on 18 February 2021, in response to what the company perceived as an attack on its business model by requiring it to pay for the Australian-originated news content that users post on its platforms, constructed Facebook as an overpowerful bully. While Facebook may have characterised the precipitating introduction of the Australian News Media and Digital Platforms Mandatory Bargaining Code as an act of aggression, that regulatory action had far less perceived impact on the lives of everyday Australians than did the Facebook 'news ban' response (Hutchens 2021). Further, given that both Facebook and Google were impacted in equivalent ways, and Google reluctantly complied with the new regulations whereas Facebook (initially) countered and fought them, Facebook highlighted its response as out of proportion to the threat posed to it by Australia's regulators in the context of its global market dominance.

Facebook appears to have lacked a sense of the implied social licence under which it services Australia's social media discourse. In protesting the regulators' actions, it was perceived as harming "community groups, charities, sport clubs, arts centres, unions and emergency services" (Hutchens 2021). Facebook has always been more than a news source because of the operations of OBA. It provides a service that is created in the image of, and harnessed to the production of, information that's relevant to the interests of every Australian Facebook user, including: friends, families, communities, sports, arts, hobbies and health. It is a community space where ideas are shared and discussed. As well as showcasing news content, Facebook is often mined by news organisations for leads and stories. Further, Facebook's pages are used to confirm and contextualise what readers and viewers may have seen or heard elsewhere.

Based on the suggested nexus between CSR and stakeholder theory, news organisations and Facebook users are both key stakeholders. If one

of the two groups is absent, the demand from the other reduces. If Facebook's aim is to build a sustainable product, it needs to recognise its responsibility to the wider Australian community as well as to other groups of key stakeholders. In the end, this is what Facebook did, imperceptibly impacting their profits by negotiating with Australian news producers and supporting the coexistence and growth/sustainability of Australia's media and journalism industry. Facebook's temporary attempt to contravene the social contract, the implied CSR licence under which it operates, has been constructed as something akin to 'an own goal' in Soccer. As Lewis (2021) noted a week after Facebook's policy reversal: "the social network's hostile attack on Australian users reinforces the need to tackle the monopoly power of tech giants". A stronger commitment to CSR on Facebook's part would have allowed it to sidestep much of the opprobrium that followed, and would have left the iron fist unseen and unused in its velvet glove. As it was, the organisation opened itself up to wry comments about Facebook's agreement "to re-friend Australia" (Lewis 2021), and undermined public confidence in Facebook's understanding and performance of CSR.

## CSR, PLATFORMS AND REGULATORS

Digital platforms comprising, among others, Facebook, Twitter, Google, Amazon, etc., have played a vital role in realising critical public values (Helberger et al. 2018) and making them more accessible. The absence of effective legislation and regulation governing the platforms is becoming more evident over time, however. Policymakers and lawmakers struggle to respond, trying to level up power and accountability differentials. Flew and Wilding (2021, p. 48) call it "the turn to regulation in digital communication." Grigore et al. (2018) suggest "a move from firm-centric orientations to stakeholder-centric orientations, and benefits and risks associated with the use of digital technology" (p. 24). Finck (2017) and Helberger et al. (2018) propose a co-regulation model to address the challenges inherent in cross-border multinational hegemonic organisations. In some ways, such a model recognises the operation of regional regulators attempting to work with and rein in international companies. Much of the newly enacted laws and regulations, in Europe as well as Australia, adopt this approach, making compliance with local law the price of doing business in the local market. In essence, this aligns local stakeholders' notions of CSR as being interconnected with organisations' best

interests, thus explicitly linking the regulation of digital platforms to their licence to operate in key markets.

This section has indicated how emerging understandings of CSR are supporting more responsible practices by tech platforms, including the Big Five.

## COMPETING CONCEPTIONS OF ACCEPTABILITY AND ACCOUNTABILITY

CSR, as it operates within the context of western democracies, is expected to align with the fundamental tenets of digital citizenship. Generally, attempts to regulate digital platforms begin with market-friendly self-regulatory and co-regulatory models and move along an interventionist scale to arrive at top-down legislative intervention (Finck 2017). The failure of platforms' self-regulation (Flew and Gillett 2020) is evident in examples such as Cambridge Analytica, both because such self-regulation not only lacks transparency but also because it does not account for the interests of actors other than those that benefit the platform itself (Finck 2017). Self-regulation is comparatively easy to ignore when problems arise that conflict with platforms' self-interest. Facebook, for example, claims to moderate the content posted on its site to prevent violence, pornography, and privacy violations but the boundaries between what is acceptable and prohibited is not always clear. In Vietnam, for example, Facebook may find itself pressured by state actors to remove or obfuscate dissent, which officials might deem as "undermining national security, social order and national unity" (Banyan 2013). This pressure exists when the content suppressed does not violate Facebook's publicised community standards. China, similarly, requires platforms to block content deemed illegal or offensive, and punishes platforms and services that don't comply. As Braw (2021) argues "For firms under pressure from China, it makes little sense to remain loyal to a home country where the share of revenue is often quite small if doing so brings the risk of losing a much bigger market." Many such state-issued regulations contrast with western ideals of free speech, however, where citizens may argue that platform review of content prior to posting is censorship, and anti-democratic (Gillespie 2017, 2018).

Finck (2017), and Helberger et al. (2018), accordingly propose co-regulation as an appropriate paradigm for future approaches whereby "companies develop [...] mechanisms to regulate their own users, which

in turn must be approved by democratically legitimate state regulators or legislatures, who also monitor their effectiveness” (Marsden et al. 2020, p. 1). This paradigm is also compatible with a CSR orientation that considers the benefits and risks to stakeholders of using digital technology (Grigore et al. 2018). It encourages CSR by promoting a better understanding of the challenges and risks that digital technologies might raise for stakeholder groups, not only for platforms themselves.

Such discussions take place in a context where has been “little reflection on the responsibilities of digital platforms in the markets in which they operate” (ACCC 2019, p. 1). Meanwhile, there is no clear agreement as to what comprises digital CSR, as the following discussion notes. Further, there is little regulation in smaller markets that is backed up by robust legislation that would encourage the Big Five platforms to change their behaviour. Ideally, a future-facing conception of CSR would embody the principles of open society, civic responsibility, market autonomy and accountability under the rule of law, as well as supporting an enhanced vision for digital citizenship, benefitting individuals, communities and the societies in which they live.

But what happens when democratic ideals clash in irreconcilable conflict? Such a contestation is highlighted by the example of the Christchurch shootings on 15 March 2019, when a gunman opened fire in two mosques in that New Zealand city, ultimately killing 51 people and injuring scores more. The gunman filmed his entire crime, posting it live on Facebook. The footage, which was subsequently copied and widely shared on social media, found its way onto the pages of some of the world’s biggest news sites in the form of images, GIFs and even videos (Macklin 2019). Soon after the implications of the (re)posting were realized as a de facto part of the gunman’s motivation, social media and news sites removed the images. In total, Facebook deleted about 1.5 million videos within the first 24 h of the attacks, automatically blocking a further 1.2 million upload attempts and removed 300,000 additional copies after they were posted (Macklin 2019). The event became a warning to platforms regarding their appropriation for terrorism and violence, and demonstrates the dark side of social media as a facilitator of xenophobia (Crothers and O’Brien 2020).

Jacinda Ardern, New Zealand’s Prime Minister, drew upon models of world’s best practice relating to suicide coverage, extrapolating that the airing of some information might create support for copycat behaviour (Greensmith and Green 2015). She also embraced emerging guidance

around the reporting of mass shooters: don't name the shooter, don't discuss their politics, focus on victims, support stricken communities, and make change where possible such as banning the weapons and the transmission of the images. Arden is in one corner of a debate around how platforms should perform in terms of CSR. Two months' later, in Paris, Ardern joined with French President Emmanuel Macron to call for an end to "the circulation of abhorrent material." Seventeen countries and some tech companies, include Facebook, Twitter, Google, Microsoft and Amazon, responded to the 'Christchurch calling' by signing a pledge to stand against online terrorism and extremism.

Australia was deeply implicated in the Christchurch shooting. This was not only because of the very close trans-Tasman connection, but also because the killer was Australian, and Australia had failed to identify him as a terrorist threat (Tarabay and Graham-McLay 2019). In response to the killer's use of Facebook to publicise his crimes, Australian Prime Minister Scott Morrison said, amongst other things, that his country would do more to regulate international digital media companies. He suggested that organisations cannot be relied upon to do the right thing but require legislation. "It should not just be a matter of just doing the right thing. It should be the law," he said (Kelly 2019).

Jacinda Ardern has been widely praised for the intent behind the 'Christchurch call' and her demand that all footage of the Christchurch Mosque shootings be removed from the internet. In this case, there is a general agreement that images promoting violent hate crimes are unacceptable. There is a widespread uneasiness, however, about legislation that draws a line between what constitutes acceptable and unacceptable digital content. For example, a 2007 attack by a US Apache helicopter killed 12 people in Baghdad, Iraq, including two Reuters staff. The video of that atrocity was posted by WikiLeaks in 2010, calling attention to US forces' behaviour in the face of perceived threats posed by unarmed civilians. It stimulated debate about Chelsea Manning's and Julian Assange's right to publicise footage of US killings, and associated moral issues. These included whether the west was justified in subsequently allowing the screening of Daesh footage of executions (Schmid 2015). While Julian Assange argued for the legitimacy of his actions under a right to 'free speech' (Alexander and Stewart 2010), other moral issues raised include whether the Apache helicopter footage might have mobilised US public support for the end of the Iraq war and helped lead to "exit strategies" (Hasian Jr. 2012, p. 190).

If the public sentiment is that Jacinda Ardern was right to call for removal of the Christchurch mosque terrorist shootings footage, might the same arguments undermine Chelsea Manning's and Julian Assange's right to publicise a much shorter video documenting the killing of 12 civilians from a helicopter gunship? The question, as Rusbridger (2019) poses it, is: "Was it in the public interest that the world should have eventually seen the raw footage of what happened?". It may be relatively easy to justify access to Daesh footage as helping persuade western audiences that the organization is murderous, inhumane, and barbaric, thereby supporting military intervention (NATO 2015). That end may be argued as justifying those means. But trying to justify which media is widely publicised and which is not on the basis of 'motivation' for posting content is not a sound foundation for effective, unambiguous, enforceable regulation.

In a final example, from 2014, *The Australian* newspaper controversially published a front-page image of a seven-year-old Australian boy holding the head of a slain Syrian soldier given to him by his father. This was a touch paper for discussion about homebred terrorism in Australia (Klausen 2015). These cases highlight different aspects of what may or may not be socially responsible, what is or is not a defensible way to deal with media access to coverage of life and death in violent scenarios.

The above three case studies show the complexity of mandating digital platforms' adoption of CSR in deciding what constitutes good corporate digital citizenship. Is nuance possible? Judgement calls demand extraordinarily complex decision making to (say) justify the screening of an Apache helicopter attack 'in the public interest', but suppression of the Christchurch shootings under the same rationale. Such nuance goes to the heart of emerging understandings of CSR in support of what constitutes responsible practices by digital platforms.

### CSR AND DIGITAL PLATFORMS: COMPLEXITY OR CHILD'S PLAY?

Prior to digitisation, organisations may have had time for decision-making around what is and what is not publishable in the public interest. In contemporary contexts, such decisions need to be made instantaneously, and are generally delegated to algorithmic computation. But can algorithms identify pro-liberal democratic priorities?



Western publics have focused on regulators' intentions to require the digital platform ecosystem to use its technology—from artificial intelligence, facial recognition software, biometrics, big data, machine learning, targeted communications, social media commentary, etc.—to make decisions in the public interest. Global discussions around this end include the General Data Protection Regulation in the EU, US Democrat Senator Elizabeth Warren's suggested breaking up of the tech giants, President Biden's recent assault on big tech's "anti-competitive practices" (Paul 2021), and the German government's legal measures against social media platforms that fail to take down hate speech, fake news, and defamatory content within 24 hours of it being posted. These are all battles over public values and competing social, economic and cultural interests.

This chapter has considered a range of critical incidents to draw attention to the issues raised by CSR in relation to digital platforms. These platforms are not rogue operators but neither are they entirely aligned with what an informed public might see as the ideal of supporting liberal democracies. Regardless of their influence in cultural and communication contexts, big tech companies are corporations run for a profit and designed to extract the greatest possible value from the workings of the 'free market' in late-capital societies.

What changes would platform media need to make to 'take responsibility' in the digital landscape? Evidence for effective intervention strategies, mainly from the EU, urges that people support new forms of CSR to enable an enhanced vision for digital citizenship that benefits both individuals and the societies in which they live. The remaining challenge is to embody democratic society's ideals, civic responsibility, and accountability under stakeholders' co-regulation and the rule of law. That is a possible way to combine a free market economy with an end to the unbridled commodification of citizens' data.

Joining Facebook, or using Google, costs people the data they use and produce. Implicitly, users agree to be monitored, but might it be possible to change this situation? Gillespie argues that:

these platforms not only host that content, they organize it, make it searchable, and in some cases even algorithmically select some subset of it to deliver as front-page offerings, news feeds, subscribed channels, or personalized recommendations. In a way, those choices are the central commodity platforms sell, meant to draw users in and keep them on the platform, in exchange for advertising and personal data. (2018, p. 210)

The rights of users should be taken on board in stakeholder approaches to platforms' performance of CSR. Current regulations often construct digital platforms as a single category, such as communication, media, and e-commerce, rather than capturing different digital platforms' heterogeneity (Nooren et al. 2018). Furthermore, some large platforms are conglomerates of interconnected platforms (Nooren et al. 2018) with diverse characteristics. When Facebook bought Instagram, for instance, it was not just buying Instagram; it was closing down a potential competitor. Smyrniaios (2018) shows how platforms use vertical integration to support an internet oligopoly: "well positioned throughout the [value] chain, either through mergers or acquisitions, stock purchases, or exclusive and privileged partnerships with companies that are upstream or downstream of their core business" (p. 91).

Hard to measure benefits, such as the quality and diversity of services and products, require consideration (Coyle 2019). As Furman et al. (2019) believe:

A pro-competition approach will provide a swifter and more proportionate means of addressing the competition challenges posed by the tendency of many digital markets to tip towards one or two large players. The introduction of a principle-based framework, developed in collaboration with the relevant players, is likely to be better suited than ex post enforcement to dealing with new and evolving practices in fast-moving digital markets. The presence of a stable and predictable framework would also provide welcome certainty to platforms on the rules of the game for operating in these markets. (pp. 123–124)

Takedown of child sexual abuse images and some aspects of violent and terrorist-related activity might be easily agreed as core business in western democracies. There is less consensus, however, on what constitutes hate speech, misinformation and tolerable forms of political debate even where it may be offensive and polarising; upon what is newsworthy and in the public interest, and what is not; and who or what should determine the boundary between these (Gillespie 2017). Addressing the 'regulatory imbalance' between traditional media and digital platforms (Flew et al. 2020), as reflected in the ACCC's Digital Platforms Inquiry (ACCC 2019), may offer one form of resolution. But patterns of information circulation and public use of digital media might suggest regulating digital platforms like news media agencies. As the ACCC (2019) notes:

Digital platforms actively participate in the online news ecosystem, performing several of the same functions as news media businesses. This means that digital platforms are considerably more than mere distributors or pure intermediaries in the supply of news content in Australia. Despite this, virtually no media regulation applies to digital platforms in comparison with some other media businesses. (p. 166)

Western publics' 'right to know' requires a nuanced balance of competing interests. Applying patterns of regulation, legislation and enforcement, and treating digital platforms like news media agencies, will potentially require digital platforms to pay more attention to CSR. In the case of the image of the seven-year-old Australian boy holding the head of a dead Syrian, *The Australian* was required to account for its decision to publish. Given that they contravened regulations and social norms, the paper had to advance an argument as to why publication was in the public interest. In news media contexts, the professional and ethical codes defining best practice play a crucial role in supporting responsible journalism (Donovan and Boyd 2021). Holding digital platforms to the same account as publishers and news agencies may support their more robust engagement with CSR.

Regulation (including self- and co-regulation), legislation and enforcement are all required if the platforms are to change their practices. Such changes will help make platform media take responsibility in the digital landscape, supporting a more constructive, pro-social engagement with information, data and knowledge. Platforms can and should be held responsible for upholding individuals' rights. Emerging understandings of CSR in the digital realm support improved operating practices on the part of tech platforms; but also by national and international agencies, and by regulators.

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# Regulating Platforms' Algorithmic Brand Culture: The Instructive Case of Alcohol Marketers on Social Media

*Nicholas Carah and Sven Brodmerkel*

## INTRODUCTION

Digital platforms like Facebook, Google, Instagram, YouTube, Snapchat and TikTok on the US-centric internet have transformed advertising and marketing. They super-charge consumer participation, the collection and use of the data created by this interaction, and the capacity of business to respond to consumers in real-time. As the Australian Competition and Consumer Commission's Digital Platforms Inquiry (2019) demonstrated, questions about digital platforms' market power and their impact on

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public life are inseparable from questions about the nature and regulation of their advertising models.

In this chapter we argue that over the past decade these platforms have not only become among the largest advertising companies in the world; they have also transformed what advertising is and how it impacts on consumers, publics and societies. Search and social media platforms in particular are advertiser-funded media engineering projects. By this we mean that where mass media businesses typically invested revenues generated from advertising into the production of content (like news and entertainment), digital platforms invest their revenues into the transformation of the medium itself: the design of interfaces and data-processing techniques to capture and channel attention and action. This means that regulation needs to respond to a form of marketing where the innovation takes place at the level of the medium, rather than the content of advertisements and their placement.

The data-driven, participatory and opaque nature of advertising on digital platforms is fundamental to questions about how we conceive of its governance or regulation:

- The *data-driven* or *algorithmic* nature of the advertising model of platforms requires us to contend with the collection and analysis of data used to customise and target advertisements and to optimise engagement with users.
- The *participatory* qualities of advertising on platforms mean we need to pay attention to how ordinary people and professional intermediaries like influencers are called on to incorporate advertisements into the content they produce and share.
- The *opaque* nature of advertising on platforms means that the activities of advertisers are increasingly only visible to the consumer being targeted, and they often take an ephemeral form. Even if promotional communication is visible to those targeted, the data-processing operations that produce those texts and optimise engagement with them are only visible to the platform and advertiser. This means advertisements are not published or archived in ways that enable broader public consideration. As a consequence, advertising is opaque in the sense that the public does not know how data is being used to target specific groups of consumers.

Many of the larger regulatory and public interest questions we are currently grappling with when thinking about the regulation of digital platforms depend on us understanding how the engineering of this new form of advertising is fundamental to the ongoing development of platforms.

In this chapter we argue that platforms are best characterised as the creators of an algorithmic brand culture (Carah and Angus 2018). The algorithms that now play a central role in governing our culture (Striphos 2015) are developed to serve the interests of advertisers and brands (Carah and Angus 2018). To understand the influence of platforms requires us to regard them as more than just the creators of a new form of targeted advertising. Rather, they have engineered a new set of relationships between our everyday communicative culture, its rhythms of consumer behaviour and expression, and the data-processing power of digital media. In the following, we will document the emergence of this algorithmic brand culture in several phases, as a means for articulating how a particular set of regulatory questions and challenges have emerged as platforms have 'undone' the well-established commercial settlements of mass media and advertising.

Platforms' dominance of audience and advertising markets makes them a central actor in governing the relationships between advertisers, creative agencies, content producers, influencers and creators, and consumers. In the case of alcohol marketing, platforms and marketers have created their own uneven governance frameworks that build on their pre-existing 'quasi regulatory' models and guidelines. Duguay et al. (2018) note that the regulation of social media platforms typically follows a 'patchwork governance' approach which combines formal policies (for instance, content moderation policies and regulations) with the selective use of technological and automated governance mechanisms (for instance, hashtag filtering, algorithmic content selection and distribution). As we will argue in detail below, in the case of alcohol marketing on digital platforms, these governance frameworks tend to focus on the symbolic content of advertisements but (conveniently) fail to address how the participatory, algorithmic and opaque qualities of the advertising model contribute to potentially harmful representations of drinking culture and—ultimately—alcohol consumption.

Throughout the chapter we draw on examples of how alcohol marketers have used digital media platforms over the past fifteen years. We do this for two reasons. Firstly, alcohol marketers have been innovative

users of digital media. And, secondly, they paradigmatically demonstrate the regulatory challenges associated with marketing in the platform-era because they are promoting a commodity that the public has an interest in regulating. Alcohol marketers were early adopters of digital media platforms. Before these platforms had formal advertising markets brands developed a range of creative strategies for generating engagement on platforms like MySpace, Facebook and Instagram. These included staging and sponsoring events, partnering with influencers and creators, and making their own native content (Carah and Shaul 2016). We suggest that through the case of alcohol marketing we can understand and assess many of the regulatory challenges posed by the advertising model of digital media platforms.

We argue that two critical developments lay the groundwork for particular regulatory challenges. Firstly, in the era before platforms had developed mature, formal paid advertising models, advertisers sought to generate organic reach by making themselves part of the participatory culture of platforms. Brands presented themselves as open-ended cultural resources that consumers could incorporate into the everyday stories they created about their identities and practices. This led to questions about the responsibility of advertisers for the moderation of content on their profiles and pages and created uncertainty about how the disclosure of commercial intent ought to work within social media's participatory cultures. As platforms created algorithmically-curated feeds of content advertisers were incentivised to 'game' the system by producing content that platforms would rate favourably. This marked the beginning of more mature settlements with platforms about how advertisers could operate as native publishers. Platforms became tuned toward recommending content that captured user attention and sustained user engagement, and rewarded advertisers who did the same.

Secondly, as platforms shifted advertisers away from 'organic' and toward 'paid' reach, the advertising model also transformed from 'targeting ads' to offering a more integrated data-driven 'tuning' or 'optimisation' of relationships between advertisers and consumers. Advertising is now central to platforms' efforts to generate curated feeds of content that sustain engagement and maximise revenue, and, as the data-driven architecture of optimising relationships between ads and audiences is increasingly refined, it has also become more opaque as advertisers' 'public' pages and profiles are replaced by highly targeted advertising and branded content. This generates fundamental questions about what

advertising is, what uses of data are harmful, and what kind of public accountability is necessary to make advertising open to public scrutiny. It also, we argue, turns our attention to how the advertising model lays the foundation for the engagement-based, metrics-oriented, algorithmic flow of information that generates many other fundamental regulatory questions that concern us. There is no way to address critical, platform-related issues like bias, discrimination, disinformation and so on without some kind of fundamental regulation of the advertising model.

## REGULATING MARKETING ON DIGITAL PLATFORMS

In recent years, sustained and critical attention has been given to the 'platformization of the Internet' (Helmond et al. 2019; vanDijk 2020; Poell et al. 2019). This work has drawn attention to the dominant role that platforms play as social, technical, institutional and infrastructural actors. Alongside this research, other streams of inquiry have investigated the ideological and 'governing power' of algorithms in relation to surveillance, transparency and consumer agency (Cheney-Lippold 2011; Beer 2017; Ananny and Crawford 2016; Ziewitz 2016). Furthermore, productive research has been conducted into the increasingly algorithmic nature of culture, drawing attention to the significant role algorithms and platforms play in the context of cultural production, content creation, and visibility (Striphas, 2015; Nieborg and Poell 2018).

Comparatively little attention, though, has been paid to the specific case of digital advertising and to the fundamental role advertising plays in the process of platformisation and its associated forms of participatory expression, datafication and algorithmic culture. Critical communication and media studies scholars have typically approached advertising on digital platforms from theoretical and conceptual perspectives focusing on three interrelated key issues: Privacy, data-driven consumer manipulation, and social discrimination. For example, McStay (2011) draws attention to the recursive loop underlying online behavioural advertising, in which information gained about individual consumer behaviour automatically feeds back into the design and development of subsequent promotional appeals. Because of this, he writes, 'ideological examination of texts and audience positioning is far less important than awareness of delivery systems and the power, privacy and profiling relations that exist beneath hybridised behavioural advertising-machines' (McStay 2011: 320).

Extending these concerns about behavioural targeting, Yeung (2017) introduced the notion of the ‘hypernudge’—a term describing the ways the deliberate and individualised algorithmic configuration of choice architectures can exploit systematic cognitive weaknesses in human decision-making (see also Nadler and McGuigan 2018). And Turow (2006, 2012) has advanced the argument that the increasing personalisation of promotional communication carries the risk of social discrimination as it sorts consumers according to their commercial profitability. This customisation arguably also shapes consumers’ self-identities and the social imaginary as a whole, thereby institutionalising an increasingly data-driven and discriminatory marketplace and associated media culture (Turow et al. 2015). Despite these concerns about the harmful and predatory character of digital advertising, media and communication research on regulation of digital platforms has mostly focussed on issues like speech, moderation, news and political campaigning. This is curious because each of these issues are shaped by how platforms’ algorithmic systems of classification, curation and recommendation are fundamentally designed to serve the strategic imperatives of an advertiser-funded business model.

In contrast, there is a longstanding concern among public health researchers and organisations about the digital marketing of unhealthy, addictive or harmful commodities like alcohol, gambling, tobacco and junk food. For the most part, this research has been tracking the shift of advertising spend to digital channels and attempting to assess its effects. In some ways, public health researchers and organisations have paid more sustained attention to the advertising model and questions of harm and regulation than media and communication researchers have because they were tracking unhealthy marketing in mass media and following its shift into digital channels.

Broadly, public health research has approached the marketing of unhealthy and addictive commodities on digital media through ‘exposure-centric’ and ‘engagement-centric’ frameworks (Carah and Brodmerkel 2021). The exposure-centric view continues the systematic research of the effects of exposing consumers to advertisements. This research operationalises advertising as the creation and distribution of discrete texts through mass media channels. The engagement-centric view attempts to conceptualise and describe how marketers capitalise on the participatory culture of social media platforms by involving consumers in creating, circulating and engaging with brand and promotional content (Goodwin



et al. 2016; Lyons et al. 2016; Niland et al. 2017; Atkinson et al. 2017). Elsewhere we have argued that 'an exposure-centric view aligns with the first wave of digital advertising that transported familiar forms of display advertising into online channels' and an 'engagement-centric view reflects the second wave of digital marketing' instigated by the participatory culture of social media (Carah and Brodmerkel 2021). However, neither of these perspectives 'adequately reflect how the advertising models of digital platforms have matured from early display advertising, to organic participatory engagement, to a third wave characterised by paid data-driven engagement that aims to optimise consumers' perceptions and actions' (Carah and Brodmerkel 2021: 20).

Digital platforms now operate as multi-sided market infrastructures that orchestrate and optimise relationships between consumers, businesses and platforms (Nieborg and Helmond 2019). Platforms combine the sale of advertising with a range of marketing services including data analytics, retail and distribution plug-ins, and tools for managing partnership with consumers and cultural intermediaries like influencers. In the following section we endeavour to give an account of how platforms was managed this transition in their own commercial interests, using alcohol marketing as a case. By doing so we can illustrate how regulatory questions and challenges have 'accumulated' over the past decade. And, we can also demonstrate the important role that media and communication researchers must play in formulating a platform-centric understanding of how digital advertising works, as a precursor to understanding its potential for harm and the possibility of effective regulation.

### THE DEVELOPMENT OF DIGITAL PLATFORMS' ADVERTISING MODEL: THE CASE OF ALCOHOL MARKETING

Alcohol marketers were early adopters of digital media, experimenting with platforms like MySpace, Facebook and Instagram before there was a formal paid advertising model. As far back as 2012, Facebook and Diageo, one of the largest alcohol companies in the world distributing global brands such as Smirnoff, Johnny Walker and Guinness, announced a 'collaboration' to 'maximise consumer participation at scale in our campaigns, particularly in emerging markets' (Carah et al. 2014). Announcements

like these were the first indication that alcohol marketing on platforms was much more elaborate than buying targeted advertising or fostering user-generated content. Instead, alcohol marketers and platforms were forming deep, ‘consultancy’-type arrangements where they shared personnel, expertise and—crucially—data.

These arrangements were not just beneficial for the marketers. Perhaps more importantly, they helped the platforms refine their advertising models. Tools like ‘custom audiences’ or ‘lookalike audiences’ could only be developed by collaborating with major global marketers who shared large consumer datasets with Facebook. In the case of ‘custom audiences’ Facebook developed data-matching tools that would take the database of customer information that marketers held and use it to ‘find’ those customers within the Facebook platform. ‘Lookalike audiences’ are more sophisticated as they take an existing audience—provided by a marketer or built within Facebook—and then use it as a ‘query’ to generate a larger set of consumers with similar characteristics on the platform. Highly prospective tools like lookalike audiences illustrate that advertisers are not so much buying advertising space or slots in a feed of content as much as they are buying access to an infrastructure that can iteratively optimise relationships with targeted consumers.

These features are arguably uniquely harmful for addictive commodities like alcohol where platforms’ algorithmic architecture could easily ‘learn’ unintended proxies for excessive or harmful consumption—classifying ‘dependent drinkers’ as ‘high value’ consumers due to patterns they share that may not be directly related to their expressed preferences for alcohol. These patterns could be derived from locative information that places them proximate to licensed venues more often than other consumers. They could be keywords used in their private messenger chats that indicate a preference for drinking, or drinking-related pastimes.

Throughout the past decade alcohol marketers have remained at the forefront of innovation about how to use digital media to track consumers and engage with them in specific times and places. In recent years, but especially since the onset of the Covid-19 pandemic, they have rapidly expanded their use of digital platforms to integrate advertising with ‘one click’ purchase and rapid home delivery services (Carah and Brodmerkel 2021; Mojica-Perez et al. 2019). In doing so, they are closing the gap between the promotion and distribution steps in their marketing strategies.

In the following, we describe and critically reflect on the transition from an organic to a paid advertising model. Where initially digital platforms' separated 'paid' display advertising from 'organic' or 'earned' engagement, over time these elements have become integrated in a paid native model. We argue that analysing the shift from an organic to a paid advertising model is crucial to understanding how the advertising model of digital platforms has matured. They also help us appreciate how our approach to studying and regulating digital advertising needs to focus on the ongoing development of platform infrastructure, rather than the specific activities of advertisers at any given moment in time. The lesson of the past decade is that the advertising model of digital platforms is in a continuous and generative state of transformation. This makes it fundamentally different to the advertising architecture of mass media. Strategies to reduce the harms caused by marketing, especially marketing of commodities where the public has an interest in the protection of vulnerable consumers—like alcohol, gambling, tobacco, unhealthy food, financial services, insurance, real estate, employment, and so on—need to aim at the *infrastructure* of platforms rather than the *content* of ads or the current *tactics* used by marketers on platforms.

### THE ORGANIC PERIOD

The 'organic' moment is characterised by brands creating profiles and posting content on social media platforms either as a stand-alone promotional activity or in addition to purchasing display advertising. In the case of platforms like MySpace and Facebook advertisers were not convinced of the value of paid display advertising, where their ads were placed as interstitial pop-ups or alongside user profiles, walls or news feeds. In the case of Instagram there was no paid advertising. Advertisers sought instead to engage directly with the participatory culture of social media. They created their own accounts, pages and profiles to post content and engage with consumers. They partnered with influencers, celebrities and other cultural producers like musicians, photographers and fashion models to post content on their behalf. They encouraged consumers to post content that referenced or incorporated the brand on their own profiles.

In this period, brands invented a native advertising model before one formally existed. In the case of alcohol marketing, brands, retailers and venues acculturated themselves to the attention economy of social media

platforms by trying to figure out what consumers' everyday drinking cultures looked like, and then attempting to make themselves part of them. For example, in Australia, we saw brands making content that anticipated the Friday afternoon 'knock off'. The Bundy Bear, the mascot of the Australian rum brand Bundaberg would post images on a Friday afternoon about how he could hardly wait to have his first rum of the weekend (Carah et al. 2014). The posts would be timed to hit the feeds of 'fans' of Bundaberg Rum on Friday afternoon when they too were getting ready to have a 'knock off' drink. They liked, shared and commented on the post as a way of communicating with their peers about their own drinking culture. As they did so, they circulated branded content within their own social networks online. In a sense, users were helping brands refine and target their messages by selectively engaging with it, adding their own commentary, and pushing it deeper into their peer networks. In time, this engagement with profiles, pages and content created by brands also served to generate data that indicated 'affinity' between brands and consumers, and enabled platforms to assign them 'preferences' that could be used to recommend content and target advertising.

A crucial feature of organic reach, for alcohol marketers, is that consumers can say things that the brand itself cannot say. Consumers can link brands directly to celebrations of excessive consumption, something brands cannot do under their own self-regulatory codes. For instance, when Jim Beam posted an image of a tumbler of bourbon with the caption 'soup of the day', fans responded with comments like 'I'm going on the Jim Beam soup diet' and other statements about how often, or how much, bourbon they could drink (Carah et al. 2014). Brands did not routinely moderate comments on these posts, and even disputed that they had a responsibility for what consumers said on their own pages (Brodmerkel and Carah 2013).

The organic moment is significant because it marked the beginning of brands engaging deliberately with the participatory culture of social media platforms during a formative period. Users extensively incorporated brands and other symbolic resources from commercial culture into their own vernacular practices. Advertisers approached the moderation of user-generated content, and the disclosure of commercial intent, in uneven ways. Although organic strategies have become a less important part of advertisers' use of social media platforms as their advertising models have matured, it is in this period that norms about moderation and disclosure were established, often in ways that suited the interests of advertisers.

One sign advertisers' use of social media was maturing during this period was the growth of more clearly defined 'social media manager' roles who not only undertook basic moderation of pages, but who took responsibility for the front-line management of engagement and reach via social channels. This became especially important as social media platforms sought to create more formalised relationships with advertisers. The key issue for platforms was that advertisers' organic practices were bypassing their paid advertising models, meaning that while advertisers might be investing resources in creating content and managing participation online, they weren't paying the platforms for using their channels. The organic moment waned because platforms no longer wanted advertisers to capture attention without paying.

The 'organic' moment evolved into the 'affinity' moment as platforms transitioned toward algorithmically-curated feeds of content. Feeds like Facebook's news feed and Instagram's home feed were chronological when they were first launched. Users saw every post from friends, profiles or pages they followed in the order they were posted. The feeds were central to capturing and harnessing attention that could be sold to advertisers. The feeds needed to be 'tuned' to prioritise content that kept consumers engaged with the platforms. The basic commercial proposition is clear: 'personalise' feeds to maximise engagement with the platform and find the optimal level of paid content.

Multiple forces shape the way feeds are tuned in practice (Van Dijk and Poell 2013; Carmi 2020). In some cases, platforms will prioritise forms of content that drive user engagement with particular platform features, or they will de-prioritise content for political reasons. For instance, Facebook has prioritised images and videos, and it has both prioritised and de-prioritised news during different periods over the past decade (Herrman and Maheshwari 2016; Sloane 2019). Early versions of Facebook's news feed were tuned to prioritise timing, type of content, and affinity. Timing was a measure of how recently an item has been posted or interacted with, content meant that some types of posts (like images) were given priority of others (like text), and affinity was a catch-all term for a range of data being utilised for developing models of 'attraction' between users on the platform. The emphasis on tuning feeds for 'affinity' meant that brands could post all they like, but their content would only be recommended and shown to consumers if the platform algorithms discerned a high degree of affinity with the brand. In addition to accumulating followers of

their pages or profiles, brands thus had to create content that generated affinity with consumers.

Advertisers looked for ways to tap into the high degree of affinity users had with their peers. This included strategies like creating real world engagement with consumers by building themed ‘activations’ at cultural and sporting events and other sites of lifestyle consumption like malls and nightlife precincts. Brands would encourage consumers to take photos of themselves socialising in themed spaces or with branded paraphernalia (glasses, hats, props and sets, etc.). As they did so they would incorporate brands and alcohol consumption into the story they were telling about themselves in their peer networks. They were also registering data that enabled platforms to make more accurate judgments about affinity between users, cultural interests and brands. During this period, we also see the emerging importance of workers like nightlife photographers and promoters (Carah 2014; Carah and Dobson 2016). They would create images, video and posts and circulate it in their own peer networks to stimulate engagement with brands and businesses. They were acutely aware of how to ‘game’ the affinity preference of recommendation algorithms (Carha and Dobson 2016; Cotter 2019).

## THE NATIVE PERIOD

During the organic period advertisers learned to embed themselves into the participatory culture of social media and then exploit the algorithmic architecture of platforms. The strategic challenge for platforms was then how to integrate their paid display advertising model into the participatory brand culture that had evolved on the platform. They needed to create a market where advertisers were compelled to pay for engagement with consumers, not just targeted display advertising. The risk for platforms was that advertisers would invest resources into the creation of branded content or partnerships with influencers to generate ‘earned’ rather than ‘paid’ reach on their platforms. In response, the platforms developed a native advertising model that integrates the participatory brand culture with their data-driven targeted advertising infrastructure. They now offer advertisers a proliferating range of ad formats including ephemeral video stories, augmented reality filters and sponsored posts. These formats flow ‘natively’ through the feeds of platforms, in that they look like any other kind of content and are not always easily distinguishable as ads. Alongside this content, platforms provide a better integration

of advertising and retail, with the introduction of shopping features like the 'buy' button on Instagram.

Platforms also now offer more formalised relationships with partners like influencers, enabling collaboration within platforms and the sharing and integration of data across platform, advertisers and their partners. This shift to a native advertising model dramatically reduces accountability. Promotional communication becomes less easy to distinguish from organic or editorial content and is more often only visible to consumers who have been specifically targeted. Formats like influencer partnerships are often only disclosed in oblique ways (Wojdyski et al. 2018). Furthermore, as the algorithmic tuning of audience categories and advertising content grows in importance, it at the same time also becomes more opaque. Formats like Instagram's ephemeral video stories are a crucial example here. Advertisers post stories from their own accounts, partner with influencers to post stories, and create and publish ads as stories. Stories are only visible to the consumers who have been targeted. There is no public archive of the content created nor how it is targeted. Stories also incorporate an expanding array of interactive buttons and features. For instance, in a story created by the beer brand Guinness the consumer is taken to an interactive map where they can find the nearest pub serving pints. Or, in a story created by the wine delivery service Vinomofo, the consumer can buy wine by swiping up on the story and being taken to an online store. On platforms like Snapchat, TikTok and Instagram we have seen the development of 'sponsored filters', a form of augmented reality advertising. Users are not targeted with ads, but rather they are targeted with ad-making tasks (Hawker and Carah 2020). The filter is an invitation to take a 'tool' provided by the brand and make an image or video that is shared with peers. The content made is only seen by peers. There is no moment where the advertisements or other activities of marketers are published or archived and therefore available for scrutiny.

These participatory and targeted forms of advertising are unfolding within platforms where our participation generates vast databases of information about our everyday life. That information is not only used to target us in discreet ways, for instance by enabling advertisers to select people of a particular gender, age, in a designated location, or with declared preferences for particular genres, pastimes and products. More fundamentally, this data is used to train algorithmic models that progressively learn to classify and make predictions about consumers and their social lives. These predictions might not correspond with definitive criteria

set by advertisers; rather what advertisers ‘buy’ from platforms is access to an audience building service. For instance, algorithmic processing of images users post on social media can identify brand logos and products and other patterns of consumption. This enables users to be assembled into audiences based on the content they post and interact with.

We ought to prepare too for a looming wave of algorithmic advertising that involves not only the targeting of ads, but the automated and dynamic generation of ads themselves. Already, tools like Facebook’s ‘dynamic creative’ learn not just to target ads but to assemble different versions of ads by repeatedly testing different combinations of images, text, buttons and calls to action with different consumers. In time, machine vision models will be able to fabricate images that appeal to different consumers in real time.

The ‘object’ of advertising on digital media is not an ‘ad’ that is ‘targeted’ using ‘data’. If we think like this we make the mistake of only looking to regulate the content of the advertisements, their placement, and the information used to target them. More fundamentally, we should conceptualise the ‘object’ as the dynamic process of optimising relationships between advertisers and consumers. Advertisers don’t so much buy ad space as rent access to a machinery that refines and tunes their audiences and their ability to act on their audiences. The longer an advertiser spends “in market” tuning these categories and creative connections, the more optimized their engagement becomes (Carah and Brodmerkel 2021). This is evident in the shift away from measuring exposure (how many people saw the ad) to measuring engagement (what people did). This indicates that the value proposition of a digital platform isn’t its ability to ‘place’ the ad in front of the right person at the right time, in so much as it is to gradually tune and tweak its capacity to nudge, move, engage a consumer. What matters is stimulating the click, the purchase, the recommendation. This means we need to be thinking about regulating this process of ‘operating’ on the consumer.

## REGULATING ALCOHOL ADVERTISING ON DIGITAL PLATFORMS

As the early combination of targeted display advertising alongside participatory organic engagement with brands and promotion morphed into data-driven, pay-to-play, full service marketing technologies, public accountability has become a major issue. This concerns not just our ability



to see what advertisers are doing—what content they are posting, for instance—but, more fundamentally, to understand how the system operates. Its power is no longer located only in the symbolic persuasiveness of advertisements, but in platforms' data-driven models and their capacity to target consumers. Over time, advertising on platforms has become the 'dynamic process of training predictive models that assemble audiences, configure ads, and optimize the relationships between them' (Carah and Brodmerkel 2021).

In the organic moment, advertisers began to operate beyond the publication of what we would consider to be traditional 'advertisements'. An emerging regulatory threshold issue was (and still remains) advertisers' responsibility for the broader participatory culture they animate around their brands. Norms need to be set around their responsibility not only to moderate content in the various channels they now operate in, but also for the forms of expression they encourage from consumers. Furthermore, we begin to see that defining the actions of advertisers around the 'advertisement' breaks down, as the ads are integrated into the open-ended participatory culture of social media. The disclosure and visibility of advertising becomes a critical issue. This involves both how advertising is distinguished from other forms of content and cultural expression and how open advertising is to public scrutiny. In the early 'organic' years content was relatively visible in the sense that members of the public could follow brand pages, and to some degree even scrape posts and build archives of advertiser content (using either platform APIs or web-scraping). But, as platforms became more organised around algorithmically-curated feeds and ephemeral content it is no longer possible to observe and archive advertisements, even in an ad-hoc way. This is a threshold issue when we consider that nearly all forms of advertising regulation are based on the principle of advertising being open to public scrutiny.

In response to demands for more accountability, platforms have developed some limited 'transparency tools'. For example, on the user-side Facebook provide dashboards that enable users to see what 'ad preferences' they have been assigned. These feature generic information about how Facebook understands them. And, they offer some limited forms of control such as the capacity to remove preferences (although they cannot stop Facebook from generating new preferences). Users are also able to stop Facebook from targeting them with ads for specific commodities like alcohol and gambling. Facebook also created the so-called Ad Library in response to the fallout about 'dark' ads during the 2016 Presidential

Election in the United States. The tool offers a rudimentary portrait of what advertisers are doing on the platform. The library enables members of the public to search for any public page on the platform and see what ads they are currently running. The term library is disingenuous in the sense that it does not archive the content, it only shows what's running live on the platform. It also provides very limited information about the ads. It will indicate if there are multiple versions, but it will not show all the versions or reveal if they are being automatically generated. It will also not provide any details about the reach of ads or the data being used to target them. While the library gives some indication of what campaigns are currently running on the platform, it does not enable a systematic archiving and analysis and it does not allow the public to come to understand and assess how audiences are assembled and targeted. This is particularly an issue of concern with addictive commodities like alcohol, where a highly tuned model would most likely disproportionately prey on vulnerable, high volume, consumers.

## CONCLUSION

Historic approaches to advertising regulation have almost exclusively focused on specifying what advertisers can say and where they can say it. Platforms have tended to follow this logic by focussing on the provision of moderation and gating tools, and transparency tools like the Ad Library which build-in the assumption that public accountability means being able to see the content of ads. This strategy works to undermine public scrutiny and accountability for a number of reasons: Firstly, platform tools for reporting content reduce scrutiny to individual preference rather than community standards. Secondly, it mis-specifies (whether deliberately or not is open to debate) how advertising on platforms works.

Public accountability post-platformization would mean coming to terms with how platforms use data to tune the relationship between ads and consumers, and build a model of advertising organised around these operations. A platform-centric view of advertising on digital media needs to attend to consumer participation in creating and circulating advertisements, the collection of data, and the training of models that enable marketers to optimize the relationships between ads and consumer actions. In other words: It is not just the symbolic message or persuasive attempt of an individual ad that has the potential to cause harm

and requires regulatory scrutiny, but the data-driven optimization of consumer attention, engagement, and behaviour.

Thus, a platform-centric view on digital marketing suggests that three key steps are imperative for establishing effective regulatory interventions: First, we need to agree that advertising ought to be open to public scrutiny because it affects the quality of public life and plays a determining role in shaping the infrastructure we now use to circulate information and create a shared sense of reality. Second, we need to reckon with what it means for advertising to be public in the platform era. It does not mean being able to see the ads, it means opening up the data-driven operations that characterise marketing on digital platforms. Third, we need to shift our focus from emphasising privacy and individual choice to a stronger focus on potential harms and the public interest. Ultimately, we need to see our concerns about moderation, speech, bias and discrimination as entwined with platforms that are fundamentally advertising companies. There is no way to deal with larger questions about how platforms affect our public culture that doesn't involve a reform of the advertising model.

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# Digital Platforms as Policy Actors

*Pawel Popiel*

## INTRODUCTION

From the Edward Snowden revelations and the Cambridge Analytica scandal to the spread of political disinformation and hate speech amid surging right-wing populism, debates about policy oversight of dominant digital platforms have become commonplace, public, and global. One of the prominent policy threads focuses on antitrust intervention and economic regulation to curb platforms' market power. In 2020, in the US alone, three antitrust lawsuits were brought against Google and Facebook, though their outcome is hardly certain given the history of judicial deference to the narrowly focused and permissive Chicago School approach to antitrust (Khan and Vaheesan 2017; Wu 2018). However, of the range of proposed policy responses, much of the policy discourse has focused on platforms' content moderation and speech regulation, whose consequences are the most visible aspect of platform operations. For a number of reasons, including that competition law cannot fully address the non-economic problems platforms pose, while traditional content regulation has difficulty grappling with the sheer scale of content

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on platforms (Gillespie 2018), there are growing calls for public–private governance regimes, like co-regulation and shared governance (Flew 2018; Gorwa 2019a), to address content and other concerns. Drawing on internet governance frameworks, these proposals envision balancing oversight between private platforms and public groups in enforcing standards whose contours need to be defined (Napoli 2015).

These policy debates often lag behind developments in platform markets that impact the issues policymakers try to address. For instance, the launch of the Facebook Oversight Board, a private–public oversight experiment intended to address content moderation controversies, gives Facebook a first mover advantage over policymakers in defining co-governance frameworks. As big tech antitrust cases were introduced, dominant platforms made record profits as scores of quarantined people turned to their services amidst a global pandemic, revealing platforms’ expansive reach into social infrastructure and across multiple sectors—a process called platformization (van Dijck et al. 2018), which animates their accumulation of platform power. Platformization is not just driven by technological innovation and business strategies, but also by platforms’ ability to influence policy to their advantage. Although this influence has met with pushback at the policy level internationally, it continues to inform policy debates, including through lobbying and policy communications (Popiel 2018; Yates 2021).

While designing policy solutions has received significant scholarly attention, platforms’ policy activities remain understudied. In this chapter I outline key features of platforms’ policy communications and discuss their implications for articulating platform oversight, particularly for defining public–private frameworks and their jurisdictional boundaries.<sup>1</sup> I begin by reviewing governance challenges posed by digital platforms. Then, I outline public–private regulatory arrangements that receive growing attention as governance solutions to the problems associated with digital platforms. Next, I consider platforms’ efforts to influence policy debates about these governance approaches by tracing key features of US tech giants’ policy communications, namely of Amazon, Apple, Facebook, Google, and Microsoft. I focus on: (a) the policy issues they engage; (b) their policy preferences; and (c) their regulatory and governance philosophies. Among other features, these philosophies converge

<sup>1</sup> This chapter draws on and adapts research from Popiel and Sang (2021).



on *frictionless regulation*: tech-defined, constantly evolving, and narrow regulatory oversight, matching the speed of tech markets at the expense of the deliberative responsiveness to the public, typical of democratic governance. I conclude by reflecting on this paradigm's implications for policy debates about platform oversight, including co-regulatory frameworks, and the tradeoffs it introduces for policymakers.

## GOVERNING DIGITAL PLATFORMS

Digital platforms have become “central gatekeepers of news and information” (Napoli and Caplan 2017), accumulating market power while mediating most of our daily interactions online. For instance, a handful of digital platforms capture a growing portion of global advertising expenditures. As gatekeepers, companies like Google and Facebook represent a major source of news for online users (Iosifidis and Andrews 2019; Park et al. 2020), compounding a growing power imbalance between digital platforms and news publishers (Australian Competition & Consumer Commission 2019). Such features characterize “platform capitalism” (Srnicek 2017) and fuel scholarly and policy attention to developing platform oversight frameworks. However, as Fay (2019) notes, “while platforms are pervasive in everyday life, the governance across the scale of their activities is ad hoc, incomplete and insufficient” (p. 27).

Digital platform markets pose unique challenges for policymakers. First, platforms' global span makes policy oversight more complex. For instance, digital platforms' business models and operations introduce problems that are international in scope (e.g., cyberterrorism) and require state coordination to address. Moreover, a state's policy governing platforms may involve both domestic and global stakeholders, including foreign governments, platform companies, civil society groups, and users. Likewise, platform-related policy debates have international dimensions, including around data regulation and content moderation. For example, Google's decision to pay selected news publishers in Germany, Australia, and Brazil fuels related policy debates in other countries (e.g., Hunter and Duke 2019). Meanwhile, efforts to assert state governance over digital markets, such as the European Union's General Data Protection Regulation (GDPR) and the Digital Single Market strategy, involve geo-political calculations, for instance involving trade. These debates and initiatives suggest a combination of policy transfer, or the travel of policy approaches across national jurisdictions (Dolowitz and Marsh 1996), and concurrent

policy translation, or the mutation and adaptation of policy frameworks to different state contexts (Stone 2012; Mukhtarov 2014). These sometimes opposing forces can yield limited policy harmonization internationally.

Second, domestically, the processes of media convergence and digitization have blurred traditional jurisdictional boundaries in communications policymaking (Flew 2016; Krämer and Wohlfarth 2018). These regulatory frameworks do not map easily onto platforms, which elude traditional definitions of media and telecommunications. Additionally, simply applying established forms of content regulation governing legacy media to digital platforms poses challenges for regulators (Flew 2018). From a practical standpoint, the sheer scale of content, data, products, and users on platforms makes regulatory oversight and enforcement technically challenging (e.g., Gillespie 2018; Klonick 2017). In the economic domain, platforms' multi-sided market structure and seemingly "free" services enable platforms to elude traditional antitrust triggers (Khan 2017; Coyle 2018). Concurrently, remaining disciplining tactics have often taken the form of massive fines for privacy violations, which ultimately represent a fraction of these companies' annual revenues, are written off as cost-of-doing-business, and fail as a deterrent.

## PRIVATE–PUBLIC GOVERNANCE

Given the challenges arising from the global scope and scale and the limits of existing regulatory frameworks for state-driven policy oversight, concepts like "soft law," shared governance, and co-regulation have gained attention as potential solutions (Flew 2018; Gillespie 2018; Gorwa 2019a). Such governance frameworks are posited as a "third way" (Gorwa 2019b, 11) between self-regulation and external oversight regimes like EU's GDPR, which regulates platforms' data practices. Drawing on international law, *soft law* involves "the use of quasi-legal processes, including rules, norms, guidelines, codes of practice, recommendations and codes of conduct, which are typically applied at an industry level, to enforce appropriate corporate behaviour" (Flew 2018, 29). Similarly, *co-regulation* essentially strikes a balance of power between the public and private sector, allowing regulators to "set the general rules and laws, and industry can oversee the operational dimensions of their application, subject to oversight from the government regulators and the parliament" (Flew 2018, 28). For instance, the 2014 "EU Internet Forum" involved a collaboration between EU governments and prominent digital platforms

to develop a code of conduct for addressing online hate speech (Gorwa 2019a). *Co-governance* denotes more expansive oversight that does not require government participation, as in the case of the Global Network Initiative (GNI)—a set of free expression-related standards and practices co-produced by human rights NGOs and digital platforms (Gorwa 2019b).

The allure of such arrangements is their purported responsiveness to “the rapid pace and development of the platform ecosystem, as well as the dynamic nature of the platform companies” (Gorwa 2019b, 12), and their ability to surmount the challenges associated with the jurisdictional issues platforms pose and the volume and scale of information flowing across their services (Flew 2018). They are designed to be pliable and can be legally binding and enforceable. However, they also require meaningful oversight, a balanced allocation of governance rights between the parties comprising these arrangements, and effective sanction mechanisms. For instance, Facebook’s Oversight Board is a private initiative that self-imposes and circumscribes external oversight on specific content-related matters by Facebook-appointed civil society members and academics (Arun 2020). The initiative blurs the line between co-governance and self-regulation raising important questions about how these types of arrangements will work in practice.

Yet, such power-sharing arrangements contribute to the growing privatization of internet governance (Freedman 2012; Musiani 2013). As Freedman (2012) argues, these third way frameworks represent “a willingness to outsource a range of responsibilities that were previously carried out by the state but that have now been subcontracted to non-state organisations. ... The preferred mechanisms of contemporary governance regimes are increasingly self-regulation” (p. 100). These policy choices impact information flows and private control over them. Undoubtedly, deciding upon and implementing such arrangements are pressing political questions, including for platform companies.

## DIGITAL PLATFORMS AS POLICY ACTORS

Digital platforms are active policy actors strategically shaping policy debates to advance their business interests. Indeed, private firms with sizable market power have a range of political tools at their disposal, including campaign funding, lobbying, and recruiting former regulators and policymakers (Teachout and Khan 2014). Over the last decade,

digital platforms increasingly lobbied the state on a growing number of policy issues, mirroring their expansion into new markets, as well as hiring former government officials in a practice known as the revolving door (Popiel 2018). These lobbying expenditures have grown amid US antitrust scrutiny (Romm 2021). From managing regulatory investigations and data-related scandals to advising governments on policy issues like cybersecurity and collaborating with them on contact-tracing apps to track and manage the transmission of COVID-19, tech giants like Amazon, Apple, Facebook, Google, and Microsoft have fundamentally established themselves as powerful political actors (Clark 2020; Byford 2020; Popiel 2018). Moreover, these companies regularly lend their services to political campaigns, actively participating in electoral politics (Bossetta 2020; Kreiss and McGregor 2017).

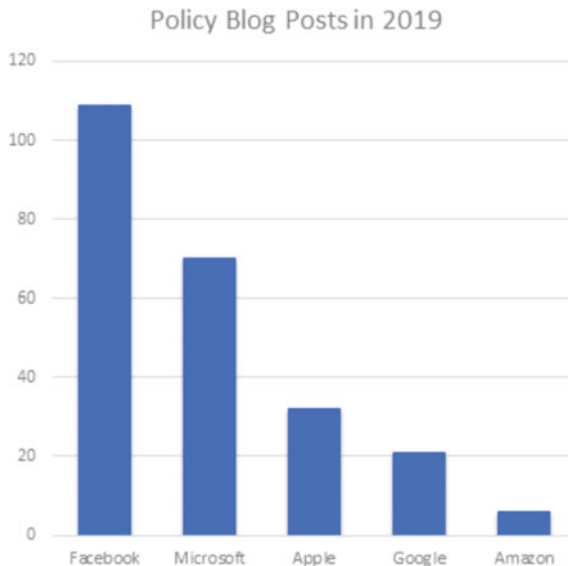
Digital platforms' political activities are not neutral. They reflect the often-contradictory mix of social liberalism with a libertarian stance on economic regulation that constitutes the tech sector's historically rooted ideology (Turner 2006). This "Silicon Valley ethos" (Levina and Hasinoff 2017) both guides and helps explain digital platforms' specific political preferences and actions. It manifests in their PR activities (Popiel 2018) as well as in subtler forms, like funding academic research that supports their policy stances (e.g., Gouri and Salinger 2017). More importantly, these ideologies continue to resonate with policymakers, particularly the idea that technology naturally produces innovation and socio-economic benefits, which regulation would obliterate. Tech giants strategically deployed these discourses, exploiting gaps in existing policy frameworks and claiming they are not media companies but platforms (Gillespie 2010; Napoli and Caplan 2017), serving as neutral "conduits for the communication activities of others" (Flew et al. 2019, 45), to evade regulations governing traditional media and telecom sectors.

If platform ideologies and imaginaries define the contours of platforms' policy activities, understanding their policy preferences and governance philosophies can help denaturalize and illuminate the significant sway platforms continue to wield over policy debates about the very frameworks meant to oversee them. Platforms' policy communications, via dedicated public policy blogs and op-eds by their CEOs and top executives in prominent news outlets, provide clues about these preferences. I draw on a case study of these policy communications in 2019 (Popiel and Sang 2021) to provide an account of platforms' policy preferences and their implications for debates about platform governance frameworks.

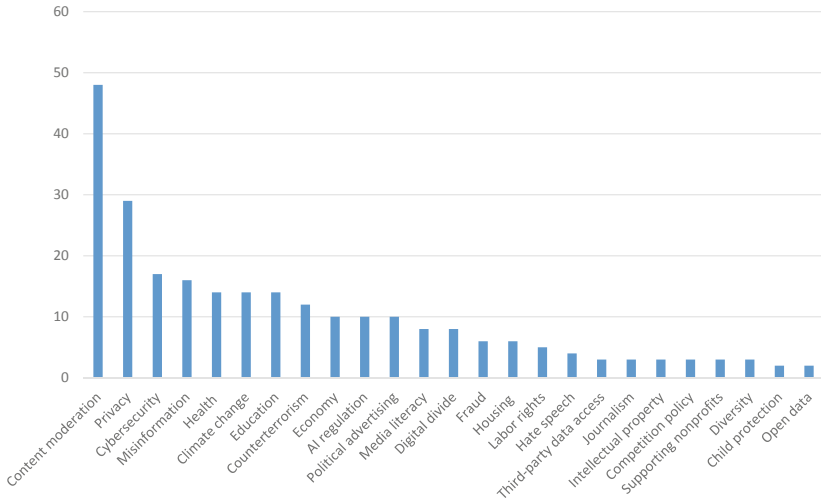
### *Digital Platforms' Policy Communications*

Platforms' policy communications resemble PR “which attempts to participate in and shape a public conversation that is held in the media sphere” (Cronin 2018, 10), and to maintain legitimacy with multiple stakeholders (Hill 2020). Platforms' policy blog posts and op-eds communicate to policymakers, civil society, potential competitors, and the public. They directly express these companies' policy preferences by articulating stances on specific issues or by attending to policy issue areas deemed important. Cumulatively, they also communicate platforms' ideas about platform governance Fig. 7.1.

Digital platforms address a breadth of issues, with a few receiving the majority of attention and the majority receiving very little, following a long tail distribution (see Fig. 7.2). The breadth reflects both growing platformization, including expansion to other sectors, and attendant imbrication in a patchwork of regulatory arenas, absent a single oversight entity. The most frequently referenced issues reflect the most politically



**Fig. 7.1** Distribution of 2019 policy blog posts ( $n = 238$ ) by company (*Source* Popiel and Sang 2021)



**Fig. 7.2** mentions frequencies of the top 25 policy issues referenced in the policy blogs and op-eds (*Source* Popiel and Sang 2021)

salient ones (e.g., content moderation and privacy) and, since these are especially central to Facebook’s operations, they also reflect the company’s prominence as a policy communicator. Indeed, as Fig. 7.1 shows, Facebook is the most active communicator, while Amazon the least active. However, Microsoft is the most vocal about specific initiatives it supports or opposes and most diverse in the policy areas it engages, ranging from broadband deployment and environmental protections to a host of socio-economic issues like housing subsidies for lower-income families, addressing unemployment, and investment in education. This breadth of engagement may stem from the company being older than the others, and engaging politics since the 1990s, particularly around the US antitrust case against the company (Chandresakaran and Mintz 1999). Ultimately, these policy communications also address policy topics not frequently associated with platforms (e.g., agriculture) that nevertheless intersect with their operations, suggesting the expansiveness of platformization and of what platform governance might denote, beyond familiar concerns like content moderation.

These policy communications: (1) describe platforms’ own policy initiatives to deal with platform-specific issues (e.g., automated hate

speech detection); and (2) express preferences on policy approaches (e.g., calls for immigration reform). The former, which constitute the majority, indicate platforms' preferred policy approaches and initiatives to addressing issues from misinformation and hate speech to privacy and artificial intelligence (AI) regulation. These approaches conform to a pattern: engaging and partnering with other stakeholders (e.g., civil society organizations, policymakers, academics); championing technical solutions (AI and machine learning), supplemented with staff hires to assist those technical efforts; and implicitly or explicitly championing self-regulation with external oversight. Thus, platforms express support for public-private governance regimes in place of state-level regulatory intervention and engage in building them to forestall such intervention. These public-private partnerships, proposed or formed, range in scale from local, city-level to international. Taken together, platforms' policy approaches and initiatives communicate the features and frameworks underlying their philosophy of self-regulation: tech-driven efforts, with liability dispersed through networks of engaged stakeholders, and some degree of external, independent, and often non-governmental oversight.

In terms of the latter, platforms communicate both specific policy preferences and preferred general approaches to governance (see Table 1). With respect to governance, drawing on their experience in policy areas like content moderation and on the multi-stakeholder model that characterizes internet governance (DeNardis 2014), platforms tend to support public-private partnerships, often with civil society organizations. While these partnerships are open to governments, they are often international in scope like platforms' business operations and the nature of problems they intend to address. For instance, to promote cybersecurity, Microsoft supported "a multi-stakeholder model, with governments, industry, academia and civil society" (Frank 2019, para. 2). Likewise, Facebook collaborates with various NGOs to combat violent extremism on its platform (Facebook 2019b). These partnerships benefit platforms by allowing them to traverse individual nation-state policy regimes with varying jurisdictions and interests, and to coordinate policy initiatives at the international level at which they operate.

Contrary to accounts of Silicon Valley as libertarian (Turner 2006), digital platforms are not opposed to state intervention in specific policy areas, though they carefully seek to define the terms of those interventions. Influenced by the Silicon Valley ethos (Levina and Hasinoff 2017), particularly the sector's imperative to "move fast and break things"

with minimal government restraint, these companies frequently push for *frictionless regulation*: a necessary, but minimally invasive form of state oversight. Microsoft’s Brad Smith and Carole Ann Browne (2019) best articulate this regulatory approach, modeled after Silicon Valley business models:

there’s a strong case for governments to innovate in the regulatory space in a way that’s like innovation in the tech sector itself. Instead of waiting for every issue to mature, governments can act more quickly and incrementally with limited initial regulatory steps—and then learn and take stock from the resulting experience. Just as for a new business or software product that ships as a “minimum viable product,” the first regulatory step would not be the last.

If governments can adopt limited rules, learn from the experience, and subsequently use what they learn to add new regulatory provisions—much as companies add new features to products—it could put laws on a path to move faster. Officials must still consider broad input, remain thoughtful, and be confident that they have the right answers for at least a limited set of important questions. But by bringing some of the cultural norms developed in the tech sector into the regulation of technology itself, governments can start to catch up with the pace of technological change. (para. 18–19)

Thus, such frictionless regulation accepts errors, prioritizing quick action and experimentation over carefully designed regulatory frameworks. As Google CEO Sundar Pichai put it, such regulation “can provide broad guidance while allowing for tailored implementation in different sectors” (Pichai 2020, para. 10). It can “set baselines for what’s prohibited” (Zuckerberg 2019, para. 6), but also implicitly revise them, maximizing flexibility of action for the regulated firms and not imposing undue friction on their operations. This regulation is not “a singular end state; it must develop and evolve. In an era (and a sector) of rapid change, one-size-fits-all solutions are unlikely to work out well. Instead, it’s important to start with a focus on a specific problem and seek well-tailored and well-informed solutions” (Walker 2019a, para. 6).

Frictionless regulation is light, narrow in scope, confined to baseline standard-setting, receptive to the private sector’s ongoing feedback and therefore control, and thus overwhelmingly favors quick responsiveness to the market over the slow and deliberative responsiveness to the public, typical of democratic governance. The approach embraces the



power-sharing logic of soft law, co-regulation, and co-governance frameworks. However, it also narrows them in scope, with tech specifying the general areas where it should be applied, and reduces the state's role, with tech defining the mode of regulation (e.g., standard setting). Thus, frictionless regulation ultimately constricts state intervention to the smallest regulatory footprint, namely providing crucial baseline coordination that enables smooth platform business operations. By maximally reducing regulatory friction, the proposal tips the power-sharing regulatory balance toward big tech platforms, increasing their ability to influence policy.

Overall, digital platforms call for global over local standards in the following policy areas: AI, data, election integrity, privacy, free expression, and addressing terrorism. These calls reflect the global span of their business operations and the growing political scrutiny they face in these areas. Moreover, the lack of international consensus on the norms circumscribing regulation in these areas (DeNardis and Hackl 2015) has resulted in governance inconsistencies and sometimes high-profile controversies (Gillespie 2017; Perotti 2017), impacting digital platforms' bottom line. For instance, Google stressed the importance of governments clearly delineating "between legal and illegal speech [since absent] clear definitions, there is a risk of arbitrary or opaque enforcement that limits access to legitimate information" (Walker 2019b, para. 5). In an op-ed on how to regulate the internet—itself reflective of platforms' political power—Mark Zuckerberg emphasized that "a common global framework—rather than regulation that varies significantly by country and state—will ensure that the Internet does not get fractured, entrepreneurs can build products that serve everyone, and everyone gets the same protections" (Zuckerberg 2019, para. 12). Since international coordination is the product of nation state policy, platforms see a crucial role for governments in harmonizing standards.

## POLICY PREFERENCES

Aside from these general features of platforms' policy preferences that prioritize multi-stakeholderism, frictionless regulation, and international norms and standards, platforms also support specific policies, some of which aim to define these norms and standards. For instance, one theme running through the policy blogs is a preference for a US-based approach to speech regulation and to competition law (e.g., Cunnane and Shanbhag 2019; Facebook 2019c). By being more permissive than

other models (e.g., EU), US-based speech and antitrust laws place smaller demands on content moderation and require less oversight of these companies' mergers and acquisitions, respectively. However, this may change as US regulators experiment with stronger enforcement in platform markets. Conversely, platforms support a strong privacy framework, often invoking EU's GDPR as a model, and data portability regulations. Such regulations make "companies minimize the data they collect about people, specify the purposes for which they are collecting and using people's data, and [ensure] they use personal data appropriately" (Brill 2019, para. 8). However, they also impose significant costs on smaller competitors, who may not have the resources to easily comply, giving dominant platforms a competitive advantage, and represent an effort to systematize data norms internationally.

Additionally, platforms support basic worker protections, like raising the minimum wage (though references to unions are notably absent), immigration reform, housing subsidies and investment in education. These preferences not only reflect the socially liberal politics associated with the tech sector (Broockman et al. 2017), but also a strategic investment in its principal work force, particularly STEM education and liberal immigration policies that enable drawing talent from the global labor pool. Platforms also call for investment in infrastructure and bridging the digital divide. Though Microsoft is the most vocal on this issue, all five platforms examined here benefit from greater connectivity since it translates to more users of their services and since they themselves invest in internet infrastructure and cloud services (Mosco 2017).

Platforms see climate change as a pressing global challenge that requires immediate and decisive action. Though several platforms offer their services to big oil (Cole 2020) and their data centers significantly harm the environment (Hogan 2015), these calls appear to extend beyond PR to a recognition that "climate change is more of an existential issue" (Facebook 2019d, 14), as Mark Zuckerberg put it. Finally, they want governments to be more transparent around cybersecurity concerns and to open their datasets to the public. Federal data-sharing can jumpstart new tech markets that use this data, "stimulate better-informed public-sector and civic efforts to match the skills needed for new jobs [and] accelerate the adoption of open-data models" (Smith and Browne 2019, para. 20), thus fueling the data economy the platforms dominate.

## IMPLICATIONS FOR PLATFORM OVERSIGHT

This chapter has traced digital platforms' policy communications and preferences within the context of policy debates about designing platform oversight frameworks. These communications cover a breadth of issues, reflecting ongoing platformization and economic expansion, and function to influence policy debates, to advance business interests, and to promote policy-related initiatives to minimize the likelihood of state intervention. Cumulatively, they define a vision of platform governance marked by the prominence of tech solutionism (Morozov 2014), namely using technical tools to address non-technical problems; frictionless regulation, namely the narrow application and a retooling of state regulatory mechanisms to match the needs and dynamics of the tech sector over those of the public; and an embrace of multi-stakeholderism, at least in principle, to legitimate business decisions and disperse liability. Although often associated with a libertarian aversion to regulation (Turner 2006), digital platforms see governments as crucial to coordinating international norms and standards, like delineating the bounds of data collection, and to providing a range of basic labor protections, while facilitating recruitment from the global tech labor pool. Thus, states have an indispensable role to play, and platforms aim to define that role.

These preferences have oversight implications. Technical solutions implicitly downplay more structural interventions. For instance, AI-based speech moderation is less invasive than antitrust intervention into the data-based business models that thrive on the spread of inflammatory speech on platforms in the first place. Frictionless regulation, though a form of state oversight, is designed to be maximally responsive to platforms' needs compared to more deliberative, processual, and therefore slower public interest regulation. The fact that platforms attempt to influence the design of regulatory mechanisms goes beyond risks associated with typical regulatory capture, namely influence over regulatory outcomes. State regulation resembles self-regulation if platforms dictate its terms. Finally, while in principle multi-stakeholderism expands participation in governance processes, it does not guarantee more legitimate policy outcomes by itself. Unless stakeholders have meaningful decision-making rights, including the ability to sanction platforms for bad behavior, their participation will be more symbolic than meaningful. More importantly, such initiatives are platform-led, with platforms in a privileged governance position, enjoying limited accountability beyond

potentially public disputes over content takedowns. In this context, experiments like Facebook's Oversight Board work to legitimate a privately-led co-governance regime, offsetting individual private content moderation decisions to public board members, while keeping the business model that gave rise to them intact. Thus, debates over co-regulatory frameworks between states and platforms raise questions about (a) where technical solutions are more appropriate than structural interventions; (b) how to design regulatory rules and their enforcement in a way that is resilient amidst sectoral fluctuations, effective in achieving policy goals, and prevents capture; and (c) how to define rules for participation of a broad range of stakeholders, while delineating areas of coordination and collaboration.

More generally, the discussion of platforms' policy preferences highlights key policy trade-offs. On the one hand, governments benefit from co-regulatory scope and scale, namely the advantage of dealing with a few large companies instead of many to address concerns like cybersecurity. Platforms prefer this approach since it makes antitrust intervention less likely. As Zuckerberg argues: "it's a lot easier to regulate and hold accountable large companies like Facebook or Google, because they're more visible, they're more transparent than the long tail of services that people would choose to then go interact with directly" (Facebook 2019a, 7; see also Clegg 2019). However, aside from risks of capture, the pervasiveness of these companies across multiple markets also makes regulatory interventions particularly challenging. Thus, on the other hand, structural separation and strong economic regulations likely should precede any co-regulatory arrangements, which intensify interdependencies between co-regulatory parties, namely policymakers, civil society, and platforms. Without such intervention, platforms' existing size and influence suggests that these co-regulatory arrangements are at risk of tending toward frictionless regulation, namely platform-directed state intervention.

Platforms' policy communications strategically set the policy agenda on their terms, not just by expressing specific preferences aligning with platform business interests, but also by exploiting policymakers' reliance on their policy input, particularly in co-regulatory approaches, to divert from certain policy options, like antitrust intervention. While certain platform policy preferences may align with public interests, contesting their influence over policy debates is a pressing first step in asserting democratic oversight over these markets.

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# Global Platforms and Local Networks: An Institutional Account of the Australian News Media Bargaining Code

*James Meese and Edward Hurcombe*

## INTRODUCTION

In recent years, researchers have explored how digital platforms influence the production and distribution of journalism (Bell and Owen 2017; Nielsen and Ganter 2018). Some have suggested that news outlets may become dependent on platforms (Caplan and boyd 2018), whereas others have been concerned about the role of algorithms in curating content (Tandoc Jr et al. 2020). At the same time, policymakers and governments have started to develop a regulatory response to platform power

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(Moore and Tambini 2018), with some of the earliest policy interventions focusing on the market power of platforms vis-à-vis the news industry (Flew and Wilding 2021). A key example is the Australian News Media and Digital Platforms Mandatory Bargaining Code (Bargaining Code hereafter), a reform which emerged from the Australian Competition and Consumer Commission's (ACCC) wider inquiry into digital platforms. The legislation has forced Google and Facebook to establish commercial deals with a variety of news organisations and in doing so, effectively pay for the use of Australian news content.

There can be no doubt that digital platforms are becoming increasingly powerful policy actors. However, there is a tendency in the literature to focus on platforms and emphasise their power at the expense of other important actors (Moore and Tambini 2018; Atal 2020). In this chapter, we take a different approach, and argue that the residual institutional power of government, the news media and policymakers played a critical role throughout this reform process. Our aim is not to downplay the ability of platforms to influence policy processes, a skill that was on display throughout. Instead, we aim to shed light on various contributions from local actors, which went on to influence the development of the Bargaining Code. This allows us to offer a more nuanced account of platform power, one that contextualises the actions of platforms with reference to the residual institutional power of government, the news media (in particular, major media companies) and policymakers.

We begin our analysis by suggesting that in the context of journalism, the focus on platform power emerged from a period in the Anglophone news industry when publishers poured resources into distributing content on social media with the goal of building large audiences. The focus on platforms in scholarship as well as public conversations about news business models therefore often reflect this 'golden era' of platform distribution when many news outlets found success through social media (Bell and Owen 2017; Hurcombe et al. 2021). However, the end of that era offers an opportunity to reevaluate this focus on platforms and examine the enduring power of local institutional actors (Meese and Hurcombe 2021). We go on to provide a case study of the negotiations around the Bargaining Code and its subsequent implementation. Here we highlight the involvement of four key institutions: publishers, platforms, the ACCC and the Australian Government. We show how long-standing institutional relationships between sections of the media and government and the 'regulatory activism' of the ACCC

(Flew et al., 2021) influenced the final form of the bargaining code. We end with some concluding thoughts on the outlook for news-related platform regulation.

### PUTTING PLATFORM POWER IN PERSPECTIVE: AN INSTITUTIONAL APPROACH

The Reuters Digital News Report reveals that social media has become a key source of news content across the world, especially among younger demographics (Newman et al., 2020). Australia generally follows these trends and while people prefer to access news by watching television (63%) and online news (53%), social media (52%) is close behind (Newman et al. 2020; p. 96). These media are ranked in the same order when people are asked to identify their main source of news. There are demographic differences, however, with the Australian Generation Z cohort overwhelmingly preferring to access news through social media (48%) than any other source. While the report does not address the role of search, it does note that 23% of people across the world used the Google News service in the last week (Newman et al. 2020 ; p. 12).

Several scholars have argued that platforms transform the operations of organisations which use them, seeing them align with the social and economic objectives of social media corporations (Van Dijck and Poell 2013). The growing importance of platforms as gatekeepers to news has led scholars to suggest that they also play a structuring role in relation to news outlets and the content they produce (Caplan and boyd 2018). As we see later on in our case study analysis, policymakers and regulators have embraced this account of the relationship between these two institutions and have been particularly concerned with two aspects of platform power.

The first is the organising power of algorithms in relation to news (Napoli 2015). Algorithms determine the visibility of certain content in social media news feeds (Bucher 2012) and the placement and ranking of news content within Google searches (Meese and Hurcombe 2021). Their internal workings are opaque, and notice is not given when adjustments are made. As a result, news organisations have had to scramble to alter distribution strategies in the wake of unannounced changes: an infamous example being a 2018 adjustment to the Facebook News-Feed algorithm that devalued content from Public Pages in favour of posts

from ‘friends and family’ (Wong 2018).<sup>1</sup> The second concern is around platform revenue streams. While news organisations get audiences from platforms, they have found it difficult to monetise social media traffic (Cornia et al. 2018). Page views can be appealing to advertisers, but even then, the cost of distributing news on platforms can be substantial (Myllylahti 2019). Revenue that normally would have flowed to news organisations has also been absorbed in other ways. Platforms dominate the online advertising market: in Australia, Google, Facebook, and YouTube received an 80 per cent share of the digital advertising market in 2020 (Meade 2020). News companies have not been able to compete with the programmatic advertising that Google and Facebook provide, losing a critical revenue stream (Pickard 2020).

More recent research has provided some nuance to these arguments. Not every news outlet is reliant on the whims of platform algorithms (Sehl et al. 2021), and many media companies are now deploying subscription-based business models, causing these same companies to devalue traffic from social platforms (Meese and Hurcombe 2021). Despite these developments, reforms regarding the economics of journalism continue to focus on platforms. At a global level this attention has come about because of the recent “techlash” (Smith 2018), which has seen growing negative public sentiment towards big tech companies and an increased willingness from states to regulate platforms. Our following case study of the Australian policymaking process shows how various institutions ensured that these global discussions were successfully translated to local contexts.

Our argument draws on the framework of “historical institutionalism” (Bannerman and Haggart 2015), one approach within the broader set of “new institutionalist” approaches (March and Olsen 2006). Historical institutionalisation is distinguished by its emphasis on “path dependence”, which states that “future institutional change... is constrained by the present institutional context” (Bannerman and Haggart 2015; p. 5). In other words, historical context matters: not only does this context shape how new entrants are received, but “different countries... can develop dramatically different institutional responses” to similar phenomena (Bannerman and Haggart 2015 ; p. 5). The framework also situates institutions as central intellectual intermediaries, who

<sup>1</sup> This impacted news organisations who generally use public pages to distribute content.

not only mediate ideas circulating across society but also deploy their own ideas “as tools” in pursuit of “their own interests” (Bannerman and Haggart 2015 ; p. 7). Institutions can also become agents when they engage in lobbying practices and are seeking to enact change. In addition, historical institutionalism focuses on the “critical juncture” (Bannerman and Haggart 2015 ; p. 8), a moment where institutions (and associated path dependencies) can be strengthened or weakened. This chapter does not deploy historical institutionalism in a formalist manner focusing on the progress of one institution.<sup>2</sup> Instead we use it as a looser interpretive framework that allows us to account for historical path dependencies across various institutions.

### THE BARGAINING CODE

It is worth briefly explaining the code before discussing how specific institutions engaged in the negotiation process.<sup>3</sup> The reform forces certain platforms to pay for the use of Australian news content. In theory, the Treasurer should specifically identify which organisations fall under the auspices of this code. Any decision is informed by “whether there is a significant bargaining power imbalance between Australian news businesses” (52E(3) (a)) and the platform and whether the platform “has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses” (52E(3) (b)).

However, the latter provision has allowed platforms to avoid designation under the code, so long as they establish enough commercial licensing deals with publishers. What is sufficient has never been publicly stated, so designation is a constant threat. At time of writing, Google has made 16 deals and Facebook has made 10 deals, covering a variety of large and small, metropolitan, and regional publishers. This means that the broad goal of the Code has largely been achieved,

<sup>2</sup> For formalist approaches, there is a rich vein of international relations scholarship that draws on historical institutionalism.

<sup>3</sup> While the intervention has been generally referred to as a code, we are not talking about a code of practice (although that was originally mooted, Meese 2021). The reform involves an amendment to the *Competition and Consumer Act 2010* and will operate as black-letter law. However, we will continue to use the term code throughout this paper as this is how most people refer to reform.

even though the accompanying legislation is technically not operative. Platforms are happy to license news content to avoid designation. This is because designation allows *any* publisher to open negotiations with them (not just the ones they choose) and exposes the platform to a strict bargaining process.

If the Treasurer *does* decide to designate a platform, the company is required to negotiate with registered news businesses for the use of content across their services. News organisations can only be registered if their “primary purpose” (1.13 EM, 11) involves producing core news content - that is, news that covers “issues and events of public significance”, engages “Australians in public debate” or informs “democratic decision-making” (1.70 EM, 20). However, news organizations can receive payment for a wider category of news content that includes things like sports and entertainment reporting. If the parties cannot agree on a deal, the parties enter mediation before the matter is moved to an arbitration panel. Here, the two parties will submit their final offers and a panel constituted by Australian Communications and Media Authority (ACMA) make a final binding determination. The panel will have to consider two sources of value: the value that platforms receive from having news on their site and the value that news outlets get from platform referrals.

## THE AUSTRALIAN CONTEXT

Some national context also provides some useful background to the code negotiations. Australia’s media ecology has historically been dominated by a small number of companies. For the past few decades, two conglomerates—Fairfax Media (now absorbed by Nine Entertainment) and News Corp—have owned the majority of daily print circulation in cities and the regions. Broadcasting has been similarly concentrated, with a small number of companies (Nine, Seven, the CBS-owned Ten) operating major television networks alongside public broadcasters (*ABC* and *SBS*). While streaming services have disrupted this media concentration, Australian platforms such as the Nine-owned Stan remain successful competitors to U.S. platforms like Netflix. A few born-digital outlets have appeared recently (Hurcombe et al. 2021), but the same print and broadcasting companies remain dominant in online news. Some of these newer outlets are also owned by the same media conglomerates, like youth-oriented Pedestrian (owned by Nine Entertainment). There are



complex reasons for this concentration but demographics is a major one. Australia's small number of medium-sized coastal urban centres only need one or two dedicated newspapers, which makes ownership across cities economically feasible for media businesses (Cunningham 2010).

This concentration has meant that a close relationship has developed between media conglomerates and government. This includes personal relationships between media identities and politicians. For example, it is customary for Prime Ministers and senior politicians to personally meet with Rupert Murdoch whenever they visit the USA "tradition" that has been likened to "pay[ing] court" (Tingle 2019). Nine also has close relationships with Australia's major political parties: In 2019, it was criticised for hosting a Liberal Party fundraiser, attended by the Prime Minister and the communications minister (Blackiston 2019). The historically relatively small number of mastheads, broadcast channels, and companies producing news in Australia has meant that a familiarity has emerged between these media players and government (Chubb et al. 2018). We discuss these relationships in more detail below.

## INSTITUTIONS, DEPENDENCIES AND OUTCOMES

Four institutions were actively involved throughout the Bargaining Code debate: the Australian news media industry (publishers), the ACCC (regulators), Google and Facebook (platforms) and the centre-right Coalition government. While we identify these institutions as key actors in our analysis, at points we also explore how different sectors *within* these institutions engaged in the debate. This is particularly relevant in our consideration of publishers, as small and large publishers engaged in the debate in different ways. Civil society groups chose to join the debate just prior to the reform entering Parliament and largely sided with publishers. As such, while they played an important advocacy role, other institutional actors already firmly established themselves earlier on in the policy debate (Flew et al., 2021). For the most part, platforms and publishers made submissions to the ACCC and argued their case in the public domain. The ACCC facilitated the reform process and made recommendations but also entered the public domain at times, strongly defending their findings. The government made it clear that they were in favour of platform regulation, intervening at critical times to ensure that this outcome was achieved. Their stance aligned with the goals of a media

sector desperate for money after years of declining publishing revenue, but outraged platforms who were keen to avoid regulatory oversight.

If we return to the beginning of the policy process, we start to see evidence of the path dependencies that caused the interests of government and larger publishers to align. The code originally came about because of complex political horse-trading. Owners of Australian media organisations had long argued that historic restrictions on cross-media ownership were excessive, particularly in the context of a convergent media environment (Day 2007). Once the free market-friendly Coalition won government in 2015, the commercial media finally had access to a sympathetic ear and the limits were subsequently weakened - although it had to do a deal with a minor party to pass the legislation in 2017. As part of the deal, the government agreed to launch an inquiry into digital platforms. The terms of reference were broad with the inquiry examining everything from the market power of platforms to consumer privacy, but from the beginning, the relationship between platforms and publishers was a central focus (Flew and Wilding 2021; Meese 2021). This was a boon for Australian news outlets who had been worried about the growth of Facebook and Google for some time.

The ownership reforms showed clear evidence of philosophical alignment between sections of the Australian commercial media and the Coalition government. This came as no surprise as there were long-standing relationships between these two actors. Leading press executives even presented at critical meetings during the 1940s, which led to the formation of the party as a viable counterweight to the centre-left Labor party (Griffen-Foley 2002). Returning to the present, both institutions also believed that the media environment was changing significantly enough that certain regulations surrounding the operations of media companies could be weakened. The interests of these two parties once again intertwined around the Digital Platforms Inquiry. These arrangements were not conspiratorial. Instead, these institutions reached aligned positions based on their own internal path dependencies, which can produce long-standing cross-institutional arrangements.

## PUBLISHERS

While we listed some of the dominant scholarly and policy concerns at the beginning of the chapter, publishers had a narrower focus. Major

Australian news media companies attempted to focus regulatory attention on the loss of their digital advertising revenue and concentration of ownership across the advertising supply chain (Nine 2018; News Corp Australia 2018; Meese forthcoming). They were also concerned that platforms were preferencing content that was not paywalled, taking news snippets to improve their own services, and complained that platforms had a much lighter regulatory burden (Flew et al. 2021). While many of these criticisms were sound, the limited focus pointed to existing path dependencies within journalism. The institution has long been reliant on advertising for revenue and this focus did not change when media companies transitioned to an online environment (Pickard 2020). As a result, these larger news companies focused on Google and Facebook's capture of the digital advertising market. A smaller coterie of social news publishers (Hurcombe et al. 2021) offered a more nuanced account of their relationships with platforms (oOh! Media 2018). While these parties also called for an equitable regulatory balance between the two sectors, many had ambivalent feelings about the role that platforms played as a whole (Meese and Hurcombe 2021). These newer outlets had achieved success because of social media, and were aware that they would continue to rely on Facebook and Google continuing to play a critical role in news distribution.

As we can see, bigger publishers had relatively general concerns, and at this point, licensing was not front of mind for stakeholders. Indeed, the issue of platform payments only came about relatively late in the bargaining process, raised during a stakeholder meeting about the future of journalism in early 2019 (ACCC 2019b). All participants were conscious that the Cairncross Review in the United Kingdom had proposed a code of conduct to support bargaining between platforms and publishers (Flew and Wilding 2021; Meese 2021). But while the meeting was lukewarm about the proposal, the ACCC took up the idea enthusiastically—and once the final report was released in late 2019, the recommendation was quickly taken up by the Government.

When the Bargaining Code was finally on the road to becoming legislation, the split between small and larger publishers became clearer. The code was initially meant to be voluntary, and platforms and some small publishers were close to reaching agreement on commercial terms. However, it took a rumoured breakdown in negotiations with News Corp and the financial impact of COVID-19 for the government to intervene and make the proposed voluntary code mandatory (Rigby

2020). When the mandatory code was released, larger companies News Corporation and Nine were broadly supportive (Samios 2020). On the other hand, a group of small digital publishers criticised the draft Bargaining Code, concerned that it would be biased towards larger media players (Blackiston 2020).

The final code appears to have justified the small publishers' concerns. Larger publishers have secured deals with Facebook and Google, reportedly worth millions of dollars (Elsworth 2021). Some small publishers have also met with success. Junkee (a social news outlet) and The Conversation have commercial deals with Google and Solstice Media has reached agreement with Google and Facebook.<sup>4</sup> However, other small outlets have not even been able to secure a meeting with the platforms. Instead, they have only been able to register with the ACMA in the faint hope that a platform is designated (ACMA n.d.). The lack of designation also appears to favour large publishers who are more likely to have the resources, networks, and skills to initiate and successfully complete these negotiations (Lee and Molitorisz 2021). We see further evidence of this divide across the news industry by exploring how the government and the ACCC acted during this critical juncture.

## GOVERNMENT

The Coalition government's embrace of a mandatory Bargaining Code can partially be explained by the historical relationship between the Australian government and the tech sector. The Coalition has generally sought to regulate and control technology when it has been in power. They had already made notable interventions around copyright, passing a law in 2015 that blocked file-sharing sites (Dootson and Suzor 2015). This law was accused of bias towards local rights-holders (such as cable news service Foxtel, of which News Corp owns a dominant share) over Australian consumers who, at the time, had limited legal access to popular overseas programmes. The party flirted with an innovation agenda in 2015 when Malcolm Turnbull was Prime Minister (he had been an online entrepreneur in a previous life) and for a brief moment the government

<sup>4</sup> Junkee also gets payments from Facebook through their production of the Junkee Takeaway. This is not considered as a commercial agreement created through the NMBC process, but it may well act as an equivalent.

sought to align itself with the tech sector. However, the effort was quietly shelved after Scott Morrison replaced Turnbull as leader.

In contrast to this temperamental relationship with the tech sector, there has always been an “intimate relationship between politics and journalism” (Hess and Waller 2016), albeit one of “uneasy exchange and reliance” (Davis 2010). The presence of this “institutional dependency” (Fisher 2017) is a core tenet of journalism and political communication scholarship, and it is evident in Australia. Relationships between journalists from established publishers and politicians are institutionalised in the form of the Canberra Press Gallery, where “insider” knowledge is celebrated (Chubb et al. 2018). These engagements breed a certain institutional familiarity between politicians and journalists and, indeed, media owners, resulting in each party being partially invested in each other’s institutional durability (Clemens and Cook 1999). We have already noted some of the more overt interactions between politicians and media owners earlier in the chapter.

Conversely, born-digital outlets and smaller publishers have not always enjoyed similar treatment. The youth publisher Junkee operates without institutional access. This is partly a result of this publisher’s progressive editorial line, which is designed to appeal to young people alienated by parliamentary insiderism. But it is also an outcome of Junkee working outside the Canberra Press Gallery. Some digital outlets have been able to make the leap from outsider to insider: for instance, the born-digital BuzzFeed began to achieve institutional recognition and proximity to parliamentary power when it gained access to the Gallery in 2015. Yet even then, News Corp and the ABC continued to express prejudice for the outlet famous for “cat videos”. In 2017 News Corp editor Chris Dore criticised BuzzFeed’s inclusion on an advisory panel for the prestigious Walkley journalism awards (Meade 2017), and in 2018 ABC editorial director Alan Sutherland defended the new (and ultimately short-lived) youth-oriented outlet ABC Life by distancing it from BuzzFeed (Sunderland 2018). BuzzFeed Australia has stopped producing news, but Junkee’s outsider status remains.

## POLICYMAKERS

As we have already noted, the inquiry came at an auspicious time with the “techlash” well underway and an international critical juncture forming around the question of platform regulation. The ACCC played an active

role in shaping this debate. As the inquiry progressed the organisation was increasingly critical of the behaviour of digital platforms, and Rod Sims, the head of the Commission, made regular public comments regarding his concerns about platform business models. He advocated on behalf of the position developed by the ACCC's digital platforms team and became a strong voice for reform (Butler 2020; Flew et al. 2021). This suggests that the ACCC and Rod Sims realised that a critical juncture was afoot.

Importantly, even though the ACCC was acting as an advocate for reform, they were only able to do so because they were embedded within existing institutional networks. The ACCC has been regarded as Australia's "regulator of last resort" (Danckert 2019), underlining that the Commission is embedded in existing institutional arrangements and path dependencies. Their relationship with the press also adds some important nuance to their institutional position. While the ACCC does not have a symbiotic relationship with the press like politicians do, like any other government body it still has an ongoing institutional relationship with the press, and in particular, the legacy media.

This position necessarily influenced the constitution of the news media bargaining code. The obvious outcome of these existing institutional relationships was that platforms were on the outer. Yet, what was especially pertinent about these relationships was how the ACCC supported a relatively conservative vision of news. The Commission acknowledged the presence of emerging publishers in their reports. However, they also argued "it is unlikely that these newer sources of Australian journalism will compensate for reduced provision of local court and local government coverage by traditional print (now print/online) media businesses" (ACCC 2019a, 320). While this is an accurate analysis, the ACCC did not wait to see how these new forms of journalism developed: instead, it took advantage of the critical juncture to push through reforms that favoured established publishers. Considering the international political context this decision is understandable, but it also emphasised that the ACCC was worried about a particular type of news disappearing, one it was keen to rescue and conserve. The approach of newer publishers like Junkee did not match this vision, and while they were accounted for in the code and even secured deals, they were not the focus of the Commission's concern.

## PLATFORMS

The institutional position and behaviour of Google and Facebook platforms stands in stark opposition to the institutional relationships discussed above. Barring some minor concessions, the two platforms argued strongly against any form of regulation, disavowing their market power and strongly contesting claims that they were ‘a “must have” channel of distribution for news publishers’ (Facebook 2019, 5). They soon became sidelined throughout the inquiry as ACCC’s intention to regulate platforms became clearer. By the time the draft Bargaining Code appeared on the horizon, Google was publicly trading barbs with Rod Sims, who accused Google of spreading “misinformation” through their publicity campaign (Gillezeau 2020). This might seem like a natural outcome of a contestable policy process: yet, there are historical reasons for this failure, which reveal that platforms are still struggling to operate as transnational policy actors.

Platforms have established cultures that valorised the ability to “move fast and break things”, a path dependency that clearly informed Google and Facebook’s choice to argue against regulation (Gray 2020). Yet, we suggest that a more telling historical trajectory emerges when we explore how these two transnational companies engage with national debates. The problem with these companies is that they resemble unwieldy empires, with strong cores and weaker peripheries. Google and Facebook are unashamedly American companies and have focused on the political world of the United States since 2007. This can be seen in the amount of money that is poured into lobbying each year, ensuring that “the tech sector is increasingly embedded in politics and political campaigning” in the U.S. (Pawel 2018). Prior to the U.S. election Facebook specifically tweaked the NewsFeed algorithm in preparation (Lyons 2020), and Donald Trump was de-platformed following the U.S. Capitol riots. Platforms have started to pay more attention to Europe due to the jurisdiction’s ongoing interest in platform regulation (Satariano and Stevis-Gridneff 2020). By way of contrast, ongoing leaks from Facebook reveal that the company leadership is largely uninterested in the edges of its global empire, and that the company is surprisingly ill equipped when it comes to managing the complexities of local politics (Cushing 2021).

This haphazard interest translates to the politics of policy development. Outposts like Australia have not been entirely ignored: Google opened

an Australian office in 2003, and Facebook followed in 2009. Upon opening these companies were predominantly focused on drumming up business to build revenue and hiring staff to support growth. Both Facebook and Google's focused on getting Australian businesses to advertise on their platform, and the latter did not hire local in-house counsel until 2007 (Nickless 2007). However, their horizons gradually expanded, and Facebook and Google started to regularly lobby Australian governments on relevant issues (Flynn 2021). This saw platforms engage in public debates and work to influence local policy frameworks and they were largely successful in this task (Bodey 2012). With the "techlash" yet to arrive, platforms avoided comprehensive regulation of their services and as a result were able to policy resources in regions like Australia with some restraint.

However, technology companies had to intensify their efforts in an attempt to stave off the Bargaining Code. Alphabet's CEO Sundar Pichai held "a video conference call with Prime Minister Scott Morrison", Facebook spoke to Treasurer Josh Frydenberg (Greber 2020) and also hired "friends of Prime Minister Scott Morrison to lobby on its behalf" (Cheik-Hussein 2020; Mason 2020). Facebook's vice-president of global public policy, Joel Kaplan, came to Australia but reportedly did not meet with the government (Morton 2019), however Mark Zuckerberg eventually managed to organise a meeting with Frydenberg and the Communications Minister (Sadler 2021). Platforms also engaged in more blunt negotiation tactics. Facebook removed Australian news (and other content) from its platforms for a brief period and Google experimented with removing Australian news content from search and later threatened to shut down their search product in Australia (Taylor 2021).

This frantic, last-minute lobbying secured some minor amendments to the code, the most critical being avoiding designation. However, both companies are still facing new financial burdens. We suggest that this outcome occurred because Facebook and Google are not institutionally connected to Australian political networks in the same way that they are in the United States. Even Facebook and Google's threats to remove news from their platforms reflect a lack of internal leverage in Australia. Pawel Popiel (2018) has noted the close links between the Obama administration and Silicon Valley. These emerged from Obama's successful 2008 campaign and continued throughout his administration with employees of technology companies assisting across a variety of



policy areas. Conversely, while these companies have paid for lobbying in Australia and have capable policy teams they are not embedded within Australian political life. Governments of all persuasions have not worked closely with platforms, and platforms engage with Australian policy and politics on an ad-hoc basis. The result is that while platforms still have power to influence policy outcomes in these distant countries, they have to contend with still-powerful local institutions.

### MEDIA POLICY AND PLATFORM POWER

Through applying historical institutionalism, we have decentred platforms within a conversation that typically centralises them. Rather than focusing on platform power, we have demonstrated that local and national networks of established institutional power are crucial explanatory factors for recent policy developments in Australia. We do not seek to valorise lobbying or under-the-table relationships that have done so much to harm the cause of publicly oriented media reform. Instead, we simply note two things. Firstly, all institutions survive because they are “reinforced through socialization or interaction or legitimation”, a process which ensures that “alternative scripts remain unimaginable” (Clemens and Cook 1999). While platforms are doing the necessary work to socialize their institutions in the United States and Europe (Satariano and Stevis-Gridneff 2020), their long-term efforts in Australia have been less intensive. This leaves space for other established actors. Secondly, even when platforms come to the policy table, they must engage with institutions who may have shared histories and their own sources of social and political power. Of course, platforms are still powerful actors, and they were able to secure a series of compromises to the code through blunt negotiation tactics. However, what our analysis highlights is the resilience of state-based institutions and other market actors, and their ability to align agendas in an attempt to counter platform power.

In closing, we note that questions remain about the Bargaining Code’s reforms. As we have discussed above, the Bargaining Code— both as policy and as policymaking process appears to favour older established media over smaller digital publishers. The policy also seems to preserve the status quo and does not look towards journalism’s future. In this sense, although the submissions from News Corp and Nine to the ACCC raised concerns about “journalism” and “information quality”, the ways in which both were discussed (as products of established media) suggests

a bias towards institutional “legitimacy”. The measurement of “information quality” beyond legitimacy and institutional trust was not raised, and the limited role those smaller digital publishers played in the negotiations—some of which have been producing innovative and successful digital journalism (Hurcombe et al. 2021)—reflects this institutional bias. These developments in turn indicate the downsides of local institutional resilience and in doing so, provide lessons for other countries who plan to embark on similar reform efforts.

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# Regulating Chinese and North American Digital Media in Australia: Facebook and WeChat as Case Studies

*Chunmeizi Su*

## INTRODUCTION

Digital media has become a significant part of people's lives. Algorithms are shaping the way of information distribution, where 'filter bubbles' might occur (Flaxman et al. 2016); personal data are being traded discreetly as a 'corporate asset' for commercial gains (Srnicke 2016); and content moderation practices are still insufficient, as evidenced by the livestreaming of the Christchurch mosque massacre (Besley and Peters 2019). For the Australian government, the problems caused by western platforms are not the only things they need to worry about these days. With the growing significance and attention around the Chinese tech-giants-BAT (i.e. Baidu, Alibaba and Tencent, Chinese equivalent of Google, Facebook and Amazon) (Su 2019), risks and threats are largely

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overlooked in the Australian market. For instance, content regulation on WeChat is under-developed (Walsh and Xiao 2019), and platform transparency and neutrality are inadequate as well.

These innate issues may intensify in offshore markets, such as Australia, or Canada, who holds the highest percentages of immigrants. According to the 2019 report released by International Organization for Migration (IOM), Canada received 690,000 Chinese immigrants, ranked 4th globally, and Australia received 640,000 Chinese immigrants, ranked 5th globally, while the first three are United States, Hong Kong, and Japan. In addition to the high volume of Chinese migrants, Australia is reported to have 30% of immigrant population (2nd in the world), where Canada have 21% (3rd in the world) (McAuliffe et al. 2019). Such data suggested that Australia and Canada are considered as the world's leading multicultural society, with a large base of Chinese immigrants, which also indicates a wide-spread adoption of Chinese digital services. Localised services, varied provisions, challenges from local or other international players, these are general problems facing most of digital platforms across the world, especially when they are trying to enter or already operating in an international market (Plantin and Punathambekar 2019). This is even more so in the case of China, where domestic companies are shielded from the Western competitors—a phenomenon that has been termed the 'splinternet' facilitated by the Great Firewall (Miconi 2019), which poses new challenges to global frameworks for online regulations.

In light of the current progress made by News Media and Digital Platforms Mandatory Bargaining Code, this chapter selects Australia, to examine and cross compare how WeChat and Facebook are regulated in the third country. There are different factors at play regarding this issue:

1. Chinese digital services are permeating Australian businesses. Australia is a major international market for Chinese digital platforms Both Alibaba and Tencent are operating and expanding their services in Australia via Tian Mall (online-shopping store) and WeChat (instant messaging software). For instance, Australia is the third largest international market for Alibaba, following Russia and South East Asia (Brook 2018), and WeChat (the primary service of Tencent) is attracting more and more non-Chinese speaking users, even Australian politicians (Hollingsworth 2019). As a result, more and more Australian businesses are beginning to adopt Alibaba and WeChat to reach their Chinese customers (such as David Jones,

Chemist Warehouse and Destination NSW), and this supports a growing popularity of the use of these Chinese digital services in Australia.

2. Strategic ties between Australia and China. Australia and China have a close economic relationship that extends over to the digital market. Indeed, Chinese internet companies have targeted Australia as a major western market for international expansion (Jing 2016).
3. The Australian digital market is heavily influenced by online services based in both the US and China. Australian market is unique in that it is politically tied to the US, but economically bound to China. In this sense, the world's biggest digital platforms (US and also China based services) are simultaneously playing on this battlefield. The Chinese government holds supreme power over the domestic market (Su 2019), whereas Australia aims to encourage the development of the free market. In comparison, America pursues the ideal of freedom of speech, vacillating between platform regulation and democratic rights of freedom of expression. With the mixture of Chinese and American online services operating within the Australian market, examining platform regulation in Australia will reveal unforeseen challenges and expose risks and opportunities associated with competing regulatory frameworks (Nooren et al. 2018). Therefore, the overarching research question is how to regulate the Chinese and North American digital media in Australia, or alternatively, is there a necessity to regulate Chinese digital services in the Australian market?

## THE RISE OF GLOBAL DIGITAL PLATFORMS

Digital platforms like Google, Facebook, Amazon and Alibaba are becoming increasingly central to the global digital economy. These companies are disrupting social, cultural and economic routines on a global scale, via interconnected services known as 'network effects' and economies of scale (Feld 2019). They operate in different political systems and territories, challenging policymakers and regulators alike, where officials are 'almost learning while doing' (Rossotto et al. 2018). As such, traditional regulatory approaches need to be improved to adapt to these challenges.

Numerous countries are trying to work out how to regulate digital platforms. On 3 August 2018, the Australian Competition and Consumer

Commission (ACCC) issued a media release in which it emphasised that the ACCC would ‘increase its enforcement action’ and hold a world-first inquiry into the market power and general corporate behaviour of digital platforms (ACCC 2019). Around the same time, the European Union issued their General Data Protection Regulation in 2016, with legislation commencing in May 2018,<sup>1</sup> while Facebook CEO Mark Zuckerberg appeared before the US Congress in 2018.<sup>2</sup> Subsequently, the EU Digital Services Act was released in 2020, and later, US Congress Antitrust report was made available as well, not to mention the strong attitude on Antitrust for Big Tech from the Biden Administration (U.S. House of Representatives 2020).

These digital platforms are being regulated in different parts of the world. As a result, researchers have focused on political systems and pertinent policies as all digital services should operate under the provisions of local laws (Rossotto et al. 2018). For US-based platforms, this means adopting an evasive tactic to circumvent local government regulations, launching push backs under US jurisdictions while evading others in different political contexts. For example, companies like Facebook and Google have been trying to get away with AU regulations through various campaigns and aggressive measures. However, Chinese-based platforms are only starting to deal with the transnational use of their products. China is one of the few countries in the world to have an industry based eco-system similar to the US. This is partly because services like Google, Facebook and Amazon are well-accepted in most countries and are banned from the Chinese market through the Great Firewall (Keane and Su 2018). This particular situation has enabled Chinese market to incubate substitutes of US-generated services and foster local monopolies (Su 2019). But what challenges do Chinese digital services face when they enter the international market, and what does this mean for platform regulation globally?

<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>2</sup> BBC, ‘Mark Zuckerberg to appear before Congress’, BBC Tech, 10 April 2018 (Dave Lee) <https://www.bbc.co.uk/news/av/technology-43706820/mark-zuckerberg-to-appear-before-congress>; Jennifer Rankin, ‘Mark Zuckerberg to appear before European parliament’, *The Guardian* (online), 17 May 2018 <https://www.theguardian.com/technology/2018/may/16/mark-zuckerberg-facebook-to-give-evidence-at-european-parliament>.

This chapter examines how digital platforms of China and North America are being regulated in Australia, using Facebook and WeChat as case studies. While Facebook and Google have been a regular feature in the Australian market for some time, China is only now becoming a major player in the Australian market. This is due to: strong economic ties between the two countries (Baxter 2019); the size and scale of Chinese immigration in the Australian society (it is the second largest immigration community) (Walsh et al. 2018); and the rapid expansion of Chinese digital platforms in the Australian market (Brook 2018). The comparative framework between Facebook and WeChat will be focused on societal issues created by disinformation, transparency in regard to content moderation, and potential or existing crisis for media diversity. By examining these three aspects of US and China based social networking apps, this research presents a comparative analysis featuring infrastructuralisation, techno-nationalism and civil society, contributing to future discourses of platform regulation in diverse settings.

## COMPARATIVE FRAMEWORK

### *WeChat, as a Counterpart or a Different Service*

WeChat is the most popular social networking digital service in China, created by Tencent—the world’s 9th internet company by market capitalization, next to Facebook (which ranked 8th as of 2021). Similar to Facebook, WeChat entails features such as messaging, video calling, friends circle (equivalent to ‘Facebook Wall’), and short video sharing. It can be described as ‘a better WhatsApp crossed with social features of Facebook and Instagram, mixed with Skype and a walkie-talkie’ (Plantin and De Seta 2019), or in other words, a ‘super-sticky platform’ or a ‘super app’ (Chen et al. 2018). WeChat however, is in many ways distinct from its Western counterparts, in its capacity of platformization, as well as the establishment of infrastructuralisation. The structure of WeChat follows the logic of platform capitalism, focusing on ‘network effects’ and enclosed business loop, where the ultimate intention is to create a ‘super sticky’ platform, that every user is obsessed with. In addition to WeChat Pay (the third payment application), one of the most successful features would be ‘mini programs’, or in other terms, the idea of ‘apps within an app’ (Chan 2015). This invention empowers WeChat to become a virtual and also physical internet infrastructure in China (speaking to enabling of

government related services, utilities fees, health codes and so on), that goes beyond linked services, and social networking purposes, but rather, as a beholder of various digital apps, with multi-purpose functioning.

A comparative study between Facebook and WeChat will unveil common issues faced by both platforms, and identify similar challenges posed by these digital giants. Through the lenses of infrastructuralisation, techno-nationalism, and civil society, this study will address disinformation, censorship, and platform neutrality to argue for the imperativeness of platform regulation, with particular reference to Chinese digital services operating in international markets.

### *Disinformation and Infrastructuralisation*

One of the consequences of platform power is mistrust in digital services. There is a growing sentiment of mistrust in news, authority, and most of all platforms (Flew et al. 2020). Algorithms for instance, facilitated a personalized feed that constraints one's own worldview via filter bubbles and echo chambers (Napoli 2018). Numerous scholars have explicitly articulated trust issues in news, with one study showing that mistrust in news has increased three percentage points from 24% in 2016 to 27% in 2019 (Park et al. 2020); another stated that news sharing on social media platforms 'has increasingly come to be perceived as a predatory one' (Flew 2020, p. 4). Critics often draw Facebook as an example, pointing to lack of content regulation that lead to livestreaming of the Christchurch, New Zealand mosque massacres (Douek 2020); misconduct of user information as in how they collect, use and trade personal data, such as Cambridge Analytica (Cadwalladr and Graham-Harrison 2018); over-reliance on algorithms that eventually incurred filter bubbles and echo chambers and problematic form of profiting models, where it is distributing established media content with likes of fake news, generating a 'news gap' in between (Flew et al. 2020).

Such a 'news gap' existed on both Facebook and WeChat and there have been calls for joint forces to tackle the issue. Facebook has notoriously been known for its fake news problem, it is catchy, fast spreading and most of all profitable. The fact is, 'disinformation is endemic to digital networks', global platforms such as Facebook and WeChat have become 'the possessor of social deviance online' (Iosifidis and Nicoli 2020). The term 'information warfare' is adopted to describe meddling of elections via disinformation, which normally happens between one country and

their opposing regimes (Iosifidis and Nicoli 2020). Accusations such as the Chinese government seeking to disrupt Australian elections via WeChat, or the Russian government aiming to sabotage UK elections via Facebook, or in other cases, the famous incident of Cambridge Analytica, demonstrated how and why digital platforms are seen as a threat to democracy (Iosifidis and Nicoli 2020). Under this context, disinformation is a common theme (or problem) across digital platforms, one that serves similar aims and needs, despite various means.

To obtain a better understanding of how disinformation functions on WeChat and Facebook, it is essential to look into the infrastructure or business model of these platforms. It is crucial to acknowledge that platforms like Facebook and WeChat are experiencing a dual process of platformization as well as infrastructuralization. Platformization lies in their attempt to centralise business models, while at the same time, amplifying and extending the ‘network effects’, focusing on the ecosystem of platform itself. In comparison, infrastructuralization points to the social impact of platforms, and how this socio-techno availability turned into a traditional mandate of infrastructures (Plantin and De Seta 2019). As users gathered on social media platforms to get and share the news, connect with friends, and update their lives, these internet giants are increasingly becoming an infrastructure that penetrates every aspect of users lives.

Infrastructuralization enlarges issues of disinformation, where reliance upon social media platforms aggravates the phenomenon known as fake news. Facebook has turned into an ‘advertising-driven business model delivered mainly on smartphones’ (Iosifidis and Nicoli 2020), personal information is then being collected and analysed for better advertising results through technologies known as online targeting—the same method that was later used in Cambridge Analytica scandal. This suggests that Facebook could be and almost is a platform that lives on and designed for disinformation. Conversely, WeChat incorporates state and self-regulation, and are more responsive to similar issues. Unlike Facebook where the revenue stream is largely dependent on advertising income, WeChat has found various ways to monetize its service, especially ‘WeChat Pay’—an online payment system with financial services, a one-stop hub for utility fees, government related services, travel expenditures and so on. WeChat is a relatively more private space comparing to Facebook; rather than directly pushing notifications on your personal feed, WeChat has created a separate tab to aggregate information from

official accounts. Additionally, advertising on WeChat Moments, a similar space to Facebook News Feed, was only starting to appear until recently. Therefore, the disparity of their business models, lies in WeChat's ability to support third-party applications, in other words, its affordance as the 'super app', whereas Facebook is overly reliant on data trade and online targeting.

Nevertheless, diversified revenue income fails to prevent disinformation on WeChat, it is still the trickiest and most persistent and prominent problem on the platform, domestically or otherwise. Verifying online news has been a direct way of combating disinformation, where traditional media channels such as CCTV (China Central Television) was constantly releasing news stories to tackle or clarify fake news. However, this process can be problematic in overseas market, where disinformation is raging without proper regulation, and dual attention is yet to be given. The content disseminated on WeChat is not properly monitored, and it is difficult to verify the sources, especially for users who rely solely on the platform for news consumption. Fact-checking, a common set-up in various countries, therefore, has become an important feature for Chinese Australians, which is currently missing or at least inadequate (Chen and Wei 2021). It is challenging and time-consuming 'for Chinese readers in Australia to verify the authenticity of the information', according to the WeChat group creator, who revealed in a news piece, 'every day, members post news to the group', in an attempt to verify the information presented there (Chen and Wei 2021).

Infrastructuralization as well as platformization is reinforcing the imperativeness of platform regulation, especially for companies like Facebook and WeChat. Content regulation and influence on election campaigns associated with Facebook have become a regular topic, and most recently, Australian government compels Facebook and Google to pay for news content, through 'Mandatory News Media Bargaining Code' (Flew et al. 2020). Although tech giants were prepared for a hard fight (threatening to pull back from AU market) (SBS 2021), Australian government were determined as well. It is evident that Australian government is one of the pioneers in regulating these US-based platforms, one move that is closely watched and monitored by governments around the world (Hitch 2020). One notable challenge in the midst of platform regulation by the third country, is political nuance and balance, where a pushback from platform-based country is possible and foreseeable. Even



though in this case, the US government attempted pressure on AU regulation appears to be in vain, it reveals political implications and tensions in regulating global platforms. On that note, any attempts to regulate WeChat would be seen as a direct threat to Chinese central government, one that disrupts censorship and challenges Chinese values.

### *Censorship and Techno-Nationalism*

As of 2019, WeChat has more than 30% registered non-English speaking users, and it has more than 1.5 million monthly Australian users (Kosłowski 2019). The recent election campaigns had put WeChat on the government's radar. Experts realized that compared to western platforms such as Facebook, WeChat has not been properly monitored by the Australian government and it may have unforeseeable impact on the election results (Kosłowski 2019).

One of the de-platforming events happened on WeChat in December 2020, where Australian Prime Minister—Scott Morrison's post, has been deleted due to Chinese allegations of spreading misleading information, the post said: the post of a false image of an Australian soldier does not diminish our respect for and appreciation of our Chinese Australian community or indeed our friendship with the people of China (Johnson 2020). Similarly, Donald Trump is also banned by Twitter and Facebook for disseminating inflammatory material (BBC News 2021). De-platforming has become increasingly mundane in the digital age, it is an effective result of platform as well as government censorship, but the guidelines were considered to be less transparent, and rather mysterious. WeChat users who experienced shut down of account or content removal unveiled that, further explanations are unavailable, except for official responses such as 'according to platform policy' (Li and Shelton 2019).

Transparency is in short supply, especially with regards to the techno-nationalist platform like WeChat, where platform development is heavily dependent on 'compliance-based privilege' (Voltmer 2013), meaning infrastructural ambitions should coincide with policy alignment (Plantin and De Seta 2019). In order to comply with national policy, WeChat has adopted mainly two ways to filter online content, that is algorithm, and content moderators, where other studies have termed it as 'auto and human censor' (Yu and Sun 2020). The platform uses algorithms

to conduct key words searching and filtering and use content moderators to eliminate potential sensitive or harmful materials online where necessary. This combination of technology and human moderation is a well-adopted method for platforms like WeChat and Facebook, but WeChat has another layer of content monitoring – the state government.

Facebook is dependent on self-regulation and self-managed content moderation, whereas WeChat is implementing both self and state regulation. Additionally, WeChat has a ‘one platform two systems’ policy, for example, blocking of chat groups normally ended up with shielding domestic users ‘from seeing and posting anything’, but ‘leaving overseas users to chat freely’ (Yu and Sun 2020). This suggested that the government is aware of its heavy-handed approach and negative impact, and therefore is encouraging freedom of speech via lessened censorship, as an attempt to recruit overseas users. Facebook and WeChat happen to be on the opposite side of one extreme, where the former is reluctant to delete anything in fear of jeopardizing freedom of speech (Guess and Lyons 2020), which is written in US constitution, and the latter is afraid of missing anything destabilizing, which aligns with national policy. Facebook has been condemned for its inactions in content regulation, with a direct result of NZ live-streamed massacre, whereas WeChat has been accused of state control and influence, leaving allegiance of overseas Chinese diaspora in question (Harwit 2017).

Facebook and WeChat provide a sharp contrast. As Facebook reluctant to pay for news content in Australia, WeChat subscription account (WSAs) has been restricted from reporting original news. According to ‘Provisions for the Administration of Internet News Information Services’ released in 2017, WeChat subscription account ‘can cite or re-post news items from official or authorised sources or platforms’ but are prohibited from generating original news content unless registered and recognized by Chinese authorities (Yu and Sun 2020). For Australia-focused accounts, this means steer clear from political topic, since it is risky, and not business-wise. However, this has created a paradox, as indicated in the study of Yu and Sun (2020), ‘they (WSAs) are Australian content providers, which serve the Australian local markets, yet they are subject to Chinese platform and content regulations as China-registered accounts’. As a consequence, Facebook in some ways, has fostered disinformation due to lack of censorship, and has resulted in mistrust in news in Australia, whereas WeChat triumphed in censorship, but damaged media diversity on the platform.

### *Platform Integrity and Civil Society*

If disinformation is the manifestation of platform issues, and censorship is a mechanism to tackle the problem, then repercussions or collateral damage would include platform integrity and media diversity. The fundamental debate around these platforms resides in the nature of their businesses, and the social impact. Facebook exhibited enormous power in its fight against Australia's News Media and Digital Platforms Mandatory Bargaining Code, where the homepage of news institutions had been blocked to all Australian users, in comparison, WeChat exemplifies the techno-nationalist nature, 'negotiates relationship between the civil society and the state' (Tu 2016). Both platforms demonstrated the capacity of jeopardising democratic nature of platforms, and the power of shaping public discourses. Platform integrity is therefore under harsh scrutiny, especially as the boundary blurs between publisher and distributor. Some scholars have hinted that Facebook is a publisher of all but name (Andrews 2019; Langlois et al. 2009).

In contrast, WeChat is not regarded as a publisher due to its inability to create original news (unless registered and recognized by Chinese authorities), but it has been frequently criticized for its omni-present censorship scheme, one that threatens platform integrity and freedom of speech (Ruan et al. 2016; Tu 2016). One of the concerns is that WeChat is creating an information vortex, 'which means that no matter where they live in the world, they still live under the same sets of narrative and the systems of mainland China' (Chen and Wei 2021). This claim is evidenced by previous analysis on subscription accounts, where Australian-focused WeChat subscription accounts are subject to repost and translate of local news (Yu and Sun 2020). However, the idea of information vortex is similar to that of filter bubbles and echo chambers (Chen and Wei 2021)—certain narratives are repeated and strengthened, constituting a limited worldview.

Platform integrity is an essential debate due to undetermined nature of digital platforms (whether it is a publisher or a distributor), whereas media diversity is often overlooked in the process. Much attention has been given to dwindled numbers of legacy media—decreasing of media companies and increasing of media ownership, and media diversity seems to be a long-lasting problem, that is less urgent to attend to. Indeed, Australian media 'has been too white for too long' (Rogers 2020), and media diversity is a serious issue that predates digital media. The tech

giants have exacerbated an imbalance in news distribution, but it would be biased to say they are stealing news content from an already concentrated news market. This suggested that Australian media policy has remained dormant or light-handed where the real damage is inflicted upon quality journalism with concentrated media ownership and a lack of media diversity (Dwyer 2014).

The scope of the News Media and Digital Platforms Mandatory Bargaining Code, therefore, goes beyond news media, market, and extends to broader digital media landscape at large. The main focus is about traditional media industry, advertising revenue, and algorithm (ACCC 2019), but it should also be about media diversity. That being said, the current Code fails to tackle with media diversity (how it is supporting independent journalism) (Clark and Ketchell 2021), issues of media ownership (restricting power of media monopolies), inclusiveness of the media market and culture (percentage of non-English/English media outlets), but rather sticks to specific guidelines to payment (Beecher 2021). Potentially, the Code could have had an effect on all digital platforms operating in Australia, forcing platforms like WeChat to start weighing media diversity in third countries, and dealing with such issues. Additionally, the Code could have had the chance to facilitate Australian media to establish an integrated media landscape, one that reflects and resonates with this multicultural society.

## CONCLUSION

This chapter offered a comparative perspective between Facebook and WeChat and attempts to engage with platform regulation discourses in Australia. Among other well-known issues, this research has focused on disinformation, where the lack of fact-checking has exposed publics to political manipulation, contributing to a contaminated digital public warfare. Disinformation on Facebook is more straightforward and direct, with online targeting functioning on the front page in most cases, conversely, fake news on WeChat tend to spread through personal networks, such as group chat, or moments (a similar function as Facebook page), susceptible to particularly elderly generation.

Disinformation is disseminated via different channels on the two platforms, and censorship is the mechanism in place to tackle such issues. WeChat is more relentless to battle fake news, and Facebook is often caught in a dilemma of benevolent actions, being reluctant to delete items

for fear of limiting freedom of speech. This is due to different cultural as well as political values, but also different regulatory frameworks. WeChat adopted a combination of state and self-regulation, which has proven to be effective in filtering fake news and preventing disinformation, however, this heavy-handed approach is considered to be demolishing against the ideals of democracy and freedom of speech. But more importantly, foreign governments are worried about the way the Chinese government uses WeChat to penetrate their political influence and agenda, and this similar set of scepticism applies to Facebook as well. Ultimately, self-regulation, state censorship, or current regulatory framework are being scrutinized for its necessity and validity.

Setting aside the effectiveness of censorship, WeChat and Facebook has concurrently damaged media diversity, both on a local and global perspective. Scholars have raised concerns about filter bubbles on Facebook (Flaxman et al. 2016), and particularly its impact during election campaigns; similarly, critics worry about ‘information vortex’ on WeChat, and its influence of political agenda and cultural values on Chinese diaspora (Chen and Wei 2021). This phenomenon leads to a slackness of fact-checking mechanisms, where diversified media organizations and news agencies are able to facilitate. WeChat specifically regulates the operation of official subscription accounts domestically and otherwise, with only a few licensed or authority recognized news accounts to report and post original news, suggesting that the majority of news media accounts on WeChat are simply transporting the information, rather than generating them. Therefore, WeChat subscription accounts are running the pilot mode in overseas market, translate and repost other news sources, while steering clear of political pieces and views.

As for Facebook, the News Media and Digital Platforms Mandatory Bargaining Code has exposed some of the deep-rooted problems in Australian news media, such as concentrated and commercialized media markets, a lack of public interest or independent journalism, and also, the absence of media diversity. In other words, Facebook has jeopardized the traditional news media industry in Australia, but it also intensifies the issue of media diversity, especially in terms of how it fails to represent the multicultural society. A lack of media diversity in Australia pushed Chinese diaspora to seek information elsewhere, and tightened regulation of WeChat subscription accounts prevented local media outlets to break through the ‘information vortex’ (Chen and Wei 2021). At the end, users are trapped or in a way forced to stay on digital media platforms, repeating

filter bubbles and echo chambers, with no other choices. However, News Media and Digital Platforms Mandatory Bargaining Code could be a historical development to deal with these issues.

Despite a thorough investigation of disinformation, censorship and media diversity, this study has mainly focused on a few issues at hand. Therefore, the viewpoints presented here are restricted due to limited time and space, and a lack of comprehensive examination of regulatory frameworks worldwide. Nevertheless, the overarching argument has been placed upon the conflict and necessity between localized policies and globalized platforms. For Facebook, it is about how to maintain and contribute to media industry and media diversity in the local market, as for WeChat, it is rather about how to encourage, foster or establish the AU-focused news services, as a direct measure to tackle disinformation in overseas market. The News Media and Digital Platforms Mandatory Bargaining Code is a promising start to a better integrated and regulated internet, but the question remains—to what end, a splintered internet, the four internets (O’Hara and Hall 2018), or else, a connected world?

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# State Actor Policy and Regulation Across the Platform-SVOD Divide

*Stuart Cunningham and Oliver Eklund*

## INTRODUCTION

There are rapidly growing concerns worldwide about the impact of content aggregation and distribution through digital platforms on traditional media industries and society in general. These have given rise to policy and regulatory debates and development across the *social* pillar, including issues of privacy, moderation, and cyberbullying; the *public interest/infosphere* pillar, with issues such as fake news, the democratic deficit, and the crisis in journalism; and the *competition* pillar, involving issues based particularly on Google and Facebook's dominance in advertising markets. The *cultural* pillar, which goes to issues such as the impact of SVODs (subscription video-on-demand multi-territory

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streaming services) such as Netflix, Amazon Prime Video and Disney+ on the ability of content regulation to support and profile country- and region-specific talent and production capacity, are often bracketed out of these debates and conducted in separate policy and research circles. We set out to show that this separation, or divide, is increasingly untenable due to the convergent complexities of contemporary media and communications policy and regulation.

Mindful of the principle of Occam's razor—that the simpler option is usually the better—it might seem quixotic to insist that policy research, and indeed policymakers, should make things more complex by conjoining issues related to platforms and SVODs rather than separating them. There are, of course, good reasons to separate platforms from SVODs, particularly if research is focusing on the United States (US). US regulators and legislators don't concern themselves with US streamers' potential global cultural hegemony, while the competition pillar has recently come to prominence in the US, with a federal antitrust suit brought against Google by the US Justice Department in October 2020 (Department of Justice 2020) which may well be taken further by the Biden administration (Bartz and Bose 2021).

But the fact is that in policy development and regulatory action in the European Union (EU), and in major countries of the EU (Germany and France), most of the four pillars have been addressed across the platform-SVOD divide. In Canada, a wide-ranging review of both broadcasting and telecommunications legislative frameworks has led to a bill currently before Parliament which programmatically overwrites the platform-SVOD divide. And in Australia—rarely a global policy leader—there has been a very strong move on the competition and infosphere pillars as applied to central platforms Google and Facebook. In that country, while SVOD regulatory initiatives are being pursued separately, platforms and SVODs have been strongly linked by the government in its strategic political communication about its initiatives.

We make in-principle arguments for the importance of seeking to grasp the dynamics of state action across the platform-SVOD divide given the tendency on the part of specialists in one or more of media industry studies, social media studies, competition law, journalism, and cultural or communications policy to focus too narrowly on their single fields. There is a growing scholarship exploring aspects of these wicked policy conundrums (on platformization of cultural production, Nieborg and Poell 2018; on content moderation, Gillespie 2018; on platforms as

media companies, Napoli and Caplan 2017). There is as yet little policy-focused research that encompasses all these pressure points, with most work focused on one or a number, but not all.

Also, the argument is important to counter the standard defences of the platforms that they operate in different markets and therefore should not be investigated holistically. But the argument has really been made for us recently by the dramatic moves policy actors have made, which we seek to outline here. One clear example illustrates the challenge. For its Digital Platforms Inquiry, Rod Sims, Chair of the Australian Competition and Consumer Commission (ACCC)—well outside its remit for a competition regulator—declared unambiguously that the crisis of news and journalism due to the market dominant behaviour of Google and Facebook was not a case of Schumpeterian “creative destruction” (and therefore merely subject to competition policy) because “journalism is a public good that benefits broader society” (and therefore goes to normative matters of a healthy democracy) (quoted in McDuling 2019).

This chapter suggests some underlying reasons why the platform-SVOD divide is being breached in state actor policy and regulation and then outlines contemporary, unfolding developments in the three key jurisdictions of the European Union, Canada, and Australia.

## DIGITAL AND GLOBAL PLAYERS BEYOND THE REACH OF ESTABLISHED BROADCASTING REGULATION

A common thread across several Western democratic jurisdictions from the 1990s is to have excluded early-stage digital technologies and services from regulation based on their at-the-time obvious differences from broadcasting and the desire not to impede their prospects of innovation. Political economist Dwayne Winseck (2019) calls this “a holdover from the 1990s era of Internet exceptionalism and neoliberal deregulation”. Now, 20 and more years later, that it is equally obvious that Google, Facebook, and Netflix have significant impact on major broadcasting and infosphere markets globally, the capacity of first digital, and more recently global, actors to remain exempt from national legislative and regulatory frameworks poses critical multi-jurisdictional challenges for governments and regulators.

Adding to the complexity of strategies for changing this is that most of the intended targets are foreign actors and thus may come under such multilateral trade agreements as the 2005 Australian United States Free

Trade Agreement (AUSFTA). The AUSFTA put limits on certain cultural policy levers within Australia, requiring bilateral consultation between the two nations to amend such limits. The provenance of the cultural exemption in the 2018 United States–Mexico–Canada Agreement may also be considered of relevance.

### THE SILICON VALLEY PLAYBOOK: THE STRONG, BLACK BOX

The Silicon Valley playbook is to disrupt highly regulated markets with a consumer-focused and -friendly offer based on world-class software and powerful recommendation algorithms while relying on already established and often publicly-developed and -provided broadband and telecommunications infrastructure.

What unites a set of concerns about Google, YouTube, Facebook, and Netflix is the very high degree of information asymmetry such Silicon Valley entities insist on in their business operations. They typically release very little consumption data to their partner content producers. This has major implications for fair and transparent terms of trade between global behemoths and regulated entities and small businesses in national jurisdictions.

This has flow-on implications for lack of partner knowledge about the efficacy of algorithmic advertising in advertising markets dominated by Google and Facebook and the degree to which it can be managed to advantage platforms and their ‘home’ products and services, rather than third parties and partners. This has led policy makers to call for new market regulatory authorities with the power to investigate and demand information on algorithmic control over news and advertising. The prospects for fair deal making and reasonably transparent terms of trade between major global commissioners and licensors of professional entertainment content such as Netflix and Amazon Prime and national production interests is also a case in point.

This is combined with the extremely innovative and disruptive degree to which the Silicon Valley playbook challenges traditional business models and threatens the viability of news media and traditional screen entertainment at the same time. The sheer scale of the dominance of Google and Facebook in advertising markets can motivate competition watchdogs and possibly overcome even the decades-long reluctance in the US to intervene on market dominance (antitrust) grounds. But it more

than this. As we have noted, the crisis of news and journalism due to the market dominant behaviour of Google and Facebook is not simply a case of Schumpeterian “creative destruction” because “journalism is a public good that benefits broader society”.

## AGGREGATORS VERSUS CONTRIBUTORS

Platforms and SVODs are more than aggregators of content they do not originate, but they are less than adequate contributors to sustainable local and national news content and locally-derived entertainment programming in national jurisdictions. There needs to be greater balance between profiting from news and entertainment content on the one hand and contributing to its sustainability on the other.

Platforms and SVODs have histories of funding ad hoc initiatives (in news and journalism, and in commissioning local product) especially when under public and state pressure. While pressure is being brought to bear on platforms (the ‘social license to operate’ through to regulation and legislation), governments can act to ameliorate and support (for example, through “innovation” funds that may work closely with Google and Facebook on sustainable business approaches, news subscriptions made tax deductible for all consumers, or investment in journalism attracting tax offsets). This suite of public subsidies and private/public partnerships around *public interest/infosphere* issues is entirely of a piece with state action in the cultural pillar to support national content and talent on SVODs.

We now turn to our three jurisdictional cases which illustrate in more detail the principles for and outworking of actual regulatory and legislative initiatives which have looked to address issues across the platform-SVOD policy divide.

## EUROPEAN UNION: SUPRANATIONAL STRATEGIC REGULATION

It might seem ironic that the European Union, the historical imperative for which was, and remains, the elimination of national regulatory borders in the interests of the creation of a single supranational market, should also become the world leader in initiating platform and SVOD regulation. This is in part because the creation of a single European market is designed to enable competition with US market leadership through

the emergence of Euro industrial ‘champions’ and has lent weight to the EU policy apparatus leading the world in closely monitoring all four pillars—social, infosphere, competition, and cultural. The broad record of EU action over time is well documented (Pauwels and Donders 2011). Our discussion focuses on the unfolding action under cultural, social and infosphere pillars.

In the EU, the 2018 *Audiovisual Media Services Directive* (AVMSD) provides baseline cultural regulation such as the requirement that video on-demand services ensure that at least 30% of their catalogue is European, as well as various avenues for member states to build further regulations for local content on SVOD services, and social regulation protecting children and enforcing content restrictions on Video Sharing Platforms (VSPs), like YouTube, perhaps even Facebook. The EU *Directive on Copyright in the Digital Single Market*, with its June 2021 implementation deadline, extends the EU’s media reform package to the infosphere. The directive supports the so-called ‘link tax’ on services like Google, which France has already implemented. Australia has enacted a similar ‘link tax’ regime, and Canada is on a similar path.

In the AVMSD, the EU has approached the cultural pillar with a view to considering all streamed entertainment under an umbrella media policy setting which expands the cultural concerns beyond broadcast TV and cinema and across SVODs and digital platforms. Article 13 (1) of the AVMSD requires member states to ensure that ‘on-demand audiovisual media services’ maintain a content catalogue of at least 30% European content. Article 28’s provisions for VSPs expand the scope of ‘audiovisual providers’ to include services that prominently share videos: “the legislation will apply to broadcasters, but also to video-on-demand and video-sharing platforms, such as Netflix, YouTube or Facebook, as well as to live streaming on video-sharing platforms” (European Parliament 2018). There is a degree of path-dependent policymaking here that builds on the history of audiovisual regulation from the EU as a whole and from individual member states (see Kostovska et al. 2020). However, the scope of AVMSD has seen substantial regulatory enlargement across the SVOD-platform divide as the EU responds to these disruptive processes. As of mid-2021, 15 member states have implemented the AVMSD into their national laws, despite the implementation deadline passing in September 2020 (European Audiovisual Observatory 2021). Portugal and Hungary are among member states that have imposed additional national and language subquotas beyond the baseline provisions of the AVMSD.



For the social pillar, the EU intends to give audiences uniform protections from inappropriate content, particularly for children. Article 28b of the AVMSD deals with the category of audiovisual services termed by the EU as VSPs. Article 28b (1), a, b, and c lay out that member states will need to regulate VSPs to protect children from inappropriate content, to protect all from hate speech or the inciting of violence through content on VSPs, and to make VSPs responsible for ensuring no illegal content, like child pornography, is disseminated through their services.

For the infosphere pillar, France's 'link tax' gives publishers rights to be compensated when aggregators and platforms, such as Facebook and Google, republish 'article snippets'. This draws on article 15 (sometimes referred to as Article 11/15) of the EU *Directive on Copyright in the Digital Single Market*. France's regulation drew the ire of the United States Trade Representative (USTR) who threatened tariffs (the Trump Administration's USTR had also threatened action on the similar Australian plan). Google initially responded with threats to cease republishing French news content. In early 2021, France and Google agreed on a path forward for this legislation, with major elements including the ability for companies to negotiate individually for the value of their snippets and a 'News Showcase' section established on Google which publishers could opt into for agreed licensing arrangements (Lomas 2021).

This issue in the infosphere pillar (called the News Media and Digital Platforms Mandatory Bargaining Code in Australia) is one that does not explicitly link to SVOD regulation and is one of the least embedded in even the EU jurisdiction (it is being pushed most strongly by France) and is being fought vehemently by Google and Facebook. The fact that it is new to the world and is being opposed stridently by the platforms affected means that each of the three jurisdictions has adopted different strategies for bringing the issue forward. Whereas France is in the middle of the battle, Canada has delayed codifying the news issues in its bill and the form of the proposed legislation is yet to be seen—signifying the difficulty of the issue and the potential stakes involved in unsettling passage of the current bill. The undercard of Australia's very aggressive approach to the infosphere and competition pillars is a softly softly approach to the cultural pillar with SVODs.

## CANADA: A ‘BIG BANG’, OMNIBUS APPROACH

In Canada, a root and branch review into broadcasting legislation by the Broadcasting and Telecommunications Legislative Review (BTLR) panel published a report, *Canada’s Communications Future: Time to Act*, in January 2020. Many of the report’s recommendations have been adopted into the major broadcasting amendment bill C-10 (which subsequently became C-11), which, as of mid-2021, is under debate in the Canadian parliament. This report has the virtue for our purposes of having had to build from first principles the rationale for broadcasting and telecommunications reform in the contemporary digital, globalized period. This contrasts with European Union actions which, having already developed extensive regulatory architecture in relation to the major US platforms, is extending and adapting rather than starting afresh, and the staged approach in Australia. Canada’s is a ‘big bang’, omnibus approach.

The report proposed to radically cut through decades of policy distinctions and exclusions in asserting that a “new model would bring all who provide media content services to Canadians—whether online or through conventional means, whether foreign or domestic, whether or not they have a place of business in Canada—within the scope of the *Broadcasting Act* (1991) and under the jurisdiction of the federal regulatory agency, the Canadian Radio-Television Telecommunications Commission (CRTC)” (BTLR 2020, p. 11). While maintaining flexibility as to the level of contribution, the report included every entity in an omnibus undertaking, noting in recommendation 60 that: “We recommend that all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner. Undertakings that carry out like activities should have like obligations, regardless of where they are located” (BTLR 2020, p. 32). This included curation (Prime Video, Netflix, Spotify as well as Canadian entities); aggregation (cable companies, MSN News, Google News, Apple News); and sharing (YouTube, Facebook).

This is a dramatic change to the current circumstances, which see a heavily regulated broadcasting landscape and largely unregulated curation, aggregation and sharing sectors. The broadcast television landscape in Canada is subject to a high degree of cultural regulation, with regulations supporting Canadian content (“CanCon”) including both transmission and expenditure requirements. Cable, satellite, and Internet Protocol Television (IPTV) are required to contribute 5% of revenues

to the creation of Canadian content, either through contributions to independently administered production funds, the Canadian Media Fund (CMF), or through expenditure on content. Licensed broadcasters are required to devote a minimum of 30% of revenues to the production of Canadian content. A minimum percentage of this money is distributed to the CMF, which the Canadian Broadcasting Corporation (CBC) draws upon for program funding. SVODs (curated services) are unregulated in this manner, but in 2017 the Canadian government and Netflix agreed to a CAD \$500 million production fund, with stipulations for a local Netflix production office, and discussions on Bill C-10 are ongoing.

*Canada's Communications Future* positioned SVODs like Netflix and Amazon Prime Video as curation services, which would be targeted with Canadian content revenue requirements, an evolution of existing CanCon regulations that apply to broadcast television. The report was clear that in its model “specific requirements would vary” in terms of the regulatory mechanism to support Canadian content, but that SVODs like Netflix in the ‘curation’ category through to platforms like Facebook in the ‘sharing’ category would all be subject to cultural regulation, with financial contributions “based on a simple calculation of the percentage of Canadian-derived revenues” (BTLR 2020, p. 12). Across various proposed regulatory mechanisms, the overriding rationale in the report was clear—Canadian content must be supported by SVODs and platforms alike. Indeed, this sees the expansion of the cultural pillar of regulation, often focused mostly on SVODs like Netflix and Amazon Prime Video rather than social media platforms like Facebook and Reddit and carries the cultural pillar even wider across the SVOD-platform divide.

In justifying this broad-scale regulatory approach, *Canada's Communications Future* lays out further commonalities new digital services in Canada share with legacy providers—they gain impressive financial benefit from Canadian market access. In 2017, Netflix's subscription revenues were estimated at CAD \$1.6 billion, with Facebook's advertising revenues estimated at the same number for 2016 (BTLR 2020, p. 123). This needs to be considered in the light of the estimation that, if the full suite of changes to the *Broadcasting Act* (1991) were to be enacted, as much as CAD \$830 million a year toward Canadian content by 2023 may be forthcoming from online streaming services (Curry and Dickson 2020). Within this broader media communications sector, which has been financially fruitful for foreign companies, the report states that “this new declaration should be a strong affirmation of the fundamental link

between the media communications sector and the expression of Canadian cultural sovereignty and democracy” (BTLR 2020, p. 124). This position makes Canada a leading nation for media regulation across the platform-SVOD divide and asserts a principle that a strong and unified case for all audiovisual services, whether foreign-owned or domestic, should contribute to local cultural output in exchange for market access.

Bill C-11, is a proposed amendment to Canada’s *Broadcasting Act* (1991), representing many of the changes called for by *Canada’s Communications Future*. The bill extends Canadian content requirements currently on legacy providers to new media providers, like SVODs. Bill C-11 would allow the CRTC to set revenue contribution requirements for SVODs, and apply other similar policies to video sharing sites, music streaming, and other like services (Canadian Heritage 2020). The government’s political communication is feisty about the cultural as well as infosphere pillars; the Throne Speech declared:

Web giants are taking Canadians’ money while imposing their own priorities. Things must change, and will change. The Government will act to ensure their revenue is shared more fairly with our creators and media, and will also require them to contribute to the creation, production, and distribution of our stories, on screen, in lyrics, in music, and in writing. (Canadian Government 2020, p. 15)

While Bill C-11 delivers dramatically on the cultural pillar, the main component of the omnibus report *Canada’s Communications Future* that is not included in Bill C-11 concerns the infosphere and competition pillars. A separate bill is forthcoming that relates to news sites and aggregators, which the Communications Minister claims will be ‘conceptually’ similar to the approaches attempted in Australia and France. Critics have called those plans a ‘link tax’, and, as we have seen, they have been strongly opposed by Google and Facebook. This decoupling, at least in timing and sequence, of the cultural pillar from the infosphere and competition pillars registers the level of difficulty establishing a mandatory rather than voluntary code to require Google and Facebook to recompense news media for their content being aggregated on these dominant platforms. News Media Canada, representing over 300 Canadian newspapers, has strongly lobbied the government to adopt the Australian approach, which we now turn to.

## AUSTRALIA: PART BIG BANG, PART SOFTLY SOFTLY

Australia has pursued two very different approaches to dealing with the infosphere and competition pillars (in relation to platforms) and the cultural pillar (in relation to SVODs). The initiatives have been advanced in separate portfolios. The Australian Competition and Consumer Commission (ACCC), a regulatory agency that sits within the Treasury portfolio, has led on the infosphere and competition pillars, while the communications department and agencies within that portfolio have focused on the cultural pillar. But the initiatives have been run in parallel and the softly softly policy development in the cultural pillar has been strategically linked to the big bang proposals in the infosphere and competition pillars.

In 2017, the government directed the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into digital platforms. The Digital Platforms Inquiry released its final report in mid-2019 with major findings in the infosphere pillar on a power and revenue imbalance between digital platforms and legacy news providers. The government initially proposed a voluntary approach to dealing with the proposed dollar value in the news content being captured by Google and Facebook's linking to and snippets of that content. That ratcheted up to a proposed News Media and Digital Platforms Mandatory Bargaining Code (NMBC), which was legislated in March 2021. It establishes a "mandatory code of conduct" to support Australian established news providers by "addressing bargaining power imbalances between digital platforms and Australian news businesses" (Frydenberg 2020, p. 7). The Code of Conduct requires the dominant internet platforms to negotiate with all news organizations above a certain revenue threshold for the right to host links to their content and would implement 'compulsory arbitration' if the parties could not agree to a negotiated valuation. Google's and Facebook's initial responses followed the playbook in France, with the platforms leveraging their market dominance and threatening the removal of their services—the provision of news in the case of Facebook and the search engine entirely in the case of Google. However, both ultimately agreed to conduct commercial negotiations with the main news businesses.

The strategic linkage across the platform-SVOD divide is clear when we consider that the ACCC Digital Platforms Inquiry report is a 600+ page report setting an international gold standard of what assertive

national jurisdictions could or should do when faced with the major social (including privacy), competition and public interest issues which particularly Google and Facebook pose for society and the traditional media. There is nothing explicit in the report on SVODs, and only three mentions of Netflix—none of them substantive. But it has been used not only to enact mandatory terms of trade between news media and Google and Facebook, but as a trigger for ramping up the significance of the cultural issue of sustainability of Australian and children’s content on screen media using the report’s recommendation for a ‘harmonised framework’ for media reform—even though this recommendation (Rec 6; ACCC 2019, p. 15) contains nothing directly to do with SVOD services.

This would suggest that the government’s strategy is to transfer the high level of now-near global advocacy for reining in the influence of the two major platforms in the social, competition and public interest fields and apply it to the cultural field to regulate SVOD services. ‘Regulated free-to-air broadcasters are competing with unregulated digital platforms and video streaming services. It has been evident for some time—and the COVID-19 crisis has made it even more obvious—that this is not sustainable. These arrangements threaten the sustainability of television broadcasters—and in turn the sustainability of the film and television content production sector,’ as Communications Minister Paul Fletcher, responsible for the cultural pillar, noted (Fletcher as cited by Karp 2020).

Australia has taken a softly softly, or ‘soft law’, approach to the cultural pillar, although its positioning and politics have drawn on the big bang circumstances that have led to the proposed mandatory NMBC. Soft law, according to Terry Flew, ‘recognises the difficulties of simply [applying] existing laws and regulations designed for publishers or broadcasters to Google or Facebook, as they do not identify with these traditional media industry models. It would enable digital platform companies to have a role in shaping the regulatory requirements they are subject to. It is also conceivable in principle that provisions could be developed by relevant government agencies working with the relevant digital platform industry stakeholders’ (2018, p. 18).

The matter of regulating SVOD services is vexed. Such services were established in various countries, including Australia, not as television services but as telecommunications services. They were, and are, therefore not subject to any of the content regulations that apply to commercial media. There is an additional background complexity to the situation in Australia: the 2005 Australia United States Free Trade Agreement

(AUSFTA). While most expert opinion agrees that there is some scope within the AUSFTA for contemplating the application of Australian content requirements on what were called at the time ‘interactive audio and/or video services’ (AUSFTA, Annex-II 2005, p. 6), the political stakes of inviting a US trade backlash would be high.

After years of relative inaction on the increasing gap between a heavily regulated broadcasting sector and an unregulated SVOD and platform sector, government agencies Australian Communications and Media Authority (ACMA) and Screen Australia issued an options paper, *Supporting Australian Stories on Our Screens—Options Paper*, in April 2020. The Government committed to “a staged process to reform media regulation towards... a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers” and “identified Australian content obligations as one of the first issues it would focus on” (ACMA and Screen Australia 2020, p. 5). After receiving 230+ submissions on the broad set of options laid out, most of which were looking for state action to bring the SVODs into the regulatory net, the government further relaxed rules on commercial broadcasters for Australian and children’s while increasing funding for the state agencies which financially support such content.

Moving remarkably quickly when compared to years of inquiries but policy stasis, the communications department (DITRDC) then issued in November 2020 a Green Paper titled *New rules for a new media landscape—modernising television regulation in Australia*. In a detailed laying-out of soft law propositions, it seeks to deal with each of the major stakeholders in a coordinated way. It offers commercial broadcasters a one-time, irrevocable choice to operate under a new commercial television broadcasting licence, with a reduced regulatory burden, provided they agree to move at a future point to using substantially less radiofrequency spectrum. This will promote the public interest derived from spectrum by encouraging multiplex sharing by broadcasters. The proceeds raised through the reform process will fund public policy initiatives that deliver value for the Australian public and support the media sector. It also proposes to formalise the role of national public broadcasters (the ABC and SBS) as key providers of Australian content, addressing a significant anomaly that the commercial broadcasters are regulated specifically to provide Australian content threatened by market forces (drama, children’s, and documentaries) but the majority-publicly funded entities are not.

Successful implementation of this policy suite would introduce an investment obligation in Australian local audiovisual content for subscription and advertising video-on-demand services. After moving through a series of eligibility criteria, such as over one million subscribers in Australia and a revenue threshold of \$100 million per annum in Australia, the Government opens the floor to debate on the appropriate level of local content investment, highlighting “as a guide to a potentially appropriate level,” that the Government has recently cut the local content obligation for pay-TV to 5% from 10% (DITRDC 2020, p. 32). The investment would be monitored and, if insufficient over a two-year period, a mandatory investment obligation would be introduced.

The Green Paper starts with the fundamental disruptive drivers that necessitate a focus on both platforms and SVODs. “The business model for free-to-air television in Australia is increasingly challenged. The trend is clear over the last decade. Viewer numbers are down sharply; in turn so is advertising revenue. This is mainly due to intense competition from large, usually overseas-based, internet services. These include social media platforms like Facebook and YouTube as well as Subscription Video-on-Demand (SVOD) services like Netflix, Amazon Prime, and Disney+” (DITRDC 2020, p. 4). It is noteworthy that this is regardless of whether platforms and SVODs operate in different consumer markets and operate different business models (advertising, or subscription). No matter the business model or content form, the impact is clear.

Linking back to the originating document of this thrust of Australian media policy reform, the Green Paper notes that “as the ACCC pointed out, digital platforms like Facebook and Google and the SVOD services like Netflix, Amazon Prime and Disney+ do not face the regulation which is imposed on free-to-air television. Yet they are competing for the same eyeballs and, in many cases, the same pool of revenue” (DITRDC 2020, p. 4). Again, whatever differences in service provision, the revenue question is based upon attention from consumers, and both SVODs and platforms compete for the same limited pool of attention. Policy cannot avoid dealing with the collapse of differences between traditional broadcasting entertainment and news media, whether press or broadcasting, with a converged advertising market shared by all parties increasingly captured by the likes of Facebook and Google.

The positioning of the policy challenge as deriving from “large, overseas-based, internet services” (DITRDC 2020, p. 4) echoes the issues



raised in *Canada's Communications Future* and the EU's suite of regulatory instruments, most recently the AVMSD. The foreign status is pertinent, not because of xenophobia or a desire to roll back commitment to foreign investment per se but because these foreign entities have so impacted the ability of national markets to operate in the national public interest.

The Green Paper lays out two new funding sources for endangered content. The rationale for them crosses the platform-SVOD divide. The Create Australia Screen Trust (CAST) and Public Interest News Gathering Trust (PING) would respectively fund Australian drama content and Australian public interest news content (DITRDC 2020, pp. 27–28). Both CAST and PING would receive funding from the one-off spectrum sale, with PING already partially funded. The funding of these trusts demonstrates a recognition that issues of local content regulation bridge the platform and SVOD divides and cannot be kept as solely the remit of cultural audiovisual services.

## CONCLUSION

What is the value of looking at state actor initiatives across the platform-SVOD divide? This chapter compares how state actors in major Western democracies are approaching the converging tech and culture regulatory issues surrounding audio and audiovisual services. Our case study analysis of unfolding regulatory initiatives in the EU, Canada, and Australia has demonstrated that a common strand of purpose is being applied by policy actors to work within this field. Indeed, there may be policy coordination and transfer, although that is (intentionally) hard to determine. Overarching rationales, such as the Australian positioning of the policy challenge as arising from “large, usually overseas-based, internet services” and the Canadian proposition that “that all media content undertakings that benefit from the Canadian media communications sector contribute to it in an equitable manner” programmatically cross the SVOD and platform divide. In the EU, we see these broader rationales leading to holistic policy development, like that embodied by the AVMSD. Across the platform-SVOD divide, there are four major pillars of interacting policymaking—the *social*, *infosphere*, *competition*, and *cultural*. Even when state actors work on parallel tracks to address matters involving these pillars, they use the momentum created around one or more pillars to activate others. Well-established silos that have separated policy issues arising

in these four pillars are collapsing under the weight of what has come to be known as the ‘platform society’ (van Dijck et al. 2018).

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# Regulating Discoverability in Subscription Video-on-Demand Services

*Ramon Lobato and Alexa Scarlata*

## INTRODUCTION

In recent years, the growing popularity of services such as Netflix, Amazon Prime Video, and Disney+—along with hundreds of other national and regional subscription video-on-demand (SVOD) platforms that provide access to online libraries of film and television content—has raised complex challenges for policymakers. Established policy approaches in a range of areas including audiovisual licensing, classification, censorship, and local production support are now being disrupted as governments grapple with the “Netflix effect” and its implications for national markets and institutions (Lobato 2019; Kostovska et al. 2020; García Leiva and Albornoz 2021). Meanwhile, consumption practices are also changing as the algorithmically curated interfaces of SVOD services invite

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audiences to discover content in new ways. In particular, the use of personalised recommendation and other algorithmic filtering techniques has prompted discussion of how SVODs manage the visibility of different kinds of content and whether these discovery environments require a policy response.

This chapter explores how discoverability has emerged as a topic of debate, specifically in relation to SVOD services, and how this is connected to other precedents in audiovisual law and policy such as prominence regulation. We examine how key territories are responding to the challenge of ensuring discoverability of nationally significant content, including public-service broadcaster (PSB) content, local content, and minority-language content. We also reflect on the many tensions inherent in this area of policy—which exists at the interface of media and platform regulation—and consider some of the normative questions raised when governments seek to intervene in audiences' content choices.

To begin, let us offer a hypothetical example to illustrate what is at stake in this topic. Consider the following scenario: a viewer comes home from work and switches on her Samsung smart TV with the aim of watching the movie *Yesterday*, which has been enthusiastically recommended by a friend. She opens her Amazon Prime Video app but cannot find the movie in the catalog, due to incorrectly spelling the title in the search bar. She then closes Amazon Prime Video and opens Netflix instead, entering the same search term. Her query generates a screen full of recommended titles including an original Netflix series with a strong female lead (*The Queen's Gambit*) which grabs her interest. She selects *The Queen's Gambit* and watches several episodes. Exiting the app, she notices that *The Queen's Gambit* is now promoted on her smart TV's home screen, alongside other content recommendations generated by Samsung and its commercial partners. In contrast, recent shows that she has watched on her local PSB do not appear in this recommended row, because these PSBs do not have commercial agreements with Samsung. The following day, when she switches on her smart TV, she notices that both her TV home screen and the Netflix app are suggesting other Netflix originals with strong female leads, including *Emily in Paris* and *Cable Girls*. These various recommendations lead her to view and enjoy further Netflix original series of which she was previously unaware.

This hypothetical example illustrates the power of interface design elements, especially personalised recommendations, to guide users in their content choices and thus to shape their media experiences. Within

a short space of time, our user’s actions generated a dense, multi-layered discovery environment—a ‘dynamically unfolding, personalized architecture of choice’ (McKelvey and Hunt 2019: 2; citing Yeung 2016)—comprising interconnected recommendation and search functions across multiple apps and the smart TV operating system. Importantly, there is no singular “algorithmic logic” at work here; instead, we find a more complex amalgam of discovery mechanisms that interact to serve particular commercial objectives. These mechanisms include:

- service-level discovery (the recommender systems, browsing categories, and search engines of Netflix and Amazon Prime Video)
- hardware-level discovery (the appearance of particular titles on the smart TV home screen after the user has exited the app)
- active search (querying a specific title)
- passive or accidental discovery (clicking on a recommended title following an unsuccessful search query)
- organic search results (relevant to the user’s query)
- prioritized results (strategic “push” promotion of particular content such as *The Queen’s Gambit*)
- personalised elements tailored specifically to the user’s data profile, and
- universal elements that appear to all users of the SVOD service.

These discovery elements interact in complex ways which cannot be reduced to a catch-all term such as “algorithmic”. Discoverability is more complex than this, because it comprises both human and machine-generated decisions. Strategic objectives underlying the discoverability architecture of SVOD services and the connected TV platforms in which they operate range from subscriber satisfaction, retention and data capture through to promotion of original content and lucrative commercial partnership agreements (such as pre-installation and integration deals between Netflix and TV manufacturers). The policy questions for regulators are therefore multiple and interrelated. Who has power in the above scenario—the user, the SVOD service or the smart TV? To what extent do familiar policy concepts such as media access, choice, selection, and diversity make sense here? What combination of “push” and “pull” characterises these discovery environments? These are some of the

challenging questions that underwrite the current policy discussion about discoverability, to which we now turn our attention.

## DEFINING DISCOVERABILITY

Discoverability refers to the ‘likelihood of discovery’ of particular content within a digital interface, and how this is shaped by ‘industry dynamics, strategies, negotiations and curation’ (Mazzoli and Tambini 2020: 12). In the case of SVOD services, there are two key considerations:

1. how SVOD services present particular content within their home screens, search, and recommendations (e.g., how easy or difficult it is to discover certain titles in your app, and the relative prioritisation of certain titles—such as originals—over others); and
2. how connected TV devices such as smart TVs present SVOD apps and content within their own interfaces (e.g., how easy or difficult it is to find SVOD apps and content in your device, as opposed to other video services).

The first consideration, discoverability within SVOD apps, is an area of policy concern for those countries where there is a policy tradition of prioritising local, national or regional content. The growing take-up of SVOD services in many nations means that certain forms of screen content that have traditionally been of special policy interest—such as national cinema and television, minority- or majority-language content, and documentaries—are no longer guaranteed the visibility that they would have received in the broadcast schedule. A key question for regulators is therefore how to enhance discoverability of this public-interest content within SVOD services, and what obligations on services might be necessary to achieve this aim.

The second consideration, discoverability of SVOD apps and content, is a policy problem in a different sense. This kind of discoverability refers to the competition between different kinds of video services, both public and private, for prime “real estate” within the connected TV device interface—e.g., the largest, most visible tiles on the device’s home screen. This is often referred to as prominence, a concept with a long history within British and European media law, which we discuss in more detail below.



While their regulatory contexts are distinct, these two terms (discoverability and prominence) cannot be easily disentangled. From a user perspective the core issue is essentially the same: how the discovery environment is constructed, what content is available, and the differential visibility of this content.

Current design norms mean that discoverability is constructed through a range of different mechanisms including home screens, recommendation rows, content carousels, search results, autoplay trailers, remote control buttons, “previously watched” reminders, and push notifications (Ofcom 2019; Ofcom and MTM 2019). The cumulative effect of these is to make certain content and/or apps more or less visible than others, with the implication that user attention is guided—strongly or weakly—towards particular options. Discoverability in digital interfaces is therefore ‘a new and evolving locus of media circulation power’ (Hesmondhalgh and Lotz 2020: 393) because it holds the potential ‘to direct audiences toward certain kinds of experience and content, and therefore away from others’ (p. 388). Numerous stakeholders naturally have an interest in discoverability and its regulation, including national governments, which prefer particular news sources and linguistic content to be more discoverable than others, for political, industrial or civic reasons; public-service broadcasters, which seek to retain the national prominence hitherto afforded by broadcast spectrum allocation; and civil society groups, which may seek prioritisation of public-interest content including minority-language, community, independent, or culturally diverse programming.

As a policy concern, discoverability is not limited to video; the topic has a larger historical resonance that needs to be considered. For example, debates about the sequencing of stories in newspapers, the selective display of media goods in retail stores, and the filtering of web search—all fundamentally matters of “discoverability”—have long been a feature of media, consumer and internet policy (Grimmelmann 2011; McKelvey and Hunt 2019; Herbert and Johnson 2019). Similarly, today’s debates about fake news, misinformation and disinformation debates can also be described as discoverability problems, in the sense that they involve algorithmic and human amplification of particular voices over others (Gillespie 2018; Noble 2018). Seen from this perspective, discoverability is more than a matter of interface design. At its core, it is about the politics of visibility in media distribution (Garnham 1990; Cubitt 2005; Lobato 2012; Braun 2015).

## POLITICS AND POLICY IN DISCOVERABILITY

The topic of discoverability is naturally challenging for liberal-democratic media policy because it appears to involve an intervention—algorithmic or otherwise—into individuals’ private consumption. From the perspective of core liberal values such as freedom of choice, such interventions are potentially problematic. However, it is important to note that forms of prioritisation have long been present in national media systems. Public-service media, local content, indigenous content, majority-language content and minority-language content have all been afforded special treatment on public-interest grounds. Enhanced discoverability has historically been achieved through a range of measures, including local content quotas and the establishment of specific channels for minority, multicultural and indigenous content. The policy question at the heart of this issue is therefore not about whether or not prioritization should occur. Rather, it is about who makes the decision to prioritize (the state or platforms); what principles guide such prioritization; and how transparent and contestable such decisions are.

In the present age of “internet-distributed television” (Lotz 2017), the technological conditions that resulted in easy discoverability of PSB content in broadcast television—capacity constraints of broadcast spectrum—are weakening. Internet distribution is mostly governed privately through commercial agreements, terms of service, and software design. Regulators must now decide whether, and how, to extend these earlier traditions of enhanced discoverability into this new environment. Having partly displaced broadcast and pay-TV channels as major audiovisual distributors, should SVODs be subject to the same expectations and obligations that previously applied to those services?

The tradition of prominence regulation in European and British broadcast law is of particular relevance here (García Leiva 2020). Prominence rules govern electronic programme guide (EPG) design and channel numbering, with the goal of maintaining a privileged position in the public consciousness for PSBs and other national institutions. In the United Kingdom, BBC One is allocated the first channel number (1), BBC Two the second (2), and so on. This tradition of prominence rules—which have long considered screen interfaces an appropriate surface for media policy—explains why many countries are hesitant to allow platforms alone to decide these matters. Current debates about discoverability build on these historical foundations, although the concept of prominence

appears to be giving way to a wider notion of discoverability that can include interfaces such as voice search, and the diverse ‘routes to content’ (Johnson et al. 2020) on digital platforms. As we now examine, there is no clear consensus on whether and how to extend prominence traditions to encompass SVOD services and connected TV platforms. Different countries are pursuing different models, in line with their own national circumstances.

## REGULATORY DEVELOPMENTS IN THE EUROPEAN UNION, CANADA AND BRITAIN

Presently, the European Union, United Kingdom and Canada are the key jurisdictions in which SVOD discoverability has been most extensively debated. In each case, specific measures for video services are being implemented or considered. Policy objectives across these territories vary, with emphasis falling on discoverability of different content types including European content, national content, subnational content, and public-service broadcaster content. We now consider each territory and the particular ways in which discoverability surfaces as a policy concern.

### EUROPEAN UNION

Discoverability debates in Europe take place against a historical backdrop of prominence rules for audiovisual services, an area of policy which has been subject to ‘a vague and heterogeneous implementation’ by different EU member states (García Leiva 2020: 9). Prominence rules have been in place since the 1990s, with an initial focus on the layout of EPGs (van der Sloot 2012; García Leiva 2020).

The 2018 revision of the Audiovisual Media Services Directive (AVMSD) (European Parliament and Council of the European Union 2018) expanded the concept of prominence to include the promotion of European content within online video services. Responding to concerns about US-based SVODs flooding European screens with Hollywood content, the 2018 AVMSD revision introduced new obligations for major SVOD services including Netflix and Amazon Prime Video. Two measures came into effect: a minimum catalog quota of 30% European content, and a requirement to provide “sufficient prominence” for these European titles. The Directive does not mandate specific prominence measures but instead notes several possibilities:

Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service’s catalogue, for example by using banners or similar tools. (AVMSD 2018 revision, recital 35).

The implementation and enforcement of these prominence rules will be a matter for EU member states. At the time of writing, member states ‘are still in the process of adopting their national prominence frameworks and there are significant differences in the implementations of the AVMS Directive’ (Mazzoli and Tambini 2020: 18–19). Guidance on prominence measures is being prepared by the European Regulators Group for Audiovisual Media Services, which advises the European Commission.

In the meantime, some member states have developed approaches to prominence and discoverability that go beyond the minimum standards laid out in the AVMSD. For example, Germany’s revised Rundfunkstaatsvertrag (Interstate Broadcasting Treaty) specifies a general principle of non-discrimination, such that content cannot be unreasonably hidden, along with an additional provision for positive prioritisation of PSB content and other commercial ‘programmes that contribute to plurality’ (Mazzoli and Tambini 2020: 21).

In summary, the European model of prominence rules—comprising EU-wide minimum standards in the AVMSD, plus additional requirements imposed by member states depending on national circumstance—suggests one possible regulatory template. The European model is not without its problems, of course, notably the inherent power imbalances within the AVMSD’s category of European content (which favours the largest EU nations over smaller nations, due to industry scale and output). Nonetheless, the revised AVMSD offers the most advanced regulatory template currently available and is closely watched by policymakers in other nations for this reason.

## CANADA

The Trudeau government in Canada has also taken steps towards enshrining discoverability as a central element within audiovisual policy.

Current Canadian cultural policy now refers explicitly to the discoverability of national content as a policy objective, not only to its creation and funding. Particular emphasis is placed on discoverability of national content (“Cancon”), including Québécois content.

This policy direction has been building for some time. In 2016 the Canadian Radio-television and Telecommunications Commission (CRTC) held a Discoverability Summit in Toronto. In 2018, it undertook a public consultation about the future of television and released a report (*Harnessing Change: The Future of Programming Distribution in Canada*) which enshrined promotion and discoverability as objectives of national policy, observing that ‘shifting focus from production alone to include the promotion and discoverability of content will be essential to ensure a vibrant domestic market in the future’ (Canadian Radio-television and Telecommunications Commission 2018, n.p.). A review of Canada’s Broadcasting Act—Canada’s Communications Future: Time to Act—was then completed in 2020. Prompted in part by the rapid take-up of Netflix in Canada, the review recommended that major curated video platforms be subject to new obligations including catalogue, discoverability, and transparency requirements, paving the way for new “Netflix laws” to make U.S. streamers more accountable to Canadian cultural policy (Broadcasting and Telecommunications Legislative Review Panel 2020). Nine months later, the Trudeau government tabled draft legislation (Bill C-10) to amend the Broadcasting Act. Bill C-10 sought to introduce a new legislative category of ‘online undertakings’ to apply to hitherto unregulated OTT services, and empowers the CRTC to make orders imposing conditions on ‘the presentation of programs for selection by the public, including the discoverability of Canadian programs’ on such services (Parliament of Canada 2020). At the time of writing, the Bill has not yet been passed into law.

By potentially empowering the CRTC to regulate SVOD content and discoverability, the Canadian approach signals a determination to bring discoverability under the auspices of national cultural policy. In practice, much will depend on the passage of Bill C-10 through Parliament and how the CRTC interprets its principles (and, in the case of Cancon catalog requirements, on the public hearings that will be part of that decision-making process). Key decisions about the details of discoverability regulation—such as whether SVODs need to include a Canadian content row or a minimum proportion of recommended Cancon titles, et cetera—will be deferred to the CRTC.

## UNITED KINGDOM

While the focus in Canada and Europe has been on the presentation of national or regional content within SVOD services, in Britain the debate has played out a little differently. The key issue has been the relative prominence of SVODs versus PSB services in connected TV devices (i.e., how discoverable BBC, ITV, Channel 4 and Channel 5 content is, in relation to Netflix or Amazon content). In recent years a chorus of voices including PSBs, the UK media regulator Ofcom, and various civil society groups have called for updated prominence rules to ensure PSB content is not “crowded out” in smart TV home screens and other digital interfaces, and can therefore compete with what former BBC Director-General Tony Hall described as the ‘the huge gas giants of the US—the Netflixes, Apples, and Amazons’ (Hall 2017).

British PSBs have long campaigned on this issue, which they see as vital to their future survival. In 2018 Hall warned that the UK was ‘sleepwalking towards a world in which children and young people barely encounter PSB content’ (Hall 2018). Representatives from Channel 4 have stated that reforming ‘prominence is the single biggest thing we need to do to safeguard PSB in this country’ (Milton 2020). After a detailed review, Ofcom released a set of recommendations in 2019 for a new framework that ‘safeguards the discoverability of PSB linear channels on the homepage’ (Ofcom 2019: 37). The aim of these proposals was to ensure that BBC and other PSB apps are guaranteed prime position on the home screens of all connected TV devices sold in the UK, including TVs and game consoles. Recognising the new importance of voice search and recommendation to discovery, Ofcom also recommended that ‘the new prominence framework’s definition of PSB on-demand services includes disaggregated PSB content (e.g. in recommendation and search results) because these routes to content are likely to become more important to viewers over time’ (40). Later that year, a House of Lords Committee Inquiry and Report (*Public service broadcasting: As vital as ever*) endorsed Ofcom’s findings, calling for a new, legislated ‘prominence framework in line with Ofcom’s recommendations’ (House of Lords Select Committee on Communications and Digital 2019: 60). At the time of writing, no such legislation has yet been introduced into parliament. It therefore remains to be seen how much of this policy agenda will make its way into legislation in the United Kingdom.

## REGULATORY OPTIONS

These ongoing debates in Europe, Canada and the United Kingdom reflect a growing awareness of the importance of discoverability and prominence in media, audiovisual and internet regulation. Elsewhere, debate about these issues is also brewing. In Colombia, regulators have decreed that SVODs must ‘make Colombian works easily available and clearly identifiable in their catalogues’ (García Leiva 2020). The Australian government is requiring SVOD services to report on local content provision and is considering introducing discoverability rules to enhance local content discovery in SVOD interfaces (Australian Communications and Media Authority and Screen Australia 2020).

Clearly, there is no one-size-fits-all solution because the policy objectives underlying these various proposals differ from country to country. In Canada and Australia, for example, the emphasis is on visibility of local content in SVODs. In the EU, the AVMSD revisions focus on visibility of regional (European) content. In the UK, the debate focuses on discoverability of PSBs in relation to SVODs.

Importantly, all the various policy approaches discussed above recognise the need for regulatory flexibility. Regulators are rightly wary of introducing measures that will be difficult to implement or risk rapid obsolescence due to changes in technology and business models. None of the aforementioned proposals in the UK, Canada or EU have established specific discoverability requirements in legislation; instead, they lay out general principles and examples and leave the finer details for regulators to decide, often in consultation with industry. This seems the most appropriate model for effective regulation, although it relies on the capacity of media regulators in each country to develop and enforce appropriate measures.

Reading across these three case studies, we see that there are a range of possible policy mechanisms which vary in their costs, operational implications, and degree of controversy (Table 11.1). At one end of the spectrum we find some “easy options” such as requiring metadata labelling of local content to enhance searchability (e.g., when a user searches for national content). Encouraging SVOD services to maintain consistent and detailed metadata on titles is relatively uncontroversial and benefits all parties. Our research in the Australian context has consistently found that although national labelling in metadata varies enormously between

**Table 11.1**  
Mechanisms for  
enhancing  
discoverability

|  | <i>Acceptable to industry (lower pushback)</i> | <i>Contentious (greater pushback)</i>   |
|--|--|---|
|  | Reporting requirements                         | Catalogue quotas                        |
|  | Metadata standards                             | Prioritizing content in search results  |
|  | Discoverability audits by regulators           | Prioritizing content in recommendations |
|  | Labelling of content                           | Algorithm transparency                  |
|  | Curated content collections/pages/rows         | Non-discrimination rules                |
|  | Dedicated promotion of priority content        |   |

services, good quality metadata makes a significant difference to discoverability of national content via search (Lobato and Scarlata 2019, 2020). Other relatively easy options to enhance priority content discoverability include dedicated landing pages and curated content collections, which can be achieved fairly easily by most SVOD services.

The more challenging measures are those that require changes to system design, especially search and recommendation algorithms, or disclosure of commercially sensitive information. Such changes are fiercely resisted by SVODs and connected TV platforms. Submissions to the UK House of Lords Public Service Broadcasting (PSB) in the Age of Video on Demand Inquiry (2019) by Samsung, LG and Sky argued that introducing prominence/discoverability requirements will degrade the user experience, adversely affect interface personalization, and undermine system integrity. These companies claim that heavy-handed discoverability regulation will impose unreasonable costs for industry and will dampen future innovation in service and interface design.

For example, the industry alliance Digital Europe—which represents technology and consumer electronics firms—argues that ‘device compliance requirements must be light touch and not prescribe how CE [Conformité Européenne] manufacturers design their UIs, which advanced features must be included, nor excessively define performance capability’ (Digital Europe 2016: 1). Netflix has also argued against regulatory intervention in its recommender system. In its submissions to government inquiries Netflix emphasises the operational integrity of its recommender, which ‘provides a personal experience that allows members to discover the most pleasing titles based on their personal preferences’ (2017: 2), and warns against government intervention in these systems.



It argues that Netflix’s own discoverability design (including its recommendation algorithms) is the best way to ensure unbiased and effective matching of content with consumer tastes.

## CHALLENGES AND PITFALLS

The challenges inherent in imposing national and regional laws on global technology firms should not be underestimated (Flew et al. 2016). Major global SVODs such as Netflix and Amazon Prime Video design their systems at global scale and have little time for national regulation that departs from industry norms of product and software development. Likewise, commercial agreements about pre-installation and prominence of apps on smart TVs are typically negotiated on a global basis between manufacturers and SVOD services. For example, a particular SVOD might pay Samsung a certain amount of money to have their app pre-installed and highly discoverable on all Samsung TV sets for a certain period (Ofcom and MTM 2019). For these companies, the prospect of particular nation-states introducing discoverability or prominence rules that might undermine these agreements is highly undesirable. Depending on the compliance costs, they may simply ignore national regulations.

Another option is for firms to withdraw from particular markets where regulatory burdens are too high. Google—whose Android TV is one of the major platforms that would likely be impacted by renovated PSB prominence rules—has employed this negotiating tactic of “play by our rules or lose our services” several times already: in Spain, with the withdrawal of Google News in 2014; in Denmark, with the removal of Danish music from YouTube following a dispute with collecting societies in 2020; and in Australia, with the threatened withdrawal of Google Search, in response to the government’s mandatory news media bargaining code for digital platforms, in 2021.

While large jurisdictions have an obvious advantage here over smaller nations striking out on their own, the prospects for ensuring compliance by the major SVOD services and connected TV platforms are by no means certain. There is no guarantee that discoverability rules introduced anywhere in the world will be enforceable in any straightforward or consistent way. Yet the alternative—doing nothing—is also unappealing to many countries. Given the rapid migration of audiences from linear services to SVODs and the widespread take-up of connected TV hardware, governments realise that they cannot simply opt out of

the discoverability space without compromising longstanding media and cultural policy objectives.

### OTHER CONSIDERATIONS IN DISCOVERABILITY REGULATION

As the discoverability debate evolves, it will be important to look beyond the loudest voices (such as PSBs and the major SVODs) and consult other constituencies whose views have so far not been widely heard. For example, one group to consider is content creators. Do film directors, for example, welcome the prospect of special treatment for their content in SVOD interfaces, or do they prefer to roll the dice and see it succeed (or fail) on its own strength within the SVOD catalogue or platform? In the case of small-nation creators, do they want their content to be included in special “local content rows” or similar—or would this be an unwelcome form of ghettoisation that might turn off viewers? How do they feel about their work being labelled as “local content” as opposed to “premium originals”? These are some of the delicate considerations that need to be factored into decision-making.

Another constituency in these policy debates is the audience itself. Do audiences want particular content types to be prioritised over others? How do they feel about institutions—whether platforms or governments—intervening in their content choices? There is surprisingly little empirical research on audience attitudes to discoverability and prioritisation, with the effect that these attitudes are not well understood. Empirical audience research in the UK and US points to a remarkably diverse array of discovery practices among audiences, suggesting that legacy promotion (including word of mouth and recommendation from friends) is often as consequential as algorithmic recommendation (Johnson et al. 2020; Frey in press).

Policy debates about discoverability must also take into account the larger ethical and sociological dimensions of the topic. Regulation of discoverability is inherently controversial because it appears to involve intervention into the private content choices of citizens and consumers. Constant reflection is therefore required on the rationales and mechanisms for such intervention. This includes acknowledging the ideological tensions inherent in the idea of regulating discoverability, as well as the frictions between different policy objectives.

For example, García Leiva (2020: 11) notes the inherent contradiction between cultural policy and competition policy objectives, observing that regulation cannot ‘effectively guarantee prominence for certain contents without colliding with other objectives (notably those related to competition), nor, on the contrary, could a light-touch approach be possible without putting a strain on other principles (notably the protection of diversity)’. As García Leiva observes, there are risks on both sides. A pure *laissez-faire* model is also likely to be unsatisfactory over the long term, because the kinds of nationally significant content accorded special value in liberal-democratic broadcast regulation—including local, minority and diverse content—may not secure the same protection afforded by prior broadcast laws. At the other extreme, heavy-handed intervention into discoverability has many risks. It may end up annoying consumers, adding extra costs for industry, and will inevitably involve “picking winners” among services or content, in ways that may clash with prevalent values of choice and freedom in the online environment, and raising the twin spectres of paternalism and propaganda.

The political context around discoverability regulation is crucial. So far, the territories that have most actively developed discoverability policy for SVODs and other video services are all liberal democracies: the European Union, Canada, and United Kingdom. However, we cannot take a liberal, pluralist cosmology for granted. There is, of course, a long tradition among illiberal states of enhancing discoverability of national propaganda. Hence the outcome of policy interventions into discoverability is likely to be determined by the social and political context in which such policies are developed. Future discoverability policy may conceivably serve nationalist rather than localist objectives or may aid propagandists rather than PSBs (categories which are not always mutually exclusive). This is not, in itself, an argument against policy intervention—because the costs of inaction may be just as great. It does, however, remind us that rationales for and risks of intervention are not stable from country to country. Policy mechanisms must also be rigorously defined to minimise future abuse and scope-creep.

This noted, discoverability should not be conceived as a zero-sum contest between state and market. Both state and market are capable of positive and negative “discrimination”, for good or ill. Nor should we begin with a romantic idea of the sovereign user as existing outside the distribution system, because any system is always-already constructed

by the range of available choices, and personal taste develops in co-dependency with these options and choices. Hence policy debates should reject the purist notion of either the state or the platform “biasing” personal choice, but instead should proceed from the understanding that our choices can never be disentangled from the underlying systems—both human and algorithmic—that construct the range of available options.

As legal scholar James Grimmelman (2011) argued in relation to search engines, efficient distribution of information always requires some kind of discrimination and thus some degree of enhanced or degraded discoverability. The notion that any algorithm—or any media distribution environment—can be fully free of “bias” is inherently problematic. This is, perhaps, one area where policy debates may benefit from the insights of media, cultural and communication experts for whom such cultural contradictions are a core business.

In conclusion, all forms of discoverability policy—and indeed, all discoverability design features—involve some kind of discriminatory intervention into the realm of consumption. Yet this realm of consumption cannot exist—indeed, is not conceivable—outside of discrimination. The question is therefore not about whether discrimination should occur, but by whom and according to what principles such decisions should be made. In the case of SVODs, we would conclude that maintaining some limited capacity for state intervention in discoverability is essential, precisely because these environments have already been—and will continue to be—organised to serve commercial purposes and not merely the personal preferences of users.

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# The Broken Internet and Platform Regulation: Promises and Perils

*Dwayne Winseck*

## INTRODUCTION

We are at a watershed moment in the development of the Internet precipitated by intense and ongoing criticism of a relatively small number of global Internet giants—Google, Apple, Facebook, Amazon, Microsoft, and Netflix (hereafter called GAFAM+). Google and Facebook’s ad-driven business models, in particular, have come under fire for causing a “crisis of journalism”, wrecking the media industries and destroying democracy. These firms also stand accused of remaking the Internet in their image—a centralized Internet ruled by a few search engines, social media services, and digital media content aggregation platforms (Noam, 2016). Their efforts to rewire the Internet for hyper-targeted advertising and messaging, now hijacked by dis/misinformation operations and used to fan the flames of political polarization, promote hate, abuse and violence, have also come under intense scrutiny (Benkler, Faris and Roberts 2018; Ghosh and Scott 2018; Mckelvey 2018).

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In response, governments have convened a dizzying number of public policy inquiries into the platforms (Winseck and Puppis 2020). Following one such inquiry, in 2021 the Australian government passed the *News Media and Digital Platforms Mandatory Bargaining Code* that seeks to have Google and Facebook pay Australian media companies for the news content they use as part of their online search and social media services. While that law makes for a popular tale of a small nation state using its sovereignty to curb the power of the American platform giants, is it really the model for a new generation of Internet regulations for the public interest and democracy that many are holding it up to be? For their part, the Internet giants—especially Google and Facebook in the Australian case—are fighting tooth-and-nail against any such efforts, with their collective spending on lobbying in Washington soaring from \$12.2 million in 2010 to \$65 million in 2019 to do just that (OpenSecrets.org 2020), yet all the while taking public stances that openly invite governments to create new rules for the Internet.

This chapter agrees that a forceful response to the platforms is long overdue but raises concerns that the case against GAFAM+ has become orthodoxy, anchored in misguided conceptualizations of ‘big tech’, cherry-picked evidence and a tendency to see these firms as the cause of all perceived woes. Working from the cultural industries approach to political economy, I argue that there is a crisis of journalism but argue that GAFAM+ are *not* to blame for it, and that in fact most media sectors are thriving. I also argue that, while the ongoing attempt to pin the label of media company on the digital platforms may be a politically expedient stepping-stone to justify regulating them based on broadcast standards, this approach rests on superficial analogies between broadcasters/media companies and digital platforms. It ignores the fact that the media industries have developed in close proximity to the vastly larger telecoms, electrical equipment manufacturing, consumer electronics and banking firms since the mid-nineteenth century.

I argue that, too often, media studies scholars neglect this more encompassing history by their focus on the mass media of the twentieth century, while the focus of platform studies on the self-contained history of computing and information systems over the last three- to four decades has a similar affect (Nieborg and Helmond 2019). In contrast, I focus on several rounds of Goliath versus Goliath battles between AT&T, Western Union and “the Radio and Electrical Group” (e.g. GE, RCA, Westinghouse, etc.) from the late 1870s through to the end of the 1930s that had

effects on the economy, media and society that were at least as significant for the rest of the twentieth century as the impact that the platformization of the Internet (Nieborg and Helmond 2019) is having today. The last sections of this chapter offer four principles of structural and behavioural regulation drawn from this history as guides for what a new generation of internet regulation could look like in our own times: structural separation (break-ups), line of business restrictions (firewalls), public obligations and public alternatives (Rahman 2018).

### THE CONTOURS OF “DIGITAL DOMINANCE”

By the end of 2018, the combined market capitalization of the GAFAM+ group of internet giants had reached \$3.5 trillion.<sup>1</sup> That level was roughly four times the market capitalization of the big six telecoms and media operators in the US.<sup>2</sup> The platforms had combined assets worth more than a trillion dollars and revenue of \$825.6 billion in 2018 (Company Annual Reports). The upshot, according to Diane Coyle (2018), is that “these giant platforms now go far beyond any other commercial entities in the scale and dominance they have achieved” (57).

In their respective markets, GAFAM+ paint a picture of dominance. In possibly the most iconic example, Google is responsible for 92.5% of all searches worldwide, 88% in the US, similar levels in Canada and 95% in Australia.<sup>3</sup> But this story extends far beyond search products. In fact, all core elements of the “platform Internet” are highly concentrated, with concentration levels (using standard economic measures, i.e. CR4 and HHI scores) typically double to triple the threshold above which concentration concerns are registered.<sup>4</sup>

<sup>1</sup> Microsoft, \$770.6 billion; Amazon, \$754 billion; Apple, \$740.1 billion; Alphabet (Google’s parent firm), \$726.8 billion; Facebook \$376.1 billion; and Netflix, \$121 billion.

<sup>2</sup> AT&T, Verizon, Disney, Comcast, Charter, and T-Mobile.

<sup>3</sup> This search dominance underpins the breadth of Google’s products: Android, Gmail, YouTube, Maps, Photos, and Docs, have over a billion users each. Google’s Android and Apple’s iOS mobile operating systems constitute a duopoly, with three-quarters of smartphones worldwide being Android-based and nearly all the rest (22%) being Apple’s iconic iPhone.

<sup>4</sup> This chapter uses Concentration Ratios (CR) and the Herfindahl–Hirschman Index (HHI) to determine whether a market is concentrated. The CR method measures the top four firms’ share in a market, with a result greater than 50% evidence of a concentrated market. The HHI method squares the market share of each firm in a market and sums

The extent of Google and Facebook’s clout is most obvious in the Internet advertising market.<sup>5</sup> Online advertising currently accounts for around half of all advertising spending in Australia, Canada and the US. As that figure increases, however, the digital duopoly’s grip on total advertising spending is steadily tightening. However telecommunications giants AT&T, Verizon and Bell Canada are also pursuing new vectors of vertical integration into the “big data” economy through acquisitions of digital advertising and data analytics firms to build their own advertising exchanges to rival Google and Facebook.<sup>6</sup>

The recent Australian Competition and Consumer Commission’s (ACCC) (2019) *Digital Platform Report* found that Australians spend half of their time online using the services of Google (20.5%), Facebook (18.6%), Microsoft (3.4%), Snapchat (2.4%), Apple (2.1%) and Australian’s main news media outlets (2.3%) (ACCC 2019: 6). If Australia’s figures are a proxy for the US, Americans spend about half of their time on the Internet using these services (Nielsen 2019: 3). What people do with the remaining half of their time online, however, the ACCC does not say.

Google, Facebook and Microsoft have also acquired significant ownership stakes in thirteen trans-oceanic submarine cables, while cloud computing infrastructure is effectively controlled by four companies.<sup>7</sup> This dominance of the ‘hidden infrastructure of the internet’ underpins the assertion that “Google and FB have direct influence over 70% + of

them. An HHI < 1,500 is said to be competitive, an HHI between 1,500–2,500 a sign of moderate concentration and an HHI > 2,500 a sign of a highly concentrated market (CMCRP 2020: 10). The HHI score for the app store market in 2018 was 5,700.

<sup>5</sup> In the US in 2019, for example, Google controlled 45% of the US \$107.5 billion online advertising market, while Facebook accounted for 24%. In Canada, combined, the two companies accounted for 80% of the \$8.8 billion (CDN) Internet advertising market in 2019. In Australia, they controlled 61% of the \$8.8 billion (AUS) online advertising market (ACCC 2019: 91). Internationally, they accounted for close to two-thirds of the \$269.5 billion online ad market in 2018.

<sup>6</sup> AT&T acquired AppNexus in 2019 (renamed Xandr), Verizon bought Yahoo! in 2018 (rebranded as Oath), and Bell acquired data analytics firm Environics in 2020 to augment what it had already built up in this area after acquiring two of the biggest media companies in Canada, CTV and Astral Media, in 2010 and 2013, respectively.

<sup>7</sup> Amazon’s AWS (42%), Microsoft’s Azure (17%), Google Cloud (9.5%) and Alibaba (9.5%) (Chapel, 2019).

Internet traffic” (Stalz 2017), an implausible but oft repeated claim (Flew, Martin and Suzor 2019: 33; Owen 2019: 3).<sup>8</sup>

### ARE GAFAM + TO BLAME FOR THE CRISIS OF JOURNALISM?

Attempts to legitimate a new era of Internet also often rest on assertions that the GAFAM+ group of Internet giants are *the* cause of the twin crises in journalism and media. Beginning with journalism, Stoller, Miller and Teachout (2020), for example, state the case bluntly: “The primary cause of the collapse [of] local and independent journalism... is Facebook and Google’s control of digital advertising revenue” (8). The Open Markets Institute also crystallizes the nub of the case:

We cannot understate the threat monopoly poses to the free press.... Google and Facebook are breaking the news. It’s time our policymakers and regulators do their jobs and break up these monopolies, before they destroy our democracy (Open Markets 2019).

The evidence that newspapers are in crisis seems clear. Revenue for the newspaper industry in the US fell by over half between 2006 and 2019. The same is true in Canada and Australia. That Facebook and Google’s revenues in the US and Canada are now double and triple that of the newspaper industry as a whole in both countries, respectively, seems to further prove the point.<sup>9</sup>

<sup>8</sup> The figure is implausible because it is based on mobile web traffic in Latin America. Mobile traffic, however, only counts for roughly 10% of all Internet traffic and web-based traffic only makes up about 13% of Internet traffic. Generalizing from mobile web use in Latin America to the Internet in the rest of the world is also problematic. Figures from Sandvine (2019) breaks down the IT giants’ share of world Internet traffic as follows: Google, 12%; Netflix accounts for 11.4%, Facebook 7.8%, Microsoft 5%, Apple 4%, and Amazon 2.9% (17). Add the digital games operations of Sony, Tencent (e.g. League of Legends) and Steam (e.g. Call of Duty), and streaming music service, Spotify, and the “big ten” global brand Internet services account for about half of all Internet traffic—a big number, to be sure, but far shy of the 70% figure attributed to Google and Facebook referred to a moment ago (17). Lastly, while the IT giants have greatly expanded their ownership of international submarine Internet cables, they still control approximately just 4% of the transoceanic Internet cable capacity.

<sup>9</sup> In addition, there were 38,000 newspaper journalists working in the US in 2019—half the level in 2006. In Canada, the number of journalists has plunged from 13,000 in

However, blaming Google and Facebook as *the* cause for newspapers' dire straits is at best a partial explanation. Circulation numbers in the US, Canada and Australia peaked in mid- to late-1980s and have fallen ever since. Circulation revenue in all three countries also began to fall in the early 2000s. The same is true for newspaper advertising revenue: it continued to rise until 2000, fell after the dot.com bubble burst, and truly collapsed after the financial crisis hit of 2008.

In sum, the woes facing 'legacy' media sectors started long before Google and Facebook came along. To compound these woes, over the last decade, "legacy media" firms relying on advertising have also been battling Google and Facebook for a stagnant or shrinking pool of ad dollars.<sup>10</sup> This trend reflects the fact that advertising spending hinges on the state of the economy (see Picard 2011). However, this structural decline in advertising spending has been supplanted by the tendency to focus on Google and Facebook as the exclusive sources of journalism's crisis, an orthodoxy amongst public inquiries, (many) academics and lobby groups (ACCC 2019; BTLR, 2020; UK 2019a, 2019b; US 2019).

A decade ago, however, when the Internet itself was blamed for killing the press, the charge was refuted by many scholars (Downie and Schudson 2009; McChesney and Nichols, 2010; Picard 2009). Others pointed to self-inflicted wounds brought about by two decades of consolidation, excessive capitalization and bloated debts, hyper-commercialization, and the triumph of corporate values over journalistic norms (McChesney and Nichols 2010; Pickard 2020).

## ARE GAFAM + DESTROYING THE MEDIA INDUSTRIES?

Beyond journalism, GAFAM+ are also blamed for upending the media industries writ large. According to Jonathan Taplin (2017), for example, in the US, the Internet giants have diverted "\$50 billion per year...

2013 to 9,100 in 2019, while in Australia, the ranks of journalists have been cut by nine percent over the decade to 2016 (ACCC 2019).

<sup>10</sup> The ACCC's (2019) *Digital Platform Inquiry* report shows that total advertising revenue peaked at \$17 billion (AUSS) in 2007 and remains below that level now (in real dollar terms) (307). In per capita terms, advertising revenue dropped from an estimated \$817 per capita in 2007 to \$640 last year. In the US, per capita advertising spending peaked at \$598 in 2000, slid over the next decade before slowly rising again, only to restore the turn-of-the-century highs in 2017–2018. In Canada, per capita advertising spending fell after 2008, with levels at that time only restored a decade later.

from the creators of content to the owners of monopoly platforms” (7). Richard Sturges (2019), a former president of the CBC, offers a similarly dismal account for Canada. Many media studies scholars seem to agree (Napoli 2019).

The image of a commercial media system being completely in distress, however, is misleading. Take the music industries, for example. While Taplin points to losses in “recorded music” to buttress his claim, once revenue from the publishing, streaming services, and live concert segments is accounted for, the story changes completely.<sup>11</sup> Revenue for the “total television market”<sup>12</sup> in the US also soared from \$182.1 billion to \$294.3 billion between 2010 and 2019. For digital games, revenue doubled from \$13.7 billion to \$27.2 billion over the same period. Overall, revenue across the US media content sectors rose from \$298 billion in 2008 to \$484.3 billion in 2019. This is a net gain of \$108.6 billion accrued not only alongside the rise of GAFAM+ but against the headwinds of the global financial crisis.

A similar picture emerges for Canada. Revenue across all segments of the television marketplace rose from \$13.4 billion in 2008 to \$17.1 billion in 2019. In addition, revenue for the online music, gaming and app stores has sky-rocketed from \$718.9 million in 2011 to \$5.6 billion in 2019. In total, combined revenue across Canada’s media content sectors grew from \$18.8 billion in 2008 to \$27.7 billion last year. Television and film production investment in Canada also jumped from \$5.4 billion (CDN) in 2008 to a record high of \$9.3 billion in 2019 (Nordicity 2020, Exhibit 1–2). In fact, film and television production have been drive to all-time highs in the US, Canada and EU by the vast growth in the television market and massive increase in spending on television and film production by the streaming services (IBIS 2019a; IBIS 2019b; Spangler 2020; Eurostat 2020).

Underpinning these trends is the reality that subscriber fees and direct purchases are now the core of the media economy. In fact, those revenue sources outstrip advertising revenue by a 3:1 ratio in the US, and 5:1

<sup>11</sup> Revenue for the music industries rose to US \$27.1 billion in 2019 versus the previous all-time high of \$22 billion in 2004. Likewise in Canada, music industry revenues declined from \$1,890 million in 1998 to \$1,589 million in 2014, before climbing again to an all-time high of \$2,355 million in 2019.

<sup>12</sup> Broadcast TV, cable channels, premium channels, VOD, online VOD services, and cable, IPTV and DTH subscriptions.

in Canada (reflecting the more commercialized US media system). Given these realities, the fact that so much of the discourse of crisis is centred on lost advertising, while making generalized claims about the state of the media economy is a classic case of misdirection.

To be sure, the IT behemoths have carved out sizeable spots for themselves in this rapidly enlarged and more complex network media economy, but they do *not* dominate it writ large. For example, while Google and Facebook dominate online advertising, as we saw earlier, they only account for about 6.4% and 3% of the trillion-dollar US media economy, respectively. While Netflix's US revenue reached \$9.5 billion in 2019 (roughly a third of the online video revenue market), its 3.2% stake of the television market is well below that of the "big six" US television giants: AT&T (16%), Comcast (14%), Disney (8.5%), Viacom-CBS (8.2%), Charter (6%), and 21<sup>st</sup> Century Fox (3.9%). Altogether, the IT giants' combined domestic media-related revenue accounted for 13.6% of the US media economy in 2019. In contrast, AT&T—the largest communications and media conglomerate in the US—single-handedly had a 15% share of the huge US media economy and its domestic revenue (\$143.9 billion) was more than the GAFAM+ group's US media-related revenues combined (i.e. \$139.2 billion). In terms of the 25 biggest firms in the network media economy in the US based on domestic revenue, Google and Facebook rank fourth and eighth, respectively, while Microsoft, Amazon, Netflix and Apple rank twelfth, fifteenth, seventeenth and eighteenth, respectively, on the list. Drawing these comparisons more broadly, also reveals that five biggest telecoms-Internet and media companies in the US—AT&T, Verizon, Comcast, Disney and Charter—employed *twice* as many people as Google, Apple, Facebook, Microsoft and Netflix in 2018 and held assets worth twice those of the IT giants.

In Canada, similar trends prevail. In 2019, Google, Amazon, Facebook, Apple, Microsoft and Netflix combined revenue reached \$9.3 billion. Bell, the biggest communications and media conglomerate in Canada, by contrast, had domestic revenues of \$24.9 billion in 2019—nearly three times the Internet giants' revenue in Canada *combined*. Compared to the half-dozen global Internet giants' 10% stake of the media economy, the "big five" Canadian companies—Bell, Telus, Rogers, Shaw and Quebecor—raked in close to three-quarters of all revenue. Figure 12.1, below, rank-orders the biggest players in the media economy based on revenue from their Canadian operations.

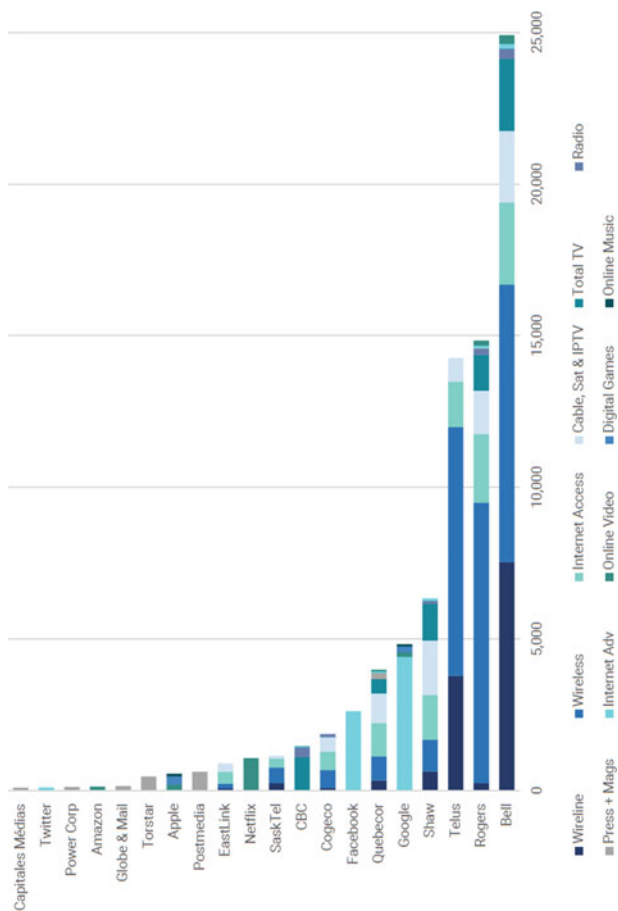


Fig. 12.1 Top Telecom-Internet and Media Companies in Canada, Ranking Based on Revenue in Canada, 2019 (Millions\$) (*Source* Canadian Media Concentration Research Project Dataset 2019 [Winseck 2020])



## ARE DIGITAL PLATFORMS MEDIA COMPANIES?

It is increasingly common to hear arguments that the global Internet giants are not only affecting the media but that they, themselves, have become media companies (broadcasters), and should be regulated accordingly. According to this perspective, rather than being neutral intermediaries, these companies' decisions deeply influence the terms of search, the visibility of content in social media spaces, and how the media in general operate. They are said to be media companies because they are competing with traditional media firms for advertising dollars. They are also 'pathways to the news', with roughly two-thirds of Americans, Australians and Canadians getting *some* news from social media and two-out-of-five from Facebook (Reuters Institute 2020). Furthermore, the platforms are becoming more involved in original content creation (Napoli 2019). As Flew (2019) surmises from these observations, "the digital platform companies are becoming de facto media companies, insofar as they are critical gatekeepers around the circulation of digital media content in all of its forms" (13), but without the usual obligations that come along with that status.

From this angle, regulating the platforms like media/broadcasters is also said to be the best option because the current alternative—competition policy—and the old line between carriage and content upon which the platforms' status as "mere conduits" allegedly rests are of recent vintage, quintessentially American in origin and based on narrow economic and technical conditions that no longer hold (Flew, Martin and Suzor 2019). In contrast, defining digital communications platforms as media firms would bring them under the authority and broader policy remit of broadcasting regulators such as the ACMA, CRTC, FCC, Ofcom, etc. (ACCC 2019; BTLR, 2020; Napoli 2019; UK 2019a, 2019b; US 2020).

## ARGUMENTS THAT PLATFORMS ARE MEDIA COMPANIES ARE SOCIOLOGICALLY MISLEADING

While accepting the case for Netflix or Hulu, two companies whose operations and identities are centered on media production and distribution, I agree with Hesmondhalgh (2019) that, while "conflating the cultural industries with the IT sector might assist in a worthwhile battle for greater regulation of online content, it would also be sociologically and

historically inaccurate and misleading, downplaying important tensions between the different sets of corporations and their varying interests” (472). Instead, the GAFAM+ group of companies are better seen as giant IT conglomerates with significant media subsidiaries.

To be sure, Amazon, Apple, Facebook and Google have upped their spending on television and film production,<sup>13</sup> but such spending still accounts for a tiny fraction of their total operating expenses (e.g. less than one percent and just over five percent of spending at Google and Facebook, respectively, versus one-half to two-thirds at Disney and Viacom-CBS). Simply put, creating and commissioning original content is not central to the businesses of GAFAM+ or their corporate culture and identity.

Second, it is also a stretch to see millions-upon-millions of automated decisions made by machines at great scale and speed as comparable to the human decision-making and thicket of social relationships that go into commissioning, publishing, scheduling, and creating a catalogue of book, movie, television, music and digital game titles. Drawing an equivalency between the digital platforms’ content moderation practices and the work of media professionals ignores a valuable history of approaches to the sociology of news/media/production (Banks, Connor and Mayer 2015; Hesmondhalgh 2019).

A recent report by an inter-agency group of French regulators based on their six-month stint embedded at Facebook’s offices in Paris fleshes out this point. The report differentiates between the machine-based “ordering” of content versus editorialization and, in so doing, distinguishes between the platforms and media companies on this basis. The result is that while there is no doubt that Facebook is intervening extensively in the flow of content made available on its platform, it is not really involved in the creation and editorial selection of content on the basis of journalistic norms or those of other media professionals. As the report also states, “[u]nlike traditional media, social networks do not select each item of content published on the service. This is a defining characteristic of such services” (France 2019: 14). The report also stresses that even if “this function of ordering content constitutes a form of de facto *editorialization*, this cannot question the legal status of the operators or lead to legal

<sup>13</sup> Spending on original media content creation in 2019 as follows: Amazon (\$6.5 billion), Apple (\$6 billion), Facebook (\$2.5 billion) and Google (\$900 million) (Bridges 2020).

requalification of hosting providers as publishers, since the majority of social network services do not carry out any selection prior to the publication of content” (France 2019: 9). Given all this, the report concludes that digital platforms are “information organization systems” not media companies (9).

### CLAIMS THAT THE IT GIANTS (DIGITAL PLATFORMS) ARE MEDIA COMPANIES ARE HISTORICALLY MISLEADING

The argument that platforms are media companies also ignores the extent to which the modern press, recorded music, film, radio and television industries, computing, and the Internet have all developed in proximity to vastly larger telecoms, electrical equipment, consumer electronics and banking sectors for the past 170 years (Miege 2011; Hesmondhalgh, 2019). While those industrial giants played a leading role in the creation of the media industries since the mid-nineteenth century, at no point were they ever understood to be media companies. Rather than shoehorning them into a politically expedient definition, policymakers recognized the unique roles they played and regulated them accordingly.

The Goliath versus Goliath battle between Western Union and the Bell telephone system in the late 1870s that led to major advances in telegraphy and telephony and in recorded music, broadcasting and the motion picture industries illustrates this point well. This bout of rivalry ended in a truce in 1879 wherein Western Union and the National Bell Telephone Company agreed to segment the fields of telegraphy and telephony and stay out of one another’s main line of business. The intense battle before this truce also turned scientific research and development into an industrial enterprise, exemplified by the creation of Edison Labs and eventually the renowned Bell Labs by 1925—the centre of American telecoms, electronics and computing supremacy for most of the rest of the twentieth century (Danielian 1939: 92–96; John 2010: 156–170, 209).

The 1879 truce settled matters between the two corporate titans for the next three decades, but in 1908 AT&T took-over Western Union in a bid to create a universal telegraph and telephone system. Five years later, however, AT&T was forced to unwind that acquisition in return for the US Department of Justice (DOJ) settling the case accusing the company of monopolization (John 2010: 352–361). The alternative was a high-profile court case that could have risked AT&T being broken up

into regional units, as the Wilson Administration Attorney General, James Clark McReynolds, had originally sought.

This outcome is highly relevant to how we think about platform regulation and the potential benefits of breaking-up some of the Internet behemoths today, with four aspects of the McReynolds Settlement (also referred to as the “Kingsbury Commitment”) standing-out:

1. AT&T would divest Western Union;
2. Henceforth, AT&T would need government approval before buying-out competitive independent telephone companies;
3. AT&T would interconnect with independent telephone providers using standardized technical interfaces and contracts;
4. AT&T’s interconnection agreements, technical interfaces, interoperability standards, and retail prices would be subject to federal regulatory review (Danielian 1939: 92–110; John 2010: 352–361).

Despite these relatively tough regulatory interventions, AT&T’s interests continued to expand far beyond telephony and it confronted other corporate titans with their own ambitions. In fact, this was a period when two opposing industrial groups often engaged in bouts of fierce competition mixed with moments of cooperation at the frontiers of industry, electrical equipment manufacturing and communications: the “Telephone Group” (AT&T and Western Electric) and the “Radio and Electrical Group” (GE, Westinghouse Electric and Manufacturing Company, RCA, Wireless Specialty Apparatus Company. United Fruit and Tropical Radio).

By the mid-1920s, both groups had established a sprawling melange of interests that reached across the fields of telegraphy, telephony, phonographs, electrical circuit arrangements, sound recording, radio broadcasting, domestic and trans-Atlantic wireless communication, submarine telegraph and telephone communication, pictures by wire, telephoto (wireless pictures), photoelectric cells, television, carrier current on power lines, communication with trains, train dispatching, railway and traffic switching control equipment—collectively constituting the infrastructure of twentieth century industrial capitalism. The name of the game, especially at AT&T, was not to innovate on the frontiers of technology but rather to conduct some modest research while buying patents whenever they could and defending the patents they did have to the hilt (Danielian

1939: 109–124)—much like the contemporary strategy of major platforms, which have bought out small innovators and their intellectual property.

Despite creating a “patent pool” under the watchful eyes of the US government in 1920 intended to limit conflict between them, the advent of radio broadcasting became a “no man’s land” where the “Telephone Group” and “Radio Group” continuously clashed between 1922 and 1926. During this time, AT&T controlled many of the patents upon which the new field was being built, and in addition it owned the WEAf radio station in New York. The station was the linchpin in a chain of seventeen broadcasting stations in the northeastern US that formed the centrepiece of AT&T’s Broadcasting Corporation of America and its ambitious plan to create a monopoly broadcasting network operated by the “Bell System” across the country.<sup>14</sup> This battle, however, was put to rest in 1926 when AT&T agreed to exit the broadcasting business while the Radio Group was left to develop radio broadcasting and all areas of wireless communications on its own but also to rely exclusively on AT&T for wire services when needed (Danielian 1939: 126).<sup>15</sup>

These examples from the US were not exceptional. Similar relationships involved communications and electrical equipment manufacturers in Germany (Siemens), France, the UK and other countries. In each case, industrial manufacturing enterprises not only built up the technological side of radio broadcasting but in some cases, as in the UK, the “big six” equipment manufacturing companies—Marconi, the Radio Corporation of America, Metropolitan-Vickers, British Thomson-Houston, GE, and Western Electric—created the British Broadcasting *Company* in 1922. Within four years, however, they exited broadcasting after the British Government refashioned that company into the public service British Broadcasting *Corporation*. In the US, General Electric and Westinghouse were shoved aside from their lead role in NBC several years later based on the recommendations of a Federal Trade Commission inquiry in 1931.

<sup>14</sup> AT&T ordered its local telephone exchanges to “refuse wires to all radio stations in localities where there was a Bell-owned broadcasting station, and to all others which had not obtained a patent license from the Telephone Company” (Danielian 1939: 123).

<sup>15</sup> The agreements also divvied up the parties’ patents, created a service agreement between AT&T and RCA, and set the terms and price for AT&T’s sale of WEAf to RCA (Danielian 1939: 126–130). Crucially, all of this was blessed by the Secretary of Commerce at the time and future US president, Herbert Hoover (Barnouw 1975).

Despite the 1926 agreements, the introduction of sound technology into the motion picture industry opened a new front in the battles between AT&T and Western Electric, on the one side, and GE, RCA and Westinghouse on the other. Western Electric (AT&T) gained the upper hand when it signed a series of long-term deals between 1928 and 1930 with Columbia Pictures, First National Pictures, the Fox Hearst Corporation, Metro-Goldwyn Pictures, Paramount Famous Lasky Corporation, United Artists and Universal Pictures, etc.. Under the terms of these deals, the Hollywood studios could only distribute their films to theaters with Western Electric equipment while theaters could only show pictures produced on such equipment. Those who dared use rival technology faced punishing penalties for doing so (Danielian 1939: 142–150). According to AT&T, such arrangements were needed to maintain the quality technical standards that it was known for. AT&T also parlayed this experience into becoming one of the largest investors in Hollywood films during the 1930s, which gave it a direct role in commissioning and editing motion pictures. Ultimately, AT&T exited the movie business, however, after coming under pressure from an emboldened FCC that was investigating the “monopoly problem” in the communication and broadcasting industries in the late 1930s (Danielian 1939: 142–150). To put all this in language familiar to platform and media studies scholars today, AT&T used its extensive control over technical interfaces, interconnection and interoperability to buttress its dominance in telephony *and* to extend its influence into two burgeoning new fields of the entertainment and the cultural industries: broadcasting and film.

Monopoly busting regulatory approaches were again applied when the FCC later sought to break up AT&T and Western Electric’s emerging control over the motion picture industry, to put an end to the Associated Press’s exclusive licensing arrangements driving consolidation of local newspapers in 1945, and to force the break-up of the vertically-integrated Hollywood Studio system (the 1948 *Paramount Decision*). The Department of Justice used Consent Decrees, for example, to prevent AT&T from entering the computer hardware, software, and processing industries in 1956 and again in 1984 to break-up the company. Meanwhile from the 1960–1980s, the FCC’s *Computer Inquiries* used line of business restrictions to keep AT&T out of the nascent information and computer services industries before allowing it to enter these markets via separate subsidiaries and on non-discriminatory, common carrier terms.

Cannon (2003) sees these steps as key to the success of the open Internet because they limited AT&T and, after its break-up, the “Baby Bells” control of the interconnecting network of networks. This conceptual framework was subsequently exported around the world, first through a series of bilateral deals between the US, UK, Japan, Canada, and the EU in the 1980s and 1990s and, ultimately, as the template for the WTO’s *Basic Telecommunications Agreement* in 1997. As markets were liberalized, however, concerns about the need to control dominant market power fell and antitrust principles fell out of favour, thereby yielding the Internet governance regime that has bequeathed to us the globe-spanning platform giants of the twenty-first century.

In sum, the industrial giants that constituted the “Telephone” and “Radio” groups, respectively, played leading roles in the creation of the early-twentieth century media industries. However, at no time did this mean that they were seen as broadcasters/media companies, or regulated as such. Instead, governments fashioned new regulatory tools fit for such realities. They broke apart the fusion of AT&T-Western Union. They imposed line of business restrictions that limited firms’ ability to expand into adjacent industries. And they regulated technical interfaces, interconnection, interoperability, service pricing and universal service mandates. They adopted common carrier and cross-ownership rules that prevented carriers from controlling media content companies. In the UK and Europe, the public service broadcasting alternative to the commercial model also emerged from this context.

### THE PROMISE OF A NEW GENERATION OF INTERNET REGULATION FOR THE PUBLIC INTEREST AND DEMOCRACY

Instead of resting the case for platform regulation on superficial analogies to media companies, a more compelling case can be made for using the following four principles drawn from history of telecoms, the media and antitrust regulation: structural separation, firewalls, public obligations, and public alternatives (Rahman 2018: 1623). These starting points shift the focus away from the content-centric concerns typical of the media policy and platform governance literature to “*structural remedies* [that] seek to eliminate the incentives that would make that conduct possible or likely in the first place” and “*behavioral remedies* [that] seek to prevent firms from engaging in specific types of conduct” (*emphasis added*, Khan 2019: 980).

**Structural separation and firewalls:** When talk turns to “breaking-up” Google and Facebook, a key focus is on their ownership and control of online advertising exchanges, data, audiences, terms-of-trade and the other hidden levers of power that echo historical telecommunications tactics of using technical control to buttress market power. Ghosh and Scott (2018), for example, see control over these resources as the taproot of Google and Facebook’s growing dominance of online advertising *and* a threat to democracy. To address the far-reaching public interests at stake on both counts, we need to start with a prime target for platform regulation: breaking up the vertically-integrated online advertising stack.

In the case of Google, for example, this would require the company to spin-off (structural separation) or, less ambitiously, to build a firewall between its suite of services, Android operating system and its online advertising exchange, respectively. It would also need to impose the dual requirement that it not unjustly discriminate between *any* user for any one of these services, and conversely that it not provide unduly preferential terms to favoured parties (especially including, but not limited to, itself). Following either path would also require the vast trove of first-party data that Google has acquired on billions of Gmail, YouTube, Android and Chrome users be separated from the operation of its online advertising system. The current complaint against Google by the DoJ and eleven states (2020) in the US, in fact, requests that the reviewing court “[e]nter structural relief as needed to cure any anticompetitive harm” (57).

The ultimate sword hanging over Facebook today is the potential that it could be required to spin-off Instagram and WhatsApp (US 2020b). While Facebook complains that these cases seek a do-over on deals that were approved years ago and that they are based on a revisionist history of how antitrust law works in the US (Newstead 2020), as we saw in the forced spin-off of Western Union by AT&T a century ago, such actions are neither novel nor a break with past antitrust conventions.

In Germany, rather than pushing for the break-up of Facebook, a Federal Cartel Office ruling in 2019 imposed functional separation rules that require the company to erect a firewall between its flagship service, Instagram and WhatsApp, respectively (Bundeskartellamt 2019). This action in Germany took place on top of a trilogy of recent decisions by the European Commission that have penalized Google for abusing its dominant market power in online search and shopping services in 2017 (€2.3 billion fine billion), its Android mobile operating system in 2018 (€4.34 billion fine), and the online advertising market in 2019 (€1.5 billion)



(EC 2017; EC 2018; EC 2019) as well as the coming into effect of the EU's General Data Protection Regulations in 2018.

It is indeed heartening to see structural remedies that have been out of favour for decades now contemplated in the recent volley of antitrust complaints and abuse of dominance cases lodged by governments on both sides of the Atlantic against both Google and Facebook, and that two of the leading intellectual figures behind the revival of the US anti-trust movement—Lina Khan and Tim Wu—are being tapped to help lead the FTC.

**Public Obligations:** The French communications regulator, ARCEP, is building on this momentum by focusing on neutrality issues across the internet stack—internet access, platforms, app stores and devices (France 2018). This is a promising development that draws lessons from the history of telecoms regulation but without treating the platforms as common carriers, not least because they do not serve as gateways to the whole Internet.

ARCEP's focus suggests opportunities to put key principles of common carriage at the heart of platform regulation. At the top of the list is what Pasquale (2016) calls the “presumption of inclusion” for all legal content, applications and services in the search, social media and apps stores of the large platform companies (498). Moreover, as he argues, “massive internet platforms must take the bitter with the sweet: if they want to continue avoiding liability for intellectual property infringement and defamation, they should welcome categorization as a conduit for speech, rather than speaker status itself” (543).

In Germany, a nascent “fair carriage” obligation is based on the legal and political premise that citizens have a positive right to express themselves, and it is the government's role to ensure that private actors that offer public communication services must respect such rights. This approach allows platforms to moderate their services but limits their scope to do as they please insofar that citizen's lawful expressions and interactions must stay up, unless a proper and just explanation of why it has been removed, and will stay down, is offered and defensible in court (Kettman and Tiedeke 2020: 9–11). Germany has also proposed “platform neutrality” rules for large commercial audiovisual platforms (e.g. Netflix and Hulu, but not YouTube or those used for private ends) and for the ranking and sorting algorithms of the biggest social media services (e.g. Facebook). This effort will no doubt encounter hard cases where, instead

of wanting the platforms to be neutral, some will want them to actively discriminate *against*, for instance, disinformation in favour of “quality journalism” (Helberger, Leerssen and van Drunen 2019). However, the outcome in such cases will turn on whether the activity/expression at issue is legal and the specific exceptions to the rule made by policy-makers on public interest grounds rather than by private fiat, and also if the action a platform takes toward such expressions is a form of *just* or *unjust* discrimination. In difficult cases where sources have been blocked, or “de-platformed”, courts can determine whether the speech is legal or not and if the platform’s action are just and reasonable.

The public obligations dimension of this approach to Internet regulation could also focus on “opening the black box” of the platforms and other online service providers by imposing regulatory oversight over, for example, terms of interconnection and interoperability and setting common technical standards so as to reduce operating and switching costs for both end users and third parties who rely on the platforms to offer their services to others. Seen from this angle, similar to the auditing and reporting requirements that banks and publicly-traded firms must meet, something like a Digital Platform Commission could oversee a certified annual audit of these firms’ blackboxes.

To its credit, the BTLR (2020) report in Canada also proposes such public obligations in relation to the concept of *electronic communications services* that it proposes to cover services such as WhatsApp, Skype, Facetime and Wechat that are functionally similar to telecoms services. To this end, the BTLR report recommends that such services would be required to carry all legal content and prohibited from controlling or influencing the content or meaning of messages and/or unjustly discriminating between different classes of speakers and users. The report also proposes that such services be required to adopt non-discriminatory interoperability and interconnection practices and to protect the privacy of individual users based on the standards set down by common carrier rules and privacy law. Similar to the common carrier principle, these recommendations do not ignore the reality that all technologies are socio-political artefacts but distinguishes between what is *reasonably necessary* to offer such services while preventing *unjust discrimination*. All of this would be overseen by a revamped CRTC, which it dubs the Canadian Communications Commission (CCC) to reflect the proposed expansion of the regulator’s remit to cover digital platforms.

Australia's just passed *News Media and Digital Platforms Mandatory Bargaining Code* can also be read through the lens of public obligations. While its opponents have tried to cast the code as imposing a “link tax” on Google and Facebook that makes them pay news companies each time they—or their users—display a link to a news story, this is misleading. The ‘crown jewel’ of the code is that it enables the ACCC to compel Google and Facebook to carry designated Australian news services for a to-be-negotiated fee (i.e. it is a limited “must carry regime”). It also requires them to give Australian news outlets fourteen days advance-notice of algorithmic changes that could up-end their operations. It also obligates them to share more monetizable audience data with national news providers. The code will also let the ACCC peek inside how Google and Facebook's business models and algorithms work, and expand its remit to cover other platform players, with hints that Apple's App Store may be next in line. It also puts the ACMA in charge of overseeing the Code's application in practice.

If it is successful, the Australian Code has the potential to lessen news media companies' dependence on the platforms and to break through the “attention trap”: namely the condition where media companies invest substantial resources to make their services “platform ready” only to see those efforts frustrated by frequent, unannounced changes to the platforms' operating logic and technical code, unreliable audience metrics and valuation models and, crucially, only a few new subscriptions and a trickle of new revenue despite increased traffic to their own websites (Myllylahti 2018).

**Public alternatives:** While other chapters elaborate on this possibility, a few broad-brush strokes will help to sketch out the role that public alternatives might play in new approaches to Internet regulation.

The first aspect entails the creation of a public data trust based on the idea that privacy and personal data are public goods. In this view, while personal data (at least in non-EU contexts) is currently harvested without any effective regulatory limits, based on the “surveillance capitalism” model (Zuboff 2019), a public alternative might start with the premise that the amount of data collected, retained and traded should be minimized to that necessary to provide a functional service. As such, instead of casting data in terms of individual consent, public repositories of personal and social-environmental and meta data could then be created. Access to that data could be governed by personal and privacy

data protection standards that take the EU's General Data Protection Regulation as the baseline applicable to all service providers—including telecoms operators, media companies, data brokers, political parties. They should also abide by information fiduciary obligations similar to those that health care providers and doctors, lawyers, teachers and other professions follow with respect to their “clients” (Kerr 2002).

These standards would replace the current situation, based on an inscrutable “dirty web” rooted in rival proprietary technical standards, unbridled data harvesting and fraudulent representations of audiences that even one of the world's largest advertisers, Proctor and Gamble, condemned in 2019 “for its lack of transparency, fraud, privacy breaches as well as violent and harmful content placed next to ads” (De Vynck and Frier 2019). This same “dirty web” has also been hijacked for dis/misinformation operations in recent years, with damaging consequences for the standards of trust and truth upon which the fate of democracy itself depends (Ghosh and Scott 2018; Mckelvey 2018). On all these issues, broadcasting regulation and media policy have little to say.

Those creating a new generation of Internet regulation must also wrestle with the reality that the same domestic communication and media groups who are in many ways driving the policy agenda have also taken a miserly view of public goods. The same can also be said for platform companies, where projects like Google's News Showcase and Facebook's News reflect their preference for voluntary initiatives over public policy solutions. Independent journalism and general news are public goods that the market and the general population have *never* paid the full cost of providing. As Victor Pickard notes in chapter 2, the current juncture presents a perfect opportunity to reimagine the possibilities for ensuring that the public good nature of journalism and news, and their democratic roles, obtain the public support they need to thrive beyond their problematic reliance on ad revenue.

It is also essential to further the development of public service broadcasters as public service *media* services. In this vein, a reformist agenda requires that they be adequately supported—financially and politically—to meet their mandates. Elsewhere I have offered a more radical proposal: create the Great Canadian Communication Corporation which would merge agencies like Canada Post, the CBC, the National Film Board and Library and Archives Canada to provide universal, affordable internet access, high quality media, information and cultural product, and a

national digital archive and library (GC3) (CMCRP 2020). For inspiration, we can rethink the original goal of the US Post Office for contemporary times, namely to bring “general intelligence to every man’s [sic] doorstep” (John, 2010). In terms of funding, the G3C could operate like a crown corporation. Revenues raised from the planned-for digital services tax, harmonized sales taxes for all AVMS services and income taxes applied to the Internet giants could also be earmarked for such ends.

### CONCLUSION: NEW MODELS FOR A NEW ERA OF INTERNET REGULATION OR “POISONED CHALICE”?

There are valuable and desirable goals animating what has been, or is, on the Internet policy agenda in Australia, Canada, the EU, France, Germany and the US. These include:

1. Ensuring a country’s digital media and Internet systems are governed not just by laissez-faire global market interests, but by sovereign regulators based on public interest policies and democratic values.
2. Striking at the issue of market concentration wherever it might manifest across the increasingly Internet-centric digital communications and media universe (but seldom do).
3. Reflecting the reality that the big digital platforms now function as shared infrastructures for the digital economy and society and, thus, the need to govern them by a minimum baseline of public obligations and values.
4. Harmonizing regulations for functionally equivalent *electronic communications services* and *media content services* (a fuzzier category consisting of broadcasting, online VOD, search, social media and web hosting services).
5. Replacing unaccountable voluntary codes of conduct by global Internet giants with formal regulations based on the rule-of-law, legitimate policy processes and democratic norms.

That said, so far, the case for a new generation of Internet regulation rests on superficial analogies of the digital platforms as media companies, cherry-picked and factually incorrect evidence, and a circumspect view of the role, function and identity of the “big tech” companies. In

contrast, this chapter has argued it is more effective to consider them in light of the “Goliath vs Goliath” clashes between AT&T/Western Electric and the Western Union in the late-1870s, and between AT&T/Western Electric (“the Telephone Group”) and the “Radio and Electrical Group” later in the 1920s and 1930s that shaped the development of the modern communications and media industries. These industrial battles and the dynamics they put into motion were at least as significant as the contemporary impact of internet platformisation. This is not to say that this earlier period trumps the latter in terms of significance, however, but rather that we must keep *both* firmly in view and use the lessons of each to better understand the other.

To this end, this chapter has attempted to rebuild the platform/Internet policy agenda from the ground up based on the principles of structural separation, firewalls, public obligations and public alternatives taken from communications and antitrust history but repurposed for our times. These principles are intended to address market dominance in all its manifestation, to pry open the inscrutable technical systems and business models that gird the Internet giants’ influence, and to refortify public values emaciated by decades of neglect. They are also respectful of people’s cognitive and communicative abilities, free speech and free press rights and the urgent need to dismantle the unlimited data harvesting practices and weak privacy and data protection rules that have given rise to ‘the broken Internet’.

Ultimately, while the possibility of designing a new era of sovereign Internet policy and regulation that serves the public interest and democracy have thus far fallen short, no democratic government anywhere should bend over backwards for the big Internet companies. Perhaps the ultimate lesson from events so far is not that the task in front of us is impossible or undesirable but rather that the pursuit of Internet regulation for the public interest and democracy must be simultaneously more ambitious in its goals *and* more circumspect of who has the power to define them.

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## Self-regulation and Discretion

*Nicolas Suzor and Rosalie Gillett*

### INTRODUCTION

Who should decide what content is permissible online? There is increasing pressure on platforms to do more to remove harmful speech, avoid removing legitimate speech, and ensure that their moderation systems are free from bias. Global communications platforms wield an inordinate degree of power and govern their networks with almost-absolute discretion (Suzor 2019). Clearly, there is unease about platforms making ad-hoc decisions and applying rules that they make up as they go along

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(Barrett 2020; Buni and Chemaly 2016). Although platforms have been improving their content moderation processes, industry self-regulation is often thought of as far too weak to bring real accountability to platform governance (Helberger et al. 2018). There is, accordingly, an understandable desire among commentators to see more democratic oversight for digital platforms (Winseck 2020; Haggart and Keller 2021).

We share the view that democratic rule-making is increasingly important to regulate the power of digital platforms. There are strong arguments in favour of public regulation based on clear and enforceable legal standards, properly made by legitimate bodies in accordance with democratic processes and constitutional limitations (Haggart 2020). Good public regulation of platforms likely also requires adapting antitrust to the platform economy (Khan 2016; Teachout 2020) and more targeted regulation of infrastructure (Frischmann 2012), the flow of private information, and trade practices (de Streel et al. 2020).

In this Chapter, we argue that improving the self-regulation of internal governance practices of platforms is a critical component of any regulatory project. Discussions about platform governance sometimes treat regulatory approaches as a choice between apparently distinct and exclusive models: self-regulation, co-regulation, multi-stakeholderism, or democratic rule (Haggart and Keller 2021). We suggest that self-regulation does not displace the need for greater scholarly attention to democratic regulation of platforms. These are not exclusive concepts (Marsden 2011). Industry self- and co-regulation may not be sufficient to bring legitimacy to platform governance (Haggart and Keller 2021), but platforms will always exercise discretion, and convincing platforms to exercise their discretionary powers responsibly is a large part of making governance legitimate (Suzor 2018).

We make our case based on the results of a qualitative study involving a broad group of participants who actively work to influence how platforms govern their users. We understand governance in broad terms as ‘organized efforts to manage the course of events in a social system’ (Burriss, Kempa, and Shearing 2008). In this sense, platforms govern their users (Klonick 2017) and are subject to influence through overlapping ‘polycentric’ (Black 2008) formal and informal regulatory regimes. We interviewed 25 participants from across business, civil society, and government to understand how they sought to influence the discretionary powers that platforms wield. We investigate how ‘hard’ law is often enforced informally, through pressure exerted by regulators, NGOs,

and private actors. We also examine how (often conflicting) demands for platforms to address ‘lawful but harmful’ conduct and material play out in practice. In both cases, we highlight the importance, consistently emphasized by our participants, of strong relationships between stakeholders and individual representatives of platforms who have a degree of influence and discretion to effect change or at least to broker connections to those who can.

Our argument is that platforms must always have a role in regulating lawful speech—that platforms must influence cultures, affordances, and social norms—and that regulating ordinary, lawful speech is critical to addressing harm. Here, we make two claims: self-regulation is both necessary and good. Necessary, in that in any regulatory regime, there are always zones of discretion within which platforms will interpret and enforce the rules they create and impose on users. And we argue that this discretion is good, in that private platforms should govern in ways that are appropriate for their unique cultures (and, for the majority of platforms, their business interests). We offer a simple proof in the moral responsibilities that platforms bear to address the pressing need for cultural change in violence against women – responsibilities that cannot fully be carried out or overseen by states or other external actors.

Because platforms exercise discretion and are influenced by a wide array of social actors, we suggest that finding ways to improve the daily practice of self-regulation by technology companies is still a necessary and important goal that will persist regardless of any formal regulatory schemes that apply. Our findings show how governance in practice, whether backed by formal law or not, involves a great deal of discretionary power and external influence. We conclude that understanding how loose networks of civil society, businesses, journalists, regulators, users, and others can effectively exert pressure on platforms for prosocial ends, and the limits at which these efforts fail, continues to be a fundamentally important challenge. Understanding how platforms respond to external demands that are judged to be positive or negative by and for different societies at different points in time is, accordingly, a key pre-requisite to understanding how democratic processes could effectively promote public interests in a global pluralistic networked environment. This is the ongoing challenge of ‘digital constitutionalism’, (Celeste 2019) which builds on the insights from regulatory theory that ‘constitutionalizing self-regulation’ (Black 1996) is necessary to bring legitimacy to systems of

governance that are partially autonomous while also expected to account to diverse groupings of state and private actors.

## BACKGROUND

Most major digital platforms have grown up under the wide protection of US law. The protections introduced by the Communications Decency Act, codified in 47 U.S.C. § 230, ensures that platforms are generally not legally liable for content posted by their users and are free to moderate as they see fit (Klonick 2017). Platforms have individual policies and community standards that set the rules for conduct—frequently set out in ways that are vague or unclear to users (West 2018). These rules are enforced through complicated content moderation processes, often including a mix of outsourced workers reviewing content; machine learning classifiers and hash matching tools that detect, prioritise, and remove material; and internal policy teams that set standards, oversee moderation, and make final decisions in some cases (Roberts 2019).

Platforms also operate various additional procedures to handle takedown requests from external users, in addition to internal flagging procedures. For example, any major platform will have a system for receiving large volumes of copyright takedown notices; direct connections with police and coordinating organisations for identifying child abuse material (Holt et al. 2020); other channels for receiving requests for information or content removal from law enforcement agencies; and channels to receive other requests for content removal, whether authorised under law or not. When the number or severity of incoming requests becomes high enough, platforms will usually build dedicated workflows—for example, specific processes to handle non-consensual explicit imagery (Gillespie 2017) or requests under the European Right to be Forgotten. Some incoming requests are processed wholly automatically, some are dealt with by legal teams, and others handled by other parts of the company. In some cases, decisions based on these requests are also used to train automated systems to detect similar content in the future.

At a large enough scale, the content moderation systems of major platforms quickly become extraordinarily complex. For many years, activists, academics, and journalists have criticized the bias, arbitrary rules, bad decisions, and the lack of clarity and certainty in the commercial content moderation systems of major platforms (e.g. York 2021; MacKinnon 2012; Suzor 2011; Buni and Chemaly 2016). While many platforms



have improved over the years in response to heavy public and media pressure (see, for example, WAM! 2013), these are all still major problems. When measured against the norms of legitimate governance that are routinely applied to nation states, platforms fare extremely poorly (Suzor 2018). When evaluated against substantive human rights concerns, content moderation systems also fail spectacularly in many ways (Kaye 2019). And no major commercial platforms provide serious democratic processes for developing editorial rules and overseeing their enforcement (Haggart 2020).

The pressure on platforms to change their content governance processes is strong and intensifying. There is clear demand for platforms to do more to suppress harmful speech and to avoid suppressing valuable speech—even if there is less consensus about where these categories begin and end. In terms of public policy, a dizzying array of policy reports, law suits, and legislative proposals are under various stages of development and debate across the world (Puppis and Winseck 2021; Flew and Gillett 2021). These proposals vary widely; the range of public policy options for platform governance is broad (Heldt 2019a). Some are based in the familiar realm of intermediary liability, where platforms are legally responsible for facilitating harms caused by their users. Some impose new obligations on platforms to remove unlawful or prohibited content upon receiving a complaint, like the German Network Enforcement Act (NetzDG) (Heldt 2019b; Schulz 2018). Others invest public regulators with powers to require platforms to remove content—like the new Australian Online Safety Act. Some approaches include requirements for transparency reporting (Wagner et al. 2020). Other approaches focus on encouraging or facilitating industry self-regulation (Bridy 2019), like the ‘Christchurch Call’, developed in the aftermath of the live-streamed massacre in 2019 (Hoverd et al. 2020). Some seek to create new, generalized duties of care on platforms to address foreseeable harm (Woods 2019). Others look to telecommunications and competition policy to inform public accountability and structural changes to internet industries (Winseck 2020). Still more options include extending media classification standards to internet platforms (Flew et al. 2019), or developing new public–private partnerships to create co-regulatory standards for acceptable content (Haggart et al. 2021).

No matter what form they take, however, all these legal obligations on platforms will be interpreted through each platform’s priorities and implemented through their own processes. Some forms of regulation will

impose greater accountability for how platforms choose to comply, but compliance is never perfect, nor is it automatic. The danger of emphasizing public regulation over private action is that it can lead to a false binary. Global platforms operate across many different legal systems, and their practices are influenced by an extremely broad range of actors—including states and their constituent components; their business partners, competitors, suppliers, and customers; their public audiences, NGOs, and media organisations. Some scholars have suggested recently that platform governance scholarship has perhaps paid insufficient attention to the work of those stakeholders in governance, particularly outside of formal multi-stakeholder regimes (Papaevangelou 2021). Developing a better understanding of how networked platform governance works in practice, and how it can be improved, is the problem to which we now turn.

## RESEARCH METHODS

This study relies on qualitative interviews with a broad range of stakeholders who actively work to influence how platforms govern their networks. We draw on Gorwa's (2019) 'platform governance triangle' to group interview participants into three groups of institutional actors: firms, NGOs, and government. We recruited regulators who exercised legal authority to compel compliance and regulators who worked informally; lawyers who represented platforms dealing with incoming complaints; community managers; journalists; NGOs advocating for stronger rules for removal of harmful speech and the protection of counterespeech; and firms that specialize in 'reputation defence', by scrubbing or burying negative material online. Our groupings are kept at a high level; the focus of this study on platforms does not require comparison across groups of external stakeholders. The strength of this broad methodology is that it helps to contrast how different regulatory approaches are experienced in practice; the unavoidable limitation is that our data should not be used to generalize across particular forms of regulation, social issues, or stakeholders.

Between 2017 and 2018, we conducted 25 interviews with people who are involved in seeking the preservation or removal of internet content. In 'firms' (n = 11), we include representatives of companies, groups of companies, and industry associations. Second, 'NGO' (n = 11), comprises non-government organizations, civil society, academics, and private individuals who identify as advocates or activists. Finally, we

include representatives from regulatory agencies, government officials, and inter-governmental organizations in the ‘regulator’ grouping (n = 3). To protect the identities of the interview participants, we have withheld their names and the organisations that they work for. The following sections thematically represent participants’ experiences attempting to convince platforms to remove or protect online content.

We conducted this research primarily in Australia, where the laws that apply to digital platforms vary extraordinarily in their approach (Pappalardo and Suzor 2018). Australian intermediary liability regimes differ widely in the strength of the incentives they provide platforms to comply with demands of our participants. The range of legal consequences includes severe criminal sanctions, established takedown regimes, threats of civil liability, and issues that are only dealt with in the public arena, not through law. This variety of rules provides a useful opportunity to understand how people dealing with platform governance issues experience different regulatory approaches. Some participants were outside of Australia; their experiences are used particularly for the analysis of extra-legal moderation of lawful content that is not jurisdiction-specific.

### LEGAL RULES ARE ROUTINELY ENFORCED INFORMALLY

The first thing to note about calls for greater public regulation is that legal regimes differ in how much discretion they expect platforms to exercise. Some regimes, like copyright takedowns, are highly standardised, requiring little or no exercise of discretion by platforms (Urban et al. 2016). Others, like defamation law, place the burden of assessing the merits of complaints on platforms (Pappalardo and Suzor 2018). Where platforms are required to exercise their judgment about whether to remove content, the decisions they make can vary to the point of appearing arbitrary or incoherent. Our interview participants, including both public regulators and private advocacy organisations, explained how they have had to develop informal relationships with platforms in order to be able to effectively request removal of unlawful content. Participants most often described developing and maintaining rapport and meaningful relationships with those who worked at large social media platforms. Several of our participants noted that these established relationships meant they were often much more successful at requesting platforms to remove unlawful content than police were.

Platforms have developed formal processes specifically for responding to requests from law enforcement agencies and for dealing with common private legal demands. These are often much more onerous and slower than informal channels can be: “[Platforms are] extremely slow to respond to law enforcement requests”. To avoid the overheads of formal processes, we heard that sometimes law enforcement officers would refer material to NGOs to report to platforms, rather than take formal action under law:

We’ve been in the situation where we’ve had police come to us with content, saying: Can you help us get a response to this? And that’s happened quite often, actually [...] this is the role that civil society plays, particularly in the US-focused context where distrust of government is part of the culture. And therefore civil society actually helps bridge the gap, that platforms can be notified in a manner that is voluntary, where the platforms, any response the platform takes, when it’s coming from civil society, is the platform’s own decision. It’s not under government compulsion. (NGO)

Even our participants from regulatory agencies told us that their usual mechanisms for enforcement were informal. An official from a public regulator who asked us to paraphrase their comments explained that when dealing with social media companies, even though they have some legal enforcement powers, they had never sought to use them in court. Their main tool was ‘reputational damage’: they would ask platforms to remove content, and if they did not, the regulator would make a public statement that the company has not complied.

The extra formalities for legal requests exist in part because platforms have been under heavy criticism for many years for acceding too readily demands that they remove content or hand over personal information. In democracies and authoritarian states, law enforcement agencies have worked to exploit informal pressure and tacit agreements (“invisible handshakes”: Birnhack and Elkin-Koren 2003) to circumvent fetters on government power and due process safeguards (Elkin-Koren and Haber 2016). Private actors too exert informal pressure on platforms and develop mutual agreements to enforce their legal rights. Intellectual property owners, for example, have a long history of working with internet infrastructure companies, banks and credit card processors, and others to shut down or financially strangle sites that traffic counterfeit (and sometimes legal) pharmaceuticals, luxury goods, media, and other

goods—often with ‘non-regulatory’ support from public agencies (Bridy 2014). Criticisms of these practices have led platforms to develop stricter procedures for appraising incoming legal requests that allow platforms to make a considered decision about whether to comply or resist (Eichensehr 2018).

Not all legal enforcement mechanisms are slow. For child abuse material (which is universally condemned) and copyright infringement (where complaints are very high in volume), moderation by platforms is routinely automated. But the platform response time for non-automated takedown requests varies widely. Even for a participant whose role in a public agency concerned child abuse material, the effectiveness of takedown requests to platforms for clearly unlawful material often depended ‘on the personal relationships that exist between investigators and key representatives of those companies.’

Effective corporate regulation frequently requires a long-term relationship between the corporation and the regulator that is sensitive to the internal processes and culture of the firm (Black and Baldwin 2010). Informal enforcement can be effective in securing compliance, but it relies on the threat of potential penalties and on the moral force of the law (Parker 2006). Several regulators in our study explained how they were able to escalate serious issues to internal contacts within major platforms, and at least where they could be dealt with locally, the platform’s response time would often be within a few hours. One regulator told us that they found platforms were ‘pretty responsive’ to requests ‘where there’s a real direct threat of harm to a person, whether a child or an adult’. But regulators struggled with ‘grey area’ content that was less clearly unlawful or harmful, noting that takedown requests ‘are dealt with inconsistently, I think, and sometimes perhaps not in a way that we would say accords with our reasonable expectations’ (Regulator).

Some regulators expressed discomfort about the potential legitimacy problems that arise from the informal use of their powers. For example, when legislation imposes penalties on platforms for failing to remove image-based abuse, but the main channel for enforcement is informal, one of our participants worried that their role might be ‘playing judge and jury’—a challenge to due process that they recognised was at odds with the need to act quickly:

That’s a lot for a government body [...] when time is of the essence. If a naked picture of me is on the internet and I haven’t consented to that [...] You can’t wait for a court process, you need that taken down, my mental

health is at stake, my life could very much be at stake, and depending on what community I come from, so could the lives of my loved ones.  
(Regulator)

Despite these legitimacy concerns, however, broader legal scholarship suggests that legal rules are frequently enforced informally across many different areas of regulation. Law is always experienced differently in practice than it is written—and it is informal practices, not the courts, that govern most interactions (Ellickson 1991). Regulators often seek to procure compliance through light-touch informal channels before escalating to more formal rules and penalties (Ayres and Braithwaite 1992). Even to the extent that laws set minimum standards for content or processes for determining and enforcing the rules, platforms still exercise a great deal of discretion in applying those rules (Douek 2020). This is true for private legal demands too; our private sector participants, including lawyers and representatives from reputation management firms, noted that the platforms they dealt with or represented would often take a risk-management approach to demands for content removal based on formal law.

In a practical sense, then, a substantial zone of discretion is inevitable. At any reasonable scale, the full due process of state institutions becomes unworkable in terms of time, cost, and complexity. Routine enforcement of speech law online will likely continue to be done largely by platforms, who will continue to exercise discretion in deciding whether and how to fulfil their various legal obligations. In the past, platforms have structured their businesses to concentrate their people, assets, and income in jurisdictions that provide them more legal protections (and frequently, lower tax). Given the complex geopolitical struggles between states and regional authorities that underpin different approaches to platform regulation (Gray 2021), these zones of jurisdictional conflict and associated discretion are unlikely to disappear in the foreseeable future. It is also important to note that we should not aim for perfect compliance; there are many cases where we expect technology companies not to defer to legal demands from states (often for personal information or censorship) in order to protect the rights of users worldwide (Svantesson 2014).

## REGULATING ‘LAWFUL BUT HARMFUL’ CONTENT

The discretion of platforms to enforce their own rules is strongly subject to influence from stakeholders. Many of our participants told us about how, in the absence of binding legal obligations on platforms, they leveraged their relationships to draw attention to material that contravened the platform’s rules or legitimate content that had been wrongfully removed. Some of our participants from regulatory agencies explained how they used informal channels to request that platforms remove content that the regulator was not legally empowered to compel the platform to remove. One regulator, for example, explained how they were able to ask an imageboard provider to remove sexual material that violated the privacy of a local complainant, even though the imageboard was known for its limited rules and was well outside of the territorial jurisdiction. They explained their work in terms of providing reasons and evidence to the platform to regulate themselves—noting that ‘the rules that they establish can, in fact, be enforced...’. They went on, however, to explain that this approach primarily worked for material that was obviously already prohibited under the platform’s own rules.

What content is, and ought to be, prohibited by platforms is deeply contested. Platforms are frequently criticized for not sufficiently understanding local contexts and cultures when they enforce their rules—which means they often misunderstand hateful content or wrongly remove counterspeech, particularly speech by, or targeted at, marginalized groups (Matamoros-Fernández 2017). Our participants reported that they often struggled to convince platforms to take action where the content was ambiguous, the harm was less visible, or additional context was required. Both regulators and NGOs noted that platforms are less responsive to take down requests that fall within the “grey area of determining whether or not some kind of protection attaches to that speech” (Regulator). An NGO representative who tackles hate speech said: “the threshold for what’s considered offensive is incredibly high, both legally and quite often from the members of the public. So casual racist comments, although they may be grossly offensive, are unlikely to get removed.” At the same time, participants were often concerned about platforms applying their rules in an overly restrictive way that silenced the voices of marginalized users:

Facebook in particular has a history of ignoring what is flat-out violence, pages devoted to violence against women, and meanwhile taking down

pages where women are owning their own sexuality or showing post-surgery breast cancer photos and those kinds of things. (NGO)

Some NGO representatives who advocated for marginalized groups explained that without a deep understanding of diverse cultures and languages, platforms cannot adequately moderate their users' content. These participants leveraged their organization's profile and expertise to show platforms how they could better address the needs of their users. One NGO representative observed the important role they played in using their organization's experience and expertise 'teaching' platforms—and their machine learning classifiers—'to recognize the subtleties of hate speech.'

Platforms rely heavily on the labour of external organisations to help them identify and prioritize harmful content. Content moderation requires users to report ('flag') content they find objectionable (Crawford and Gillespie 2014). But the accuracy of user reports, measured against the platform's rules, is typically quite bad; users frequently flag content that is not prohibited (Matias et al. 2015). Our NGO participants explained how they provide platforms with a trusted source for vetted flags. They undertake the work of investigating and triaging complaints, understanding context, and identifying those that are most serious. Some of our participants also told us how they do the additional painstaking work of 'translating' the complaints of users into the rather technical categories of rules that platforms use—without which, they felt, user concerns were much more likely to be ignored.

There are major limits to the influence of civil society actors on the policies of platforms. Even though platforms were often responsive to specific removal requests where there was clear harm, participants described the game of "whack-a-mole" they played with social media companies to keep content down. One NGO representative described their efforts to get image-based abuse removed from YouTube: "it would pop up again and we would have to intervene again because YouTube was not responding the way that they were supposed to" (NGO). Some participants thought that their takedown requests were unsuccessful because they competed with platforms' business interests: "And so, I think, whether or not they're receptive has a direct correlation to whether or not what we're asking for goes directly to their business model or to their bottom line." (NGO).



One of the major challenges of informal content regulation is that it is difficult to drive longer-term policy change. Participants complained that even where platforms acted on the individual reports they made, ‘there’s been very little concrete action beyond that ... at a policy level and not just individual case levels, we’ve seen that there hasn’t been much apart from rhetoric at the moment.’ (NGO) Some platforms have explicit ‘trusted flagger’ programs that are designed to prioritise complaints from experienced NGOs and regulators, and some of our participants found these programs to be quite effective in terms of receiving quick responses from platforms. Other NGO actors in our study, however, thought that their relationships with platforms were tokenistic. An NGO representative who advocated for women online believed that this tokenism meant platforms did not fully understand the concerns of their users:

This is part of why I think they aren’t really listening to the stakeholders that they invite to the table or really asking them the right questions, because if they did, some of these things that they roll out and then roll back they wouldn’t be doing. (NGO)

Another NGO representative explained how the organization they worked for was a member of a social media platform’s safety board, but that they doubted the meaningfulness of this partnership and understood it as a public relations stunt: “we knew that they were just using us to look good.”

Platforms are perhaps most responsive when faced with public crises. Policy changes and promises are frequently made in response to ‘public shocks’ (Ananny and Gillespie 2017), but lasting change is more challenging. One of our participants explained their experience as an editor of a major news publication featuring Indigenous writers discussing discrimination and abuse. The editor and the writers repeatedly had their articles removed and their personal accounts suspended from major social media platforms for sharing links to their published articles about racism. The editor explained that their complaints to these platforms had been repeatedly ignored, and it was only after they were able to turn one incident into a major news story that the platform concerned was willing to engage. Even then, the editor characterized the platform’s response as a public relations exercise by people ‘who are not genuine, they just genuinely want the problem to go away.’ When the editor re-shared the same content a year later, the platform again suspended their account,

suggesting the platform's initial response was an isolated reaction to a crisis, not an attempt to address underlying problems: 'if you were sensitive to Aboriginal customs, then you would work out a way to fix it, but they haven't.' (Firm).

Platforms play an important but fraught role in setting and enforcing the boundaries of acceptable speech. Informal pressure on platforms to regulate lawful speech is common, but some public regulators or law enforcement officials respondents expressed concern about the legitimacy of asking platforms to enforce rules that are not provided by law. One of the regulators we spoke to explained that they routinely approach platforms with complaints under their terms of service, but were concerned about the implications:

When it comes to adults, where do you draw the line between robust discussion and disagreement, such as vile disagreement and conduct that should be regarded as worthy of regulation... (Regulator)

The regulator continued, articulating a concern that is core to the rule of law: that rules ought to be clear, validly made, and fairly enforced: 'if it's worthy of regulation, why aren't the police properly granted that role?'

### THE NECESSITY OF PRIVATE DISCRETION

There is clearly something deeply troubling about relying on the extra-legal enforcement of non-democratic prohibitions on speech by unaccountable private platforms. But the set of rules that platforms enforce—and are frequently expected to enforce—is necessarily much broader than what laws require. Platforms are not 'common carriers': they are legally entitled to determine their rules and enforcement procedures, and with limited exceptions, they are not prohibited from discriminating for or against certain types of content or groups of speakers. This, we suggest, is a Good Thing. Policy that would limit the ability of platforms to discriminate against different types of lawful speech and different speakers would not only flatten competitive differences between platforms but likely drown us all in cesspits of spam, abuse, disinformation, and irrelevance.

At any rate, pragmatically, we are not heading towards a future where platforms are required to moderate less. Platforms are under increasing pressure to do much more to regulate 'lawful but harmful' speech online. Take, for example, the demands on platforms to address toxic and hateful

content on their networks. Ordinary hateful speech that does not rise to the level of explicit hate speech is generally not prohibited, but it nevertheless creates and reinforces the foundations for violence and discrimination. Harmful criminal acts that we view as aberrant are made possible by the normalization of ordinary abusive behavior (Kelly 1988). Part of the link is explicit; malicious actors use covert and coordinated hate campaigns (Lewis et al. 2020; Marwick and Caplan 2018) to spread and reinforce harmful attitudes toward marginalized groups (Shifman and Lemish 2011; Matamoros-Fernández 2020). Users learn to deliberately skirt legal rules and develop strategies to avoid content moderation systems (Matamoros-Fernández 2020; Bhat and Klein 2020). A great deal of discrimination is propagated and normalized through everyday sexism and misogynistic views (Jones et al. 2019) and sexist humour (Shifman and Lemish 2011). But the perpetuation of oppression is also implicit in ordinary expressions of prejudice and acts of discrimination that enable widespread abuse and harassment to become normalized online (Gillett 2019). Much of this harmful speech is not and should not be regulated by law—the abilities of states to create laws that make content unlawful to distribute are necessarily restricted in scope and subject matter. This does not mean that hateful speech should not be regulated; rather, that it should be regulated through social norms and private approbation (Matsuda 1989). This likely includes rules set by platforms which, we have suggested elsewhere, have a responsibility to address systemic inequalities that are perpetuated, at least in part, by these types of speech on their networks (Suzor et al. 2018).

Strong government regulation of digital platforms is more democratic (Haggart 2020) and better aligned with the rule of law and constitutionality (Winseck 2020) than private ordering, self-regulation, and discretionary power. But legal rules cannot cover the entire field of decisions that platforms make. The interpretation of rules is always imprecise – rules expressed in natural language are necessarily open to interpretation (Hart 1994). Even where they are clear, rules are never perfectly enforced; there is a great deal of content on major platforms that might be prohibited but has never been reported. Users are less likely to report prohibited content that they do not perceive to be highly harmful or routine, and platforms often choose not to enforce their rules strictly.

The answer is not to try to remove discretion. The limits that societies impose on the ability of states to exercise coercive power do not translate

directly to digital platforms. Discretionary power is fundamentally necessary to platforms as we know them. In a world of information abundance, content moderation and curation is the commodity that platforms offer to their users (Gillespie 2018). Digital platforms implement extensive rules designed to protect their business interests, meet the expectations of their users, and shape their own distinct cultures (Burgess and Baym 2020). They need a degree of discretion to align their rules, affordances, and processes to their distinct cultures and priorities (Klonick 2017). Platforms also need discretion to create and enforce timely rules that respond to harmful lawful content and reinforce prosocial norms on the limits of socially acceptable speech.

We suggest instead that one of the critical tasks ahead for scholars of platform governance is to better understand how discretionary power can and should be appropriately limited and made accountable – what regulatory scholars call ‘throughput legitimacy’ (Haggart and Keller 2021). Discretion is legitimate where it is constrained within a zone of autonomy; generally speaking, platforms currently enjoy ‘broad’ discretion: power without effective oversight (Suzor 2011). The development of new mechanisms to limit – or ‘constitutionalize’ – the discretionary power of platforms is critical to improving platform governance (Celeste 2021; Suzor 2019). But for global platforms enmeshed in many varied controversies with a great many stakeholders over the governance of their networks, this is no easy task. From the little we know so far about the rapidly changing decision-making of platforms, whatever legal limits we might seek to impose on platforms, internal commitment, effective self-regulation, and extra-legal pressure will have a major impact on compliance. As with so much else, cultural change is key.

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# Beyond the Paradox of Trust and Digital Platforms: Populism and the Reshaping of Internet Regulations

*Terry Flew*

## INTRODUCTION: MISINFORMATION, ‘FAKE NEWS’ AND THE LIMITS OF SUPPLY-SIDE SOLUTIONS

The most common approach to thinking about the relationship between digital platforms and the crisis of trust has been to focus upon the dissemination of what is variously referred to as disinformation, misinformation and ‘fake news’. The problems have been understood primarily as information problems, and the focus has been upon what can be referred to as the *supply side*, or the wilful dissemination of misinformation and disinformation through digital platforms. The European Commission High-Level Group on Fake News and Online Disinformation has identified the problem in such terms:

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Problems of disinformation are deeply intertwined with the development of digital media. They are driven by actors — state or non-state political actors, for-profit actors, media, citizens, individually or in groups — and by manipulative uses of communication infrastructures that have been harnessed to produce, circulate and amplify disinformation on a larger scale than previously, often in new ways that are still poorly mapped and understood (European Commission, 2018, p. 5).

Lazer et al. (2018), in their highly influential account of ‘fake news’ defined it as:

Fabricated information that mimics news media content in form but not in organizational process or intent. Fake-news outlets, in turn, lack the news media’s editorial norms and processes for ensuring the accuracy and credibility of information. Fake news overlaps with other information disorders, such as misinformation (false or misleading information) and disinformation (false information that is purposely spread to deceive people). (Lazer et al., 2018, p. 1094)

The initial surge in attention given to disinformation and ‘fake news’ in the late 2010s was driven by the rise of populist political movements, and threshold political events such as the 2016 U.S. Presidential election and the ‘Brexit’ referendum in the U.K. in the same year (Benkler et al., 2018; Kellner, 2017; Livingston & Bennett, 2020). The COVID-19 global pandemic has generated a new set of concerns about public health disinformation and conspiracy theories, and their adverse impact upon measures to contain and ultimately eradicate the virus. The United Nations Secretary-General, Antonio Guterres, described this as ‘an infodemic of misinformation’, and Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization (WHO), observed that ‘misinformation ... spreads faster and more easily than this virus’ (United Nations Department of Global Communication, 2020). In defining an infodemic, the WHO observed:

Infodemics are an excessive amount of information about a problem, which makes it difficult to identify a solution. They can spread misinformation, disinformation and rumours during a health emergency. Infodemics can hamper an effective public health response and create confusion and distrust among people. (United Nations Department of Global Communication, 2020)

Identification of trust problems as information problems is typically accompanied by measures to promote ‘good’ information and suppress or eliminate ‘bad’ information. The EC High-Level Group, for instance, promoted five measures to address online disinformation:

1. Enhancing the transparency of online news, in terms of data and information about its sources, as well as fact-checking initiatives;
2. Promoting media and information literacy to counter disinformation and helping users navigate the digital media environment;
3. Develop tools for empowering users and journalists to tackle disinformation and fostering a positive engagement with fast-evolving information technologies;
4. Safeguarding the diversity and sustainability of the European news media ecosystem; and
5. Promoting continued research on the impact of disinformation in Europe to evaluate the measures taken by different actors and constantly adjust the necessary responses (European Commission, 2018, pp. 6–7).

The focus is upon fact-checking, ‘myth-busting’ (United Nations Department of Global Communication, 2020), media and information literacy, further research, and strengthening the credibility of mainstream news media as the most reliable sources of public information. These are recognisable responses to misinformation and disinformation that approach the problem from *a supply-side perspective*, and envisage the intervention of experts, including academics and news media professionals, as the principal antidote to purveyors of such misinformation who prey upon an otherwise vulnerable public.

As the focus on restricting, suppressing and ultimately eliminating bad information (misinformation, disinformation, ‘fake news’) is so strongly embedded as a common-sense response, questioning it sounds churlish, and puts one at risk of being a purveyor of conspiracy theories. It is certainly an approach that finds strong support with the leading digital platform companies themselves, as it is consistent with a new framing of companies such as Google, Facebook and Twitter, not as the digital upstarts that ‘move fast and break things’ (Taplin, 2017), but as responsible stewards of the online public sphere, able to exercise corporate social responsibility in a new age of stakeholder capitalism (Business

Roundtable, 2019). It is consistent with Facebook CEO Mark Zuckerberg's call for 'new rules for the Internet', with 'a more active role for governments and regulators' (Zuckerberg, 2019). It also aligns with the post-COVID vision of national governments and global tech companies as co-regulators of public life, articulated by Microsoft CEO Satya Nadella in terms of 'the challenges we face demand[ing] an unprecedented alliance between business and government' (Nadella, 2020), and the power of digital platform companies being offered on the basis of their problem-solving capabilities for policy-makers.

One point of contention is the implicit framing of online publics as vulnerable. The question of whether audiences are powerful or powerless in the face of media messages has a long history in communication, media and cultural studies, with what Sonia Livingstone describes as 'an intellectual history of academic oscillation ... regarding their supposed power—to construct shared meanings (as debated by semiotic and reception approaches to media culture), to mitigate or moderate media influences (as debated by media effects research), or to complete or resist the circuit of culture (as debated by cultural studies and political economy theories)' (Livingstone, 2015, p. 439). The debates in the 1970s and 1980s about cultivation theories with regards to violence on television (Gerbner, 1998), and the critiques from the perspective of active audience theories (Gauntlett, 1998), acquired new life with debates about social media and 'participatory culture' (Carpentier & Jenkins, 2013). They are resurfacing around online misinformation and its societal impacts, particularly around whether algorithmic sorting has produced 'filter bubbles'. Deuze and McQuail astutely observe that it is not surprising that 'old' concerns associated with twentieth century mass communications media, such as media manipulation, media literacy, and media effects, are now very much on the policy and academic agenda with regards to digital platforms. With the platformisation of the Internet, social media platforms simultaneously 'massify' audiences as data subjects while largely relinquishing the information gatekeeper function associated with mass media institutions, meaning that 'with a more open media culture, in the context of individualisation and globalisation, there are persistent and insoluble problems of trust and reliability' (McQuail & Deuze, 2020, p. 580).

## MEDIA DISTRUST AND THE CRITIQUE OF EXPERTISE

It has been widely observed that the current era is one of amplified distrust of the media, and of political and social institutions more generally (Botsman, 2017; Edelman, 2020; Flew, 2019, 2021b; McSweeney's, 2019; Zuckerman, 2019). We tend to associate mistrust of the media with political polarisation, based on the well-documented divide between Republicans and Democrats in the U.S. around media trust (Schudson, 2019), as well as the propensity of right-wing populist leaders to denounce the media—while simultaneously maximising their exposure through it—as ‘fake news’, ‘enemies of the people’ etc. (Moffitt, 2016). But as Stephen Reese has pointed out (Reese, 2021), critiques of the media have long been the domain of the political left, whether it be critiques of news framing and objectivity as implicitly favouring the political *status quo*, as argued in by U.K. scholars such as Stuart Hall, the Glasgow Media Group and others (Glasgow University Media Group, 1976; Hall, 1982, 1986; Sparks, 1986), or Noam Chomsky and Edward Herman's forensic analysis of *The New York Times* through a ‘propaganda model’ whereby liberal media ‘manufactures consent’ with the existing socio-political order (Chomsky & Herman, 1988).

In the 2000s, much energy was invested in creating alternatives to the mainstream media (‘the MSM’ as it was known) through blogging, citizen journalism, alternative online media, and other online practices. The founding slogan of Indymedia was, ‘Don't hate the media, be the media’, and the promise of the ‘Fifth Estate’ powered through collaborative digital networks was proffered as an alternative vision (Dutton, 2009; Flew & Wilson, 2012; Kidd, 2011). This literature also often looked to what was known at the time as ‘Web 2.0’ and social media to power an alternative media ecosystem. Over the course of the 2010s, a number of factors dissipated this influence. Digital platforms increasingly became the communications sites themselves, with activists making use of the affordances of Facebook, Twitter etc. rather than producing their own media platforms, while media entities of all kinds came to be increasingly dependent upon advertising revenues and the ‘attention economy’ driven by these platforms, in a relationship that became increasingly unequal and fraught as the decade proceeded (Bell, 2018; Tow Center, 2018, 2019). Importantly, the tools and techniques of alternative media were open to be adopted across the political spectrum, and in many respects the political right had an advantage, as it has a more clearly delineated media

ecosystem that links mainstream and alternative media outlets, whereas left-wing alternative media are more likely to view mainstream ‘liberal’ media as competitors or as enemies (Benkler et al., 2018; Entman & Usher, 2018; Livingston & Bennett, 2020).

A paradoxical consequence of calls for greater ‘media literacy’ or ‘digital media literacy’ is that it can fuel greater distrust of the media, promoting an auto-didactic methodology whereby the online public search for absences or gaps in mainstream media representations of major issues, and the mass sharing of such ‘research’, can be the kindling for the spread of conspiracy theories. As a result, measures at scale by digital platforms to suppress ‘fake news’ or conspiracy theories runs the risk of further promoting such theories, as those affected point to information suppression as proof that such conspiracies do indeed have merit. Jack Bratich has provocatively argued that the crisis of misinformation, ‘fake news’ and conspiracy theories is in fact indicative of a crisis of the liberal political order, where:

The ultimate goal of the current moral panic war on fake news/misinformation spreaders is to restore a political center as a mode of restoring state legitimacy. “Unity” means separating (a center from extremes, a passive majority from insurgent minority) in order to prevent contagion. Such a restoration of the political spectrum sorts subjects into friends and enemies ... Tech companies have become full partners with professional journalism, intelligence agencies, and pundits in a new nexus to wage a war on dissent via counterinsurgency (Bratich, 2020, pp. 324, 325).

The crisis of trust in media both sits alongside, and is integrally connected with, a wider crisis of trust in expertise. In his book *The Crisis of Expertise*, Gil Eyal proposed that expertise constitutes forms of know-how that develop at the intersection of science and technology on the one hand, and law and democratic politics on the other (Eyal, 2019). It is different to science in that while it draws upon scientific knowledge, expertise has a more specific problem-solving focus, and co-exists with two other key aspects of social life: risk and trust. Eyal observed that expertise typically involves four methods to define and delineate its subjects, the question of who can (and cannot) speak, and legitimate and illegitimate knowledge. These are: (1) exclusion, or a “boundary-work” that confines controversy to technocratic expert judgment; (2) inclusion, or

the extension of controversy to the participation of lay people in order to improve transparency; (3) mechanical objectivity, or the search for objective and standardized procedures that reduce human judgment and error; and (4) outsourcing, or a strategy of expertise spin-off (e.g. governments commissioning academics, consultants or think tanks to advise on policies).

In identifying a crisis of expertise, Eyal referred to seven ‘engines’ of crisis, that both destabilise and reinforce systems of expertise, and which feed upon one another. They are:

1. *Jurisdictional struggle*, or who has authority to make recommendations and decisions;
2. The *expansion of regulatory science*, whose objects differ from basic science, as they are more concerned with projections for the future based upon evidence from the present or recent past. Such projections are designed to inform action to regulate different aspects of social life;
3. *Trust*, as something that is earned through practice, but also damaged by evidence of decisions going wrong, or the unstable relationship between ‘backstage’ and ‘frontstage’ behaviour;
4. The *legitimation crisis of state-regulated capitalism*, experienced in the 2020s as the global crisis of neoliberal economics (c.f. Streeck, 2017);
5. The *challenge of lay experts* to the knowledge and authority of designated experts;
6. *The Internet and social media*, which both ‘accelerate the pace and break the boundary between backstage and frontstage’, and ‘accelerate and extend other processes that have broken the monopoly of the gatekeepers, those with the power to bestow symbolic capital of recognition’ (Eyal, 2021, p. 5).
7. *The mediatization of science*, as scientists increasingly take on the role of public communicators and educators, entering directly into the spheres where other challenges to expertise are taking place, such as the media, social media, and politics.

An understanding emerged during the COVID-19 pandemic that counterposed rational experts to irrational politicians and populist leaders. This dichotomous framing of rational experts and irrational populists echoed



the famous 2017 *New Yorker* cartoon where a man stands upon in the middle of a flight and declares “These smug pilots have lost touch with regular passengers like us. Who thinks I should fly the plane?” (Fig. 14.1).

Indeed, one could contrast the cool authority of public health experts such as Dr. Anthony Fauci from the U.S. Center for Disease Control with political leaders such as former U.S. President Donald Trump, publicly asking whether injecting bleach or inserting flashlights into your rectum could prevent the spread of Coronavirus. There is little doubt that some countries managed COVID-19 better than others, and the relationship between political leadership and public health expertise was a key variable in that. Given the poor record of populist leaders such as Trump, Jair Bolsonaro in Brazil, and Narendra Modi in India in managing the pandemic, some wondered whether COVID-19 had killed off populism (Gruen, 2020)?

However, just as attacking the supply of ‘bad’ information does not redress the crisis of trust in media, there is little likelihood of the critique



*“These smug pilots have lost touch with regular passengers like us. Who thinks I should fly the plane?”*

**Fig. 14.1** These smug pilots have lost touch with regular passengers like us. Who thinks I should fly the plane? (Source *The New Yorker*, 2017)

of expertise abating simply by measures taken to promote expert opinion, while also suppressing or excluding other views, through the media or on the Internet. This is partly because expertise, because it is so engaged in real-world problem-solving, rests upon shakier knowledge foundations than science in general. This has long been apparent in the social sciences. If one thinks of economics, it was generally accepted prior to the late 2000s that high levels of public debt were a problem, and that austerity was a necessary policy corrective to such high levels of debt. This was until many of those who had previously advocated austerity policies began to rethink their own positions (Ostry et al., 2016), and governments of all political persuasions accumulated debt so as to manage the economy more effectively in the COVID-19 pandemic. They often did so on the advice of the same people and institutions (e.g. Treasury departments) that would have advised against such policies a few years earlier. The relationship between models, assumptions, parameters and concrete circumstances is hence ever-shifting, and those who may once have been deemed to have had ‘unacceptable’ ideas (e.g. that governments should accumulate debt in order to reduce unemployment) now found their ideas accepted. The COVID-19 pandemic drew attention to the sometimes seemingly arbitrary parameters that informed public health actions while at the same time recognising the importance of social action, as there were ongoing debates about the pros and cons of outdoor mask wearing, how to serve food (are buffets OK?), when it is appropriate to sing indoors or go to a gym, and the numbers able to safely attend sporting events or live concerts. Referring to COVID-19, Eyal observed:

If anybody thought that the role of experts in democratic politics is a sideshow to the more important distributional or ideological politics, the Coronavirus pandemic should have disabused them of this notion (Eyal, 2021, p. 1).

### POLITICS, PIKETTY AND POPULISM

The French economist Thomas Piketty has been one of the most influential social theorists of recent years. In *Capital in the Twenty-First Century* (Piketty, 2014), Piketty provided extensive data on trends in global economic inequalities to argue that, in the absence of countervailing measures by governments to redistribute income and wealth, capitalism has an inherent tendency to increase inequalities, as the rate of return

on capital generally exceeds the rate of economic growth ( $r > g$ ). His underlying argument was that electoral pressures arising from a unionised workforce and social democratic political parties stimulated such redistributive policies from the 1930s to the 1970s, but that from the 1980s onwards, the rise of ideologies which justified economic inequalities, and of political parties and movements that sought to reduce the size and scope of the state over economic activities, saw such inequalities increase to levels not seen since the 1920s.

In *Capital and Ideology* (Piketty, 2020), Piketty elaborated upon these arguments, while also developing new propositions. Addressing the critique of *Capital in the Twenty-First Century* that it presented an economically determinist argument that capitalism has certain ‘iron laws’, and where other factors such as politics are ‘both everywhere and nowhere’ (Jacobs, 2018, p. 512), *Capital and Ideology* stresses the point that ‘ideas and ideologies count in history’ (Piketty, 2020, p. 1035). But there is a particular aspect of ideas, ideologies and politics that captures Piketty’s attention, which is the failure of political parties of the left to make electoral headway in many parts of the world since the Global Financial Crisis of 2008. Instead, the major beneficiaries of disaffection with the political *status quo* have been populist movements, parties and leaders, suggesting that anti-capitalist thinking has morphed into a diffuse anti-elitism, which has been able to be tapped into by nationalists and populists, and has primarily benefited political parties of the right.

For Piketty, the core structuring feature of advanced liberal democracies over the last 60 years has been the manner in which political parties of the centre-left have increasingly become parties of the highly educated. In the 1950s and 1960s, the voting base of parties such as the U.S. Democrats, the British Labour Party, the French Socialists and others was strongly rooted in lower-income voters and communities, allowing for a class politics where they stood as primarily working-class parties pitted against political opponents whose voter base was for the most part the middle- and upper classes. From the 1960s, however, there is a consistent pattern whereby the percentage of those with the highest levels of education (tertiary qualifications) voting for the parties of the centre-left continues to increase. Even after controlling for other variables such as age, gender, race, ethnicity and family status, this is a consistent trend internationally, which accelerates from the 1990s onwards.

This does not necessarily mean that political parties of the right or centre-right become parties of the less well-educated, in spite of the confident claims of Trump and other to ‘love the poorly educated’. Piketty notes that even in the United States the votes of high-income earners split more-or-less evenly between the Republicans and Democrats, and the strong preference of ethnic and racial minorities for left and centre-left parties means that the average income of voters for right-wing parties remains higher than that of left-wing parties. Surveying voting patterns across 21 Western democracies from 1948 to 2020, Gethin, Martínez-Toledano and Piketty found that parties of the right still attracted the majority of higher-income earners – but with the U.S. at 50:50 by 2010— but that left of centre parties overwhelmingly attracted voters with higher levels of education, thus reversing a historical pattern (Gethin et al., 2021) (Fig. 14.2).

As a result of these trends, Piketty refers to the trend as the rise of a ‘Brahmin elite’ on the political left. In the case of the United States, the party system in the period 1990–2020 has become ‘a system of multiple elites, with a highly educated elite closer to the Democrats (the “Brahmin left”) and a wealthier and better paid elite closer to the Republicans (“merchant right”)’ (Piketty, 2020, p. 815). This development has at the same time exposed the fragility of the coalition that links the traditional working-class support base of such parties and the more highly-educated supporters dominant in these parties under the new alignment. It leaves

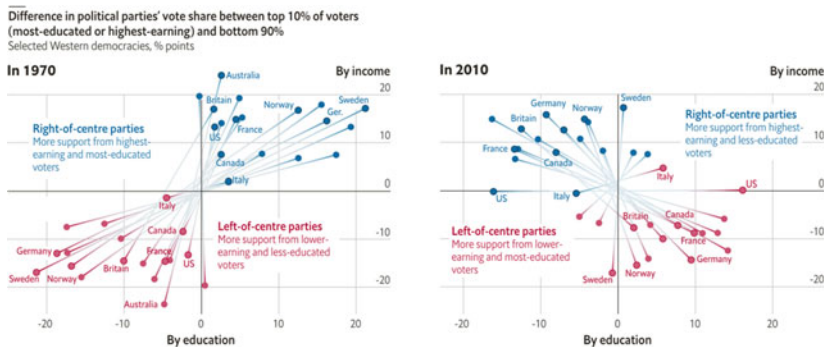


Fig. 14.2 Voting patterns by education and income in 21 liberal democracies, 1970–2010 (Source *The Economist*, 2021)

parties of the left and centre-left open to the critique that they represent the ‘winners of globalization’ (Piketty, 2020, p. 816), and losing those who are ‘left behind’ by globalization and technological change to anti-elitist populism. This may take the form of new populist parties of the Right, such as Marine Le Pen’s National Rally (formerly National Front) in France or Nigel Farage’s UKIP/Brexit Party in Britain, or it may be capitalised upon by populists arising from within the traditional parties of the Right, as with Donald Trump’s victory in the 2016 U.S. election (‘I love the poorly educated’, Trump famously said after winning the Nevada Primary), or Boris Johnson’s Conservatives successfully breaking Labour’s ‘Red Wall’ of Northern working class seats in the 2019 U.K. General Election.

Another feature of politics where education, rather than class or income, becomes a primary divide is the growing significance attached to cultural factors as markers of political identity. Pippa Norris and Ronald Inglehart (Norris & Inglehart, 2016 2019) have observed that the economic platforms of populist parties tend to run across a spectrum from being strongly pro-market to being strong supporters of state intervention, and that the economic circumstances of their voters vary considerably between parties and across countries. At the same time, a common feature of the populist parties they have studied has been a tendency towards ‘traditionalist’ conceptions of culture and suspicion of what they view as ‘cosmopolitan’ cultural values. Comparing populist political parties across 163 countries, Norris found that such parties were evenly split on economic values, with 49% having left-wing economic values and 51% having right-wing economic values, the polarisation of social values was far more marked, with 84% having conservative social values and only 16% having liberal social values (Norris, 2020, p. 707).

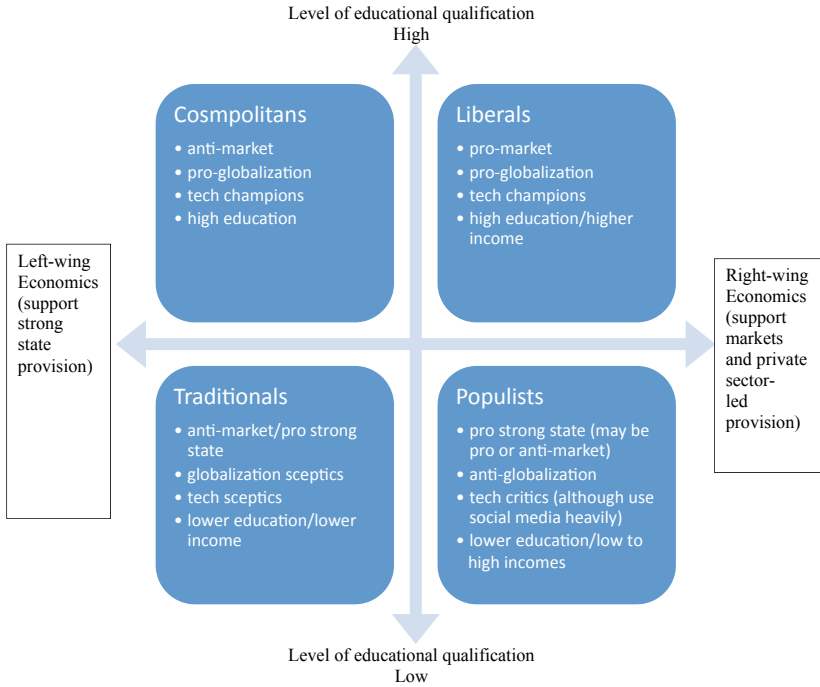
Norris cautions that, while the majority of populist parties are ‘in favour of order, tradition and stability, believing that government should be a firm moral authority on social and cultural issues’ (Norris, 2020, p. 707), their defining feature may be less social conservatism—which they share with older parties on the political right—as much as a hostility to pluralism. Those aspects of liberal democracies that mitigate against direct rule by ‘the people’, understood as a numerical majority, that include minority rights, an independent judiciary, binding global agreements, multiculturalism, media that is critical of government, and the celebration of social and cultural diversity, tend to attract the most hostility from populist parties. This intersects with nationalism insofar as

the ‘will of the people’ is by necessity a national will: global institutions are seen as distant and inherently undemocratic in their nature. Norris thus defines populism in the following terms:

Populism is conceived at minimum as a form of rhetoric, a persuasive language, making symbolic claims about the source of legitimate authority and where power should rightfully lie. The discourse rests on twin claims, namely that (i) the only legitimate authority flows directly from the “will of the people” (“the citizens of our country”), and by contrast (ii) the enemy of the people are the “establishment.” The latter are depicted as the powerful who are corrupt, out of touch, self-serving, falsely betraying the public trust, and seeking to thwart the popular will (Norris, 2020, p. 699).

Drawing together the accounts of changes in voter behaviour from Piketty and his collaborators, and those dealing with populism from Norris, Inglehart and others, we can see a four-fold divide in contemporary liberal democracies, based on education on one axis, and economic values on the other (Fig. 14.3).

Thinking about each category, we can make the following observations. First, *liberals* broadly equate to what Bratich terms ‘centrists’, and run the spectrum from what is commonly termed the centre-left to the centre-right. While there are considerable policy differences among those in this group (e.g. around the role and size of the public sector), they are broadly pro-market and pro-globalisation, with the most significant differences typically coming less from economic policy issues than from social and cultural ones. Issues such as marriage equality or measures to mitigate climate change may generate important divides between those at the social democratic and conservative ends of this spectrum, although both issues can find advocates across these traditions (e.g. carbon pricing to address climate change). It is the space that an increasing number of leaders in the corporate sector occupy, and informs much of the mainstream media, even if different media position themselves across this spectrum: in the UK, *The Times* as centre-right as compared to *The Guardian* as centre-left. While the ‘Third Way’ turn of the 1980s and 1990s saw parties of the centre-left reconcile themselves to the global market economy through leaders such as Tony Blair and Bill Clinton, in more recent years the corporate sector has been moving to the left on social, cultural and environmental questions, as seen with initiatives



**Fig. 14.3** Relationship between education, economic perspectives and other variables (based on Piketty [2020]) (Source Author)

around stakeholder capitalism and the civic responsibilities of business (Business Roundtable, 2019; *The Economist*, 2021). Liberals strongly support the idea of the open Internet, both as a philosophical ideal and as a vehicle for new forms of market competition and societal innovation (Potts, 2019).

The liberal reformism of the last 40 years—sometimes referred to as ‘neoliberalism’, although not unproblematically (Flew, 2014)—comes up against two forms of critique: that the moral aspirations of liberalism do not go far enough to change society, and that the policy consequences of liberalism have gone too far, and undermined the social order. *Cosmopolitans* critique liberals for failing to recognise the contradictions between their normative agenda of formal equality and the substantive inequalities of opportunities and life chances experienced by different

groups within society. Increasingly, this critique of liberal-democratic capitalism is driven by intersectionality (Collins, 2019; Crenshaw, 2017), and the proposition that structural inequalities and injustices based upon race, gender, social class, sexuality, disability and other factors interact and intersect, meaning that campaigns for social justice need to recognise and work across these multiple societal fault-lines. As a result, they critique the assumptions of meritocracy that underpin both ‘neoliberal’ and ‘Third Way’ versions of liberalism, arguing that true equality of opportunities and life chances requires more radical social transformation than can be envisaged in the competitive market economy. As the British social theorist Jo Littler has put it ‘the idea of meritocracy has become a key means through which plutocracy – or government by a wealthy elite –perpetuates, reproduces and extends itself ... the language of meritocracy has become an alibi for plutocracy and a key ideological term in the reproduction of neoliberal culture’ (Littler, 2018, p. 2).

Both liberals and cosmopolitans tend to be highly educated and increasing constitute either the ‘right’ and ‘left’ of centre-left parties (as with the Democrats in the US and the Labour Party in the UK), or the latter group have come to be prominent in Greens parties around the world. Cosmopolitans tend to be anti-capitalist yet also pro-global in many respects, ranging from strong support for multiculturalism and high levels of immigration, to favouring identities and institutions that are associated with *non-territorial identities*, or attachments and affiliations based upon age, class, disability, gender, race, sexual orientation or other aspects of ascribed behaviour or a common sense of belonging. Jan Aart Scholte observes that ‘large-scale globalisation since the middle of the twentieth century has spurred unprecedented growth of non-territorial identities and associated networks of solidarity and struggle’ (Scholte, 2005, p. 240). Of particular importance in this regard is the idea of the open Internet, that promotes both extra-territorial engagement and identities and forms of civic action beyond the boundaries of the nation-state.

The third group, *traditionals*, are also highly critical of the dominance of liberal ideas, values and policies, but for different reasons. This group, which to some extent overlaps with the working class in the classic sense, have lower average levels of education than liberals and cosmopolitans, are more likely to work in unskilled or semi-skilled occupations or in manual/‘blue-collar’ jobs. They are typically located in the suburbs of



major cities or in regional centres rather than the urban metropolises associated with finance, technology, global mobility, university campuses and the ‘creative class’ (Florida, 2017). With the growth in global inequality of income and wealth over the last three decades (Piketty, 2014), this is the group that have most strongly felt the impact of stagnant real wages, rising house prices, and pressures to adapt to more precarious occupational situations (e.g. being ‘gig workers’ or on ‘zero-hour’ contracts) than was the case for previous generations of their families; they may also be recent migrants trapped in secondary labour markets and insecure work.

This group, variously referred to as the ‘precariat’ (Standing, 2014), the ‘left behinds’ (Standing, 2018), and those located ‘somewhere’ rather than being geographically mobile (Goodhart, 2017), have also experienced a degree of cultural loss and loss of identity. Guy Standing observed that they have been ‘losing cultural rights, in that those in it feel they cannot and do not belong to any community that gives them secure identity or a sense of solidarity and reciprocity, of mutual support’ (Standing, 2018). Having historically been the backbone of centre-left and social democratic political parties, the experiences of declining trade union membership, hollowed-out post-industrial towns, and a sense of perceived disadvantage arising from inequitable access to post-secondary education and associated cultural capital, have generated a mix of economic and cultural demands that can appear contradictory to the traditional left, but which derive from a demand for security in the face of globalisation, technological change, and policy changes from which they feel disadvantaged and excluded (Freiden, 2018).

The fourth and final group are *populists*. In some respects, populism can be seen as a weaponisation of the concerns of the traditionals, manoevered in particular political directions. Among the large literature on populism, noted above, four recurring concerns can be identified, or what Eatwell and Goodwin (2018) term the ‘four D’s’:

1. Distrust of political elites, anger at corruption, and perceived exclusion from the institutions of liberal democracy;
2. Deprivation, in the face of rising economic inequalities, stagnant real wages, job insecurity and declining social provision;
3. Destruction—real or perceived—of national cultures and traditions, value systems and authority structures, and historically embedded ‘ways of life’;

4. Dealignment of citizens as voters from the major political parties, and from the class and other societal cleavages associated with those parties (Eatwell & Goodwin, 2018).

Populist movements tend to be national, with globalisation and cosmopolitanism being two of the things they rail against. Reflecting on the diversity of national populisms, Matthew Goodwin observed:

Each national populist party has its own local particularities but there are common themes. In the aggregate, national populists oppose or reject liberal globalisation, mass immigration and the consensus politics of recent times. They promise instead to give voice to those who feel that they have been neglected, if not held in contempt, by increasingly distant elites (Goodwin, 2018).

Both traditionalists and populists tend to have concerns about the power of digital platforms and the societal impacts of social media. Populism has a more dynamic and contradictory relationship to digital platforms, as it does to the media generally. Benjamin Moffitt has argued that populism is an intensely mediatised political phenomenon, whose leading figures continually rail against the mainstream media ('fake news'), while maximising access to it in order to reach their constituencies 'over the heads' of established political elites. Identifying social media as providing the opportunity to bypass information gatekeepers and media elites, in order to speak more directly to their support base, populist movements and leaders have established a strong presence on social media platforms – Donald Trump and Twitter being the most (in)famous example – while at the same time railing against the power of liberal elites they associate with 'Big Tech'. Philip Napoli has argued that the Trump presidency's technology policies exemplified symbolic policy-making (Napoli, 2021), where rhetorical railing against 'Big Tech' was matched by an almost complete absence of substantive policy initiatives. As such, it appealed to his support base who, Napoli argues, 'cared far less about what Trump actually did and far more about what he represented – essentially, the symbolic dimensions of Trump' (Napoli, 2021).

## THE PAST, PRESENT AND FUTURE POLITICS OF TECH POLICY

One of the key features of the evolution of the Internet has been the extent to which its development has been bound up with research and educational institutions. The ‘wizards who stayed up late’ (Hafner & Lyon, 1998) were primarily affiliated to universities and research centres, and insofar as they had necessary connections to corporations or to the U.S. military, they maintained a cultural distance from mainstream bureaucracies, instead cultivating a counter-cultural ethos alongside a belief in the inherent virtues of digital technologies (Turner, 2006). While the Internet is now effectively a mass medium, with about 4.7 billion people online in 2021, or 59.5 per cent of the global population (Johnson, 2021), the association of the Internet with liberal politics, cosmopolitanism, and those with high levels of education remains a constant.

To take one example, a 2019 study of Twitter users in the U.S. by the Pew Research Center found that they were younger than the U.S. population as a whole, and far more likely to be college educated and Democrat voting than the population as a whole: this was especially marked among the 10% of Twitter users deemed power users, who generate 6900% more Tweets than the other 90% of users, and generate 80% of content on the site (Wojcik & Hughes, 2019). The other key feature of the Internet is its global nature: it has long been championed as enabling the ‘death of distance’ (Cairncross, 1998), forms of politics and identity that transcend nation-states and national cultures and identities (Castells, 2008; Giddens, 2003; Scholte, 2005), and forms of polycentric and multistakeholder governance, buttressed by binding international laws and conventions, that can empower global civil society and no longer be reliant upon nation-state governments (Castells, 2009; Haggart, 2020; Scholte, 2017).

For a long period, the politics of the Internet were shaped in most parts of the world—and particularly the liberal democracies—by what has been termed the ‘Californian Ideology’ of ‘free minds and free markets’ (Barbrook & Cameron, 1996; Rossetto, 1996). It was in many ways the corollary of what Thomas Friedman would term the ‘Golden Strait-jacket’ whereby economic prosperity was dependent upon accepting the rules of the game of global liberal capitalism, so that ‘your economy grows and your politics shrinks’ (Friedman, 2001, p. 106). While such a

bargaining away of sovereignty was never acceptable to countries such as China, Russia and Saudi Arabia, these countries were seen as outriders in terms of the global Internet. The dominant ‘hands off’ agenda of global Internet politics, which saw massive growth in the major ICT and digital platform companies, has been challenged from a variety of perspectives in the 2010s and 2020s. What was termed the ‘global techlash’ saw a diverse range of concerns unleashed towards the dominant digital platforms, from monopolisation of digital markets to being conduits for ‘fake news’ and online misinformation, and from lack of diversity in their workplaces and internal cultures to the circulation of hate speech and other forms of online harms to women and minorities, and the wider implications of a socio-economic regime based around ‘surveillance capitalism’ (Flew, 2019; Soriano, 2019; Zuboff, 2019). This has in turn promoted a diverse range of regulatory responses around the world, and the rise of a new ‘regulatory field’ around platform governance (Flew, 2021a; Flew et al., 2021; Schlesinger, 2020; Schlesinger & Kretschmer, 2020).

The entry of nation-state governments into the platform regulation space can be seen as marking a shift toward tech policy becoming more integrally connected to electoral politics. For much of the time, policies towards the Internet have been primarily shaped by a cosmopolitan critique of liberalism, in two ways. First, they have focused upon the internal cultures and practices of the largest digital tech companies, such as the manner in which a lack of diversity within the companies—the ‘techbro’ phenomenon—manifests itself in practices that display gender, racial, and other forms of bias (Lusoli & Turner, 2021; Noble, 2018). Second, there has been demands for forms of supranational governance that can empower international NGOs and set limits to the regulatory capacity of nation-states, including digital constitutionalism (Celeste, 2018; Suzor, 2018), social media councils (Docquir, 2019), and the use of human rights laws, such as Article 19 of the UN Convention on Civil and Political Rights (Kaye, 2019), to set boundaries to nation-state jurisdiction in the digital domain.

What has been a consistent corollary has been that, insofar as nation state governments or entities such as the European Union have proposed regulations for the Internet and digital platforms, these are more often than not opposed by relevant NGOs. Germany’s Network Enforcement Act, or NetzDG (*Netzwerkdurchsetzungsgesetz*) Law, which aimed to combat hate speech on the Internet by requiring digital platforms to remove hate speech quickly under threat of large fines, was opposed

when introduced in 2018 by civil society groups advocating for online freedom of expression such as the Electronic Frontiers Foundation, journalism organisations such as Reporters Without Borders, Human Rights Watch, Internet industry representatives, and political parties ranging from the far-right Alliance für Deutschland (AfD) and the centre-right Free Democrats, to the Left Party (Echikson & Knodt, 2018). The European Union's Article 13 Directive on online copyright was opposed by Human Rights Watch, Reporters Without Borders, the Electronic Frontier Foundation, Creative Commons, and European Digital Rights, as well as by the major technology companies Google and Facebook (Reynolds, 2019). The Australian government's News Media and Digital Platforms Mandatory Bargaining Code, passed in March 2021, was strongly opposed not only by Google and Facebook, but also by NGOs such as Digital Rights Watch, who argued that it failed to address the data-driven business model of surveillance capitalism (Floreani, 2021).

The United States under the Biden administration is proving to be a fascinating case study in such debates. As the pro-Silicon Valley consensus among the Democrats leadership during the Clinton and Obama administrations fractured, with Presidential nominees such as Sen. Elizabeth Warren calling for strong antitrust action to 'break up big tech', the then-nominee Joe Biden gave an interview to *The New York Times* indicating a preparedness to revoke Sect. 230 provisions for digital platform companies unless they were held more accountable to content hosted on their sites:

[The New York Times] can't write something you know to be false and be exempt from being sued. But he [Mark Zuckerberg, CEO of Facebook] can. The idea that it's a tech company is that Section 230 should be revoked, immediately should be revoked, number one ... It should be revoked because it is not merely an internet company. It is propagating falsehoods they know to be false, and we should be setting standards not unlike the Europeans are doing relative to privacy. You guys still have editors. I'm sitting with them. Not a joke. There is no editorial impact at all on Facebook. None. None whatsoever. It's irresponsible. It's totally irresponsible (Editorial Board, 2020).

With Biden's inauguration as U.S. President in January 2021, 70 activist, social justice and human rights organisations prepared an open letter to the new administration warning against what they termed 'overbroad' changes to Sect. 230, arguing that:

Section 230 is a foundational law for free expression and human rights when it comes to digital speech. It makes it possible for websites and online forums to host the opinions, photos, videos, memes, and creativity of ordinary people, rather than just content that is backed by corporations (Fight for the Future, 2021)

As has often been the case, this does put these activist and social justice groups, along with long time free speech advocacy groups such as Electronic Frontier Foundation, on the same side of debates about tech policy as industry advocacy groups, such as the Competitive Enterprise Institute (Nabil, 2021).

What is apparent is that, insofar as issues in tech policy have issue salience (Moniz & Wleizen, 2020), there is typically majority public support for measures to rein in the market power of ‘Big Tech’, or to require digital and social media platforms to have both legal and ethical responsibilities with regards to content hosted on their sites. There are also well-documented concerns about trust in information generally, with both media as traditionally understood and social media platforms seen as having responsibilities in this regard, along with business and government (Edelman, 2020; Zuckerman, 2019). This would not be an uncritical support for all forms of state regulation. Clearly nation-states can go too far in regulating the Internet, or develop policies which have unintended consequences. But the baseline assumption that the community is less disposed towards regulation of digital platform companies because that may ‘break the Internet’, as compared to support for regulating large companies in the interests of accountability, transparency and control over market power, is not well back up by recent experience of policy initiatives. Cosmopolitan critics of market liberalism in the tech sector often find themselves in a position of Saint Augustine in the face of temptations, saying “Lord make me chaste, but not yet”. The modern-day parallel is that of “Let there be more regulations of Big Tech, but not those ones”.

If progressive politics is primarily concerned with cosmopolitan critiques of nation-state regulation, in the name of globalisation and supranational governance regimes, it runs the risk of being side-lined by government proposals that tap into the concerns of ‘traditionalists’—many of whom have been historically aligned with left and centre-left political parties—about the apparent dissolution of the social contract, and populists who identify ‘Big Tech’ as an elite that should be subject to greater popular sovereignty. As it appears that nation-state regulation

of digital platforms will increasingly be a feature of the global Internet, in the liberal democracies as well as in authoritarian states, the ethos of global cosmopolitanism that has underpinned much Internet activism will bump up against demands for greater accountability and transparency on the part of digital platforms, and forms of governance that are meaningfully subject to state laws and regulations, and where sanctions for non-compliance can be effectively applied. In light of the demographic, electoral and political trends identified by authors such as Piketty, it would appear that populism will be around for some time, and will be something which all engaged in politics, policy and the management of digital technologies will have to contend with.

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