



FROM HOT NEWS TO LINK TAX:  
THE DANGERS OF A QUASI-PROPERTY RIGHT IN INFORMATION

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INTRODUCTION

In February 2021, the Australian federal government enacted the “News Media and Digital Platforms Mandatory Bargaining Code,” which requires Facebook and Google to pay domestic news outlets for linking to their websites. It was a first-of-its-kind mechanism for redistributing revenue from Big Tech platforms to legacy journalism, and it has attracted global attention from policymakers looking to halt the Internet-fueled decline of the traditional news industry. Thus, the success or

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failure of what critics call Australia’s “link tax” has significant implications for the future of both the World Wide Web and the news industry writ large.

But while the full consequences of Australia’s regulatory innovation will not be apparent for several years, there is a precedent from the United States that could shine light on the possible outcomes. In the early twentieth century, U.S. courts created a “hot news” doctrine to bolster the Associated Press newswire service when it faced new competitors and navigated the technological disruption caused by the spread of the telegraph. The intended and unintended consequences of the American hot news doctrine offer a cautionary tale to contemporary policymakers interested in an Australian-style link tax. Both hot news and the link tax are forms of enclosure that turn a category of information into a novel form of property. Doing so has radical implications: rewarding politically connected incumbent firms, punishing insurgent competitors, and producing ideological consensus.

It is not breaking news that newspapers in the twenty-first century have experienced a general decline that has dramatically affected circulation, advertising, and revenue. The rise of the consumer Internet eroded classified advertising, once the single most significant source of newspaper revenue. In Australia, classified revenue fell from \$1.5 billion in 2002 to just \$0.2 billion by 2018. At the same time, overall Australian newspaper revenue fell by nearly the same margin—from \$4.4 billion to \$3 billion—suggesting that the migration of classified ads to online clearinghouses like Craigslist was a principal factor in the collapse of the old newspaper financial model.<sup>1</sup>

### I. WHO SHOULD PAY AND HOW?

Australian newspapers had a revenue problem and looked to their national government for redress. A straightforward solution would have been to tax the online classified-ad platforms and redistribute the money to bereft newspapers, whose market share had fallen from 96% to 12%. However, such an approach would have been straightforwardly anti-competitive, would have generated costs that fell directly on consumers, and would have targeted domestic classified-ad platforms. Instead, Australian newspapers sought to take a slice from a much-larger financial pie: online search-and-display advertising, which enjoys quadruple the

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<sup>1</sup> ALPHABETA, AUSTRALIAN MEDIA LANDSCAPE TRENDS (Sept. 2020), <https://perma.cc/845D-GKBT>.

revenue of online classifieds.<sup>2</sup> Since two companies that are headquartered abroad—Facebook and Google—dominate search-and-display in Australia, the costs of a link tax would not fall as directly on Australian consumers (so long as neither company pulled out of the market entirely).

Online classified platforms derive nothing from newspapers, so taxing them to subsidize newspapers would not have seemed equitable (nor would it have been particularly lucrative). By contrast, Facebook and Google operate as news aggregators, linking to newspaper articles in order to sell ads and garner user data. Since aggregators have a proximate relationship to the news, it is easy to claim that they are free-riding off of journalists' hard work and should pay a fair share.<sup>3</sup> As Australia's Federal Treasurer Josh Frydenberg put it, "This is really a question of fairness. If you prepare the content and the digital platforms are using it to bring traffic to their websites, then they should pay for it."<sup>4</sup>

Note that the justification offered is moral, rooted in a particular concept of what is fair. It is not a proposition that translates well in the offline world. For instance, it would be strange to suggest that brick-and-mortar retailers have a moral obligation to pay manufacturers not only for their product but also for the mere right to resell and display the product on their shelves. (Typically, the relationship is reversed, with manufacturers paying major retailers for prime shelf space. Efficient distribution is a value-added proposition.)<sup>5</sup> Fundamentally, the problem that the link tax is meant to address is not moral but structural, as policymakers attempt

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<sup>2</sup> *Id.* at 15. The four largest Australian classified advertising companies by revenue are REA Group, Seek, Carsales, and Domain, each headquartered in Australia. It is worth noting that many newspapers have since migrated their classified sections online, meaning that they are now direct competitors with non-newspaper platforms.

<sup>3</sup> "How do you value fact-based news absent advertising? News has always been valued on the back of how much ads that the outlet can sell. Because Google and Facebook have dominated the advertising market and taken that out of the equation, we're now trying to work out the value of public interest journalism." Associated Press, *Australian Media Law Raises Questions about 'Pay for Clicks'*, USA TODAY (Feb. 19, 2021), <https://perma.cc/8T9U-LVWJ> (quoting Peter Lewis, Director of the Australia Institute's Center for Responsible Technology).

<sup>4</sup> Richard Holden, *Australia's News Media and Digital Platforms Bargaining Code Is Great Politics but Questionable Economics*, PROMARKET (Sept. 21, 2020), <https://perma.cc/2596-96S8>.

<sup>5</sup> FED. TRADE COMM'N, *SLOTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES* (Nov. 2003), <https://perma.cc/AQW3-DTRT>.

to buttress traditional media organizations that are coping with technological disruption, albeit with varying degrees of success.

Yet news aggregators had little to do with the financial decline of the newspaper industry. They were not major players in the rise of online classified advertising. Additionally, online advertising has shifted display-ad revenue away from its traditional proximity to the news. Advertisers have more non-news digital options for placing their ads—social media, streaming, etc.—than they did back when print newspapers were one of the few mediums for reaching large audiences. For example, a clothing store would have once placed an ad in the local newspaper by necessity (and not because it was a newspaper per se); how else could they affordably reach a large group of potential customers? Today, however, that clothing company would be more likely to place an ad with a TikTok influencer or to buy a display ad on Pinterest, neither of which has anything to do with news reporting. Only a miniscule fraction of the revenue lost from display ads in print newspapers was transferred over into advertising on online news aggregators.<sup>6</sup> In other words, even if one were to somehow abolish online news aggregation, it would not return significant display-advertising revenue to newspapers.

Nevertheless, after several years of studying a variety of financial redistribution mechanisms—including a per-click hyperlink tax, the source of the now somewhat-misleading “link tax” moniker—the Australian Competition and Consumer Commission opted for a mandatory-bargaining scheme. News aggregators are expected to negotiate revenue sharing deals with news producers in exchange for linking to their articles and videos. If they fail to do so within three months, the treasurer is given sole authority to appoint an arbitrator, require the parties to submit competing offers, and then choose whichever offer they find fairest.<sup>7</sup> Thus far, the mandatory-bargaining component has remained notional, given that the treasurer has yet to exercise his authority. But the mere possibility of enforcement was enough to convince Google and Facebook—after some brief initial resistance—to quickly strike a number of deals with Australia’s largest news producers.<sup>8</sup>

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<sup>6</sup> Ads on news searches account for as little as 1% of Google’s total revenue. Kamil Franek, *How Google News Makes Money: Business Model Explained* (Dec. 17, 2019), <https://perma.cc/H9S7-K9Q4>.

<sup>7</sup> *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021* (Cth) 28 (Austl.), <https://perma.cc/Q6WH-44Q5>.

<sup>8</sup> Facebook imposed a one-week ban on news-article-sharing on its platform, sparking a public

The early returns from the law have heartened proponents. Australia's largest newspaper and magazine conglomerate, News Corp Australia, negotiated a \$50 million deal with Google, while broadcasters Seven and Nine got \$30 million apiece. The total reported transfer to all news outlets from both Google and Facebook as of March 2022 was \$200 million, with 90% going to News Corp, Seven, and Nine. Flush with cash—for instance, Nine Entertainment reported a 39% increase in earnings because of the payments—the outlets have embarked on a journalist-hiring spree.<sup>9</sup>

However, the newly fattened bottom lines of Australia's largest media enterprises are unlikely to assuage critics of the link tax. Indeed, given that News Corp is owned by Rupert Murdoch, opponents have dubbed it the “Fox News tax,” raising concerns that the link tax will merely entrench the global news magnate's disproportionate share of the Australian news industry and bolster his ability to influence politics in a particular ideological direction.<sup>10</sup> Others have argued that the link tax is an example of ham-fisted government intervention, an “extraction of money at the point of the proverbial gun” rather than an “honest attempt at collective bargaining.”<sup>11</sup> The boldest claim, however, comes from Sir Tim Berners-Lee, the inventor of the World Wide Web, who was “concerned that the Code risks breaching a fundamental principle of the web by requiring payment for linking between certain content online” and “could make the web unworkable around the world.”<sup>12</sup>

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backlash among Australian users. Rod McGuirk, *Unfriended No More: Facebook to Lift Australia News Ban*, AP NEWS (Feb. 23, 2021), <https://perma.cc/N3A7-C6DX>.

<sup>9</sup> Mathew Ingram, *Facebook and the News After Australia: What Happens Now?*, COLUM. J. REV. (2021); Christopher Warren, *Diversity Hit Between the Eyes as Old Media Pockets about 90% of Big Tech Cash*, CRIKEY (Feb. 24, 2021), <https://perma.cc/PA3D-GKPQ>; Nic Fildes, *Australia's Media Thrives After Forcing Big Tech to Pay for Content*, FIN. TIMES (Mar. 11, 2022), <https://perma.cc/59CJ-8CPB>.

<sup>10</sup> James Allworth, *Australia's Proposed “Fox News Tax”*, MEDIUM (Jan. 25, 2021), <https://perma.cc/3DA4-GQAW>; *Saving the Free and Diverse Press: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L.*, 116th Cong. (2021) (statement of Jeff Jarvis, Leonard Tow Professor of Journalism Innovation, City Univ. of New York).

<sup>11</sup> Ben Thompson, *Australia's News Media Bargaining Code, Breaking Down the Code, Australia's Fake News*, STRATECHERY (Aug. 20, 2020), <https://perma.cc/D56N-K9GP>.

<sup>12</sup> Timothy Berners-Lee, *Testimony to the Senate Standing Committee on Economics* (Jan. 18, 2021), <https://perma.cc/E58F-KPLZ>.

## II. MADE IN AMERICA

This is not the first time a national news industry has successfully pushed for government intervention to subsidize operations via a novel legal mechanism in response to technological disruption and financial competition. In the early twentieth century in the United States, the Associated Press (AP) newswire service found itself facing a similar crisis. Half a century earlier, a group of New York City newspapers had banded together to share the costs of producing original journalism. For example, a journalist on assignment in Charleston, South Carolina or London, England could send back dispatches about the latest events, from which each AP member could then construct a news story with their own stylistic spin. This system allowed newspapers to focus their efforts on the local news beat while defraying the high cost of national and international coverage. In addition, as historian Richard Schwarzlose puts it, the AP “was partner in a common-law marriage with Western Union,” which enjoyed a functional trans-continental telegraph monopoly.<sup>13</sup> As a result, the AP could not only share costs across a national pool of member newspapers, but it could transmit dispatches more quickly than could its various regional competitors.

The AP’s competitive advantages made membership a desirable privilege. By the turn of the twentieth century and by design, only about 30% of American newspapers had been allowed to join the AP fold. First-class AP members were given the right to exclude from membership all other newspapers in a 120-mile radius. It was a tradeoff. On the one hand, more members meant that shared costs could be spread more widely; however, adding too many members would dilute the value of existing memberships by introducing local competition between member newspapers. And since AP membership rights were transferable, when a member newspaper folded, its membership could sell for the modern equivalent of hundreds of thousands or millions of dollars at auction. As one newspaper owner put it, “The exclusive character of the news [was] an essential element of its value, and incentive to its collection.”<sup>14</sup>

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<sup>13</sup> RICHARD SCHWARZLOSE, *THE NATION’S NEWSBROKERS VOLUME 2: THE RUSH TO INSTITUTION: FROM 1865 TO 1920*, at 14 (1990).

<sup>14</sup> *Id.* at 184; JONATHAN SILBERSTEIN-LOEB, *THE INTERNATIONAL DISTRIBUTION OF NEWS: THE ASSOCIATED PRESS, PRESS ASSOCIATION, AND REUTERS, 1848–1947*, at 49–50 (2014).

But that value proposition was under serious pressure by the turn of the century. Antitrust action against Western Union and the rise of competing telegraph lines had eroded AP's technological advantage. Newspaper owners clamoring for AP membership lobbied state governments and appealed to the courts, asking for a mandate that the AP sell its wire service to all comers as a "quasi-public utility affected with a public interest."<sup>15</sup> But when the Illinois Supreme Court ruled against the AP in *Inter-Ocean Publishing Co. v. Associated Press* in 1900, the AP dodged this requirement by moving to New York and re-organizing under a designation intended for fish and game clubs.<sup>16</sup>

Hunting club or not, by the 1900s, dissatisfied newspaper owners like magnate William Randolph Hearst—better known today as the inspiration for the movie *Citizen Kane*—took aim at the AP cartel and founded competing newswires, including United Press and the International News Service. Hearst was a sensationalist and innovator, the first newspaperman to print letters to the editor and color cartoons (including the popular *Yellow Kid* strip, which originated the phrase "yellow journalism" as a description of Hearst's often-lurid article topics).<sup>17</sup> Instead of the AP's dry, boring dispatches full of legislative votes and business mergers, the new wire services provided colorful accounts that had human-interest angles. Furthermore, they were early adopters of the faster, cheaper teletype technology.

The Associated Press, then under the leadership of Melville Stone, needed to find a mechanism that would stymie external competitors, quiet restive AP affiliates, and preserve the value of possessing an AP membership. Stone believed that the AP would find its salvation in "hot news" (a name derived from the saying that news was "hot off the press," pages still warm from the printing process). Stone believed that newswires deserved an exclusive, time-limited, legal right to disseminate information collected by one of its correspondents or affiliated newspapers. This was a significant departure from the standard news-gathering practices of the time; it had been routine to extract facts from competing newspaper stories and rewrite them into stories for one's own paper. An entire ecosystem of evening-edition and West Coast newspapers had sprung up around the practice, repurposing

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<sup>15</sup> SCHWARZLOSE, *supra* note 13, at 193.

<sup>16</sup> RICHARD M. HARNETT & BILLY G. FERGUSON, UNIPRESS: UNITED PRESS INTERNATIONAL, COVERING THE 20TH CENTURY 16 (2003).

<sup>17</sup> BEN PROCTOR, WILLIAM RANDOLPH HEARST: THE LATER YEARS, 1911–1951, at 5–6 (2007).

information gathered from morning editions and East Coast papers.

This system had been tolerated because it helped morning newspapers by—as early AP member Horace Greeley put it—making it “notorious” that “certain journals have the earliest news” while evening papers were forced to regurgitate from the leavings of the morning papers. And the practice was so beneficial to the morning papers that Greeley said he “would rather that those [evening newspapers] who do not take it should copy than not.”<sup>18</sup> Indeed, the Associated Press itself engaged in so-called “news piracy.” As Stone reported to the AP Board of Directors after the U.S. Supreme Court ruling in *INS v. AP*, the “proprietary news case had not only great advantage for us, but it had some disadvantage” by “necessarily put[ting] an end to our pirating news from the London papers.”<sup>19</sup> But the loss of that benefit was outweighed by the way in which the hot news doctrine would reinforce the competitive advantages of the Associated Press. Since the AP had the largest news-gathering network, decreasing the amount of free-riding performed by non-member newspapers and insurgent newswires would simultaneously raise costs for competitors, increase the value of an AP franchise, and convince current AP members to remain in-network and continue paying the substantial membership fees required.

Stone found a test case involving an employee of an AP affiliate in Cleveland, Ohio, who had been bribed by the International News Service to relay information gathered from the newsroom’s bulletin board. The AP sued, the federal district court ruled in its favor, INS appealed, and the case then went to the U.S. Supreme Court, which upheld the district court’s decision in *International News Service v. Associated Press* (1918). Melville Stone got his wish for a hot news standard when the Supreme Court granted newswires and newspapers a “quasi property” right over freshly collected news as rightful recompense for “one who gathers news, at pains and expense, for the purpose of lucrative publication” and to prevent unfair competition.<sup>20</sup> The Supreme Court did not set a cooling-off period for hot news, though the district court had suggested a minimum of “three or four hours,” as long as “sufficient time has elapsed to afford opportunity for general publication.”<sup>21</sup> Regardless, the Supreme Court had created something wholly new, a category of

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<sup>18</sup> FREDERIC HUDSON, *JOURNALISM IN THE UNITED STATES, FROM 1690–1872*, at 541–42 (1873).

<sup>19</sup> SILBERSTEIN-LOEB, *supra* note 14, at 207.

<sup>20</sup> *Int’l News Service v. Associated Press*, 248 U.S. 215, 216 (1918).

<sup>21</sup> *Id.* at 426, 428.



property separate from copyright, trademarks, trade secrets, stock tips, and other established categories of proprietary information.

### III. ENCLOSURE OF AN INFORMATIONAL COMMONS

Both the hot news doctrine and the link tax have created a novel, quasi-property right in information. The proper term for describing that process is “enclosure,” an echo of how rentiers in early modern Europe turned previously common pasture, open to the use of all village residents, into private property by erecting fences and legal boundaries. Similarly, as legal scholar Yochai Benkler wrote in 1999, “We are in the midst of an enclosure movement in our information environment,” as “our society is making a series of decisions that will subject more of the ways in which each of us uses information to someone else’s exclusive control.”<sup>22</sup> The invention of the Internet undermined the value that could be extracted by a class of quasi-monopolistic newsgatherers who had been able to charge consumers inflated prices for access to news information and the classifieds marketplace.

With those geographically defined news-distribution monopolies under threat from digital disruption, it is understandable why the formerly landed newspapers would seek a legal mechanism to enclose their corner of the World Wide Web—to erect a high regulatory fence that could keep out all those who would graze on their news without permission. The metaphor breaks down, however, given that in the case of Internet news aggregation, the grazing does not crop the grass, starving the animals, and leaving the owner bereft; rather, the aggregator funnels users to the news originator, expanding their audience at no marginal cost to them. It is hardly the fault of the aggregator that the news producer lost an entirely different form of income (from classified ads) and has suffered as a result.

Proponents of hot news and a link tax often justify a quasi-property right on the basis that reporting the news takes hard work and great expense. As the Associated Press had argued in its brief, “News is a business commodity, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay.”<sup>23</sup> In other words, it is property because we have it, it was hard to produce, and you want it so much that you will pay for it. The U.S. Supreme Court in *INS v. AP* had agreed, adopting what would later become known as the

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<sup>22</sup> Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 354–55 (1999).

<sup>23</sup> *Id.* at 221–22.

“sweat of the brow” standard for property in information.<sup>24</sup> Factual news itself, not merely copyrightable stories about that news, was considered a form of time-limited property under the hot news doctrine.

By contrast, the traditional standard for those “noblest of human productions—knowledge, truths ascertained, conceptions, and ideas”—was that they should be, in the words of Justice Louis Brandeis (from his dissent to *INS v. AP*), “free as the air to common use.” Exceptions could be made to this rule, especially “productions which, in some degree, involve creation, invention, or discovery”—a standard which certainly applies to news gathering—but it was an exception that proved the rule.<sup>25</sup> For instance, copyright was a form of property invented to be, as Lord Thomas Macaulay put it, “a tax on readers for the purpose of giving a bounty to writers.”<sup>26</sup> According to dissenters like Justice Brandeis, the question of whether or not an abstraction should be proprietized was a function of the social utility derived and not the labor that went into making it. The goal was not payment for authors per se but rather the creation of a necessary incentive that would lead to greater literary production and thus net social benefit.

This is an old debate, which legal scholar Richard Epstein has summarized as the difference between “those who see the source of property rights in the positive law” and “as a command of the sovereign” versus those who ground “property rights on the traditions and common practices within a given community” and see property arising “from the bottom up, and not from the top down.” In the latter conception, the State ought to play merely a discovery role, figuring out “what the community has customarily regarded as binding social rules” and then enforcing

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<sup>24</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). The U.S. Supreme Court overturned the standard despite the admitted expenditure of effort and expense that went into compiling telephone numbers for a white-pages publisher.

<sup>25</sup> *Int'l News*, 248 U.S. at 250.

<sup>26</sup> Thomas Babington Macaulay, *First Speech to the House of Commons on Copyright*, in *MACAULAY'S SPEECHES ON COPYRIGHT AND LINCOLN'S ADDRESS AT COOPER INSTITUTE* 201, 201 (James Fleming Hosic ed., 1915). Indeed, Macaulay expressly opposed the extension of copyright terms postmortem because, as he put it, doing so tipped copyright into mere “encouragement to expenditure.” *THOMAS BABINGTON MACAULAY, COPYRIGHT* 1394 (London: Thomas Curson Hansard, 1842). Notably, Melville Stone’s moment of inspiration for his hot news crusade came while reading Isaac Disraeli’s *Calamities and Quarrels of Authors*, in which he wrote, “Is it wonderful . . . that even successful authors are indigent? . . . [F]or, on the publication of their works, these cease to be their own property.” See *MELVILLE STONE, FIFTY YEARS A JOURNALIST* 355 (1921).

those organically generated rules. Indeed, this debate underlines the current contest over the link tax. Should the government of Australia use positive law—given “its administrative ease of application,” to quote Epstein again—to subsidize news outlets via the creation of a novel, quasi-property right over links to news articles? Or should it instead constrain itself to conforming the law to the spontaneously evolving technical and community standards of the World Wide Web?<sup>27</sup>

#### IV. WRECK-IT RUPERT BREAKS THE INTERNET

It is important to recognize just how radical a departure such a link tax enclosure is from the norms of the World Wide Web. This was the source of Sir Timothy Berners-Lee’s concerns about the link tax’s effect on the future of the Internet. Lee invented the concept of hypertext in 1980—which links text on one site to text in another location—and then connected it to emerging protocols for transmission and identification, thus creating the first modern website in December 1990. As he later described, his intention was always that “normal links should simply be references,” meaning that a hyperlink did not imply endorsement or claim ownership of the linked site. The link was no more the property of the reference site than the bare footnote to this paragraph is the property of the cited author.<sup>28</sup> The resulting spiderweb of interconnections spread quickly and globally, thus earning the name “World Wide Web.”

The Australian link tax, however, turns the hyperlink itself into a form of quasi-property by granting an exclusive right of control and compensation to the reference site.<sup>29</sup> As Internet-theorist Konstantinos Komaitis notes, this “changes fundamentally the meaning and scope of hyperlinks” and “ascribes to them a meaning they are not meant to have.”<sup>30</sup> Links to news sites are no longer “normal links” under Berners-Lee’s taxonomy. Google and Facebook can no longer legally share a

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<sup>27</sup> Richard Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 85–88 (1992).

<sup>28</sup> Tim Berners-Lee, *Axioms of Web Architecture, Links and Law: Myths*, w3 (Apr. 1997), <https://perma.cc/6456-NGJZ>.

<sup>29</sup> I prefer the term “quasi-property” for the link tax both because it echoes its use by the U.S. Supreme Court to describe hot news and because it’s a non-formalized form of property. The Australian government could have instead formalized a full property right over hyperlinks via copyright law.

<sup>30</sup> *In the Case of Australia vs. Facebook, the Internet Is the Casualty*, KONSTANTINOS KOMAITIS (Feb. 19, 2021), <https://perma.cc/68RH-NYY5>.

mere link to one of Rupert Murdoch's papers without paying for his permission to do so (or, at least, without risking the wrath of the treasurer of Australia for their failure to bargain). Yet, according to Berners-Lee, it is "the ability to link freely . . . without limitations regarding the content of the linked site and without monetary fees" that "is fundamental to how the web operates, how it has flourished till present, and how it will continue to grow in decades to come."<sup>31</sup> The link tax, by appropriating the hyperlink and legally enclosing online news, threatens to snip a set of threads tying together the World Wide Web.<sup>32</sup> Australia has been a relatively minor player in global Internet development, so the Web can likely survive even so fundamental a challenge. But the success of the link tax Down Under could propel the rise of an imitative, rentier class across the globe, each nation snipping away at the threads that bind together the Web. The days of a truly "world-wide" Web may be numbered.

To understand just how radical the legal enclosure of hyperlinks could be, consider other similar forms of information and how social benefit is derived from their remaining publicly accessible. Compare a news website to the house you occupy; both required significant expense and effort to construct and furnish. However, owning a house at a particular location does not give the title holder ownership of the street address. That is because there is immense social and civil benefit derived from that address remaining public information—remaining "free as the air." Its non-ownership is a traditional, well-established communal norm. It is useful for taxing authorities, commercial entities, and social connectedness; in the Internet age, it is a vital part of services such as Google Maps that greatly benefit travelers.

Turning street addresses into private property could have potential upsides, like helping shield celebrities from stalkers or domestic-abuse survivors from former partners. Perhaps it could even generate rents for those holding these novel rights in street addresses by forcing phone-book companies and registries to pay for listing rights. But more likely, enclosure would simply destroy these networks that provide socially beneficial uses without returning any monetary benefit to the

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<sup>31</sup> Berners-Lee, *supra* note 12.

<sup>32</sup> Although the mechanism of enclosure is different, the current debate over enclosing hyperlinks is reminiscent of concerns about the rise of Internet "walled gardens" in the late 1990s and early 2000s. Facebook is a descendant of those older walled gardens—including AOL and Yahoo—though Google helped blow them apart. AOL's 'Walled Garden', WALL ST. J. (Sept. 4, 2000).

owner.

Indeed, this is the reason why, when looking at the global map of Google Street View locations, you will find large blank spots in Germany. Based on an understandable, historical fear of government surveillance and an emphasis on personal privacy rights, German courts have upheld “informational self-determination” and prohibited corporations from using images of people’s homes or even listing their street addresses without obtaining express permission. Enclosing this category of information—which is freely available in other parts of the world—destroyed much of the social utility derived from Google Street View and did so without returning any kind of monetary benefit to German residents. Given the value Germans place on privacy, it appears to be a price they were willing to pay.<sup>33</sup> But it serves as a reminder that the decision to enclose a commons can generate distributed social costs and informational deadweight losses.<sup>34</sup>

Or imagine a world in which authors—jealous of the revenue extracted from their hard work by used bookstores or the loss of revenue from library borrowing—convinced the government to proprietize factual information about books.<sup>35</sup> In this imaginary world, in order to display a book cover on its shelves or list a book title or description in its catalog, a bookstore or library would need to obtain and pay for the express permission of the newly endowed rights holder. This might create some financial benefit for authors, but it would certainly devastate the used-bookstore and library industries. Given the costs of regulatory compliance and decreased competition, that would leave consumers literarily impoverished with fewer titles carried in fewer locations and at higher prices.<sup>36</sup> Likewise, the future of

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<sup>33</sup> Frank Jacobs, *Why Germany Is a Blank Spot on Google’s Street View*, BIG THINK (Feb. 11, 2022), <https://perma.cc/S8BF-G73G>.

<sup>34</sup> It is worth noting that the proximate problem for Google Street View in Germany was not the creation of a privacy property right per se but the way that doing so functionally increased transaction costs. See Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 MOD. L. REV. 6 (2013), <https://perma.cc/6U9Z-F8ST>.

<sup>35</sup> The fair-use right to share print books in libraries is traditional and well-established. However, digital books are newer and the loss of profits from library use of e-books has been hotly contested. Alison Flood, *Writers Sue US University Libraries for Copyright Infringement*, GUARDIAN (Sept. 13, 2011), <https://perma.cc/B2QV-MP42>.

<sup>36</sup> Compare this imaginary scenario to the very real devolution of publisher liability for U.S. bookstores over the course of the twentieth century. It was once routine for booksellers to be considered equivalent to publishers and thus held criminally responsible for the content of the books

a World Wide Web in which an increasing number of hyperlinks are considered property is an Internet composed of fewer links, offering fewer services, and providing less information, even as it returns only a fraction of that lost consumer value to a handful of websites.

#### V. PASS GO AND COLLECT \$200

The desirability of a new property right should be determined by weighing its social benefits and detriments. To do so, it is first necessary to study the contexts from which hot news and the link tax originated. Both were rooted in efforts—by the Associated Press in the U.S. in the 1910s and Australian news outlets in the 2010s—to protect natural advantages that were crumbling under technological disruption. In the mid-nineteenth century, a natural monopoly in telegraphy developed in response to its high capital costs and the need for government-granted easements, a situation from which the Associated Press, via its relationship with Western Union, derived a massive competitive advantage. As discussed previously, the late-nineteenth-century erosion of the AP’s derived telegraph monopoly launched both a wave of new competition and Melville Stone’s reactionary hot news crusade.

Australian newspapers at the turn of the twenty-first century did not have a comparable technological advantage, but newspapers in the pre-Internet era typically enjoyed a different kind of natural advantage: a geography-based regional monopoly in news provision. As Berkshire Hathaway CEO Warren Buffett once put it, “If you have a monopoly newspaper . . . your idiot nephew could run it.”<sup>37</sup> Buffett backed his words with his wallet, going on a U.S.-newspaper buying spree in the 1970s. By that point, Australian newspaper magnate Rupert Murdoch had already inherited the family newspaper in Adelaide and embarked on his own buying spree of distressed newspapers as the industry consolidated. Classified-ad revenue—

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they sold. But the courts eventually recognized the downsides of that approach, exempting bookstore middlemen that stand between producers and consumers from liability. That principle was then enshrined for the Internet in Section 230 of the Communications Decency Act. Or to put that another way, the mere carrying of a book title did not imply approval or ownership of book by the store, which is the same principle behind Timothy Berners-Lee’s conception of hyperlinking. Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 3 (2020).

<sup>37</sup> Interview with Warren Buffett, Chairman & CEO, Berkshire Hathaway (May 26, 2010), <https://perma.cc/D4UW-GM9J>.

which Murdoch once described as “rivers of gold”—was the financial bedrock on which Murdoch ultimately built a network of domestic broadcast stations, international newspapers, and, in 1996, a new American cable-news network, the Fox News Channel.<sup>38</sup>

But by the 2000s, it was apparent that technological disruption of the newspaper industry was on the horizon. Online classified-ad platforms provided better, faster, and cheaper service to consumers than print newspapers could, and newspaper owners were generally slow to pivot and create their own online platforms lest they cannibalize their existing business model. In addition, some of the earliest online news aggregators did not merely share links to articles hosted on the newspaper’s own websites—driving display-ad revenue—but simply copied the content wholesale and posted it on their own sites. By the end of the decade, the newspaper industry’s income had fallen precipitously; at *The New York Times*, for example, revenue had halved from \$3.27 billion in 2006 to \$1.59 billion in 2012.<sup>39</sup> But the paper’s executive editor Bill Keller blamed not the direct copiers—which could be, and often were, sued for copyright violations—but aggregators like *The Huffington Post*, which merely linked to *The Times*’s articles, and which Keller dramatically compared to Somali pirates.<sup>40</sup>

The frustrations of newspaper owners percolated up to the Associated Press, which announced its intent to spend more on its legal efforts to win “appropriate compensation” for its newsgathering. Like in Australia, the primary cause of newspaper revenue decline was the loss of classified ads, but there was nothing the *NYT* or AP could do about the likes of Craigslist and other classified ad platforms. They could, however, target early news aggregators like *Huffington Post* and *Drudge Report*, which were dependent on linking to newspapers. The Associated Press had waged a war against news piracy in the early twentieth century; and in the early twenty-first century, the Associated Press and member newspapers charged once more into the breach, albeit one opened by the advent of the Internet instead of the

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<sup>38</sup> *Classified Calamity*, *ECONOMIST* (Nov. 17, 2005), <https://perma.cc/3K9C-7WJB>; GEORGE MUNSTER, RUPERT MURDOCH: A PAPER PRINCE (1985); WILLIAM SHAWCROSS, MURDOCH: THE MAKING OF A MEDIA EMPIRE (1997).

<sup>39</sup> Amy Watson, *New York Times Company’s Revenue from 2006 to 2021*, STATISTA (Mar. 21, 2022), <https://perma.cc/68AQ-DYH8>.

<sup>40</sup> Seth Mnookin, *The Kingdom and the Paywall*, *N.Y. MAG.* (July 24, 2011), <https://perma.cc/4LDA-A724>.

decline of a telegraphic monopoly.

Little about the rhetoric involved had changed in a century. Back in 1917, district court judges had accused the International News Service of being a “parasite,” which by “taking the news” would kill off the Associated Press and then “meet the same fate that every parasite meets,” dying “with the stock upon which it feeds.”<sup>41</sup> Likewise, a 2009 article in the *Los Angeles Times* was titled “Internet Parasites” and opened with an elaborate analogy in which newspapers were compared to the hard-working, bread-baking Little Red Hen of the eponymous folk tale, while online aggregators played the role of the lazy dog, cow, and pig who “undercut her price and each others’” until all were driven out of the bread business.<sup>42</sup>

The moment also demonstrated the continuing relevance of Melville Stone’s crusade for hot news. From 2008 to 2012, a wave of scholarship and activism called for a revival of a federal hot news doctrine (which had lapsed in the 1930s) with *INS v. AP* as a precedent.<sup>43</sup> If news itself—and not just copyrightable stories about the news—were considered a form of quasi-property, then free-riding online papers and bloggers would have to either wait to publish their own derivative articles or pay the newspapers for the right to do so promptly. Yet while a closely watched Federal Trade Commission panel in 2009 discussed “potential revenue sources from changes in law” to bail out the newspaper industry—including federal hot news legislation—the proposals went nowhere in either Congress or the courts.<sup>44</sup> In part, that was because early aggregators were small fry; the oft-maligned *Huffington Post*, for example, had only \$30 million in revenue in 2010, at which point the *NYT* was seeking to recoup nearly fifty times that amount.<sup>45</sup>

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<sup>41</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 585 (1918).

<sup>42</sup> David Marburger & Dan Marburger, *Internet Parasites*, *L.A. TIMES* (Aug. 2, 2009).

<sup>43</sup> See, e.g., Ryan Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 *J. TECH. L. & POL’Y* 1 (2008); Lindsay Rabicoff, *The Hot News Misappropriation Doctrine: Confusion in the Internet Age and the Call for Legislative Action*, 53 *JURIMETRICS* 1 (2012); Eric Schmidt, *Hot News Misappropriation in the Internet Age*, 9 *J. ON TELECOMM. & HIGH TECH L.* 313 (2011); Elaine Stoll, *Hot News Misappropriation: More than Nine Decades After INS v. AP, Still an Important Remedy for News Piracy*, 79 *U. CIN. L. REV.* 3 (2011).

<sup>44</sup> FED. TRADE COMM’N, *Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism* (2010), <https://perma.cc/LPJ8-QTEU>.

<sup>45</sup> Jim Romenesko, *Huffington Post Says It’ll Post First Annual Profit This Year*, *POYNTER* (Dec. 14, 2010), <https://perma.cc/M735-E333>.



## VI. “ADVERTISING ONLY IS DEAD”

In any case, by the middle of the decade, the larger American news outlets had discovered a new, even more successful financial model. The newspapers might have lost classified ads and their regional monopolies, but they now enjoyed a potentially global audience in which the marginal cost of every additional subscriber was zero. They slapped up subscription paywalls, dribbled out a handful of free news articles each month to inveigle new subscribers, and watched their subscription bases swell. For example, *The New York Times* had flipped its \$88 million operating loss in 2012 into a \$109 million profit by 2021, in large part by multiplying its online subscriber count from less than one million readers to more than ten million.<sup>46</sup> With growth and profits this torrid, demand for a revived hot news doctrine went cold.

However, the idea of a quasi-property right in news persisted Down Under. While the *NYT* and Associated Press complained and dithered, Rupert Murdoch acted. In an insightful speech at a Federal Trade Commission Workshop in 2009, Murdoch acknowledged that “the old [newspaper] business model based on advertising-only is dead” and any replacement “that relies primarily on online advertising cannot sustain newspapers over the long term.”<sup>47</sup> The reason is simple arithmetic. . . . The old model was founded on quasi-monopolies such as classified advertising—which has been decimated by new and cheaper competitors.” Instead, “good journalism will depend on the ability of a news organization to attract customers by providing news and information they are willing to pay for.” By 2009, Murdoch had already begun to pivot to a subscription model, well before his peers.<sup>48</sup>

Murdoch’s acute business analysis did not, however, alleviate his sense that news aggregators were unfairly appropriating his content. He decried those who “take our news content and use it for their own purposes without contributing a

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<sup>46</sup> Amy Chozick, *New York Times Co. Posts \$88 Million Loss, Citing About.com Write-Down*, N.Y. TIMES (July 26, 2012); Alexandra Bruell, *New York Times Tops 10 Million Subscriptions as Profit Soars*, WALL ST. J. (Feb. 2, 2022).

<sup>47</sup> Rupert Murdoch, *From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?*, FED. TRADE COMM’N (Dec. 1, 2009), <https://perma.cc/RV9M-Q96C>.

<sup>48</sup> R. Johnson & A. Gutiérrez, *Reinventing the Business Model of the Newspaper Industry: Electronic Business Models and the Newspaper Industry, The Wall Street Journal as Case Study* (2010) (M.A. thesis, Blekinge Institute of Technology), <https://perma.cc/QE8K-5UH7>.

penny to its production,” and some who “rewrite, at times without attribution, the news stories of expensive and distinguished journalists . . . all under the tattered veil of ‘fair use’” but which is truly “theft.” Bear in mind that his speech was titled, “From Town Crier to Bloggers: How Will Journalism Survive the Internet Age,” suggesting a capacious definition of unfair online competition. Murdoch might have made the smart move and pivoted his newspapers to a subscription model, but he was still determined to crack down on bloggers, aggregators, and copiers by restricting their right to profit from his news articles without his express permission. “There’s no such thing as a free news story,” Murdoch enjoined, “and we are going to ensure that we get a fair but modest price for the value we provide.”<sup>49</sup> Of course, what Murdoch saw as collecting a “fair but modest price,” critics saw as him extracting a pound of flesh—vengefully taking that which was not his by right.

While the push for an enhanced property right in news in the U.S. stalled, Murdoch was able to take advantage of his even greater influence over Australian media and politics. As Rod Sims—the head of the Australian Competition and Consumer Commission, which drafted the mandatory-bargaining rules—acknowledged, it was Rupert Murdoch who first proposed a link tax.<sup>50</sup> Sims recently stepped down, but Murdoch’s personal influence within the link tax regime is likely to continue given that the new head of the competition committee, Gina Cass-Gottlieb, is a former director of the Murdoch family trust.<sup>51</sup>

## VII. CONCENTRATE, CONSOLIDATE

Rupert Murdoch is both the driving force behind the Australian link tax and its greatest beneficiary. That is because the Australian newspaper industry is one of the most highly concentrated in the world. One study of media concentration ranked it third out of thirty countries, behind only China and Egypt, which have nationalized news outlets and authoritarian governments. It is so concentrated that more

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<sup>49</sup> Murdoch, *supra* note 47.

<sup>50</sup> Mike Masnick, *Australian Official Admits that of Course Murdoch Came Up with Link Tax, but Insists the Bill Is Not a Favor to News Corp.*, TECHDIRT (June 17, 2021), <https://perma.cc/N9PX-FSYV>.

<sup>51</sup> Hannah Wootton, ‘Go for Your Life’: ACCC’s New Chief Hailed as a Win for All Sides, AUSTL. FIN. REV. (Dec. 14, 2021), <https://perma.cc/D8QW-3X5U>; Hannah Wootton & John Kehoe, *New ACCC Chairwoman Is Murdoch Family Insider*, AUSTL. FIN. REV. (Dec. 15, 2021), <https://perma.cc/WHM6-QBTH>; Bill Grueskin, *Millions of Dollars for News, Shrouded in Mysterious Deals*, ED. & PUBLISHER (Mar. 10, 2022), <https://perma.cc/52MS-2VKF>.

than half—51.9%—of all newspaper readership in Australia goes to newspapers affiliated with Murdoch’s News Corp. Throw in the next three networks by size, and only 7.4% of the market is left for independently owned papers.<sup>52</sup> It should not be a surprise that Murdoch’s News Corp and the Nine Network together received over 90% of the total money brokered between Google, Facebook, and Australian newspapers. The largest conglomerates in a highly concentrated industry are naturally best able to extract the greatest financial returns from the new regulations they helped design.<sup>53</sup>

This is an expected outcome from informational enclosure. As legal scholar Yochai Benkler notes, enclosure increases input costs for everyone “because some information previously available at no charge from the public domain is now available only for a price.”<sup>54</sup> Previously, another website or aggregator could freely link to a news article; doing so now, however, comes at a cost. News producers and distributors can compensate for those higher costs by either sharing fewer links or by adjusting their organizational strategy to reduce costs—merging, in this case.<sup>55</sup>

Benkler’s taxonomy of organizational structures can be adapted to the Australian media landscape. News Corp is a blend of two organizational forms. It is, like most traditional newspapers, a “quasi-rent seeker,” an entity that sells exclusive access to a time-sensitive product.<sup>56</sup> But News Corp is also something that Benkler calls a “Mickey” (after Disney’s famous Mouse), meaning a highly integrated firm with a large catalog of valuable content. News Corp is horizontally integrated across a national network of newspapers and radio and television stations. A quasi-rent-seeking “Mickey” has the most to gain from enclosure because the value of its large informational holdings increases; and it has the least to lose since horizontal integration mitigates increased transaction costs by allowing resource-sharing from across the firm. In short, member newspapers do not have to pay to link to each other, while non-members do.

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<sup>52</sup> ELI NOAM, WHO OWNS THE WORLD’S MEDIA?: MEDIA CONCENTRATION AND OWNERSHIP AROUND THE WORLD (2016); Nick Evershed, *Australia’s Newspaper Ownership Is Among the Most Concentrated in the World*, GUARDIAN (Nov. 13, 2020), <https://perma.cc/U9CY-HYBP>.

<sup>53</sup> Warren, *supra* note 9.

<sup>54</sup> Benkler, *supra* note 22, at 406.

<sup>55</sup> *Id.* at 401–06.

<sup>56</sup> Benkler’s use of “rent-seeker” differs from the narrower sense of the term as used in the public choice literature. See David Henderson, *Rent Seeking*, ECONLIB, <https://perma.cc/Q5QP-BY8F>.

This incentivizes smaller newspapers to merge or to join with larger existing firms. Enclosure thus propels consolidation “of a greater portion of the information production function in the hands of large commercial organizations.” In 1999, Benkler presciently predicted that “a world dominated by Disney, News Corp., and Time Warner appears to be the expected and rational response to excessive enclosure of the public domain.”<sup>57</sup> Given that Australia already has one of the most concentrated news industries in the world, the anti-competitive effects of enclosure should be a particular concern.<sup>58</sup>

There has already been a severe imbalance that is evident when looking at which companies have benefitted from Australia’s mandatory-bargaining regime. Big newspaper conglomerates like News Corp, Seven, and Nine have each won tens of millions of dollars from Google and Facebook. But smaller, non-profit, and public outlets have struggled to receive the same consideration. Ostensibly, the mandatory-bargaining rules allow these outlets to appeal to the Australian federal treasurer, who can impose arbitration (although the treasurer has yet to do so in any instance). However, even if the rules functioned as designed, smaller outlets would still simply have “less clout than a bigger player, than a News Corp,” in the words of media critic Jeff Jarvis.<sup>59</sup> That includes Croakey Health Media, which reaches indigenous communities with health information. Croakey’s editor-in-chief, Melissa Sweet, has asked the federal treasurer to compel Google and Facebook to begin mandatory bargaining, but she worries that they “don’t have that political power.” A system that requires companies to “bend the ear of the Treasurer” if they are unable to strike a deal with Google or Facebook on their own is a system that will be more responsive to the likes of Rupert Murdoch than to those like Melissa Sweet.<sup>60</sup>

Furthermore, an anti-small bias is designed into the mandatory-bargaining code. It expressly limits mandatory-bargaining rights to news organizations with a minimum of \$150,000 in revenue. That excludes most bloggers, newsletters, non-

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<sup>57</sup> Benkler, *supra* note 22, at 359.

<sup>58</sup> *Id.* at 401–06, 410.

<sup>59</sup> Rod McGuirk, *Facebook to Lift Australia News Ban After Dispute over Paying for Journalism*, PBS (Feb. 23, 2021), <https://perma.cc/EKU8-MSJB>.

<sup>60</sup> Grueskin, *supra* note 51; Hal Crawford, *Comment: Why Australia’s Dishonest News Media Code Is a Bad Way to Tax Google and Facebook*, PRESSGAZETTE (Oct. 14, 2021).

profits, and even small startup newspapers. The \$150,000 limit would be an unusual criterion if the goal of the link tax, as originally stated, was truly to enforce “fairness” in the distribution of the news by ensuring that aggregators pay all news gatherers. But if the goal is merely financial redistribution from Big Tech to Big Ink—from Google and Facebook to News Corp and other news conglomerates—then it makes perfect sense.<sup>61</sup>

The problem is that enclosure, in general, creates incentives for consolidation, just as Yochai Benkler predicted a quarter of a century ago; creating this kind of size threshold only heightens the consolidation pressure for companies that would benefit by meeting it. For example, Broadsheet Media—a small Australian city guide specializing in restaurant reviews—falls below the mandatory-bargaining threshold and thus cannot compel Google to offer them compensation for linking users to their restaurant recommendations. But if a larger conglomerate newspaper were to start a competing culture guide in Broadsheet’s market, it would be qualified for mandatory bargaining, thus driving Broadsheet out of business or into a merger.<sup>62</sup>

#### VIII. “PROPERTY RIGHTS TALK”

The early returns from Australia’s link tax suggest that there will be anti-competitive outcomes. The history of the hot news doctrine is instructive in this regard. After the victory in *INS v. AP*, the Associated Press grew enormously, with membership swelling from 35% of all daily newspapers in 1912 to 67.8% by 1948, while total revenues nearly tripled. The ratio was even more skewed for morning newspapers, of which a remarkable 96% were affiliated with the AP by the 1940s.<sup>63</sup> Indeed, AP head Melville Stone had worried that the U.S. Supreme Court’s decision was so useful to the AP’s enterprise that it might “destroy our competition or hamper it in such measure that it will make us seem a monopoly,” thus attracting “very dangerous” antitrust attention. The longstanding goal of Associated Press leadership in the early twentieth century was not monopoly power but “moderated competition.”<sup>64</sup>

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<sup>61</sup> My thanks to Kyle Langvardt for coming up with the phrase “Big Tech to Big Ink.”

<sup>62</sup> Mariam Cheik-Hussein, *Explainer: The Arguments Against the News Media Bargaining Code and What Happens Next*, ADNEWS (Feb. 1, 2021), <https://perma.cc/E5LF-VLYH>.

<sup>63</sup> SCHWARZLOSE, *supra* note 13, at 231; SILBERSTEIN-LOEB, *supra* note 14, at 67, 80.

<sup>64</sup> SILBERSTEIN-LOEB, *supra* note 14, at 77.

From Stone's perspective, the hot news doctrine would cement the AP's control over existing members, who were restive over high telegraphy fees, worried about the promise and peril of radio news, and tempted to leave because of the AP's reluctant decision in 1915—under antitrust pressure from the U.S. attorney general—to allow members to receive news from competing wire services.<sup>65</sup> By reducing free-riding by non-members, the hot news standard would theoretically raise the costs of leaving the AP fold. However, Stone stepped down from his active duties shortly after the legal victory, and his successor, Kent Cooper, did not share Stone's interest in pursuing a hot news-based, anti-competitive strategy. Instead, Cooper reduced fees while increasing the number of member newspapers.

Cooper's approach worked to the benefit of William Randolph Hearst, who was not only the head of the INS but also the single largest owner of newspapers with AP memberships. Hearst had lost *INS v. AP* in his capacity as INS head, but his AP holdings hedged that loss significantly. Indeed, the post-case boom in the size of the AP meant that even more of Hearst's papers were quickly added to the AP fold. For Hearst, creating the INS was at least in part a way to increase his bargaining power *within* the AP—a way to pressure it to loosen its cap on the number of newspapers allowed into membership.

It is also a reminder that the point of asserting an informational property right can be something other than the direct financial benefit that it entails. Even if a property right is never formalized nor defended in court, its mere existence—and the implied threat of assertion—can boost negotiating power or constrain unwanted behavior. Publisher and AP member Horace Greeley once described the inveterate complaints about news piracy as something “talked of for effect's sake.”<sup>66</sup> Complaining has its own utility, a function that the AP's Stone sought to boost by inventing a novel property right in hot news.

This “property-rights talk,” to use legal scholar Douglas Baird's phrase, may bear on the Australian link tax situation.<sup>67</sup> If the goal of inventing a novel quasi-property right over hyperlinks was the creation of an equitable and transparent redistribution process, then the chosen mechanism has already proven itself to be a

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<sup>65</sup> Douglas Baird, *Property, Natural Monopoly, and the Uneasy Legacy of INS vs. AP 2*, CHI. UNBOUND (2005), <https://perma.cc/KW6B-FCRS>; SCHWARZLOSE, *supra* note 13, at 84.

<sup>66</sup> HUDSON, *supra* note 18, at 541.

<sup>67</sup> Baird, *supra* note 65, at 36.

failure. But if the link tax's goal was instead to bolster the bargaining power of well-connected, incumbent newspaper conglomerates, then the link tax has been a major success. That distinction also makes sense of the fact that the mandatory-bargaining system has yet to be formally invoked by Australia's federal treasurer. The system's nominal purpose and actual function are quite different. By persuading Google and Facebook to sit down with large outlets like News Corp, the link tax may have already fulfilled its true purpose.

#### IX. CENSORSHIP AND CONSENSUS

There are other negative consequences that stem from informational enclosure beyond industry consolidation and diminished competition. When the consolidated power of an industry is dependent on governmental support, it exacerbates the risk of either overt censorship or the creation of an artificial consensus. It is too early to predict any particular outcomes from Australia's link tax in this regard, but there are warning signs. The tax vests a great deal of discretionary power in a single, appointed position: the federal treasurer. And the mandatory-bargaining process is a black box. Initial negotiations between news outlets and aggregators are private. If those negotiations fail and an appeal is filed, the federal treasurer is under no obligation to explain why they mandated arbitration or chose not to. When concerns about the opacity of the bargaining process were raised, the head of the Australian Competition and Consumer Commission retorted that "the objective was never transparency. . . . The simple thing was evening out the bargaining power. If deals are done that the media companies are happy with, then it's a success."<sup>68</sup> It is hard to imagine a design more likely to result in regulatory capture and untoward political influence on behalf of favored media groups.

There is a subtler danger than overt censorship. News-media consolidation tends to favor centrist politics and the creation of ideological consensus. Smaller, more radical newspapers will naturally have greater difficulty than larger firms in building the political capital needed to "bend the ear" of a partisan treasurer or their appointed arbitrators. Without intending to, the link tax could set the stage for decreased ideological diversity in the output of the Australian newspaper industry.

Something similar happened in the aftermath of the hot news doctrine. Although the test case in *INS v. AP* involved news piracy in Cleveland, Ohio, the sub-

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<sup>68</sup> Grueskin, *supra* note 51.

ject of the pirated wires was the world war being waged in Europe. Hearst had developed a pro-German reputation prior to U.S. entry into the conflict, becoming the “most hated man in the country” (though he averred that his anti-war views made him “the only powerful sane man on the mad planet”). Hearst changed his tune after the U.S. declaration of war in 1917, but by that point, each of the major Allied governments had already barred INS reporters from using their cables or postal services, angry about INS newspapers running unapproved (but mostly true) stories about various military setbacks and political machinations. Hearst sounded a defiant note—“I will not supplicate England for news”!—but his newspapers still needed coverage from the front.<sup>69</sup> Hearst was forced to rely heavily on information obtained from the AP’s wire reports and did so until he was caught in Cleveland. By contrast, Stone and the Associated Press had deferred to French and British censors and had earned special, expedited privileges for AP reports.<sup>70</sup> Back in the U.S., the AP encouraged President Wilson to create a censorship board and pledged its “hearty support” for the war effort.<sup>71</sup>

In this context, granting a property right over hot news reinforced wartime censorship by guaranteeing that the most enthusiastically pro-government wire service carried the freshest news. In his dissent from *INS v. AP*, Justice Brandeis recognized this problem, noting the “danger involved in recognizing such a property right in news” when it aligned with “prohibitions imposed by foreign governments.”<sup>72</sup> There were even concerns within the AP about the situation. Stone’s successor, Kent Cooper, later said that he “disliked the idea of the Associated Press having exclusive access to and being an outlet for the propaganda tainted announcements of foreign governments, which in effect set The Associated Press up as the exclusive mouthpiece in America for these governments.”<sup>73</sup> That kind of knock-on government censorship is relatively easy to spot. There is, as of yet, no evidence of a similar problem in Australia today involving the link tax.

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<sup>69</sup> PROCTOR, *supra* note 17.

<sup>70</sup> STONE, *supra* note 26, at 245–46.

<sup>71</sup> *Id.* at 325–26; HARNETT & FERGUSON, *supra* note 16, at 54; for more on the censorship board, see STEVEN VAUGHN, HOLDING FAST THE INNER LINES: DEMOCRACY, NATIONALISM, AND THE COMMITTEE ON PUBLIC INFORMATION (1980).

<sup>72</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 263 (1918).

<sup>73</sup> SCHWARZLOSE, *supra* note 13, at 82.



However, what is less visible but no less pernicious are the ways in which enclosure and consolidation can stifle peripheral voices, creating an artificial ideological consensus even without formal censorship. By the early twentieth century, the Associated Press had earned a reputation for conservatism, opposition to organized labor, and disinterest in racial issues. Garrison Villard, owner of *The Nation*, accused the AP of siding “in ninety-nine cases out of a hundred” with “the views of the employing class.”<sup>74</sup> INS, on the other hand, reflected Hearst’s more progressive politics, his desire to “see the press fulfill its noble calling, and as the mouthpiece of the people, rule, regulate, and reform the world.”<sup>75</sup> Other, smaller newswires cropped up in the 1900s and 1910s to address the oversights of the AP, including the Federated Press, which served a group of socialist newspapers, and the Associated Negro Press, which reached a growing national network of black-owned newspapers. The hot news standard was never strictly enforced, but a rigorous hot news regime would have been damaging for these second-tier newswires, which often relied upon basic information gleaned from the AP. Through its cozy relationship with the federal government and a relative disinterest in serving radical or marginalized communities, the AP’s rise to predominance by the 1940s may have played an important role in the formation of the post-World War II liberal consensus.<sup>76</sup>

#### X. FRIEND OR FOE?

Censorship concerns aside, it is possible that the link tax’s bark will be worse than its bite, as was the case with the hot news doctrine. The mandatory-bargaining rule has yet to be formally invoked or challenged in court. And the major news conglomerates do have a substantial interest in keeping news aggregators in the Australian market. Perhaps the strangest aspect of the rhetoric revolving around

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<sup>74</sup> HARNETT & FERGUSON, *supra* note 16, at 40; Christopher Wadlow argues that Justice Mahlon Pitney, who authored the majority opinion in *INS v. AP*, was primarily motivated by his longstanding malice towards labor union agitation. *INS v. AP* was thus an attempt to create a precedent for enhanced protection of commercial property from union organization. Christopher Wadlow, *A Riddle Whose Answer Is ‘Tort’: A Reassessment of International News Service v Associated Press*, 76 MOD. L. REV. 4 (2013).

<sup>75</sup> PROCTOR, *supra* note 17, at 6.

<sup>76</sup> For instance, the AP’s coverage of the Dies Committee was highly deferential. Peter Barker, *Un-Americanism in the Papers: Anti-Communists and Their Use of the Press* (2009) (MA thesis, Miami University), <https://perma.cc/83N8-CH9X>. The concept of a postwar “liberal consensus” comes from Godfrey Hodgson. See ROBERT MASON & IWAN MORGAN, *THE LIBERAL CONSENSUS RE-CONSIDERED: AMERICAN POLITICS AND SOCIETY IN THE POSTWAR ERA* (2017).

the link tax is that it often assumes an unnecessarily adversarial relationship between news producers and news aggregators. Remember, aggregators did not cause the decline of local newspapers. Aggregators actually provide crucial assistance to papers that have been able to transition away from peddling classified ads and instead pivoted towards a subscription-based financial model. Aggregators function as global discovery and distribution networks for newspapers, which is why newspapers almost invariably keep their websites open to search-engine indexing. If news-aggregator “piracy” were truly a problem, stopping Google would be as easy as inserting a simple text file (robots.txt) into a website’s code. It is so easy that U.S. courts have recognized that the failure to implement such code grants an “implied license” to aggregators to index and link to a website.<sup>77</sup>

That discovery-and-distribution function has significant monetary value. Google claims to direct consumer referrals worth \$218 million to Australian media companies yearly. Facebook claims \$407 million.<sup>78</sup> Both companies have an incentive to exaggerate their contribution, but their willingness to pay hundreds of millions to stay in the Australian news market suggests that it is not too far from the truth. And the value of news aggregation is backed by research from overseas. When Spain passed a tax on snippets (the brief description of a website that appears below the hyperlink), Google News pulled out of the country entirely, giving researchers a natural experiment about the effects of (dis)aggregation of online news. All eighty-four major Spanish online newspapers lost a huge amount of traffic and revenue, with the losses concentrated among the smallest newspapers.<sup>79</sup> By severing the mutually beneficial relationship between news producers and news aggregators, Spain’s snippet tax left everyone poorer and consumers less informed.

Australian newspapers will naturally wish to maximize their share of the revenue from mutually beneficial deals struck with aggregators. But they also have an incentive not to completely drive aggregators away, as happened in Spain. The best-case scenario would be that the link tax is an extreme example of “property-rights talk” or jawboning, not an effort to create a quasi-property right over hyperlinks. If

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<sup>77</sup> Monika Jasiewicz, *Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators*, 122 YALE L.J. 3 (2012).

<sup>78</sup> Holden, *supra* note 4; Bianca O’Neill, *Is the News Media Bargaining Code the Start of a New Internet Era?*, ROLLING STONE AUS. (Feb. 18, 2021), <https://perma.cc/NMJ3-QL3K>.

<sup>79</sup> Mike Masnick, *Study of Spain’s ‘Google Tax’ on News Shows How Much Damage It Has Done*, TECHDIRT (July 29, 2015), <https://perma.cc/DZF6-UMH2>.

it is jawboning, the link tax is a signal that Australian newspapers want to be taken seriously, not literally. It would then merely reset the bargaining equilibrium at a different value proposition than if the link tax did not exist. Such a scenario may be true, but it is a dangerous game to play, given the high stakes involved.

Policymakers in Canada, the United Kingdom, and the European Union are looking to Australia's experience for guidance while considering implementing their own versions of a link tax.<sup>80</sup> But a link tax can undermine mutually beneficial exchange—i.e., news producers receiving free distribution and distributors accessing free content—and generate significant downside risks—e.g., inequitable enclosure, corporate consolidation, ideological consensus, and a snipped World Wide Web. Thus, a link tax is a questionable option for addressing the decline of the legacy news industry. If redistribution of online revenue is a priority for policymakers, then almost any other mechanism for accomplishing that goal would be preferable.

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<sup>80</sup> David Ljunggren, *Canada Plans Digital Tax in 2022 on Global Tech Giants*, REUTERS (Nov. 30, 2020), <https://perma.cc/82AQ-TFY5>; Sam Dumitriu, *The EU's Link Tax Is Bad Enough, but the UK's Version Would Be Even Worse*, CAPX (Feb. 2, 2022), <https://perma.cc/EA6L-HLRC>.

