

# THE DIGITAL COASE THEOREM AND THE NEWS

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# CPI ANTITRUST CHRONICLE

## Special Edition · March 2021

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## **The Digital Coase Theorem and the News**

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The rise of news aggregator apps has spurred legislative initiative across the globe due to the lawmakers' ability to represent the interest of local trade associations – namely, traditional news publishers. To a perceived problem, the traditional approach has consistently been to identify the negative externalities created by news aggregator apps at the expense of traditional news publishers. The traditional approach nevertheless lies upon numerous pitfalls and a partial analysis of the situation, hence favoring inefficient outcomes. This Article offers an alternative approach. This approach spawns from the tradition first incepted by Nobel Prize Laureate Ronald Coase. Applying the Coase Theorem to the digital journalism problem identified, this Article proposes a “Digital Coase Theorem” where an efficient outcome is reached and where innovation is optimally incentivized.

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## I. INTRODUCTION: THE NATURE OF THE PROBLEM

The rise of digital platforms has enabled individuals worldwide to access news articles with unprecedented ease.<sup>2</sup> Digital companies have innovated and designed applications whereby individuals can access tailor-made news content (hereafter, the “news aggregator apps”). The multiplication of news aggregator apps has not eclipsed the ascendancy of two highly appealing companies to users: the social media platform Facebook and the search engine Google.<sup>3</sup> These two companies have designed complex algorithms to best suit the individuals’ preferences concerning news topics and trends.

### A. *The Problem Identified*

News aggregator apps, including Facebook and Google, curate online third-party news but do not publish them (hereafter, the “news publishers”). News aggregators are legion and include medium-sized companies as well as digital leaders.<sup>4</sup> On the other hand, news publishers, from newspapers to magazines, have traditionally been slow to react to the on-going digital innovation which has disrupted the way individuals consume news: printed matter, generating income streams by selling physical copies and by the advertising included inside, were gradually but inevitably on the wane as individuals vastly preferred digital news format, which in many cases were harder to monetize.<sup>5</sup> Traditional news publishers experienced a sizable decrease in their revenues. Most of them developed their apps, and all of them were referenced in news aggregator apps as a necessary venue for increasing web traffic to their websites.<sup>6</sup> While on the publisher websites, readers generate income through advertising revenues associated with articles, through paywalls,<sup>7</sup> or a combination of the two.

Nevertheless, publisher trade associations coalesced to lobby governments and raise awareness about the news publishers’ decrease in revenue in the digital age. Allegedly, their revenues through

both their own websites and their reference in news aggregator apps were much lower than previously realized. Admittedly, news publishers’ unpreparedness to digital disruption and the increased competition in news markets with online-only news platforms, thanks to the digital disruption, all contributed to a noticeable decrease in revenues.

The coalition of news publishers experiencing a loss of revenues generated anger, frustration, and the need to push for government interventions, through regulations and subsidies, to preserve the “traditional” model of curating news articles.<sup>8</sup> Because the news aggregator apps were designated as the source of the decline in news publishers’ revenue, governments felt the need to intervene to save news publishers and increase their profitability, news publishers argued worldwide. The problem was easily identified. The scapegoats were quickly singled out; since news aggregator apps used excerpts and pictures from news articles (so-called “snippets”) protected under copyright laws, governments had to regulate the use of protected content by news aggregator apps. The news publishers argued these aggregator apps freerode on news publishers’ copyrights while generating their own advertising revenue.

2 Damian Radcliffe & Christopher Ali, Local News in a Digital World: Small-Market Newspapers in the Digital Age, *Tow Center for Digital Journalism, Tow/Knight Report*, Fall 2017; Jahangir Karimi, Zhiping Walter, The Role of Dynamic Capabilities in Responding to Digital Disruption: A Factor-Based Study of the Newspaper Industry, *32 Journal of Management Information Systems* 1, 39-81 (2015).

3 Celina Ribeiro, Can Australia Force Google and Facebook to Pay for News? *Wired*, August, 30, 2020.

4 Angela M. Lee & Hsiang Iris Chyi, The Rise of Online News Aggregators: Consumption and Competition, *17 The International Journal on Media Management* 1, 3-24 (2015); Chris Fitzgerald, 7 Great News Aggregator Websites You Should Check Out (Plus How to Build Your Own), *Themeisle*, January 13, 2021 (where none of them are either Google or Facebook); Doh-Shin Jeon, Nikrooz Nasr, News Aggregators and Competition among Newspapers on the Internet, *8 American Economic Journal* 4, 91-114 (2016); Doh-Shin Jeon, Economics of News Aggregators, *Toulouse School of Economics Working Paper N°18-912*, April 2018.

5 George Brock, *Out of Print: Newspapers, journalism and the business of news in the digital age*, London: Kogan Page Limited (2013); Derek Thompson, The Print Apocalypse and How to Survive It, *The Atlantic*, November 3, 2016; OECD, The Evolution of News and the Internet, *DSTI/ICCP/IE(2009)14/FINAL*, June 11, 2010.

6 Elizabeth Grieco, Fast facts about the newspaper industry’s financial struggles as McClatchy files for bankruptcy, *Pew Research Center*, February 14, 2020.

7 Or “datawall” on based on an ad-funded business model, see Tom Evens, Kristin Van Damme, Consumers’ Willingness to Share Personal Data: Implications for Newspapers’ Business Models, *18 International Journal on Media Management* 1, 25-41 (2016).

8 Kristy Hess, The government’s regional media bailout doesn’t go far enough – here are the reforms we really need, *The Conversation*, August 19, 2020; Bree Nordensen, The Uncle Sam Solution, *Columbia Journalism Review*, September-October 2007; Jelle Boumans, Subsidizing The News? *Journalism Studies*, 2264-2282 (2017); Marc Tracy, With Little Hesitation, Struggling News Outlets Accept Federal Aid, *The New York Times*, April 29, 2020; Charles Rusnell, Financially struggling newspapers to get federal money within weeks, heritage minister says, *CBC*, April 27, 2020.

In comparison, news publishers' advertising revenues depleted mostly because individuals were satisfied with the excerpts of news articles and were often unwilling to click through to visit the news publishers' websites. Therefore, news publishers argued that news aggregator apps created a negative externality by freeriding legally protected content. More eloquently, Facebook and Google were identified amongst the news aggregator apps responsible for such freeriding as the perfect scapegoats. The media and Government then shifted their focus to consider how best to regulate their practices.<sup>9</sup>

This problem has been addressed in two alternate, yet comparable, ways the Australian solution of a Code and the French solution of court proceedings.

### **B. The Solutions Compared**

The Australian Government intervened to protect traditional news publishers' income with a so-called "Media Bargaining Code."<sup>10</sup> Assuming that news aggregator apps, especially Facebook and Google, enjoy an excellent monopsony power at the expense of traditional news publishers, the Australian Government's goal is to address bargaining power imbalances between Australian news publishers and digital platforms. The chosen digital platforms are only Facebook and Google due to a discretionary selection amongst many other news aggregator apps. The mandatory Code forces news aggregator apps Facebook and Google to "adequately" compensate news publishers for viewing monetization and revenue-sharing commitments. By designing a bargaining framework to address the digital platforms' monopsony powers, the Code requires digital platforms to reach an agreement, "in good faith," with news publishers within three months after the Code comes into effect. Should the negotiations fail to reach an agreement or the agreement raise disputes, a third-party mediator could force the digital platforms to pay for using the articles' excerpts. The legislative obligation to financially compensate for the

negative externality created by digital platforms' use of snippets at the expense of news publishers is equivalent to a fiscal tax, given the financial levy's mandatory aspect. The economic rationale underpinning such fiscal duty appears blatant: it is a Pigouvian tax.<sup>11</sup> Named after Arthur Charles Pigou, such a financial duty aims to internalize the negative externality created by the tortfeasor. Here, the financial duty paid directly to news publishers is expected to cause Facebook and Google to internalize the alleged externality stemming from the use of news publishers' snippets without compensation.

The French approach to the problem illustrates another solution. The European Union has copyright legislation encompassing eleven directives and two regulations. Of highest relevance, the 2019 EU Directive on copyright and related rights in the Digital Single Market enshrines news publishers' entitlement to be remunerated for snippets referenced by news aggregators.<sup>12</sup> The justification for such compensation are the so-called "neighboring rights" – a regulation-created right granting content creators a right to be compensated whenever a reference to their creations are made. Thus, news publishers become entitled to remuneration whenever snippets of their articles, albeit protective of copyrights thanks to paywalls, are referenced by news aggregators. Article 18 of the Directive states that "Member States shall ensure that where the authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration" but also paradoxically and immediately states that "in the implementation in the national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and fair balance of rights and interests." The regulator can interfere in such contractual freedom and set the allegedly appropriate remuneration. This is precisely what occurred in France, where the French Competition Authority delivered a decision on April 9, 2020, where interim measures against Google were imposed.<sup>13</sup>

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9 Cecilia Kang, The Decimation of Local News Has Lawmakers Crossing the Aisle, *The New York Times*, January 12, 2020; John Horgan, How Facebook and Google are killing independent journalism, *The Irish Times*, July 13, 2016; Shira Ovide, Google and Facebook Killed Free Media, August 9, 2016; Jawad Iqbal, Tech giants can't be allowed to kill local journalism, *The Times*, October 6, 2020; Adrienne LaFrance, The Mark Zuckerberg Manifesto Is a Blueprint for Destroying Journalism, *The Atlantic*, February 17, 2017; Jill Lepore, Does Journalism Have a Future? *The New Yorker*, January 28, 2019.

10 The Parliament of the Commonwealth of Australia, House of Representatives, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, December 9, 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId:r6652%20Reconstruct:billhome>; Australian Competition & Consumer Commission, *Mandatory News Media Bargaining Code*, Concepts Paper, May 19, 2020, <https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%202019%20May%202020.pdf>.

11 Arthur Charles Pigou, *The Economics of Welfare*, London: MacMillan & Co. Ltd (1920), <https://archive.org/details/dli.bengal.10689.4260>.

12 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, L 130/92, May 17, 2019.

13 French Competition Authority, Decision 20-MC-01 of April 9, 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information Générale and others and Agence France-Presse, April 9, 2020, [https://www.autoritedelaconurrence.fr/sites/default/files/integral\\_texts/2020-06/20-mc-01\\_en.pdf](https://www.autoritedelaconurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf).



The claimant, the French trade association of news publishers and others (“Alliance de la presse d’information Générale” and others and Agence France-Presse), protested that Google preferred to no longer show snippets rather than remunerating news publishers for snippets’ display. After having granted Google free licenses for their snippets’ use and display, news publishers were granted the right to force Google to display and pay for these snippets, even though the European Directive and French implementing law only required duty to negotiate fairly should Google want to display snippets. The Paris Appeal Court has confirmed the French competition authority’s decision on October 8, 2020.<sup>14</sup> Akin to the Australian approach where the forced display of snippets is associated with a forced remuneration, the French approach to sue Google is tantamount to enforcing a Pigouvian tax. The French decision requires Google to enter negotiations with no other outcome possible but to display and pay for the snippets it wanted to withdraw.

Both approaches, the Australian Code and the French proceedings, entice a Pigouvian tax aimed at internalizing the perceived negative externality created by Google or Facebook when using snippets of news publishers’ articles. Both approaches, it can be argued, have pitfalls if one ponders the reciprocal nature of the problem identified.

### C. *The Reciprocal Nature of the Problem*

Both approaches address the identified disagreement as a problem where digital platforms, arbitrarily confined to Google and Facebook, are considered freeriding on the value created by news publishers without generating an added value when displaying snippets. This inaccurate view overlooks the so-called reciprocal nature of transaction costs, as seminally emphasized by Nobel Prize laureate Ronald Coase.<sup>15</sup> Coase indeed stressed that:

“The traditional approach has tended to obscure the nature of the choice that has to be made. The question is

commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.”<sup>16</sup>

In the problem inquired, we can certainly acknowledge the use by digital platforms of articles’ snippets under copyright protection. However, these snippets are licensed for free to digital platforms such as Google and Facebook.<sup>17</sup> Additionally, many news publishers post these snippets themselves on social media platforms.<sup>18</sup>

More importantly, the externalities never are one-sided, as eloquently demonstrated by Ronald Coase’s demonstration of the reciprocal nature of the problem of transaction costs. Indeed, in our case, Google and Facebook (and many other news aggregator apps) may cause an externality by using and referencing snippets created and curated by news publishers. However, Google and Facebook’s use of snippets also generate incommensurable benefits to news publishers; it provides free referencing, thereby developing web traffic to websites where the news publishers can earn revenues through advertisements and paywalls.<sup>19</sup> Consequently, the news aggregator apps, notably Google and Facebook, generate a positive externality towards news publishers. Their referencing generates massive web traffic and high exposure to internet users’ attention. They attract clients to news publishers’ websites in the manner of Yellow Page listings used to attract potential clients to professionals. The fact that Google and Facebook, among others, reference news publishers’ websites for the latter to generate profits once the end-users browse these websites inevitably leads to the conclusion that the externality thus created is positive.

The positive externality was acknowledged both in Spain and Germany, where, in both countries, Google and Facebook were

14 Paris Appeal Court, *Société Google LLC, Société Google Ireland Ltd, Société Google France SARL c/ Le Syndica des Editeurs de la Presse Magazine (SPEM), Agence France-Presse (AFP), Alliance de la Presse d’Information Générale*, 20/08071, October 8, 2020, [https://www.autoritedelaconurrence.fr/sites/default/files/appealsd/2020-10/ca\\_20mc01\\_oct20.pdf](https://www.autoritedelaconurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf) (available only in French).

15 Ronald H. Coase, *The Problem of Social Cost*, 3 *The Journal of Law & Economics*, 1-44.

16 *Id.* at p.2.

17 This free licensing raises doubts as per the reality of the protected nature of the snippets since copyrights owners may legitimately be claimed to have implicitly, with this free licensing, waived off its claims on the snippets.

18 Again, the nature of the protected content may be put into question since, assuming the copyright owner cannot generate a self-inflicted harm, the copyright owner can be alleged to have abandoned his copyright claims.

19 Deloitte, *The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain, and the UK*, March 2016; Susan Athey, Markus M. Mobius & Jenő Pal, *The Impact of Aggregators on Internet News Consumption*, *Stanford University Graduate School of Business Research Paper N°17-8*, (2017); Alice Ju, Sun Ho Jeong & Hsiang Iris Chyi, *Will Social Media Save Newspapers? Examining the effectiveness of Facebook and Twitter as news platforms*, 8 *Journalism Practice*, Issue 1, (2014); Charlotte Tobitt, *Facebook and Google referrals boost contributed to jump in news traffic at start of Covid-19 crisis*, *Press Gazette*, July 31, 2020.

required to compensate for the news snippets.<sup>20</sup> Instead of forced pay, the digital platforms de-referenced and started to shut their news services in these countries. Immediately, web traffic for news publishers plummeted. Their reactions were unanimous; publishers preferred to revert to the previous situation where news aggregator apps were “freeriding” by using snippets for free. Indeed, the negative externality cost is much lower than the benefit derived from increased web traffic to the publishers due to the use of snippets. Therefore, the news publishers are the cheapest-cost avoiders here. Publishers can avoid the costs by not requesting financial compensation for the snippets and instead allowing news aggregator apps to freeride by not requesting compensation for the snippets. The cheapest-cost avoiders (i.e., news publishers) could maximize their benefits while allowing digital platforms to generate benefits. Mutual gains from bargaining over snippets’ rights could be developed given the imbalance between the small costs incurred by the use of snippets (namely, opportunity costs of missed compensation) and the considerable benefits generated by these snippets (namely, increased web traffic and increased revenues).

Consequently, as Ronald Coase had argued in his seminal examples, the problem identified is reciprocal nature. Thereby, the problem at stake enables us to delineate the contours of a “Digital Coase Theorem.”

## II. THE DIGITAL COASE THEOREM

### A. *The Problem of Transaction Costs*

In his article from 1960, Ronald Coase used the example of a neighboring property’s occupation by a cattle-raiser. He considered that whenever the costs of the crop damaged are greater than the net benefits derived from the sale of the undamaged crop, then the two neighbors may enter into a mutually beneficial bargain according to which that tract of land is left uncultivated.<sup>21</sup> Coase then demonstrates that irrespective of the liability rules (whether the cattle-raiser is responsible for damages or the farmer is responsible for protecting the crop), a mutually beneficial bargain would be reached if property rights are well assigned, and transaction costs are low. Coase contemplates that the mutually beneficial outcome, which minimizes the social cost, may very well be that

the cattle-raiser pays the farmer to fence the crop since the farmer is the one who can minimize the costs most cheaply. However, the traditional approach assigns liability to the cattle-raiser to fence his land at a more significant cost than the farmer would fence his. Most fundamentally, the ideal solution envisaged by Coase is prevented from occurring in real life due to a formidable impediment present in all interactions: the presence of transaction costs. Because the cattle-raiser and the farmer may be hindered from bargaining (due to opportunism, the number of actors involved, the information asymmetries, etc....), such Coasian bargaining cannot occur, and a less efficient solution prescribed by traditional liability rules will be enforced. This is the problem of transaction costs, whereby efficient outcomes are out-of-sight due to high transaction costs. Absent transaction costs in a theoretical world, the assignment of property rights becomes less relevant since market actors will be able to bargain over their property rights to reach efficient, mutually beneficial solutions identifying the cheapest-cost avoiders of any damage.

In our case of neighboring rights granted to news publishers, the number of news publishers and the presence of many opportunistic behaviors (such as rent-seeking practices, hold-up problems, etc....) prevent news publishers and the digital platforms from reaching a mutually beneficial agreement where the social cost is minimized by the proper identification of the cheapest-cost avoider. Moreover, property rights are poorly assigned despite legislative attempts to clarify; neighboring rights may contradict access rights. Neighboring rights may also unduly expand the reach of copyright protection to allow for opportunistic behaviors and prevent the free use of ideas and content deliberately circulated by the content creator. Because both transaction costs are high and because property rights are poorly designed and enforced, Coasian bargaining can hardly take place in an environment where the cheapest-cost avoider may very well be the one most incentivized to adopt opportunistic behavior thanks to political sympathies.

The Coase Theorem, coined after Ronald’s Coase article, which emphasized the potential for Coasian bargaining in a costless transaction world, has spurred a vast amount of literature and policy insights.<sup>22</sup> A political Coase theorem has been proposed

20 Joan Calzada & Ricard Gil, What Do News Aggregators Do? Evidence from Google News in Spain and Germany, 39 *Marketing Science* 1, 134-167 (2020).

21 See, more generally, Steven Medema, Richard O. Zerbe, The Coase Theorem, In *The Encyclopedia of Law and Economics*. Ed. Boudewijn Bouckaert and Gerrit De Geest. Aldershot: Edward Elgar; Steven Medema, The Coase Theorem at Sixty, 58 *Journal of Economic Literature* 4, 1045-1128 (2020).

22 For relevant reviews of literature, see Steven Medema, Richard O. Zerbe, The Coase Theorem, In *The Encyclopedia of Law and Economics*. Ed. Boudewijn Bouckaert and Gerrit De Geest. Aldershot: Edward Elga; Herbert Hovenkamp, The Coase theorem and Arthur Cecil Pigou. *Arizona Law Review* 51 (3): 633-649 (2009); Steven Medema, The Coase Theorem at Sixty, 58 *Journal of Economic Literature* 4, 1045-1128 (2020); Cento Veljanovski, The Coase theorem—The Say’s law of welfare economics? *Economic Record* 53 (December): 535-541 (1977); Warren J. Samuels, The Coase theorem and the study of law and economics. *Natural Resources Journal* 14 (January): 1-33 (1974).

in a voters' environment.<sup>23</sup> In contrast, a linguistic Coase theorem has been suggested in a multilingual environment where bargains may take place over linguistic rights.<sup>24</sup> Our present case may further foster Coase's legacy with a so-called Digital Coase Theorem.

### ***B. The Importance of Allocation of Rights***

Let us scrutinize the problem before us. Allocation of rights could differ depending on the outcome desired by the lawmakers.<sup>25</sup>

Under the first proposition, the rights are allocated to news publishers under a liability rule. News publishers are entitled to be compensated for any damage, use, and reproduction of any part of their created content. Copyrights and neighboring rights are enforced to the broadest extent, thereby including any use by any their content by any digital platforms. This is a liability rule assigned to news publishers where damages are acceptable subject to appropriate compensation. This liability rule is the traditional approach used in Spain and Germany.

Under the second proposition, the rights are allocated to news publishers under a property rule. News publishers are entitled to prevent any trespass by third-party onto their property, protected content, and content subject to neighboring rights. The property rule paves the way for injunctive relief claimed in courts, with the trespasser urged to no longer use protected content. The property rule both entitles for compensation against the trespasser and an order to return to the ante-trespass situation. The property rule assigned to news publishers has enabled news publishers to request injunctive reliefs against digital platforms and ultimately having the latter barred from using news publishers' snippets. This rule has never been applied since the news publishers derive benefits from the digital platforms' use of snippets as outlined above in discussing the reciprocal nature of the problem.

Under the third proposition, the rights are allocated to the news publishers as inalienable rights. Akin to the property rule, the inalienability rule proscribes trespassers to use any protected or related content and orders them to affect the situation that existed before the trespass occurred. However, the inalienability rule differs from the property rule by prohibiting news publishers from contracting and bargaining over the use of snippets by third parties. The inalienability rule prescribes that under no circumstance a news publisher can consent to have a third party using protected content, irrespective of the contractual arrangements. The inalienability rule is nowhere yet enforced,

but some advocates suggest that this rule may be desirable according to them.

Under the fourth and final proposition, the rights are allocated to the digital platforms under a liability rule. Digital platforms are entitled to use news publishers' snippets and are entitled to compensation for the benefits generated for news publishers. On the other hand, news publishers are allowed to be compensated for snippets by digital platforms. The two compensation awards are canceled out so that the party that generates more positive externality to the other party creates negative externalities. That party becomes the net benefactor of compensation from the other party. In our case, rather than having digital platforms being requested to compensate news publishers for the use of snippets, such liability rule with rights assigned to digital platforms may ultimately lead to news publishers paying (or at a minimum allowing) digital platforms for the use of snippets. Such use increases web traffic and generates advertising as well as pay-articles revenues.

### ***C. The Alternative Approach***

It must be noted that each of the propositions results in different outcomes. Contrary to the Coase Theorem, we assume that transaction costs are positive and that information is asymmetrical. Consequently, the assignment of rights matter when looking to reach an efficient solution. The efficient solution is the one where the cheapest-cost avoider mitigates the costs, and the wealth maximizer compensates the cheapest-cost avoider for the mitigation costs. In our case, it can reasonably be assumed that the cheapest-cost avoiders are the digital platforms since they can most easily mitigate the opportunity costs of not sharing news content, and thereby creating wealth through advertising and paid-articles. On the other hand, news publishers are the ones who initiate wealth-creation by creating content, and therefore they need to be optimally incentivized to create this content. They will receive the optimal incentive once they know their content will be widely shared and viewed while reaping benefits for every viewer.

Consequently, the digital platforms may hypothetically compensate news publishers for the use of protected content. In return, news publishers may compensate digital platforms for the web traffic created as part of the news referencing. Once equalized, these two compensations may reveal a net positive externality from digital platforms to news publishers' benefit because of the unequal financial flows. Therefore, should Coasian bargaining take place, a net payment from news publishers to digital plat-

23 Francesco Parisi, Political Coase Theorem, 115 *Public Choice*, 1-26 (2003).

24 Aurelien Portuese, Law and Economics of the European Multilingualism, 34 *European Journal of Law & Economics*, 249-325 (2012).

25 Guido Calabresi, A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 *Harvard Law Review* 6, 1089-1128 (1972).

forms may prove to be the most efficient outcome where the social cost is minimized, and the value creation is maximized.<sup>26</sup>

Unfortunately, not only may such an efficient outcome prove hard to materialize because of the presence of transaction costs, but most utterly, the law has increased transaction costs by promoting opportunistic behaviors. The law has indeed unreservedly sided with news publishers against digital platforms by designing a liability rule together with a Pigouvian-like tax. Not only are the identified tortfeasors compelled to pay, but they are also compelled to pay for a service they have become compelled to deliver. This socially detrimental outcome overlooks the flawed identification of tortfeasors – namely Google and Facebook – by ignoring the externalities' reciprocal nature that is inevitably generated.

On the contrary, in the presence of high transaction costs, the law should mimic Coasian bargaining, whereby an efficient outcome is reached for the benefit of social welfare and digital innovation. Reducing the cost of accessing information while ensuring that news creators are fairly remunerated should be the law's objective. ■

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26 More generally, on the antitrust implications of Coasian bargaining, see Alan, J. Meese, Antitrust balancing in a (near) Coasean world: The case of franchise tying contracts. *Michigan Law Review* 95 (1): 111-165 (1996).



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