

How to make Platform - Press Deals Work

Is the new press publishers right a solution to funding the press, and if not, how can we make it work?

After a huge fight in the EU halls of power in June 2019 a new right for publishers was approved as part of the Digital Services Market act (DSM). The press publishers right (PPR) established by this is intended to provide journalism with a new source of funding to offset the loss of advertising and subscription income to the major platforms like Google and Facebook that have hoovered up most online income.

But, as the second anniversary and implementation deadline approaches this summer, very little has happened to change the grim outlook for professional news journalism. Newspapers continue to close, shed staff and reduce investment. So why hasn't DSM worked? Is this a matter of timing, noting that the relevant right has only been enacted in national legislation in a few countries so far, or is there something more fundamentally flawed?

Is the Press Publishers Right a Solution?

The press has relied for many years on the twin pillars of advertising and subscription income to fund journalism. Online has changed the publishing scene, with many publishers hoping the potential online audience would open up new advertising opportunities, encouraging free, advertising only led strategies. In practice technology has fundamentally tilted the balance of power from publishers to news aggregators, and especially those aggregators that are supported by advertising. Users can find alternative source for news in a heartbeat. Search (Google) and share (Facebook) are natural monopolies, and natural gateways to online access to news for many consumers. These platforms are advertising supported, so competitors to newspapers. And they have become huge players with \$100bn plus turnover and fat profit margins.

Many newspapers find themselves in an unequal competition for advertising income with the aggregators that many now need to discover and carry their content to readers. They now also face many new publisher competitors for the reader attention that their advertisers need. The competitors including anyone with a dubious story to share and access to the internet. The resulting race to the bottom on quality of news and integrity of journalism is an acute threat to wider societal values. Fake News is everywhere. The fact that Google and Facebook are in many countries taking 90% of new online advertising revenue as newspapers print revenue declines illustrates the seismic scale of the challenge to both publishers and normal values of accuracy and truth that underpin democracy.

DSM is a pop gun weapon to fight this massive shift. DSM is intended as a basis for making it easier for licensing the news content use by platforms. The underlying assumption is that larger players can be forced to pay enough for the content they take to fund the press. But as the value attached to usage of journalism relative to all the other content carried has declined, any royalty rates won't ever be enough. Journalist output is read more than ever, but the value per click decline in a sea of trivia.

Unless and until newspapers can re-establish subscription income online – as the smarter ones are doing - the expectation that licensing can play more than a supporting role in addressing the issue is

highly questionable. But in a world where the competition is a search and a click away, getting users to pay for news is a huge challenge that only the unique, and the smart have addressed.

There are seven interrelated challenges, in my view.

1. Monopoly power must be broken

Google and Facebook are natural monopolies. They have enormous power and leverage. Google is a \$150bn gorilla, dealing with publishing companies it dwarfs in size. Further, Google controls the technology and operations of digital advertising. Fair dealing with newspapers is simply unlikely. This concentration of power is a monopoly issue, and the DSM copyright extension isn't a solution as the exercise of the new right takes place in an unbalanced market.

The French and Australian competition authorities have recognised the issue and intervened in the publisher – platform negotiation process, with a clear view that that market is flawed and a legal framework around the deal making process is needed. In both countries publishers cut deals. The ACCC (Australia) are satisfied that their arbitration framework allowed acceptable deals, but the French less happy. The UK government has linked regulation of platform press deals to the competition authorities. In the USA the anti-trust wheels are now grinding towards a structural, break up, solution, but these processes take years. Unless and until the power of the platforms is curtailed it seems unlikely that real progress can be made.

2. The Google and Facebook resistance must be faced down

When their lobbying against DSM failed the platforms switched to a containment strategy, seeking to buy off the publishers with paying trivial amounts for content, outside the DSM where possible. This is an extension of the earlier PR strategies of Google (GNI) and Facebook. The new Google service – News Showcase – was launched on a promise of \$100m dollars for the news industry. For all newspapers globally sounds good till you see its over three years, all countries. Divide it accordingly and see the value per title is peanuts, (and non transparent peanuts at that). But it is also based on publishers putting more content on Google's platform where usage, user data and ad revenue follows to Google's benefit. And the small print includes an obligation (probably illegal) not to pursue DSM rights. Facebook's approach is similar. The platforms are fighting a ruthless defence, typified by Facebook switching off their service in Australia to secure concessions from the local DSM equivalent law.

3. National Governments must be more supportive

In the passage of DSM and in related legislation elsewhere governments have been wary that regulation might stifle innovation, and disrupt services that consumers value. An unholy alliance of well funded platforms, the free web gurus, and pirates meant DSM met objections from a number of national governments in the drafting stage and beyond. In the national processes by EU directives are translated into national law there is ample opportunity for opponents of DSM to water down its effectiveness. Across Europe the fight over drafting local laws has been stiff. Most governments are moving slowly (it looks likely that only France, Netherlands, Denmark will meet the June deadline), some governments are introducing changes that undermine the intent of PPR. There is confusion on whether the related article 17 provisions apply to press. A variety of approaches also reflects the fact

copyright is national law. Google is lobbying on the grounds its News Showcase makes the law unnecessary.

4. Newspapers must build expertise in licensing

Licensing is at least historically small beer from the newspapers' perspective. Their business has always rested on the twin pillars of advertising and cover price, with other income seen as an ornamental cherry. While models are changing, the collective industry understanding and faith in licensing as a solution lags behind music. Licensing can be assumed to represent 3-5% of a newspaper's income (though that number will vary with more for some nationals and less for regionals). The value of PPR is not yet tested but might double that. Its useful, but not game changing.

Unless and until newspapers see that licensing – as in the music industry – represents a serious, long term growth opportunity and that it could be a major third strand to their income, it is difficult to see how they can take advantage of the new rights.

5. Newspapers must negotiate collective agreements

The best chance newspapers have is to balance the power of the platforms through collective agreements, using the collective management structures (CMOs) referenced in the DSM. In a number of EU countries CMOs have been successful in licensing press cuttings and other business use of news content. But using the existing (or creating new) CMOs is a challenge for publishers.

Newspapers' history is of fierce competition with their peers. Newspapers' DNA is independence and questioning of authority to a greater extent than most business. And committing a crucial resource (commercial rights to web content) to a collective approach does not sit easily with either the independent spirit or the commercial instinct.

Most CMO roots are in licensing copying in education and while they have deep specialist strengths in arcane but important areas like revenue sharing they sometimes have cultures that don't mix easily with entrepreneurial newspaper management approach.

CMOs are tricky to build and run, and it is understandable that the attempts to create or use CMOs at national or European level have struggled so far. The further divide on whether such initiatives should be mandatory (with or without opt outs), or voluntary also complicates. The incentive opt outs give to publishers to 'free ride' collective efforts is real (as, arguably, the French publisher licensing progress has demonstrated).

6. Publishers, agencies and journalists have to unite

Although they share a common concern and a common analysis of the platform – press challenge, there is a huge disconnect between publishers and journalist on PPR that can fatally undermine using the new right. Journalists lobbying helped secure the new rights, and they naturally see that journalist should benefit directly, primarily through the CMOs that represent them. The loose words in the directive provide some support. But publishers (quite rightly) point out that it is a press publishers right, and to precedent that any income from a right accrues directly to their staff and suppliers is unacceptable, as no business can operate profitably with a large slice (the Austrian draft

suggests 50%) going to journalists, who are also paid salaries. And journalists must recognise that without an incentive for newspapers to invest in exploiting the right (which will almost certainly require a long and expensive legal battle – absent statutory implementation) there will be deadlock. Publishers will not spend money to chase a precedent that could affect other licensing income.

A publisher view – what would you do?

Newspapers are under huge pressure and many – especially regional titles – are closing. They face a series of hurdles to use the PPR as and when it becomes law. They would need to;

- Believe there is enough licensing income to justify the effort
- Feel that the opportunity cost in taking that fight is justified against other priorities
- Work to ensure the PPR is implemented effectively in their national law, supported by competition authority oversight of any negotiation
- Create, adapt or use a (largely) unfamiliar and untested CMO structure to negotiate a deal
- Be prepared if necessary to resource a long legal battle with the platforms, who will throw money at blocking payment
- Find a way to deal with journalist share challenges

The level of uncertainty is significant. For many some cash now beats a long legal fight. Many have signed up to platform offers (most recently Axel Springer to Facebook).

How this might change – ‘What is to be done’

My manifesto is simple – build a credible business case that publishers can put in the context of their own strategies. And their own publishing plans – especially the adoption of paywalls – must come first.

The starting point for DSM is to establish the potential worth of a licence for the platforms, now and into the future. This needs proper econometric work. It is likely to show the ‘size of the prize’ is significant, and growing. Such a study would also show the gross under valuation of current Google and Facebook offers.

Unless and until publishers work together they don’t have the clout to get a fair deal. A significant effort is needed to explain the basis of CMOs to publishers, and to create or adapt existing CMO models to address legitimate concerns. And existing CMOs need to engage and listen and demonstrate a better understanding of the unique nature of the press. A realistic approach to journalist right, is needed, taking into account national differences in how this is approached.

Based on this and publisher input model licences for platforms need to be drafted that licence PPR narrowly, affording maximum publisher rights to develop extensions for existing or new CMOs to take into discussions. And publishers should then see the control benefits that a licence can create;- control of arbitrary changes to algorithm and presentation of their content by platforms.

The current DSA efforts could help by tightening the regulatory pressure on platforms and clarifying aspects of DSM.

If national governments then saw a united creative industry seeking a fair and realistic settlement from the major platforms, the chance of an effective implementation increase.

Competition authorities and state weight also need to bear down on the platforms to ensure a deal.

In the long term, the platforms need to be tightly regulated or even broken up.

Andrew Hughes, writing in a personal capacity. June 2021

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