NEWS MEDIA ALLIANCE

HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM

TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM

JUNE 2020

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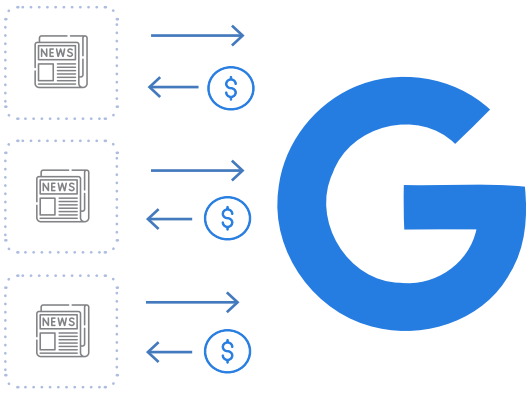
EXECUTIVE SUMMARY

This White Paper is published by the News Media Alliance based on over a year's worth of interviews and consultations with many members of the organization. The news publishers speak with a collective voice in demanding that Google stop abusing its market dominant position in its interactions with them, compensate them fairly for the value of their content to Google, and give them meaningful control over the specific uses of their own news articles by Google.

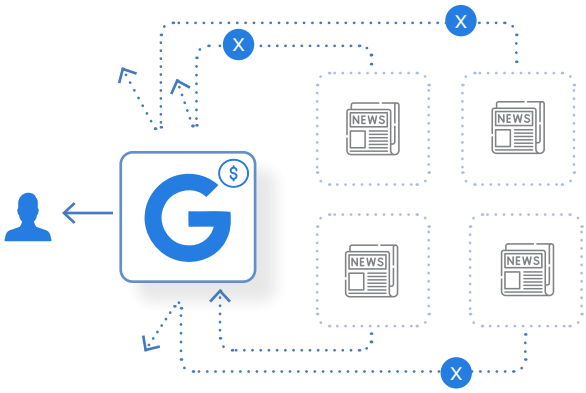
As set forth in this White Paper, many of Google's current uses of news content likely exceed the boundaries of fair use under the Copyright Act. Given that reality, Google should have to negotiate an appropriate use-specific license with news publishers for each use of their content. In a competitive market, news publishers would be able to resist Google's demands by withholding their content unless and until acceptable terms were negotiated. But as set forth below, Google has so much power as the dominant online platform, with the ability to play one publisher off the other, that it has been able to effectively secure acquiescence from the news publishers for its activities, which often are harmful to publishers (See illustration on p. 4.) At base, there has been a market failure in the news publishers' ability to exercise the rights granted to them under the Copyright Act.

How Google Dominates the Online Content Marketplace

Ideal Scenario:
A Competitive Market



Current Scenario:
The Market Dominated by Google



AMP keeps users in Google's ecosystem while creating several disadvantages for many news publishers – including making it more difficult in some cases to form direct relationships with their readers, reducing some publishers' subscription conversion rates, limiting the use of interactive features in AMP articles, reducing some publishers' ad revenues, and impairing their collection of certain user data.

Google has exercised its control over news publishers to force them into several relationships that benefit Google at the publishers' expense. These relationships include the following:

1

Google effectively gave the news publishers no choice but to implement Google's Accelerated Mobile Pages (AMP) standard – or else lose critical placement in mobile search and the resulting search traffic. Publishers were not only forced to build mirror-image websites using this format, but Google caches all articles in the AMP format and directly serves this content to mobile users. This subverts the core principle that grounded the early copyright decisions protecting Google – namely, that a search engine is a fair use primarily because it acts as an electronic pointer to the original website. AMP keeps users in Googles ecosystem while creating several disadvantages for news publishers – including making it more difficult in some cases to form direct relationships with their readers, reducing their subscription conversion rates, limiting the use of interactive features in AMP articles, reducing publisher ad revenues, and impairing their collection of certain user data. Further, Google imposed onerous terms of use on news publishers using the AMP URL API – which appear to give Google broad rights to use AMP formatted articles in any Google products.

2

Google used its market dominant position to force news publishers into the use of their content in the newly designed Google News app – Google's mobile news aggregator, which makes heavy use of AMP content. The Google News app is designed in a fashion to satisfy many casual readers, rather than leading them to click through to the articles. Further, to participate meaningfully in Google News, news publishers must accept the onerous Google News Producer Terms of Service, which grant Google the right to use the news content not only in Google News and the Google News app, but for all "Google Services" – defined as any products, service or technology developed by Google from time to time.

3

Google is using news publishers' AMP content to power its "Google Discover" service, another news aggregator that is more akin to social media. Google never negotiated any specific use license with the news publishers for this content.

4

Google Search is increasingly becoming a "walled garden" – a final destination rather than an electronic pointer to news websites. Google has again used its market dominant position to force acquiescence to new features that diminish the chances that users will visit the news websites.

This White Paper makes several recommendations at its close. First, antitrust enforcers should address Google's abuse of its market power. Second, the News Media Alliance advocates the passage of the bipartisan *Journalism Competition and Preservation Act*, which would allow news publishers to join forces and negotiate collectively with Google. Third, Congress should explore various means toward ensuring that publishers are compensated for their content. Journalism is essential to a functioning democracy and requires substantial investment. Google is advancing its own dominance while inflicting harm on the news industry. The detailed investigation set forth in this White Paper makes plain that action is necessary to correct this abuse.

I. INTRODUCTION:

GOOGLE – THE FRENEMY TO NEWS PUBLISHERS

In 2007, the Ninth Circuit ruled in the *Perfect 10* case that Google's display of grainy thumbnail photographs in its search engine results constituted fair use under the Copyright Act.[1] The decision was the leading case that defined a generation of copyright law regarding search engines and aggregators. It was also pivotal for Google, giving it the imprimatur of the courts. Some thirteen years later, Google's use of news content in Google Search, the Google News app and Google Discover has vastly expanded, bearing little resemblance to those early days. Google has become a publisher in its own right, heavily relying on and using premier newspaper content, including news photographs, to draw traffic and thereby gather highly valuable data to fuel its advertising business. Google's use of news publishers' content does send substantial traffic to news publishers, but:

Google is not fairly or appropriately compensating news publishers for the value of their material, or properly treating the news industry as an important strategic partner. Instead, as set forth in this White Paper, Google has misused its position as the dominant online platform to reap the benefits of the news media's substantial investments in reporting without paying a license fee.

Further, it has misused its monopoly power to remove the ability for news publishers to have adequate control of the use of their content – often using its market power to force publishers into granting Google the apparent right to make vast and unknown uses of their intellectual property far into the future, or other problematic conditions, if they wish to be included on basic Google services. While Google, through the Google News Initiative, has donated grant funding to the news media industry and provided some useful advice, none of this is sufficient given the benefit to Google from news content and Google's substitutive nature. In short, the legal system gave Google protection on the theory that it was engaged in good faith, fair uses of third-party content. Now, the facts underlying that original assumption have changed dramatically and upset the balance between Google and publishers, leading to industry and societal ramifications. In the process, the system has allowed Google to establish and entrench its market power at the expense of publishers and other content creators.

Copyright law should protect the news publishers, since the argument is strong that Google is exceeding the boundaries of fair use and thus should be required to pay a license fee for its current usage of news content. But as set forth below, Google has so much power as the dominant online platform, with the ability to play one news publisher off the other, that it has been able to effectively secure acquiescence from the publishers for its activities without paying a license fee for their content, despite their significant costs in reporting the news.

At base, there has been a market failure in the news publishers' ability to exercise the rights granted to them under the Copyright Act.

Accordingly, copyright and competition policy need to align with these stark market realities. This White Paper details Google's broad usage of news publishers' content through exercise of its dominance, rather than fair negotiations or a fair license fee.

Ultimately, Google has used cases like *Perfect 10* and other decisions from the "early days" of the internet to clear cut the legal protections of content creators and propel itself to a position of unprecedented profitability and durable dominance at the expense of news publishers and other content creators.

A. A Fair Use No Longer: The Factual Assumptions of the *Perfect 10* Case No Longer Hold

The factual assumptions that led the Ninth Circuit to conclude that Google's use of thumbnail photographs in its search engine constituted a fair use no longer hold. The fair use inquiry, set forth in 17 U.S.C. §107, is a fact-specific analysis based on several non-exclusive factors.

The first factor is "the purpose and character of the use" – including whether the use is of a commercial nature as opposed to a nonprofit educational use, and whether the use is "transformative." In order to determine if a new use is "transformative," a court considers "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." [2] The second factor is the nature of the copyrighted work, including whether it is unpublished. The third factor is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work."

What considerations led the *Perfect 10* court to hold in 2007 that Google's use of thumbnail photographs in its search engine was fair? First, Google's search engine was not seen as an ultimate destination or publisher, but as merely as a tool or "pointer" providing direct access to the original website containing the original copyrighted material – and hence a "transformative" use. This was in keeping with Larry Page's vision at the time; as he told an interviewer in 2004, "We want to get you out of Google and to the right place as fast as possible."[3] Second, the court did not see Google as heavily commercial. AdWords was still relatively nascent, and courts had yet to fully appreciate the significance of search advertising. Further, the low-quality, grainy thumbnail images in Google search results at that time were not viewed as a substitute for the original image and had no independent aesthetic appeal. Critically, the court also did not perceive a search engine as creating any market harm for the original publisher. Finally, the court viewed Google's indexing of the plaintiff's images as "incidental" and found that Google was acting in keeping with principles of good faith and fair dealing. At the core of its reasoning, the court concluded that the goal of the Copyright Act was to incentivize the progress of science and the arts, and that the public benefits of the search engine outweighed any minimal impact of the use on the original website's incentive to create.

None of these assumptions apply today. In our view:

Google would have a difficult time relying on fair use to justify all its uses of newspaper content in Google Search, Google Discover, and the Google News app.

No longer are these confined to the minimal search results featured in the famous blue links or the tiny, grainy photos from Google's early days. The current, highly appealing displays of news content create a deeply troubling substitution effect. A leading study commissioned by the European Union found that an astonishing 47 percent of EU consumers "browse and read news extracts on [search engines, news aggregators and social media] without clicking on links to access the whole article in the newspaper page."[4]

And while the *Perfect 10* court did not view Google as a commercial business, today Google and its parent Alphabet – which had 2019 revenues in excess of $161 billion – are recognized as one of the most successful commercial enterprises in the world. In 2019, Google reported roughly $98 billion in annual revenue from search and other advertising.[5] This is roughly four times the total annual revenue for circulation and advertising of all U.S. news publishers combined. As is no secret, the news publishers are suffering economically, cutting staff and closing their doors – thus reducing their ability to play the critical role served by the press. A recent report found that approximately 20 percent of all local newspapers in

the United States have closed or merged since 2004, and approximately 1,300 communities have lost all local news coverage.[6] In 2019 alone, the media industry laid off more than 7,800 people.[7] Finally, given both Google's conduct and the changed factual realities, it is likely that a court would view Google more as a free-rider and be far more reluctant to conclude that it was acting in accordance with principles of good faith and fair dealing.

B. Google Has Misused Its Position as a Market Dominant Platform to Strong-Arm News Publishers Into Inequitable Arrangements

A court taking a hard, fresh look at Google would likely find that many of its current uses of newspaper content exceed what fair use permits – and thus, that Google has no legal right to use this content absent a license.

Given that reality, Google should be entering into fair negotiations, and mutually acceptable written agreements, with the news publishers for each specific contemplated use of their content, negotiations that would allow the news industry to attempt to negotiate compensation and control if the playing field were remotely equal. But today's world is also very different from 2007 in the numerous ways that Google has used its position as the dominant online platform to strong-arm the news industry into implicitly or explicitly giving into broad and often unknown or unanticipated uses of its content. Google has used its leverage in ranking search results to steer the news industry into a web of products that do not compensate publishers for their participation or give them control over their valuable content. For example, no news publisher can afford to remove itself from Google News for fear of falling in its Google Search rankings – in part because of their interoperability – and Google has used this power to advance its ends at the news media's expense. As one publisher explained the relationship generally,

Google "sucks you into the vortex one step at a time without any visibility into its eventual plans, leading to a clear dependency on Google, and only at the last minute do you realize you've given away the farm."

Copyright law has become an ineffective protection because the news publishers do not have the power to enforce their copyright rights.

This White Paper focuses on four examples to illustrate Google's behavior toward the news industry and the attendant competition concerns. The first relates broadly to Google's herding of the news publishers into using "Accelerated Mobile Pages" (known as AMP) – a stripped-down format developed by Google to shorten the load time for web pages on mobile devices, first announced in the fall of 2015. The second and third examples relate to the significantly revamped Google News app and the Google Discover feed, both launched in 2018 – which make heavy use of AMP content. In none of these situations did Google sit down with major publishers to engage in a genuine negotiation of terms involving a give-and-take, rather than a "take it or leave it" approach. Finally, this White Paper examines the changes in Google Search, which raise increasing concerns that Google Search acts as a substitute for the original news articles. In short, through the exercise of its monopoly-like power and the threat of lower search rankings, Google dictated non-negotiable terms of service or otherwise corralled the news industry into less-than-fair terms for use of its content well beyond the boundaries of fair use.

Google's approach toward the news industry for Google Search and Google News differs from Facebook, which has recently entered into agreements with certain news publishers to compensate them for the use of their articles in Facebook's news tab. Apple News also provides some compensation to a small number of news publishers for Apple News Plus. While publishers have criticized aspects of these arrangements, it is noteworthy that these platforms have not adopted Google's extreme stance of refusing to provide compensation to news publishers for use of their content in Google Search, Google News and Google Discover.

Most broadly, the four examples in this White Paper demonstrate that as Google has built its monopoly-like market power in search, aggregation, and advertising, it has used that market dominance to extract greater concessions of various sorts from publishers, in turn reinforcing Google's dominance of the web. This pattern demands review by federal and state antitrust agencies.

Four Ways Google Strong-Arms News Publishers

1. **Forcing them to adopt AMP**
2. **Not negotiating for use of news publishers' content for Google News app**
3. **Not negotiating for use of news publishers' content for Google Discover feed**
4. **Making changes to Google Search to make it a substitute for original news articles**

II. THE AMP FORMAT:

A LAND GRAB IN THE NAME OF SPEED

Google developed and launched Accelerated Mobile Pages (AMP) in 2015, as a format sometimes described as a "website on a diet." AMP makes use of a stripped-down version of HTML that prioritizes loading speed simultaneously with dozens of proprietary extensions. Google characterizes AMP as an open format, but it is anything but. Google did not develop AMP in a manner consistent with the obligations and practices of a standards body, and it follows almost none of the Open Standard principles defined by the organizations in charge of Internet governance.

AMP stands in stark contrast to a truly open standard such as the HTML (HyperText Markup Language) standard that defines the fundamental language used in Web pages. Over the years, the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), and the Web Hypertext Application Technology Working Group (WHATWG) were delegated as the independent standards bodies to oversee the technical specifications of the HTML format. All versions of HTML were contributed to, and ultimately adopted by, countless private corporations and now serve as a basis for all web pages. On the other hand:

AMP has been developed and used predominantly by Google, and imposed on the market as a condition to obtain traffic from Google Search on mobile devices.

Although some news publishers were initially attracted to the AMP format because it promised a better user experience, including increased speed, the truth is that Google effectively gave news publishers little choice but to adopt it – requiring them to create, in addition to their customary websites, a second, near-mirror image website with AMP-formatted versions of their articles (AMP URLs) that are hosted, stored and served from Google's servers rather than their own.[8] While Google asserted that AMP was not a ranking factor for Google Search, it simultaneously stated that "speed is a ranking factor

for Google Search" – and the whole point of the AMP format is that it loads faster.[9] Further, shortly after making this statement, Google introduced the news carousel and indicated that "When an AMP page is available, it can be featured on mobile search as part of rich results and carousels" – placement that is critical to getting traffic.[10] Thus, Google inextricably linked its AMP standard to placement for publishers on Google's dominant search engine result page. In addition, many Google products (such as the Google News app, Google News on the web and Google Discover) give preferential treatment to AMP pages or only accept the AMP format.

In the face of Google's pressure, the major news publishers began developing and offering a second website with AMP-formatted articles starting in 2016, putting most although not necessarily all of their articles on these AMP URLs.

One major newspaper that utilizes a paywall decided not to incur the substantial cost of building an AMP website with a paywall and tried to survive for several months without participating in AMP; although its subscriptions rose, the traffic from Google and other platforms declined too precipitously for this to be a viable road.

A. News Publisher Concerns About the AMP Format

While Google effectively made it impossible for news publishers to avoid creating AMP versions of their web pages with a differently-formatted URL structure, it also extracted significant – and in many cases undue – concessions from publishers. First, the way AMP works is that once a news publisher posts its articles in the AMP format, Google caches these articles so that they can load instantly for any mobile user who accesses the articles within the Google ecosystem. By participating in AMP and using Google's AMP URL API, publishers agree, via non-negotiable terms and conditions, to let Google copy, store, host, and directly serve their content to users. This inures to Google's significant benefit in a variety of ways, including by permitting Google, rather than the publishers, to "own" the relationship with their readers, and by putting Google, rather than publishers, in charge of related data collection.[11] It also gives Google an ongoing, almost full-scale copy of all publisher content to potentially use in ways that were never contemplated. Although AMP enhances load speed for consumers, it represents a seismic shift from the fundamental assumptions that initially led the courts to view Google's search engine as fair use.

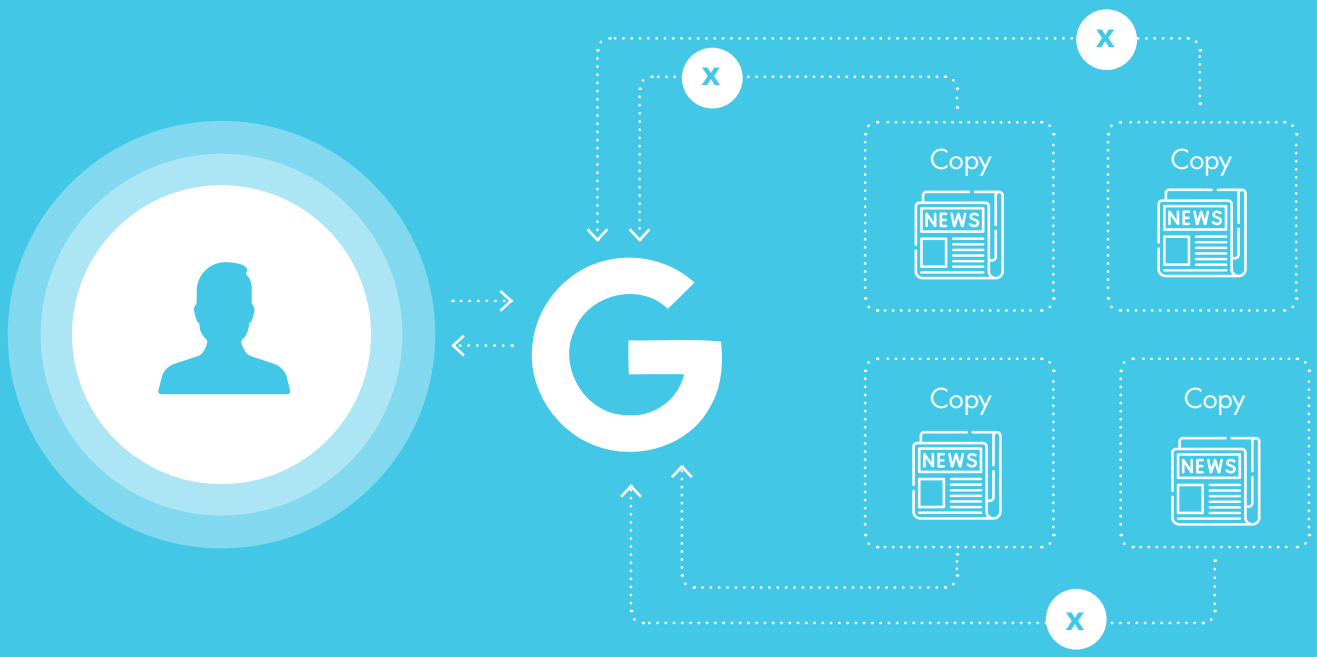
In short, while the core premise of the *Perfect 10* case was that the user would click on a link in Google Search and travel to the original website, mobile users who click on AMP-formatted articles in Google products *remain* in the Google ecosystem, where they are shown the cached article instead of being directed to the news publisher websites.

As numerous prominent developers stated in an open letter to Google, "AMP keeps users within Google's domain and diverts traffic away from other websites for the benefit of Google. At a scale of **billions of users**, this has the effect of further reinforcing Google's dominance of the Web."[12]

Google has purposely chosen to create a premium position at the top of their search results only to "publishers that use a Google-controlled technology, served by Google from their infrastructure, on a Google URL, and placed within a Google controlled user experience."[13]

Second, as detailed below, Google unilaterally dictated the terms of service for AMP – rather than permitting the news industry to negotiate with them. Per Google, publishers using the AMP URL API are governed by Google's standard API terms of service, and these raise significant concerns regarding Google's ability to use the newspaper's content now and into the future in broad, unknown ways. In short, Google gave the news publishers little choice but to adapt the AMP format and then required them to agree to broad, unknown future uses of their content. The news publishers were corralled into building AMP URLs without knowing what they were agreeing to in connection with future uses of their content – a problem that has now apparently manifested itself with Google's more recent products, as outlined below.

The AMP format admittedly has its benefits – although many if not all of these benefits could have been achieved through means that did not so significantly increase Google's power over publishers or so favor its ability to collect data to foster its market domination. As mobile use continues to grow rapidly, news websites need to load quickly to maintain the attention of consumers with wide content choices. The AMP format increased load speed, which facilitates traffic (although there were other potential routes to increased load speed). But many in the news industry still have substantial concerns about the AMP format and its Google-dictated ramifications:



At the most fundamental level, Google has placed itself in the middle of the relationship between the newspaper and its user. The user is no longer visiting the publisher's website directly, but instead viewing a copy of the article hosted on Google's servers. Further, Google controls the AMP elements of the format, its functions and capabilities, and encourages users to stay within the search results page, for example, by creating an H-scroll in the Top News carousels that seamlessly moves from one publisher to the next without ever leaving Google. As subscriptions become increasingly important in an era in which digital ad revenues pale in comparison to earlier revenues from print ads, having a separate proprietary format that does not easily foster direct relationships is even more problematic.

Some newspapers with paywalls have expressed concerns that Google's use of articles in the AMP format has significantly hurt their ability to convert consumers into subscribers – a key and increasingly important source of revenue. One major newspaper, for example, did a study comparing subscriber conversion rates for mobile traffic to its regular website as compared to traffic to its AMP URL. The number of subscribers per million users was 39% lower for AMP traffic. Another major news publisher has likewise compared AMP traffic with the rest of search traffic and found that the conversion rate to subscribers is very significantly lower with the AMP articles – a mere fraction of "vanilla" search traffic.

The reasons why AMP articles lead to lower subscriber conversion rates are many and varied. As discussed further below, the Google products making heavy use of AMP articles are often designed to provide a fast, free and not deeply engaging user experience. The AMP format also can make effective branding more difficult. It commoditizes page design, which many believe shifts more value to the search engine or aggregator and away from the publisher. Consumers are effectively trained to merely view publishers as websites with collection of articles rather than coherent, immersive, and differentiated experiences with their own unique identities and qualities that merit direct navigation, subscription, or longer dwell times.

Further, Google has given publishers a Hobson's choice regarding paywalls on AMP articles – which also impacts subscriber conversion rates. Newspapers such as *The Wall Street Journal* employ a highly customized paywall on their websites, significantly varying the number of free articles that a user is permitted to read before being asked to subscribe to the newspaper. This flexibility is highly beneficial, allowing them to maximize engagement and increase subscriptions. For AMP articles, however, Google restricts the paywall options. Unless publishers rebuild their paywall options and their meters for AMP, they can only provide all of their content for free or none of their content for free. The only other option is to use Subscribe with Google, which has many benefits for Google and downsides for news publishers.[14] Accordingly, unless they invest in building another and separate paywall, news publishers who do not want to use Subscribe with Google have a *de facto* all-or-nothing choice regarding the imposition of a paywall, which lowers subscriber conversion rates.

Other newspapers have noted that the AMP format has interfered in other ways with their methods of increasing subscriptions –

such as the lack of support for certain interstitial windows prompting users to sign up and provide their emails, later used for marketing subscriptions.

- The fact that readers are not on the news publisher's website but rather remain in Google's ecosystem for AMP articles also has impacted data collection. News publishers do not get the same information regarding readers of their AMP articles as from organic traffic to their websites. While Google did add some ways of obtaining limited data about readers, for some publications they are noticeably inferior to the data news publishers get directly on their own sites.

- While ad revenues for AMP articles have been on par with non-AMP articles for some news publishers, others have experienced a lower advertising yield from AMP articles. Ad yield is generally lower for AMP articles for a variety of reasons all connected to Google's control of this ecosystem: publishers are third-parties on AMP and face cookie-matching issues (or sometimes cookie bans such as on Safari); most ad tech providers do not have equivalent solutions on AMP as opposed to HTML because they have not invested in a format that benefits their largest competitor, Google; and AMP limits the number of ads and ad formats on the AMP articles.

- One major news organization compared the average number of page views by consumers and concluded that they are materially lower for stories featured in the AMP format. Although not all news organizations have experienced this effect, this news company reviewed the average number of page views of users clicking on an AMP-formatted story and determined that the average was 1.1 page views per customer – considerably lower than the overall average for users clicking through from all Google links.

In other words, their research showed that the user clicking through on an AMP-formatted story is "one and done" and tends to bypass links to the news organization's home page or other articles.

As the percentage of the total Google search landscape using the AMP format increases, this becomes more and more of a problem for their news organization. To some extent, these figures are likely partially attributable to the increase in mobile traffic, but the news organization believes that the AMP format, which is used widely now in Google search on mobile and the Google News app, has contributed to this troubling problem.

- Google's caching of AMP articles creates very significant advantages for Google, but it is a one-sided exchange without parallel advantages for the news publishers as strategic partners. The fact that the user remains on the Google ecosystem is highly beneficial to Google because it allows Google to be the first-party and collect far more and richer user engagement data, such as the dwell rate on a given article topic.

- While Google has gained highly valuable data – the lifeblood of its advertising revenues – by herding the news publishers into allowing Google to cache their articles, Google has not returned the favor by sharing its own full set of data on the users and instead only shares limited data with the newspapers.

- One of the keys ways that news publishers increasingly can provide superb reporting and distinguish themselves from the broad swath of content in all formats available online is by using data and interactive features in in-depth news articles. The AMP format imposes limitations on interactive features, and it is often sufficiently difficult to rebuild them in this format that publishers decide not to do so. While readers can still find these articles, they are not given the same prominence in Google products heavily reliant on AMP articles. Further, given Google's long-time strength in crawling and indexing text and images but not dynamic content, Google, by dictating and limiting newspaper content in this manner, is essentially reinforcing its market power over competitors who might take a different approach toward such content.

- Standardization of the news industry into the AMP format, which (although available to other browsers such as Firefox, Safari, and Edge) is optimized specifically for Google, makes it much easier for Google to index news websites – giving Google a significant advantage over potential competitors seeking to enter or grow in the search and news aggregation markets. A market with multiple players, none of whom had Google's monopoly power, would inevitably lead to competitive negotiations with the news industry.

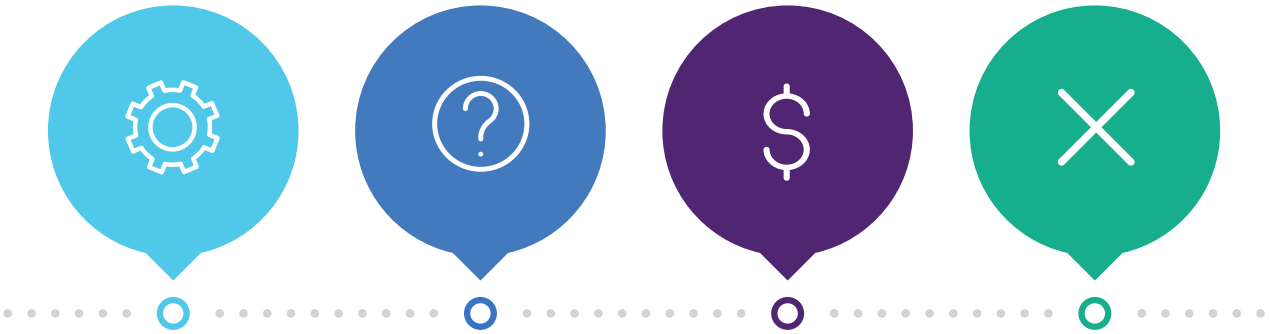
B. The Problematic Terms of Service Governing AMP

Further, by being corralled into creating AMP URLs for their websites, news publishers also became governed by terms of service that give Google vast undefined rights to use their content in future products. Google dictates that all news publishers using the AMP URL API are governed by the Google terms of service for APIs – terms of service not specifically designed for AMP.[15] These terms of service raise substantial concerns. They appear to provide that merely by creating an AMP website and using the AMP URL API, the news publishers have given Google a "perpetual, irrevocable, worldwide, sublicensable, royalty-free, and non-exclusive license to Use content submitted, posted, or displayed to or from the APIs through your API Client" so long as Google's "sole purpose" is to "provide" or "improve the APIs (and the related service(s))." "Use" means "use, host, store, modify, communicate and publish."[16] Google is, in effect, conditioning placement at the top of the dominant search engine – a tool ostensibly designed to assist users in locating and navigating to content on the internet – on the granting of intellectual property to Google.

Although subject to debate, this grant appears to give Google the right to use the newspapers' articles in the AMP format for any Google product, whether a then current or future product. Although some publishers anticipated that the use of their AMP content would not be limited to mobile search results, the grant language is particularly broad and vague. This paper explores two Google products launched after Google steered the news publishers into AMP URLs that make heavy use of AMP content, namely the Google News app announced in May 2018 (which is also governed by another set of terms as well) and Google Discover, announced in late September 2018. The AMP URL API terms of use appear to have robbed news publishers of the ability to negotiate regarding Google's right to use their content in these new products – or others yet to come.

In our view, the AMP URL API terms of use also amount to exclusionary and anticompetitive conduct. A news publication does not appear to have the ability to acquiesce in the use of its AMP content on Google mobile search, for example, while declining permission for use in the new (and free) Google News app, which may directly compete with a newspaper's own app or another app licensed by the publisher. Further, the language is sufficiently broad and unclear as to raise the question whether it gives Google the right to use the content for free for other purposes, such as artificial intelligence, that supposedly "improve" the APIs (and may in turn reinforce Google's market power). Moreover, the terms give Google the right to sub-license use of the content to third parties, including presumably for a license fee. Finally, the license is irrevocable; although a news entity can theoretically stop creating AMP pages for its publication and stop using Google's AMP URL API (with all its negative consequences), Google's right to use the content continues indefinitely for all earlier-posted AMP pages (See illustration on the next page). It is striking that these are contractual provisions – not technical innovations – that reinforce Google's dominant position.

The AMP URL API Terms of Use Amount to Exclusionary and Anticompetitive Conduct



The terms do not appear to allow a newspaper to acquiesce in the use of its AMP content for Google mobile search but not the Google News app.

The language is sufficiently broad and unclear as to raise the question whether it gives Google the right to use the content for free or for other purposes, such as artificial intelligence.

Moreover, the terms give Google the right to sub-license use of the content to third parties, including presumably for a license fee.

Finally, the license is irrevocable.

In the end, the two most fundamental problems with AMP are that Google has used its dominant market power and the threat of lower rankings to push publishers into the AMP format, a format and environment over which Google – and not the newspapers – appears to have near total control, now and into the future, whatever direction Google decides to pursue. In addition, it has used this power to create terms of use that appear to provide Google with broad leeway to use the AMP articles in unknown, new products of Google's own devising, without publisher control. Although the focus of this paper is on intellectual property, Google's conduct raises many significant competition concerns.

As reviewed below, there are two non-mutually exclusive avenues to address these concerns: antitrust review and an antitrust safe harbor that would allow publishers to offset Google's market power by negotiating collectively.

III. THE GOOGLE NEWS APP:

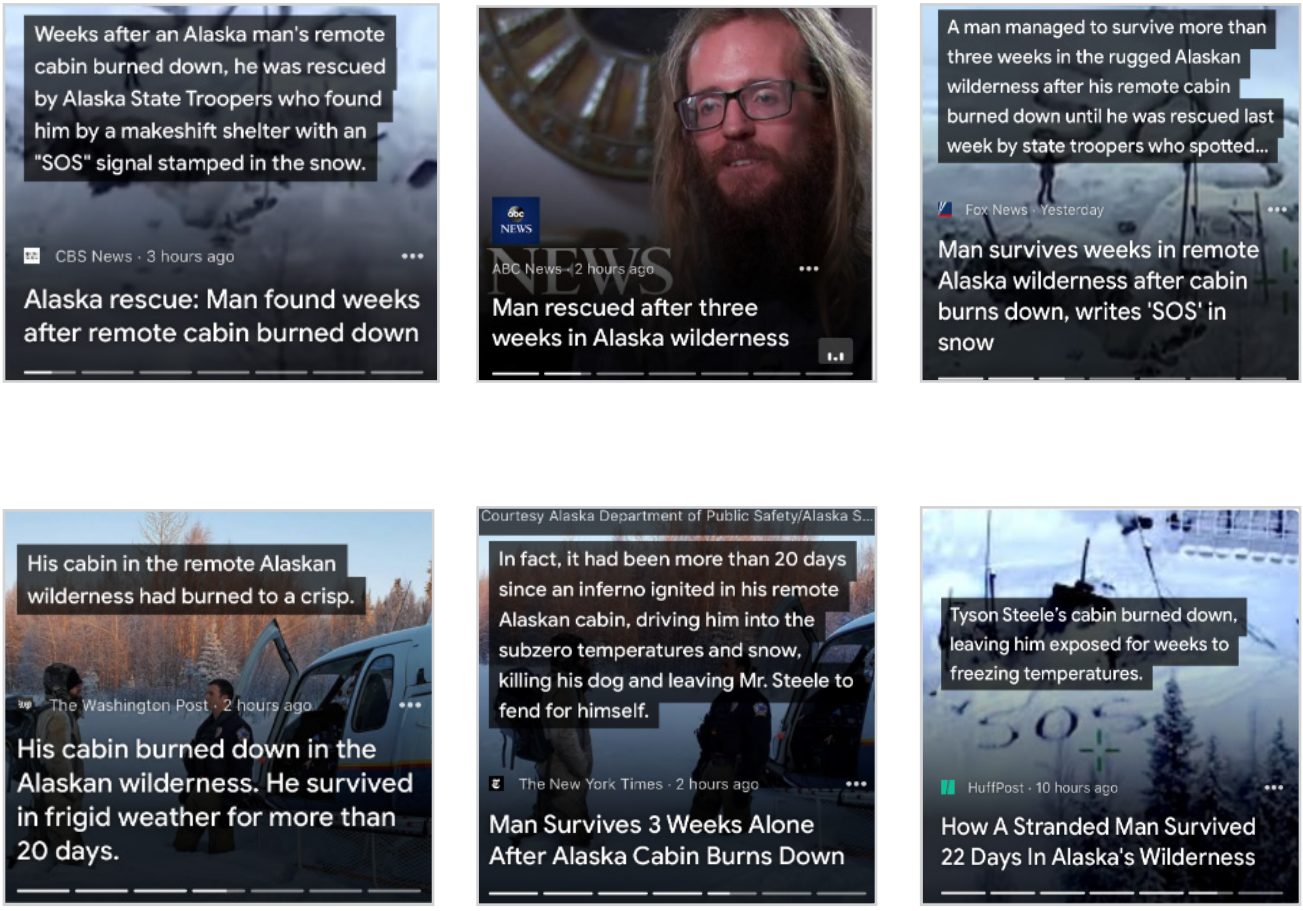
A NEWS AGGREGATOR IN DIRECT COMPETITION WITH NEWSPAPERS' APPS

On May 8, 2018, Google announced the all-new Google News, using one all-encompassing brand name to denote what had been known as Google News on desktop, Google Play Newsstand on mobile and desktop, and the Google News & Weather app on mobile.[17] While the new Google News on desktop was fairly similar to the earlier version, the new Google News app in particular features a starkly different design and functionality from its antecedents. The Google News app makes very heavy use of AMP content, on top of the traditional feeds long used for Google News (where publishers send their articles out on the feed).

If Google were relying on the fair use defense to justify the new Google News app, it would have a weak case. Critically, the Google News app is primarily an aggregator rather than a search engine – and thus has an inherently weaker claim to fair use under settled law.[18] In other words,

Google publishes content of its own selection in the Google News app, rather than simply providing results in response to a user's search query, with links to the original. Further, the Google News app differs significantly from earlier versions. It presents collections of headlines with high-quality images, with a personalized "briefing" as well as curation on major news topics. The photos, which are zoomed in on before any snippet appears on top of them, are high resolution, prominent and eye-catching – the stark opposite of the grainy images of *Perfect 10* – allowing Google to capitalize on the very significant investment that news publishers make in photojournalism without contributing a dime. Videos created by the publisher at great effort and expense autoplay in the app as you scroll over them. Many "Headline" news stories are presented in an eye-catching "carousel" format, with a snippet or quote from the article appearing over the high-quality image and above the headline as the app scrolls through a collection of different publishers' articles on a particular topic.

Here is an example of a carousel of articles about the same story:



By the time the user views the full collection of articles in the "carousel" format, the user often knows the high points of the news story. Although some news publishers get decent traffic from the Google News app, in the view of many in the news industry the Google News app – with its aggregation of content by topic, combined with high-quality photos, headlines, and snippets in "carousels" – can satisfy the reader about the "news of the day" without ever having to click through on any given story.[19] Further, the navigation features in the app make it very easy for the user who clicks through to a news story to return to the Google News interface, rather than going to other stories or the home page of the original news source, which is how a typical news publisher would design the presentation of an article. In short, while any fair use defense depends heavily on demonstrating that the new use does not substitute for or usurp the market for the original copyrighted work, the Google News app appears to do just that for many users.

Since the Google News app likely does not qualify as fair use, Google should have negotiated fair licenses with the news industry for use of their content in the app. In ordinary circumstances, a licensor discloses its potential plans for using copyrighted material and negotiates a license appropriate to the new use, with back-and-forth traded compromises. But that is not what happened with the revised Google News app for most major newspapers. The story once again reveals the unfair terms that Google has been able to obtain as a market dominant platform.

The story begins several years ago with the old Google Newsstand. Many news publishers agreed to click-through or other agreements with Google contemplating use of their content in this particular, more benign product. But the fine print in Google's agreements with news publishers for Google Newsstand gave Google the right to use the news content in revisions of the product, no matter how significant.[20] Thus, even though the format of Google Newsstand changed significantly with the new Google News app, Google undoubtedly would argue that these old consents apply, in addition to the Google AMP URL API terms of use discussed above. Indeed, the terms of the current Google News Publisher Agreement begin by providing that, "If you are already participating in Google News (formerly known as Newsstand) this Agreement will supersede your prior online terms."[21] These provisions are a perfect example of the grossly unequal bargaining power between Google and the news organizations, which Google has misused to its strong advantage to obtain apparent consent for unknown, as yet undeveloped products.

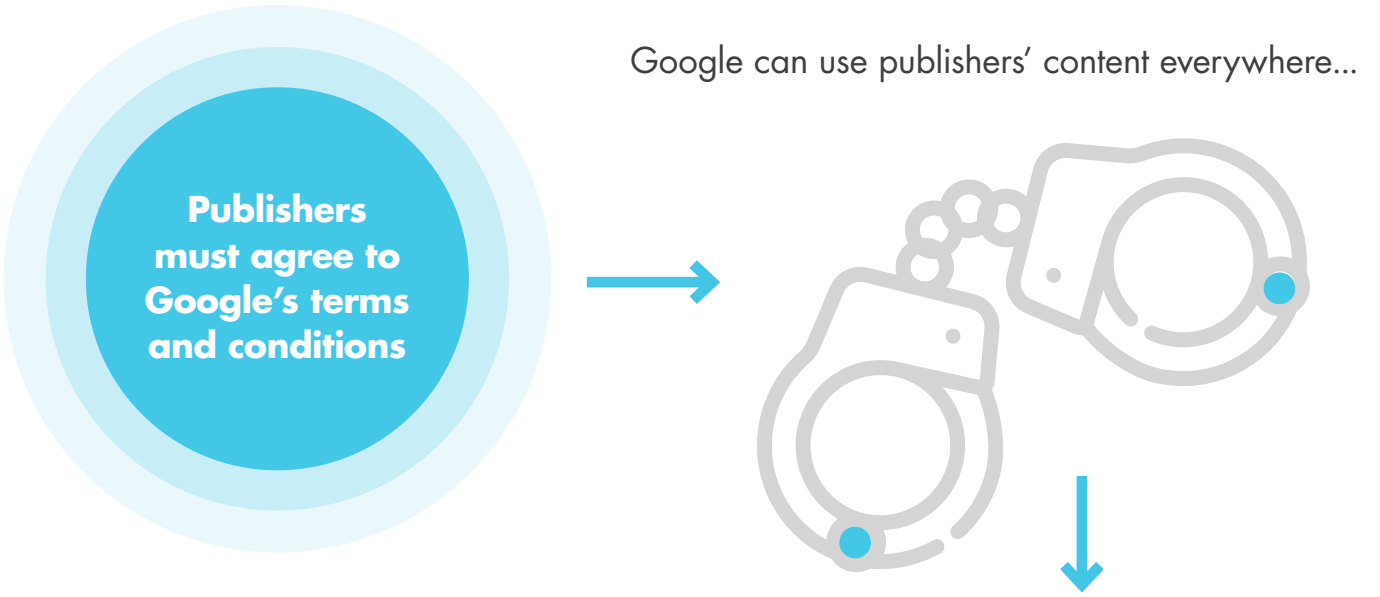
Further, instead of negotiating a fair license – and one specific to the new Google News app – Google has continued to use its monopoly power to unfairly extract additional layers of consent from the news publishers for use of their content in the Google News app, and other undisclosed products. In part it has done so by tying together participation in the Google News website with the Google News mobile app – knowing full well that newspapers cannot realistically opt out of Google News on the web. Moreover, publishers fear that opting out of Google News will negatively impact their performance in search performance, since the two products are connected in ways only Google understands and controls – and the risk of losing search rankings makes it difficult if not impossible for publishers to opt out of Google News.

There is no escaping Google's unfair terms.

Google has stated that even if a news publisher does not agree to the use of its content in Google News, Google has the right to crawl the news website and include the content in all its Google News products unless the publisher blocks the Googlebot-News (via robot.txt.), which would have the adverse effect of removing the page(s) from the Google News index entirely – an unrealistic option.[22] If a publisher wishes to be included in Google News, Google imposes a condition that publishers must sign up for the Google "Publisher's Center," and Google has indicated that only those who do so will receive essential "benefits" in Google News (including the app) – such as the right to "content and branding control," the right to "run ads inside your content area in the [Google News] app," the right to use paywalls through Subscribe with Google, and the ability to be eligible for the desirable Newsstand section of the Google News app.[23] The catch-22, however, is that in order to have a Google News Publisher account or to register with the Google News Publisher Center, a news organization must accept the onerous Google News Producer Terms of Service (also known as Google News Publisher Agreement).[24]

The posted terms of the Google News Publisher Agreement are exceptionally slanted in Google's favor. News publishers are required to grant Google vast and unclear rights to use the publishers' news content. The required grant of rights to Google extends not only to Google News but for all "Google Services" – defined as any products, services or technology developed by Google from time to time.[25] In short, as a price of having their content appear on the regular Google News website, a publisher apparently is not only required to participate in the Google News app, and any future version of the Google News app, but any product or service developed by Google in the future.

The Price of Appearing on Google News



News publishers are required to grant Google vast and unclear rights to use the publishers' news content. The required grant of rights to Google extends not only to Google News but for all "Google Services" – defined as any products, services or technology developed by Google from time to time. In short, as a price of having their content appear on the regular Google News website, a publisher apparently is not only required to participate in the Google News app, and any future version of the Google News app, but any product or service developed by Google in the future.

More specifically, the click-through agreement provides that Publisher "authorizes Google and each Google Group Company on a worldwide ... basis" to:

> (b) use, copy, reproduce, store, display, distribute, adapt, communicate and make copies available of Publisher Content (in each case including through caching, Google Services, third-party websites and devices) to allow (on Publisher's behalf) End Users to use, adapt, download, store, access, view … Publisher Content and copy, paste, print, annotate Publisher Content … and do such acts as permitted by applicable law and/or which are enabled by the functionality provided from time to time by Google Services and/or platforms and devices where Google News is available."[26]

Nowhere does the Google News Agreement further limit how Google can use the news publisher's articles, including any limitations on the display of photos or snippets on the display pages of the Google News app. Rather, as with the prior Newsstand Publisher Agreement, the Google News Publisher Agreement provides that Google "may add or remove functionalities or features of Google News at any time" and "may modify the Agreement at any time."[27] The only "out" provided to the news publishers is not realistic: "If Publisher does not agree to any modified terms in the Agreement, this Agreement will terminate and Publisher must remove its Publisher Content from Google News and stop using Google News."[28]

As with other Google agreements, the Google News Agreement also contains slanted provisions requiring news publishers to provide broad warranties and indemnities to Google, while Google provides highly limited warranties and indemnities to the publishers.[29]

While the Google News Agreement effectuates a massive land-grab from the news publishers, it makes clear that all revenues, other than for ad slots in the news articles, go to Google: "Google reserves the right to retain all other revenues derived from Google Services including any revenues from ads that may appear on any search results pages."[30]

In sum, Google has used its position as a market dominant platform to strong-arm news publishers into using their content

in a product that weakens publishers and strengthens Google's position to extract unreasonable and often anticompetitive concessions from publishers.

IV. GOOGLE DISCOVER:

A MOVE TOWARD "SOCIAL"

In September 2018, Google announced that it was discontinuing the old Google Feed and launching Google Discover as part of its three fundamental shifts in how it thinks about Search.[31] Google Discover is a highly customized feed targeted to the individual user with both current news and older, evergreen content – a product far closer to social media than earlier products. Google Discover relies heavily on articles in the AMP format. Once again, Google did not sit down with the news publishers to negotiate a fair, use-specific license for this product. There was no need because Google's massive market power meant that it could unilaterally impose its whims on publishers. Given their inability to bargain collectively, publishers were powerless to resist Google's actions.

Although it remains unclear, Google is apparently relying on the terms of use governing AMP URL APIs for supposed "publisher consent" to use their articles in Google Discover.[32] Absent these terms of use,

Google would likely face an uphill battle convincing a court that its use of high quality news photos in an aggregation product like Google Discover, which is not fueled by search queries, constitutes fair use.

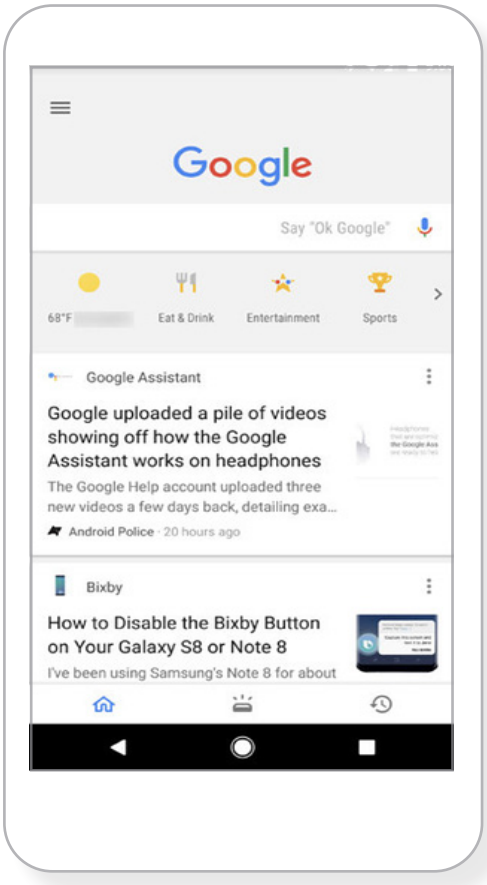
Thus, in 2016 Google used its dominant role in search to require publisher participation in the AMP format, and created related terms of use that appear to give them authorization to use the AMP content in a new Google product released years later – and one that is far more akin to social media and less beneficial to news publishers than Google Search in several ways.

As Google proclaimed in its September 2018 announcement, its next chapter will be driven by three fundamental shifts: 1) "the shift from answers to journeys"; 2) "the shift from queries to providing a queryless way to get to the information"; and 3) "a shift from text to a more visual way of finding information."[33] In keeping with these goals, Google Discover does not rely heavily on search queries but rather sends the user a feed with a mix of content based on either the user's interactions with other Google products (e.g., data on the user's web and app activity, location history and location settings),[34] or topics that the user has selected to follow. Articles are grouped under numerous topic headings – thus permitting the user to customize his or her experience. The feed includes both current news and older articles – for example, articles of interest if one were planning a trip. In addition to news articles, Google Discover also features "videos, sports scores, entertainment updates (such as a new movie release), stock prices, event information (such as nominees for a major

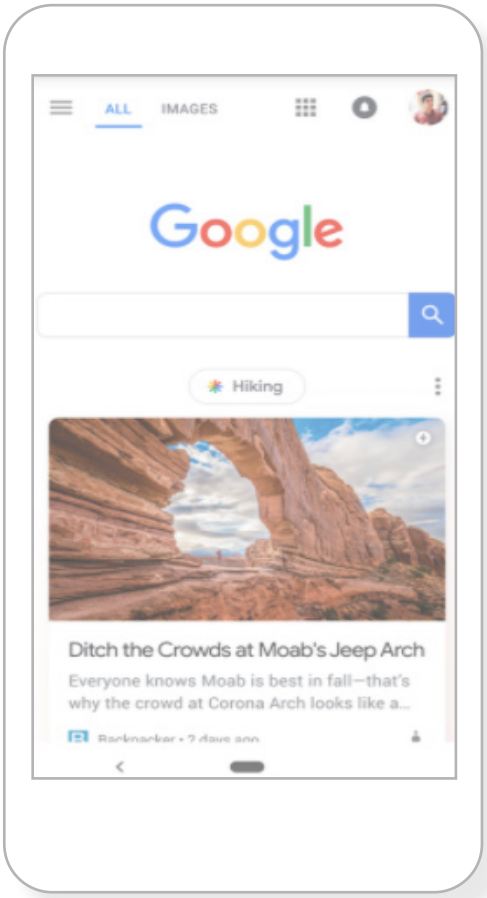
awards ceremony, or the lineup of an upcoming music festival), and more."[35] Again, in keeping with its new goals, Google Discover includes a lot of high quality photographs.

A quick comparison of screenshots from the original Google Feed (on the left)[36], which mostly featured news headlines, short descriptions and occasional photos, and Google Discover (on the right) vividly displays the differences:

Google Feed



Google Discover



Google is giving Google Discover broad visibility. Not only is it on the Google app, but it is featured prominently as an option on Chrome's mobile homepage. In short, the mobile homepage gives users the ability to embark on their "search journey" via search query or via Discover.

News publishers have several concerns about Google Discover, in addition to their fundamental objections regarding use of their content without compensation and Google's failure to negotiate a specific agreement with them targeted to this use.

Publishers are concerned about subscriber conversion rates. Generally speaking, search is the gold standard for subscriber conversion, since users looking for specific content are the most engaged audience and therefore most likely to be willing to subscribe. News publishers have a far lower subscriber conversion rate on social media traffic than search (other than for paid content). Google Discover is essentially a social experience – one for the drifting Internet user. As one blogger described it, "Discover gives lean-back consumers … a platform to gobble up highly-personalized entertainment that has Google's name on it"[37] – and such lean-back consumers are less likely to be willing to pay for content. Further, as noted above, some publishers already experience far lower subscriber conversion rates with articles in the AMP format, heavily featured in Google Discover. This one-two punch raises particular concerns as news publishers rely more heavily on subscriptions as digital advertising revenues remain disappointing.

Publishers are at Google's whim regarding its selection of content for Google Discover – more so than with search, where Google has historically, generally (although with faults) displayed the most responsive articles to a query. Although it is clear that Google Discover prefers articles in the AMP format and with high-quality photographs, its other criteria for selection for the current news articles and evergreen content are unknown.

News publishers are concerned that with all the sports scores, weather, video content, paid content, entertainment updates, and other distractions on Google Discover, users will be less focused on news articles.

News publishers are concerned that Google Discover is a product geared too heavily to advertisers and one that will be far more lucrative for Google than Search. Being able to target consumers based on subject-matter buckets that they follow is a highly powerful tool for advertisers. As Google has announced, it will include sponsored content labeled as advertisements in between the news articles on Google Discover. Google presumably will get all or most of the revenue from this sponsored content – as opposed to the smaller cut paid to Google's ad tech service for placing advertisements within news articles. **News publishers fear that Google Discover will permit Google to siphon off more of the revenues sold against their content than Google Search.**

V. GOOGLE SEARCH:

BECOMING A WALLED GARDEN

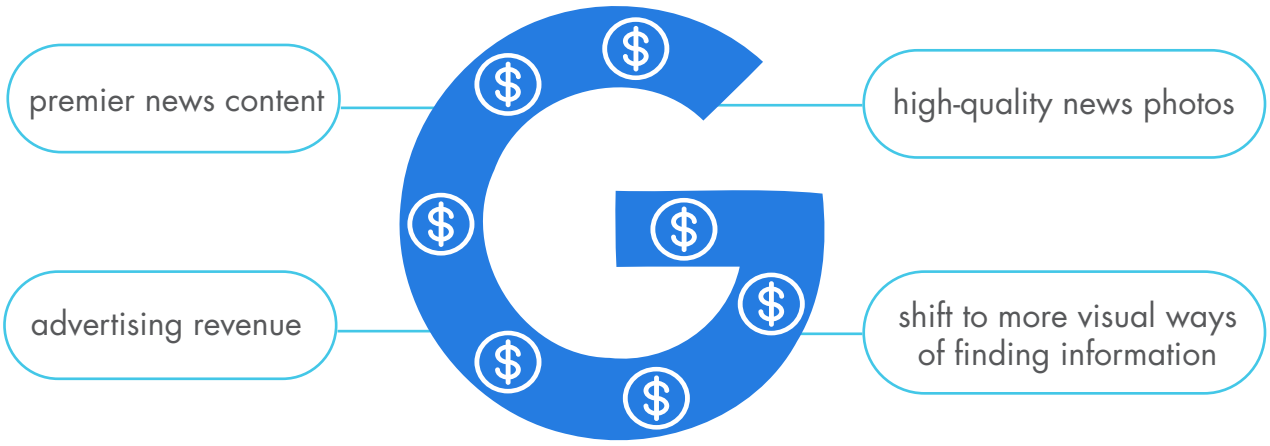
News publishers have different but equally pressing concerns about the direction of Google Search – in both desktop and mobile. As stated above, in 2018 Google itself disclosed fundamental shifts in its view of search, including a shift to more visual ways of finding information – but these are only part of the problem from the publishers' perspective. For many years, Google Search results consisted of simple blue links with only a headline and very short snippet from an article. Today, Google Search makes heavy use of premier news content, including high quality news photos. Google uses this content to enhance its own brand – especially in an era plagued by fake news – and earns substantial advertising revenues for aggregating content it did not create or fund. Moreover, news publishers worry that Google Search is increasingly becoming more of a publisher than a search engine, supplying sufficient content to substitute for their publications. This violates the core assumption at the foundation of the *Perfect 10* case.

Google: A Walled Garden

News publishers worry that Google Search is increasingly becoming more of a publisher than a search engine.

Inside Google's Walled Garden

Supplying sufficient content to substitute for news publications



For many years, Google Search results consisted of simple blue links with only a headline and very short snippet from an article. Today, Google Search makes heavy use of premier news content, including high quality news photos. Google uses this content to enhance its own brand – especially in an era plagued by fake news – and earns substantial advertising revenues for aggregating content it did not create or fund.

Illustration

Thus, one growing concern for the news industry is the current length of snippets from their articles, which often can collectively provide ample information on any news story to satisfy the casual reader skimming the news.

Google is able to use its role as the market dominant platform to pressure newspapers into providing "rich snippets" for search.

If these rich snippets are not on properly optimized pages (meaning the publisher implemented Google-dictated structured data and markup properly, and the images are of requisite quality and size), the newspaper is put at competitive disadvantage. As illustrated by the examples and screenshots detailed below, a second, broader concern is the format and wide range of content presented by Google on today's search results pages, usually above the traditional headlines and links to news articles – changes which undoubtedly decrease the chances that a user will click on a news link. Many have quoted the stunning statistic that,

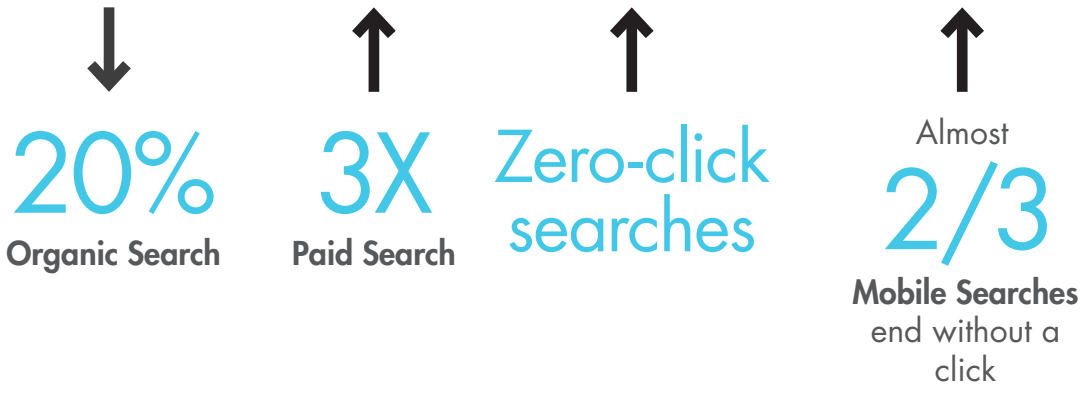
"In June of 2019, for the first time, a majority of all browser-based searches on Google.com resulted in zero clicks. We've passed a milestone in Google's evolution from search engine to walled-garden."[38]

The situation is even more stark on mobile: in the past three years, "[o]rganic has fallen by almost 20%, while paid has nearly tripled and zero-click searches are up significantly. … Today … almost two-thirds [of mobile searches ended without a click]."[39] Thus, while Google still sends substantial traffic to news websites, it is clear that it has wholly abandoned early Larry Page's approach where he stated: "We want to get you out of Google and to the right place as fast as possible."

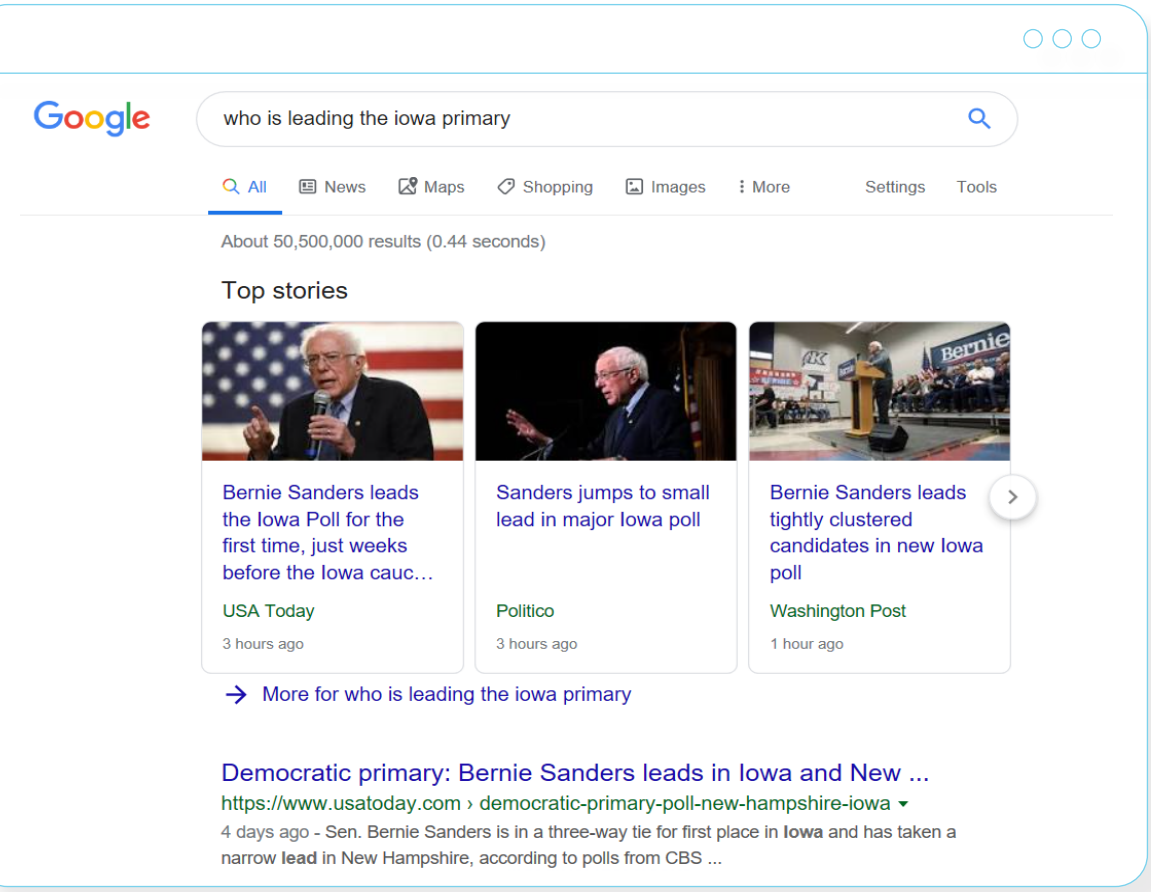
Effect of Google's Walled Garden: Search Results Dominated by Paid Ads, Rich Snippets, Etc.

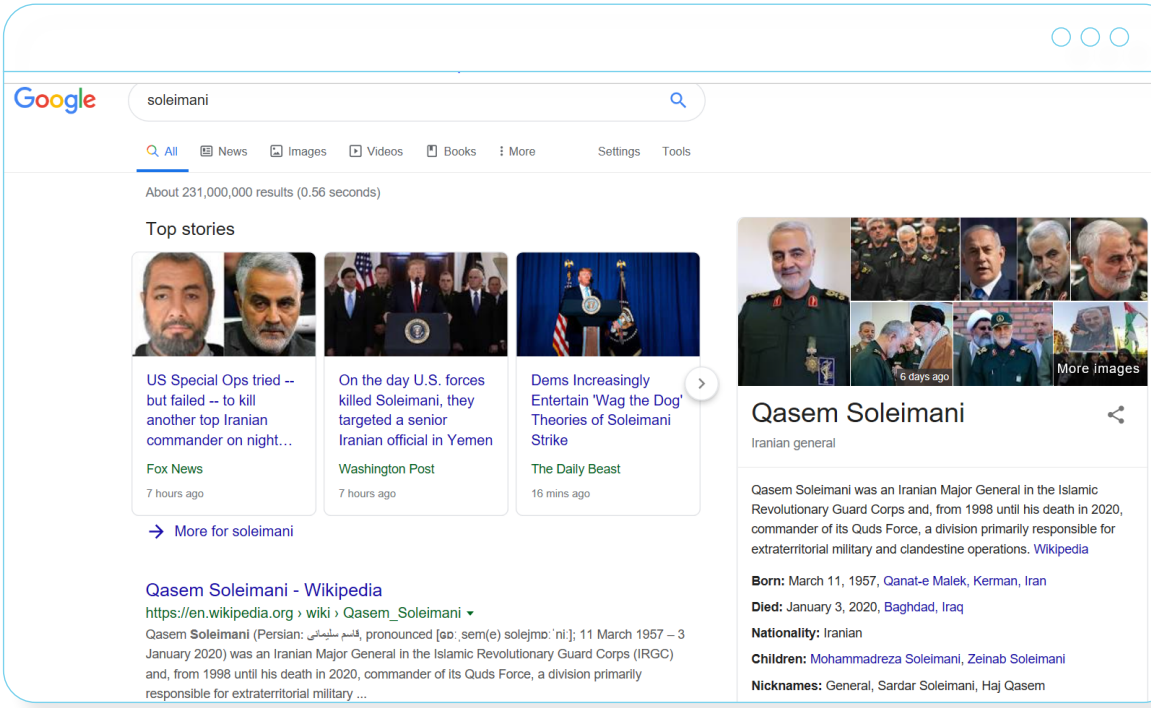
Removes Incentive for Users to Click Through to Original Content

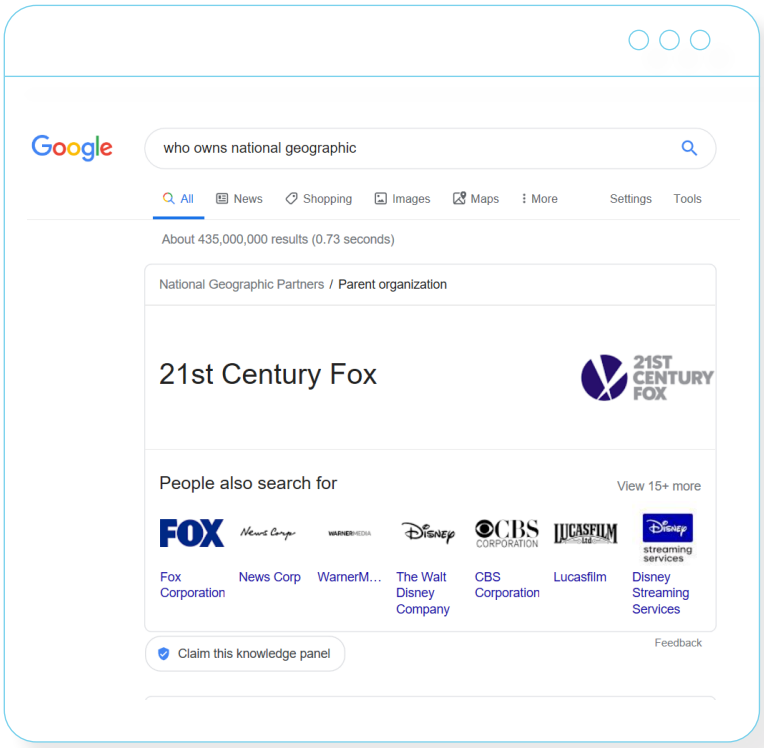
In the past three years:



Here are two examples of Google search results:

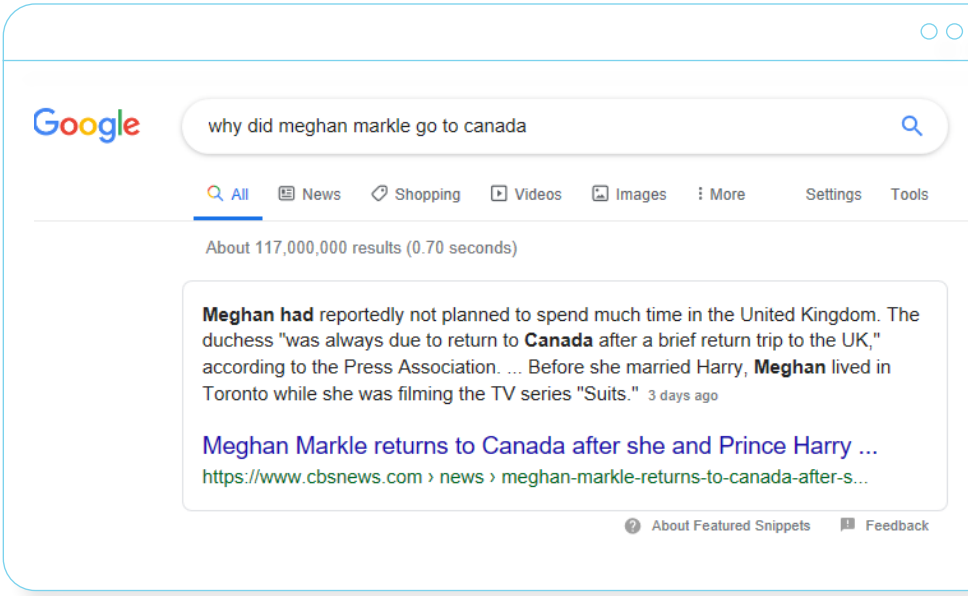






Examples of the expanded content presented in Google Search results before traditional news headlines and links include the following. **First**, sometimes Google Search simply provides the answer to a question, such as "Who owns National Geographic?"

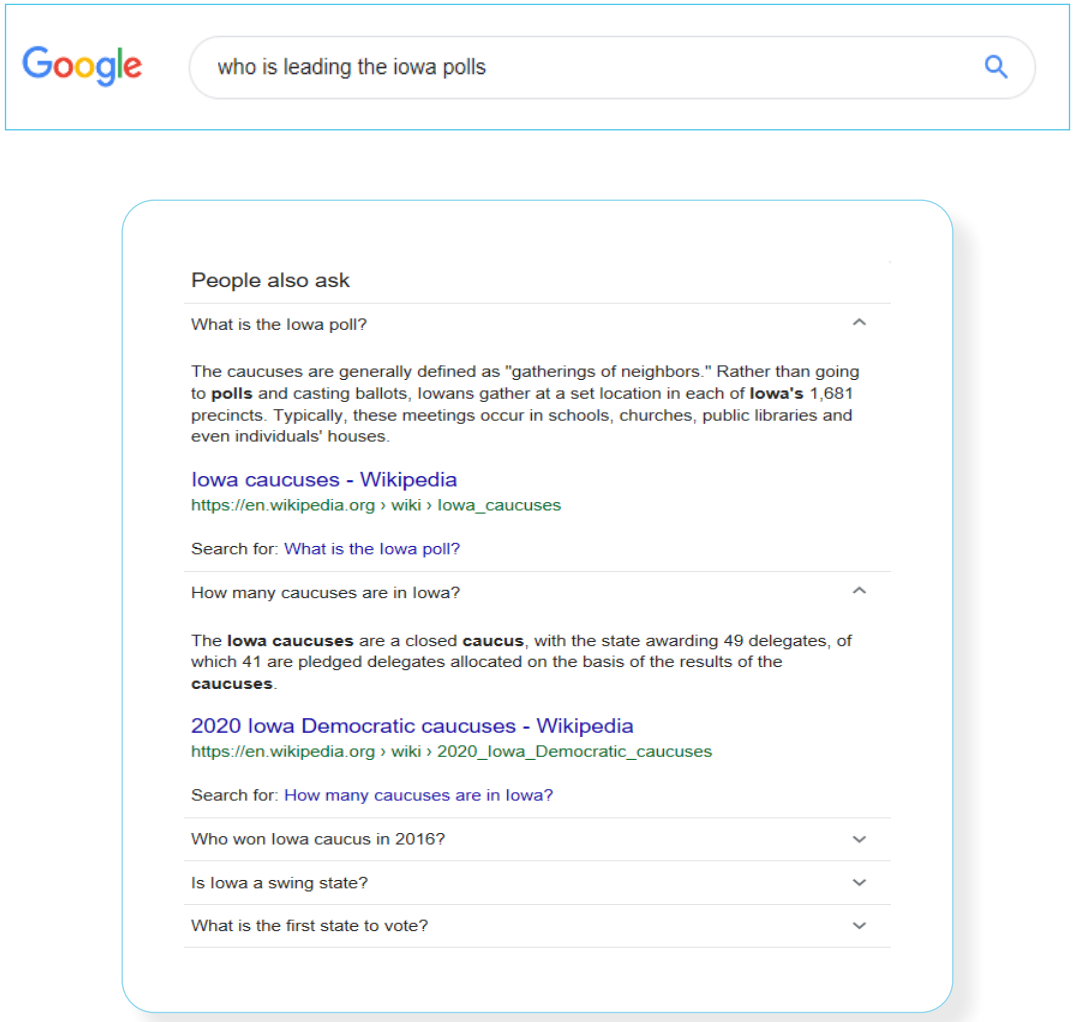
Second, Google currently is making extensive use of "featured snippets," including on mobile. These are special boxes where the format of regular listings is reversed, showing the descriptive snippet first before the link. (Featured snippets commonly contain only one link for the listing.)



Featured snippets are often sufficiently lengthy and comprehensive that the user is far less likely to click on any news link; they also push regular news links farther down the search page. **One 2017 study analyzed two million featured snippets and found that when a featured snippet is present, the first organic result showed a significant drop in click-through rate.**[40] Not surprisingly, since newspapers are all in competition with one another, there is substantial pressure to provide sufficiently lengthy snippets to draw traffic or be selected for the "featured snippet" on any given topic.

Google's website states that news publishers can only opt out of featured snippets by "remov[ing] all snippets on your page, including those in regular search results."[41] In other words, a news publisher cannot decide to opt out of featured snippets without removing all textual snippets from its ordinary search results – which would be suicidal.

Third, Google also has introduced the "People Also Ask" feature in Google Search, which generally provides questions and answers, often with a link to Wikipedia – reducing newspaper traffic.



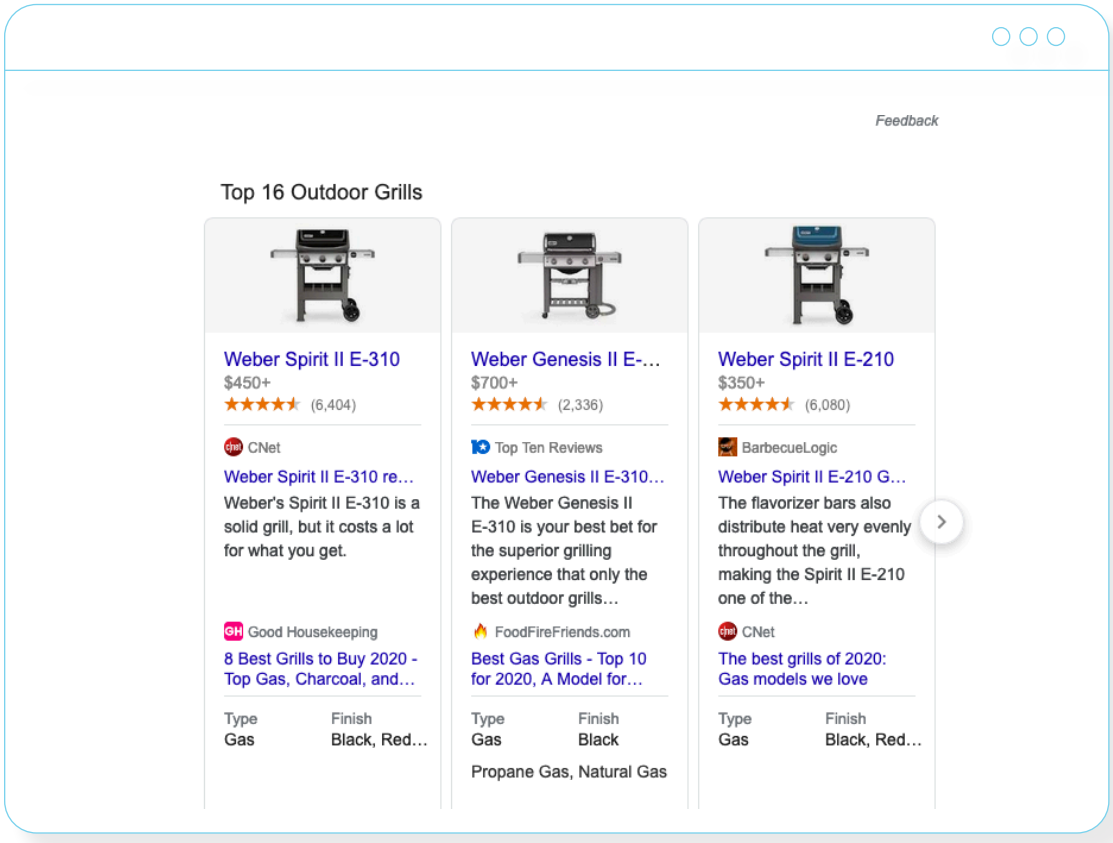
Where the "People Also Ask" feature displays newspaper content, it provides lengthy snippets akin to the "featured snippets," which often provide sufficient information that a reader will not feel the need to click through to the original site.

Fourth, Google often places ads and other sponsored content in search results, often pushing news links farther down the page and reducing the likelihood that a user will click on a news link. This is frequently the case in searches for consumer products that are reviewed in "service journalism" – publications like *Consumer Reports, Reviewed or The Wirecutter*. Searches for topics such as "best outdoor grills" are crowded with all sorts of ads and sponsored content before the publishers' organic search results. Moreover, as can be seen below, Google is using snippets of news content as specific promotions for individual products, all to its commercial benefit; for example, if the user clicks on these products, they link to a shopping module.

In other words:

Google is using the news media's content to advance its chance of selling the product at issue, without compensation to the publisher – and circumventing the user's need to visit the publishers' web sites and an opportunity for publishers to earn a share of affiliate revenues.

All told, the changes in Google Search and its movement toward a "walled garden" raise significant concerns for news publishers, who rely heavily on Google Search traffic and whose content is instead used for Google's own purposes.



News publishers also have other concerns about Google Search unrelated to Google's movements toward a "walled garden." They also have expressed concerns that their rankings on Google Search have fallen when they have decreased the number of free articles offered before requiring a subscription. As they have explained, the Google algorithm can detect when users leave a newspaper's page – as they often do when hitting a paywall – and this lowers search rankings. As the premier newspapers increasingly make use of paywalls to fund their operations, these practices by Google have troubling implications.

News publishers also are angered about Google's apparent use of news content they have authorized for use in Google Search in entirely different Google products, including Google Assistant. Google Assistant is but one of the growing "Voice-first" Google platforms. The Google website states that, "If you search with the Google Assistant, featured snippets may also be read aloud."[42] The full extent of this practice is not known, but in a limited review the news publishers have certainly found examples. When Google Assistant provides an audio response, that audio response obviously does not contain any link to the original article. In short, in that setting, the *quid pro quo* that supports any fair use defense is absent. While some publishers have affirmatively opted-in by using structured data known as "speakable markup" (used to signal consent to Google for use of excerpts

Google Assistant Does Not Give Credit to Original Publisher

This is Not Fair Use

in text-to-speech), most of the news industry has not provided knowing consent to this use of their content on Google Assistant. That apparently has not stopped Google. Google is currently paying license fees to some publishers for custom-tailored audio content on Google Assistant, but the full extent of Google's use of news content for Google Assistant remains opaque but certainly goes far beyond those few publishers that have given actual consent. It is widely expected that Google Voice is the new frontier and, as with Google Search and Google News, publishers have substantial concerns regarding attribution, monetization, traffic and audience data, and customer relationship issues relating to use of their content that need to be far better addressed. **Google's use of content authorized for one product in another product entirely in very different circumstances is yet another example of Google's misuse of its power as a market dominant platform.**

VI. NEEDED STEPS TO COMBAT GOOGLE'S BEHAVIOR

As the facts outlined above portray, news publishers have not had the ability to rely on copyright law to protect their publications in the face of Google's near monopoly power, which Google repeatedly deploys to extract undue concessions from the news publishers and increase that market dominance. In the *Perfect 10* case, Google got a significant "win" on a fundamentally different set of facts, and then grew so large and powerful that no individual news publisher has genuine negotiation muscle against it to enforce their rights.

Thus, no matter what copyright protection the newspapers are rightfully due under the Copyright Act – which is there to protect their ability to flourish and incentive to create – there has been a market failure in their ability to obtain adequate compensation or control over the current and future use of their content.

This is one among several causes that have greatly damaged the news publisher industry, leading to the decline of high-quality coverage of public affairs, including local news, to the detriment of all citizens. Such coverage is especially necessary in these challenging times, as truth is subject to attack and the ability of governments to grapple with pressing political challenges such as climate change and the corruption of politics by special interests becomes ever more pressing.

All of this makes it imperative that there be some structural solution to address Google's market dominance and ability to dictate grossly one-sided terms that can be changed at its whim at any time – as well as its ability to play one publisher against another. After all, no news publisher can afford to be the lone publication standing up to Google, while its competitors cave in to Google's unfair demands and get the resulting traffic. The concern extends far more broadly than the current versions of Google Search, Google Discover, and the Google News app. Rather, the concern only amplifies as one looks into the future – including for example, the unknown extent to which Google intends to use newspaper content in Google Voice and to develop artificial intelligence. Google Voice is anticipated to be highly important for Google, whether via Google Assistant or other platforms, and Google's anticipated use of artificial intelligence to develop answers to questions is a hot topic in news circles. [43]

A. The EU Adopts A Publisher's Right and Abuse of Economic Dependence Principles

In the European Union, similar concerns recently have led to extensive studies and important legal changes. Last year, the EU adopted a "Publisher's Right" as part of the "Directive on Copyright in the Digital Single Market" (the "Directive").[44] Each country in the EU must now enact implementing legislation, which France has already done. The Publisher's Right essentially gives press publications the right to compensation for use of their works by "information society service providers" – except for "the use of individual words or very short extracts of press publications."[45] While "very short excerpts" are not defined, the Directive makes clear that "it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive."[46] The Directive clarifies that the rights granted to publishers do not extend to acts of hyperlinking or "mere facts."

The Directive is expressly based on the public policy considerations at stake. It recognizes that "[a] free and pluralistic press is essential to ensure quality journalism and citizens' access to information" and that a thriving press "provides a fundamental contribution to public debate and the proper functioning of a democratic society."[47] It seeks to address the "problems" experienced by press publications "in licensing the online use of their publications" to online services both in light of the publications' need to "recoup their

investments" and as a matter of equity – concluding that the "reuse of press publications" constitutes an "important part of the[ ] business models" of online services and "a source of revenue."[48] The Directive is premised on a recognition of the market dominance of the major platforms. As the [Commission Staff Working Document Impact Assessment] stated, "Online service providers often have a strong bargaining position and receive the majority of advertising revenues generated online … This makes it difficult for press publishers to negotiate with them on an equal footing, including regarding the share of revenues related to the use of their content."[49]

It is far too early to determine the ultimate impact of the EU Publisher's Right. Thus far, Google has publicly stated that it will not pay press publications for search results and will instead limit the detail in its search listings, citing an experiment purportedly demonstrating that in such instances, traffic will go to non-news sites, thus harming news publishers.

In April 2020, the French Competition Authority found that Google was abusing its monopoly position in search to circumvent the French version of the Publisher's Right and ordered it to engage in negotiations under stated conditions.[50]

Google's behavior is in keeping with its earlier response to similar legislation. In 2014, Spain and Germany enacted laws permitting publishers to charge Google for displaying snippets in search results, or to prohibit Google from doing so. A consortium of German publishers initially told Google that it could not display snippets or images in its search results; when Google complied (displaying only headlines), traffic to major news publishers crashed so significantly that within two weeks, Germany's largest publisher reversed course.[51] In response to the Spanish law, Google chose to shut down Google News in Spain altogether rather than pay publishers for their content[52]; as a result, studies documented an immediate reduction in traffic falling on smaller publishers.[53] However, recent reports show that over time online traffic trends for select Spanish news sites seem to have remained largely unchanged, with the total number of unique monthly visitors actually increasing with many publishers.[54]

The EU Publisher's Right holds promise for European news publishers, although the last chapter on its implementation has yet to be written. Whatever its ultimate impact, the EU and American legal systems are very different. The EU Publisher's Right is most salient in the U.S. as a reflection of a fundamental principle regarding the value of news content to be attained through some vehicle, even if not in the exact manner as the EU. **Certainly, the EU's adoption of a Publisher's Right underscores the legitimate nature of the news publishers' concerns reflected in this paper and the necessity for action.**

Another EU legal development may provide more concrete possibilities for U.S. legislation that would provide redress for the news publishers' concerns with Google. In France, Belgium, Germany and other jurisdictions, there are laws governing the

abuse of economic dependence, which focus on situations in which one party has a significant share of the relevant market[55] and abuses its power over those highly reliant on it as a supplier. The French law broadly prohibits "the abusive exploitation by a company … of the state of economic dependence" (Article L. 420-2 of the Code de Commerce) – listing as examples a refusal to sell, tied selling or discriminatory practices. The German abuse of economic dependence provisions have an even greater sweep and are not confined to prohibiting practices such as those listed above that affect overall competition.[56] More broadly speaking, commentators have proposed and analyzed potential Platform-to-Business (P2B) regulations in recognition of the superior bargaining position often held by platforms in relation to their business users, which can lead to unfair practices.[57] Notably, French news publishers recently raised the laws against abuse of economic dependence in the above-described April 2020 case before the French Competition Authority finding that Google was abusing its monopoly position in the general online search market to circumvent the French version of the Publisher's Right – although the abuse of economic dependence claim was not ultimately decided in that decision.[58]

The "abuse of economic dependence" concept goes to the heart of the problem between Google and the American news publishers and has some of the same strains as unfair competition law in the United States. While U.S. antitrust laws do not currently recognize exploitative abuse of economic dependence, this concept could be used in U.S. legislation to protect news publishers who are in a state of economic dependence on Google on two fronts: traffic and advertising. As evidenced by the history set forth above, Google's superior bargaining power as the dominant market player is so out sized that it has made it effectively impossible for the newspapers to enforce their rights under the Copyright Act, especially as Google plays one publisher off another. They have been forced to consent in one fashion or other to use of their content beyond the boundaries of fair use without remuneration. In short, intellectual property law has become an ineffectual protection in the face of Google's market power abuse and many newspapers are being hampered in their ability to provide the reporting that plays a critical role in our democracy. While legislation built on concepts of "abuse of economic dependence" and unfair competition would be somewhat novel in its approach, it is worth considering such legislation in the context of platform use of news content since it is both appropriate and critical for Congress to directly address Google's market power abuse outlined here. Such legislation could define and target specific practices that constitute exploitative abuse of news content by market dominant platforms, including some of the objectionable practices highlighted in this paper. Further, these concepts could well inform broader principles to be employed by anti-trust regulators, as well as negotiations between the news publishers and Google under the proposed safe harbor legislation discussed below.

B. News Media Alliance Recommendations

The News Media Alliance makes the following recommendations for action by the United States Congress and federal and state Attorneys General:

1

Antitrust enforcers must remain vigilant and address Google's abuse of market power. In 2019, the U.S. Department of Justice and an unprecedented working group of 50 state attorneys general each announced broad antitrust investigations of Google. It is imperative that these investigations explore and address the root causes of Google's market power. Enforcers must take steps to curb Google's abuses and, if necessary, impose structural and/or other remedies to ensure that publishers have the ability to negotiate fairly and benefit from competition for the distribution and monetization of their news. Among other things, antitrust enforcers should examine Google's conduct regarding AMP, including Google's uses of its dominant search results page to enforce its unilateral AMP standard and Google's use of the AMP standard to access key consumer data. Federal and state enforcers should investigate and address Google's practices that force publishers to flatten their content in a manner that supports Google's business model by commoditizing content, discouraging innovation in the presentation of content, and devaluing the differentiated and immersive experience offered by publishers. The News Media Alliance believes that the issues presented by the news industry are among the most critical posed, given the important role of newspapers, including local newspapers, in a functioning democracy, and the perilous state of the legacy news industry. As the European Publishers Council and its allies eloquently stated, "Press freedom is not just a function of the law. It also depends on a market that can generate sufficient returns for the huge financial investments required, and to cover the enormous legal and commercial risks of the news media business."

"Press freedom is not just a function of the law. It also depends on a market that can generate sufficient returns for the huge financial investments required, and to cover the enormous legal and commercial risks of the news media business."

– European Publishers Council

2

The News Media Alliance advocates the passage of legislation it has proposed allowing news publishers to bargain collectively with Google. The perverse current state of affairs is that Google can use its massive and unchecked market power to negotiate with publishers, but publishers cannot join forces to negotiate collectively. **The bipartisan legislation, the *Journalism Competition and Preservation Act*, was introduced as H.R. 2054, with an identical Senate version (S.1700) to address this extreme market and legal failure.** Copyright reform alone will not work if Google can use its market power to extract exploitative, exclusionary, and anticompetitive terms from publishers. News publishers face a collective action problem and cannot negotiate effectively – indeed, at all – in one-off negotiations with Google.

An appropriately tailored safe harbor – like the *Journalism Competition and Preservation Act* – will help begin to restore some semblance of a balance of power by giving publishers the ability to begin offsetting Google's power as a market dominant player in search and news aggregation.

The time has come for antitrust law to work by addressing Google's Standard Oil-sized market power, not by penalizing or restraining the smaller businesses attempting to offset Google's power through limited collective negotiations.

3

News publishers should be compensated for their content, and Congress should explore various means toward that end. The News Media Alliance encourages Congress to strengthen the intellectual property rights of news publishers, including revisiting federal copyright preemption to establish rules allowing state misappropriation claims to survive in a narrowly prescribed manner. Congress should also consider legislation that would facilitate licensing of digital content. The News Media Alliance also calls on the Copyright Office to issue regulations providing for a practical process for the registration of copyright for dynamic digital content such as that contained on digital news properties.

Further, the News Media Alliance calls on Google to adopt the following principles, and for Congress, courts, antitrust enforcers, and regulators likewise to act based on the following principles:

- **Google should genuinely treat news publishers as strategic players in a mutually dependent ecosystem** recognizing that without their critical content, Google would be significantly impaired. Broadly speaking, Google should consider the impact on the news industry of all of its actions in order to ensure that all stakeholders in the ecosystem will prosper.

- **Google should base its actions on the principle that news publishers have the right to control the specific uses of their content** by Google and should not be forced to "consent" or accede to unknown or undesired uses of their articles and photographs by being presented with untenable alternatives.

- **Google should stop using features or benefits necessary to secure high search rankings to coerce agreement to other undesired terms,** or condition search rankings on publisher participation in any other Google products.

- **Google should pay news publishers a fair share of the value of their content to Google.** There are many ways this could be structured, so long as the total consideration accurately represents an equitable distribution given Google and the news publishers' respective contributions and the enormous value to Google of the data it collects in news searches, rather than the structural imbalance between Google and the news industry in terms of negotiation power.

- **Google should share more user data** with the news publishers.

- **Google should not use its power over news publishers to collect and use data that users would be providing to publishers,** as it does with Google Subscribe.

- **Google should revise the user interfaces for Google Search results, Google Discover and the Google News app in a manner that will increase the chances that users will click on news links**, rather than increasing the chances that the consumer will use these Google products as a substitute for the original news publication.

✓ **Google should adopt a completely new approach for its terms of service and other agreements with news publishers,** and renounce reliance on all such prior documents. In order to foster fair negotiations and a true "meeting of the minds" with genuine consent, Google should:

- Inform the news publishers of intended desired uses of newspaper content in sufficient detail to permit knowledgeable negotiations;
- Engage in a meaningful "give and take" with the news industry to address their concerns, rather than effectively forcing them to agree to non-negotiable contracts of adhesion;
- Negotiate agreements pertaining to one product, not multiple products;
- Cease any tying arrangements or other provisions that require news publishers who want to consent to one use of their content to agree to other uses of their content, including features within a given product;
- Revise its "grant of rights" clauses significantly, so that they are both circumscribed and clear;
- Cease the use of any provisions providing in sum or substance that "Google may add or remove functionalities or features at any time," and that "Google may modify the agreement at any time";
- Agree to a fairer distribution of risk through more equal indemnification provisions.

✓ **Google should engage in transparent and fair negotiations with news publishers** regarding any uses of their content in Google Voice and artificial intelligence.

IN CONCLUSION

Long ago the courts gave Google certain limited legal protections, believing that it was engaged in good faith, fair uses of third-party content, and ultimately acting in the public interest. Now, the balance is upset, leading to significant societal ramifications and harm to the free press. The News Media Alliance calls upon both the government and Google to address these urgent problems.

ENDNOTES

1. *Perfect 10, Inc. v.* Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).
2. *Campbell v. Acuff-Rose Music,* 510 U.S. 569, 579 (1994).
3. David Sheff, *Playboy Interview: Google guys: a candid conversation with America's newest billionaires about their oddball company, how they tamed the web and why their motto is "Don't be evil",* Playboy, Sept. 1, 2004 at p. 55.
4. Flash Eurobarometer 437 Report: Internet user's preferences for accessing content online, EU Open Data Portal (Sept. 2016), at p. 5, available for download at https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2123.
5. *Alphabet Announces Fourth Quarter and Fiscal Year 2019 Results* (Feb. 3, 2020), available at https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf?cache=79552b8.
6. Tom Stites, *About 1,300 U.S. communities have totally lost news coverage, UNC news desert study finds, Poynter* (Oct. 15, 2018), available at https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/.
7. Benjamin Goggin, *7,800 people lost their media jobs in a 2019 landslide, Business Insider* (Dec. 10, 2019 5:05 p.m.), available at https://www.businessinsider.com/2019-media-layoffs-job-cuts-at-buzzfeed-huffpost-vice-details-2019-2#spin-media-group-29-jobs-september-and-january-18.
8. AMP pages on mobile search are served from the Google AMP cache. However, Google has long indicated that "AMP pages on desktop . . . aren't served from the Google AMP Cache/AMP Viewer." Google Developers, *Understand How AMP Looks in Search Results*, available at https://developers.google.com/search/docs/guides/about-amp (last visited on June 2, 2020).
9. *Id.*
10. *Id.*
11. Google Developers, *FAQ*, available at https://developers.google.com/amp/cache/faq (last visited June 3, 2020). As the Google FAQ states:

    What gets cached?
    If an AMP page is valid and is requested (so the Google AMP Cache is aware of it), it will get cached. Any resources in AMP pages, including AMP images, also get cached.

    Can I stop content from being cached?
    No. By using AMP, content producers are making the content in AMP files available to be cached by third parties. For example, Google products use the Google AMP Cache to serve AMP content as fast as possible.
12. *A letter about Google AMP,* (Jan. 9, 2018), available at http://ampletter.org/.
13. *Id.*
14. These include the following: 1) Google gets the subscriber data; 2) the user must use Google Wallet or Google Pay, instead of providing its credit card to the news publisher and establishing a direct relationship with the publisher; and 3) Google takes a 5 to 15 percent cut. See Nushin Rashidian, George Civeris, Pete Brown, Platforms and Publishers: The End of an Era, Columbia Journalism Review (Nov. 22, 2019), available at https://www.cjr.org/tow_center_reports/platforms-and-publishers-end-of-an-era.php.
15. Google Developers, Privacy and Terms, available at https://developers.google.com/amp/cache/policies (last visited June 3, 2020) ("Use of the Google AMP URL API is subject to the Google APIs Terms of Service and the Google Privacy Policy."); for APIs Terms of Service, see https://developers.google.com/terms. At least one news publisher has been able to devote the resources necessary to develop its own in-house solution allowing it to avoid use of Google's AMP URL API – and thus imposition of the related terms of service – for its news articles in the AMP format, but this requires extensive resources and is not a solution for the broader industry.

16. See Google APIs Terms of Service, ¶5(b) at Google Developers, *Google APIs Terms of Service*, available at https://developers.google.com/terms (last visited June 2, 2020). The full clause reads:
b. Submission of Content
Some of our APIs allow the submission of content. Google does not acquire any ownership of any intellectual property rights in the content that you submit to our APIs through your API Client, except as expressly provided in the Terms. For the sole purpose of enabling Google to provide, secure, and improve the APIs (and the related service(s)) and only in accordance with the applicable Google privacy policies, you give Google a perpetual, irrevocable, worldwide, sublicensable, royalty-free, and non-exclusive license to Use content submitted, posted, or displayed to or from the APIs through your API Client. "Use" means use, host, store, modify, communicate, and publish. Before you submit your content to our APIs through your API Client, you will ensure that you have the necessary rights … to grant us the license."

17. Trystan Upstill, The *New Google News: AI Meets Human Intelligence* (May 8, 2018), Google: The Keyword Blog, available at https://blog.google/products/news/new-google-news-ai-meets-human-intelligence/?utm_source=tw&utm_medium=feed&utm_campaign=io18.

18. *See, e.g., Associated Press v. Meltwater US Holdings, Inc,* 931 F. Supp. 2d 537 (S.D.N.Y. 2013); *Fox News Network v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

19. The Google News app has many of the aspects of the user interface that have been found to depress the reader's propensity to visit the content producer's website – aspects set forth in an in-depth academic study. See Chrysanthos Dellarocase, Juliana Sutanto, Mihai Calin, Elia Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators* (Dec. 10, 2015), Management Science Vol. 62, No. 9: 2543-2562, available at https://pubsonline.informs.org/doi/10.1287/mnsc.2015.2237.

20. *See, e.g.*, Google News/Producer, Newsstand Publisher Agreement at ¶2.1, available at https://www.google.com/producer/legacytos (last visited June 3, 2020).

21. Google News/Producer, News Publisher Agreement, available at https://www.google.com/producer/tos (last updated Jan. 1, 2019) ("Google News Publisher Agreement"). While such clauses are not uncommon, circumstances vary widely; here, Google's product has changed significantly and the changes have a material impact on news publishers.

22. *See* Support.google.com, *Appear in Google News – Publisher Center Help*, available at https://support.google.com/news/publisher-center/answer/9607025?hl=en (last visited June 3, 2020), and Support.google.com, *Block Access to Content on Your Site – Publisher Center Help*, available at https://support.google.com/news/publisher-center/answer/9605477 (last visited June 3, 2020).

23. Support.google.com, *Appear in Google News – Publisher Center Help*, available at https://support.google.com/news/publisher-center/answer/9607025?hl=en (last visited June 3, 2020).

24. *See* Google News Publisher Agreement at https://www.google.com/producer/tos.

25. *Id.* at ¶1 (Definitions).

26. *Id.* at ¶2.2(b).

27. *Id.* at ¶2.1.

28. *Id.* at ¶2.1.

29. *Id.* at ¶6.1 and ¶6.3.

30. Since the Google News app makes heavy use of AMP content, the above-described Google API Terms of Service would also appear to apply to AMP content on the Google News app.

31. See Karen Corby, *Discover new information and inspiration with Search, no query required*, Google: The Keyword Blog (Sept. 24, 2018), available at https://www.blog.google/products/search/introducing-google-discover/ and https://www.blog.google/products/search/improving-search-next-20-years (hereinafter "Corby").

32. Thus, Google's website states, "To enable large images in your Discover results… [e]nsure that Google has the rights to display your high-quality images to users, either by using AMP or by filling out this form to express your interest in our opt-in program." Support.google.com, *Google Discover: Optimize your content on Discover*, available at https://support.google.com/webmasters/answer/9046777?hl=en (last visited June 3, 2020).

33. Ben Gomes, *Search: Improving Search for the next 20 years*, Google: The Keyword Blog (Sept.24, 2018), available at https://www.blog.google/products/search/improving-search-next-20-years (last visited June 9, 2020).

34. Support.google.com, *Customize what you find in Discover*, available at https://support.google.com/websearch/answer/2819496?co=GENIE.Platform%3DAndroid&hl=en (last visited June 3, 2020).

35. Karen Corby, *Discover new information and inspiration with Search, no query required*, Google: The Keyword blog (Sept. 24, 2018), available at https://www.blog.google/products/search/introducing-google-discover/.

36. The source for this image is JR Raphael, *The Google feed has lost its soul*, Computer World (Oct. 3, 2017), available at https://www.computerworld.com/article/3229933/google-feed.html.

37. Gordon Donnelly, *So Long Google Feed; Hello, Google Discover*, WordStream: Blog (Aug. 19, 2019), available at https://www.wordstream.com/blog/ws/2018/09/28/google-discover.

38. Rand Fiskin, *Less than Half of Google Searches Now Result in a Click*, SparkToro: Blog (Aug. 13, 2019), available at https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/ (citing studies by Jumpstart, the data arm of Avast).

39. *Id.*

40. *See* Tim Soulo, *Ahrefs' Study of 2 Million Featured Snippets:10 Important Takeaways*, Ahrefs: Blog (Apr. 7, 2020), available at https://ahrefs.com/blog/featured-snippets-study/; *see also* Barry Schwartz, *Another Study shows how featured snippets steal significant traffic from the top organic results*, Search Engine Land (May 30, 2017, 10:25 a.m.), available at https://searchengineland.com/another-featured-snippet-study-shows-steal-significant-traffic-first-organic-result-275967 (summarizing Ahrefs' study).

41. Support.google.com, *Featured snippets and your website*, available at https://support.google.com/webmasters/answer/6229325?hl=en (last visited June 9, 2020).

42. Support.google.com, *How Google's featured snippets work*, available at https://support.google.com/websearch/answer/9351707?p=featured_snippets&hl=en&visit_id=637127182315986847-2628332654&rd=1 (last visited June 3, 2020); see also Danny Sullivan, *A Reintroduction to Google's Featured Snippets,* Google: The Keyword blog (Jan. 30, 2018), available at https://www.blog.google/products/search/reintroduction-googles-featured-snippets/.

43. *See, e.g.*, Cade Metz, *Google's Hand-Fed AI Now Gives Answers, Not Just Search Results*, Wired (Nov. 29, 2019 7:00 a.m.), available at https://www.wired.com/2016/11/googles-search-engine-can-now-answer-questions-human-help/; Katrina Brooker, *Google's quantum bet on the future of AI and what it means for humanity, Fast Company* (Sept. 17, 2019), available at https://www.fastcompany.com/90396213/google-quantum-supremacy-future-ai-humanity.

44. Official Journal of the European Union, 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, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN (last visited June 8, 2020).

45. *Id.* at 13.

46. *Id.*

47. *Id.* at 12.

48. *Id.* at 12-13.

49. Commission Staff Working Document Impact Assessment on the modernization of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (Sept. 16, 2016) at p. 160, available at https://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=CELEX:52016SC0301&from=EN.

50. *See* Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 concerning the requests for provisional remedies submitted by the Syndicat des editeurs de las presse magazine, Alliance de la press d'information generale inter alia, and Agence France-Press.

51. *See* Harro Ten Wolde, Eric Auchard, *Germany's top publisher bows to Google in new licensing row,* Reuters, (Nov. 5, 2014 10:35 a.m.), available at https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105; Colin Lecher, *German publisher caves to Google News after massive traffic drop,* The Verge (Nov. 5, 2014 12:47 p.m.), available at https://www.theverge.com/2014/11/5/7160587/german-publisher-axel-springer-google-news.

52. Google Europe Blog, *An update on Google News Spain* (Dec. 11, 2014), available at https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html.

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54. News Media Alliance, *The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure* (Nov. 2019), available at http://www.newsmediaalliance.org/wp-content/uploads/2019/10/Final-Revised-Spain-Report_11-7-19.pdf (last visited June 3, 2020).

55. As the French Competition Authority recently summarized: "In order to characterize a situation of economic dependence, it is … necessary to assess whether the following four criteria are met: (i) the brand of the respondent enjoys sufficient notoriety; (ii) the latter has a significant market share in the relevant market; (iii) its share in the turnover of the company possibly in a situation of economic dependence is significant; and (iv) the said company does not have an alternative solution under comparable technical and economic conditions." See Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 concerning the requests for provisional remedies submitted by the Syndicat des editeurs de las presse magazine, Alliance de la press d'information generale inter alia, and Agence France-Press.

56. See, e.g., Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, Oxford Academic: Yearbook of European Law (Nov. 12, 2019), Vol. 38 at pp. 448 – 499, available at https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729 (hereinafter "Graef").

57. *Id.*

58. *See* Decision no. 20-MC-01 of the Autorité de la Concurrence of 9 April 2020 relating to the requests for provisional measures presented by the Syndicat des editeurs de las presse magazine, Alliance de la press d'information generale inter alia, and Agence France-Press, Autorité de la concurrence (Apr. 9, 2020), available at https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de.

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