



## BAD NEWS: Bill C-18 and the Distortion of Canadian Digital Policy

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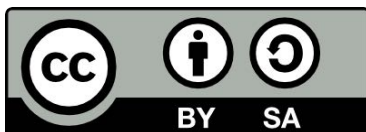
# About CIPPIC

CIPPIC is Canada's first and only public interest technology law clinic. Based at the Centre for Law, Technology and Society at the University of Ottawa's Faculty of Law, our team of legal experts and law students works together to advance the public interest on critical law and technology issues including privacy, free expression, intellectual property, telecommunications policy, and data and algorithmic governance. For more information, visit our website at [www.cippic.ca](http://www.cippic.ca).

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# Introduction

Journalism is the lifeblood of democracy. Independent news media serve the essential function of informing the electorate on issues of public concern and of holding those entrusted with power accountable.<sup>1</sup>

News media in Canada, as in other democracies, are facing significant challenges in remaining financially viable in a rapidly changing technological environment.<sup>2</sup> No reasonable person can dispute the importance of finding public policy solutions to address this important problem. Unfortunately, Canada's federal government is going about supporting journalism in the worst possible way with Bill C-18, also known as the *Online News Act*.

Bill C-18 requires “digital news intermediaries” such as Meta (Facebook) and Google to “compensate” news organizations for making news content “available” on their platforms through a vague and unspecified “bargaining process.” While the impulse to help fund the news media is laudable, our report adds to the growing chorus of critiques of Bill C-18 by identifying three additional problems with its structure and provisions.

Our report will begin by exposing weaknesses in the drafting of Bill C-18, by highlighting certain provisions that are underinclusive and perhaps even unconstitutionally vague. Second, we will show how Bill C-18 upends longstanding principles of copyright law that are meant to balance the public interest with the pecuniary interests of news publishers. Third, we will show how Bill C-18 serves to reinforce the toxic ad-supported business models of large technology companies that undermine our democracy and invade our privacy by addicting our news media to their profits.

## Bill C-18's Text is Vague and Underinclusive

Bill C-18 is remarkable in how poorly it is drafted. The Bill as it stands contains language that is underinclusive and vague to the point of being unconstitutional.

First, the Bill's definitions of “news content” and “news businesses” are unclear. Bill C-18 incorporates several eligibility criteria for news businesses, among them an outlet that “produces news content of public interest that is primarily focused on matters of general interest and reports on current events including coverage of democratic institutions and processes.” Such outlets must employ two or more journalists, operate in Canada, produce content that is not primarily focused on a particular topic, and adhere to the ethical standards of the journalistic profession.<sup>3</sup>

This definition of “news businesses” is dramatically underinclusive, given how the production of news is evolving in our technological age. Bill C-18's focus on outlets that produce news content of

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<sup>1</sup> Vincent Blasi, “The Checking Value in First Amendment Theory” (1977) 2:3 A B F Research J 521.

<sup>2</sup> Vivek Krishnamurthy et al, “Media Freedom and Technological Change” (8 November 2021), online: *Harvard Kennedy School Carr Center for Human Rights Policy* <[carrcenter.hks.harvard.edu/publications/media-freedom-and-technological-change](http://carrcenter.hks.harvard.edu/publications/media-freedom-and-technological-change)>.

<sup>3</sup> Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*, 1st Sess, 44th Parl, 2021-2022-2023, cl 27(1) (third reading 14 December 2022) [*Online News Act*].



“general interest,” rather than those that focus on “a particular topic,” may well exclude outlets that focus on a particular industry (like the legal or tech industries) from financial support. This would be a public policy mistake of the first order, given the role played by specialized news outlets in breaking some of the most consequential news stories of our day.<sup>4</sup>

Even more problematic is Bill C-18’s requirement of a “significant bargaining power imbalance” between digital news intermediaries and news businesses to trigger its “bargaining” obligations.<sup>5</sup> Bill C-18 provides no meaningful guidance on what constitutes such an imbalance, or how it should be determined. Rather, Bill C-18 states that the existence of a “significant bargaining power imbalance” will be determined by considering the size of the parties, whether the market gives the intermediary a strategic advantage over the news business, and whether the intermediary occupies a prominent market position.<sup>6</sup>

These provisions may well be unconstitutionally vague. The Supreme Court of Canada has ruled that “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.”<sup>7</sup> This is an apt description of the “significant bargaining power imbalance” provisions of Bill C-18, which fail to provide adequate guidance on how such an imbalance is to be determined.

Consider the “size of the parties” factor, for example. In determining the size of a “digital news intermediary,” are its worldwide operations considered, or only its operations in Canada? Do we consider all the business operations of a conglomerate like Google, which range from developing autonomous vehicles to producing Android smartphones, or just those parts of its operations that relate to the distribution of news? Is revenue the appropriate measure of size, or rather profitability? Bill C-18 so lacks in precision that it sheds no light on how to answer any of these questions. Yet the existence of a duty on the part of online platforms to bargain with Canadian news outlets turns on how such questions are answered. As the Canadian Media Concentration Project has shown, large Canadian media companies and the Canadian operations of large technology companies are of a similar size—meaning that the existence of a “significant bargaining power imbalance” is going to turn on what pieces of these conglomerates get included in the C-18 analysis.<sup>8</sup>

## Bill C-18 Eviscerates Fair Dealing Protections for Online Services

An aspect of Bill C-18 that has received inadequate public scrutiny is how the proposed legislation eviscerates provisions of the *Copyright Act* that protect the right to free expression and the broader public interest. Clause 24 of the Bill provides that “[f]or greater certainty, limitations and

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<sup>4</sup> For example, *Law360*—a specialized legal news outlet—broke the news of Supreme Court Justice Russell Brown’s absence from the bench, opening the way for other outlets to determine that his conduct is the subject of an official investigation. See Peter Zimonjic, “Judicial Council says it’s reviewing complaint against Supreme Court Justice Russell Brown” (7 March 2023), online: *CBC* <[www.cbc.ca/news/politics/canadian-judicial-council-russell-brown-1.6770682](http://www.cbc.ca/news/politics/canadian-judicial-council-russell-brown-1.6770682)>.

<sup>5</sup> *Online News Act*, *supra* note 3 at cl 38(c).

<sup>6</sup> *Ibid* at cl 6.

<sup>7</sup> *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72.

<sup>8</sup> Dwayne Winseck, “Media and Internet Concentration in Canada, 1984-2021” (2022) at 139, online (pdf): *Global Media and Internet Concentration Project Carleton University* <<http://www.cmcrp.org/wp-content/uploads/2023/01/GMICP-Concentration-Report-Canada-2021-30012023-21.50.pdf>>.

exceptions to copyright under the *Copyright Act* do not limit the scope of the bargaining process.”<sup>9</sup> This provision means that the fair dealing protections in the *Copyright Act* that permit the public to use copyrighted works for purposes ranging from research and education to satire, parody, and (ironically) news reporting are no longer available to online platforms that redistribute news content.<sup>10</sup>

The purpose of the *Copyright Act* is to achieve a balance between users’ and authors’ rights.<sup>11</sup> Fair dealing is an essential tool for achieving this balance, yet Bill C-18 deprives a vague and unspecified set of “digital news intermediaries” from the protections of fair dealing when they distribute news content. This is true not just of social media services like Facebook and Twitter that facilitate the sharing of news content, but also of search engines like Google and Bing that make news content searchable. Without the benefit of the *Copyright Act*’s fair dealing provisions and other public interest copyright exceptions, we should expect a range of online services to mirror Google and Meta’s lead in removing Canadian news content from their services. Otherwise, such services face unknown financial liabilities from the mandatory bargaining process for performing the public service of making Canadian news content more accessible.

Limiting the ability of platforms to rely on fair dealing and other copyright exceptions establishes a dangerous precedent in our law, as powerful economic interests seek to restrict the legitimate uses that Canadians can make of copyrighted works. Furthermore, such limitations on fair dealing raise serious concerns under the *Canadian Charter of Rights and Freedoms*, as the fair dealing exception is a key element in ensuring the constitutionality of the *Copyright Act*.<sup>12</sup>

## Bill C-18 Disincentivizes the Regulation of Big Tech’s Toxic Business Model

Perhaps the single worst aspect of Bill C-18 is that it makes Canadian journalism—the very lifeblood of our democracy—economically reliant on a toxic industry that is undermining the very foundations of democracy at home and abroad. Large online companies like Google and Meta make most of their money by selling targeted digital advertising, which use personal data mined from our online activities to bombard us with ads that follow us around the internet.<sup>13</sup>

The practices of this industry have been devastating for the privacy of Canadians—especially given just how weak our privacy laws are at regulating this industry. Worse still, targeted digital

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<sup>9</sup> *Online News Act*, *supra* note 3 at cl 24.

<sup>10</sup> *Copyright Act*, RSC 1985, c C-42, s 29.

<sup>11</sup> See *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at paras 90--91. See also Michael Geist, “Why the Online News Act is a Bad Solution to a Real Problem Part Four: Undermining Canadian Copyright Law and International Copyright Treaty Obligations” (23 September 2023), online (blog): Michael Geist <[www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/](http://www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/www.michaelgeist.ca/2022/09/why-the-online-news-act-is-a-bad-solution-to-a-real-problem-part-four/)>.

<sup>12</sup> Graham Reynolds, “Reconsidering Copyright’s Constitutionality” (2016) 53:3 Osgoode Hall L.J. 898-947.

<sup>13</sup> Amnesty International, “Surveillance giants: How the business model of Google and Facebook threatens human rights” (21 November 2019), online: Amnesty International <[www.amnesty.org/en/documents/pol30/1404/2019/en/](http://www.amnesty.org/en/documents/pol30/1404/2019/en/)>.

advertising is at the heart of scandals such as the Cambridge Analytica affair in the U.S.,<sup>14</sup> and foreign interference in elections around the world.<sup>15</sup> Well-crafted targeted digital advertisements have the potential to move elections and sow discord in democratic societies, and our adversaries know it.

If Bill C-18 succeeds in its aims, it promises to addict Canadian news organizations to the excess profits generated by the toxic digital advertising industry. This is akin to making Canada's public health care system reliant on revenues generated by the production of a noxious substance like asbestos for its survival.

Just as we moved to outlaw asbestos<sup>16</sup> and ban dangerous chemicals like PCBs,<sup>17</sup> we should be moving as fast as we can to regulate the digital advertising industry and the way it weaponizes our private information to target us with ads. Yet Bill C-27—the government's privacy reform bill—remains moribund in Parliament and proposes only modest improvements in the level of privacy protection enjoyed by Canadians.<sup>18</sup> This may well be because the government needs companies like Google and Facebook to remain profitable to use them as cash cows to fund Canadian journalism. Correspondingly, Bill C-18's short-term fixation on wresting money from the giants of Silicon Valley distorts Canadian digital policy by reducing the government's incentives to tackle the significant harms that are being caused by Big Tech's ad-supported business model.

## Conclusion

The people of Canada and our journalistic organizations deserve better than Bill C-18. The news media are vital civic infrastructure in our democracy and, just like our physical infrastructure, they deserve to be funded appropriately. No one can dispute that large technology companies should contribute their fair share to financing public expenditures. Tech giants like Google and Meta should do so by paying appropriate taxes on their profits, however, rather than through poorly designed legislative gimmicks that serve to reinforce the pathologies of their business models.

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<sup>14</sup> WIRED, "The Cambridge Analytica Story, Explained" online: <[www.wired.com/amp-stories/cambridge-analytica-explainer/](http://www.wired.com/amp-stories/cambridge-analytica-explainer/)>.

<sup>15</sup> See Kurt Wagner, "Congress just published all the Russian Facebook ads used to try and influence the 2016 election" (10 May 2018), online: Vox <[www.vox.com/2018/5/10/17339864/congress-russia-advertisements-facebook-donald-trump-president](http://www.vox.com/2018/5/10/17339864/congress-russia-advertisements-facebook-donald-trump-president)>. See also Craig Silverman, "Facebook Can't Say for Sure Whether Russians Bought Election Ads in France and Germany" (26 September 2017), online: *Buzzfeed News* <[www.buzzfeednews.com/article/craigsilverman/facebook-cant-say-whether-russians-bought-election-ads-in](http://www.buzzfeednews.com/article/craigsilverman/facebook-cant-say-whether-russians-bought-election-ads-in)>.

<sup>16</sup> Environment and Climate Change Canada, News Release, "The Government of Canada takes measures to ban asbestos and asbestos-containing products" (18 October 2018), online: *Government of Canada* <[www.canada.ca/en/environment-climate-change/news/2018/10/the-government-of-canada-takes-measures-to-ban-asbestos-and-asbestoscontaining-products.html](http://www.canada.ca/en/environment-climate-change/news/2018/10/the-government-of-canada-takes-measures-to-ban-asbestos-and-asbestoscontaining-products.html)>.

<sup>17</sup> Government of Canada, "It's Your Health" (14 December 2006), online: *Government of Canada* <[www.canada.ca/en/health-canada/services/healthy-living/your-health/environment/pcbs.html#wh](http://www.canada.ca/en/health-canada/services/healthy-living/your-health/environment/pcbs.html#wh)>.

<sup>18</sup> Teresa Scassa, "Proposed data privacy law favour industry over individuals" (7 October 2022), online: *Toronto Star* <[www.thestar.com/opinion/contributors/2022/10/07/proposed-data-privacy-law-favour-industry-over-individuals.html](http://www.thestar.com/opinion/contributors/2022/10/07/proposed-data-privacy-law-favour-industry-over-individuals.html)>.