



April 24, 2020

The Honorable Lindsay Graham
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Diane Feinstein
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jim Jordan
Ranking Member
House Judiciary Committee
2142 Rayburn House Office Building
Washington, DC 20515

The Honorable Roger Wicker
Chairman
Senate Commerce Committee
512 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Frank Pallone
Chairman
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Mariah Cantwell
Ranking Member
Senate Commerce Committee
420 Hart Senate Office Building
Washington, DC 20510

The Honorable Greg Walden
Ranking Member
House Energy and Commerce Committee
2322 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

On April 23, an article appeared in the Wall Street Journal alleging that -- in violation of its representations to vendors, public statements, and testimony before Congressional committees -- Amazon product teams used proprietary information from independent vendors to develop competing products.¹ As the article also highlights, Amazon both denies the allegations and defends various practices as consistent with its previous statements. While disturbing in and of

¹ Dana Matioli, "Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products," Wall St. J. (April 23, 2020). Available at: https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015?mod=newsviewer_click&adobe_mc=MCMID%253D47707026683927173480579067696057101970%257CMCORGID%253DCB68E4BA55144CAA0A4C98A5%2540AdobeOrg%257CTS%253D1587652101

itself, the Wall Street Journal article highlights an increasing problem in the digital market place. As concentration and network effects limit the ability of vendors to protect their proprietary information via traditional market mechanisms, digital platforms (including, but not limited to, Amazon) have an increasing ability to unfairly appropriate this proprietary information for their own use.

It is of course necessary and appropriate for Congress to ensure that any company and witness provide honest answers to questions as part of Congressional hearings, and we fully support all efforts to ensure that Amazon is held accountable if it failed to live up to its claims to Congress and the public. However, regardless of that inquiry, Public Knowledge urges Congress to adopt a legislative solution that will protect fair competition in ecommerce: adapt the Customer Proprietary Network Information (CPNI) rules to digital platforms.

What Is CPNI?

As Public Knowledge has explained previously,² two-sided markets such as digital platforms bring parties together to facilitate transactions. Especially when these platforms are networks that require information to pass through them, it creates an opportunity for the intermediary platform to collect data that the parties would normally consider proprietary. But for the system to work, the parties *must* disclose the information to the intermediary platform. For a vendor to access customers through Amazon, it must provide Amazon with access to its sales data. Similarly, the buyer must expose details pertaining to purchasing decisions for Amazon to serve and bill the customer.

As part of drafting the Telecommunications Act of 1996, Congress faced a similar problem with regard to the introduction of competing telecommunications services to the local monopoly phone company. In order to reach customers, providers of rival services needed access to the existing telephone network. This required them to reveal proprietary information about

² See, Harold Feld, *The Case for the Digital Platform Act: Breakups, Starfish Problems, and Tech Regulation*, Public Knowledge & Roosevelt Institute (D.C. 2019); Harold Feld, “What Would Real Platform CPNI Look Like?” Public Knowledge Blog (July 30, 2018). Available at: <https://www.publicknowledge.org/blog/part-iv-what-would-real-platform-cpni-look-like/>

their technology to interconnect with the network. How could Congress prevent the phone company from using this information to give themselves unfair advantages? Stealing customers or duplicating products, or potentially using this proprietary information to give themselves other, unfair competitive advantages?

Building on over a decade of rulemaking by the Federal Communications Commission (FCC), Congress created Section 222 of the Communications Act.³ Section 222(a) creates a general obligation on telecommunications providers to protect the “proprietary information” of their customers. Section 222(b) prevent the carrier from using proprietary information provided by rival telecommunications carriers in order to provide competing telecommunications services for any purpose other than the purpose provided.

Importantly, CPNI strikes a balance between facilitating fair competition and allowing the carrier to participate in the market. A carrier that wants to offer a traditional “enhanced service” (now defined as an “information service”)⁴ can do so. AT&T, for example, offers alarm services in competition with other alarm services that reach customers through its network. But, thanks to CPNI, AT&T may not unfairly use the information that rivals must disclose to AT&T to reach AT&T’s landline customers – or use information from subscribers (such as calling an alarm service sales number) to its own advantage.

Adapting CPNI To the Online Digital Marketplace.

To be clear, Public Knowledge does not propose to simply expand the existing Section 222 to include digital platforms. Despite important similarities between digital platforms and physical communications networks, there are important differences as well. As discussed in *The*

³ 47 U.S.C. §222. Although often thought of as a consumer privacy statute, CPNI has its roots in the FCC’s efforts to promote competition in “enhanced services” and telecommunications markets such as long-distance. The original Senate version of the CPNI provisions had no consumer privacy protection. Only after then-Representative Ed Markey added consumer privacy provisions in the House did CPNI come to incorporate consumer protection provisions. *See generally* Harold Feld, Charles Duan, John Gaspirini, Tennyson Holloway and Meredith Rose, “Protecting Privacy, Promoting Competition: Updating the FCC’s Privacy Rules for the Digital World,” Public Knowledge (2016). Available at: <https://www.publicknowledge.org/assets/uploads/blog/article-cpni-whitepaper.pdf> The measures Public Knowledge proposes here are meant simply to address competition concerns, and are wholly inadequate as a matter of consumer privacy.

⁴ 47 U.S.C. §153(24).

Case for the Digital Platform Act, simply cutting and pasting the provisions of the Communications Act and applying them to digital platforms would be a recipe for disaster. Rather, we believe that Congress can adapt the successful principles of CPNI – themselves derived from traditional common law principles such as the duty of loyalty and principles of fundamental fairness in competition – to the online digital marketplace. Congress can create a statute that defines digital platforms (or at least digital platforms engaged in retail ecommerce), and impose strict limits on how these platforms can use information collected for the purpose of completing transactions.

The existing exceptions in the CPNI statute can be adapted to ensure that these restrictions do not interfere with the ability of platforms to protect consumers, cooperate with law enforcement, or protect their own legally cognizable interests. Nor would they prohibit platforms from competing on a level playing field with other vendors. The exceptions would need to be structured in such a way so as to permit platforms to continue to offer relevant search and recommendation functions – but in a way that does not unfairly maximize profit to the platform through the use of third party proprietary information.

Public Knowledge has put considerable thought into how these concepts can be translated into legislative language since proposing this idea last year. We are happy to share these with your committees, and to discuss these ideas further. We look forward to working with you to promote a fair and vibrant digital marketplace.

Sincerely,

xHarold Feld
Harold Feld
Senior Vice President,
Public Knowledge