

February 2, 2022

Senator Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
425 Dirksen Senate Office Building
Washington, DC 20510

Senator Mike Lee
Ranking Member
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
361A Russell Senate Office Building
Washington, D.C. 20510

Re: The Journalism Competition and Preservation Act (currently [S. 673](#))

Chairwoman Klobuchar and Ranking Member Lee,

The group of public interest, copyright, technology and media organizations listed below are writing to make clear that we oppose the Journalism Competition & Preservation Act, which may be a subject of the [hearing](#), “Breaking the News – Journalism, Competition, and the Effects of Market Power on a Free Press,” in the Subcommittee on Competition Policy, Antitrust, and Consumer Rights on Wednesday, February 2. We wholeheartedly support the aims of the bill, which are to protect Americans’ access to trustworthy sources of news and information and mitigate any market power of Google and Facebook in relevant product markets. However, we believe the JCPA will entrench existing power relationships among both news organizations and digital platforms and alter the free and open nature of the internet -- while doing little to ensure more reporters on the beat, help the kind of news organizations that represent local journalism’s brightest potential future, or allow news organizations to be compensated fairly for their work. Some of us have already shared these concerns with your offices.

JCPA Could Entrench Existing Power Relationships in Media

As some of us [have noted before](#), including in Congressional testimony, allowing a news media cartel by statute (as the JCPA explicitly proposes) may actually hurt local publishers by entrenching existing power relationships between the largest platforms and largest publishers. News giants with the greatest leverage would dominate the negotiations and small outlets with diverse or dissenting voices would be unheard if not hurt. Proponents of the bill point to its current requirement that negotiations with online content distributors must be nondiscriminatory as to similarly situated news content creators. But that doesn’t change the fact that the larger news outlets stand to grab the lion’s share of any benefits, as they would dominate their side of the negotiations. In fact, the bill may actually *encourage* further consolidation in the news industry since scale is the primary source of leverage in negotiations.

We believe this is a fundamental flaw in the use of an antitrust exemption to achieve these aims. That is why a number of organizations that, in principle, support a thriving journalistic ecosystem are deeply skeptical of the model proposed in JCPA and propose a more direct approach to the issue.

JCPA Could Alter the Free and Open Nature of the Internet

Our second concern, [shared](#) by organizations interested in copyright law, is that the law as drafted represents, at best, a fundamental mischaracterization (or, at worst, a planned alteration) of U.S. copyright law. News outlets, *even when banded together*, lack any legal right to prohibit third parties from linking to their content. Linking is properly outside the ambit of copyright law, while brief excerpts or previews of news stories are long-established [fair uses](#) and do not require permission from the copyright holder. These basic fair uses are essential to millions of websites and online services, as they use links to connect content to online communities large and small. A right to restrict third parties from linking to external content would go far beyond any right that *any* copyright owner has ever enjoyed, in the history of our intellectual property system. More importantly, changing this foundational aspect of the internet could have a wide ranging impact far beyond dominant players like Google and Facebook.

Even in the absence of direct language to this effect in the JCPA, a court seeking to give the statute meaningful effect could easily read the text as implicitly granting news publishers such exclusive rights. The “reading-in” of such a right could stymie the ability of users to share news articles online without some sort of payment, which in turn would limit the availability of credible information online. The outcome – limiting access to news and information – would be the opposite of the goal to ensure a healthy free press.

This concern is particularly grave in light of Congress’s request that the Copyright Office conduct “a public study to evaluate the effectiveness of current copyright protections for publishers in the United States.” This seems to us like confirmation that the JCPA inevitably requires a drastic expansion of intellectual copyright law.

Some organizations have [suggested](#) that Congress should incorporate a savings clause in the JCPA that would make it clear that copyright protections wouldn’t be impacted by the law. This could mitigate but not necessarily eliminate concerns about an unprecedented expansion of intellectual property rights.

JCPA May Not Help the Kind of News We Need Most

As we understand it, the JCPA has no requirements that the funds gained through collective bargaining will be used to hire or retain journalists. It would be fair game -- at least as far as the proposed law is concerned -- for news organizations (or the conglomerates, venture capital firms, and hedge funds that own them) to use the funds to pad profits, pay down debt, or reward private equity or shareholders.

The current definition of “news content creator” in the JCPA focuses on commercial business models (advertising, subscriptions, or sponsorships). Yet most experts believe that the brightest future for civic journalism lies in business models such as community ownership, non-profits, and philanthropy. It’s also troubling that major broadcasters, who are [not suffering](#) the same financial challenges as newspapers, and who do [far less original reporting](#) to support communities, could benefit substantially from the collective bargaining under the bill.

Many have pointed to the Australian News Media and Digital Platforms Mandatory Bargaining Code as a model for the benefits of allowing collective bargaining for compensation for news content. But thanks to a last-minute amendment, Facebook and Google have avoided even being designated as subject to

that law. Their negotiations with news outlets for rights to content for Google's News Showcase and Facebook's News Tab have been without any transparency or public oversight. [Report](#) after [report](#) has confirmed that the confidential and platform-dominated negotiations have left small publishers struggling for fair compensation, or even a seat at the table in negotiations. Google has [acknowledged](#) its payment structure for News Showcase favors large publishers, and smaller publishers have already [complained](#) to regulators they are not being remunerated fairly by Google or Facebook.

We suggest that Congress include language that defines the allowable uses of funds obtained through negotiation, specifically precluding transfer to other financial or legal entities, use of the funds to conduct financial transactions (including debt payments), or allocating them to shareholders. We also suggest that Congress include language to expand eligibility from "commercial" news organizations to encompass other business models, such as non-profit, cooperative, public- or community-funded, membership, or a non-profit relying on a donor-funded business model. We would also like to see language that preferences smaller, local, or civic news organizations. In particular, such language would encourage support for publications in under-served communities, including communities of color and rural news deserts. It should also exclude eligibility from news organizations owned by conglomerates, venture capitalists, or hedge funds; or establish a size limit for news organizations able to bargain collectively.

We also believe the inclusion of broadcasters in this legislation directly implicates the Federal Communication Commission's (FCC) jurisdiction to ensure that media ownership promotes a diverse set of views as well as diversity in ownership. Combined with the concerns outlined regarding the impact on how our free and open internet operates, this bill rightly deserves a referral to the Senate Commerce Committee for its consideration, given that Committee's jurisdiction over the FCC, the FTC, and its interests in ensuring a thriving internet.

JCPA Will Not Ensure News Organizations Are Compensated for the Value of Their Work

Allowing collective bargaining for compensation will not solve for the fundamentally different views of the financial value of news between publishers and platforms. Both the [News Media Alliance](#) and the [National Association of Broadcasters](#) have published studies estimating the value that news produces for platforms (in the form of advertising revenue) in the billions of dollars. However, Google [maintains](#) that the direct economic value it gets from news content in search is "very small" since they don't run ads on Google News or the news results tab on Google Search, and that the indirect value it gets is also low because news-related queries in search account for just over 1 percent of total queries. Facebook also [claims](#) the business gain from news is minimal and that news makes up less than 4 percent of the content people see in their News Feed.

In both situations, it's hard to know which side is correct. But Facebook and Google can continue to say they don't experience significant financial harm when they do not provide access to news. As we saw in Australia, they may seek to [prove the point](#) by restricting publishers and people from sharing or viewing news content.

JCPA May Be Hard to Police...and Hard to End

[Past efforts](#) of [this nature](#) in the media industry prove it will be very difficult to police the actual behavior of those participating in the collective bargaining, or to ensure the intended outcomes are achieved.

Although the bill includes a sunset date, it may be hard to actually move on when the four years (or any number of years) lapse.

We suggest that Congress include a reporting requirement in the bill, in which the Federal Trade Commission will submit to the Judiciary Committee of the House and Senate a report on the impact of the legislation. The report would include assessments of the impact of the statute on news content creators, competition, and consolidation, and require evidence that payments negotiated have been invested in creation of news content. The bill could also include an oversight function and require transparency on the outcome of each negotiation. This would give Congress some basis on which to assess the merits of an extension.

We want to again affirm our collective commitment to ensuring a strong and free press as a critical component of democratic participation, and to mitigating any market power of the dominant digital platforms, Facebook and Google, in their relevant markets. However, the Journalism Competition and Preservation Act would not have either of those effects, nor will it have its asserted one: ensuring that citizens have access to local, credible, independent news. Although we have offered solutions to address specific issues, even in aggregate they are unlikely to overcome the fundamental challenge of using antitrust immunity to address the crisis in local news, and we will continue to oppose this bill.

Sincerely,

Common Cause

Copia Institute

Creative Commons

Fight for the Future

Free Press Action

Library Futures

Medical Library Association

Public Knowledge

Wikimedia Foundation

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