

Frequently Asked Questions About the JCPA

Due to decades-long changes in how news is distributed and consumed, we are facing a genuine crisis in local news. [Studies](#) show that citizens without access to local journalism feel less of a sense of cohesion and community, are more polarized, vote less, are less informed, are less likely to run for office, and experience higher corruption, costs, and corporate malfeasance in their communities. That is why so many democratic governments provide financial support to journalism, and why we strongly support efforts to do so in the United States.

But the JCPA is the wrong solution. It will actually compound some of the biggest problems in our information landscape: inequitable access, consolidation, and declining quality of information available to citizens. And it doesn't do anything to "rein in Big Tech."

First off: what does the JCPA do?

The bill creates an exemption to antitrust law, which normally prohibits industry collusion on pricing and other business terms. It would allow news publishers and broadcasters to band together into "joint negotiating entities" to negotiate for payment from dominant digital platforms for "accessing" their content. The bill calls for "[baseball-style arbitration](#)" if an agreement can't be reached.

Topline it for me: what's wrong with the JCPA?

1. Antitrust exemptions, in general, tend to preserve and strengthen incumbents. The bill builds up dominant media organizations; it doesn't break down dominant tech companies.
2. The requirement for payment for simply crawling or linking to content undermines years of copyright law and threatens the internet principle of open access to information online. The bill also allows publishers to restrict platforms from linking to their news stories, ultimately limiting *the public's* access to information online.
3. Despite claims that it will "fairly compensate" news outlets for the value of their work - in fact, that's the whole premise of the bill - the arbitration process is not structured to do so.
4. Provisions in the bill discourage or prevent platforms from using content moderation to support their community standards or terms of service, meaning users will see more harmful disinformation, extreme content, and hate speech online.
5. The largest news companies will get a disproportionate share of the money - and there are no provisions requiring them to spend it on journalism or journalists.

What's the JCPA got to do with the Australian News Media Bargaining Code?

The Australian News Media and Digital Platforms Mandatory Bargaining Code, passed in early 2021, was also designed to force large technology platforms to pay news publishers for the news content linked on their platforms. But Facebook and Google avoided being subject to the code by forcing a last-minute loophole and cutting private *licensing* deals with large news publishers. That means the Australian legislation doesn't "rein in big tech" - it leaves their

gatekeeper power in search and social media intact. We now know that most of the money went to two behemoth Australian news organizations. Small publishers have complained that they have been left out of the negotiations altogether, even though they qualify under the code. And the code was designed without transparency requirements, which is now widely acknowledged as a mistake.

In other words, the Australian code wasn't the success JCPA proponents are making it out to be - and its results bear little resemblance to what's intended for the JCPA.

How would the JCPA impact the open nature of the internet?

The bill introduces payment for crawling and/or linking to content on the internet, a precedent that could be extended in the future (and why some opponents of the bill use the idea of a "link tax" to describe its impact). Payment for links or for snippets or thumbnails of news stories by platforms would also upend decades of copyright law. Linking does not infringe on any of the exclusive rights of copyright holders, and [snippets](#) have been consistently considered fair use of the content. Demand for payment could be extended to smaller platforms (in fact, Nine Entertainment, one of Australia's major news organizations, recently [asked](#) that TikTok and YouTube be designated under the Australian code), then other kinds of organizations, then internet users. A copyright savings clause in the bill, while valuable, would not prevent this from happening via new legislation, and it may not even impact how the JCPA may be interpreted by an unpredictable Supreme Court.

Lobbyists for the JCPA say, "the Australian law didn't break the internet." But the threat of the Australian law brought about licensing agreements, not payment for access to content in search or social media the way the JCPA is meant to do.

Don't online publishers need to be able to prevent Google or Facebook from linking to their news content in order to be paid for it?

Online publishers can already prevent platforms from linking to their news content. For example, they can use "noindex" and "nofollow" tags on their sites to prevent Google from indexing their pages in search or from following links on that page. And they can put up paywalls to keep their news content from being accessed without payment, or take down their account pages on Facebook. But they don't - because the traffic the platforms create, which can be converted to revenue by the publisher through advertising, subscriptions or memberships, is simply too valuable.

Shouldn't publishers be fairly compensated for the value of their work?

The JCPA doesn't create fair compensation for the value of news content. Most of the negotiations will end in baseball-style arbitration, where each side submits a final offer and a panel of three arbitrators chooses one of the offers without modification. That means that each arbitration may have wildly different outcomes. In fact, the arbitration panel is *prohibited* from considering the value any eligible publisher has gotten from the platform distributing its content (such as the traffic platforms create) - so how can the outcomes be "fair"?

How would the JCPA be bad for consumers?

The bill allows publishers to restrict platforms from linking to their news stories, ultimately limiting *the public's* access to credible information online. And there are several provisions in the bill that mean platforms will be prohibited or discouraged from conducting content moderation; that is, removing, labeling, downranking or fact-checking content, even the most extreme content or harmful disinformation or hate speech. One provision prohibits retaliating against news outlets for participation in negotiating entities; another prohibits discriminating against news outlets for their viewpoint or size. The platforms may *choose* not to moderate participating news organizations' content to avoid legal risk. The bill's impact on content moderation will be devastating to communities harmed by extreme content, disinformation, and hate speech.

How would the JCPA hurt our information landscape, including small local publishers?

First, some small publishers aren't eligible. The JCPA does not apply to news organizations that have been in business for less than a year, and it excludes news businesses that earn less than \$100,000 per year. That's why some local news organizations, like the Local Independent Online News publishers, are [actively advocating against the bill](#). Almost half of their membership would not be eligible.

Second, the JCPA doesn't require that funds gained through negotiation or arbitration will be spent on journalism. In a time when more than half of U.S. newspapers, by circulation, are owned by hedge funds or other financial interests, chances are great that funds will be used to make acquisitions, pay dividends, or reward shareholders. That's why the dominant communications union is [advocating for changes to the bill](#).

Third, the large news conglomerates will inevitably dominate the negotiations, and structure payments in ways that favor their scale and business model. As different as the Australian code may be from the JCPA, they will share that outcome.

The JCPA will also increase publishers' reliance on dominant platforms. Google and Facebook are already the [largest benefactors of journalism in the world](#); in fact, reports that Facebook will decrease its investment in news made [headlines](#) a few months ago. Is it likely we'll get the next investigative piece on platform behavior if publishers are even more invested in their success?

Some advocates for the JCPA have said that the bill "favors small publishers exclusively" but this is an enormous over-reach. Publishers with more than 1500 employees are not eligible to join a negotiating entity. However, that applies to precisely THREE newspapers in the United States: Wall Street Journal, Washington Post, and New York Times. And the employee cap doesn't apply to broadcasters at all. So [Sinclair Broadcasting Group](#) – with approximately 13,000 employees and \$2.59 billion in profit in the first quarter of 2022, can participate as an eligible broadcaster.

Advocates have also said that funds will be allocated "based on the number of journalists" employed by a news outlet. That is not true. The bill says that publishers have to provide information about their *spending* on journalists working at least 20 hours a week (which omits many freelancers serving small communities) as a *proportion* of their budget. If the negotiations go to arbitration, arbitrators will use this information to "guide" - not direct - only 65% of the

distribution of funds among the members of a joint negotiating entity. A version of the bill being discussed in the House would strengthen this: it calls for 70% of funds received to be used for news journalists, to be confirmed through a required independent auditor.

Who would benefit most from the JCPA?

The largest legacy publishers and broadcasters, who have brought lobbying and editorial clout to the development of the bill and will bring scale clout to the negotiating table. That's why the two largest media lobbying associations, the News Media Alliance and the National Association of Broadcasters, are the two biggest advocates - by far - for the bill.

The bill provides particular advantages to large broadcasters. For example, if they have an online presence, a media conglomerate can double dip in the funds by participating as both an eligible broadcaster and an eligible publisher. They could vote in joint negotiating entities as both an eligible broadcaster and an eligible publisher. And whereas publishers engage in the negotiations as one entity no matter how many qualifying publications they own, "eligible broadcaster" has no such limitation. If they own multiple broadcast licenses, they may get multiple votes. Lastly, broadcasters are not subject to any employee cap, or any requirement that at least 25% of their content be news content, as publishers are. Lastly, even the minor limitations on television networks don't impact radio networks and large radio group owners.

What are other ways to affect the dynamic between newsrooms and large digital platforms?

We should break down the power of big tech with new competition reforms like S. 2992, the American Innovation and Choice Online Act (AICOA). AICOA and other big tech competition legislation can create fair competition on dominant digital platforms like Google and Facebook, as well as promote competition *against* those gatekeepers so that disruptive innovators have a shot to unseat them. Data privacy protections can undercut the surveillance business model of the dominant platforms that is their not-so-secret weapon in targeting and content customization. There are also proposals for a dedicated regulator with the expertise and agility to keep up with innovation in the technology sector while reining in its excesses. A more direct route is policy that empowers consumers, small businesses and newsrooms themselves to revitalize news organizations that truly meet the needs of communities, like the [Local Journalism Sustainability Act](#).