

October 26, 2022

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The White House
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Brian Deese
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National Economic Council
The White House
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RE: Journalism Competition and Preservation Act

Dear Director Deese and Special Assistant Wu,

We write today to urge the Biden Administration to support the Journalism Competition and Preservation Act (JCPA), a bipartisan solution to Big Tech's exploitation of small and local news media organizations. The JCPA will empower journalism providers to negotiate fair compensation for their work when it appears on digital platforms. It is currently under consideration in the Senate

Digital Platforms and the Decline of American Journalism

Since 2005, the nation has lost more than 2,500 newspapers and tens of thousands of newsroom jobs, turning the communities of tens of millions of Americans into siloed "news deserts" devoid of local reporting.¹ Such a situation is unprecedented; since the late 1780s, newspapers financed by advertising have been a fundamental part of American society and governance. Advertising provided a means of supporting independent information channels free from state control. As Alexis De Tocqueville noted in 1835, "In America there is scarcely a hamlet which has not its own newspaper."

Yet over the last fifteen years, this situation has changed. Tens of thousands of newsroom jobs have been eliminated, cutting citizens off from vital information about their communities and disconnecting constituencies from their representatives, governments, and institutions. A core driver of this is that the advertising revenue that has traditionally financed publishers has been redirected to dominant technology firms such as Google and Facebook. The consequences threaten our very capacity for self-government.

¹ Maria Curi, "Bill to Aid Local News Gets Revamp, New Bipartisan Interest" Bloomberg, June 15 2022, <https://about.bgov.com/news/proposal-to-aid-local-news-gets-revamp-new-bipartisan-interest/>; Brier Dudley, "New report finds U.S. 'news desert' spreading, more papers closing," Seattle Times, Jul 1 2022, <https://www.seattletimes.com/opinion/new-report-finds-u-s-news-desert-spreading-more-papers-closing/>; and Penny Abernathy, "The State of Local News: 2022 Report," Northwestern University Medill Local News Initiative, June 29 2022, <https://localnewsinitiative.northwestern.edu/research/state-of-local-news/report/>.

Until recently, newspapers had their own direct relationships with both readers and advertisers. News publishers could deal directly with advertisers to place advertisements in their publications, and newspapers could print and distribute their publications directly to their readers or indirectly through, for example, newsstands. Newspapers could control who they advertised with (their source of revenue) and who they distributed to (their readers).

Today, that is no longer the case. To make deals with advertisers, news organizations must sell ads through digital ad markets that are owned and controlled by Google and Facebook. The Big Tech firms' duopoly in digital advertising is well documented. Through a combination of lax antitrust enforcement and a regulatory failure to craft strong data privacy laws, the digital advertising market has been rolled up by two major players: Google and Facebook.² Nearly seven of every ten dollars spent on digital advertising worldwide now ends up in the coffers of Google or Facebook.³ In short, to sell digital advertising, publishers need to go to Google or Facebook.

On the other side, to reach their readers, newspapers rely on tech platforms who control access to the most online users: again, Google and Facebook. Whether news media consumers find their news through internet search, social media, or messaging platforms, Google and Facebook dominate the pathways by which news media consumers find news content. Today more than half of Americans report getting their news from social media, while 65% do so using a search engine like Google.⁴ As a result, Google and Facebook exert significant control over news sites' internet traffic. In Australia, for example, a recent government investigation found that both firms controlled more than half of all internet traffic to the country's news media websites.⁵

With online advertising markets structured as they are today, the tech platforms and news publishers both depend on one another. Publishers need the advertising markets run by Google and Facebook, as well as the online reach to readers that the platforms provide. The platforms, on the other hand, need publishers to provide the content that populates their platforms to make their advertising valuable: last year, 81% of Google's revenue came from online advertising, while Facebook clocked in at 98%.⁶

² Leah Nylen and Gerry Smith, "DOJ Is Preparing to Sue Google Over Ad Market as Soon as September," Bloomberg, Aug 9 2022, <https://www.bloomberg.com/news/articles/2022-08-09/doj-poised-to-sue-google-over-ad-market-as-soon-as-september>; and Cecilia Kang, "Facebook antitrust suit can move forward, a judge says, in a win for the F.T.C.," New York Times, Jan 11 2022, <https://www.nytimes.com/2022/01/11/technology/facebook-antitrust-ftc.html>.

³ Seb Joseph and Ronan Shields, "The Rundown: Google, Facebook and Amazon are on track to absorb more than 50% of all ad money in 2022," Digiday, Feb 4 2022, <https://digiday.com/marketing/the-rundown-google-facebook-and-amazon-are-on-track-to-absorb-more-than-50-of-all-ad-money-in-2022/>.

⁴ Elisa Shearer, "More than eight-in-ten Americans get news from digital devices," Pew Research Center, Jan 12 2021, <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

⁵ See Figure 2.12, "Digital Platforms Inquiry: Final Report," Australian Competition & Consumer Commission (ACCC), Jun 2019 <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

⁶ Fourth Quarter and Full Year 2021 Results, Facebook Investor Relations, Feb 2 2022, <https://investor.fb.com/investor-news/press-release-details/2022/Facebook-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx>; Paresh Dave and Nivedita Balu, "Google Search Ads Beat Targets Despite Global 'Uncertainty,'" Reuters, Jul 26 2022, <https://www.reuters.com/technology/google-parent-alphabet-posts-higher-quarterly-revenue-2022-07-26/>.

The problem, however, is that the platforms do not need any one small publisher—because there are many—whereas the publishers depend on the platforms individually—because there are effectively only two. Google and Facebook’s digital advertising duopoly means that newspapers cannot realistically use different methods of reaching advertisers in search of better, fairer deals. And Google and Facebook’s internet search and social media monopolies mean that newspapers can’t choose to distribute their content on platforms that provide better, fairer compensation for the value news adds. This creates a critical disparity in bargaining power.

As a result, the tech firms can force news organizations to accept unfair and exploitative terms, knowing there is no alternative for them. These terms include denying news organizations access to their readers’ data, forcing them to provide articles for free, requiring them to accept inferior and less profitable publication formats (such as AMP or Facebook Instant Articles), preventing them from optimizing how “snippet” content appears on search engines or social media, failing to reward or protect original content against low-quality outlets that copy others’ content, and maintaining a lack of algorithmic transparency that leaves news organizations scrambling to grow and maintain distribution on digital platforms.⁷ Centrally, publishers are unable to demand a fair share of advertising revenue for the value that they provide. Publishers may object to these terms, but Google and Facebook’s multi-market dominance gives them no reason to bargain fairly with individual news organizations.

However currently, our antitrust laws protect Google and Facebook by serving as an enforcer of this disparity in bargaining power. Google and Facebook might be able to live without one or several individual news organizations, but the platforms greatly benefit from news content as a whole. However, publishers are unable to take advantage of the tech firms’ dependence on them collectively: if they did band together as a group to bargain with Google or Facebook over the terms of, or revenue from, online advertising, they would find themselves in violation of our antitrust laws. To outlaw other harmful behavior like price fixing, Section 1 of the Sherman Act prohibits coordination of this kind between direct competitors. In other circumstances, these prohibitions on coordination make sense. But here, our antitrust laws effectively discipline small publishers, keeping them at the mercy of dominant technology firms – tech firms that other antitrust laws should have, but have failed to, rein in.

The consequences of the status quo have been grave. The continuation of an uncorrected bargaining power imbalance between news organizations and global tech monopolies only benefits the latter while putting the future of journalism at risk. News media revenue has plummeted more than 80% since 2000, even as Google and Facebook’s dominance grows.⁸ Americans are suffering the consequences – particularly those who don’t live in large metropolitan areas. One third of the country’s locally focused newspapers have shuttered their newsrooms since 2005 and nearly 30,000 newsroom employees have lost their jobs since 2008, leaving 70 million Americans living or at risk of living in news deserts. Google and Facebook’s market power abuses have deprived

⁷ “Digital Platforms Inquiry,” ACCC.

⁸ “Newspapers Fact Sheet,” Pew Research Center, Jun 29 2021, <https://www.pewresearch.org/journalism/fact-sheet/newspapers/>

the American public of the free, fair, and politically diverse press they rely on to stay informed about the nation and their communities.⁹

Bill and Solution

The JCPA rebalances the unequal relationship between tech platforms and news organizations by creating a time-limited, 8-year “safe harbor” exemption to our antitrust laws, allowing smaller publishers and news organizations to coordinate together to bargain with tech platforms without running afoul of the law. Negotiating together, small news organizations will be able to bargain on fair terms with dominant tech platforms – even if the platforms control access to revenue and readership – and negotiate fair terms and compensation for their work.

The JCPA also has provisions that ensure the stability and fairness of the negotiation process itself. Tech platforms and news media providers are held to the same standards: they must both make reasonable, good-faith proposals that must be responded to in a timely manner to prevent stalling. A neutral arbitration board is designated to resolve any standstills in the process and is tasked with providing a fair and final judgement if news organizations and tech platforms can’t come to an agreement. To protect the integrity of the process, the JCPA also explicitly protects journalism providers from any form of retaliation by tech platforms.

In addition to being targeted and time-limited, the JCPA also bolsters transparency, requiring news organizations to openly report the amounts and terms of their agreements with tech platforms, as well as document how those funds are used. The JCPA is also ideologically neutral – the bill applies to news organizations across the political spectrum and is inclusive of all viewpoints across the political spectrum.

Receiving fair compensation for the profits their digital work earns, small journalism providers will be able to deliver consistent and crucial high-quality news products to local communities across the country. The JCPA doesn’t just correct a massive power imbalance between local journalists and tech companies – the bill delivers significant benefits to the American public, breathing new life into an embattled industry performing an essential public good.

Proven Success in Australia

Legislation similar to the JCPA has already shown impressive results overseas. In Australia, the introduction of a 2021 code providing a similar structure for media organizations to bargain for payment from tech giants has already significantly changed news and public information access in the country for the better.¹⁰ Facebook initially attempted to bully the Australian government into

⁹ Today, four million Americans live in counties with no local newspaper, while 66 million live in counties with just one newspaper (which is often responsible for providing coverage across huge distances). Two thirds of the nation’s counties (2,000) lack a daily newspaper. See Abernathy, “The State of Local News.” See also Dudley, “New report finds U.S. ‘news desert’ spreading”; and Mason Walker, “U.S. newsroom employment has fallen 26% since 2008,” Pew Research Center, July 13 2021, <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>.

¹⁰ Bill Grueskin, “Australia pressured Google and Facebook to pay for journalism. Is America next?” Columbia Journalism Review, Mar 9 2022, https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php.

abandoning the rule by blocking access to any local news on its platform.¹¹ However, after the introduction of the news media bargaining code, Google and Facebook struck deals with journalism providers, flooding the industry with hundreds of millions of dollars in funding. The influx of money has allowed Australian newspapers to hire more journalists and editors, bolster local coverage, and invest in new multimedia offerings for a wide array of audiences.¹²

In just over a year, hundreds of publications of all sizes have benefitted from the rule, which reportedly brought in even more money than expected.¹³ Both Australian journalists and public officials report “widespread enthusiasm” for the much-needed boost. One Sydney journalism professor lauded the code by describing how after the law was passed, her students began forgoing internships because it was so easy for them to land full-time jobs; she even remarked that she hadn’t seen her industry so financially robust in decades.¹⁴ The swift and clear successes of the Australian code should urge the passage of the JCPA, establishing the proven benefits of a news media bargaining model.

The JCPA, however, improves further on ideas from the Australian code. The JCPA’s transparency requirements shine light on the terms of each agreement reached between tech giants and journalism providers and establish clarity in how news outlets spend the funds they receive, increasing the process’s transparency and strengthening all parties’ accountability. The JCPA also directly prioritizes small and local journalism providers: the bill excludes the largest national publications and broadcasting organizations which are already profitable and may already have their own lucrative deals with dominant tech giants. Finally, unlike the Australian code, the JCPA’s antitrust safe harbor has a limited scope of eight years that ensures adaptability in an evolving economic and digital environment.

Maintaining Content Moderation and Copyright

The bill has attracted unfounded criticism on several fronts.

Misinformation and Content Moderation

First, some argue that the JCPA would enable the spread of hate speech and disinformation, preventing platforms from carrying out any of their content moderation policies. For example, one group argues that the JCPA states that “Neither a cartel nor a covered platform may discriminate against a [Digital Journalism Provider] ‘based on ... the views expressed by its content,’”¹⁵ implying that platforms like Google and Facebook would be required to carry, and pay for, hate speech and misinformation.

This argument is misleading and misrepresents the contents of the bill. Section 6(a)(1) of the JCPA states that the joint negotiating entity (comprised of digital news providers) cannot exclude a

¹¹ Kerry Flynn, “Facebook bans news in Australia as fight with government escalates,” CNN Business, Feb 19 2021, <https://www.cnn.com/2021/02/17/media/facebook-australia-news-ban/index.html>.

¹² Ibid.

¹³ Schifffrin, “Australia’s news media bargaining code.”

¹⁴ Grueskin, “Australia pressured Google and Facebook.”

¹⁵ TechFreedom letter to Senate regarding JCPA, September 7, 2022, <https://techfreedom.org/wp-content/uploads/2022/09/Journalism-Competition-Preservation-Act-JCPA.pdf>.

provider from the negotiating entity based on their views, and Section 6(a)(2) prohibits platforms from discriminating against certain content in the context of negotiations.¹⁶

Putting Sections 6(a)(1) and (2) together, platforms are still able moderate content as they already do, they just cannot use content moderation as a pretext to gain the upper hand in negotiations over payment. And other media providers cannot exclude other digital journalism providers from the negotiating entity based on the content or their views.¹⁷ But this is already the case: newspapers and digital news providers do not have power over the revenue streams of other media organizations based on their content.

In short, the provisions in question prohibit the tech companies from using view content as a pretext to scuttle negotiations or weaken the bargaining positions of publishers. This does not prohibit platforms from simply not carrying certain views on their platforms in accordance with existing content moderation policies.

Copyright

Second, many are arguing that the JCPA will significantly alter copyright law,¹⁸ but these are based on entirely speculative fears about how courts will interpret the law. This argument centers around the notion that the JCPA will create an “ancillary” copyright for publishers, and alter the basic norms of the internet. First of all, the U.S. Copyright Office was asked to comment on the JCPA and related issues of copyright in May of last year,¹⁹ and in its reply it did not take any position on the JCPA, noting that the JCPA was a competition issue that did not create an ancillary copyright as the bills detractors claim.²⁰ The Copyright Alliance likewise clarified with reference to these arguments, “The JCPA addresses antitrust issues and does not mention or implicate copyright law. At best, this misstatement represents a fundamental misunderstanding of the both the legislation itself and copyright law.”²¹

Some have argued that the JCPA might be *expanded* by courts to create new copyrights beyond this purpose because “Courts also have on occasion interpreted statutes in ways that contradict their legislative history...this bill could be interpreted by courts to implicitly change the scope of copyright, expanding the exclusive rights that news publications enjoy in their material beyond

¹⁶ “No covered platform may discriminate against any eligible digital journalism provider that is a member of a joint negotiation entity in connection with a negotiation conducted under section 3, or an arbitration conducted under section 4, based on the size of the eligible digital journalism provider or the views expressed by the eligible digital journalism provider’s content.” Sec. 6(a)(2).

¹⁷ Detractors emphasize the risks of a court erroneously siding with a plaintiff whose content was appropriately moderated and was not, in fact, retaliated against, but that is how non-retaliation provisions work in the context of other policy areas as well. See TechFreedom letter to Senate, September 7, 2022, <https://techfreedom.org/wp-content/uploads/2022/09/Journalism-Competition-Preservation-Act-JCPA.pdf>.

¹⁸ Disruptive Competition Project, “The JCPA Hasn’t Improved with Age,” September 1, 2022, <https://www.project-disco.org/competition/090122-the-jcpa-hasnt-improved-with-age/>.

¹⁹ Senate Letter to Shira Perlmutter, Register of Copyrights, May 3, 2021, <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf>.

²⁰ United States Copyright Office, “Copyright Protections for Press Publishers,” June 2022, <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>.

²¹ Copyright Alliance Letter, July 12, 2021, <https://copyrightalliance.org/wp-content/uploads/2022/08/Copyright-Alliance-JCPA-Letter-Final4.pdf>.

what any copyright owner has ever enjoyed.”²² These arguments are entirely speculative, and have no implications that go beyond the way that media providers’ content is shared and published by dominant platforms. The JCPA only applies narrowly to very large, covered platforms and how they access and connect to journalism content, and creates no substantive additional copyright claims for publishers.

Likewise, this argument entirely ignores the example of the Australian News Bargaining Code, which has been in effect for over a year now and has not required any changes to Australian copyright laws in order to function.

Conclusion

The JCPA offers a proven and bipartisan solution to the destruction that Big Tech’s monopoly power has wrought on American journalism and public information access. The JCPA will protect vital news organizations of all viewpoints and sizes from the exploitation of Big Tech by ensuring that small and local journalism providers across the political spectrum can collectively bargain for fair compensation for their work. We urge you to support the JCPA and help restore integrity and independence to America’s news landscape.

Sincerely,

American Economic Liberties Project
Alliance for Audited Media
Authors Guild
California Black Media
Ethnic Media Services
Main Street Alliance
National Press Photographers Association (NPPA)
News Media Alliance
Radio Television Digital News Association (RTDNA)
Revolving Door Project

²² Lisa Macpherson, “Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says ‘Probably Not’,” June 17, 2021, Public Knowledge, <https://publicknowledge.org/can-the-journalism-competition-preservation-act-really-preserve-local-journalism-public-knowledge-says-probably-not/>. See also Lisa Macpherson, “Not Big, If True: Congress’s Proposed Changes Fail to Solve the Fundamental Problems with the JCPA,” April 18, 2022, Public Knowledge, <https://publicknowledge.org/not-big-if-true-congresss-proposed-changes-fail-to-solve-the-fundamental-problems-with-the-jcpa/> (“As we have pointed out before, advocates of the bill claim that it creates no new intellectual property (or similar) rights. However, it is easy to see how a framework like this could be interpreted to give publishers the right to restrict users of platforms from doing things that do not require any form of “license” or permission, and which currently rightsholders have no right to prevent. These include activities considered fair use (like excerpts and quotations from articles) or activities that fall outside the scope of copyright entirely (like linking).”); Letter Opposing JCPA, February 2, 2022, <https://publicknowledge.org/policy/public-interest-letter-opposing-jcpa/> (“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.”)

Cc:

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