

September 2, 2022

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
United States Senate

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Mike Lee
Ranking Member
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
United States Senate

Dear Chairman Durbin, Ranking Member Grassley, Senator Klobuchar, and Senator Lee,

We write today to express our ongoing concerns with the Journalism Competition & Preservation Act (JCPA), an act that would create an ill-advised antitrust exemption for publishers and broadcasters. The bill remains enormously problematic for reasons we outline below.

The signatories to this letter represent a broad cross-section of organizations focused on protecting and advancing our democracy and its democratic values. We include civil society organizations; librarians and archivists; creators; technology companies; experts in antitrust, copyright, constitutional and digital rights law; and media and news groups. While we represent a broad range of policy positions, we join in the view that this legislation should not be passed.

We are well aware that local news (newspapers, in particular) is in [crisis](#). Many of the organizations whose names appear below have passionately advocated for public policy solutions to ensure citizens have the quality information they need to engage in civic life and the political process. However, the JCPA will compound some of the biggest issues in our information landscape and do little to enable the most promising new models to improve it.

As a group our organizations have identified the following serious concerns with the JCPA:

New language forces platforms to negotiate for payments and to carry the content of any digital journalism provider that qualifies to be part of a joint negotiation, regardless of how extreme their content. The JCPA would permit a digital journalism provider to bring a legal action against a covered platform to hold it liable for limiting the reach of content the platform owner finds offensive or contrary to its terms of service or community standards. This is a direct assault on a bedrock principle of content moderation on the internet, and will increase the amount of networked disinformation, hate speech, and harassment found there. This form of government mandate for covered platforms to carry and pay is also a violation of First Amendment

protections. The statute also precludes consideration of any benefit provided to any negotiating publisher or broadcaster of being listed in search or gaining reach on a platform.

The JCPA sets a legal and political precedent that some uses of content that were once free of charge now require payment. The rule of construction that the JCPA may not be interpreted to expand copyrights or impair rights under Title 17, such as fair use, may limit the extent to which the JCPA is cited to limit fair use, or to create broad new ancillary copyrights over linking. However, the basic mechanism of the bill appears to create an ancillary copyright, if limited to certain major platforms, an approach recently rejected by the Copyright Office. The bill's basic mechanism expands the rights of content owners beyond the traditional bounds of copyright law in ways that would prove detrimental to the public interest. Requiring payment for using facts flies in the face of Supreme Court precedent, based on the First Amendment, that no one may own facts.

Large media conglomerates can still dominate negotiations, and small outlets would be unheard if not hurt. Despite [claims](#) that the bill is “designed to benefit small and local publishers exclusively,” a new publisher employee cap of 1,500 would exclude only the nation's three largest newspapers from participating in negotiations (and as noted below, doesn't apply to broadcasters at all). The cap could also create unintended consequences such as layoffs or transitions to more part-time or freelance employees, which denies journalists any benefits. The “one publisher, one vote” provision for negotiating entities underplays the forms of soft power large conglomerates with brand-name news outlets can bring to the negotiations. In fact, the bill encourages - and may help fund - more consolidation among both newspapers and broadcasters.

Not only are broadcasters now included, the bill favors big ones. In fact, the JCPA favors big broadcasters such as News Corp, Sinclair, iHeart and Comcast/NBCU over any other form of journalism, and it undermines the stated goal of helping *local* news. The bill's 1,500-employee cap does not apply to broadcasters, so it won't keep the largest broadcasters in the United States from benefiting from what is framed as intended to help local journalism. Although the bill purports to exclude television networks as beneficiaries, it explicitly excludes from the definition of “television network” any network station “owned and operated” by a network. And the bill applies to all radio licensees, so again the largest group owners will benefit without any requirement that they invest in local programming. The bill further privileges large group owners by permitting individual licensees to count as individual members of joint negotiating entities – each therefore receiving one vote despite their common ownership and control. The owners will therefore control the governance of these entities *and* take the lion's share of revenue.

The bill has no provisions guaranteeing that funds gained through negotiation or arbitration will accomplish the goal of paying journalists. Indeed, the bill creates “collective bargaining” rights for some of the same news organizations that are actively denying their own journalists the same rights. New language requires reporting of how funds are used in news production and distribution, but it does not require that they actually *are* used that way. There are no auditing or enforcement mechanisms. In contrast, other recent legislation, such as the CHIPS & Science

Act of 2022, had actual restrictions on use of funds for such purposes as stock buybacks or paying dividends - this proves it can be done.

Historically, antitrust exemptions have not accomplished beneficial goals, and instead have harmed competition and consumers, entrenched existing power structures and increased codependence between industry incumbents. The JCPA will cement and stimulate consolidation in the industry and create new barriers to entry for new and innovative models of truly independent, local journalism.

There are other policy solutions to the crisis in local journalism, and we strongly urge you to reconsider the Journalism Competition & Preservation Act.

Sincerely,

Association of Research Libraries
Authors Alliance
Center for Democracy & Technology
Chamber of Progress
Coalition for Creativity (C4C)
Common Cause
Computer & Communications Industry Association
Consumer Reports
Creative Commons
EFF
Fight for the Future
Free Press Action
Internet Archive
Library Futures
Local Independent Online News Publishers
Patreon
Public Knowledge
R Street Institute
Re:Create
Techdirt
Wikimedia Foundation