

December 6, 2022

The Honorable Charles Schumer
Senate Majority Leader
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Senate Minority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House
1236 Longworth House Office Building
Washington, DC 20515

The Honorable Kevin McCarthy
House Minority Leader
2468 Rayburn House Office Building
Washington, DC 20515

RE: Journalism Competition and Preservation Act

Dear Majority Leader Schumer, Minority Leader McConnell, Speaker Pelosi, and Minority Leader McCarthy,

We, the undersigned public-interest organizations which do not receive funding from Big Tech, strongly support the Journalism Competition and Preservation Act and urge you to support its inclusion on the NDAA. The JCPA is a bipartisan solution to Big Tech's exploitation of traditional news media through its monopoly over online advertising. The JCPA empowers journalism providers to negotiate fair compensation for their work, which tech companies otherwise monetize with minimal payment to news organizations.

Digital Advertising Monopoly and the Decline of American Journalism

As stated in a previous coalition letter to the White House, the JCPA seeks to preserve journalism by addressing a structural problem in online advertising markets: technology companies like Google and Facebook have so thoroughly monopolized digital ad markets that content providers like journalists are no longer able to earn income from this longstanding revenue source.¹

For over a century, newspapers and other journalism providers have relied on selling ads. Traditionally, newspapers would do this through a series of direct relationships: they would sell

¹ Coalition Letter to White House, October 26, 2022, <http://www.economicliberties.us/wp-content/uploads/2022/10/Economic-Liberties-JCPA-Letter-FINAL-1.pdf>.

ads directly to businesses who wanted to advertise, and they were selling advertising to readers with whom they had a direct relationship, by virtue of delivering the news directly to your door.

The consolidation of digital markets means that this is no longer the case today. Google and Facebook now control centralized ad markets where online ads are bought and sold in arms-length transactions. This has occurred through Big Tech's expansion of their online marketplaces, a series of mergers to consolidate control of digital ad markets, and through collusive schemes of which they have been credibly accused.² As a result, today most money spent on digital advertising globally goes to Google or Facebook.³

This consolidation of the digital economy also means that newspapers and other journalism providers rely on the two dominant tech platforms for their content to reach users. News media consumers find their news through pathways that Google and Facebook dominate: internet search, social media, or messaging platforms. Today, more than half of Americans report getting their news from social media, while 65% do so using a search engine like Google.⁴

Even though the platforms benefit greatly from the journalism content that populates their platforms—last year, 81% of Google's revenue and 98% Facebook's came from online advertising⁵—the platforms do not need any one publisher to maintain this business model, in which they sell ads based on content journalism creates. This creates a massive disparity in bargaining power, under which the tech firms can force news organizations to accept unfair and exploitative terms, knowing there is no alternative for publishers. Google and Facebook have been known to, among other things, deny news organizations access to their readers' data, force them to provide articles for free, require inferior and less profitable publication formats, or failing to reward or protect original content against publications copying content.⁶ Centrally, publishers are unable to demand a fair share of advertising revenue for the value that they provide.

However, as it stands today, our antitrust laws prohibit news organizations from doing anything about this. If publishers did band together as a group to bargain with Google or Facebook over their compensation from online advertising, they would be in violation of Section 1 of the Sherman Antitrust Act, which prohibits coordination of this kind between direct competitors. In this

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 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/>.

⁶ "Digital Platforms Inquiry," ACCC.

situation, our antitrust laws prohibit the forms of coordination that might be used by those in a weaker bargaining position: horizontal coordination by groups of publishers. By contrast, antitrust enforcement has effectively condoned as legal the coordination used by the stronger party: massive, concentrated, and vertically integrated corporate concentration by tech monopolies. As it stands, our laws *enforce* this disparity in bargaining power.

The JCPA Solution

The JCPA rebalances the unequal relationship between tech platforms and news organizations. It allows news organizations to band together and coordinate in their negotiations with Big Tech by creating a time-limited, six-year “safe harbor” exemption to our antitrust laws. 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 establishes transparent procedures for these negotiations to ensure the stability and fairness of the process. 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.

Success of the Australian News Media Bargaining Code

We know that the JCPA will have substantial positive effects for journalism, because similar legislation has already shown impressive results overseas. In Australia, the 2021 News Media Bargaining Code created a similar structure for media organizations to bargain for payment from tech giants.⁷ After the introduction of the News Media Bargaining Code, Google and Facebook struck deals with journalism providers, flooding the industry with even more money than expected.⁸ In contrast to the dismal current state of journalism in the United States, one Sydney journalism professor noted that after the code was passed, her students began forgoing internships because it was so easy for them to land full-time jobs.⁹

The principal differences between the Australian code and the JCPA are improvements. The JCPA includes transparency requirements on the terms of the negotiated agreements and establish clarity in how news outlets spend the funds they receive. The JCPA excludes the largest national publications. Finally, unlike the Australian code, the JCPA’s antitrust safe harbor is limited to six years.

⁷ 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.

⁸ Anya Schiffrin, “Australia’s news media bargaining code pries \$140 million from Google and Facebook,” Poynter, August 16, 2022, <https://www.poynter.org/business-work/2022/australias-news-media-bargaining-code-pries-140-million-from-google-and-facebook/>.

⁹ Grueskin, “Australia pressured Google and Facebook.”

Furthermore, the Treasury of the Australian government just released a report reviewing the performance of the News Media Bargaining Code over its first year in effect, largely finding it a success in its aims.¹⁰ The report finds that the code has benefited a full range of diverse news outlets, noting that “Google and Meta have reached over 30 agreements with a broad range of news businesses, both large and small, and in metropolitan and regional areas.”¹¹ In many cases it was confirmed that the additional revenue supported substantial expansions in journalism staff, with Guardian Australia stating that it “underwent a significant expansion since the agreements were completed. Our newsroom has grown by over 40 journalists, while our commercial and operations team has expanded by over 10 [full time employees]. Not all of these roles were a direct result of the funding from Google and Facebook, but the financial security of these contracts gave management the confidence to bring forward investments that would otherwise have been made in subsequent years.”¹² Nearly all Australian outlets credited the News Media Bargaining Code for bringing the Big Tech companies to the negotiating table. We have enclosed this review of the Australian code for your review.

Criticisms

The bill has attracted unfounded criticism on several fronts. First, detractors have argued or implied that the JCPA would enable the spread of hate speech and disinformation, preventing platforms from carrying out any of their content moderation policies.¹³ This argument is misleading and misrepresents the contents of the bill. These criticisms and related arguments were more extensively addressed in the previous coalition letter to the White House.¹⁴ However, in short, the JCPA provisions in question prohibit the tech companies from using view content as a pretext to scuttle negotiations or weaken the bargaining positions of publishers; the JCPA does not ban platforms from simply prohibiting certain views on their platforms in accordance with existing content moderation policies.

Many also argue that the JCPA will significantly alter copyright law.¹⁵ We detailed these arguments more extensively in our previous letter,¹⁶ but these arguments are based entirely in speculative fears about how courts will interpret the law, not the provisions of the law itself. The U.S. Copyright Office was asked to comment on the JCPA and related issues of copyright in May of last year¹⁷ and was clear in their response that the JCPA was a competition issue that did not

¹⁰ Australian Government Treasury, “News Media and Digital Platforms Mandatory Bargaining Code: The Code’s first year of operation,” November 2022, <https://treasury.gov.au/sites/default/files/2022-11/p2022-343549.pdf>.

¹¹ Ibid., p. 5.

¹² Ibid., p. 9.

¹³ See, for example, TechFreedom letter to Senate regarding JCPA, September 7, 2022, <https://techfreedom.org/wp-content/uploads/2022/09/Journalism-Competition-Preservation-Act-JCPA.pdf>.

¹⁴ Coalition Letter to White House, October 26, 2022, <http://www.economicliberties.us/wp-content/uploads/2022/10/Economic-Liberties-JCPA-Letter-FINAL-1.pdf>.

¹⁵ 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/>.

¹⁶ Coalition Letter to White House, October 26, 2022, <http://www.economicliberties.us/wp-content/uploads/2022/10/Economic-Liberties-JCPA-Letter-FINAL-1.pdf>.

¹⁷ Senate Letter to Shira Perlmutter, Register of Copyrights, May 3, 2021, <https://www.copyright.gov/policy/publishersprotections/letter-to-the-copyright-office.pdf>.

create an ancillary copyright issue as the bills detractors claim.¹⁸ The Copyright Alliance has likewise clarified that the JCPA does not affect copyright law.¹⁹

Conclusion

We urge Congress to pass the JCPA this lame duck session. The JCPA will restore a much-needed revenue model for news organizations of all political and social viewpoints, providing the bargaining position to negotiate more fairly with Big Tech's digital monopolies, and help restore America's news landscape, which plays a critical role in our democracy.

Sincerely,

American Economic Liberties Project
America's Newspapers
CA Black Media
Ethnic Media Services
Main Street Alliance
National Newspaper Association
News Media Alliance
Radio Television Digital News Association
Revolving Door Project

Enclosure

¹⁸ United States Copyright Office, "Copyright Protections for Press Publishers," June 2022, <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf>.

¹⁹ Copyright Alliance Letter, July 12, 2021, <https://copyrightalliance.org/wp-content/uploads/2022/08/Copyright-Alliance-JCPA-Letter-Final4.pdf>.