



Insight

Journalism Competition and Preservation Act: The Price of Digital Ink

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Executive Summary

- The Journalism Competition & Preservation Act would allow certain newspapers and local news broadcasters to join together to collectively negotiate with “online content distributors” — specifically, Google, Meta, Apple, Amazon, and Microsoft — to increase compensation for journalists’ content.
- The bill would essentially provide a carveout to allow certain publications and broadcasters to engage in price fixing, an anticompetitive practice that would otherwise violate antitrust laws; the bill would also threaten established laws and practices related to content moderation and copyright protection online.
- Previous attempts to provide antitrust exemptions for individual industries, including journalism, have failed to induce greater competition or higher-quality goods and services in the past, and there is little reason to believe this attempt would be different.

Introduction

A bipartisan group of lawmakers led by U.S. Senators Amy Klobuchar (D-MN) and John Kennedy (R-LA), and Representatives David Cicilline (D-RI) and Ken Buck (R-CO), introduced the [Journalism Competition and Preservation Act](#) (JCPA). The [most recent version](#) of the bill would allow “eligible broadcasters and publishers,” such as newspapers and local news broadcasters, to form a cartel and collectively bargain with “covered platforms” including Google, Meta, and Amazon over “the terms on which content may be distributed.” The drafters argue that this is necessary to preserve “[a strong and independent press](#),” and to [remedy](#) “the results of Google, Facebook, and other’s anticompetitive conduct toward local news outlets, conservative media, and other news organizations.” The bill attempts to create a lifeline for “eligible digital journalism providers” who have seen revenues and engagement decline by permitting collective bargaining and cartelization to address what lawmakers see as anticompetitive and harmful practices by large technology companies.

While concern about the loss of local and independent media organizations is understandable, exempting a single industry from conduct that is per se illegal under current law is not a viable solution. By allowing eligible publishers and broadcasters to form a cartel, the legislation could cause rather than prevent harm to consumers and journalists alike. First, the legislation would allow firms to evade the rules that govern competition and anticompetitive conduct instead of adapting to changing technology and consumer preferences. Second, the legislation would limit how services can deliver and tailor content for users, likely infringing upon platforms’ First Amendment rights. Finally, the JCPA subsidizes a dying business model and shields certain firms from competition by forcibly diverting revenues away from large technology companies and toward eligible digital journalism providers.

Antitrust Distortions and Cartel Creation

The key component of the bill is the eight-year exemption for “eligible digital journalism providers” to collectively bargain with “covered platforms” to set prices, a violation of one of the basic tenets of competition policy. The bill’s sponsors argue this is necessary for companies to be fairly compensated by platforms that host or link to their content. Specifically, the bill would allow eligible digital journalism providers to negotiate terms that allocate a larger percentage of ad revenues to themselves and grant more control over their content to drive monetization. The arrangement would exempt companies from prohibitions on price fixing among competitors, which is per se illegal under the Sherman Act. The JCPA would allow these anticompetitive practices by traditional media because, the drafters argue, they are struggling to compete in a new market environment that is more diverse and competitive than the pre-internet age. As a result, the JCPA would allow these firms to collect more revenue from digital platforms rather than address difficult questions regarding how consumers find and share information online.

Research on previous attempts to shield incumbent media organizations illustrates how this attempt not only will fail to improve competition but will lead to lower quality products and higher prices for consumers. In the section on “[Statutory Exemptions from the Antitrust Laws](#),” the Antitrust Modernization Commission highlighted how “consumers, (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.” Exemptions benefit incumbents at the expense of their competitors and consumers. For example, [research](#) on antitrust exemptions for newspapers in the 1960s and 1970s showed that the protections failed to prevent abuse by incumbents, protect small and independent newspapers, or improve quality of reporting. Newspapers that joined “joint operating agreements” (essentially newspaper cartels) were still subject to takeover and liquidation by larger rivals. But instead of those rivals competing with other firms, they colluded to fix advertising and circulation prices, producing a lower-quality product for consumers and raising barriers to entry. While the bill’s proponents tout the JCPA as a necessary support for local journalism, historical evidence and established antitrust doctrine tell a different story.

Instead of focusing on competitive effects, the bill targets large technology platforms due to their size, a common practice for the neo-Brandeis school of antitrust that views size as a problem in and of itself. As written, the [bill](#) defines “covered platforms” as sites that have “at least 50,000,000 U.S.-based monthly active users or subscribers,” and “net annual sales or a market capitalization greater than \$550,000,000,000” or “not fewer than 1,000,000,000 [active](#) monthly users in the aggregate of all of their sites or online services.” The only sites or companies currently hosting that much traffic are Google, Meta, Amazon, Apple, Microsoft, and recently, Tik Tok. This definition leaves out notable platforms such as Twitter and Snap, as well as information-sharing hubs Reddit and Wikipedia. This is reminiscent of [previous legislation](#) introduced to address competition concerns related to Big Tech, since it redirects revenues from internet companies to digital journalism providers based on their size.

Also of concern is the JCPA’s provisions that require arbitrators to consider the benefits digital journalism providers’ content creates for covered platforms, but not the benefits accrued to providers from the platforms. A biased arbitration process harms competition by ignoring the value created by covered platforms. [Empirical results](#) from Europe demonstrate “online news aggregators complement newspaper websites and may benefit them in terms of increased traffic and advertising revenue.” The bill’s intention to raise the cost of linking content and create a biased arbitration process dismisses any potentially positive benefits covered platforms create for eligible digital journalism providers. Such moves threaten a basic function that allows the internet to operate, grow, and thrive.

Potential Threats to the First Amendment and Internet Functionality

Beyond the potential harm created by allowing price fixing among competitors, the bill could also negatively impact user experience online.

Currently, online platforms can moderate the content that appears on their sites due to First Amendment protections and procedural benefits of [Section 230](#) of the Communications Decency Act. As private companies, platforms such as Meta and Google have no obligation to host speech they find objectionable and are allowed to moderate content to promote consumer welfare or prevent the spread of misinformation or disinformation. Yet section 6(a)(2) of the JCPA would prevent any covered platform from “discriminating” against a publisher’s content based on its views, forcing platforms to carry *all* speech if the publisher is part of a covered cartel. Theoretically, this could force a platform to leave up hateful or harmful content.

Further, the bill would allow negotiating members to sue covered platforms for “refusing to index content or changing the ranking, identification, modification, branding or placement of the content....” Every covered platform uses algorithms to help users find the information they want and deliver desired content. Interfering or restricting the use of these algorithms could encroach upon First Amendment rights, as [courts](#) have found algorithms and code written by humans is speech protected from prior restraint. If an algorithm deems certain content to be unpopular, misleading, or otherwise objectionable, it may not show that content unless a user seeks it out, and indexes it accordingly. This provision of the JCPA would make this function illegal and allow cartel members to sue covered platforms for damages. Removing these abilities would pose a significant threat to the functionality of these platforms, create a worse experience for users, and raise serious First Amendment questions.

These concerns also highlight why the bill sponsors have tried to move away from copyright as a tool for pursuing wealth transfers to the journalism industry. Digital platforms provide links and short snippets to news articles under the [fair use doctrine](#), a legal doctrine that promotes freedom of expression by permitting the unlicensed sharing of copyright-protected works in certain situations. By presenting only headlines or short snippets, platforms present factual information rather than a creative output, and “transform” the product from its original comprehensive format. This contrasts with ancillary copyright laws tried in other [countries](#), where digital platforms must receive permission and pay for every link they provide, regardless of transformation or use of factual information. If the bill simply created an ancillary copyright for the snippet that platforms use as has been done in other countries, the First Amendment and fair use would prevent cartel members from enforcing those copyrights. Therefore, the bill tries to avoid this issue by stating that “[n]othing in the Act may be construed to modify, impair, expand, or in any way alter rights pertaining to [copyright law],” but substantively the regime would still make sites such as Google and Meta pay for the right to link to an article or video produced by a cartel member, essentially disregarding fair use and First Amendment concerns.

The JCPA Promotes Protectionism Rather than Competition

While the JCPA's drafters may intend to promote competition in journalism, it is little more than a set of protectionist policies for one industry at the expense of other industries and consumers, generally. This does not mean that the decline of local journalism and independent news outlets should be dismissed. Local journalism and independent media outlets are struggling to retain subscribers and boost revenue. But the JCPA does not address these issues and in fact ignores the economic and historical reality of antitrust exemptions broadly, and for media organizations, specifically. The internet makes more information available at a lower cost than ever before. Passing a law to drive these costs up will likely lead to less innovation, less competition, and a less open internet. Competition for attention, which drives advertising spending and revenue, is greater than ever before. Ignoring changing consumer preferences and insulating incumbents from market trends will hurt rather than protect the quality and legitimacy of the journalism industry.