

Saving the News from Big Tech:

The Journalism Competition and Preservation Act

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American journalism is struggling. Since the mid-2000s, 2,200 local newspapers have closed, and the number of newspaper journalists has fallen by more than 50% since 2008.¹ The situation is dire for our democracy, given how an informed citizenry relies on a vibrant and commercially viable news industry at the local, regional, and national level. At the same time, a recent legal experiment in Australia has shown one way to reverse this trend.

A key reason for the decline in journalism is that Facebook and Google, as dominant platforms in online ad markets, have redirected the flow of ad money from publishers to themselves through a variety of exploitative terms imposed on publishers and news organization. These include:

- Denying news organizations access to their own readers' data;
- Forcing publishers to provide free articles (for example, Google's "First Click Free" policy);
- Requiring publication formats that direct readers to the platform's content, such as Google's AMP format or Facebook's "Instant Articles";
- Failing to reward or protect original content against publications copying content; and
- Insufficient compensation for content.²

¹ *The Washington Post Magazine*, The Lost Local News Issue, November 30, 2021, <https://www.washingtonpost.com/magazine/interactive/2021/local-news-deserts-expanding/>.

² Australian Competition & Consumer Commission (ACCC), "Digital Platforms Inquiry: Final Report," June 2019, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

The fundamental problem is a bargaining imbalance. Google may need the news, but it doesn't need any one newspaper, whereas newspapers all individually need Google to survive. And whereas antitrust enforcement has condoned the platforms' recent acquisition of their dominant position, it prohibits newspapers from banding together to bargain over pricing, data, ad revenue, or other terms.

The Journalism Competition and Preservation Act (JCPA), which was introduced by Senators Klobuchar (D-MN) and Kennedy (R-LA) last month, presents one possible legislative solution to this crisis by allowing publishers and broadcasters to bargain collectively with the Big Tech companies over the compensation received for digital advertising revenue.³ It is modeled on an Australian law that has dramatically boosted the newspaper industry in that country. This brief explains the bill, its purpose, and dispels several common misrepresentations.

BIG TECH'S DOMINANCE OF DIGITAL ADVERTISING MARKETS AND ONLINE JOURNALISM

Traditionally, news organizations have relied on income from advertising, whether in print advertising in newspapers or on-air. Organizations would provide the public with news, prompting citizens to read or tune in. Having grabbed the attention of consumers, journalism outlets monetized their audience by selling page space or airtime to businesses to promote their products or services. Historically, publishers and broadcasters did this via direct relationships. The newspaper or broadcaster would hire its own salespeople to sell ads to businesses in addition to producing news content.

The rise and consolidation of digital ad markets in the 2000s changed this environment, both in terms of the distribution of news and the advertising structure financing it. Today, news has moved online and away from print. As a result, news consumers are often not going directly to journalism outlets but rather through various news "aggregators," like Google Search, Google News, Facebook Timeline, and others. More than half of Americans report getting their news from social media, while 65% do so using a search engine like Google.⁴ This is particularly true for smaller and more local outlets: whereas large publishers like the New York Times can attract readers directly to their websites, local and regional outlets obtain much more of their traffic through internet search and social media.

³ S. 1094, 118th Congress, Journalism Competition and Preservation Act, <https://www.congress.gov/bill/118th-congress/senate-bill/1094>.

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

At the same time, Google and Facebook (now Meta) came to dominate online advertising markets through both acquisitions and specific business practices involving compiling dossiers on citizens and serving them ads as they move around the web. Both companies also serve as key news aggregators. Today, most money spent on digital advertising globally goes to Google or Facebook.⁵ Facebook has a dominant position in social media, brought on by its own platform as well as its acquisitions of Instagram and WhatsApp.⁶ For users reaching news primarily through social media, Facebook serves as an essential gatekeeper.

Google, through acquisitions and certain business practices, has built a complex and dominant online ad ecosystem, acting as a representative for both buyers and sellers, and as the market regulator. Its software is the plumbing for online advertising. When a publisher, such as a newspaper, wants to sell digital advertising, they use Google Ad Manager to sell ads, which are then sold on Google's online ad exchange AdX, where they are sold and traded in rapid transactions akin to a stock market. Advertisers on the other side of this market buy the ad space through Google's DV360 buying tools.⁷

As a result of this consolidation of the digital economy, most publishers are dependent on Facebook and Google for both distribution and ad financing. When a publisher goes to sell ads or set the terms for the commercial use of its journalism, it finds itself standing alone against one of two multinational technology giants. A news provider does not have meaningful outside options to take their business elsewhere, and therefore also does not have the position to push for better terms if it were to negotiate with the platforms. If a single news organization were to refuse to list links on or buy ads through Facebook or Google, neither platform's revenue would be impacted in a significant way, even if journalism from publishers is, collectively, a critical component of the platforms' traffic.

Key is that this is a difference solely of bargaining power. By virtue of being predominantly advertising businesses themselves — in 2021, 81% of Google's revenue and 98% Facebook's came from online advertising⁸ — Facebook and Google benefit greatly from the journalism content that populates their platforms. Nonetheless, this disparity in

5 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, February 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/>.

6 It is worth noting that Facebook is currently facing antitrust litigation for these acquisitions. *Federal Trade Commission v. Facebook, Inc.*, First Amended Complaint for Injunctive and Other Equitable Relief [Public Redacted Version], August 19, 2021, https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

7 Google is facing multiple antitrust actions for monopolization of these markets, overcharging advertisers, undercompensating publishers, and colluding with Facebook to rig ad auctions to stymie competition. *United States v. Google, LLC*, Complaint, January 24, 2023, <https://www.justice.gov/opa/press-release/file/1563746/download>.

8 Fourth Quarter and Full Year 2021 Results, Facebook Investor Relations, February 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, July 26, 2022, <https://www.reuters.com/technology/google-parent-alphabet-posts-higher-quarterly-revenue-2022-07-26/>.

bargaining power allows the tech firms to force news organizations to accept unfair and exploitative terms with limited compensation, knowing they have no alternatives.

Since publishers collectively are important to Google and Facebook — not to mention providing an essential service in a democracy — they would be better compensated if they could bargain as a group with the platforms. However, Section 1 of the Sherman Act prohibits coordination between direct competitors.⁹ While this often makes sense in prohibiting price fixing by large companies, by preventing news organizations from joining together to bargain over their compensation from online advertising, our antitrust laws do not just condone but also enforce the disparity in bargaining power of Big Tech over journalism

THE JOURNALISM COMPETITION AND PRESERVATION ACT

The JCPA addresses this bargaining imbalance by allowing publishers to join together to negotiate agreements with tech platforms. Specifically, the JCPA allows eligible publishers and broadcasters to create “joint negotiating entities” to collectively bargain with the Big Tech platforms over the terms of their compensation. To facilitate this, the JCPA provides a six-year “safe-harbor” exemption from the antitrust laws, solely with respect to the collective bargaining process that is outlined in the JCPA. The law outlines a series of regulatory and legal adjustments necessary to structure these negotiations.

The JCPA only applies to “covered platforms,” which includes any platform with at least 50 million monthly users,¹⁰ and requires these platforms to enter into negotiations with joint negotiating entities. Joint negotiating entities can include all broadcasters and any digital publishers with less than 1,500 employees, a limit which excludes only the New York Times, the Washington Post, and the Wall Street Journal. Negotiations between the two must be “conducted in good faith and solely to reach an agreement regarding the pricing, terms, and conditions under which the covered platform may access the content of the eligible digital journalism providers.”¹¹

The JCPA 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

⁹ 15 U.S. Code § 1, available at <https://www.law.cornell.edu/uscode/text/15/1>.

¹⁰ S. 1094, 118th Congress, Sec. 2(3)(A).

¹¹ S. 1094, 118th Congress, Sec. 3(b)(1).

any standstills in the process through take-it-or-leave-it, final offer arbitration, which incentivizes both parties to negotiate in good faith and come to an agreement.¹²

The JCPA resembles the Australian News Media Bargaining Code, passed in 2021.¹³ The Australian code created a similar structure for media organizations to bargain for payment from dominant tech platforms,¹⁴ and the results from that law have been extraordinarily positive. After the code was introduced, Google and Facebook quickly struck deals with a number of journalism providers, flooding the industry with even more money than expected.¹⁵ 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.¹⁶

A recent review of the News Media Bargaining Code from the Australian Treasury found that the code has benefited a full range of diverse news outlets.¹⁷ It noted 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.”¹⁸ Guardian Australia stated 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].”¹⁹ Other research indicates that job listings for journalism in Australia are up 46% because of the code’s adoption.²⁰

COMMON CRITICISMS OF THE JCPA

Despite the JCPA’s broad popularity with the American public, opponents typically object to the law on several grounds. Some argue that it will spread misinformation and hate speech, that it violates the First Amendment or our copyright laws, or that it will lead to a big-media cartel of publishers. As explained below, these criticisms are unfounded.

12 S. 1094, 118th Congress, Sec. 4.

13 Australian Competition and Consumer Commission, News Media Bargaining Code, February 25, 2021, <https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code/final-legislation>.

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

15 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/>.

16 Grueskin, “Australia pressured Google and Facebook.”

17 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>.

18 *Ibid.*, p. 5.

19 *Ibid.*, p. 9.

20 Bill Browne and Matt Grudnoff, “Effect of news media bargaining code on journalism employment,” The Australia Institute, April 2023, <https://australiainstitute.org.au/report/effect-of-news-media-bargaining-code-on-journalism-employment/>.

Misinformation, Nondiscrimination, and Content Moderation

Many opponents of the JCPA argue that the JCPA “would spread misinformation and hate speech,”²¹ implying that platforms like Google and Facebook would be required to carry and pay for misinformation and extreme content. This argument misrepresents the bill by misleadingly suggesting that a provision prohibiting viewpoint discrimination *in the context of negotiations* amounts to a requirement that the platforms display and pay for extreme content.

When making this point, critics are pointing to the nondiscrimination and nonretaliation provisions in Section 6 of the JCPA.²² These provisions do a few things. Section 6(a)(1) prohibits joint negotiating entities (the bargaining group of news providers) from excluding a news organization based on their size or the viewpoints presented in its content. Section 6(a)(2) prohibits *platforms* from discriminating against providers for size and content, but only “in connection with a negotiation conducted under section 3, or an arbitration conducted under section 4.”²³ Simply put, these provisions are designed to ensure that the negotiations are fair, and that ideological issues of content moderation are not used as a pretense for the platforms to negotiate in bad faith.

However, critics misconstrue this provision. Ignoring the limited scope of the nondiscrimination rules in the actual law, TechFreedom, a Big Tech-funded DC think tank,²⁴ argues that the JCPA makes an absolute claim that neither a joint negotiating entity or a platform “may discriminate against a [Digital Journalism Provider] ‘based on ... the views expressed by its content.’”²⁵ Others similarly characterize this provision as a “must-carry” rule, which would require platforms to both display and pay for content that might be offensive or violate their policies.²⁶ And by characterizing the nondiscrimination and nonretaliation provisions this way, opponents falsely claim the JCPA also violates the First Amendment by forcing platforms to both carry and pay for speech.

However, as noted above, these provisions apply only to the context of negotiations and arbitrations. They do not apply to content moderation more generally, and there is no

21 See Chamber of Progress, “Tell Congress Reject JCPA: Journalism Competition and Preservation Act Would Spread Misinformation and Hate Speech,” <https://progresschamber.org/act/tell-congress-reject-jcpa/>.

22 S. 1094, 118th Congress, Sec. 6(a).

23 Specifically, platforms are prohibited from discriminating “against any eligible digital journalism provider ... 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.” S. 1094, 118th Congress, Section 6(a)(2).

24 See Google, “Trade Associations and Membership Organizations,” https://services.google.com/fh/files/misc/trade_association_and_third_party_groups.pdf, for a list of the groups “that receive the most substantial contributions from Google’s U.S. Government Affairs and Public Policy team.”

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

26 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/>; Professor Blake Reid letter to Chairman Dick Durban Re: Journalism Competition and Preservation Act (JCPA), September 1, 2022, available at <https://blakereid.org/concerns-about-the-jcpa/>.

general requirement that the platforms display and pay for any content. Platforms will be able to moderate content exactly as they already do, for better or worse. If a provider's content violates the content moderation policies or terms and conditions of the platform's service, there is nothing in the JCPA stopping them from removing that content from their platform. Similarly, since this is not a "must-carry" provision, there is no First Amendment concern. The platforms would *not* in fact be required to display and pay for content to which they object.

As with other areas of this bill, the remaining objections are highly speculative. Detractors emphasize the risks of a court erroneously siding with a plaintiff whose content was appropriately moderated and was not, in fact, retaliated or discriminated against.²⁷ This is, however, a risk with any other nondiscrimination or nonretaliation clause.

The principle of the JCPA is that if the platform accesses provider content to make a profit, that access should be paid for under the terms of the joint negotiations. If a platform does not access or display content, it does not need to pay for it.

Copyright and Requiring Payment

Second, critics assert that the JCPA will significantly and negatively alter copyright law,²⁸ specifically in that it requires payment for the display of short summaries and preview pages of news articles even if a reader does not click through to the news organization's website. One critic argues that "no one can own facts because of the First Amendment, yet that is exactly what the JCPA does: it gives publishers an ownership right in facts."²⁹ The argument is that by requiring the platforms to pay journalism providers for accessing and displaying their content, including short preview pages or summaries, the JCPA is adding new copyright protections to those short sections, or at least "quasi-copyright" protections that currently do not exist, as short phrases cannot be owned under the fair use doctrine.

First, this is simply a misrepresentation of the copyright issue itself. In May 2021, the JCPA's sponsors wrote to the U.S. Copyright Office to ask for its input on the JCPA, copyright, and related issues.³⁰ The Copyright Office's reply was clear that the JCPA was a competition issue that did not create an ancillary copyright, as the bill's detractors claim.³¹

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

28 Blake Reid letter to Durban, <https://blakereid.org/concerns-about-the-jcpa/>.

29 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/>.

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

31 United States Copyright Office, "Copyright Protections for Press Publishers," June 2022, <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf> ("Should Congress wish to explore non-copyright measures for supporting journalism, the comments on this Study offered several proposals, including the JCPA, a levy on digital advertising revenue, increased public funding, or tax breaks for journalism," and "We believe that other agencies are better positioned to evaluate the merits of competition-based protections for press publishers. For this reason, the Office does not offer any findings or recommendations with respect to competition policy or alternative models for funding journalism.").

The Copyright Alliance has likewise clarified that “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.”³²

Critics then argue that the JCPA might be expanded by courts to create new copyrights, 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 what any copyright owner has ever enjoyed.”³³ However, these arguments, like many of the arguments against the nondiscrimination provisions, are entirely speculative and not credible.

Second, this is a veiled way of saying that journalism should not be paid for. Equating paying for journalism with “requiring the platforms to pay for facts” suggests that the only work journalists do is collect bundles of facts that are fair use for all others to use. Journalists do far more than this: investigation, analysis, framing, narrative, substantive expertise around specific issues, and so on. By framing all that work as unprotected, fair-use facts that Big Tech should be free to monetize, the end position is that journalism does not merit compensation. Furthermore, with the arrival of artificial intelligence technologies that can scrape and synthesize the language of others to an unprecedented degree, it is more important than ever for real journalism to be compensated.

The JCPA applies narrowly to how large, covered platforms access and connect to journalism content, and it creates no substantive additional copyright claims for publishers.

Effects on Labor and Spending on Journalism

Another common objection is that the JCPA’s primary benefits will not flow to journalism or to journalists, but to the investment companies that own many American newspapers and broadcasters. With decades of layoffs, downsizing, and cuts made while some of these companies continued to pay out substantial investor compensation, some ask why the JCPA

³² Copyright Alliance Letter, July 12, 2021, <https://copyrightalliance.org/wp-content/uploads/2022/08/Copyright-Alliance-JCPA-Letter-Final4.pdf>.

³³ 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-congress-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.”).

is aiming to provide the very investors who have made most of these layoffs with a new funding source with which to compensate themselves.

The JCPA outlines that 65% of the funding received under agreements made pursuant to the JCPA are to be allocated to journalism providers according to their actual spending on journalism and journalists.³⁴ While this is not a guarantee that additional funds would be spent on journalism, it would dramatically change the incentives of news providers: to get a larger share of the revenue flowing from a negotiated agreement, a publisher would need to spend more on paying journalists.

This criticism also almost entirely ignores the example set by the Australian News Media Bargaining Code, which did not even have this guardrail to encourage more employment or spending on content. Nonetheless, employment in journalism in Australia has boomed, with many newsrooms using the resources and financial security provided by negotiated agreements to hire dozens of reporters and editorial staff.³⁵

Reliable careers in journalism — or any other line of work — depend on having a profitable employer. Big Tech platforms are preventing news publishers from earning sufficient financial resources to grow their businesses and employ more people. While the JCPA will not solve all the issues some ownership structures create, the law will begin increasing news publishers' revenue and changing their incentives to employ more journalists.

Antitrust Exemptions and a Supposed “Big Media” Cartel

Lastly, JCPA detractors make general claims that antitrust exemptions are by their nature not a good idea, and that as a result the JCPA will create a big-media cartel.³⁶

The United States has antitrust exemptions everywhere — professional sports, insurance, export trading companies, agricultural cooperatives, hospital mergers, government lobbying, and antitrust compliance overseas. One of the first antitrust exemptions was granted to organized labor, so that the antitrust laws could not be used as a weapon against workers for “colluding” in the form of collective bargaining for better wages and working conditions. The idea was to protect workers, but also because the bargaining power of an employer was so much greater than any individual worker, this exemption also leveled the playing field for workers to bargain with employers.

34 S. 1094, 118th Congress, Section 4(d)(5)(F)(ii)

35 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>.

36 For example, see Public Knowledge Letter, September 2, 2022, <https://publicknowledge.org/policy/group-letter-to-congress-opposing-jcpa/> (“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.”); Tim Karr and Sanjay Jolly, “Journalism's Bad Bargain,” Common Dreams, October 21, 2022, <https://www.commondreams.org/views/2022/10/21/journalisms-bad-bargain>.

Today, journalism providers also face a large disparity in bargaining power relative to the tech platforms. Moreover, this is in part because of a de facto antitrust exemption the federal government has given to large companies to pursue mergers and exclusionary conduct. Merger enforcement was scaled back with a major revision to the merger guidelines in 1982.³⁷ Google has made at least 270 acquisitions in the past 22 years, and Facebook has made at least 97 in the past 18 years.³⁸ This includes several key acquisitions that gave Google its dominance in digital advertising (DoubleClick in 2007) and gave Facebook its dominance in social media (Instagram and WhatsApp), which they have used to prey upon news providers.

This criticism also ignores that the authors of the bill have included a simple guardrail in the form of a six-year sunset provision. Congress will have to renew this law. This six-year period is intended to give publishers a lifeline, and it does not extend in perpetuity.

While Big Tech's dominance remains as a result of other failures of antitrust policy, to oppose the JCPA because it gives an antitrust exemption for publishers is to take the side of protecting corporate power.

CONCLUSION AND IMPROVEMENTS

Following the successful Australian News Media Bargaining Code, the JCPA is tailored to rebalance an unequal bargaining relationship between journalism providers and the tech platforms that aggregate the news, connect users to it, and dominate digital advertising markets. Likewise, other jurisdictions are currently considering similar legislation, including Canada and the state of California.³⁹

That being said, the legislation could be improved. First, while the existing bill does not require that the platforms display any content that violates their policies, many critics still insist that Section 6(a)(2) amounts to a “must-carry” provision, requiring platforms to both display and pay for all sorts of offensive content. The JCPA is meant to resolve an imbalance of negotiating power between journalism providers and platforms, not to alter content moderation policies. To the degree that this would address existing criticism, the bill could explicitly state that the nondiscrimination provisions apply only in the context of the negotiations or arbitrations outlined by the JCPA, and that the platforms would not be required to display or pay for any content as long as they do not access and profit from it.

³⁷ Department of Justice, 1982 Merger Guidelines, <https://www.justice.gov/archives/atr/1982-merger-guidelines>.

³⁸ American Economic Liberties Project, Big Tech Merger Tracker, available at <https://www.economicliberties.us/big-tech-merger-tracker/>.

³⁹ Online News Act, C-18 44th Parliament, <https://www.parl.ca/legisinfo/en/bill/44-1/c-18>; AB-886 California Journalism Preservation Act (2023-2024), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB886.

Second, the bill could be revised to require that at least a certain percentage of the funding received under agreements entered into under the JCPA must be used to pay for journalism. The JCPA currently states that spending on journalism, and journalist employment, “shall be used to guide 65 percent of the distribution of remuneration among the members of [a] joint negotiation entity.” This percentage only guides how the funding is allocated among journalism providers. The bill could be improved by requiring that a similar percentage of the funding brought in by the JCPA be spent on journalists.

Even in its current form, the JCPA would make a substantial step in allowing companies that specialize in journalism in the digital age to remain on solid commercial and financial footing. Having a commercially viable news industry, especially at the local level, is critical for our democracy.

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