

December 5, 2022

The Honorable Nancy Pelosi
Speaker of the House
United States House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

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

We write today to express our continuing opposition to the Journalism Competition & Preservation Act (JCPA), an act that would create an ill-advised antitrust exemption for publishers and broadcasters. We urge you not to include the JCPA in any pending legislation, including the NDAA. This bill, despite months of advocacy and multiple revisions, contains far too many contradictions, complexities, and problems to be included in any omnibus or must-pass legislation.

Many of the organizations listed below noted the issues with this bill in September, in [a letter signed by a broad cross-section](#) of organizations focused on protecting and advancing our democracy and its democratic values. They included civil society organizations; librarians and archivists; creators; technology companies; experts in antitrust, copyright, constitutional and digital rights law; and media and news groups. While the group listed below represents 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. We've learned again through the current election cycle how essential quality information is to the preservation of our democracy. 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:

Language from the Senate amendment in the nature of a substitute forces platforms to negotiate for payments and to carry the content of any digital journalism provider that becomes part of a joint negotiation entity, 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 contrary to First Amendment protections. The bill is also artificially one-sided – it precludes consideration of any benefit provided to any negotiating publisher or broadcaster for 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 or impair copyrights under Title 17 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 also flies in the face of Supreme Court precedent, based on the First Amendment, that no one may own facts.

Large media conglomerates can 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 publisher employee cap of 1,500 would exclude only the nation's three largest newspapers from participating in negotiations (and as noted below, the cap 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 enforceable requirement that they invest in local programming. The bill further privileges large group owners by permitting individual licensees to each 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.

As reported by the Senate Judiciary Committee, the bill has no provisions requiring that funds gained through negotiation or arbitration will even be paid to journalists. (The House Judiciary Committee may have been considering amendments that attempt to create accountability for how funds are spent, but since they don't preclude transfers of funds within news organizations they would be meaningless.) We also note that the bill still creates "collective bargaining" rights for some of the same news organizations that are actively denying their own journalists the same rights.

Historically, antitrust exemptions have not accomplished beneficial goals, and instead have harmed competition and consumers, entrenched existing power structures, and increased codependence between powerful 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 not to pass the Journalism Competition & Preservation Act in the NDAA or any other omnibus legislation.

Sincerely,

American Civil Liberties Union
ARTICLE 19
Association of Research Libraries (ARL)
Authors Alliance
Center for Democracy & Technology
Chamber of Progress
Coalition for Creativity (C4C)
Common Cause
Computer & Communications Industry
Association (CCIA)
Copia Institute
Creative Commons
Electronic Frontier Foundation
Engine
Fight for the Future
Free Press Action
Library Futures
Local Independent Online News
Publishers(LION)
Media Justice
Niskanen Center
Patreon
Public Knowledge

Re:Create
R Street Institute
SPARC
Techdirt
United Church of Christ Ministry
The Wikimedia Foundation