

Journalism Competition & Preservation Act: Not What It Says on the Box

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tl;dr

Background: As leaders of the U.S. Senate work to pass the National Defense Authorization Act (NDAA) in the ongoing lame-duck session, [some reports](#) suggest that [S. 673, the Journalism Competition and Preservation Act \(JCPA\)](#), could be added to the legislative package. Approved in September 2022 by the Senate Judiciary Committee, the JCPA aims to boost the fortunes of traditional media companies by forcing “covered” online platforms to pay for digital journalism accessed via their services. The bill would require that platforms continue to display digital journalism, while setting out an intricate process whereby digital-journalism providers would collectively negotiate the price of content with platforms.

But... This quixotic attempt to prop up flailing media firms will create legally sanctioned cartels that harm consumers, while forcing online platforms to carry and pay for content in ways that violate long-established principles of intellectual property, economic efficiency, and the U.S. Constitution.

KEY TAKEAWAYS

JCPA MAY VIOLATE THE FIRST AMENDMENT

At its core, the JCPA forces major online platforms to carry and pay for the content of

“eligible digital journalism providers.” Where such digital-journalism providers seek to obtain compensation for their content, covered platforms would be barred from “retaliating” or “discriminating” against them. It also prevents “joint negotiation entities” from discriminating among news providers.

Unfortunately, these provisions would impinge on covered platforms’ First Amendment right to [editorial discretion](#). In particular, it threatens their ability to exclude content that a given platform may deem to be hateful or untruthful.

Any journalism provider that finds itself excluded by a covered platform could always claim that the exclusion was due to viewpoint discrimination—which the JCPA renders impermissible—rather than a desire to provide a better service to the platform’s users.

Similarly, a platform’s decision to limit the journalistic content it displays would create potential legal liability under the JCPA’s prohibition against “retaliation” by a platform that seeks to avoid paying for news.

Ultimately, these provisions raise significant First Amendment concerns and will make it harder for platforms to screen out lower-quality journalistic enterprises.

NEWS CARTELS HARM CONSUMERS

The JCPA also raises significant concerns for consumer welfare. The legislation would create legally sanctioned cartels through which

digital-journalism providers could fix prices and boycott “covered” platforms that fail to meet their demands.

Bill sponsor Sen. Amy Klobuchar, D-Minn., has euphemistically described this provision as “[a limited safe harbor from federal and state antitrust laws](#),” but she knows better. If any area of antitrust policy enjoys near-unanimous consensus, it is that cartels restrict output and harm consumers. Moreover, online platforms would have to pass on at least some of these monopoly prices to consumers—be it in the form of paid tiers or increased ad loads.

The bill's proponents may retort that these costs are more than offset by the benefits engendered through directing increased monetary rewards to high-quality content. But the virtue of markets is that they direct resources toward those goods and services that are truly valued by consumers. Putting news remuneration in the hands of courts and arbitrators all but guarantees at least some funds will be misallocated. In other words, the bill may lead to more news, but that is not the same thing as *better* news or more *valuable* content.

THE BILL CONFLICTS WITH COPYRIGHT LAW

There have been numerous legal questions regarding whether “framing,” linking to, or displaying thumbnails of digital content produced by others infringes copyright or falls under the “fair use” doctrine, with most courts concluding the latter (see, e.g., [here](#) and [here](#)).

Among other findings, courts have held that thumbnails “benefit the public by enhancing information-gathering techniques on the internet.” They have also concluded that displaying thumbnails tends to increase rather than diminish the value of online content. This would appear even more obviously true in the case of displaying links or news snippets.

Platforms balance the interests of different parties in a multi-sided market, which could include the choice to license content through ordinary market negotiations. When they link to news stories at external sites, it is usually a net benefit to online journalism.

THE JCPA SUPPRESSES COMPETITION

Concerns about the perceived decline of journalism are not to be taken lightly, but JCPA is not the right too. It would shatter such long-standing principles as a platform’s right to decide what speech it will carry, the consensus that cartels should be avoided, and that news snippets are likely subject to fair use.

All of this is done to protect media firms that are struggling precisely because competition among them is so intense. In that sense, JCPA is a weak attempt to disguise the suppression of competition as its preservation.

For more on a similar policy experiment launched in Australia, see ICLE’s [comments](#) to the Australian Competition and Consumer Commission’s Digital Platforms Inquiry.

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