

June 17th, 2021

Senator Amy Klobuchar  
Chairwoman  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
425 Dirksen Senate Office Building  
Washington, DC 20510

Senator Mike Lee  
Ranking Member  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
361A Russell Senate Office Building  
Washington, D.C. 20510

Congressman David Cicilline  
Chairman  
Subcommittee on Antitrust, Commercial  
and Administrative Law  
2233 Rayburn House Office Building  
Washington, DC 20515

Congressman Ken Buck  
Ranking Member  
Subcommittee on Antitrust, Commercial  
and Administrative Law  
2455 Rayburn House Office Building  
Washington, D.C. 20515

**Re: The Journalism Competition and Preservation Act (H.R.1735, S. 673)**

Chairwoman Klobuchar, Chairman Cicilline, Ranking Member Lee, and Ranking Member Sensenbrenner:

There is a crisis in local news. Media consolidation costs thousands of journalism jobs each year;<sup>1</sup> some areas are no longer even served by a local newspaper.<sup>2</sup> This has serious implications for holding our democratic institutions accountable and promoting civic engagement.<sup>3</sup> Local journalism's demise is often attributed, in part, to the rise of tech platforms and their anticompetitive behavior.<sup>4</sup> The Journalism Competition and

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<sup>1</sup> Tracy, M. (2020, December 4). *News Media Outlets Have Been Ravaged by the Pandemic*. The New York Times. <https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html>

<sup>2</sup> Center for Innovation and Sustainability in Local Media. (2020, December 28). *Expanding News Deserts | UNC Center for Innovation & Sustainability in Local Media*. The Expanding News Desert. <https://www.usnewsdeserts.com/>

<sup>3</sup> Macpherson, L. (2021, May 26). *The Free Press Is A Pillar of Our Democratic Infrastructure — and It's Crumbling. Policymakers Should Support Local News in the Infrastructure Bill*. Public Knowledge. <https://www.publicknowledge.org/blog/the-free-press-is-a-pillar-of-our-democratic-infrastructure-and-its-crumbling-policymakers-should-support-local-news-in-the-infrastructure-bill/>

<sup>4</sup> U.S. Senate Committee on Commerce, Science, and Transportation. (2020). *Local Journalism: America's Most Trusted News Source Threatened*. [https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20\\_430pm.pdf](https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf)

Preservation Act (JCPA), which is premised on this disputed assumption,<sup>5</sup> is billed as a way for small news outlets to survive by “band[ing] together to negotiate with online platforms Google and Facebook” for necessary revenue.<sup>6</sup> While this sounds attractive in theory, the bill’s framework relies on what is, at best, a fundamental mischaracterization--and, at worst, a planned alteration--of U.S. copyright law.

The JCPA would create an antitrust law exception to allow certain publishers the ability to jointly negotiate business terms with major online platforms. Notably, it does not otherwise alter substantive law. However, no individual news publication currently has any legal right (via copyright, or any other statute) to prohibit third parties from linking to their content. Nor does banding together to collectively negotiate give such a right. In other words, a cartel of news sites is *exactly as powerless* to prevent Facebook or Google from linking to its members’ content as a small site would be negotiating on its own.

This central disconnect means that the structure of the bill does not achieve its stated legislative aims. As such, we are concerned that 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. To the extent that this creates a new substantive right to demand that material not be linked to, this is unwise; to the extent that it interferes with fair use rights, particularly of the rights of users of platforms, it is unconstitutional and violative of our international obligations.

The ability of one website to connect (“link”) to other websites, without needing to negotiate to do so, is a foundational component of modern internet infrastructure. Linking is not, and has never been, an act within the scope of copyright. It is not within the statutory *or* common-law ambit of copyright law, as merely linking to a piece of external content is not a reproduction, display, performance, or distribution of that content. As such,

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<sup>5</sup> Rodriguez, J. (2020, March 18). *Making Big Tech Pay News Outlets Won’t Help Save Independent Journalism*. Truthout.

<https://truthout.org/articles/making-big-tech-pay-news-outlets-wont-help-save-independent-journalism/>;

Carr, T. and Aaron, C. (2019, February). *Beyond Fixing Facebook*.

[https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final\\_0.pdf](https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final_0.pdf)

<sup>6</sup> *Senator Klobuchar and Representative Cicilline Introduce Legislation to Protect Journalism in the United States*. (2021, March 10). [Press release].

<https://www.klobuchar.senate.gov/public/index.cfm/2021/3/senator-klobuchar-and-representative-cicilline-introduce-legislation-to-protect-journalism-in-the-united-states>

rightsholders do not--and should *not*--have the ability under copyright law to prevent third parties from linking to their publicly available content. (Notably, the vast majority of rightsholders do not want such a right, and those that do already have technical methods which allow them to do so.)

Also at issue are the brief snippets of content--such as headlines, images, or short excerpts--that often accompany links. These minimal quotations of copyrighted material have been consistently found to be fair uses under copyright law, and protection for these uses is mandated by our participation in the Berne Convention. These fair uses cannot be banned or substantially curtailed without running afoul of Supreme Court jurisprudence, the First Amendment,<sup>7</sup> and multilateral international obligations.<sup>8</sup>

We are asking that Congress create a savings clause that explains that copyright protections are *not* being expanded to include linking, or fair use snippets of linked material. Without such a savings clause, the JCPA may make it more costly and difficult to access information. Even with such a savings clause, the better solution to solving the journalism crisis is to directly help the most harmed newsrooms, rather than allowing our largest media conglomerates to become a cartel.

Thank you for your consideration,

Authors Alliance

Copia Institute

Fight for the Future

Library Futures Foundation

Niskanen Center

Public Knowledge

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<sup>7</sup> Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (describing fair use and other relevant limitations as “built-in First Amendment accommodations” that save copyright law from unacceptably stifling speech).

<sup>8</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), Article 10 (“It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”). *See also* Band, J. and Flynn, S. (2021, February 8). *Australian Link Code May Violate Berne Convention and Provoke Trade Litigation*. InfoJustice. <http://infojustice.org/archives/42925>