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Chairman Dick Durbin
Ranking Member Chuck Grassley
Senator Mike Lee
Senator Amy Klobuchar

Sept. 1, 2022

Re: **Journalism Competition and Preservation Act (JCPA)**

Dear Chairman Durbin, Ranking Member Grassley, Senator Lee, and Senator Klobuchar:

As a law professor specializing in communications and copyright law, I write with concerns about the version of the Journalism Competition and Protection Act (JCPA) released on August 22, 2022.² My comments defer to others on the wisdom of the overarching policy goals of the bill and its negotiation and antitrust mechanics, instead focusing narrowly on the bill's quasi-copyright, quasi-carriage structure for negotiations between news publishers and covered platforms.

Overall, the JCPA's coupling of access licensing and carriage obligations amounts to a highly unusual scheme in the pantheon of American communications and copyright law. It effectively compels platforms to both carry the content of others *and* pay for the privilege of doing so. In my view, this approach is conceptually ill-considered and creates a significant potential for constitutional problems.

While the JCPA creates elaborate machinery for joint negotiations between groups of news organizations and online platforms³ with arbitration mechanics to resolve disputes⁴ and a carveout from antitrust law to allow for coordination,⁵ it fails to articulate a coherent and constitutional *object* of those negotiations. The nominal focus of negotiations specified by the bill is "terms and conditions by which [a] covered platform

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² <https://www.klobuchar.senate.gov/public/cache/files/0/2/02edbc26-debb-41b4-8c19-da7090159e30/60AA7BF7A217968D95D8CE417B93C06C.sil22a02.pdf> (JCPA Draft).

³ JCPA Draft § 3.

⁴ JCPA Draft § 4.

⁵ JCPA Draft § 5.

may access the content” of the joint negotiating entity’s news publisher members.⁶ However, the bill fails to identify a clear basis for news publishers to exclude covered platforms from accessing their reporting.

One unlikely basis for exclusion is copyright in news articles. While news articles are nominally protected by copyright, the U.S. Copyright Office recently acknowledged that the ability to leverage copyright law to control the use of articles is significantly constrained under both international copyright treaties and U.S. copyright law, including by the ineligibility of facts and ideas for copyright protection, the doctrine of merger, limitations on the protectability of short phrases including headlines and ledes, fair use, and the server test for linking.⁷ In declining to recommend the creation of a new ancillary copyright protection for publishers, the Office also acknowledged that doing so would give rise to substantial First Amendment challenges.⁸ The JCPA follows suit, expressly disclaiming any modification or expansion of copyright law.⁹

A more likely possibility is that publishers could deny initial access to news articles using technological authorization mechanisms, reinforced by state and federal computer fraud and abuse statutes.¹⁰ But while publishers potentially could gate direct access to lock out online platforms, they would have little, if any, right or ability to control the downstream dissemination of the facts of their articles or their subsequent ingestion and further distribution by online platforms given the aforementioned limitations in copyright law. As a result, any negotiation would, as an economic matter, necessarily be limited to the value of *direct initial access* to content on publishers’ sites, divorced from and without regard to the *use* of the content permitted widely permitted under copyright law.

Moreover, there is little likelihood that, even in the aggregate, publishers could successfully create a cognizable market for direct access if they collectively withheld access from a covered platform. This is because, as the Copyright Office explained, the news publishers heavily rely on those platforms to drive traffic to the publishers,¹¹ and thus have as much or more to lose by denying the platforms direct access than the platforms have to lose simply by declining to carry the publishers’ content by means of direct access.

⁶ JCPA Draft § 3(b)(1).

⁷ *Copyright Protections for Press Publishers*, Report at 30–45 (June 2022), <https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf> (“*Ancillary Rights Report*”).

⁸ *See id.* at 54–55, 58.

⁹ JCPA Draft § 9(b).

¹⁰ *See generally* *Ancillary Rights Report* at 46 & nn.257–259.

¹¹ *See id.* at 51–52.

The difficult reality is that there is little lawful basis upon which to structure a negotiation between publishers and platforms. The JCPA attempts to avoid this reality by *compelling* the platforms to continue directly accessing the publishers' articles even when access has been revoked. The JCPA implicitly subjects platforms to potential liability under computer fraud and abuse law if they directly access articles and explicitly subjects them to liability under a new private cause of action in the JCPA for "retaliation" if they don't.¹²

This too-clever-by-half approach effectively tries to lever publishers' narrow ability to prevent *direct access* to their articles into a right to govern the *use* of the articles by effectively funneling all potential uses by the platforms through direct access. This approach effectively tries to launder copyright-style protection into computer fraud and abuse law—but in doing so, fails to grapple with the many limitations on controlling the dissemination of news using copyright law. Many of these limitations are rooted firmly in the First Amendment and would apply likewise to any attempt to apply computer fraud and abuse law as a quasi-copyright regime.

Moreover, this facet of the JCPA imposes a novel *carriage* regime on covered platforms. It does so by subjecting any ordinary decision of a platform to moderate or rank content to scrutiny as an act of "retaliation," in the JCPA's parlance, for a publisher's participation in a joint negotiation with the platform. This carriage obligation raises substantial First Amendment questions and conflicts with the mechanics of Section 230 of the Communications Act. Moreover, it raises concerns that it will be abused by some publishers to compel platforms to carry hate speech, mis- and disinformation, and other content that the platforms may hold a legitimate First Amendment interest in suppressing, de-indexing, downranking, or otherwise moderating.

If the Committee's goal is to facilitate a transfer of wealth from platforms to publishers—a goal on whose wisdom I do not opine here—it should avoid funneling this transfer through compelled transactions over news articles and included facts whose free dissemination has long been a hallmark of the First Amendment. Instead of erecting a constitutionally fraught transactional framework around news articles and the facts they contain, the Committee should focus on funding and supporting the *labor of reporters* who create those articles and facts in the first instance.

As it stands, the JCPA focuses negotiations between publishers and platforms on an constitutionally problematic locus. I urge the Committee to revise the bill to better serve the important ends of the First Amendment and the sustenance of journalism—both critical priorities that have come under attack in recent years and which the JCPA, however well-intended, risks disserving with its convoluted structure.

/s/

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¹² See JCPA Draft § 6(b).