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News Media and Digital Platforms – Note by the United States

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

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United States

1. Introduction

1. There is broad recognition in the United States that the news media provide significant societal value, from keeping the electorate informed, serving as watchdogs on government activities, and disseminating accurate health and safety information, to name a few examples. As has been reported widely, however, the news media industry has been experiencing financial pressures for many years, particularly at the local level.¹ Meanwhile, digital platforms have been on the rise, playing a disruptive role in the distribution and monetization of news. These trends have prompted consideration of whether the antitrust laws should be invoked or amended to address the difficulties facing the press.²

2. The Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively, the Agencies) submit this paper to provide background on this debate in the United States. The paper first summarizes recent legislative activity in this area, including the findings of a recent Congressional inquiry that identified concerns regarding the relationship between digital platforms and news publishers and recommended consideration of a new antitrust exemption to allow news publishers to collectively negotiate with digital platforms. Next, the paper describes an existing antitrust exemption for newspapers under the Newspaper Preservation Act of 1970. It then summarizes previous proposals for antitrust exemptions for the news media. Finally, it describes some examples of news media collaborations that do not rely on exemptions from the antitrust laws. This paper does not include discussion of the Agencies' pending investigations or lawsuits that may be relevant to this topic.

2. Recent Legislative Activity

3. The U.S. Congress recently has devoted significant attention to understanding the extent to which the business practices of the dominant digital platforms are impacting various aspects of the U.S. economy, including the news media. A prominent example is the investigation of major online platforms (Amazon, Apple, Facebook, and Google), launched in June 2019 by the House Committee on the Judiciary and led by the Subcommittee on Antitrust, Commercial and Administrative Law ("Subcommittee").³ The Subcommittee conducted seven oversight hearings as part of its investigation, including a hearing focused specifically on the effects of market power in digital markets on the "free

¹ See, e.g., Penny Abernathy, Knight Chair in Journalism and Digital Media Economics at the UNC Hussman School of Journalism and Media, "News Deserts and Ghost Newspaper: Will Local News Survive?," <https://www.usnewsdeserts.com/reports/news-deserts-and-ghost-newspapers-will-local-news-survive/>.

² Modifications to copyright laws are also being considered as a measure to protect press publishers. See, e.g., U.S. Copyright Office, Publishers' Protections Study: Notice and Request for Public Comment (Oct. 12, 2021), <https://www.federalregister.gov/documents/2021/10/12/2021-22077/publishers-protections-study-notice-and-request-for-public-comment>.

³ Lina Khan, sworn in as Chair of the FTC on June 15, 2021, served as Counsel to the Subcommittee throughout the course of the digital markets investigation.

and diverse press.”⁴ At the conclusion of its 16-month investigation, the Subcommittee released a 450-page report (“Majority Staff Report”) summarizing its findings and recommending reform legislation.^{5,6}

2.1. Majority Staff Report Findings

4. According to the Subcommittee Majority Staff report, digital platforms—Google and Facebook in particular—have become digital gateways to the news for many consumers.⁷ As a result, the Report stated that publishers and broadcasters are “increasingly beholden” to Google and Facebook,⁸ that there is a “significant imbalance of bargaining power” between the dominant online platforms and news publishers,⁹ and this imbalance has undermined the quality and availability of credible news sources.¹⁰

5. Informed by the Subcommittee’s investigation, the Report provided a broad set of recommendations, including systemic proposals for addressing anticompetitive conduct in digital markets as well as a targeted recommendation to “create an even playing field for the free and diverse press.”¹¹ Regarding the news media, the Subcommittee recommended consideration of legislation, authored by Subcommittee Chair David Cicilline, that would provide news publishers and broadcasters with a temporary shield from antitrust liability to collectively negotiate with dominant online platforms. This legislation, the Journalism Competition and Preservation Act, was previously proposed in 2019, and the Report recommended that Congress take it up again. This legislation is discussed in the following section.

⁴ Online Platforms and Market Power, Part 1: The Free and Diverse Press: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 1–3 (2019).

⁵ Subcom. on Antitrust, Com. and Admin. Law of the House Comm. on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (Oct. 6, 2020) https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

⁶ Republican lawmakers on the Subcommittee did not sign on to the Majority Staff Report, and several supported a separate report by one of the Republican members. These lawmakers largely agreed with the factual assertions in the Majority Staff Report, but were unwilling to support all of the legislative recommendations proposed by the Majority Staff. They did not address the conclusions or proposals related to the news media. See Press Release, Rep. Ken Buck, *Rep. Buck Pens Antitrust Report that Presents a “Third Way” to Take on Big Tech* (Oct. 6, 2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

⁷ Majority Staff Report at 63.

⁸ *Id.*

⁹ *Id.* at 64.

¹⁰ *Id.* at 57.

¹¹ *Id.* at 388-390.

2.2. The Journalism Competition and Preservation Act of 2021

6. In March 2021, the Journalism Competition and Preservation Act of 2021 (JCPA) was re-introduced in the House and the Senate.¹² The proposed legislation is similar to the version proposed in 2019, except that the prior version was limited to digital and print publishers, whereas the 2021 version includes television and radio news outlets.¹³ If the JCPA becomes law, the legislation will create an exemption from the antitrust laws to allow news content creators to band together to negotiate with large online platforms, or “content distributors.” Online content distributors are defined as companies with at least 1 billion monthly active users that display, distribute, or direct users to news articles, which is understood to include Facebook and Google. News content creators include any print, broadcast, or digital news organization with at least 25% original content and a dedicated editorial staff that publishes at least on a weekly basis.

7. The JCPA would allow coordination by news publishers only if the coordination: (1) directly relates to the quality, accuracy, attribution or branding, and interoperability of news; (2) benefits the entire industry, rather than just a few publishers, and is non-discriminatory to other news publishers; and (3) directly relates to and is reasonably necessary for these negotiations.¹⁴

8. It is unclear whether the proposed legislation will be enacted into law. Both the House and Senate bills have at least some bipartisan support.¹⁵ At a March 12, 2021 Subcommittee hearing, however, several witnesses and legislators expressed reservations about relaxing antitrust rules for large media companies, observing that there could be unintended consequences from allowing the largest media outlets to consolidate their power.¹⁶ Both bills are referred for consideration by their respective committees in the House and Senate, which is an early stage in the legislative process; neither has yet been the subject of a markup or committee vote.

3. Existing exemption for newspapers in U.S.: Newspaper Preservation Act of 1970

9. U.S. law currently provides a limited antitrust exemption for joint operating agreements (JOAs) between newspapers pursuant to the Newspaper Preservation Act of 1970 (NPA). In order to promote the preservation of independent editorial voices in newspapers, the NPA relaxes the requirements of the failing company doctrine and allows

¹² S. 673, <https://www.congress.gov/bill/117th-congress/senate-bill/673/text>, and H.R. 1735, <https://www.congress.gov/bill/117th-congress/house-bill/1735/text>.

¹³ See S. 1700, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1700/text>.

¹⁴ <https://www.klobuchar.senate.gov/public/index.cfm/2021/3/senator-klobuchar-and-representative-cicilline-introduce-legislation-to-protect-journalism-in-the-united-states>.

¹⁵ S. 673 is sponsored by three Democrats and four Republicans; H.R. 1735 is sponsored by 23 Democrats and 12 Republicans.

¹⁶ Reviving Competition, Part 2: Saving the Free and Diverse Press, Subcommittee on Antitrust, Commercial, and Administrative Law, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4440>; see, e.g., *Statement for the Record from Matthew Schruers, President, Computer and Communications Institute of America*, <https://docs.house.gov/meetings/JU/JU05/20210312/111315/HHRG-117-JU05-20210312-SD011.pdf>.

newspapers to combine certain business functions, so long as their editorial functions are kept separate.¹⁷ For example, the NPA immunizes joint ventures between newspapers that contain otherwise unlawful price-fixing agreements, market allocations, and revenue pooling, provided that one of the newspapers in the joint venture is failing.

10. The NPA was a congressional reaction against a successful antitrust suit brought by DOJ against a JOA between the only daily newspapers in Tucson, Arizona in 1965.¹⁸ That JOA provided that the newspapers would set subscription and advertising rates jointly, and pool profits from the papers' joint operations; the JOA precluded the owner of either paper from competing with the joint entity. In *Citizen Publishing v. United States*, 394 U.S. 131 (1969), the Supreme Court agreed with the DOJ that the JOA was per se illegal. At the time that *Citizen Publishing* was decided, there were 22 JOAs in existence across the United States. The publishers of these papers argued that without shelter from antitrust prosecution, newspapers in JOAs that were about to be sued for antitrust violations under the *Citizens Publishing* standard would simply fail and go out of business.

11. Congress, in turn, passed the NPA, providing an antitrust exemption under specific circumstances for both pre-existing and new JOAs.¹⁹ Proposed agreements are subject to review and approval by the Attorney General. For a joint operation to receive the exemption, all but one of the papers must be in probable danger of financial failure.²⁰ Joint operating agreements not approved in advance do not receive the benefit of the immunity and remain subject to the antitrust laws.²¹ Moreover, the statute does not extend immunity to conduct that would be unlawful "if engaged in by a single entity," *i.e.*, that would be unlawful under Section 2 of the Sherman Act.²²

12. The Agencies have been vigilant in ensuring that the immunity afforded by the NPA is circumscribed. For example, in 2007, DOJ litigated a case in federal court to undo the acquisition of one Charleston, West Virginia newspaper (the *Daily Mail*) by the owners of the other local paper (*U.S. v. Daily Gazette Company and MediaNews Group JOA*). Before the acquisition, the owners of the two papers had operated with a JOA, under which the papers had been competing. The Division alleged that the transaction was part of a plan by the Daily Gazette Company to kill off the *Daily Mail*, leaving Charleston with a single daily newspaper, the *Charleston Gazette*. The Division settled with the parties in January 2010 and the settlement was approved in July 2010. The decree required the defendants to enter into a set of revised contracts that restructure the JOA to provide the *Daily Mail* with stronger governance rights and to re-establish financial incentives to compete for readers. It also prohibited the defendants from discontinuing publication of the *Daily Mail* unless it is established as a failing firm; required the defendants to maintain strict editorial independence between their newspapers; prevented discrimination against the *Daily Mail* in circulation or advertising sales; and mandated a remedial subscription campaign for the *Daily Mail*.

¹⁷ Newspaper Preservation Act, 15 U.S.C. § 1802(2).

¹⁸ *Citizen Publishing v. United States*, 394 U.S. 131 (1969).

¹⁹ 15 U.S.C. §§ 1803(a), (b).

²⁰ 15 U.S.C. § 1802(5).

²¹ 28 C.F.R. § 48.1.

²² 15 U.S.C. § 1803(c).

13. Although the NPA remains in force, the antitrust exemption may not have materially aided the newspaper business and has been widely criticized.²³

4. Prior Proposals to Create Antitrust Exemptions Aimed at Supporting the News Industry

14. Concern over the internet's impact on the newspaper industry has prompted consideration of additional antitrust exemptions in the past.

15. For example, in May 2009, certain newspaper publishers asked the Senate to relax antitrust laws to allow newspapers to collaborate to “protect copyright from aggregators and plan an industry-wide transition to a paid online subscriber base.”²⁴ DOJ's Deputy Assistant Attorney General Carl Shapiro testified that current antitrust laws were flexible enough to meet the needs of the dynamic news media marketplace, and that vigorous antitrust enforcement remained critical.²⁵

16. Likewise, in March, 2011, DOJ's Assistant Attorney General Christine Varney noted that the recent attempts to expand antitrust immunity for the newspaper industry were “well-intentioned, but ultimately misguided.”²⁶ She repeated the DOJ's longstanding opposition to such proposals, adding that recent changes in the industry were “not caused by antitrust enforcement, and limiting antitrust enforcement will not reverse those changes,” and that many newspapers face difficulties in spite of having an exemption.

5. News Media Collaborations

17. The news industry has developed mechanisms to collaborate without relying on an antitrust exemption. In at least two instances, collaborations among members of the news media have been reviewed through the DOJ's business review process, where an organization may submit proposed conduct to the DOJ and receive a statement as to the

²³ See, e.g., Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism at 14,

https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf.

²⁴ Testimony of James M. Moroney III, Committee on Commerce, Science and Transportation, Subcommittee on

Communications, Technology and the Internet. Hearing on The Future of Journalism: Communications, Technology, and the Internet (May 6, 2009), <https://www.govinfo.gov/content/pkg/CHRG-111shrg52162/pdf/CHRG-111shrg52162.pdf>.

²⁵ Testimony of Carl Shapiro, Deputy Assistant Attorney General for Economics, Antitrust Division, Department of

Justice, House Justice Subcommittee on Courts and Competition Policy (April 21, 2009), <https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2009/05/06/2009-05-06-atr-shapiro-journalism.pdf>.

²⁶ Prepared remarks for the Newspaper Association of America on “Dynamic Competition in the Newspaper Industry,” <https://www.justice.gov/atr/speech/dynamic-competition-newspaper-industry>.

DOJ's present intention to challenge the proposed conduct under the antitrust laws based on the facts the parties provide.

18. In 2010, DOJ announced it had no present intention to challenge a proposal by MyWire Inc. to form the Global News Service, an online subscription news aggregation service.²⁷ The service planned to provide interconnections among different publishers' online content, such as news articles and video and audio clips, that relate to the same topic. Based on representations made by MyWire, the DOJ concluded that the formation and operation of the news service would not be likely to reduce competition among Internet publishers and could provide procompetitive benefits to both publishers and consumers.

19. Also in 2010, DOJ reviewed a proposal by The Associated Press (AP) to develop and operate a voluntary news registry to facilitate the licensing and Internet distribution of news content created by the AP, its members, and other news originators.²⁸ DOJ issued a favorable review letter, stating that the development and operation of the registry was not likely to reduce competition among news content owners and could provide procompetitive benefits to both participating content owners and content users.

6. Conclusion

20. The U.S., like other jurisdictions, is considering whether and how the competition laws may be useful in protecting the press from the challenges posed by the rise of the digital platforms. A recent Congressional report highlighted a number of concerns regarding the imbalance of power between the dominant digital platforms and the press. This has prompted some to call for consideration of a new antitrust exemption for the news media to allow for collective negotiation.

²⁷ Letter from Christine A. Varney, Assistant Attorney General, Dept. of Justice Antitrust Division, to Charles E. Biggio, Esq., Wilson Sonsini Goodrich & Rosati (Feb. 24, 2010), <https://www.justice.gov/atr/response-mywire-incs-request-business-review-letter>.

²⁸ Letter from Christine A. Varney, Assistant Attorney General, Dept. of Justice Antitrust Division, to William J. Baer, Esq., Arnold & Porter, LLP, concerning the Associated Press's proposed News Registry (Mar. 31, 2010), <https://www.justice.gov/atr/response-associated-presss-request-business-review-letter>.