



*CPI's North America Column Presents:*

# News Media Cartels are Bad News for Consumers

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Antitrust has two legal standards by which to assess firm conduct. The first is the *rule of reason*, which applies to the majority of antitrust matters that appear before competition agencies. The second standard is *per se* condemnation, which is reserved for conduct that is deemed so plainly harmful that the act itself is sufficient to find liability – the canonical example being cartel price fixing. The reason why cartels are condemned under a *per se* standard is because there is little to no redeeming social value from allowing competitors to jointly set the terms of trade in a market. Put simply, cartels are the antithesis of competition. They collectively negotiate on behalf of their members in order to extract a greater share of the market surplus while also damaging the market through higher prices, lower output, and/or lower quality.

This takes us to the Journalism Competition and Preservation Act.<sup>2</sup> This bill was introduced with the professed objective of allowing small newspaper publishers to band together in negotiations with Facebook and Google in order to secure a more fair and equitable distribution of profits from online advertising.<sup>3</sup> As virtuous as that may sound, the reality is quite different. The bill would allow *all* online newspaper publishers (including conglomerates such as the News Corporation, AT&T, and Viacom) to form a cartel to fix prices and other terms of trade. This is not a bill aimed at small publishers, nor is it a bill aimed at ensuring “quality”<sup>4</sup> (which is often a red herring in antitrust as it invokes a desire for incumbents to create artificial barriers to entry). Rather, the bill would create antitrust immunity for colluding media conglomerates.

In this short article, we first describe precisely what is in the bill. Next, we describe the structure of the online news market, and the role that online platforms play in distributing news content. Finally, we detail the impact that such collusion would have on the market.

### **What actually is in the Journalism Competition and Preservation Act?**

The bill would create a “safe harbor” for four years to “*any* print or digital news organization [emphasis added]” (that creates “original” news and is commercially marketed) to jointly negotiate terms of trade with “online content distributor[s]” that “displays, distributes, or directs users to news articles” and “has not fewer than 1,000,000,000 monthly active users, in the aggregate, of all its websites.” Thus, despite a press release that contends the act “will allow small publishers to band together in negotiations with Facebook [&] Google,”<sup>5</sup> the bill is clearly not limited to small publishers as there is no discussion that places a limit on the size of the covered entities. Thus, conglomerates and large operations such as the News Corporation, AT&T, Viacom, the Walt Disney Corporation, the Fox Corporation, The New York Times Company, Bloomberg, the Gannett Company, and the Washington Post will be allowed to collude. Relevantly, according to Wired, the “prime driver of the bill is the News Media Alliance,”<sup>6</sup> a trade association comprised of 2,000 newspapers across the U.S. and Canada.

The bill clearly targets Facebook and Google, as they both have more than a billion monthly users; although, given that the bill offers four years of antitrust immunity, it is possible that

other online platforms will fall under its scope before expiration.<sup>7</sup> Specifically, the bill expressly allows media companies to “collectively withhold content from” Facebook and Google in order to extract better terms of trade.<sup>8</sup> Importantly, the bill expressly allows price fixing — although, the price fixing must be directly related to “the quality, accuracy, attribution or branding, and interoperability of news.”<sup>9</sup> The bill’s sponsors represent that this price clause does not “allow publishers to collude on price.”<sup>10</sup> Yet that answer is misleading, as the sponsors’ full answer reveals that collective negotiation over price is allowed (as stated expressly in the bill) as long as it is, again, directly related to “the quality, accuracy, attribution or branding, and interoperability of news.”<sup>11</sup> The plasticity of this clause suggests there is no real hinderance to price fixing.

Another key clause is that the media cartel must negotiate terms that are “non-discriminatory as to similarly situated news content creators” and, likewise, must negotiate “terms that would be available to all news content creators.” This “non-discriminatory” provision can be read a number of ways. At first blush, this clause would appear to protect news media organizations and sites who choose not to join the cartel — as the terms of trade that the cartel negotiates with online platforms would be “available to all news content creators.” The relevant phrase in the bill, however, is “similarly situated.” Even if this phrase were not in the bill, it seems plausible that the cartel would negotiate different terms of trade for different “tiers” of news organization (i.e. “similarly situated”). The *overall deal*, however, would be available to all news creators. For instance, *inter alia*, the News Corporation, The New York Times, and the Washington Post would be part of a top tier, which gets the most favorable terms of trade as it would be given some type of “A+” rating on “quality,” while smaller, local newspapers would be part of some lower tier — yet, overall, there would still be *one* ratified agreement. Thus, there would technically be no “discrimination” under the provision of the bill since the *overall* terms of trade are available to all news organizations. Moreover, there is nothing in the bill that prohibits the cartel from including a most-favorable nations (MFN) clause that would effectively limit the ability of individual news organizations, whether part of the cartel or not, from cutting side deals with online platforms. This would contractually, and *legally*, limit the fundamental feature that makes cartels vulnerable: defections.<sup>12</sup> Rather than being an actual non-discrimination provision, it is more accurately a *uniformity* provision.

### **The Role of Facebook and Google in News Distribution**

As justification for antitrust immunity, the bill states that “some dominant platforms serve as a de facto gateway to all online content for many web users, wielding an enormous amount of control over how readers find and interact with content produced by the press.”<sup>13</sup> Yet, an examination of publicly available data indicates that Google and Facebook do not account for the majority of traffic to news sites. Hence, the bill is built on a false premise.

In order to be a “gateway,” a platform must be responsible for the overwhelming majority of traffic to a website, *and* there must be no viable alternative outlets. While a systematic

empirical assessment of this question is beyond the scope of the article, there are a multitude of sources that are in conflict with this assertion. Focusing on The New York Times' website, statistics from SimilarWeb, which is an online analytical tool, show that *all* search engines account for 30.5 percent of traffic to nytimes.com.<sup>14</sup> While this is certainly a significant percentage, the most common search terms are “new york times” and “nytimes.”<sup>15</sup> This means users are, in effect, directly going to the New York Times website; they are merely using search engines as a method to “bookmark” the site. In terms of social media, according to SimilarWeb, *all* social media sites account for 11.2 percent of traffic to nytimes.com. For CNN, while the search engine statistics are similar to the New York Times, the importance of social media is much lower at 5.5 percent.<sup>16</sup> While these are just examples, a systematic study would likely show a distribution where some sites receive a great deal of referral traffic from search engines and social media, while others receive relatively little. Yet the point remains that there is little support for the notion that Facebook and Google are monopolistic gateways to news sites. For instance, Allcott & Gentzkow (2017) find top U.S. news sites received only 10.1 percent of their traffic from all social media sites and 30.6 percent from all search engines.<sup>17</sup>

Similarly, another justification for the bill involves a reference to a Pew Research Study to support the assertion that “the majority of Americans access news through only two platforms—Facebook and Google.”<sup>18</sup> Yet, according to the cited Pew Research study, Facebook is not unique in the percentage of users who consume news while on any given social media platform (68 percent).<sup>19</sup> For instance, both Twitter (74 percent) and Reddit (68 percent) have similar levels of news readership among their users. Additionally, the study states, “Getting news on social media doesn’t mean that other more traditional pathways to news are ignored.” Additionally, “Facebook news users are more likely to often get news from local TV than those on YouTube, Twitter and Snapchat.” The fundamental error that is being made is to suggest that, because users of social media and search engines get news from those sites, that it is the only source of news for these users — or even that it is the most important source of news for these users. It ignores the reality of multi-homing — not just in terms of online sites (which is typically how multi-homing is considered) but in terms of across online and offline sources. Another Pew Research report indicates that, in 2017, 50 percent of Americans often get news from television, 43 percent from online, 25 percent from radio, and 18 percent from print media.<sup>20</sup> Thus, again, the evidence does not support the assertion that Facebook and Google are monopolistic gateways for news outlets.

### **The Impact of Providing Antitrust Exemption to the Media Cartel**

Put simply, the impact of the bill is to legalize a media cartel. The bill expressly allows the cartel to fix the price and set the terms of trade for all market participants. The clear goal is to transfer surplus from online platforms to news organizations, which will likely result in higher content costs for these platforms, as well as provisions that will stifle the ability to innovate. In turn, this could negatively impact quality for the users of these platforms.

Furthermore, a stated goal of the bill is to promote “quality” news and to “highlight trusted brands.”<sup>21</sup> These are usually antitrust code words for favoring one group, e.g. those that are part of the News Media Alliance, while foreclosing others who are not “similarly situated.”<sup>22</sup> What about the non-discrimination clause? Will it protect non-members from foreclosure? Again, a careful reading of the bill raises serious questions as to whether it will actually offer protection. The bill only ensures that the terms of the negotiations are available to all “similarly situated” news organizations. It is very easy to carve out provisions that would favor top tier members of the media cartel.

Additionally, an unintended consequence of antitrust exemptions can be that it makes the beneficiaries lax by insulating them from market competition and, ultimately, can harm the industry by delaying inevitable and difficult, but necessary, choices. There is evidence that this is what occurred with the Newspaper Preservation Act of 1970, which provided antitrust exemption to geographically proximate newspapers for joint operations.<sup>23</sup>

There are very good reasons why antitrust jurisprudence reserves *per se* condemnation to the most egregious anticompetitive acts including the formation of cartels. Legislative attempts to circumvent the federal antitrust laws should be reserved solely for the most compelling justifications. There is little evidence that this level of justification has been met in this present circumstance.

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- <sup>2</sup> The act was introduced by Representative David N. Cicilline, the Ranking Member of the House Judiciary Antitrust Subcommittee, on March 7, 2018.
- <sup>3</sup> See <https://cicilline.house.gov/press-release/cicilline-collins-introduce-bill-provide-lifeline-local-news>.
- <sup>4</sup> See the bill's Fact Sheet at <https://www.newsmediaalliance.org/journalism-competition-preservation-act-fact-sheet-cicilline> ("The Journalism Competition and Preservation Act establishes a 48-month safe harbor for the free press to band together to negotiate with online platforms to improve the access and quality of news online").
- <sup>5</sup> See <https://cicilline.house.gov/press-release/cicilline-collins-introduce-bill-provide-lifeline-local-news>.
- <sup>6</sup> See <https://www.wired.com/story/bill-would-let-publishers-gang-up-versus-facebook-and-google>.
- <sup>7</sup> Also, the four-year expiration should be considered a "soft" expiration given that (a) the media organizations can easily lobby for an extension and/or (b) negotiate a long-term agreement that goes beyond four years.
- <sup>8</sup> See H.R. 5190, "Journalism Competition and Protection Act of 2018" ("A news content creator shall not be held liable under the antitrust laws for engaging in negotiations with other news content creators during the negotiation period to collectively withhold content from, or negotiate with, an Online Content Distributor").
- <sup>9</sup> See H.R. 5190, "Journalism Competition and Protection Act of 2018" ("A news content creator shall not be held liable...if—the negotiations with the Online Content Distributor—are not limited to price...and directly relate to the quality, accuracy, attribution or branding, and interoperability of news").
- <sup>10</sup> See Fact Sheet ("Q. Will the Journalism Competition and Preservation Act harm competition, unfairly prejudice platforms, or allow publishers to collude on price? A. No.").
- <sup>11</sup> See Fact Sheet ("Coordination that is limited to price, is not directly related and reasonable necessary to the goals of the bill, or is not directly related to promoting access to quality journalism is prohibited").
- <sup>12</sup> See George J. Stigler (1964), "A Theory of Oligopoly," *Journal of Political Economy* 72, pp. 44-61.
- <sup>13</sup> See H.R. 5190, "Journalism Competition and Protection Act of 2018."
- <sup>14</sup> See SimilarWeb.com for the site "[nytimes.com](https://www.nytimes.com)" (accessed April 18, 2019).
- <sup>15</sup> See <https://www.similarweb.com/website/nytimes.com#search>.
- <sup>16</sup> See <https://www.similarweb.com/website/cnn.com#overview>.
- <sup>17</sup> Hunt Allcott & Matthew Gentzkow (2017), "Social Media and Fake News in the 2016 Election," *Journal of Economic Perspectives* 31, pp. 221-236 at 222.
- <sup>18</sup> See the Fact Sheet, and also <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017>.
- <sup>19</sup> See <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017>.
- <sup>20</sup> See <https://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use>.
- <sup>21</sup> See <https://www.wired.com/story/bill-would-let-publishers-gang-up-versus-facebook-and-google>.
- <sup>22</sup> For example, the agreement could exclude certain sites or organizations that do not meet some strict definition of "original" news or, similarly, sites that the cartel deems as purveyors of "fake news." On its face, this could be justified as ensuring quality—yet, we should always be weary of quality measures defined and imposed by competitors.
- <sup>23</sup> See Daniel Gross, "JOA DOA? It's time to kill the antitrust exemption that allow rival newspapers to act like partners," May 8, 2003, Slate.com at <https://slate.com/business/2003/05/the-folly-of-joint-operating-agreements.html>.