CPI's North America Column Presents:

Countervailing Coordination Rights in the News Sector Are Good for the Public (A Response to Professor Yun)

By Sanjukta Paul & Hal Singer[1]

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Professor John Yun's recent CPI Column addressing Reps. Cicilline's and Collins' proposed Journalism Competition and Preservation Act ("JCPA") as legalizing "news media cartels" is a virtually perfect document of the reflexivity of modern antitrust's condemnation of horizontal coordination beyond firm boundaries. This rigidity results in an accommodation of dominance by a few powerful tech firms. If anything, the JCPA does not go far enough to liberalize coordination among newspaper publishers and other "news content creators" to benefit a healthy news ecosystem, although it would be a step in the right direction.

The key factual findings upon which the bill is based are three. First, according to a Pew survey, most Americans get news from a handful of online platforms, whether a search engine (Google) or a social media platform (Facebook or Google's YouTube). Second, dominant platforms typically dictate the terms of the relationships between themselves and news content creators, both in terms of splitting advertising revenues and in terms of the conditions under which readers will see certain content in the first place. Third, newspapers' and other news outlets' revenues have fallen drastically during the same period that their audiences have increasingly transitioned to reading online. Except for whether online platforms are in fact dominant (on which, more below), Professor Yun does not contest these central facts.

A logical regulatory response to this situation is to permit joint bargaining among news creators in their dealings with the platforms, explicitly including price coordination. The bill would indeed permit joint bargaining among "news content creators" (newspapers and other news outlets) in their negotiations with "online content distributors," principally powerful platforms like Facebook and Google — but only where those negotiations are "not limited to price" and only where they also "directly relate to the quality, accuracy, attribution or branding, and interoperability of news."[2] The problem with these conditions is that they are overly restrictive: the legislation would seem to require news outlets to prove, for any given instance of joint bargaining, that the negotiations at hand relate directly to news quality. This is an overly onerous burden, particularly for small publishers with little or no litigation budget, and it is also a waste of judicial resources.

The much better approach would be for Congress, having conducted appropriate investigation, to find that the relationship between content creators and platforms is generally lopsided and that this adversely affects news quality. Having drawn that conclusion, Congress ought to permit joint bargaining among content creators as to price negotiations. This finding is far better handled at the legislative level than at the level of episodic litigation, both in terms of legislative and judicial competencies and in terms of use of public resources.[3] The findings already contained in the JCPA, along with the basic economic insight that paying content creators an amount that undervalues their actual contribution to generating that revenue will result in reduced output in a critical segment of our economy, justify this regulatory approach. For now, let's put this issue with the bill aside and consider the merits of straightforwardly permitting joint bargaining among publishers/creators as to price, in their dealings with the dominant platforms.

Historically, a rigid stance against horizontal coordination beyond firm boundaries is relatively new. When the Sherman Act was passed, legislators explicitly discussed coordination among small producers or among economic actors forced to deal with one or a few dominant players, and they were quite united in supporting such coordination. In fact, there is good evidence that they rewrote the bill that became the Sherman Act precisely to avoid the conclusion that *all* price coordination among producers, regardless of market conditions, would be prohibited.[4] When confronted by one of his colleagues with the proposition that an earlier version of the bill could be interpreted to prohibit price coordination among farmers, laborers, or other small producers, Senator Sherman replied: "That is a very extraordinary proposition," adding "I desire to say distinctly that is not my idea or the idea of any one of the committee."[5]

Moreover, economic coordination of *some* kind is always necessary; antitrust law decides what kinds of coordination will take place, and how concentrated or democratic that coordination will be.[6] Numerous exceptions to antitrust's putative anti-coordination stance, both explicit and tacit, already exist. It is unclear why we ought to allow Google and Facebook to serve as *de facto* market coordinators for huge swaths of socially significant economic activity while condemning limited, countervailing coordination rights for newspapers. Some of this coordination by dominant platforms entails actually mandating that news publishers "port content to Facebook's website," on pain of much slower download speeds, thus ensuring that more advertising dollars flow to Facebook rather than news publishers.[7] Facebook's algorithm perversely rewards click-worthy (but often unreliable) stories by moving them to the top of users' news feed, and co-mingles sponsored content or ads alongside user-generated content in its news feed, thereby equating the quality of legitimate news and potentially fake news (not all sponsored content is fake news). This sort of anticompetitive conduct is tolerable for Professor Yun because it occurs inside the (colossal) firm boundaries of the tech platforms.

Antitrust condemns the type of coordination sought by the JCPA as a *per se* violation, Professor Yun argues, because "there is little to no redeeming social value from allowing competitors to jointly set the terms of trade in a market." Yet we explicitly allow for workers to be shielded from antitrust scrutiny in collective wage-setting, out of a recognition that workers are atomistic relative to employers and therefore workers could be exploited if forced to bargain individually. The principles animating this exemption naturally extend to atomistic news publishers in their dealings with Facebook and Google. More generally, antitrust law already contains numerous other exemptions, including those relating to professional sports, agricultural cooperatives, and health insurance. Antitrust grants the biggest exemption of all to the business firm itself, one which has been effectively expanded by the regulatory tolerance for market dominance by one or a few powerful firms.

In deploring the possibility that larger media outlets could avail themselves of the protections of the JCPA, Professor Yun understates the dominance of Google and Facebook, and overstates the countervailing power of even well-established newspapers like the *New York Times*. Even the *New York Times* is small in content space relative to Facebook's footprint in the online distribution space. Facebook accounts for over half of all social media site visits in

the United States,[8] and Facebook and Google combined account for over 60 percent of the U.S. digital advertising market according to eMarketer.[9] Facebook can live without the *New York Times*, but the *New York Times* cannot live without Facebook-generated traffic. As Professor Yun acknowledges, the *New York Times* depends on social media and search engines for an impressive 11 and 30 percent of its traffic, respectively. Because the *New York Times* is larger than most news publishers, it follows that the dependence of typical news outlet on Facebook and Google is even greater. Indeed, analytics consultancy Parse.ly estimates that in the last twelve months, Facebook and Google generated more than 80 percent of external traffic to Parse.ly's network of online media sites.[10] In the absence of coordination among news publishers, the online ad duopoly will appropriate most of the value created by news sites, leading to reduced news output and edge innovation. Larger news outlets should be included in the JCPA protections because their presence at the negotiating table will benefit smaller news outlets — an aspect that Professor Yun ignores.

Finally, Professor Yun's argument in the context of online news fails to recognize the "zero-price" nature of tech platforms. The antitrust establishment often condemns economic coordination among input suppliers on the ground that it would raise consumer prices. Putting aside the merits of that argument as a general matter, it is entirely inapposite here — because the consumer price for accessing news via the dominant platforms is already zero. (Some news sites charge a subscription, but even they offer a few articles per month for free.) Permitting coordination among publishers in their dealings with Facebook and Google would affect the *distribution* of ad revenue between original publishers and the dominant platforms; it would not affect the price to consume news.

Now, the nature of this distribution of advertising revenue does affect consumers, but in a different way than Professor Yun implies. The current highly lopsided power balance between platforms and original publishers means that platforms gobble up ad revenue and add to their already enormous profits, which has no discernible consumer benefit. However, as newspapers and other news outlets are continually squeezed on their margins, if they can survive at all, they are decreasingly able to invest in quality news reporting — not to say investigation — and are forced to churn out quick "click-bait" in order to break even, if they're lucky. Allowing news outlets to capture a larger proportion of ad revenue would permit investment in quality reporting and investigation, with obvious consumer benefits and indeed, sorely needed social benefits in terms of democratic functioning.

[1] Sanjukta Paul is Assistant Professor of Law at Wayne State University. Hal Singer is Managing Director at Econ One and Adjunct Professor at Georgetown's McDonough School of Business.

[2] H. R. 5190 (March 7, 2019), § 3(b)(1)(A).

[3] If there is a concern that market conditions could change so that a positive relationship between joint bargaining (among creators) and news quality would no longer obtain, then this could also be accomplished by delegating the duty to periodically re-examine market conditions to the appropriate agency.

[4] This argument is further developed in Sanjukta Paul, *Solidarity in the Shadow of Antitrust* (under contract with Cambridge University Press).

[5] 20 Cong. Rec. 1458 (Feb. 4, 1889).

[6] Sanjukta Paul, "Antitrust as Allocator of Coordination Rights," 67 UCLA Law Review (forthcoming).

[7] Hal Singer, "How Washington Should Regulate Facebook," *Forbes*, available at https://www.forbes.com/sites/washingtonbytes/2017/10/18/what-to-do-about-facebook.

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