TECHFREEDOM
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September 14, 2022

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
United States Senate

The Honorable Mike Lee
Ranking Member
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
United States Senate

Re: September 15, 2022 Markup: Journalism Competition & Preservation Act (S. 673)

Dear Senators Durbin, Klobuchar, Grassley, and Lee:

Last week, we wrote to express our concerns about how the JCPA could affect content moderation. While the bill aims to protect serious journalism, we explained why courts are likely to interpret it to allow extremist, pseudo-journalistic publications that peddle noxious content to qualify as "digital journalism providers"—and thus benefit from the bill.

We appreciate your latest amendments. They begin to address our greatest concern: that the bill would amount to a "must-carry" mandate for false or corrosive content that platforms do not wish to display on their services. But the bill continues to invite extensive and protracted litigation over content moderation, which will deter platforms from engaging in moderation in the first place. We also remain deeply concerned that the bill will operate as a "must-pay" mandate for all DJPs because a covered platform must pay any DJP whose content it "accesses," whether or not it displays that content.

Must-Carry. The bill's definition of retaliation remains so broad ("refusing to index content or changing the ranking, identification, modification, branding, or placement of the content") that essentially *any* content moderation decision could be framed as "retaliation" against a DJP participating in a negotiation. Again, distinguishing between genuine retaliation and complaints over content moderation is a question of fact that courts will likely be unable to

resolve before trial. That means the threat of litigation will be a powerful weapon against content moderation involving refusals to carry, or "downranking," of objectionable content.

Must-Pay. A DJP can still sue platforms for discriminating against it based on viewpoint in "connection with a negotiation… or arbitration." Today, platforms refuse to allow monetization of various controversial or inflammatory topics depending on the viewpoint expressed: *e.g.*, supporting versus opposing racism, denying versus documenting school shootings. The only sure way to protect platforms' ability to make such distinctions is to remove the ban on viewpoint discrimination.

Furthermore, the definition of "access" in the current text of JCPA—"acquiring, crawling, or indexing content"—triggers payment obligations too quickly. It would require covered platforms to pay for content before they even know what it is, much less decide what to do with it. Unless a site is already on a blacklist, before a platform "crawls" content on that site, it has no way of discerning the nature of the content. Crawling is *how* a platform decides whether it wants to carry content and how to handle it. But under the JCPA, a platform that "crawls" content may be obligated to pay for the privilege of deciding that the content violates its terms of service. The definition of "access" should exclude circumstances where a covered platform crawls content that it subsequently determines violates the platform's content policies. The same should go for "programmatic access," a term that is currently left undefined.

Consider also content uploaded or posted by DJPs directly *to* a covered platform. By any reasonable definition the platform will have "acquired" such content. Only after content is uploaded or posted can the platform analyze it to determine whether it violates that platform's content rules. A DJP with an agreement under the JCPA could upload or post content that clearly violates that platform's rules (because, *e.g.*, it glorifies terrorism or incites violence)—and trigger the platform's obligation to pay without any action by the platform itself. This is a perverse result with significant potential for abuse, and it does nothing to alleviate concerns about platforms' allegedly unfair profits from their use of external content. This shortcoming could be addressed by excluding from the definition of "access" any content uploaded or posted directly to a covered platform's service.

Narrowing the definition of "access" and "programmatic access" in this way should mean that websites do not have to pay for content they choose not to carry for editorial reasons. But it would not prevent disputes over a critical aspect of content moderation: enforcing policies regarding content that *is* carried on a site but is also deemed ineligible for monetization.

An affirmative defense could protect such exercises of editorial judgment and guard against the abuse of both the anti-retaliation and non-discrimination provisions: If a platform can show that it has applied public, generally applicable content moderation or monetization policies in good faith based solely on the objectionable nature of the content, it should not be required to pay for that content or otherwise be subject to liability. Such an amendment would reflect a fundamental constitutional principle: the First Amendment protects the editorial judgments of media companies but not their business practices. Thus, if they are not deleted altogether, we suggest amending Section 6(a) and Section 6(b)(1) to provide a safe harbor that can be used to quickly dismiss any suits filed against efforts to moderate or downrank content in good faith.

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Again, we appreciate your attention to our concerns about content moderation. While the amendments we outline above do not address all our concerns about the bill, they would reduce some of the unintended problems the current draft would create. We remain ready to assist your committee in understanding these difficult issues.

Sincerely,

TechFreedom

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