Comment of NetChoice on Reviving Competition, Part 2: Saving the Free and Diverse Press before the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law

March 12, 2021

NetChoice

Introduction & Background on the News Industry

For over a century the newspaper industry relied on a mixture of subscription fees, paper sales, and ad sales for revenue. That business model was built around the needs and capabilities of the time, but has since become largely outdated in the post-digital age. The development of the internet increased competition in news and commentary by allowing anyone with a computer to get the news from any digital publication anywhere in the world. The internet also created millions of new places for advertisers to advertise their products or services.

Because the news industry is an institution closely linked to our country's democratic ideals–we want the news to hold our elected officials accountable, for example–the increased competition that results from the internet comes as a mixed bag. On the one hand, lawmakers should celebrate that the average American now has access to more news than ever before and all for less money. Likewise, small businesses have hundreds, if not thousands, of new and different options for advertising, also for less money. On the other hand, the emergence of this new form of competition has contributed to at least some small, local news outlets struggling to stay afloat.

Given the news industry's important role in liberal democracies, policymakers at home and abroad are understandably concerned about maintaining the industry's viability in our increasingly digital age. While policy prescriptions vary, there is a growing belief that to help the news industry, governments must weaken digital platforms like Facebook and Google.

Not only is using government power to attack a few specific businesses bad policy, it fundamentally misdiagnoses the cause of the news industry's financial woes. For starters, it's the *entire* internet that has put pressure on the news industry's old business model, not a specific internet platform or two. And this view ignores that these platforms have actually helped the news industry adapt in the face of the internet's competitive pressure and to enter the digital age. The truth is, few things have empowered democratized journalism and decentralized news more than the emergence of the internet.

Facebook and Google have built incredibly valuable ad tech platforms that give advertisers more bang for their buck. Thanks to interest-based advertising, for example, small- and medium-sized businesses can spend less money while reaching the most relevant consumers, rather than relying on expensive ads that reach broad but not necessarily relevant audiences. In fact, Facebook and Google built ad tech that goes beyond what newspapers once offered–many of their advertising customers are those who never advertised in the past. They created an entirely new business model that meets the advertising needs of a previously unserved community.

In fact, the internet is full of websites that offer new advertising options that former newspaper staples now use instead. Consider real estate agents. Before the internet's rise, they listed homes in newspapers for a hefty price. Although some still list homes there, many more rely mostly on digital platforms like Zillow, Redfin, and Trulia. Because real estate agents use these subscription-based websites, they have less of a need to list homes in newspapers.

Similarly, product manufacturers and sellers use the internet to advertise their products and services. Before the internet, Duracell Battery may have advertised its batteries in the newspaper, but these days, it'll use targeted advertising on Walmart's online marketplace too. At bottom, Facebook and Google didn't steal the newspaper industry's customers. Nor did they rob it of money or misuse its content. Instead, the internet subjected the industry's business model to competition–from every direction.

But more fundamentally, the development of the internet and the rise of these incredibly innovative digital platforms has actually spurred the creation and monetization of decentralized news and journalism in the United States and abroad. For example, many local newspapers that would have been forced to shutter their doors as a result of their dwindling print readership have instead transitioned to an online format that greatly lowers their costs and better serves the needs of their customers. Rather than harming these publications, the internet has actually given them a way to survive.

In turn, digital platforms have continually driven traffic and new readership to smaller outlets as a result of their search and dissemination capabilities. Previously, a local publisher hoping to attract new readership had to rely primarily on recommendations from current readers, advertising through other mediums, or an important event in the local area driving interested parties to their paper. Now a search provider like Google can help display these publications to a much wider audience of people that may not previously have been exposed to them. Someone looking to find the relevant publication for their specific interests or the topics each paper writes on can now execute a quick Google search and easily identify relevant articles and publications. In addition, social media companies like Facebook and Twitter empower local publications by allowing users to share this content with their friends and family–the people to whom it is often most relevant–driving even more traffic to these publishers. In fact, in the past three years Facebook and Google each pledged $300 million to support initiatives aimed at promoting local journalism.[1]

Furthermore, a number of new outlets and publications have emerged as a direct result of our increasingly digital age. Outlets like Vox, HuffPost, and the Daily Caller were born online and would not exist in a pre-internet world. Axios–another publication to emerge as a result of the internet–recently announced that it is launching a variety of local publications to support regional news throughout the country.[2] The internet has virtually eliminated barriers to entry in the news sector. Almost anyone can quickly, easily, and affordably set up a new website or publication, or use an existing one such as Medium or Blogspot, to promote and distribute their own work and the work of others online.

---

[1] Hamza Shaban, Why Facebook is giving $300 million for local journalism, Washington Post (Jan. 15, 2019), https://www.washingtonpost.com/technology/2019/01/15/facebook-pledges-million-local-journalism-projects/; Hamza Shaban, Google announces plan to combat spread of misinformation, Washington Post (Mar. 20, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/03/20/google-announces-plan-to-combat-spread-of-misinformation/.

[2] Axios, Axios Local, https://www.axios.com/local/.

Today, almost every American can contribute to the creation and dissemination of news themselves through online platforms such as Facebook, Twitter, and Reddit. These platforms empower users to share important information throughout their social systems with just the click of a button. Local community groups use these platforms to provide users with more information than was ever possible under the newspaper model for local journalism. Parents and families create Facebook groups dedicated to specific schools and community organizations that allow them to share large quantities of information immediately in ways that were previously impossible. By contrast, a local newspaper is unlikely to write a blurb about an upcoming dance or fundraising drive, but parents and educators use digital platforms to do just that.

And while the newspaper subscription-based model may no longer be as viable as it once was, advertising is more viable than ever. Newspapers and publications can now monetize their journalism in a way that provides a much needed source of revenue as more and more of our daily freetime is spent online. This is one of the main reasons the internet has enabled such a vast array of new and often niche publications to emerge.

While it is easy to bemoan the impact that the digital age has had on traditional media, it is important to remember that the internet has also democratized and decentralized the free flow of information like virtually nothing else.

Proposed Reforms

Unfortunately, some of tech's critics are missing the facts on the ground. Latching on to concerns about journalism's viability, they argue that Facebook and Google are responsible for virtually all of the industry's woes. And that only "bold" reform that redistributes revenue from tech businesses to newspaper providers will solve the industry's problems. Outside the United States, these reforms include everything from explicit calls for the state to support the newspaper industry to government-mandated "negotiations" between American tech firms and foreign media outlets. But all of these reforms are a mistake abroad and should not be imported into the United States.

Australia's Approach: Media Bargaining Code

Start with Australia's Media Bargaining Code. Australian lawmakers, bowing to pressure from News Corp., planned to shake down successful American tech businesses and give the money to Rupert Murdoch's media conglomerate. Although watered down, the proposal still risks devastating the open internet and hurting users everywhere.

First, Australia's plan is just crony capitalism and it manipulates industrial policy to further line the pockets of a few lucky Australian corporations at the expense of American citizens and consumers worldwide. That's why Google, Facebook, and the U.S. government opposed the effort.[3] Under Australia's Media Bargaining Code, Australian media conglomerates would have the legal right to force American businesses to bargain over prices for displaying links to or story snippets from those publications. Any disagreements over prices would be settled and finalized by an Australian arbiter.

---

[3] Calla Wahlquist, U.S. Attacks Australia's 'Extraordinary' Plan to Make Google and Facebook Pay for News, The Guardian (Jan. 18, 2021), https://www.theguardian.com/media/2021/jan/19/us-attacks-australias-extraordinary-plan-to-make-google-and-facebook-pay-for-news.

Although billed as a tool to help the news media, the code actually helps only a few traditional Australian outlets, including large, profitable conglomerates like News Corp. and tech's opportunistic competitors like Microsoft.

What's Really Going On

This is classic rent-seeking from a few large corporations. As the New York Times describes it, "Australia's assertive challenge to the online giants has placed it in the vanguard of a movement to bolster a traditional news media ecosystem that America's trillion-dollar tech companies threaten with extinction.. [and] has become a focal point of [tech's] global efforts to limit regulation, as governments around the world look to rein them in."[4]

That's because, thanks to the internet, people can read the news from millions of outlets and from all over the world. Google Search makes it easy to read stories from well-known outlets like the *New York Times* and the *Wall Street Journal* as well as from newer outlets like Vox and Slate. Facebook, too, helps consumers discover different news outlets and sources.

Despite record profits and ratings, traditional media giants–including Murdoch-owned channels like Fox News–find new and thriving digital competition threatening.

Enter Australia. Pressured by one of the world's richest and most powerful businessmen, Rupert Murdoch, the country wants to put its thumb on the scale and lend a helping hand to the

[4] Damien Cave, An Australia With No Google? The Bitter Fight Behind a Drastic Threat, N.Y. Times (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/business/australia-google-facebook-news-media.html.

Australian media magnate.[5] Rather than admitting this unseemly and politically toxic manipulation, lawmakers are instead trying to cloak the subsidy as leveling the "value exchange" between Big Tech and Big Media.

What Australian lawmakers overlook is how American tech businesses already supply immense value to media companies. Just as Google and Facebook drive traffic to online outlets like Vox and National Review Online, they drive traffic to traditional media outlets like the *New York Times* and the *Wall Street Journal* through their online versions, nytimes.com and wsj.com. In fact, Google Search directed over 3 billion clicks, worth about $218 million, to Australian publishers last year.[6] Tech also drives advertisers to publisher websites. Because advertisers go where consumers are, increased web traffic means increased advertiser interest, which means increased advertising revenue.

As if that were not enough, Google and Facebook also have direct partnerships with thousands of publishers. Both have negotiated individual contracts with publishers to pay them for featuring their content. That's on top of the free benefits and expanded reach for readership these publishers receive from Google Search results or from Facebook's news feed. This is in

[5] Zoya Sheftalovich, Australia Reveals How it Will Make Google and Facebook Pay for News, Politico (Jul. 31, 2020) https://www.politico.eu/article/australia-reveals-how-it-will-make-google-and-facebook-pay-for-news/.
[6] Google, 13 Things You Need to Know About the News Media Bargaining Code (Aug. 24, 2020), https://australia.googleblog.com/2020/08/13-things-you-need-to-know-about-news.html.

addition to the billions they've invested in helping publishers[7] and small publications thrive in the digital age.[8]

This heavy-handed government intervention on behalf of News Corp will take away the benefits competition in digital markets provides. Australia's Code, for example, would require Google and Facebook to buy links whether they use the content or not—forcing Google and Facebook to subscribe to all of the media's content even if that content isn't relevant to Google and Facebook's users.

Distorting Competition in Tech

Beyond breeding cronyism in Big Media, Australia's Code also risks distorting competition and innovation in the tech industry. Consider that Microsoft, a competitor of both Facebook and Google, supported Australia's code. While it claimed to do so because it worries about journalism's survival, its support is opportunistic at best.

As the owner of Bing, Microsoft knows full well that the internet relies on the free sharing of information, including links to information. And so it understands that if its competitors have to pay for linking to information–even information they don't use–it'll put them at a competitive disadvantage.

To disguise this attempt to curry special favors from the Australian government, Microsoft has cloaked its support of the Media Bargaining Code in concerns about the news industry.

---

[7] Catherine, Thorbecke, Google Pledges $1 Billion Over 3 Years to Pay News Publishers for Content, ABC News (Oct. 1, 2020), https://abcnews.go.com/Business/google-pledges-billion-years-pay-news-publishers-content/story?id=73362110#:~:text=Google%20has%20announced%20a%20%241,the%20%22Google%20News%20Showcase.%22.

[8] Campbell Brown, The Next Step in Our Journey to Help Local News Publishers, Facebook (Aug. 2, 2018) https://www.facebook.com/journalismproject/facebook-next-step-in-journey-news-publishers.

Microsoft has gone so far as to argue that its support of the Code illustrates how it cares more about misinformation than other tech businesses. Microsoft is now running the same play in the United States.

But Microsoft's ignores its own actions. If the company's concern were genuine, it would look internally first: a recent study showed that Bing is plagued by disinformation and does significantly worse than Google Search in combating it.[9] Additionally, Microsoft might also examine its decades-long relationship with News Corp.[10]—another "sensational, less reliable content" producer with a "70 per cent stranglehold on print readership," as former Australian Prime Minister Kevin Rudd put it.[11]

Ramifications

Australia ignores the benefits today's consumer-focused internet provides and tries to cast large media companies like News Corp victims. While Australian lawmakers want a David-versus-Goliath story, this is a story about consumers losing to large corporations.

If Australia passes the proposed code of conduct, internet platforms will have no choice but to restructure their business models or leave Australia. The open internet we now have relies on information sharing. Google and Facebook's business models facilitate that in consumer-friendly ways by organizing the

---

[9] Daniel Bush & Alex Zaheer, Bing's Top Search Results Contain an Alarming Amount of Disinformation, Stanford (Dec. 17, 2019) https://cyber.fsi.stanford.edu/io/news/bing-search-disinformation.

[10] Richard Trenholm, Microsoft and Murdoch ganging up on Google?, CNet (Nov. 23, 2009) https://www.cnet.com/news/microsoft-and-murdoch-ganging-up-on-google/.

[11] Kevin Rudd, Rod Sims' big tech fixation blinds him to Murdoch's monopoly, Financial Review (Feb. 7, 2021) https://www.afr.com/companies/media-and-marketing/rod-sims-big-tech-fixation-blinds-him-to-murdoch-s-monopoly-20210203-p56zam.

internet's content so users can easily find the information they need.

But if tech businesses have to pay simply to provide links to information, or short snippets from websites, the free and open internet will be no more. As the creator of the World Wide Web explained, Australia's Media Bargaining Code "risks breaching a fundamental principle of the web by requiring payment for linking between certain content online."[12]

Imagine if you had to pay every time you linked to an article in an email or text message, or a blog post like this explaining current events. Real-time information sharing would be far less common. And yet, Australian lawmakers think it's okay so long as those paying are American tech businesses. Nevermind the global detriment this would have on all consumers.

But regardless of price, paying for links is simply not feasible. Google and Facebook's business models rely on organizing information and making it easily accessible to users. That can't be done if some content–Australia's code doesn't even specify what exactly counts as news–must be paid for just to be linked to.

None of this is necessary. Under existing practice, publishers can opt out from having their content shared. For example, Google Search won't provide snippets from websites that indicate they don't want snippets shared. Likewise, Google's algorithms will exclude links to websites that ask not to be listed in search results. So if publishers are genuinely worried about their content being shared, they may simply opt out.

---

[12] Calla Wahlquist, Australia's proposed media code could break the world wide web, says the man who invented it, Guardian (Jan. 19, 2021) https://www.theguardian.com/media/2021/jan/20/australias-proposed-media-code-could-break-the-world-wide-web-says-the-man-who-invented-it.

Unfortunately for everyone, including the Australian public, Australian lawmakers want both the benefits of American tech, including web traffic, and additional special benefits that forced payments to select Australian media conglomerates could provide.

U.S. Approach: Exempting the News Industry from Antitrust Enforcement

While Congress believes it must throw local journalists a lifeline, shielding news and media corporations from federal antitrust enforcement would likely sink them. Proposals like the Journalism Competition and Preservation Act, for example, would free the media from the Sherman Act's prohibition on restraining trade or acting anticompetitively.[13] The proposal's supporters argue that, by allowing news and media corporations to band together, they'll have more leverage to extract favorable terms from advertisers, Big Tech, and consumers. In reality, it'll help only the big guys, disrupt the free and open internet, and leave Americans worse off. And this cronyist merger between Big Media and Big Government is even more problematic given journalism's foundational role in keeping public officials in line. By giving government officials more leverage over journalists, we risk deterring the critical, hard-hitting pieces that provide a check on our officials and threaten to undermine public trust in both media and government.

[13] Taylor Hatmaker, Lawmakers want to empower publishers to collectively negotiate with Facebook, TechCrunch (Mar. 10, 2021) https://techcrunch.com/2021/03/10/journalism-competition-and-preservation-act-reintroduced-cicilline-klobuchar/.

The Exemption Will Entrench Media Conglomerates & Hurt Local Journalists

This antitrust exemption won't keep local journalism above water. Instead, it'll entrench large media corporations like the New York Times Corp., Ginette, and News Corp. Start with the obvious. If Congress's goal is to help local journalists, the exemption should not apply to large, national conglomerates. Consider the *New York Times*. Late last year, the paper announced that its online subscription revenue rose 34%, while its print subscription revenue fell 3.8%.[14] Even with the drop in print subscribers, the *Times* still brought in $426.9 million in revenue from September to November last year.[15] And it had a cash hoard of $800 million on hand, no debt, and $250 million available in credit.[16] Simply put, the *Times* is not struggling.

Even so, some are tempted by the fantasy that the *Times* and its brethren will band together with local papers and negotiate for the industry's common good. Perhaps. More likely, however, large media conglomerates will use the congressionally blessed cartel to serve their own interests. Or worse: the cartel will behave as cartels usually do and pad their pockets at Americans' expense.

First, consider who the cartel would protect. Large media conglomerates like the New York Times Corp. and News Corp. would have disproportionate power because they make up the bulk of links shared on the internet. What's more, hedge funds also own

---

[14] Edmund Lee, New York Times Hits 7 Million Subscribers as Digital Revenue Rises, N.Y. Times (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/business/media/new-york-times-q3-2020-earnings-nyt.html#:~:text=As%20online%20subscription%20revenue%20rose,30%20percent%2C%20to%20%2479.3%20million.

[15] Id.

[16] Id.

newspapers and, as we know, hedge funds look aggressively for ways to cut costs while increasing profit. So even if we trust the *Times* and *Wall Street Journal* to take principled stands for the free press, hedge fund-owned media should give us pause. At bottom, all of these entities will have *their* individual bottom lines to advance. And when differences inevitably arise over what's best for them and what's best for local papers, it'll be the former that wins out. Indeed, even as Congress views this as a news-media-versus-tech-businesses struggle, news and media outlets still compete against each other.

Second, even if the cartel's members agree with each other, it'll only be a matter of time before it uses its power to strongarm tech businesses in ways that hurt Americans. For example, it's in the cartel's best interest to *prevent new entrants*. Like all incumbent businesses, existing newspapers and media outlets worry about innovative newcomers who give them a run for their money. So even though Vox's interests may differ from the *Times'* right now, once they are all under the same umbrella, immune from antitrust enforcement, they'll have every interest in using the cartel to lock out newcomers.

Remember, the internet and tech platforms enable millions of independent voices to gain name recognition and reach millions for free. If the cartel negotiates lopsided deals with tech, tech platforms may reasonably conclude that they must limit who can share links to certain outlets to the exclusion of newcomers. And even if that doesn't happen with "Big Tech," it may happen with smaller tech platforms that can't afford the prices set by the Big Media Cartel and agreed to by Big Tech. That in turn would mean today's most popular platforms gain a leg up on their smaller competitors.

The Exemption Risks Undermining the Free and Open Internet

Since the internet's rise, Americans have frequently shared links to websites for free. Just as we don't expect a user to pay for sending a link by email, we shouldn't expect platforms to pay when their users share links. Indeed, paying for links to content is antithetical to the internet as we currently know it.

To be sure, that the internet is open and free does not give others license to steal and republish content. But copyright law, including the DMCA, is sufficient in policing and punishing outright copying of content. It is simply not true that tech platforms "take" content from publishers; instead, they host links *to* that content.

But if the mere hosting of links is enough to require negotiations with the Big Media Cartel, we can expect far less content and link sharing. Platforms will understandably seek to limit how many links are shared, or will restrict the available links that can be shared, in an effort to control costs. The cartel, meanwhile, will only grow emboldened to make more and more demands.

The Exemption Will Hurt Americans

At bottom, the exemption will harm American consumers. As antitrust law has long recognized, when businesses collude, consumers often pay for it. Here, the exemption would remove federal and state oversight of the news media. And it would bless the intentional creation of trade restraints and anticompetitive tactics. Even if set to sunset, this exemption will reduce competition, drive up subscription costs, drive away newcomers, and potentially spillover into the tech platforms. It may, for example, encourage platforms to ditch their free-to-use business model for a subscription-based model, like what Hulu uses.

In fact, that is likely among the reasons why Microsoft supports legislation like this. As in Australia, Microsoft stands to benefit from any law that hurts its competitors, including Facebook and Google. Although the exemption would affect Microsoft too–it owns Bing Search, for example–it will disportionately hurt its competitors, which makes it a net win for Microsoft. That would mean that Microsoft won't have to invest in improving Bing; it could instead rely on the cartel toppling or hurting its competitors.

Bottom Line

Few doubt the important role a free press plays in global democracies like the United States. But contrary to critics' claims, America's tech businesses help the free press. Thanks to Google and Facebook, people have access to more news sources than ever before. And thanks to them, people have access to more news sources for free than ever before. That may not be great for some media outlets who'd prefer readers pay for a subscription, but it is a victory for the public.

Even as tech breaks down economic barriers to how we get and consume content, media and journalism remains viable and, in fact, very profitable. As the *Times* shows, millions of people are more than willing to subscribe to media outlets to access high-quality reporting. And advertisers are still willing to advertise with media sources even as consumers surf more and more websites.

Thanks to the free advertising and web traffic that American tech provides, thousands of small and niche publications are able to gain followers. Without devoting large chunks of their operating budgets to reaching readers, publications like Vox can attract readers simply by writing relevant stories that show up in search results or that are shared on Facebook. This is a victory for the free press.

That's not to deny that some local publications are struggling. To the contrary, it's to highlight that today's dynamic news industry, changed for the better by the tech industry, will be harmed, not helped, by proposals like Australia's Media Bargaining Code and the antitrust exemption.

Policymakers should be working to make it easier, not harder, for everyday citizens to access the news they desire. NetChoice stands ready to work with them to help achieve that end. NetChoice also appreciates this opportunity to comment on this important issue.

Sincerely,

Carl Szabo, Vice President & General Counsel, NetChoice