

Legislative Options for Supporting Local News: Alternatives to Copyright Reform

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TRANSCRIPT

Thank you. First, thank you all for inviting me. And I know we have our bios online, but just so you have some background about me because it's going to inform what I say today. I work at the Congressional Research Service, a nonpartisan agency that is part of the Library of Congress. Our job is to give nonpartisan expert analysis to members of Congress and their staff. CRS works exclusively for Congress, but the reports that we write are available to the public. So, if you want to learn more about some of the comments that I'm saying today in writing, you can go to crsreports.congress.gov, where you can find the paper that my colleague and I wrote about newspapers.¹

In other words, I take no position. I'm just explaining. I can talk about competition issues. Prior to working at the Congressional Research Service, I spent almost ten years at the Federal Communications Commission ("FCC"), including a six-month detail at the Antitrust Division of the Department of Justice plus five years working in the private sector at Univision.

That said, I also have a slightly different perspective today than I would have a month ago. That is in part to my experience with my wife, Charlotte Scherer, who's up there, who used to live in Fort Myers, Florida, where I would commute to see her.

My definition of local versus national news has expanded somewhat in September during Hurricane Ian. I also have an aunt who lives in Port Charlotte. In order to figure out what was going on, and particularly since she lost electricity, I used Google News to search for the Fort Myers news gazette.

Because the local television station went off the air, the station relied on Facebook Live to report the weather. In order to tell my aunt what was going on, I actually

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1. DANA A. SCHERER & CLARE Y. CHO, CONG. RSCH. SERV., R47018, STOP THE PRESSES? NEWSPAPERS IN THE DIGITAL AGE (2022).

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monitored local news sites from my desk in Washington, D.C. This personal experience adds some perspective.

I also noticed that the local organizations were able to give some nuance and have some details that the national organizations, that were kind of flying in, just didn't have. I relied on the local news sites that definitely offered a different perspective.

That said, I'm going to talk about four different bills that have been introduced by members of Congress that address some non-copyright policy options. And then also describe one in detail, which Ariel² and Hal³ are also going to talk about, which was also mentioned, the Journalism Competition and Protection Act.

First, I'm going to talk about a couple of bills that have been introduced. Some have gone further than others. One would establish a committee. It's called the Future of Local News Act of 2021.⁴ It would have thirteen members, including eight appointed by members of Congress, to study the state of local news, make suggestions for policy, not unlike what we're doing today. And so far, it's been introduced in the House and Senate and hasn't gone further.

The second option, which we've also heard discussed, would provide tax breaks, including payroll tax breaks, for media organizations that hire journalists, and potentially, also give tax breaks to people who subscribe to local media.⁵

That proposition got a little bit further. Parts of it were included in the Build Back Better compilation or the legislative package.⁶ It was passed by the House as a big omnibus bill. The Senate did not go forward with that. The bill that ultimately became law, known as the Inflation Reduction Act, did not include these kinds of tax breaks. This legislative option remains on the table.

And then the third policy option goes to what Colin⁷ mentioned. He stated that when people, that is consumers, use Google or Facebook to link to a news website, then the news website publishers can make money from digital advertising. This option also addresses Neil's⁸ point about there being Google and Facebook, but particularly, Google having such a big role as intermediaries.

If you look at my report, you'll actually see my boxes and arrows describing all the different components of the advertising technology supply chain. One senator referenced a Google employee who likened it to Goldman Sachs or Citibank owning the New York Stock Exchange.⁹

That's because Google is both buying advertising on behalf of advertisers on websites on media sites, and acting as the seller on behalf of media organizations.

2. Ariel Katz, another panelist at the 2022 Kernochan Symposium.

3. Hal J. Singer, another panelist at the 2022 Kernochan Symposium.

4. Future of Local News Act, H.R. 3169, S. 1601, 117th Cong. (2021).

5. Local Journalism Sustainability Act., H.R. 3940, S. 2434, 117th Cong. (2021)

6. Build Back Better Act, H.R. 946, 167 CONG. REC. H6375, H6560–H6561 (2021).

7. Colin Stretch, another panelist at the 2022 Kernochan Symposium.

8. Neil Netanel, another panelist at the 2022 Kernochan Symposium.

9. Press Release, Mike Lee, Senator, Lee Introduces Digital Advertising Act (May 19, 2022), <https://www.lee.senate.gov/2022/5/lee-introduces-digital-advertising-act> [<https://perma.cc/P5KH-XETP>] [<https://web.archive.org/web/20230428020721/https://www.lee.senate.gov/2022/5/lee-introduces-digital-advertising-act>] (citing a Google employee).

Because Google is also selling its own advertising and collecting data, some argue it's not necessarily acting in the best interests of all the people on that entire supply chain.

And for that reason, governments in Australia and Europe and now the U.S. have proposed focusing on the ad technology component between these revenue sources.

Senator Mike Lee introduced a bill called the Competition and Transparency in Digital Advertising Act.¹⁰ This bill would rely on antitrust enforcement. The bill would effectively require certain companies generating more than \$20 million digital advertising revenue annually to divest components of their ad tech divisions. It would also require any agents acting on behalf of buyers or sellers of advertising to represent their interests, just like a real estate broker is supposed to represent the interests of people who are buying and selling houses.

The bill would prohibit them from coordinating or sharing information. Even among buyers and sellers within same "agency," the bill would apply the same kind of rules. So that's the third legislative option.

The fourth bill, which we are going to go into a little bit more today, is the Journalism Competition and Preservation Act ("JCPA").¹¹ And the status of that right now in the Senate is that it was ordered to be reported by the Senate Judiciary Committee.¹²

Which means that they voted on it in committee. It would go to the Senate floor for a potential chamber vote.

I'm just going to describe it briefly since we're going to go through it more in detail. But it essentially would give an antitrust exemption to media organizations, specifically owners of broadcast TV and radio stations and press publications to collectively bargain with Google or Facebook or other social or online media organizations that meet certain thresholds.

This goes back to what we were talking about bargaining power to effectively give them increased bargaining power for negotiation for a limited period of six years. If they can't come to some sort of agreement on their own, they can make a final offer through arbitration. The bill also would include some monitoring by government agencies.

Whatever final agreement they would come up with would have to be filed by the Federal Trade Commission and the Department of Justice. Also, the Government Accountability Office would then issue a report to Congress, explaining and analyzing what the developments were.

10. Competition and Transparency in Digital Advertising Act, S. 4258, H.R. 7839 (2022). Representative Ken Buck introduced the companion bill. Senator Lee introduced a similar bill in the 118th Congress. A Bill to Amend the Clayton Act to Prevent Conflicts of Interest and Promote Competition in the Sale and Purchase of Digital Advertising, S. 1073 (2023).

11. Journalism Competition and Preservation Act of 2022, H.R. 1735 (2021), S. 673 (2022). Senator Amy Klobuchar introduced a similar bill in the 118th Congress. Journalism Competition and Preservation Act of 2023, S. 1094 (2023).

12. On November 28, 2022, Senator Richard Durbin reported the bill with an amendment in the nature of a substitute.

Finally, I'm just going to talk about two things because I'm going to compare that regime to another regime, which is similar. And that has to do with the retransmission of broadcast television stations. That's more my original bailiwick having worked at both the Federal Communications Commission and a television organization.

Similar to what we're talking about here, broadcast stations have the right, and also, Neil mentioned this, to negotiate with cable and satellite operators for payment. Or option to two, if they don't think they have a whole lot of bargaining power, require that cable and satellite operators retransmit their signals for no payment.

But in contrast to this bill, the JCPA, there's a government agency that can act as a referee and has more of an oversight function. And that's the Federal Communications Commission. The other aspect of it is that in the Communications Act, all parties are required to negotiate in good faith.

There are some steps or factors outlined in the Communications Act about what that means and also what it does not mean or what would not be considered bad faith.

Similar to the JCPA in 2019, Congress enacted a law called the Television Viewer Protection Act of 2019, that would enable, that would permit small cable operators with 500,000 or fewer subscribers to collectively negotiate. This would be giving small cable operators a leg up in their negotiations with giant broadcasting companies or big broadcasting companies.

That's one aspect of it. That's similar, but we're talking instead of an exemption in antitrust law, we're talking about a carve out in communications law. And one other thing I wanted to raise here, which is it goes back to my background, when I was at the FCC, I was part of the team that worked on the merger between Comcast, which is an acquirer of license or of intellectual property rights, and NBC Universal, which is the licensor.

The licensee is Comcast; the licensor is NBC. They're the ones that own the property rights. One of the conditions, which I drafted, so this is how I remember it, was that there would be a firewall between NBC and Comcast during these negotiations.

That meant that Comcast couldn't use information it gained from owning NBC when it was negotiating with NBC's stations competitors. And likewise, NBC couldn't use the information from Comcast as it negotiated with Comcast competitors.

Interestingly, and this again goes back to my background and working at Univision, Google made an investment in Univision Televisa in April 2021 [of] a billion dollars along with some private equity firms.

JCPA does not mention this, but Google actually, just like Comcast and NBC, has an insider's view on both sides of the equation. As Google, of course, will be the licensee of content. But as a strategic investor in Univision Televisa, it would also be a licensor. So that's an issue that I think is interesting that hasn't been addressed. And I think that's about it. I would be happy to respond to other questions.

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