

**U.S. House of Representatives Committee on the Judiciary  
Subcommittee on Antitrust, Commercial and Administrative Law**

**Hearings on “Online Platforms and Market Power,  
Part 1: The Free and Diverse Press”**

***Remarks of David Pitofsky, General Counsel, News Corp***

Chairman Cicilline, Ranking Member Sensenbrenner, and members of the subcommittee: Thank you for inviting me to speak with you today.

My name is David Pitofsky. I am the General Counsel and Chief Compliance & Ethics Officer of News Corp, a global media and information services company that creates and distributes authoritative and engaging content to consumers and businesses around the world. The company, which came into existence in 2013 when it split from what was formerly known as 21st Century Fox, comprises businesses across a range of media, including but not limited to: news and information services such as *The Wall Street Journal*, book publishers such as *HarperCollins*, and digital real estate services, including *realtor.com*.

It is a privilege for me to contribute my views today, as the subcommittee kicks off these important hearings. A small number of online platforms act not only as gateways, but often gatekeepers to the Internet, and their impact on today’s economy cannot be overstated. I commend the subcommittee for beginning its inquiry by focusing on the impact these dominant platforms have on a free and diverse press.

I am here today because the marketplace for news is broken. Healthy markets should incentivize investment, risk and effort by rewarding companies that actually develop superior products. When it comes to news, the companies that invest in original journalism should reap the financial rewards of their creations. Unfortunately, free-riding by the dominant online platforms has resulted in a massive siphoning off of profits, such that the lion’s share of online advertising dollars generated off the back of news content goes to the platforms, not to the content creators. As a result, while the tools consumers use to find news on the Internet may continue to develop, there is less and less reliable, quality news for consumers to find.

Throughout our history, Congress has recognized that news publications are not just consumer products but also part of the infrastructure of our democracy. Few private industries are referenced in the Constitution, but the press is; for good reason. And at appropriate moments, this institution has enacted legislation to enable the press to

overcome some of the economic difficulties associated with providing a public good.<sup>1</sup> This is one of those moments.

We commend the subcommittee for these hearings, which begin the hard work of shining a light into dark, critical corners of 21<sup>st</sup> century commerce. And we thank Chairman Cicilline and Ranking Member Collins for introducing the Journalism Competition Preservation Act, which is an important step toward re-establishing marketplace conditions that allow publishers to meaningfully negotiate with the dominant platforms.

### **News organizations are under siege by the dominant online platforms**

Many in Silicon Valley assert that members of the press are nothing more than a relic of the “old media,” displaced by the “new media” thriving in the digital world. That is not the case. Dominant online platforms have not invented a better way to gather or report the news. And news publishers have not failed to adapt to the digital world. Only 2% of the U.S. population regularly went online to get news in 1995, but as of last year 93% of U.S. adults accessed at least some news online.<sup>2</sup>

Instead, online platforms are placing news organizations under siege through massive free-riding. They deploy *our* highly engaging news content to target our audiences, then turn around and sell that audience engagement to the same advertisers news publishers are trying to serve. Dominant platforms take the overwhelming majority of advertising revenue without making any investment in the production of the news, all while forswearing any responsibility for its quality and accuracy. As a result, one of the pillars of the news industry’s business model, advertising revenue, is crumbling.

Part of the problem is that news content traditionally has thinner protections under intellectual property law. This is a reflection of the fact that no one creates the “news” and that it is important—and sometimes critical—that news be disseminated quickly. Despite this, in the pre-Internet era, content was protected to some degree because it took time to copy, rewrite, print, and distribute follow-on articles, giving the original publisher a vital, valuable period of exclusivity.<sup>3</sup> But now, in the digital era, stories are copied, republished, and distributed within minutes.<sup>4</sup> And, as I will explain, the platforms

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<sup>1</sup> For example, the Post Office Act of 1792 permitted newspapers to distribute their papers through the mail at extremely low rates, and the Newspaper Preservation Act of 1970 relaxed antitrust laws to authorize the formation of joint operating agreements among competing newspaper operations within the same market area.

<sup>2</sup> *News Audiences Increasingly Politicized*, PEW RES. CTR. (June 8, 2014), <https://www.people-press.org/2004/06/08/i-where-americans-go-for-news/>; *Digital News Fact Sheet*, PEW RES. CTR. (June 6, 2018), <https://www.journalism.org/fact-sheet/digital-news/>.

<sup>3</sup> These limits initially met public policy objectives to encourage the widespread diffusion of information by allowing others to build upon news output without jeopardizing the incentives of professional news organizations to profit from their investments and efforts.

<sup>4</sup> The issues facing the professional news industry are rooted in *competition*, regardless of the applicability of copyright. Copyright alone does not and cannot address the broad use of dominance by online platforms to induce consent or engage in bias and discrimination. The damage is profound. Publishers across the

actually facilitate and promote the copycat articles over the originals. All of this has led to the commoditization of news and the flattening of brand identities. As economists can explain, commoditized industries lower incentives to invest and innovate because it is extremely difficult to realize a fair return on investment. Although stronger intellectual property protection for news may be necessary to address fundamental changes resulting from the mass distribution and copying of news on the Internet, the industry will continue to decline so long as dominant platforms maintain and exercise monopoly power over distribution and advertising.

In the so-called “ad tech” space, where publishers and advertisers buy and sell digital advertising inventory, a dizzying array of acquisitions and other anticompetitive conduct has eliminated any meaningful competition. By some accounts, only 30 cents of each advertising dollar reaches publishers (as opposed to 85 cents in the pre-Internet era).<sup>5</sup> The other 70 cents is eaten up by the opaque, multilayered algorithmic software products that make up the ad tech infrastructure. Dominant online platforms control the infrastructure, data, and tools for news publishers to sell and serve online ads, while simultaneously competing against those publishers for the very same ad dollars. This presents a significant conflict of interest.

Many news publishers have responded by trying to shift to a business model more reliant on subscription revenue. To boost subscriptions, news publishers must invest in generating high-quality content that will be a compelling product to subscribers. But the dominant platforms have thwarted these efforts by, for example, demoting in their search results news websites that charge for access on the grounds that this is a “bad user experience” for search users, who prefer free content. Consider this for a moment: consumer choice has been all but eliminated by a false and fateful decree that all search users prefer free news, not quality news.

This is obviously a bad deal all around for publishers, but the absence of competition denies us other options. In a competitive marketplace, we would seek fairer terms from the search and social media providers that surface our stories, and we would take our digital ad inventory to other ad tech providers, who would need to compete for our inventory by offering better terms. But there is no competition, and as a result we are powerless to negotiate a fair price, either for our news content or for our digital ad inventory.

Dominant tech platforms dispute the allegation that they have obtained or maintained their dominance through means that violate the antitrust laws, but one cannot reasonably argue about the *existence* of their dominance, and its effect on news publishers. Many of the key facts about the mysterious operation of their algorithms, and in particular whether they are designed to advance consumer interests or to unfairly block competition, reside

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world, including News Corp, are laying off professional journalists and editors at alarming rates. Publishers are diverting scarce funds to pay for search engine optimization (SEO) and other click-generation strategies and writing news to appeal to algorithms rather than readers.

<sup>5</sup> David Pidgeon, *Where did the money go? Guardian buys its own ad inventory*, MEDIATEL (Oct. 4, 2016), <https://mediatel.co.uk/newsline/2016/10/04/where-did-the-money-go-guardian-buys-its-own-ad-inventory/>.

with the platforms themselves. But we look forward to these hearings and other enforcement efforts to surface the relevant facts and thereafter take appropriate enforcement or legislative action.

### **News organizations are now financially dis-incentivized to invest in high-quality reporting**

High-quality news reporting, especially investigative journalism, is expensive and requires the expertise of experienced, professional journalists and editors. The value of such reporting extends far beyond its ability to sell news content. Journalism has played a pivotal role in our Nation's most trying moments and greatest achievements. By serving as a forum for national debate and faithfully reporting the facts necessary for an informed citizenry to hold its leaders accountable, the news industry plays a crucial role as the Fourth Estate.

But for the reasons I outlined above, news publishers are increasingly dis-incentivized to invest in high-quality journalism, because the costs cannot be recouped. Reader attention and user data, the life-blood of the Internet, is spirited away by the platforms and by the copycat publishers they have enabled.

Let me give a concrete example from *The Wall Street Journal*. Last November, the *Journal* published an important investigative piece regarding payments to Stormy Daniels. Five reporters and multiple editors and lawyers worked on the story for months, at significant expense. Within a few hours of its publication, however, the Internet was full of rewrites by online sites that made no investment in the story. The dominant platforms benefited from the *Journal's* hard work because the large majority of online readers access their news through these platforms. And copycat publishers also enjoyed an outsized and unearned benefit by investing in copying rather than original reporting. Because the *Journal* has a subscription paywall, search results demoted the original, *Journal* version of the article below scores of copycat rewrites—on a mobile device, it was the equivalent to scrolling down through five pages. Because of the press convention of citing original sources, the demoted search result for the *Journal* story did note that it was “highly cited,” meaning the search engine knew it was the original, authoritative source, but demoted the *Journal* story anyway.

There is no comprehensive data examining the phenomenon I just described. But a study we did on a different, high-profile story published in our flagship Australian newspaper last year indicated that rewrites earned approximately *22 times* the traffic (*i.e.*, readers) of the original story. And these examples do not touch on the even larger problem that fake and fraudulent news stories have found a profitable place on the Internet.

Publications that used to pride themselves on producing investigative, hard-hitting journalism now compete to see how quickly they can free-ride off each other's stories and optimize to the top of search results pages. Other, less scrupulous, entities resort to publishing fake news and sensationalist, polarizing stories that are rewarded with high placement. In other words, clickbait.

## **Dominant platforms have deep conflicts of interest**

In their initial incarnations, the dominant online platforms acted more like matchmakers, connecting users with content and *vice versa*. But increasingly, publishers' relationships with the platforms are not complementary; instead, the platforms act as substitutes. The platforms have configured their pages so that customers seeking news are increasingly "satisfied" by search results or news feeds without the need to click through to the underlying source. The platforms are creating walled gardens that tighten their stranglehold over advertising dollars and consumer data.

And because, under current law, online platforms—unlike news publishers—cannot be held legally responsible for any harm caused by inaccurate reporting, the platforms have little if any commitment to accuracy or reliability. When it comes to dominant online platforms, a news article is valuable if it is viral, not if it is verified. Keep in mind this key difference between platforms and publishers: they provide news—both false and real—to readers, but they do so without having any reporters who verify the facts, without having any editors to check the reporters' work, without having any publishers to whom people can complain, without having any op-ed page or letter to the editor or correction column for public recourse. Power without responsibility, without accountability, is a recipe for disaster.

The shuttering of news publishers does not negatively affect the online platforms. So long as platforms have sources of news to serve to their users, the clicks and resulting advertising dollars will flow. But the silencing of editorial voices, particularly at the local level, is having profound negative effects on media plurality and the news media's ability to play its constitutionally-enshrined role. Although most of our publications are national or international in scope, we still care deeply about the vibrancy of local journalism; just as a rising tide raises all ships, a tide in ebb eventually puts all ships at risk of running aground. The depletion of local press is also a problem for democracy itself.

In the ad tech space, the dominant platforms control the algorithmic decision-making software that matches ad inventory and ad spend. But they are also a critical source of ad inventory themselves, with a clear incentive to direct ad money toward their own products and services.

To be clear, we do not seek to demonize the dominant online platforms, nor to deny the innovations they have made and the many benefits they have brought to consumers. Dominant online platforms have designed businesses that exploit actual or perceived weaknesses in the enforcement of the antitrust laws, particularly as they relate to vertical integration. They have exploited these weaknesses because doing so has served their shareholders through the generation of immense profits. We suggest the focus needs to be on reinvigorating antitrust enforcement, reconsidering narrow precedents, and assessing whether new legislation is needed to fill blind spots exposed by modern market dynamics.

## **News Corp has embraced technological change**

I would like to dispel the myth that somehow the news industry has been slow to innovate. The news industry at large is marked by innovation. The reason so many people access news content through search engines and social media products is because news organizations are investing in the production of immersive and informative online experiences. Speaking for News Corp, we have long viewed the Internet as an opportunity to reach wider audiences and connect with readers in new ways. Digital content and products have been at the core of our business for over a decade.

We invest in developing online experiences for our audience. For example, News Corp has been at the forefront of developing immersive experiences for the consumption of news on phones and tablets. *The Wall Street Journal* was among the first companies to develop immersive news experiences for Apple's iOS. Even today, *The Wall Street Journal* app is among the most popular and highest ranked apps available on Apple's App Store.

We also invest tens of millions every year to monetize our products through online advertising and subscription services. Indeed, News Corp was an online advertising pioneer and among the first — if not the first — customers of a fledging online ad serving company called *DoubleClick*, which Google eventually acquired.

And we invest in reporting and creating innovative news content. News Corp has modernized its newsrooms to deliver high-quality, up-to-the-minute journalism across the world in milliseconds. We have reporters stationed across the world covering important world events in real-time with the rigor and precision of professional journalism.

All of these investments have contributed to News Corp's success in creating content for the new digital era. Popular and trusted mastheads at News Corp in the U.S., U.K., and Australia are profitable, though not at a scale commensurate with their quality and the demand for premium news.

## **Platform concentration has forced news organizations into a classic prisoner's dilemma**

Although publishers technically have a choice to withhold their content from online platforms, that choice is not a meaningful one. The online platforms are simply too dominant. Withholding content unilaterally would starve the publisher of access to traffic sourced through the platforms. Platforms have no incentive to negotiate a fair deal in return for access to news content. It is therefore no surprise that dominant platforms engage with the press from a position of overwhelming strength and with a degree of indifference and impunity that would offend the consciences of the Founders who sought to protect the press for the benefit for the public.

The only way out of the prisoner's dilemma is to act collectively. If publishers could band together they might be able to use their collective leverage to bring the platforms to the negotiating table. But doing so is made impossible by the antitrust laws.

We are hopeful that reinvigorated antitrust enforcement is on the horizon. After a generation of obsession with price effects, without adequate consideration of the other aspects of consumer and social welfare, including quality, innovation, and choice, some very recent, encouraging signs of regulatory re-examination and re-energization have emerged. However, that road will be long. The complexity of the facts will likely require years of investigation and litigation, and it will take work to get the judiciary to update its application of the antitrust laws for the 21<sup>st</sup> century. If current laws prove unable to support healthy competition, Congress will need to consider new statutes, which also requires a lengthy process.

In the interim, news publishers need a fighting chance. The Journalism Competition and Preservation Act is well-designed to help restore the proper balance between content generators and content distributors on the Internet. This bipartisan legislation is narrowly tailored, both in scope and duration, to balance the dual policy goals of ensuring that news organizations have sufficient resources to generate high-quality content while allowing for widespread distribution. The Act establishes a limited safe harbor for publishers—which ends after 48 months—so they can cooperate and coordinate before negotiating with the online platforms. The safe harbor is designed to encourage negotiations that improve the development and distribution of high-quality and original journalism.

The Act requires that all news organizations will benefit from collective negotiations with the dominant online platforms. The benefits of any collective negotiation extend to all news content creators, not just those directly involved in the negotiations. So, whatever terms *The Wall Street Journal* and *The New York Times* negotiate with a platform, local media outlets seeking to distribute their content across that platform may also benefit from those terms should they wish to do so.

The Journalism Competition and Preservation Act is consistent with the underlying policy goals and values expressed by the Founders in the First Amendment and consistent with the antitrust laws.

### **Concluding remarks**

Through my engagement with these issues, I have had a chance to reconnect with the work and scholarship of my late-father, Robert Pitofsky. As you may know, he was a giant in antitrust law—in academia, in private practice, and in government, where his service culminated in his term as chairman of the Federal Trade Commission from 1995 to 2001.

He was acutely aware of and sensitive to the need for antitrust regulators to give a higher degree of scrutiny to competition matters implicating First Amendment concerns. In a November 2000 newspaper article on the topic, he was quoted as saying:

“Antitrust is more than economics. And I do believe that if you have issues in the newspaper business, in book publishing, news generally, entertainment, I think you want to be more careful and thorough in your investigation than if the same

problems arose in cosmetics, or lumber, or coal mining. I mean, if somebody monopolizes the field of cosmetics, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be."<sup>6</sup>

In a seminal law review article from 1979 that has been happily and appropriately rediscovered, he wrote: "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."<sup>7</sup>

Informed by history, policy, and political values, the antitrust laws should protect the pillars of both our economy *and* our democracy. And there are few industries more central to our democracy than the news media.

Thank you.

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<sup>6</sup> Alec Klein, *A Hard Look at Media Mergers*, WASH. POST, (Nov. 29, 2000), [https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/?utm\\_term=.8c4ac8503319](https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/?utm_term=.8c4ac8503319).

<sup>7</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).