



**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

COMMENTS

of

News/Media Alliance

on the

**Advance Notice of Proposed Rulemaking for a
Trade Regulation Rule on Commercial Surveillance and Data Security
“Commercial Surveillance ANPR, R111004”**

November 21, 2022

I. Executive Summary

High-quality journalism plays a vital role in supporting the U.S. economy, a healthy democracy, and local communities. Millions of Americans and readers around the world rely on American newspapers and magazines to stay up to date on the latest local, domestic, and international news, political developments, entertainment offerings, and discussion topics related to their hobbies, activities, or areas of interest. In short, newspapers and magazines help keep their readers and communities informed and entertained – they educate, combat misinformation, keep decision makers accountable, and provide a vital communication method during times of national crises, among other benefits. In addition to their societal benefits, newspapers and magazines offer advertisers, including small and local businesses, a way to reach their communities – both geographic and interest-based – in a cost-efficient way, helping to spur local economies and business development. Publishers reach an estimated audience of 129 million Americans, representing nearly 40 percent of the total population, while magazines’ total audience – without duplication – amounted to over 222 million in 2021 and a total brand audience (including duplicates) of 1.56 billion.¹ Newspapers and magazines are able to support local communities and invest in high-quality journalism in large part, because of digital advertising. In 2020, newspapers’ digital advertising revenues were an estimated \$3.74 billion², while magazine publishers’ digital advertising revenues were an estimated \$6.8 billion in 2021.³ While these numbers may seem impressive, they actually represent a rapid decrease in revenues. Those numbers will continue to fall, unless the Federal Trade Commission promulgates privacy rules that correct market imbalances and reflect consumer expectations.

Responsible digital advertising (that recognizes the direct and trusted relationship between publisher and consumer) provides an important revenue stream to publishers and: (i) ensures accessibility and availability of high-quality journalism; (ii) allows publications to remain free from government control; and (iii) helps keep the press at the highest level of integrity (something that readers have come to depend on). This trusted relationship is predicated upon publishers disclosing their data collection practices to consumers, including the fact that they use digital advertising to provide free or low-cost journalism to their readers – a quid pro quo that benefits publishers, advertisers, and readers (who generally prefer targeted advertising if done correctly). While digital advertising may not be perfect, these responsible advertising practices provide an important revenue stream that eases the burden for the development of new subscription revenues which take time to grow and nurture. Any regulations adopted should protect this value exchange that helps keep journalism available to all.

During any potential rulemaking, the Federal Trade Commission should be mindful of existing data security and privacy compliance frameworks, and any privacy rule should be consistent with those existing laws and regulations. News and magazine publishers already expend a great amount of time and resources to comply with existing regulations, and harmonizing an FTC privacy rule on data security more closely

¹ See generally, NEWS/MEDIA ALLIANCE, NEWS ADVERTISING PANORAMA (2020) (publicly available to NMA members only; on file with author); The U.S. population was 331 million in July 2021. CENSUS BUREAU, QUICK FACTS, available at <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 17, 2022); MPA – THE ASSOCIATION OF MAGAZINE MEDIA, MAGAZINE MEDIA HANDBOOK (2021), available at https://www.newsmediaalliance.org/wp-content/uploads/2018/08/2021-MPA-Factbook_REVISED-NOV-2021.pdf (last visited Nov. 17, 2022).

² See PEW RESEARCH CENTER, NEWSPAPER FACT SHEET, available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17, 2022) (Digital advertising accounts for 39% of the overall \$9.6 billion in advertising revenue, which amounts to \$3.7 billion).

³ See MARKETING CHARTS, US ONLINE AND TRADITIONAL MEDIA ADVERTISING OUTLOOK, 2021-2025 (Jul. 21, 2021), <https://www.marketingcharts.com/featured-117719> (last visited Nov. 17, 2022).

with currently enacted laws would lower compliance costs and provide much needed consistency and predictability to publishers.

Any remedies available under a privacy rule should be weighed against the harm to the consumer, and regulated entities should be provided with a right to cure violations that have not resulted in a “substantial privacy harm,” particularly where an entity has put forth good faith efforts to comply, or has adopted adequate and proportionate compliance processes. Similarly, enforcement actions should be restricted to instances where harm is a direct and proximate result of a knowing or reckless violation of the privacy rule.

The FTC should also strongly consider the adoption of a Data Poaching Rule which would correct market imbalances and unwind the ability of the dominant tech platforms to poach first-party consumer data from independent digital properties. The proposed Data Poaching Rule would grant the sole right to collect consumer data to the known owner or operator of the brand or digital property with whom the consumer expects to interact, providing both direct and indirect benefits to the consumer, while preventing dominant platforms from engaging in unfair and anticompetitive data collection practices.

Dominant platforms use their market power in the markets of social media, search, and ad tech to collect consumer data throughout the internet, overstepping the narrow bounds of the quid pro quo “service for data” arrangements that consumers have come to expect. These dominant platforms also dictate the contractual terms of any services they provide, which include broad usage rights for the platform as a controller or business and limit transparency, access, and control by news and media publishers, and the consumers to whom the data relates. Further, the dominant platforms’ ability to collect consumer data even when consumers are engaged in activity far from the dominant tech platform’s branded properties allows each platform to “fully track” a single consumer throughout the internet, ultimately leading to an erosion of consumer trust and weakening competition in the market for digital advertising. There is past precedent in the marketplace for a Data Poaching Rule that is based on consumer expectations. When Apple introduced its “App Tracking Transparency” feature that allowed iPhone users to limit advertisers from accessing their iPhone user identifier (degrading the ability of the platform to track consumer activity across apps run on the iOS platform), Meta projected a \$10 billion decrease in its digital advertising revenue. Essentially, Meta lost about 10 percent of its digital advertising revenues when it lost the ability to track iPhone user behavior using third-parties.⁴ The proposed Data Poaching Rule would have a similar order-of-magnitude effect, and would engender the same end result – losing access to data poached from independent digital properties.

Any new privacy rule should also recognize the broader market imbalances and bargaining disparities in the digital advertising ecosystem by apportioning obligations based on size and risk to avoid creating undue burdens for publishers who have fewer resources and may otherwise lack the leverage to negotiate around the dictated terms and technical tools of the dominant online platforms. The Commission has the opportunity to craft privacy regulations that can correct these market imbalances and set a privacy standard based on consumer concerns and expectations. We hope that in developing a new privacy rule, the FTC will consider these market imbalances and consumer expectations, creating a rule that will foster a vibrant, financially stable, and independent press which is essential to the preservation of a healthy democracy. Such a rule would also directly benefit consumers as a higher output of high-quality journalism

⁴ See Commercial Surveillance ANPR (R111004), Comments of Hal J. Singer and Augustus Urschel (submitted November 21, 2022).

keeps readers and communities informed, educated, combats misinformation, and keeps decision makers accountable.

II. Introduction

The News/Media Alliance (“N/MA” or the “Alliance”) is a nonprofit organization headquartered in Washington, D.C., representing the news and magazine media industries, and empowering members to succeed in today’s fast-moving media environment. The Alliance’s members represent nearly 2,000 diverse news and magazine publishers in the United States and internationally, ranging from the largest news and magazine publishers to small, hyperlocal newspapers, and from digital-only and digital-first outlets to print papers and magazines.

In total, the Alliance’s membership accounts for nearly 90 percent of the daily newspaper circulation in the United States and includes nearly 100 magazine media companies with more than 500 individual magazine brands on topics including news, culture, sports, lifestyle, and virtually any other interest. Newspapers combat misinformation, encourage democratic engagement, strengthen community ties, lower municipal borrowing costs, and help children improve their spelling and vocabulary, while magazines are proven to improve memory, inspire readers to purchase, deliver valuable information, and provide readers with shared discussion topics.⁵ The Alliance diligently advocates for news organizations and magazine publishers on a broad range of current issues affecting them, including consumer privacy laws and regulations that relate directly to our members’ trusted relationships with their readers.

The news and magazine media industries’ contribution to the U.S. economy and society is considerable, with estimated revenues of almost \$45 billion in 2020, making the combined industries larger than recorded music, local television, and movies.⁶ Similarly, newsrooms were estimated to employ approximately 31,000 people in 2020, not including any indirect employment effects, while magazines employed over 73,000 people directly and supported a total of over 219,000 jobs in 2021.⁷ News publishers

⁵ See, e.g., Matthew Gentzkow, et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011); Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 JOURNAL OF POLITICS 447 (2014); Mary Ellen Klas, *Less Local News Means Less Democracy*, Nieman Reports (Sept. 20, 2019), available at <https://niemanreports.org/articles/less-local-news-means-less-democracy/> (last visited Nov. 17, 2022); The Covington News, *The Benefits of Local Newspapers*, available at <https://www.covnews.com/nie/benefits-local-newspapers/> (last visited Nov. 17, 2022); Pengjie Gao, Chang Lee, and Durmot Murphy, *Financing dies in darkness? The impact of newspaper closures on public finance*, 135(2) JOURNAL OF FINANCIAL ECONOMICS (2020); Ella Rhodes, *Why Magazines Matter* (Nov. 25, 2016), THE BRITISH PSYCHOLOGICAL SOCIETY, available at <https://www.bps.org.uk/psychologist/why-magazines-matter> (last visited November 17, 2022).

⁶ See generally, MOTION PICTURE ASSOCIATION, THEME REPORT 2021, available at <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf> (last visited Nov. 17, 2022); PEW RESEARCH CENTER, LOCAL TV NEWS FACT SHEET (JUL. 13, 2021), available at <https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/> (last visited Nov. 17, 2022); Tim Ingham, *With \$15Bn in Revenue, 2021 Was the US Record Industry’s Biggest Ever Year (Kind of...)*, Music Business Worldwide (Mar. 9, 2022), available at <https://www.musicbusinessworldwide.com/with-15bn-revenue-2021-was-the-us-record-industrys-biggest-ever-year-kind-of/> (last visited Nov. 17, 2022); See PEW RESEARCH CENTER, *Newspaper Fact Sheet* (June 29, 2021), available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17, 2022); ESTIMATED AGGREGATE REVENUE OF U.S. PERIODICAL PUBLISHERS FROM 2005 TO 2020, STATISTA, available at <https://www.statista.com/statistics/184055/estimated-revenue-of-us-periodical-publishers-since-2005/> (last visited Nov. 17, 2022).

⁷ See PEW RESEARCH CENTER, *NEWSPAPER FACT SHEET* (June 29, 2022), available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17, 2022); Mason Walker, *U.S. Newsroom Employment Has Fallen 26% since*

reach an estimated audience of 129 million Americans, representing nearly 40 percent of the total population, while magazines' total audience – without duplication – amounted to over 221 million in 2020 and a total brand audience (including duplicates) of 1.56 billion.⁸

The share of digital audience is large for both magazine and newspaper publishers, with news publishers having over 200 million unique visits and 6.7 billion page views per month, and 40 percent of magazine readers accessing the content on mobile devices.⁹ The importance of an audience for publishers' content was highlighted during the COVID pandemic with visits to local news sites increasing 89 percent month-to-month in March 2020, and news articles gaining 124 percent more views.¹⁰ The audience and subscriptions for newspapers and magazines are based on a reputation for quality and driven by content that is trustworthy and reliable.¹¹ As a result, publishers must continuously invest in high-quality journalism in order to attain and retain new readers.

However, despite the importance of and audience for high-quality journalism, far too many publishers – especially small and local newspapers – are struggling. In less than 20 years, newspaper circulation and advertising revenues have dropped from \$57.4 billion in 2003 to an estimated \$20.6 billion in 2020, while magazines have witnessed a drop from \$46 billion in 2007 to \$23.92 billion in 2020.¹² In short, news publishers' revenues have decreased by almost two-thirds and magazines have lost almost half of their revenues. As a result, thousands of communities are now news deserts with no local daily newspapers, while many magazine publishers have reduced frequency or cut print editions altogether, in an effort to merely survive.¹³

2008, PEW RESEARCH CENTER (Jul. 13, 2021), available at <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>; MPA – THE ASSOCIATION OF MAGAZINE MEDIA, MAGAZINE MEDIA HANDBOOK (2021), available at https://www.newsmediaalliance.org/wp-content/uploads/2018/08/2021-MPA-Factbook_REVISED-NOV-2021.pdf (last visited Nov. 17, 2022).

⁸ See generally, NEWS/MEDIA ALLIANCE, NEWS ADVERTISING PANORAMA (2020) (publicly available to NMA members only; on file with author); The U.S. population was 331 million in July 2021, CENSUS BUREAU, QUICK FACTS, AVAILABLE AT <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 17, 2022); MPA – THE ASSOCIATION OF MAGAZINE MEDIA, MAGAZINE MEDIA HANDBOOK (2021), available at https://www.newsmediaalliance.org/wp-content/uploads/2018/08/2021-MPA-Factbook_REVISED-NOV-2021.pdf (last visited Nov. 17, 2022).

⁹ *Id.* NEWS/MEDIA ALLIANCE, NEWS ADVERTISING PANORAMA (2020); MPA – THE ASSOCIATION OF MAGAZINE MEDIA, MAGAZINE MEDIA HANDBOOK (2021).

¹⁰ See Rebecca Frank, *COVID-19 Drives Traffic to News Sites, But Will Publishers Benefit?*, NEWS/MEDIA ALLIANCE, (Apr. 8, 2020), available at <https://www.newsmediaalliance.org/covid-drives-traffic-to-news-but-will-publishers-benefit/> (last visited Nov. 17, 2022).

¹¹ See AMERICAN PRESS INSTITUTE, *Paying for News: Why People Subscribe And What It Says About the Future of Journalism* (May 2, 2017), available at <https://www.americanpressinstitute.org/publications/reports/survey-research/paying-for-news/> (last visited Nov. 17, 2022).

¹² See PEW RESEARCH CENTER, *Newspaper Fact Sheet* (June 29, 2021), available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17, 2022); ESTIMATED AGGREGATE REVENUE OF U.S. PERIODICAL PUBLISHERS FROM 2005 TO 2020, STATISTA, available at <https://www.statista.com/statistics/184055/estimated-revenue-of-us-periodical-publishers-since-2005/> (last visited Nov. 17, 2022).

¹³ See generally University of NORTHWESTERN UNIVERSITY, LOCAL NEWS INITIATIVE, *The State of Local News 2022*, available at <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/> (last visited Nov. 17, 2022); Beth Braverman, *How Magazine Publishers Are Cutting Print Costs to Improve Profits* (Aug. 2, 2021), Folio Magazine, available at <https://archive.foliomag.com/magazine-publishers-cutting-print-costs-improve-profits/> (last visited Nov. 17, 2022).

These losses are, in large part, a direct result of decreasing print advertising revenues, which have not been offset by digital advertising, despite publishers' best attempts to develop sustainable digital advertising business models and revenue streams. Instead, the majority of digital advertising revenues (and user data that forms the foundation for developing competing advertising services and deep relationships with readers) have been captured by a number of third-party vendors and intermediaries, but mostly, by a few dominant online platforms. These market imbalances have created an existential crisis for publishers of all sizes. Platforms force publishers to accept their terms and conditions in the digital advertising ecosystem (often claiming ownership, or at least joint control over data), and further undermine the direct, first-party, trusted relationships between publishers and their readers by making use of consumer data collected through publisher digital properties in surreptitious and opaque ways.

The Alliance commends the Federal Trade Commission for issuing this important Advance Notice of Proposed Rulemaking to request input on how to approach consumer privacy and data security issues at the federal level, and taking care that any such regulations are appropriately targeted, and do not further entrench the position of the dominant platforms that place undue burdens on their competitors. We hope that this process will demonstrate the need to address the unfair and anticompetitive data collection and processing practices of the dominant online platforms, while preserving the ability of publishers that fulfill a vital First Amendment function, to benefit from digital advertising and support communities' access to free and low-cost journalism.

III. The Commission Should Consider How Any New Privacy Rule May Affect The Practice Of Newsgathering and the Public Benefits the Press Provides (Questions 10, 63)

The First Amendment to the U.S. Constitution and nearly all state Constitutions protect a free and independent press. The free press is on the front lines helping the American people hold accountable those in positions of power within our democracy, and around the world. A vibrant and financially stable independent press is therefore essential to a healthy democracy. As noted above, the news and magazine media industries' contribution to the U.S. economy is also considerable, with millions of readers, an employment effect measured in hundreds of thousands, and estimated revenues of almost \$45 billion in 2020, making the combined industries larger than many other content industries.¹⁴

A. Consumers benefit from quality journalism which is only possible through a vibrant and financially stable independent press

High-quality journalism plays a vital role in supporting the U.S. economy, a healthy democracy, and local communities. Millions of Americans and readers around the world rely on American newspapers and magazines to stay up to date on the latest local, domestic, and international news, political developments, entertainment offerings, and discussion topics related to their hobbies, activities, or areas of

¹⁴ See MOTION PICTURE ASSOCIATION, THEME REPORT 2021, <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf> (last visited Nov. 17, 2022); PEW RESEARCH CENTER, LOCAL TV NEWS FACT SHEET, available at <http://www.journalism.org/fact-sheet/local-tv-news/> (last visited Nov. 17, 2022); Tim Ingham, *With \$15Bn in Revenue, 2021 Was the US Record Industry's Biggest Ever Year (Kind of...)* (Mar. 9, 2022), Music Business Worldwide, available at <https://www.musicbusinessworldwide.com/with-15bn-revenue-2021-was-the-us-record-industrys-biggest-ever-year-kind-of/> (last visited Nov. 17, 2022).

interest. In short, newspapers and magazines help keep their readers and communities informed and entertained – they educate, keep decision makers accountable, and provide a vital communication method during times of national crises. In practical terms, newspapers combat misinformation, encourage democratic engagement, strengthen community ties, lower municipal borrowing costs, and help children improve their spelling and vocabulary, while magazines are proven to improve memory, inspire readers to purchase, deliver valuable information, and provide readers with shared discussion topics.¹⁵

The FTC should remain mindful of the essential role news and media publishers play in the dissemination of information and within the U.S. economy. Respecting consumer privacy while balancing the need to adapt to changing advertising markets is an art that news and magazine publishers work hard to master because of its role as the Fourth Estate. News and magazine publishers need the flexibility to be able to engage in newsgathering activities, including the collection and sharing of information with those assisting in the creation and distribution of vital news to the people.

Any privacy rule should not infringe upon otherwise legal First Amendment activity, and no rule should sweep up conduct by those engaged in journalism or newsgathering, as those activities are inherently “non-commercial” and protected under the First Amendment. Any privacy rule should make clear that news and magazine publishers may collect, use, disclose, disseminate, transfer or otherwise make available or communicate consumer personal information in the pursuit of journalism (and that news and magazine publishers may share such information with another media outlet, business or third party, without penalty, in such circumstances).

B. High-quality journalism can stem the devastating effects of misinformation

The rise of social media and online platforms has also coincided with the proliferation of online misinformation and disinformation. The societal implications are immense, and the loss of high-quality newspapers and magazines leads to an information vacuum that harms consumers and further exacerbates the spread and negative effects of misinformation.

American consumers are widely concerned about the spread of misinformation, with almost 75 percent considering it a major issue and only 9 percent of news consumers disagreeing with that sentiment.¹⁶ The challenge of combatting misinformation is overwhelming, with false information often spreading faster and wider than accurate news. For example, according to one study, misinformation is 70 percent more

¹⁵ See, e.g., Matthew Gentzkow, et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011); Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 JOURNAL OF POLITICS 447 (2014); Mary Ellen Klas, *Less Local News Means Less Democracy*, Nieman Reports (Sept. 20, 2019), available at <https://niemanreports.org/articles/less-local-news-means-less-democracy/> (last visited Nov. 17, 2022); The Covington News, *The Benefits of Local Newspapers*, available at <https://www.covnews.com/nie/benefits-local-newspapers/> (last visited Nov. 17, 2022); Pengjie Gao, Chang Lee, and Durmot Murphy, *Financing dies in darkness? The impact of newspaper closures on public finance*, 135(2) JOURNAL OF FINANCIAL ECONOMICS (2020); Ella Rhodes, *Why Magazines Matter* (Nov. 25, 2016), THE BRITISH PSYCHOLOGICAL SOCIETY, available at <https://www.bps.org.uk/psychologist/why-magazines-matter> (last visited November 17, 2022).

¹⁶ See Brooke Auxier and Jana Arbanas, *Majority of News Consumers See “Fake News” as a Big Problem Today* (Jun. 10, 2021), Deloitte Insights, available at <https://www2.deloitte.com/us/en/insights/industry/technology/study-shows-news-consumers-consider-fake-news-a-big-problem.html> (last visited Nov. 17, 2022).

likely to be retweeted on Twitter, in addition to reaching the first 1,500 users six times faster.¹⁷ In total, while accurate news stories often struggle to reach 1,000 Twitter users, false information is “routinely diffused to between 1,000 and 100,000 people.”¹⁸ Misinformation also has a longer shelf-life and tends to resurface more often than high-quality news.¹⁹

Dominant tech platforms (which control the vast majority of user data) often act as the main conduits for the spread of misinformation. These platforms direct users to sites that reinforce biases, recommend harmful content based on the massive data they have gathered on users’ preferences, and host bots that help spread misinformation to new susceptible audiences.²⁰ Further, the difficulty of separating high-quality information from mis- and disinformation, together with these platforms’ incapacity or unwillingness to moderate content, makes it easier for false information to spread.²¹ These platforms also profit from the spread of mis- and disinformation through unregulated and unmoderated targeted advertising. For example, Facebook experienced a 75 percent drop in the sharing of fake news after they made changes to their advertising system to combat fake news.²²

Communities without access to high-quality journalism are particularly susceptible to the spread of misinformation, and the effects can be devastating. As local newspapers disappear, an increasing share of the population gets their news from online platforms, many of which own large datasets on those users and deploy algorithms that allow for the targeted spread of misinformation.²³ At the local level, the spread of incomplete, misleading, or deceptive information can lead to communities where citizens are unable to stay up to date on what is happening locally, how their area relates to communities around them, and leaves them vulnerable in emergencies.²⁴ For example, according to the World Health Organization, health misinformation can lead to misinterpreted scientific knowledge, polarization, escalating fear or panic, and decreased access to healthcare – with Twitter, Facebook, YouTube, and Instagram playing a key role in disseminating such information.²⁵ The spread of misinformation, therefore, can lead to substantial harm to the consumer, especially those in vulnerable communities without access to high-quality journalism.

¹⁷ See Sara Brown, *MIT Sloan Research about Social Media, Misinformation, and Elections* (Oct. 5, 2020), Ideas Made to Matter, available at <https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections> (last visited Nov. 17, 2022).

¹⁸ See David Ardia, Evan Ringel, Victoria Smith Ekstrand, and Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online*, available at <https://citap.unc.edu/local-news-platforms-mis-disinformation/> (last visited Nov. 17, 2022).

¹⁹ *Id.*

²⁰ See Filippo Menczer and Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It* (Dec. 1, 2020), *Scientific American*, available at <https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it/> (last visited Nov. 17, 2022).

²¹ See David Ardia, Evan Ringel, Victoria Smith Ekstrand, and Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online*.

²² See Sara Brown, *MIT Sloan Research about Social Media, Misinformation, and Elections*, Ideas Made to Matter (Oct. 5, 2020).

²³ See David Ardia, Evan Ringel, Victoria Smith Ekstrand, and Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online*.

²⁴ *Id.*

²⁵ See WORLD HEALTH ORGANIZATION, *Infodemics and Misinformation Negatively Affect People’s Health Behaviours, New WHO Review Finds* (Sep. 1, 2022), available at <https://www.who.int/europe/news/item/01-09-2022-infodemics-and-misinformation-negatively-affect-people-s-health-behaviours--new-who-review-finds> (last visited Nov. 17, 2022).

In addition to readers, the spread of misinformation harms advertisers with the majority believing that their company's reputation would be harmed if their advertisement was placed next to misinformation.²⁶ This sentiment is supported by studies that indicate that 73 percent of consumers have an unfavorable view of brands associated with misinformation and 65 percent of consumer would be hesitant to buy from advertisers whose ads appear next to misinformation.²⁷

The clearest antidote to the spread of misinformation is the preservation of high-quality journalism that provides readers with accurate, trustworthy information and keeps our communities informed and engaged. Ensuring that news and magazine publishers can fully benefit from digital advertising and continue to build deep, trusting relationships with their readers through data processing – while preventing large online platforms from further cementing their dominant position in the data and digital advertising economy – provides an essential lifeline for thousands of newspapers and magazines.

A well-designed privacy rule could help combat the spread of mis- and disinformation online. With a rule that takes into consideration the specific needs of news and magazine publishers, the press can continue to do its job as intended in the U.S. Constitution, and consumers can continue to have access to cost-efficient, and varied news sources, as well as control over the use and exchange of their data.

IV. News and Magazine Publishers Rely on Advertising Revenues from Responsibly Collected Data (Questions 1-3, 11)

News and magazine publishers have a direct and trusted relationship with the readers with whom they interact and from whom they collect certain data. Publishers' business models depend on these long-established, first-party relationships, as well as brand recognition and reputation. Publishers already abide by state and federal laws, as well as self-regulatory frameworks (including clear and accurate privacy policies, and implementing reasonable security procedures and practices). It is in a publisher's best interest to abide by these privacy laws and frameworks, because their livelihood relies on trust from readers.

Readers are well-aware (and supportive) of their relationship with publishers because publishers are already required by existing law, and benefit from, disclosing their data collection practices, including the fact that they use digital advertising to provide free or low-cost journalism to their readers. While users may have concerns over some of the ways they are being tracked across the internet, especially by large platforms with whom they do not have a trusted first party relationship, many consumers want targeted advertising over irrelevant ads that do not speak to their interests. Studies have shown that 70 percent of consumers prefer personalized ads and get frustrated if their shopping experiences are too impersonal, while

²⁶ See INTEGRAL AD SCIENCE, *Advertising in the Age of Misinformation: How Consumer Perception of Misleading Content Impacts Brand Favorability* (Sep. 7, 2022), available at <https://integralads.com/insider/advertising-age-misinformation-consumer-research/> (last visited Nov. 17, 2022).

²⁷ *Id.*

80 percent are more likely to make a purchase if a brand provides them with a personalized shopping experience.²⁸ In general, consumers indicate a clear preference for fewer, but more personalized ads.²⁹

In effect, readers prefer targeted advertising if done correctly without excessive surveillance or obscure tracking practices. Brands and advertisers want to be able to target their advertising to specific user groups in order to maximize value for dollar spend, and many publishers rely on targeted advertising in order to provide a competitive service that appeals to such advertisers. Small and medium-sized publishers especially are reliant on programmatic advertising as an integral revenue stream, partly due to their limited subscriber base and geographic reach. The issue, therefore, should not be whether, but how, to make targeted advertising work better for everyone – more equitable for publishers, better value for advertisers, and more open and controllable for users. In short, any privacy regulations should be designed to help ensure that data collection and profiling can be done responsibly and openly.

In addition to supporting newspaper and magazine publishers, digital advertising and advertising in general supports thousands of jobs across the United States, with targeted advertising forming an important part of the digital advertising ecosystem. Overall, it is estimated that the U.S. ad spend will reach \$456.6 billion by 2026, representing an annual growth rate of 4.6 percent – noticeably higher than that of the U.S. gross domestic product.³⁰ In total, of the \$36.7 trillion in sales activity posted in the United States in 2020, almost \$3 trillion was directly stimulated by advertising, with the inclusion of indirect and induced effects more than doubling that number.³¹

V. News and Magazine Publishers Depend on Consumer Data to Promote and Sustain High-Quality Journalism (Questions 24, 26, 27, 29)

News and magazine publishers, from the hyperlocal to those on the international stage, significantly rely on consumer data collected for digital advertising in order to keep the press: (i) free from government control; (ii) affordable and accessible to all (not just to those who can afford a subscription); and (iii) at the highest level of integrity that the people of the United States (and the world) have come to depend on.

This high-level quality of journalism – arguably more important now than ever before – does not come cheap. It requires substantial investments by publishers, with investigative and foreign reporting being particularly resource intensive. For example, the International Consortium of Investigative Journalists has stated that the Panama Papers investigation cost it \$2 million, while The Atlantic estimates that a single long-form magazine story can cost up to \$500,000.³² These are just a few examples of the considerable

²⁸ See David Kirkpatrick, *Study: 71% of Consumers Prefer Personalized Ads* (May 9, 2016), Marketing Dive, available at <https://www.marketingdive.com/news/study-71-of-consumers-prefer-personalized-ads/418831/> (last visited Nov. 17, 2022); EPSILON, *New Epsilon Research Indicates 80% of Consumers Are More Likely to Make a Purchase When Brands Offer Personalized Experiences* (Jan. 9, 2018), available at <https://us.epsilon.com/pressroom/new-epsilon-research-indicates-80-of-consumers-are-more-likely-to-make-a-purchase-when-brands-offer-personalized-experiences> (last visited Nov. 17, 2022).

²⁹ See IAB, *The Value of Targeted Advertising to Consumers* (2016), available at <https://www.iab.com/wp-content/uploads/2016/05/Value-of-Targeted-Ads-to-Consumers2.pdf> (last visited Nov. 17, 2022).

³⁰ See IHS MARKIT, *The Economic Impact of Advertising on the US Economy 2018-2026* (2021) (on file with author, available upon request).

³¹ *Id.*

³² See France24, *Crippling Costs Of War Reporting And Investigative Journalism* (Aug. 28, 2018), available at <https://www.france24.com/en/20180828-crippling-costs-war-reporting-investigative-journalism> (last visited Nov. 17, 2022).

investments required to produce journalism. Every day, thousands of newspapers and magazines with limited resources cover stories ranging from local town halls to regional dog shows that matter just as much to their readers and require time, expertise, and investment to ensure the accuracy, relevancy, and exhaustiveness that their readers expect.

Digital advertising revenue leads to an increase in available resources for high-quality, trusted coverage from the hyperlocal to the international, which is of the utmost importance to the communities that news and magazine publishers serve. Even the California Privacy Protection Agency (CPPA) board members, during their board meeting on September 23, 2022, recognized how targeted advertising could help them ensure their public awareness campaigns reach all California residents and communities.³³

The reputation of news and magazine publishers is built on the principles of trust and quality – a reputation many news and magazine publishers have spent years, if not decades, building. The ability to maintain that reputation in the digital landscape, especially with respect to trust, requires news and magazine publishers prioritize ethical digital advertising practices. While digital advertising is not perfect, responsible advertising practices provide an important revenue stream that allows publishers to support their investments in journalism and eases the burden for the development of new subscription revenues that take time to grow and nurture. Similar to the experience with free subscriptions, paid newspaper and magazine subscriptions are driven in large part by the perceived quality of content, high levels of accuracy, a publication’s willingness to admit mistakes, and fair treatment of all sides of an argument.³⁴

Publishers of all types and sizes have responded to changes in consumer behavior and preferences, by adopting digital-led business models, and pivoting to digital advertising, only to have their efforts hampered by the rise of a few dominant platforms. These platforms reap the majority of benefits from user data and digital ad revenues by operating on all sides of the ad tech ecosystem, while publishers with first-party, trusted relationships with readers struggle to survive. This effectively forces publishers to agree to platform-dictated terms in order to use the products and services of the few dominant platforms. As a result, the platforms gain even more user data and revenue than publishers, whose content and trusted relationship with readers forms the foundation for that data collection.

Unlike platforms, news and magazine publishers provide substantial benefits to readers in exchange for user data, including free or low-cost journalism. Without this *quid pro quo* value exchange, some publishers may go out of business or be forced to charge considerably higher subscription or access fees for their content. This will cause the content of news and magazine publishers to be unavailable for large swathes of the population who may not have the resources for a paid subscription and/or already live in a print news and magazine desert. This is also a pressing concern considering the recent increase in the cost of living that places millions of households under financial pressure. In effect, the ability of publishers to benefit fully from digital advertising helps provide high-quality content to news and magazine deserts today (and can prevent the further spread of news and magazine deserts), and may also prevent the creation of “haves and have nots” for the general population, which would aggravate regional, socio-economic, and educational disparities.

³³ See CPPA Board Meeting on September 23, 2022, starting at 01:19:11, and available at https://youtu.be/G_LE2mg6lOw.

³⁴ See THE MEDIA INSIGHT PROJECT, *Paths to Subscription: Why Recent Subscribers Chose to Pay for News* (2018), available at <https://www.americanpressinstitute.org/publications/reports/survey-research/paths-to-subscription/> (last visited Nov. 17, 2022).

The FTC should consider how privacy rules meant to prevent the most damaging business practices could also impose blanket limitations on a wide range of ethically-driven advertising practices, including those based on a direct publisher-to-consumer relationship, thereby imperiling a key revenue source that sustains news and magazine publishing through a continuously changing media landscape.

VI. The FTC Should Take Care to Harmonize any Data Security Requirements with Existing Law (Questions 30, 34-35)

News and magazine publishers already must comply with applicable state and federal laws regarding privacy and data security, including the Massachusetts data security regulations (201 CMR 17.00) and the California Consumer Privacy Act (Cal. Civ. Code § 1798.100). These laws and regulations allow publishers to implement reasonable security measures that are designed to protect consumers' information online. The FTC should be mindful of existing requirements and obligations and any privacy rules should be consistent with those existing laws and regulations.

The FTC should harmonize any data security requirements with current federal, state, and international privacy laws in order to provide consistent and predictable guidance to, and save unnecessary expense and burden for, publishers that have expended (and are continuing to expend) significant time and effort implementing and maintaining privacy and security compliance programs. Harmonizing an FTC privacy rule about data security more closely with currently enacted laws would also provide much needed consistency and predictability to publishers of all shapes and sizes. It would ease the burdens placed on small and medium-sized publishers as well as provide certainty for larger multi-jurisdictional publishers regarding the completeness of their privacy and security compliance programs.

Any new privacy rule should not disrupt the comprehensive compliance programs and data security policies that publishers have worked hard to establish, which are based on the consistent state law frameworks already in place. News and magazine publishers generally expend time and money to conduct due diligence into ensuring their service providers and vendors have also taken steps to comply with applicable privacy and data security laws and regulations. Any additional privacy trade regulation rules should align with the service provider obligations under applicable privacy and data security laws and regulations.

By aligning any new privacy rule with consumer expectations and existing applicable laws, this can help improve trust in independent journalism at a time when it is under threat. The FTC's goal should be to regulate entities in a way that instills trust online instead of sowing discourse between consumers and regulated entities, all while preserving the ability of publishers to benefit from digital advertising and support communities' access to free and low-cost journalism.

VII. The Alliance Supports a “Data Poaching” Rule that Would Level the Playing Field Between Publishers and Dominant Search and Social Platforms (Questions 39, 43-45)

While the Alliance commends the FTC for its efforts to craft a privacy rule, the Commission should consider rules that will not further entrench the position of dominant platforms when it comes to data collection and use. Current laws do not adequately address unfair and anticompetitive data collection and processing practices of the dominant online platforms.

Any privacy rule should include a “data poaching” prohibition for dominant search and social media platforms, especially platforms which provide services on all sides of the digital advertising ecosystem (“Data Poaching Rule”). These dominant search and social media platforms dictate the contractual terms of any services they provide, which include broad usage rights for the platform as a co-controller of consumer data while limiting transparency, access, and control by news and media publishers, and even the consumers to whom the data relates. Further, the dominant platforms’ ability to collect consumer data even when consumers are engaged in activity far from the dominant tech platform’s branded properties allows each platform to “fully track” a single consumer throughout the internet. Using their market power in the related markets of social media, search, and ad tech, the dominant platforms poach the same first-party data collected by the publisher through “embeds” (code, packages, plug-ins, integrations, iframes, or software tools – developed by the dominant tech platforms and commonly used by publishers). This leads to an erosion of consumer trust and weakens competition in the market for digital advertising.

This Data Poaching Rule would grant the sole right to collect consumer data to the known owner or operator of the brand or digital property with whom the consumer expects to interact. This would both benefit consumers directly via enhanced privacy and indirectly through a host of positive downstream effects caused by increased competition in the digital advertising market, which could lead to lower prices paid by consumers. Such a rule would also ensure that the traditional and anticipated exchange of “service for data” remains solely between the consumer and the publisher.

The costs of the Data Poaching Rule would be borne solely by the tech platforms, while consumers would see meaningful benefits – both direct and indirect. Directly, such a rule would lessen the severity of data breaches because there would be less data available through any one breach. Indirectly, we would see revenue generation in the advertising market shift to more, and even smaller players, rather than disappear or continue to shift towards the already dominant platforms. For online publishers who charge consumer fees but also display digital ads, an influx of advertising revenues would enable publishers to offer their content at a lower price point. A permanent influx of revenue would also prompt publishers to increase their investment in original content creation. Overall, a shift of advertising revenues to news and magazine publishers would engender greater investment in the news and content itself, which benefits American civil society, generally.

The Alliance strongly supports a Data Poaching Rule as it would provide a framework to unwind the ability of the dominant tech platforms to poach first-party consumer data from independent digital properties, appropriately limiting their first-party data collection to the constellation of properties they own. A Data Poaching Rule would essentially force dominant platforms to compete for advertising dollars against publishers, and level the playing field. Such a rule would also benefit consumers, making it easier for them to enforce their privacy choices because they would be aware of the first party collecting their data and could assert their rights directly with that first party.

For further analysis on the Alliance’s proposed Data Poaching Rule, see the Comments of Hal J. Singer and Augustus Urschel.³⁵

³⁵ See Commercial Surveillance ANPR (R111004), Comments of Hal J. Singer and Augustus Urschel (submitted November 21, 2022).

VIII. Consumer Opt-Out Choices Are Ineffective Because of Dominant Platforms' Market Dominance (Questions 73-76, 80)

Dominant search and social media platforms often dictate their own rules for honoring opt-in and opt-out signals. This makes it difficult for publishers to comply with their own obligations and effectively creates more work on the part of publishers. Meanwhile, publishers have absolutely no control over whether the dominant search and social media platforms actually comply with such consumer requests. Current opt-out frameworks have not been effective because users often have no ability to opt-out of commercial surveillance by dominant search and social media platforms. Any new privacy rule should account for the inherent imbalance in effectuating consumer opt-outs and hold dominant platforms accountable for honoring consumer requests.

IX. The FTC Should Consider Remedies that Balance the Harm to Consumers (Question 94)

The FTC should provide regulated entities with a right to cure violations that have not resulted in a “substantial privacy harm.” Where an entity has put forth good faith efforts to comply, or has adequate processes in place designed for compliance (taking into consideration its size and volume of user data processing), such regulated entities should be given notice and an opportunity to cure the violation.

For similar reasons, the FTC should only bring enforcement actions against a regulated entity for a “substantial privacy harm” where the harm is a direct and proximate result of a knowing or reckless violation of the privacy rule. Relief for such harm should be restricted to actual damages sustained by the consumer as a direct and proximate result of the “substantial privacy harm,” or the FTC may seek injunctive relief.

The FTC should also ensure that any regulated entity that exercises its First Amendment rights or freedoms to gather and publish information as guaranteed under the U.S. Constitution or any applicable state Constitution will not be in violation of any privacy rule. Neither should the exercise of any such rights amount to a substantial privacy harm.

X. Any New Trade Regulation Rule Should Seek to Correct the Imbalances Vis-à-Vis Dominant Tech Platforms and Enable Publishers to Continue to Benefit from Responsible Digital Advertising (Question 95)

The FTC should consider the unique position of the news and magazine industries when crafting any additional privacy or data security requirements. A new privacy trade regulation rule should not hinder readers' access to high-quality news information, media, and independent journalism.

News and magazine publishers' ad revenues have decreased considerably over the last fifteen years or so, with news publishers losing over 80 percent of their ad revenues between 2005 and 2020.³⁶ At the same time, news publishers' share of ad revenues coming from digital advertising has increased from 17 percent in 2011 to 39 percent in 2020, while consumer magazines are expected to witness a compound

³⁶ See PEW RESEARCH CENTER, NEWSPAPER FACT SHEET, available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17 2022).

annual growth rate of 3.1 percent in digital advertising revenues between 2021 and 2025, as opposed to a 5-year compound annual decline of 2.8 percent in overall ad revenues.³⁷ In short, while digital advertising has grown significantly, it has failed to make up for the decline in print advertising revenues.

At the same time that advertising revenue is in decline, jobs in the magazine and news media industries have decreased noticeably with newspaper employment down from approximately 71,000 in 2008 to less than 31,000 in 2020, a trend that is expected to continue in the coming years.³⁸ Similarly, there has been a substantial loss of community newspapers with at least 200 counties, representing four million Americans, no longer having a newspaper.³⁹ In total, 2,500 newspapers have either closed or merged since 2004.⁴⁰ These losses are more likely to affect already disenfranchised people and communities, with many of the lost or failing newspapers in areas that are less affluent than the national average.⁴¹ While magazine publishers have generally fared somewhat better, many have been forced to reduce print days or cut print editions completely, in an effort to lower costs.⁴²

However, while advertising revenues have fallen sharply, the audience for newspaper and magazine journalism has increased substantially. Newspapers' digital circulation increased between 27 and 38 percent from 2019 to 2020, while the number of unique monthly visitors to the top 50 U.S. newspaper websites increased by almost 70 percent between 2014 and 2020.⁴³ Similarly, the audience for magazines increased during the COVID-19 pandemic to 1.56 billion readers.⁴⁴ Overall, the top three magazine publishers reach more women than the top four technology platforms.⁴⁵

Part of the reason publishers have been unable to replace print advertising revenues with digital advertising is the so-called "ad tech tax," which captures a large percentage of digital ad spend. On average, publishers receive only 51 percent of advertiser spend on programmatic advertising, with some estimates indicating that their share could be as low as 30 to 40 percent.⁴⁶ The remaining lost share is worth billions

³⁷ See PEW RESEARCH CENTER, NEWSPAPER FACT SHEET; MARKETING CHARTS, US ONLINE AND TRADITIONAL MEDIA ADVERTISING OUTLOOK, 2021-2025 (Jul. 21, 2021), available at <https://www.marketingcharts.com/featured-117719> (last visited Nov. 17, 2022).

³⁸ See Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RESEARCH CENTER (Jul. 13, 2021), available at <https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>; BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: REPORTERS, CORRESPONDENTS, AND NEWS ANALYSTS, available at <https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm> (last visited Nov. 17, 2022).

³⁹ See University of NORTHWESTERN UNIVERSITY, LOCAL NEWS INITIATIVE, *The State of Local News 2022*, <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/> (last visited Nov. 17, 2022).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Beth Braverman, *How Magazine Publishers Are Cutting Print Costs to Improve Profits*, Folio Magazine (Aug. 2, 2021), available at <https://archive.foliomag.com/magazine-publishers-cutting-print-costs-improve-profits/> (Nov. 17, 2022); Peter Houston, *2021 in Print: Newspapers' Decline Continues, But for Magazines ... It's Complicated*, What's New in Publishing (Dec. 20, 2021), available at <https://whatsnewinpublishing.com/2021-in-print-newspapers-decline-continues-but-for-magazines-its-complicated/> (last visited Nov. 17, 2022).

⁴³ See PEW RESEARCH CENTER, NEWSPAPER FACT SHEET, available at <http://www.journalism.org/fact-sheet/newspapers/> (last visited Nov. 17, 2022).

⁴⁴ See MPA – THE ASSOCIATION OF MAGAZINE MEDIA, *MAGAZINE MEDIA HANDBOOK* (2021), available at https://www.newsmediaalliance.org/wp-content/uploads/2018/08/2021-MPA-Factbook_REVISED-NOV-2021.pdf (last visited Nov. 17, 2022).

⁴⁵ *Id.*

⁴⁶ See ISBA, *Programmatic Supply Chain Transparency Study 19* (May 2020), available at <https://www.isba.org.uk/system/files/media/documents/2020-12/executive-summary-programmatic-supply-chain->

of dollars in revenue – money that lines the pockets of intermediaries and online platforms – instead of benefiting the publishers who produce the content against which the ads are sold.

Plummeting publisher revenues have coincided with the rise of the dominant online platforms, who control the digital advertising space. Together, Meta and Alphabet account for almost 55 percent of the digital advertising market, including the vast majority of all digital advertising growth.⁴⁷ In addition to reaping the most benefits from digital advertising, these platforms also collect and process the vast majority of user data, including users who search for and interact with news content – data that they can poach from third-party websites to further entrench their position.⁴⁸

While many publishers experiment with alternative revenue streams in the face of online monopolies – from subscription-based approaches to non-profit models – digital advertising remains an integral lifeline for most publishers, especially small and local publications with a limited readership base. Due to the realities of the current online marketplace, publishers serve digital advertisements in a variety of formats, including ads that allow advertisers to target specific consumer segments. Considering the benefits of such advertising in preserving high-quality journalism, the Alliance believes any rulemaking should focus on how to do so responsibly, build policy frameworks that establish obligations based on risk, and preserve the ability of newspapers and magazines to continue to benefit from digital advertising in order to provide free and low-cost trustworthy information on which their readers rely.

Google, in particular, operates on all sides of the digital advertising marketplace. Almost 90 percent of all online searches go through Alphabet or one of its platforms. Alphabet also is involved in nearly 70 percent of all digital ad tech transactions⁴⁹ – cemented by Google’s acquisitions of DoubleClick and AdMob over the past 15 years⁵⁰ – giving it unprecedented market power over publishers and competitors who are

[transparency-study.pdf](#); NEWS/MEDIA ALLIANCE, *Big Tech Says Publishers Keep Majority of Ad Revenue, But Experience Suggests Otherwise* (Nov. 16, 2020), available at <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/> (last visited Nov. 17, 2022).

⁴⁷ See generally Alexandra Bruell, *Amazon Surpasses 10% of U.S. Digital Ad Market Share*, *The Wall Street Journal* (Apr. 6, 2021), available at <https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200> (last visited Nov. 17, 2022); Megan Graham, *Digital Ad Spend Grew 12% In 2020 Despite Hit From Pandemic*, *CNBC*, available at (Apr. 7, 2021), <https://www.cnn.com/2021/04/07/digital-ad-spend-grew-12percent-in-2020-despite-hit-frompandemic.html> (last visited Nov. 17, 2022).

⁴⁸ See, e.g., David Braue, *Google hoards more personal data than Facebook*, *ACS Information Age* (May 26, 2022), available at <https://ia.acs.org.au/article/2022/google-hoards-more-personal-data-than-facebook.html> (last visited Nov. 17, 2022); THE GUARDIAN, *Why Google And Facebook Are Being Asked to Pay for the News They Use – Explainer* (Sep. 4, 2020), available at <https://www.theguardian.com/technology/2020/sep/05/why-google-and-facebook-are-being-asked-to-pay-for-the-news-they-use-explainer> (last visited Nov. 17, 2022).

⁴⁹ See generally STATCOUNTER, *Search Engine Market Share United States of America, January 2009 to October 2022*, available at <https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america/#monthly-200901-202210> (last visited Nov. 17, 2022); Jeff Desjardins, *How Google Retains More Than 90% of Market Share*, *Business Insider* (Apr. 23, 2018), available at <https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4> (last visited Nov. 17, 2022); NEWS/MEDIA ALLIANCE, *Big Tech Says Publishers Keep Majority of Ad Revenue, But Experience Suggests Otherwise* (Nov. 16, 2020), <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/> (last visited Nov. 17, 2022).

⁵⁰ See, e.g., Nicolás Rivero, *The Acquisitions That Made Google a Search Monopoly*, *Quartz* (Oct. 20, 2020), available at <https://qz.com/1920334/the-acquisitions-that-built-googles-monopoly-on-search/> (last visited Nov. 17, 2022); Greg Sterling, *A Year Later: AdMob A Critical Mobile Asset For Google*, *Search Engine Land* (May 25, 2011), available at <https://searchengineland.com/a-year-later-admob-a-critical-mobile-asset-for-google-78515> (last visited Nov. 17, 2022); Robert Hahn & Hal Singer, *An Antitrust Analysis of Google’s Proposed Acquisition of*

sometimes wholly reliant on Alphabet's services. In the past, Google effectively forced publishers to adopt services like its Accelerated Mobile Pages (AMP), which required publishers to build mirror-image websites using the AMP format and allowed Google to cache all AMP articles to directly serve them to mobile users.⁵¹ AMP keeps users in Google's ecosystem while making it harder for publishers to form deep relationships with their readers, reducing subscription conversion rates and advertising revenues, and preventing publishers' collection of certain user data.⁵²

A properly formulated privacy rule should recognize the noticeable market imbalances and bargaining disparities in the digital advertising ecosystem, particularly between publishers and the dominant online platforms, which pose an existential threat to news and magazine publishers. Any rule should aim to apportion obligations based on size and risk to avoid creating undue burdens for publishers who have fewer resources and lack the leverage to negotiate around the dictated terms and technical tools of the dominant online platforms that are designed to siphon data away from publishers and their first-party relationships with consumers. Failure to recognize this reality will further entrench the dominant position of these search and social platforms. A properly drafted privacy rule will help to level the playing field and bring value back to publishers who are engines for creating sought-after content, supporting the foundation for a vibrant and financially stable independent press and a healthy democracy.

XI. Conclusion

The Alliance appreciates the opportunity to provide these comments to the Advance Notice of Proposed Rulemaking. We commend the Federal Trade Commission on its efforts and we hope that this process will demonstrate the need to address the unfair and anticompetitive data collection and processing practices of the dominant online platforms, while preserving the ability of publishers that fulfill a vital First Amendment function, to benefit from digital advertising and support communities' access to free and low-cost journalism.



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⁵¹ NEWS/MEDIA ALLIANCE, *How Google Abuses Its Position as a Market Dominant Platform To Strong-Arm News Publishers And Hurt Journalism* (2020), available at http://www.newsmediaalliance.org/wp-content/uploads/2022/09/NMA-White-Paper_REVISED-Sept-2022.pdf (last visited Nov. 17, 2022).

⁵²*Id.*