January 30, 2023

Mr. Daniel Lee  
Assistant U.S. Trade Representative for Innovation and Intellectual Property  
Office of the U.S. Trade Representative  
600 17th Street NW  
Washington, DC 20508

Re: News/Media Alliance Comments Regarding the 2023 Special 301 Review, Docket Number USTR-2022-0016.

Dear Mr. Lee,

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. The Alliance diligently advocates for news and magazine publishers on a broad range of current issues affecting them, including intellectual property protections.

The Alliance welcomes the opportunity to provide these comments to the Office of the United States Trade Representative (“USTR”) in response to the Request for Comments and Notice of a Public Hearing Regarding the 2023 Special 301 Review, Docket Number USTR-2022-0016, 87 Fed. Reg. 76,660 (December 15, 2022).

The news and magazine media industries make considerable contributions to the U.S. economy and society. Combined, the industries’ estimated revenues amounted to almost $45 billion in 2020, while newsrooms were estimated to employ approximately 31,000 people in 2020 – not including any indirect employment effects – and magazines over 73,000 people directly and over 219,000

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jobs in total, including indirect employment effects, in 2021. In addition to numerous societal benefits, news publishers reach an estimated online and print audience of 136 million Americans per week, representing approximately 40 percent of the total population, while the total audience of magazines – without duplication – amounted to over 221 million in 2020 with a total brand audience (including duplicates) of 1.56 billion. A reputation for quality and content that is accurate and reliable matters to many readers and subscribers, and as a result, publishers must continuously make considerable investments in producing and supporting high-quality journalism. This journalism keeps our communities informed, decision makers accountable, and supports a healthy democracy and self-government.

However, despite the importance of and strong audience for high-quality journalism and publishers’ efforts to develop new business models and revenue streams, 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. 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 survive.

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These losses are, in large part, a result of decreasing print advertising revenues, which have not been offset by digital advertising, despite publishers’ best attempts. Instead, the majority of digital advertising revenues, as well as user data, have been captured by a few dominant online platforms, who impose terms and conditions on publishers and others in the online ecosystem, while also controlling algorithms that decide what content gets promoted or demoted. These market imbalances have created an existential crisis for publishers of all sizes, with small, local publishers particularly affected.

Over the last four years, a wide range of countries and regions, including the European Union, Australia, Canada, India, and the United States, have recognized these power imbalances and the importance of addressing them in order to protect the sustainability of high-quality journalism. In 2019, the European Union set the stage by adopting the Directive on Copyright in the Digital Single Market, including Article 15 which requires EU member states to create an ancillary copyright for news publishers, providing publishers with an independent right to protect their content online and thereby effectively granting European news publishers the same fundamental rights that are already provided under U.S. law. Since its implementation into national law in France, Germany, and other member states, publishers small and large have reached significant deals with the platforms, despite efforts to avoid payments.

Following the EU’s example, in 2021, Australia adopted its News Media Bargaining Code, which is based on competition law instead of copyright law. The Code requires designated platforms to negotiate with eligible publishers and establishes a binding, final-offer arbitration mechanism in case negotiations fail. Despite no platforms having yet been designated under the Code, the mere threat of designation has led to multiple deals, amounting to estimated payments of AUS$200 million to publishers and increased hiring of journalists. The overwhelmingly positive effects of the Code speak to the significance of these measures in advancing the important public policy goal of protecting the availability of and communities’ access to professional journalism.

Other countries, including the UK, Canada, India, and Taiwan have since introduced or are reportedly considering introducing similar measures that would facilitate negotiations between


publishers and the dominant online platforms. In the United States, Congress recently considered the *Journalism Competition and Preservation Act*, which garnered a total of 15 co-sponsors in the Senate and 75 in the House. The Senate Judiciary Committee marked up the bill before the end of the last session and it continues to enjoy strong bipartisan support in the current Congress as well as in the Administration. All of these measures are narrowly tailored, nondiscriminatory, and aimed at addressing a pressing public policy concern that underlies the health of our democratic institutions.

It is therefore disheartening that some stakeholder groups have in recent years called on the USTR to express concerns over these measures in various proceedings, including the request for comments for the Special 301 Review. During the previous review cycle, one stakeholder specifically argued that the Office could address these issues under the Special 301 process as it “should not only account for gaps in enforcement but also identify areas where countries ... have used intellectual property regulation to target leading U.S. firms.” The Alliance strongly disagrees with this characterization of the scope of the Special 301 Review process, in addition to which the underlying assumption is factually inaccurate. These bills do not “target leading U.S. firms,” but are narrowly tailored to correct market imbalances in order to protect professional journalism, regardless of the national origin or the place of incorporation of the platform in question. The fact that the majority of the platforms engaging in harmful market behaviors that make these measures necessary in the first place are American does not make them discriminatory. Neither are these measures a violation of international law, despite arguments to the contrary.


While the Special 301 Review Report has in the past referred to the EU’s Copyright Directive as a potential issue, the Alliance has been encouraged by the Office’s recent Special 301 Review reports that have left competition-based approaches to news compensation unaddressed while simply noting that “U.S. stakeholders have expressed views” regarding the EU’s Copyright Directive in general and encouraging consistent and transparent implementation of the obligations at national level.\(^{13}\) Considering that the measures to ensure fair and adequate compensation for the use of news content online are arguably not within the scope of the Special 301 Review, and that there exist considerable differences of opinion within the U.S. stakeholders on these issues, we strongly urge the Office to continue to remain silent. While these comments relate to the Special 301 Review, we believe that this principle is sound and should be followed in other proceedings and communications as well.

Considering the strong international consensus for measures to protect publishers and the importance of high-quality journalism for healthy democracies, the Alliance believes it is vital that the U.S. Government support policies globally that enhance and strengthen protections for professional journalism. The Alliance welcomes this opportunity to provide the USTR with these comments, and we look forward to continuing to support the Administration in its efforts to address challenges facing American businesses abroad and to make trade work better for all Americans.

Sincerely,

Danielle Coffey
Executive Vice President & General Counsel
News/Media Alliance