

RE: Canada’s Online News Act Is Not a Discriminatory Trade Barrier under USMCA

Background

On June 22, 2023, the Canadian Government adopted Bill C-18, the Online News Act, to enable news publishers to negotiate – collectively, if desired – with digital platforms for compensation for the use of their content. The Canadian policy is very similar to the U.S. *Journalism Competition and Preservation Act* (JCPA), a bipartisan measure – recently reintroduced by Senators Amy Klobuchar (D-MN) and John Kennedy (R-LA) as S. 1094 – that was marked up by the Senate Judiciary Committee in June 2023, having previously been passed by the Senate Judiciary Committee in 2022 and nearly adopted by the U.S. Congress at the end of the last session. Canada’s Online News Act and the JCPA are both similar to the News Media Bargaining Code, adopted in Australia in 2021. The Australian policy has resulted in new revenue and increased newsroom hiring for the Australian news media, delivering a considerable benefit to the Australian public.¹

All of these policies address the monopoly problem that has led the Biden administration to launch a priority all-of-government competition initiative. U.S. Trade Representative Katherine Tai’s major policy speech at the National Press Club on June 15, 2023, reiterated that the Biden administration’s trade policy incorporates and seeks to elevate the strong Biden administration effort to counter the threats monopoly power poses to our economy and democracy and to promote competition. In the case of the JCPA, Canadian Online News Act, and Australian New Media Bargaining Code, the monopolies in question are the few dominant online platforms that control digital advertising and content distribution. The policies solve an important public policy concern: How to protect the sustainability of high-quality journalism in the face of anti-competitive market practices by the largest online platforms that take advantage of news content without fair payment to the content creators while simultaneously dominating the advertising market that used to provide revenue to support the journalism necessary to sustain democratic governance.

¹ See, e.g., Australian Government The Treasury, *News Media and Digital Platforms Mandatory Bargaining Code: The Code’s First Year of Operation* (Nov. 2022), <https://treasury.gov.au/sites/default/files/2022-11/p2022-343549.pdf> (stating that the “Code has been a success to date” with over 30 commercial agreements reached with a cross-section of Australian news businesses, leading to increased revenues and hiring of journalists); ABC, *ABC to Add More than 50 Journalists in Regional Australia* (Dec. 3, 2021), <https://about.abc.net.au/press-releases/abc-to-add-more-than-50-journalists-in-regional-australia/>; Sims, Rod, *Instruments and Objectives; Explaining the News Media Bargaining Code*, https://jinstitute.org/wp-content/uploads/2022/05/Rod-Sims_News-Bargaining-Code_2022.pdf; Schiffrin, Anya, *Australia’s News Media Bargaining Code Pries \$140 Million from Google and Facebook* (Aug. 16, 2022), <https://www.poynter.org/business-work/2022/australias-news-media-bargaining-code-pries-140-million-from-google-and-facebook/>.

The failure of competition policy and authorities to rein in market dominant platforms in the digital ecosystem and to preserve fair market terms for access to local, regional, and national news content is damaging in its own right, but the relative size and globalized nature of digital platforms exacerbates these policy and market failures. Digital advertising is now largely controlled by a limited number of very large digital platforms, which has greatly diminished revenue streams with which news businesses had previously supported reporters and newsrooms. At the same time, news businesses in any given city, state, or country are effectively forced to depend on these platforms' services for essential distribution functions due to their market reach and power. In order to survive, news businesses therefore have few other options than to cooperate and *accept the platforms' business terms and practices*. This creates fundamental bargaining disparities between the digital platforms and news businesses, leaving news businesses largely unable to negotiate terms of compensation for their content on an even playing field with digital platforms, or to effectively enforce their intellectual property rights over the content that news businesses generate with respect to the digital platforms that profit from the use of that content.

The result is a crisis in newsrooms in many countries where the news outlets vital to sustaining healthy democracies cannot generate the income needed to pay journalists to cover the news. According to a recent report, the United States has lost one-quarter of its newspapers since 2005, with one-fifth of the population living in news deserts or areas that are susceptible to becoming news deserts. At the current rate, Americans are losing an average of two newspapers per week, and will have lost one-third of their newspapers by 2025.² The same disconcerting trends are happening in Canada, with hundreds of newspapers closing between 2008 and 2020 and the rate of closures increasing.³ Numerous essential public interest goals, shared by countries worldwide, rely on professional journalism at local, regional, and national levels to provide information for citizen engagement. Yet worldwide, newsrooms are being hollowed out and publications are closing. The concerns that have motivated the creation of the JCPA, the Online News Act, and Australia New Media Bargaining Code are widely shared among policymakers and the general public not only in United States, Canada and Australia, but also in Europe, India, and the UK.

To counter this threat, the relevant U.S. (proposed), Canadian and Australian competition policies employ a similar mechanism that is neutral with respect to the national origin of the market players to which they apply: They allow news publishers to come together to negotiate collectively with large online platforms to obtain fair compensation for the platforms' online use of the publishers' content. Which platforms are required to bargain with content creators is determined on the basis of size and

² See, e.g., Abernathy, Penny, *The State of Local News: The 2022 Report*, <https://localnewsinitiative.northwestern.edu/research/state-of-local-news/report/>.

³ See, e.g., Grafton, Ken, *News Deserts: Why the Decline in Local Journalism Threatens Democracy* (Apr. 16, 2021), <https://www.thespec.com/opinion/contributors/2021/04/16/news-deserts-why-the-decline-in-local-journalism-threatens-democracy.html>; Hoffman, Josh, *Canada's Local News Deserts* (Nov. 30, 2020), <https://signalhfx.ca/canadas-local-news-deserts/>.



market power without regard to national origin. U.S.-based platforms would be affected by Canada’s Online News Act because of their size and market dominance, not because they are American. Despite this, some technology interests have attacked the Canadian law as violating Canada’s trade obligations with respect to the United States.

The Online News Act is compatible with Canada’s commercial non-discrimination obligations in trade agreements, including rules concerning equal treatment for domestic and foreign goods and services in the United States-Mexico-Canada Agreement (USMCA). If the Office of the U.S. Trade Representative were to consider the Canadian Online News Act, with its facially neutral mechanism applying to large firms of all national origins that meet the Act’s definition of “*digital news intermediary*,” to be a violation of the USMCA “non-discrimination” rules, it effectively would mean that the Biden administration interprets the USMCA as designating essential 21st century anti-monopoly policies as forbidden trade barriers. This position would be in stark contrast to Ambassador Tai’s recent speech underscoring that U.S. trade policy must promote, not undermine, the administration’s all-of-government competition policy priority. Thankfully, as the next section of this memo explains, such an interpretation is not supported by an analysis of the actual USMCA provisions relevant to the Online News Act.

1. The Online News Act Is a Generally Applicable Measure That Does Not Discriminate Against U.S. Companies

Article 4 of the Online News Act articulates the foundational public policy objective of regulating “*digital news intermediaries with a view to enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability, including the sustainability of news businesses in Canada.*”

To reach the identified policy objective, the Act adopts a narrowly-tailored, non-discriminatory approach that targets anticompetitive behavior directly related to the size, practices, and market position of digital platforms. The measure applies equally to like domestic and foreign entities. The Online News Act covers “operators” of “digital news intermediaries,” regardless of their national origin. A digital news intermediary is defined as an “online communications platform, including a search engine or social media service . . . that makes news content produced by news outlets available to persons in Canada.”⁴ A digital news intermediary is covered by the policy if it meets market-based applicability criteria that are discussed below. “News business,” meanwhile, is defined as “an individual or entity that operates a news outlet in Canada,”⁵ with Article 27(1) making clear that publishers based in the United States that have editorial staff or bureaus in Canada can also benefit from the Online News Act.

⁴ Article 2(1), Bill C-18, An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/third-reading>.

⁵ Article 2(1), Bill C-18, An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/third-reading>.



Article 6 provides that digital news intermediaries are subject to the Act only if, in light of their size, strategic advantage, and market position, there is a “significant bargaining power imbalance between [the platform’s] operator and news businesses.”⁶

The Online News Act will apply to a:

“...digital news intermediary if, having regard to the following factors, there is a significant bargaining power imbalance between its operator and news businesses: (a) the size of the intermediary or the operator; (b) whether the market for the intermediary gives the operator a strategic advantage over news businesses; and (c) whether the intermediary occupies a prominent market position.”

These factors are directly related to, and justified by, the public interest goal of addressing the anticompetitive conduct unique to companies that meet the criteria and thereby pose the biggest threat to the sustainability of high-quality journalism in Canada. These criteria apply to any online platform – present or still to be developed – that has gained a prominent position in the Canadian market.

Importantly, digital platforms of all national origins are equally subject to the Online News Act to the extent that their size and market position enable the concerning conduct – “significant bargaining power imbalance” - targeted by the legislation. U.S.-based platforms would receive treatment no different than “like” platforms based in Canada or other countries. Because the test is one of power imbalance, not national origin, no small platforms are subject to the Act, foreign or domestic. Smaller firms’ characteristics do not enable them to engage in the types of conduct vis-à-vis news businesses that are targeted by the Online News Act. As a result, various U.S.-based platforms, such as Vimeo and Reddit, would likely be excluded from the scope of the Act, as would Canadian platforms with similar characteristics. The criteria are also narrowly tailored to address market imbalances between digital platforms and local, regional, national, and (perhaps particularly) Indigenous news businesses generally, regardless of the identity or national origin of the digital platform.

For example, during debate in the Canadian Senate, Senator Donna Dasko specifically asked whether TikTok would be affected by the Act. The Online News Act’s sponsor, Senator Peter Harder, confirmed that the “bill is agnostic in terms of identifying particular platforms.”⁷ Rather, he emphasized, the Act is instead designed to address the issue of the “appropriat[ion of] the journalistic content created by the publishing community” and the actors responsible for that conduct.⁸ In sum, the application of the Online News Act is based on national-origin-neutral criteria that target specific conduct, with the

⁶ Article 6, Bill C-18, An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/third-reading>.

⁷ Senator Donna Dasko, Topic Intervention 598742-25 (Feb. 7, 2023), <https://sencanada.ca/en/senators/dasko-donna/interventions/598742/25>.

⁸ *Id.*



companies affected by the proposed policy being clearly distinguishable from those unaffected by it for reasons entirely unrelated to national origin.

Despite this, some opponents have claimed that the Online News Act violates terms in USMCA Chapters 14, 15, or 19 by discriminating against U.S.-based companies. The law does not conflict with those USMCA obligations given that Canada negotiated a broad “Cultural Industries” carve-out. This carve-out allows Canada to enact and enforce policies related to “publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form” that the carve-out places outside the scope of USMCA rules. Ironically, this provision, Article 32.6, states that if Canada uses the carve-out, one of the ways in which another signatory country may “retaliate” is to enact a similar policy, such as the JCPA. Undoubtedly, this is not the objective of the opponents of Canada’s Online News Act.

The rest of this memo explains the legal reasons why Canada does not violate its USMCA obligations by adopting and applying the Online News Act. Specifically, the memo submits that:

- a. Under USMCA Article 32.6, USMCA obligations do not apply to measures with respect to Canadian cultural industries like the Online News Act;
- b. The Online News Act would not violate the National Treatment obligations included in USMCA Articles 14.4 and 15.3 given that domestic Canadian businesses are not in like circumstances compared with large U.S. digital platforms; and
- c. Even if USMCA obligations were applicable, USMCA Article 19.4 on non-discrimination for digital products does not apply to the Online News Act.

a. USMCA Obligations Do Not Apply to Canadian Cultural Industry Policies Such as the Online News Act

In this memo we will consider if the Online News Act could theoretically violate some provision of the USMCA. However, this is arguably irrelevant as Canada obtained a broad USMCA carve-out for “Cultural Industries” and thus the law is not subject to these USMCA provisions.

Article 32.6 allows Canada to establish and maintain policies covering cultural industries, including “*the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,*” “*the production, distribution, sale, or exhibition of film or video recordings,*” and “*all radio, television and cable broadcasting undertakings.*” This is a broad carve-out that directly states: “*This Agreement does not apply to a measure adopted or maintained by Canada with respect to a cultural industry, except as specifically provided in Article 2.4 (Treatment of Customs Duties) or Annex 15-D (Programming Services).*” Thus, policies with respect to these industries are excluded from the agreement’s coverage, regardless of whether they would theoretically violate USMCA obligations.





Insofar as the Online News Act is undoubtedly a policy adopted by Canada to ensure the survival of the cultural industries mentioned above, including local newspapers, magazines, and radio and television broadcasters, USMCA Article 32.6 is applicable and, consequently, the measure is not covered by the obligations of the agreement.

The carve-out also includes two provisions that allow the United States and Canada to take countervailing actions if they believe that a Canadian policy exempted from USMCA's obligations by this carve-out alters the balance of obligations and benefits under the agreement. The first provision, as noted above, would promote U.S. adoption of the JCPA – and further the Biden administration's all-of-government competition policy initiative as a form of "retaliation." Article 32.6(3) provides:

With respect to Canadian goods, services, and content, the United States and Mexico may adopt or maintain a measure that, were it adopted or maintained by Canada, would have been inconsistent with this Agreement but for paragraph 2.

The carve out also provides for a more traditional countervail in Article 32.6(4).

Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2 or 3.

However, given the Online News Act is a facially neutral competition policy very similar to a policy with bipartisan support in the U.S. Congress, we strongly urge the USTR not to support such a response and to communicate so to the Canadian government.

b. The Online News Act Would Not Violate USMCA's Investment or Services Chapters' Non-Discrimination Rules

Opponents of the Online News Act also argue that the law would violate the USMCA services and investment chapters' non-discrimination rules if Canadian businesses are not designated as "digital news intermediaries" subject to the negotiation mandate of the law.

Assuming that the U.S.-based firms the Online News Act could cover were considered foreign investors under the USMCA, the proposed legislation does not provide for more favorable treatment to like Canadian investments, investors, services, or service suppliers than to those of other parties as prohibited by USMCA Article 14.4 and Article 15.3.

That is the case because those two clauses require:

*Art 14.4: National Treatment 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, **in like circumstances**, to its own investors with respect to the*



establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. (emphasis added)

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. (emphasis added)

Article 15.3: National Treatment 1. Each Party shall accord to services or service suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to its own services and service suppliers. (emphasis added)

Both provisions also include this clause:

Art 14. 4 (4): For greater certainty, whether treatment is accorded in “like circumstances” under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 15.3(3): For greater certainty, whether treatment referred to in paragraph 1 is accorded in(3) “like circumstances” depends on the totality of the circumstances, including whether the relevant treatment distinguishes between services or service suppliers on the basis of legitimate public welfare objectives.

One opponent, for example, has claimed that if small Canadian businesses – such as UrbanToronto, Loonie Politics, or Daveberta – are not designated as covered digital news intermediaries, Canada would violate these National Treatment standards.

This perspective fails to recognize that the key element to determining whether there is a violation of the National Treatment standard of both chapters is the existence of domestic firms, services, or covered investments in “like circumstances” as those of the foreign businesses allegedly being discriminated against. There is no set of comparators that would lead to the conclusion that local news aggregators, like Loonie Politics⁹ or Daveberta,¹⁰ could be deemed businesses in “like circumstances” of those enjoyed by the most valuable and powerful digital platforms in the world.

Indeed, given the U.S. administration’s competition policy agenda that Ambassador Tai recently emphasized is also at the heart of administration trade policy, there is only one way for USTR to approach the “like circumstances” test. That is to conclude that size and market power matter when analyzing the circumstances surrounding competition policies. This would not be an unprecedented

⁹ Loonie Politics, *About Us*, <https://looniepolitics.com/about-us/>.

¹⁰ Daveberta.ca, *About*, <https://daveberta.ca/about/>.



position. Investment law arbitrators have recognized that differences in treatment based on businesses' size are a valid policy rationale that truncates National Treatment allegations.¹¹

To ensure consistency across the administration, USTR must conclude that, with respect to trade agreement National Treatment obligations, if a competition policy results in disparate impacts for certain American firms – provided that the policy is not facially discriminatory – then the “like circumstances” analysis must be premised on fulfilling the legitimate public welfare objective of addressing monopolies. Absent such a position, *any* and *every* competition policy initiative in the tech sector that, as is necessary and appropriate for such a policy, is targeted based on firms' size or market dominance, is an agreement violation as they will have a greater impact on U.S. firms – not because they are from the United States but because many of the largest most dominant firms in this sector happen to be U.S. firms. Certainly, it cannot be the Biden administration's policy that when other nations adopt policies that target the largest, most market dominating firms, these are illegal trade barriers if those firms happen to be American, but when the United States proposes similar measures, like the JCPA, we are carrying out sound anti-monopoly policy.

Moreover, as noted above, any analysis of an alleged breach of the non-discrimination standard must factor in whether the treatment afforded through the relevant policy is based on legitimate public welfare objectives. The Online News Act is a narrowly tailored solution to a very real threat to the public interest. Access to and availability of free and independent journalism is vital for Canadian communities, which rely on high-quality journalism to make important decisions on various issues, including health, education, and democratic engagement.

The Act's provisions ensure continued sustainability of journalism “in both the non-profit and for-profit sectors, including independent local ones.”¹² It does so by strengthening the position of news publishers in negotiations regarding compensation for use of their content by digital platforms who would otherwise have no incentive to negotiate, especially with smaller or Indigenous news outlets. The adoption of the Online News Act would benefit all publishers in Canada meeting the eligibility criteria, regardless of their place of incorporation, including – and arguably especially – small, local, and Indigenous publishers that are struggling the most and lack the leverage to negotiate effectively with digital platforms. Digital platforms in Canada frequently use the content of such small, local, and Indigenous newspapers, and it is expected that such newspapers will be able to negotiate more effectively with these platforms to protect their rights and to support newsroom expenses under the Act. As Canadian Senator Peter Harder stated during the Canadian Senate debate on the Act, the “working principle” is that the Act could cover up to “about 30 to 35 percent” of Canadian publishers'

¹¹ *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (Award of 22 Aug. 2016). Paras. 556 – 564. In this case the tribunal sided with the defendant state rejecting Rusoro's claim that Venezuela had discriminated against it by offering additional support and less stringent requirements to small miners.

¹² Article 4, Bill C-18, An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/third-reading>.



newsroom salaries and wages.¹³ Senator Harder further specified that the compensation would not be “a cross-subsidy to non-news efforts.”¹⁴

The Online News Act is focused on large digital platforms because such entities’ dominance in the digital advertising ecosystem and control over content distribution are threatening the journalism necessary for a healthy democracy. The data warrant the policy’s focus. For example, Google controls over 90 percent of the publisher ad server market and 60 percent of the market for “ad exchanges,” while Google and Meta together capture almost half of all U.S. digital advertising revenues.¹⁵ In Canada, Google and Meta accounted for 80 percent of the digital ad market in 2019.¹⁶ Additionally, 65 percent of users stay within Google’s walled gardens and do not click through to the original content.¹⁷ And even if users do click through, platforms take up to 70 percent of every digital advertising dollar due to their control of the ad tech ecosystem, in addition to capturing large amounts of reader data.¹⁸ Meanwhile, Google has used its dominant market position to effectively force publishers to adopt its technologies and services, even undermining efforts to develop competitive services.¹⁹ Considering these market realities, publishers’ negotiation leverage against the platforms is diminished and measures to level the playing field needed.

Additionally, the Act’s provisions that enable collective bargaining by groups of eligible news businesses would establish for the news industry a mechanism similar in function to collection societies, which are already common in the administration of copyrights in domestic and international markets, including for public performances of works. Collection societies reduce costs for rights holders and rights users alike and enable more fair and effective negotiations for adequate royalty payments by rights users.

Further, the Act includes provisions to ensure that revenues received by eligible news businesses under agreements negotiated pursuant to the Act go directly to the production of journalism. The exemption

¹³ Senator V. Peter Harder, P.C. - Topic Intervention 598742 (Feb. 7, 2023), <https://sencanada.ca/en/senators/harder-peter-pc/interventions/598742/25>.

¹⁴ *Id.*

¹⁵ See, e.g., Cho, Winston, *Gannett Blames Google for Newspapers Shuttering in Digital Advertising Monopoly Lawsuit* (Jun. 20, 2023), <https://www.hollywoodreporter.com/business/business-news/gannett-sues-google-illegal-monopoly-digital-advertising-1235519995/>; Fischer, Sara, *Slow Fade for Google and Meta’s Ad Dominance* (Dec. 20, 2022), <https://www.axios.com/2022/12/20/google-meta-duopoly-online-advertising>.

¹⁶ NEWS MEDIA CANADA, *Google and Facebook Control the Internet Advertising Market in Canada* (Mar. 30, 2021), <https://nmc-mic.ca/2021/03/30/google-and-facebook-control-the-internet-advertising-market-in-canada/>.

¹⁷ See, e.g., NEWS/MEDIA ALLIANCE, *How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism* (Sep. 2022), http://www.newsmediaalliance.org/wp-content/uploads/2022/09/NMA-White-Paper_REVISED-Sept-2022.pdf; NEWS/MEDIA ALLIANCE, *Statement: White Paper Shows Google’s Ongoing Use and Abuse of News Content, Why We Need the Journalism Competition & Preservation Act* (Sep. 8, 2022), <https://www.newsmediaalliance.org/statement-white-paper-shows-googles-ongoing-use-and-abuse-of-news-content-why-we-need-the-journalism-competition-preservation-act/>.

¹⁸ *Id.*

¹⁹ *Id.*



orders – which allow a digital news intermediary to request an exemption from the requirements of the Act under certain circumstances – for example, are conditioned on the deals providing an “appropriate portion of the compensation” to “support the production of local, regional and national news content” and that a “significant portion of independent local news businesses benefit” from them.²⁰ Similarly, the independent annual review on the impact of the Act must include “information relating to the distribution of the commercial value of those agreements among eligible news businesses, including relative to the expenditures of those businesses on their newsrooms.” Put simply, contrary to what certain interest groups have suggested, the Act would not fill the pockets of large corporate shareholders but would instead help small local publishers survive and contribute to the sustainability of the Canadian news ecosystem.

While some have expressed concerns over the division of benefits between small and large publishers and broadcasters under the Australian News Media Bargaining Code – and articulated similar concerns with regards to Canada’s Online News Act – the Australian Code has benefited both small and large news outlets alike, in addition to which, it is not unexpected for large publishers to gain more in real terms, partially due to the fact that large news businesses have a larger audience, employ more journalists, and have greater expenses compared to smaller news businesses. In addition, Australia has one of the most concentrated media markets in the world, unlike Canada, making the comparison somewhat inappropriate. In fact, Canada’s media market being less concentrated than Australia’s makes a law providing collective negotiating rights for publishers even more important for the preservation of Canadian news media industry.

The Online News Act’s policy justifications are therefore not a façade to mask protectionism or other disconcerting purposes, such as a value-transfer from successful U.S. digital platforms to large Canadian corporations. It is also not aimed at aiding large news businesses or subsidizing journalism expenses generally. The Act is similar to the JCPA, which also provides for a negotiating framework, nondiscrimination between eligible digital journalism providers, and reporting requirements on investments to journalism in an effort to provide for a more sustainable future for high-quality journalism in the United States. In sum, the law’s treatment of large digital platforms stems exclusively from a legitimate public welfare objective and does not violate USMCA’s National Treatment obligations.

²⁰ Article 11(1)(a), Bill C-18, An Act Respecting Online Communications Platforms That Make News Content Available to Persons in Canada, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-18/third-reading>.



c. USMCA’s Digital Trade Chapter Article 19.4 Non-Discrimination Rule Does Not Apply to the Online News Act

According to the interpretations of USMCA Article 19.4 promoted by USTR and key industry sources, Canada’s policy also would not violate the digital trade chapter’s non-discrimination rule. This provision of the USMCA Digital Trade chapter prohibits countries from according “*less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party*” than is given to other like digital products.

The USMCA digital trade chapter’s non-discrimination obligation applies to a “digital product.” USTR has repeatedly stated that USMCA Article 19.4 is limited to discrimination related to specific digital products, such as e-books, games, movies, or – arguably – news content, and that it does not encompass whole digital platforms, their services, or the companies that own and operate them.

The Online News Act targets digital intermediaries – operators that provide broad services across product lines – with respect to the anticompetitive conduct of such firms. This means that the “treatment” afforded by the Canadian policy is related to the “operator,” not the platform that the operator makes available or the services it provides, much less to specific digital products. Thus, Article 19.4 does not apply to U.S.-based companies that may be subject to the Online News Act.

Ironically, the Computer and Communications Industry Association (CCIA), a lobby group representing Google, Amazon, Facebook and Apple that is most engaged in attacking the Online News Act as a USMCA violation, has reiterated this limited scope. For instance, in a CCIA document²¹ about the digital provisions in the USMCA and the proposed Indo-Pacific Economic Framework (IPEF), the CCIA notes:

“Critics are erroneously conflating how a government treats a supplier generally with how that supplier’s products are treated in comparison to those of its competitors. Regardless of whether new competition-inspired regulation is justified measures seeking to constrain the behavior of specific suppliers (e.g. Europe’s Digital Markets Act, Korea’s App store legislation) do not typically result in creating explicit “preferences” for domestic products, the target of digital non-discrimination rules.” *(emphasis added)*

4. The Online News Act Is Consistent with Canada’s USMCA Obligations to Address Anticompetitive Business Conduct

In addition to the Act not being discriminatory and supporting a critically important public policy objective, competition promoting measures like the Online News Act are explicitly permitted and

²¹ CCIA, *Myths and Facts about Digital Trade Rules*, <https://ccianet.org/library/myths-and-facts-about-digital-trade-rules/>.



encouraged by Chapter 21 of the USMCA. Chapter 21 clearly establishes the right and, indeed, obligation of each Party to “maintain national competition laws that proscribe anticompetitive business conduct to promote competition” and the right to “provide for certain exemptions from the application of its national competition laws” as long as such exemptions are clear, established in law, and based on public policy grounds.²²

As noted above, the public policy goal of the Online News Act is to promote the sustainability of news businesses in Canada and access to high-quality journalism by “enhancing fairness in the Canadian digital news marketplace.” The provisions of the Act promote competition in the digital news marketplace by enabling news businesses to more effectively negotiate fair payment for the use of their content by digital platforms. The Act thereby addresses the policy concern that digital platforms within the scope of the Act have engaged in unfair competition by using and promoting news content to their own benefit, without the payment of fair compensation to rightsholders. The Act also clearly sets forth the relevant criteria for any applicable exemptions – both as to the ability of news businesses to bargain collectively, as well as for the non-applicability of the Act to digital platforms if they demonstrate that they have independently entered into fair and appropriate agreements with news businesses.

Conclusion

In sum, the nondiscriminatory nature of the Online News Act, its support for a critical, democratic policy objective, and Canada’s broad and well-defined policy space under USMCA to enact measures with respect to cultural industries render the Act consistent with Canada’s USMCA obligations. The Online News Act is narrowly tailored to apply only to those platforms whose characteristics yield the greatest risk for anticompetitive conduct in their negotiations with news businesses, with minimal implications for international trade. This is especially the case considering the existence of similar laws and bills in other countries, including one under consideration the United States – and there are no alternatives that would accomplish these same goals while minimizing the burden to businesses in the online ecosystem. Thus, the Online News Act is not a tool of discrimination and does not conflict with Canada’s USMCA commitments.

²² The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., Chapter 21, art. 1 and 3, agreed to Oct.1, 2018, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Compensation_Policy.pdf.

