




NEWS MEDIA
ALLIANCE

August 15, 2018

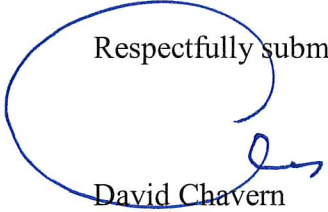
Ms. Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street SW
Washington, DC 20436

Re: News Media Alliance Written Submission for *Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness*, 83 Fed. Reg. 3185, January 23, 2018; Investigation No. 332-563.

Dear Ms. Barton:

The News Media Alliance hereby submits its written submission for *Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness*.

Respectfully submitted,



David Chavern
President & CEO
News Media Alliance

**Written Submission of the News Media Alliance for
the United States International Trade Commission**

**Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade
Restrictions, and U.S. Competitiveness**

The News Media Alliance (the “Alliance”) is a nonprofit organization that represents the interests of more than 2,000 news media organizations in the United States and around the world. The Alliance diligently advocates for newspapers before the Federal government on issues that affect today’s media organizations, including protecting newspapers’ intellectual property and economic interests globally.

The Alliance welcomes the opportunity to provide these comments to the United States International Trade Commission (the “Commission”) in response to 83 Fed. Reg. 3185 (January 23, 2018) with respect to Investigation No. 221-563, *Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness* for the purposes of preparing the third of three reports requested by the Office of the United States Trade Representative (“USTR”) on January 13, 2017, under Section 332(g) of the Tariff Act of 1930 (19 U.S.C. §1332(g)).

The news media industry generates \$28.9 billion in total revenue and employs approximately 174,000 people in the United States, while copyright-intensive industries in general contribute \$1.2 trillion to the US economy and employs 5.5 million people.¹ While vital to the functioning of democracies, news media in the United States and globally is facing a myriad of challenges. In the United States, physical newspaper circulation dropped by over 10% between 2016 and 2017, and although some news organizations witnessed large increases in digital subscriptions, overall digital circulation too dropped by 9% on average.² At the same time, however, over the last five years, digital audience for newspapers increased 21% from 2015 to 2016 and remained the same from 2016 to 2017.³ While this considerable increase in audience has led to increased digital advertising revenues, it is often not enough to offset the reduced physical advertising and digital

¹ Michael Barthel, “*Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*”, Jun. 1, 2017, <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>; United States Department of Labor, Bureau of Labor Statistics, *Newspaper Publishers Lose Over Half Their Employment from January 2001 to September 2016*, Apr. 3, 2017, <https://www.bls.gov/opub/ted/2017/newspaper-publishers-lose-over-half-their-employment-from-january-2001-to-september-2016.htm>; Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report 2* (Economists Incorporated, 2016).

² Pew Research Center, *Newspaper Fact Sheet*, <http://www.journalism.org/fact-sheet/newspapers/>.

³ *Id.*

and physical subscription revenues. News organizations in the United States and around the world are therefore forced to rethink their operating models while trying to survive the digital transformation with drastically reduced resources.

In their attempts to develop new business models and revenue streams, news organizations are further contending with a digital advertising and distribution ecosystem that is largely controlled by a select few online platforms, including Google and Facebook. These platforms account for 73% of the online ad market, including 83% of all digital advertising growth, with 93% of adults reading news online.⁴ The platforms also unilaterally control algorithms that are used to determine which news articles are delivered to users, and therefore, which news organizations succeed in the digital marketplace. These decisions by the platforms particularly affect small, community newspapers who struggle with declining revenues and the lack of resources more than more established, national news organizations.

Considering the importance of the creative industries and news media to the US economy and society in general, the Alliance believes it to be of vital importance for the US Government to support policies internationally that enhance and strengthen intellectual property protections for American creative industries and high-quality news. The Constitution requires the government to secure “for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁵ Due to the inherent nature of news publishing, the Copyright Act and case law unequivocally extend this protection to news publishers through the work for hire doctrine.⁶ The protections set out in our Constitution and the Copyright Act should set the minimum baseline for protections that the US government supports abroad.

Recently, however, some government agencies have expressed concern over efforts just like this that would grant the same type of protection internationally to creators already protected under US law. Consequently, the Alliance believes that the United States should carefully evaluate its position regarding developments such as the ongoing reform of the European Union’s copyright regulations. Instead, in order to stimulate US economy, innovation, and international trade, United States should focus on international developments that challenge the operating model of American innovative industries as a whole and have potentially broad extraterritorial reach.

Neighboring Rights in the European Union Benefit News Publishers and US Creative Industries

Unlike news publishers in the United States, European publishers do not own copyright to their publications. Instead, in defending against unauthorized and infringing uses of their products, European publishers often rely on contracts made with the authors that allow the publishers to enforce the copyright. However, in some countries, this can be procedurally cumbersome,

⁴ Jillian D’Onfro, “Google and Facebook Extend Their Lead in Online Ads, and That’s Reason for Investors to Be Cautious”, Dec. 20, 2017, <https://www.cnbc.com/2017/12/20/google-facebook-digital-ad-marketshare-growth-pivotal.html>.

⁵ Pew Research Center, *Newspaper Fact Sheet*, <http://www.journalism.org/fact-sheet/newspapers/>.

⁶ Copyright Act of 1976, 17 U.S.C. § 101 (2012); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (clarifying the work for hire doctrine).

making the process expensive and lengthy.⁷ This is in stark contrast with other copyright-intensive industries, including film and music, where the production and recording companies hold neighboring rights to the works, unlike news publishers. Furthermore, the situation discourages new entrants utilizing news media content from licensing it from the publishers as they do not have an independent right to protect it. With copyright protection varying from member state to member state, a neighboring right for press publishers would provide legal certainty to online services that wish to utilize news media content.

Some European countries have recently enacted laws to correct this imbalance between other creative industries and news publishing, and the resulting abuse of news content without compensation by various news aggregation services, by creating neighboring rights for news publishers. In 2013, Germany adopted a publishers' right that gives news publishers the exclusive right to control the use of their publications by news aggregators and search engines for one year.⁸ Challenged by some stakeholders, the new right is currently being litigated.⁹ The case was recently referred to the Court of Justice of the European Union to determine whether the law was passed following the correct procedure.¹⁰ If the Court decides correct procedure was followed, the right is valid and German publishers can benefit from it.

Meanwhile, in 2014, the Spanish legislature also passed a regulation granting press publishers an unwaivable right for the use of small excerpts of their publications.¹¹ In response to the law, Google shut down its Google News service in Spain. However, contrary to some reports, website traffic and ad revenues, which dropped for many news publishers following the shutdown, have since largely rebounded to pre-2014 levels.¹² Furthermore, the collecting society representing press publishers in Spain has successfully started licensing news content to other news aggregators than Google News.

In 2016, the European Commission ("Commission") published its proposal for a Directive on Copyright in the Digital Single Market ("Directive" or "Copyright Directive"), designed to modernize and standardize copyright laws across the European Union.¹³ As part of the Directive, the Commission proposed a publishers' right in Article 11 of the Directive, similar to the neighboring rights already held by broadcasters and film and music producers, although limited

⁷ News publishers invest in, edit, and publish thousands of contributions from journalists, photographers, designers, and editors. Relying solely on rights derived from contracts with the authors reduces the publishers' legal certainty. For large scale infringements, publishers have to prove that they have the rights to each individual article and other contributions, while taking account of the different copyright laws in EU member states. Further, the current copyright regime does not protect against unauthorized use by search engines and news aggregators as small excerpts are often not protected by copyright law. See *Infopaq*, C-5/08 (CJEU, 2009).

⁸ Urheberrechtsgesetz (Copyright Act) §87(f) et seq.

⁹ *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc.* (Landgericht Berlin, 2017).

¹⁰ *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc.*, C-299/17 (CJEU, pending).

¹¹ Ley de da Propiedad Intellectual art. 32.

¹² European Publishers Council, *EU Copyright Reform: The Truths and the Myths* 4, Jun. 2018, <http://epceurope.eu/wp-content/uploads/2018/06/Myth-rewrite.pdf>.

¹³ Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, 2016/0289 (COD), Sep. 14, 2016.

strictly to online uses only. Following considerations in the Council of the European Union (the “Council”), the Council agreed a common mandate for negotiation which includes a compromise on the proposed publishers’ right. Although the European Commission’s original proposal offers more clarity and legal certainty, especially with regards to short excerpts, the Council’s decision is a decisive step in the right direction.

In June 2018, the Committee on Legal Affairs (“JURI”) of the European Parliament (“Parliament”) adopted a text also including a sensible and balanced compromise on Article 11, with minor changes and improvements. However, the plenary session of the Parliament rejected the JURI report and the negotiation mandate in July. Consequently, the file was opened for debate and new amendments, which will be voted on in the next plenary session on 12 September 2018. The so-called trilogue negotiations will presumably start shortly after if the Parliament grants the negotiation mandate.

Although sometimes characterized by opponents as a “link tax” that would “destroy the internet,” the proposed Article 11 does not fit that description. The publishers’ right is not a tax levied by a government – it simply gives press publishers leverage in negotiating with other private entities for the use of their publications. Linking to press publications is also allowed under the Commission proposal. The JURI draft further clarifies this by explicitly excluding hyperlinks and private, non-commercial use from its scope. Both the Parliament’s version as well as the Council would limit the protection to unauthorized uses by information society service providers. The right also is not limited to short excerpts but enhances the negotiating and enforcement position of news publishers regardless of the identity of the opposing party or the scope of their use.

Contrary to some arguments, the proposed right also would likely not be in violation of the “quotation right” in the Berne Convention for the Protection of Literary and Artistic Works.¹⁴ The World Intellectual Property Organization defines the term “quotation” in the Convention to mean an extract used to “illustrate a theme or defend some proposition or to describe or criticize the work quoted from.”¹⁵ Therefore, excerpts without context should not be considered quotations for the purposes of the Convention. Additionally, the proposed Article 11 would be subject to the same exceptions as other copyrights in the European Union. As mentioned, other creative industries already have similar rights in the European Union, encouraging US investment and digital trade with the Union, and these neighboring rights have not diminished the functioning of the internet or harmed other US industries.

A higher level of protection for news publishers in the European Union would bring the rights of news publishers to the same level as other creators and the rights protected in the United States. Considering the rapidly expanding digital readership for news publications and the globalized marketplace in which many news media organizations now find themselves, Article 11 would have a considerable positive effect on the US news publishers’ ability, position, and incentives to

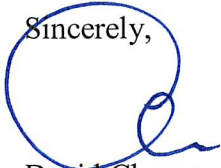
¹⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 10(1), S. Treaty Doc. No. 99-27.

¹⁵ World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 58, http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf.

engage in digital trade with the European Union. It is therefore important for the United States to adopt a balanced approach to such policy developments within our most important trading partner with regards to intellectual property protections for the creative industries.

The News Media Alliance welcomes this opportunity to provide the Commission with these comments, and to highlight these issues that both advance and threaten digital trade between the United States and the European Union. We look forward to continuing support the Commission with its important work in examining and advancing global digital trade.

Sincerely,

A handwritten signature in blue ink, consisting of a large, circular loop followed by a smaller loop and a short horizontal stroke.

David Chavern
President & CEO
News Media Alliance