

# NEWS MEDIA ALLIANCE

January 15, 2019

Mr. Edward Gresser  
Chair of the Trade Policy Staff Committee  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, DC 20508

**Re: News Media Alliance Comments Regarding Negotiating Objectives  
for a U.S.-United Kingdom Trade Agreement, Docket No. USTR-2018-0036.**

Dear Mr. Gresser:

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 Office of the United States Trade Representative (“USTR”) in response to the *Request for Comments on Negotiating Objectives for a U.S.-United Kingdom Trade Agreement*, Docket Number USTR-2018-0036, 83 Fed. Reg. 57,790 (November 16, 2018).

The news media industry generates \$28.9 billion in total revenue and employs approximately 174,000 people in the United States.<sup>1</sup> These journalists and others who rely on newspapers for their living create content that reaches 136 million adults in the United States each week, representing 54 percent of the country’s adult population.<sup>2</sup> Online, news organizations receive over 200 million unique visits and 6.7 billion pageviews per month.<sup>3</sup> News organizations also ensure the health of our local communities, with most local news media companies reaching more adults in their local markets than any other local media.<sup>4</sup>

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<sup>1</sup> 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>.

<sup>2</sup> News Media Alliance, News Advertising Panorama 2018.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

While vital to the functioning of our democracy, news media organizations are facing a myriad of challenges. Although some publications have witnessed large increases in digital subscriptions, both overall physical and digital newspaper circulation dropped by approximately 10 and 9 percent during the 2016-2017 time period, respectively.<sup>5</sup> At the same time, however, digital audience for newspapers increased 21% from 2015 to 2016 and remained the same from 2016 to 2017.<sup>6</sup> While this considerable increase in audience has led to increased digital advertising revenues, they are often not enough to offset the reduced physical advertising and digital and physical subscription revenues.

The recently negotiated United States-Mexico-Canada Agreement (USMCA) includes some considerable improvements to the intellectual property provisions included in the Trans-Pacific Partnership. However, USMCA also includes concerning provisions related to safe harbors for online platforms for both copyrighted and other third-party content. Consequently, USMCA fails to adequately protect American creative industries – instead entrenching the position of a few dominant online platforms – and should not serve as the template for future trade agreements negotiated by the United States, including the U.S.-UK Agreement.

In the case of U.S.-UK trade, both countries have well-developed and strong intellectual property regimes. The United Kingdom already has clear laws regarding copyright protection and enforcement as well as online safe harbors for both copyrighted and other illicit and harmful content. These laws and policies provide largely adequate protections for content creators and achieve a balance between sectoral interests. While reiterating both countries' commitment to intellectual property protections and global digital trade – and strengthening them where necessary – is commendable, exporting U.S. legal doctrines or regulations to a country with a distinct and different legal and political system may be counterproductive and ill-advised.

### **Transatlantic Trade Relies on Strong Intellectual Property Protections**

News publishers both in the United States and the United Kingdom need strong and unambiguous copyright protections to ensure the sustainability of high-quality news. While the U.S. Constitution and the Copyright Act protect the intellectual work of American creators, including news publishers, these protections have been largely decimated by the judicial expansion of the fair use doctrine. Although fair use exceptions are vital for a functioning copyright regime, case law over the past decades has expanded the fair use doctrine beyond its natural bounds.<sup>7</sup> As a result, news publishers are placed in a worse position when protecting their content online, particularly against unauthorized commercial use of news content.

The Alliance commends the Administration for not including prescriptive fair use provisions in the USMCA, instead opting to leave the scope and nature of copyright exceptions and limitations

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

<sup>6</sup> *Id.*

<sup>7</sup> *For discussion, see, e.g.*, Brief for Intellectual Property Scholars as Amicus Curiae supporting Plaintiff-Appellant, Oracle America, Inc. v. Google, Inc., 750 F.3d 1381 (2018) (No. 17-1118).

to the state parties. Similarly, the Alliance was pleased to see that there was no mention of the “balance” language that could lead to the further erosion of copyright protections for content creators. Since the fair use doctrine would not likely transfer well to countries with different legal systems and without the institutional memory to reflect its complexities, the Administration should continue excluding any detailed fair use provisions from future trade agreements, including the U.S.-UK Agreement. If limitations and exceptions provisions are included, they should simply restate the three-step test for copyright exceptions.

## **U.S.-UK Agreement Should Not Enshrine or Expand Online Safe Harbors**

The United Kingdom has taken a leading role in ensuring the sustainability of high-quality news and responding to challenges posed by recent developments in the online ecosystem, including the proliferation of fake news, hate speech, and foreign interference with democratic elections and institutions. For example, the UK Parliament’s Digital, Culture, Media and Sport Committee launched an investigation into fake news in early-2017.<sup>8</sup> The Alliance filed comments and provided written testimony in response to this investigation, outlining potential solutions to the spread of misinformation. The Committee released its interim report in July 2018. Among its other recommendations, the Committee recommended establishing “clear legal liability for the tech companies to act against harmful and illegal content on their platforms.”<sup>9</sup>

In addition to the UK Parliament, the UK Government has also recently launched a review into the sustainability of high-quality journalism in the UK.<sup>10</sup> In addition to examining the business models of news organizations, the review will also look at potential policy responses and the dominant role of a few online platforms in the digital economy. The Alliance filed comments with the review in September 2018, calling for a review of the regulations governing online platforms in order to level the playing field and ensure the future of high-quality news and local journalism.

It is important that the United States trade policy does not undermine these kinds of informed and sensitive reviews that are vital for the functioning of democratic institutions and the future of high-quality news. Worryingly, USMCA included language essentially enshrining the broad immunities for online platforms provided by Section 230 of the Communications Decency Act of 1996 for the first time in a trade agreement. These immunities protect online services from civil and some criminal liability for the third-party content they publish. At a time when both the United States and the United Kingdom are trying to respond to challenges posed by issues ranging from the opioid epidemic to hate speech and online political bias, it would be ill-advised

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<sup>8</sup> House of Commons Digital, Culture, Media and Sport Committee, *‘Fake News’ Inquiry Launched*, Jan. 30, 2017, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news-parliament-2015/fake-news-launch-16-17/>.

<sup>9</sup> House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and ‘Fake News’: Interim Report 18*, Fifth Report of Session 2017-19 (Jul. 24, 2018).

<sup>10</sup> Department for Digital, Culture, Media & Sport, *Chair Appointed to Lead Review of Press Sustainability in the UK*, Mar. 12, 2018, <https://www.gov.uk/government/news/chair-appointed-to-lead-review-of-press-sustainability-in-the-uk>.

to limit the options available to lawmakers in the United States or abroad when responding to these challenges.

Similarly, the USMCA's provisions on copyright safe harbors are problematic and fail to fully reflect the complexities and requirements of existing U.S. legal doctrines, largely established by the Digital Millennium Copyright Act of 1998 (DMCA).<sup>11</sup> The Administration should be wary of expanding the scope of copyright safe harbors through international agreements by including language inconsistent with U.S. law. While the United States should insist on strong limits to copyright safe harbors, it should not do so in a way that has the potential to rewrite the DMCA domestically.

### **Free Flow of Information is Vital for U.S. News Publishers**

In addition to strong copyright and platform liability provisions, the U.S.-UK Agreement should ensure the continued free flow of news, information, and data. Transatlantic exchange of information and data is vital for U.S. creative industries, including the news media, and the U.S.-UK Agreement should safeguard such flows even after the UK leaves the European Union.

In order to do that, the Agreement should create adequacy determination mechanisms that either resemble or replicate the obligations and benefits of the EU-U.S. Privacy Shield Framework. This is particularly important if the United Kingdom retains adequacy requirements for cross-border data transfers but does not remain a member of the Privacy Shield after March 29, 2019. The EU-U.S. Privacy Shield sets out clear requirements for companies to abide by, while providing legal certainty and lowering compliance costs. These are particularly important benefits for news publishers with a large number of readers and operations in the United Kingdom.

The Alliance strongly supports strengthening the bilateral trade relationship between the United States and the United Kingdom and commends the Administration for engaging in constructive talks with the UK Government to develop a trade approach for the post-Brexit world. The Alliance welcomes this opportunity to provide the USTR with these comments, and we look forward to working with the Administration to make trade work better for all Americans.

Sincerely,



David Chavern  
President & CEO  
News Media Alliance

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<sup>11</sup> See, Report of the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) on A Trade Agreement with Mexico and Potentially Canada, Sep. 27, 2018.