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Computer & Communications Industry Association (CCIA)
White Paper on Canada's Bill C-18, the "Online News Act"

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Executive Summary

Canadian Bill C-18—*An Act respecting online communications platforms that makes news available to persons in Canada*" (the "Online News Act")—imposes an undue and discriminatory burden on one set of clearly targeted market participants in the country's news industry: U.S. Internet platforms. This paper (1) outlines the evolution of news gathering in the online age and risks of further market concentration with the flawed approach of Bill C-18, and (2) analyzes key provisions of Bill C-18 and the concerns regarding Canada's international obligations to trading partners.

The Online News Act is the wrong answer to the changing news and information-sharing landscape. Imposing a payment obligation on only a few players in the social media and search ecosystem and channeling these payments to a select few large and powerful media companies will do little to nothing to support sustainable quality journalism in Canada. And requiring U.S. platforms to carry content from untrusted third parties raises disinformation and content moderation risks. This legislation would target a limited number of U.S. technology companies and would likely run afoul of several of Canada's trade commitments, leaving Canada vulnerable to potential retaliation. Policymakers should recognize the shifting news landscape and identify methods of cooperation that genuinely support the growth of the journalism ecosystem, as opposed to taking regulatory shortcuts that primarily benefit existing media incumbents.

Part 1. The Evolution of News Gathering and Dissemination, and Risk of Further Market Concentration.

Digital technology is just the latest iteration of the disruptive effects of technological change on the business model of news. From town criers to the first newspapers, from wire services to radio and television, the collection, production, and dissemination of news has always faced the need to adapt to technological change both to respond to consumer preferences and to ensure an economically sustainable business model. Quality, independent news has a value to society that may not be fully reflected in market outcomes, and thus can benefit from a supportive policy environment—*e.g.*, privileged access to scarce resources, such as spectrum and rights-of-way, and even public funding, a common feature of most markets. However, instituting an intra-industry subsidy between select participants in the digital ecosystem to preserve the societal benefits of local news, by targeting specific foreign platforms, is difficult to justify.

The dominant current business model for news in Canada is, as it is elsewhere, a partly "two-sided" market drawing revenue both from subscription fees and advertising. Digital technologies have posed a particular challenge to this business model: as consumers increasingly access news online, print circulation has declined, and both advertising and subscription revenue streams associated with physical delivery have suffered.[1] Many traditional news businesses—in particular, independent and smaller outlets—have not succeeded in compensating for these declines with additional digital revenue streams. In addition, the ease of entry facilitated by digital delivery (where printing facilities and distribution networks can be avoided) has attracted a range of new entrants that has put additional pressure on legacy news outlets. This has been particularly difficult for local newspapers—a segment that in Canada (as in the United States) has long been dependent on selling high-margin classified advertisements, and in many markets enjoyed a quasi-monopoly status.[2] However, it is notable that the demise of classified advertisements long preceded the rise of large platforms, and has had more to do with services like Craigslist (or its more successful competitor in Canada, Kijiji) that moved rapidly in the 1990s and 2000s to offer low-cost, interactive systems for linking local buyers and sellers.

At the same time as classified advertising declined, the dominance enjoyed by local newspapers has also been threatened by the digital versions of national newspapers. In the past, most national publications lacked physical distribution networks in low-density markets (which in turn bolstered local newspapers' quasi-monopoly status), but these publications can now reach consumers everywhere with digital versions of national news.

As a result, local news production faces particular challenges and a sustainable, alternative model to classified-ad-supported local journalism remains a work in progress. There is, however, no shortage of innovation, with platforms like Substack providing tools for generating and disseminating news, and new business models looking to fill the gap in local news coverage. For example, the company Nextdoor, where users post about hyper-localized happenings and share links to local news articles, went public earlier this year, and is available in Canada in both French and English.[3] Canadian digital-native startups are also beginning to emerge,[4] with sites like UrbanToronto, Loonie Politics, Canadaland, and Daveberta providing meaningful alternatives for digital-only news.[5]

For specialized, national, and international news, consumers now benefit from dramatically increased access, significantly expanding the subscribership of those businesses that have successfully transitioned to digital delivery. Whether in Toronto or Tignish, the Guardian, The Jerusalem Post, The Irish Times, the South China Morning Post and The Times of India are all one click away, and in many cases, have begun developing significant additional subscribership. These highly-accessible news channels play an important role in enhancing global perspectives and in maintaining immigrant communities' insight and links with their countries of origin, a subject of frequent study.[6] While such sources compete, to an

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[1] *Compare* https://nmc-mic.ca/wp-content/uploads/2021/10/NAV2012YTD-10012013-FINAL.pdf *with* https://nmc-mic.ca/wp-content/uploads/2022/02/2020-Net-Ad-Volume-Report-01.26.2022.pdf.

[2] https://web.stanford.edu/~gjmartin/papers/Craigslist_Draft_November_2021.pdf; https://www.gc.cuny.edu/sites/default/files/2021-07/seamans_zhu_craigslistpaper.pdf.

[3] https://www.bloomberg.com/news/features/2022-06-09/nextdoor-s-quest-to-beat-toxic-content-and-make-money.

[4] *See* https://thenarwhal.ca/opinion-canada-journalism-future-march-2021/; https://www.michaelgeist.ca/2022/04/here-comes-the-online-news-act-why-the-governments-media-shakedown-is-bad-news-for-press-independence-and-competition/.

[5] *See* https://urbantoronto.ca/; https://looniepolitics.com/; https://www.canadaland.com/; https://daveberta.ca/.

[6] *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5439377/ ("Irrespective of their migration background, five broad themes emerged from their motives of news consumption: (1) the acquisition of information about events and current affairs of the host country, (2) the acquisition of competence in the host country's language, (3) the acquisition of information that can facilitate living and functioning in the host country, (4) the acquisition of information about events and current affairs of the home country and (5) the acquisition of information about events and current affairs of foreign countries."); https://paaia.org/wp-content/uploads/2018/08/PAAIA-2013-Survey-of-Iranian-

extent, against incumbent local and national newspapers, the clear benefits of such access cannot be discounted, even if these alternative sources for news also compete for advertising revenue previously dominated by local and national outlets.

With respect to national news, in the myriad of towns and rural communities where publications such as Toronto-based The Globe and Mail or Montreal Gazette lack a physical distribution network, Canadians now benefit from the access digital delivery provides for such national or regional newspapers—often via traffic referrals from the very platforms Bill C-18 seeks to tax.

In the midst of this market disruption, legacy news businesses are consistently concentrated.[7] In Canada, six companies are responsible for 79% of circulation of daily newspapers, and five companies accounted for roughly 88% of all TV revenues based on recent reports.[8] Almost all of the daily newspapers (95%) are owned by corporate entities in Canada, and just 5% are independent outlets.[9] This concentration of corporate ownership of daily newspapers has remained effectively stagnant for at least the past decade.[10] Instituting a new mechanism that will likely benefit these players may well cement this dominance. Rather than any needed "rebalancing" in the news space, the Online News Act instead may consolidate large publishers' expanding market power to the online space through opportunistic "anti-tech" rent-seeking.

Other countries have recognized this risk to competition. In a 2014 report, the Spanish National Commission for Markets and Competition issued a report warning that forcing payments for sharing pieces of news online via ancillary rights could damage competition in the country and suppress smaller and newer competitors seeking to disrupt larger publishers' dominance.[11]

There may be value in exploring and developing new models for funding journalism. One option may involve voluntary compensation arrangements between digital players—a practice which currently occurs *without* government intervention. Nothing currently prevents news business and platforms from negotiating or seeking to negotiate payments (*e.g.*, for exclusive or paywalled content) where such arrangements make economic sense. Indeed, there are many examples of such deals being struck in the absence of compelled bargaining, the key feature of this proposal.[12]

Such opportunities underscore a critical point. If news businesses do not believe they are being adequately compensated for their choice of using platforms to index and quote their content, absent negotiated arrangements, they have an obvious means to respond—they can withhold their content selectively or in full, including through easy-to-use technical mechanisms.

Americans-FINAL-PRINT-Web-1.pdf at 1 ("Moreover, seventy percent (70%) said that they very closely or somewhat closely follow news from Iran."); https://www.sagepub.com/sites/default/files/upm-assets/34990_book_item_34990.pdf at 58-59.

[7] *See* Appendix B for further data on media concentration in Canada.

[8] https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf at 10; https://crtc.gc.ca/eng/publications/reports/policymonitoring/2021/rad.htm#a4

[9] https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf at 10.

[10] https://nmc-mic.ca/about-newspapers/circulation/daily-newspapers/.

[11] https://www.project-disco.org/intellectual-property/121514-spanish-publishers-to-google-news-you-cant-leave/.

[12] For example, the Toronto Star reported in April that before the Online News Act had even been introduced, Google had already secured agreements with 11 outlets and Meta had signed agreements with 18 news publishers. https://www.thestar.com/politics/federal/2022/04/13/australias-small-news-publishers-have-been-shut-out-of-deals-for-big-tech-money-could-the-same-thing-happen-in-canada.html. In 2022, Google News and News Showcase became available in Spain following successful negotiations, after an eight-year hiatus. https://www.reuters.com/technology/google-news-re-opens-spain-after-eight-year-shutdown-2022-06-22/.

Targeting U.S. firms to subsidize Canadian news outlets' transition to interactive, digital delivery of content may appear attractive as a short-term fix to the struggles of traditional news businesses; but it may also delay a transition to a more sustainable business model for news and jeopardize the long-term viability of the sector by instituting economically unjustified transfer payments between equally vital partners in the digital ecosystem.

The notion that bargaining between news business and Internet platforms should be an obligation subject to prescriptive rules is based both upon an ill-defined concept of bargaining asymmetries and an unfounded assumption that news businesses are not already fairly compensated for the value they bring to platforms. One can seek to promote a sustainable model for high-quality journalism without instituting what appears to be an extractive and redistributive form of economic rent-seeking.

To the extent that some of these regulatory models purport to address an imbalance in value, the proponents willfully fail to recognize the value that platforms drive to publishers. This can occur in a variety of ways, but referral traffic is an obvious and significant one, since platforms aggregate hundreds of millions of consumers who might otherwise never visit news websites directly. This aggregating function, made possible through major investments in data processing, storage, and transmission capacity, is generally made available to news businesses at no cost.

In short, the disruptive effect of technology on journalism provides numerous opportunities for companies to adapt in providing services that are both more targeted and have broader geographical reach and thus better respond to consumers' preferences and needs. Subsidizing legacy costs and business models through intra-industry revenue transfers is at best a temporary fix, and at worst a path to ossification and increased market concentration in an industry whose social benefits depend on diversity and adaptability.

Part 2. Analysis of Key Provisions of the Online News Act and Related Trade Concerns.

On April 5, 2022, Canadian Heritage Minister Pablo Rodriguez introduced into Canada's House of Commons Bill C-18. To date, this bill has been subject to two readings, and is expected to be taken up again in the next session of Parliament later in 2022.

The key goal of Canada's proposed Online News Act is to effectively mandate that designated platforms ("digital news intermediaries"):

- carry Canadian news (based on a non-discrimination provision, Article 51);
- pay Canadian news organizations for that mandated carriage (through the threat, or invocation of compulsory bargaining, in Articles 11-25); and
- provide a mechanism for setting a rate that Canadian news organizations can force platforms to accept through mandatory arbitration, using criteria that have no clear link to market-based values (Articles 38 and 39).

In addition, the proposal explicitly permits Canadian news businesses to form cartels for purposes of bargaining with designated news intermediaries. The following section takes a closer look at key provisions and their conflict with Canada's international commitments.[13]

(1) The targeted scope and anticipated application conflicts with Canada's commitments on most-favored nation and national treatment.

<u>Designated "digital news intermediary"</u>

A digital news intermediary is broadly 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."

However, Bill C-18 includes vague criteria for "designating" specific suppliers that are likely to be used to target primarily U.S.-based companies. Namely, designation applies 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.[14]

These factors ("significant bargaining power imbalance," "size," "strategic advantage," and "prominent market position") all suffer from a common flaw: since intermediaries and news businesses are not actually in direct competition with each other and there is no compelling basis for mandating bargaining in the first place (*e.g.*, evidence of systemic market failure), using such factors to identify a target for application of the law makes little sense, other than as an arbitrary mechanism for identifying lucrative targets for transfer payments.[15]

Canadian policymakers have been clear that the intent of the law is to extract revenue mainly, if not exclusively, from successful U.S. platforms; and redistribute that revenue to select Canadian companies. This is clear from statements made by supporters at the second reading of the bill and the debate in the House of Commons—members referenced U.S. companies a total of 73 times between invocations of "Facebook," "Meta," "Google," "Twitter," "Apple," and "GAFAM" (a reference to the U.S. firms Google, Apple, Facebook, Amazon, and Microsoft).[16]

The presence of U.S. technology companies in the Canadian market is due in part to the trade commitments Canada undertook both in the North American Free Trade Agreement and its successor, the United States-Mexico-Canada Agreement (USMCA). A key point of these agreements was to ensure that U.S. firms would be free to enter the Canadian market, and Canadian firms would be free to enter the U.S. market. Targeting specific U.S. firms as a source of transfer payments to Canadian entities and

[13] See Appendix C for consolidated analysis of key trade conflicts.
[14] Bill C-18 Article 6, Application.
[15] Article 84 of Bill C-18 further notes that the Governor in Council may make additional regulations relating to these factors in designating applicable news platforms.
[16] *See* https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-71/hansard#11685803. Further examples of the one-sided focus on specific U.S. companies can be found in Appendix A.

subjecting U.S. firms to unique performance requirements calls into question Canada's commitment to that basic bargain. By way of analogy, a comparable U.S. action would be to target Canadian maple syrup suppliers (which enjoy roughly 66% market share in the United States[17]) for mandatory transfer payments to an adjacent industry—for example, the economically struggling restaurant sector. This is hardly sound policy and would not be consistent with U.S. trade obligations to allow Canadian companies to compete fairly in the U.S. market.

At the heart of the issue, from a trade rule perspective, is the justification for targeting specific foreign suppliers, explicit in these criteria. Simply being a successful participant in a market does not justify disparate treatment, particularly if the policy goal sought is relevant to comparable participants, irrespective of size. Canada has not articulated any particular problem that can be attributed to large platforms, other than successfully competing in the market for online advertising.

Many companies are currently adjusting to the developing digital ecosystem—The Globe and Mail, Canada's most widely-read newspaper, is predicting a significant increase next year for its overall revenue compared to before the pandemic for both print and digital,[18] with a spokesman for the company noting that the outlet has pivoted from a position of "70% advertising revenue and 30% reader revenue split, to a 30% advertising and 70% subscription revenue split" while "not losing market share on the advertising side."[19]

Put another way, if platforms "owe" news businesses for the services they provide in hosting, indexing and quoting content, based on an unsupported theory that they are unduly diverting ad revenue away from legacy businesses, obtaining such compensation should be the norm generally, absent the notion of "significant bargaining power" identified in the Bill C-18 text. Accordingly, absent market failure, one would expect all platforms (and particularly smaller platforms) to be compensating news businesses for the indexing, linking, and providing a venue for publicly available news (*i.e.*, non-paywalled content).

However, there is no evidence that Canadian news businesses have succeeded in, or even sought, negotiating compensation for non-paywalled content with comparable smaller platforms (such as Bing, Baidu, Yandex, Tencent, TikTok) that presumably lack the "significant bargaining power" to reject compensation and resist news businesses' threat to withhold content.

When examining the relationship between platforms and news, the lack of such agreements is clear. The relationship is mutually beneficial and symbiotic where withholding content would result in a net loss of value to news businesses. On the other hand, if one asserts that there is a market failure preventing widespread adoption of compensation arrangements, this suggests the need for an obligation on *all* comparable platforms (including Canadian platforms), rather than application to an arbitrarily-identified subset of market participants.

This lack of general applicability of a highly burdensome requirement raises a core issue. Since being designated under Bill C-18, by definition, would incur a significant burden (*i.e.*, complying with the substantive and procedural obligations that flow from this Act), these vague and arbitrary criteria that

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[17] https://www.ers.usda.gov/data-products/sugar-and-sweeteners-yearbook-tables/sugar-and-sweeteners-yearbook-tables/#U.S.%20Maple%20Syrup%20Production,%20Prices,%20and%20Trade at Table 43—U.S. maple syrup production, imports, exports, and prices, by calendar year.

[18] https://wan-ifra.org/2022/05/how-the-globe-and-mail-has-managed-to-grow-revenue-subscriptions-and-print/.

[19] https://pressgazette.co.uk/phillip-crawley-interview-globe-and-mail-canada/.

define a "designated news business" will make it difficult for Canada to avoid a charge of unjustified discrimination, thus implicating rules at the heart of its trade obligations—*i.e.,* treating one subset of market participants (the intended and likely targets, U.S. firms) less favorably than comparable Canadian or third-country platforms. Accordingly, this would implicate Canada's national treatment and most favored nation obligations under USMCA.[20]

<u>Qualified Canadian "eligible news organization"</u>

A qualified Canadian eligible news business, the intended beneficiary of this proposal, is—if not already designated as a "qualified Canadian journalism organization" under Canada's *Income Tax Act*—defined as an entity that, *inter alia*, per Article 27

> (i) regularly employs two or more journalists in Canada,
> (ii) operates in Canada, including having content edited and designed in Canada, [and]
> (iii) produces news content that is not primarily focused on a particular topic such as industry-specific news, sports, recreation, arts, lifestyle or entertainment.

While some foreign news organizations could conceivably qualify under this definition, most likely would not, putting them at a clear disadvantage as compared to their Canadian competitors with respect to the benefits Bill C-18 offers. Such discriminatory treatment raises additional questions regarding compliance with trade obligations, as either investors (USMCA Article 14.4), cross-border service suppliers (USMCA Article 15.3) or suppliers of digital products (USMCA Article 19.4). In short, the effect of Bill C-18 with respect to U.S. (and third-country) news businesses is clearly to provide an unjustified advantage to Canadian suppliers, thereby harming foreign suppliers seeking to compete in the Canadian market for news.

(2) *De facto* must-carry obligation would apply to designated news intermediaries to carry Canadian news, implicating USMCA performance requirement prohibitions.

When other countries have introduced payment mechanisms such as through compulsory licenses pursuant to ancillary copyright provisions, some intermediaries have responded by simply exiting the specific affected market (*e.g.*, news aggregation for a specific market). This is a rational choice where a payment demand does not prove economically justifiable.[21] To avoid such a scenario (*e.g.*, an intermediary choosing not to index Canadian news, or a social media platform declining to host a news organization's page), Canada has proposed a disingenuously-termed "non-discrimination" provision.

Article 51 states:

> In relation to news content that is produced primarily for the Canadian news marketplace by a news outlet operated by an eligible news business and that is made available by a digital news intermediary, the operator of the intermediary is prohibited from acting in any way that

[20] USMCA Articles 14.4, 14.5, 15.3, and 15.4.
[21] *See* https://www.huffpost.com/entry/google-news-leaving-spain_b_6325244.

> (a) unjustly discriminates against the business; (b) gives undue or unreasonable preference to any individual or entity, including itself; or (c) subjects the business to an undue or unreasonable disadvantage.

In essence, this provision requires a designated news intermediary to either a) carry Canadian news (subject to the threat or implementation of mandatory compensation); or b) withdraw from the indexing, linking and hosting of *any* news content visible in Canada. In other words, if a platform declines to index, link to, or host specific Canadian content (*e.g.*, if the terms demanded by news businesses are unreasonable), the platform would be required to also de-index and de-host The New York Times or the South China Morning Post for a Canadian audience. Given the impracticality of a global withdrawal from news content,[22] designated news intermediaries will be effectively required to carry Canadian news and likely trigger a payment obligation.

The result, a *de facto* "must-carry" obligation forcing designated intermediaries to carry Canadian news, appears inconsistent with commitments in USMCA. In the Investment Chapter of USMCA (Article 14), Canada undertook an obligation to avoid performance requirements with respect to U.S. investors and investment—*i.e.,* a prohibition on requirements "*to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory*."[23] The *de facto* obligation to carry Canadian news content that is at the heart of Bill C-18 cannot be squared with this commitment.

(3) The scope of coverage of news would conflict with longstanding copyright limitations and exceptions and Canada's international copyright commitments.

Through a combination of a broad definition of the term "making available" and an exclusion of copyright limitations and exceptions, Bill C-18 ensures that the merest fragment of Canadian content carried by an intermediary (typically, as noted previously, at the news organization's direction) suffices to justify imposing obligation pursuant to this measure. The definition of "making available" in Article 2 of Bill C-18 specifies that:

> news content is made available if (a) the news content, *or any portion of it*, is reproduced; or (b) access to the news content, *or any portion of it*, is facilitated *by any means*, including an index, aggregation or ranking of news content. (*emphasis* added)

Additionally, an explicit exclusion of copyright exceptions and limitations closes off the right to quotation (Article 10(1) of the Berne Convention, to which Canada is a party) or to use minimal content that might be indexed or linked to.[24] Article 24 of Bill C-18, Limitations and Exceptions, states: "For greater certainty, limitations and exceptions to copyright under the Copyright Act do not limit the scope of the bargaining process."

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[22] For example, imagine the infeasibility of designing a search service that, for a specified market, could not index news stories in response to search terms such as "Putin," "Ukraine," "coronavirus," or "Tour de France."

[23] USMCA Article 14.10.1(c).

[24] https://www.law.cornell.edu/treaties/berne/10.html ("It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.").

A complete elimination of fair use/fair dealing, consistent with the three-step test memorialized in Berne, could open Canada up to potential litigation.[25] Accordingly, Bill C-18 significantly broadens the basis for asserting a claim for compensation as compared to countries who have sought similarly extractive policies through expanded intellectual property rights (which generally cannot override treaty-based exceptions and limitations). Additionally, this scope significantly lowers the threshold for being able to set up a business designed to facilitate access to mandatory payments. If the analogous phenomenon of "clickbait" is any guide, it is doubtful that incentivizing broad compensation claims will do anything to promote quality journalism and may well have the opposite effect.

(4) The authorization of a bargaining cartel deviates from standard competition policy.

Article 48 of C-18 provides a waiver from the civil and criminal penalties set out in Canada's Competition Act (Articles 45 and 90.1) designed to prevent collusive behavior harmful to competition, thereby authorizing Canadian news businesses to seek compensation from designated platforms on the basis of collective demands. Such a deviation from standard competition policy is highly unusual, and the fact that it applies to a sector already under scrutiny for its level of concentration only compounds the serious flaws of this overall policy.

(5) The arbitration process risks increasing market share in Canada due to factors used to determine compensation.

Article 38 specifies mandatory factors an arbitration panel must consider in setting compensation, if a Canadian news business seeks arbitration. Specifically, the arbitration panel must consider, *inter alia*, "the value, monetary or otherwise to the news content in question by each party, assessed in terms of the investment, expenditures and other actions in relation to that content." While such factors may appear superficially reasonable, they can also be subject to significant manipulation and distortion, and undermine the goal of developing quality, sustainable, and innovative journalism. These specific factors raise three key issues: (1) the level of investment or expenditure has no necessary relationship to the quality of news;[26] (2) using these factors as a basis for compensation can actually incentivize wasteful spending as a basis for increasing compensation;[27] and (3) it prioritizes compensation to legacy news businesses saddled with higher costs, and who, notwithstanding likely inefficiencies, hold high market shares in Canada.

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[25] Prior cases before the WTO show that Berne non-compliance is actionable. *See* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (clarifying the scope of TRIPS Arts. 9 and 13 Berne Convention and Art. 11bis and 11 in a dispute between the United States and the European Union regarding limitations on exclusive rights granted to copyright holders for their copyrighted work, in the form of exemptions for broadcast by non-right holders of certain performances and displays).

[26] According to one study, traditional news organizations devote 12-20% of their budget to producing journalism, as opposed to digital-native publications, where the allocation is more typically 70%. *See* https://thenarwhal.ca/opinion-canada-journalism-future-march-2021/.

[27] This is analogous to the "gold-plating" phenomenon in rate-of-return regulated utilities, where the more a company spends the more it can raise its regulated rates.

Conclusion

Industry supports efforts to ensure a vibrant and sustainable market for domestic news. News and quality journalism contribute significantly to civic and cultural life and are indispensable to an informed citizenry and a healthy democracy. Digital technologies have had a profound effect on how news is collected, produced, and disseminated, as well as the challenges such changes pose for the economics of traditional news gathering and dissemination.

However, the Online News Act is the wrong answer to the changing news and information-sharing landscape. The way consumers exchange information and share articles, videos, and other pieces of news is constantly changing, and enshrining a tax on a few technology companies to be paid primarily to a select few large, powerful media companies will do little to nothing to support sustainable quality journalism in Canada. This legislation would transparently target a limited number of U.S. technology companies and would run afoul of several of Canada's trade commitments, leaving Canada vulnerable to potential retaliation. Policymakers should recognize the shifting news landscape to identify methods of cooperation that may genuinely support the growth of independent journalism.

APPENDIX A:
Canadian Lawmakers' Statements Implicating U.S. Suppliers as Solely Subject to Online News Act

Proponents of the Bill have made it clear that U.S. firms are the prime target. Several examples of supporters of the Online News Act making it plainly clear the targets of the bill are either explicitly Google and Facebook or U.S. companies writ large are the following (**emphasis** added). These quotes come from Minister of Canadian Heritage, Pablo Rodriguez, introducing the legislation in April[28] and from lawmakers during the debate in the House of Commons upon the second reading of the bill in May.[29]

Heritage Minister Pablo Rodriguez introduces the Online News Act (April 5, 2022):

- "In 2020, online advertising revenues in Canada were close to 10 billion dollars, with two dominant digital platforms taking over 80% of those revenues. That's an incredible chunk of power in the market…"

- "Now, **tech giants like Meta, Google are making a lot of investments in Canada, and you know what, we love that**. And guys, keep investing in our country, we encourage it. But, at the same time, **they continue to profit from the sharing and distribution of Canadian news content, without really having to pay for it.** So, with **this bill, we're seeking to address this market imbalance**."

- "... [J]e ne peux pas répondre, par exemple, qui serait inclue. Si on regarde la tendance, si on regarde le fait qu'en 2020, ces deux compagnies-là avait 80% des revenues en-ligne, vous avez raison c'est probablement ça mais c'est pas moi qui détermine…"[30]

  *[... I can't answer, for example, who would be included. If we look at the trend, if we look at the fact that in 2020, these two companies [Meta and Google] had 80% of online revenues, **you're right that that's probably it**, but it is not me who determines that…]*[31]

Chris Bittle, Parliamentary Secretary to the Minister of Heritage, speaks at the House of Commons debate (May 13, 2022):

- "Many of us get our news through Google or Facebook, which is okay. There is nothing wrong with that, but the problem is that digital media platforms do not compensate media when they use their content… [R]ight now there are two companies, Google and Meta, that get 80% of the ad revenue on the Internet. It does not feel like it is a free market…"

- **"[T]his is the elephant in the room, in terms of ad revenues that have left, ad revenues that are going away from local news organizations and going to massive American companies, the dominant digital players. Again, 80% of that revenue goes to those two companies**."

[28] https://www.youtube.com/watch?v=oKCzorUfzTw.
[29] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-71/hansard#11685803.
[30] https://www.youtube.com/watch?v=oKCzorUfzTw&t=999s.
[31] Unofficial translation.

- “We could take a look at climate change and see the misinformation and disinformation out there, when there is scientific consensus on those types of issues. There is no check against it, seemingly, on Meta, Twitter, Google and other companies, so we are going to rely more heavily on local journalism and national journalism, the media in general, to ensure that Canadians have access to accurate information.”

John Nater, Conservative Member of the House of Commons and Vice-Chair of the Standing Committee on Canadian Heritage, speaks at the House of Commons debate (May 13, 2022):

- “Mr. Speaker, we know full well that newspapers and media outlets are in trouble. Also, **more and more advertising space is being bought from the web giants, including Facebook, Meta and Google**.”

Sébastien Lemire, Bloc Québécois Member of the House of Commons and Vice-Chair of the Standing Committee on Industry and Technology, speaks at the House of Commons debate (May 13, 2022):

- “The share of ad revenue that traditionally went to news organizations is dwindling year after year, and the big print and broadcast ad contracts are no longer going to news organizations, but rather to companies like Google and Facebook.”

- “Simply put, if web giants like GAFAM share news on their platforms, it is because they are getting something out of it. They are profiting handsomely, and unfairly, off all the people who write the news. They are shamelessly exploiting the news.”

- “Facebook and Google are not going to send a reporter to cover a Russell Cup win by the Ville-Marie Pirates or the T[é]miscaming Titans. They leave that to CKVM, TV Témis, RNC M[e]dia and TVA Abitibi-Témiscamingue. Facebook and Google are not going to send a reporter to ask Rouyn-Noranda municipal authorities about construction delays for the aquatic facility. They leave that to the Rouyn-Noranda paper, Le Citoyen. Facebook and Google are not going to cover all the Amos festivals. They leave that to MédiAT, CHU[M]-FM, TV Témis and Abitibi-Ouest community television with Gaby Lacasse.”

- “That is why Bill C-18 is important. **It is time for GAFAM to share revenues with local media.** This money is important to boosting our regional media… The Minister of Canadian Heritage has provided an opt-in mechanism for GAFAM. Either they take a forward-looking approach and immediately begin reaching agreements with the various news companies, or the government will say that it will take care of them. **It is up to GAFAM to decide**.”

- “Facebook needs to offer more engaging content, because the more eyeballs it can attract, the more advertising it can sell and the more revenue it will earn. Almost all of Facebook’s revenue comes from advertising. Facebook and Google take in 80% of all online ad spending. That is where the real money is. About $193 million of their Canadian revenue is derived from content that was created by journalists and that does not belong to these companies. That is the kind of money that our news agencies could expect to get back in compensation.”

Alexandre Boulerice, NDP Member of the House of Commons, speaks at the House of Commons debate (May 13, 2022):

- "Google and Facebook took in nearly $10 billion in revenue from Canadian online advertising in 2020. Google and Facebook combined account for 80% of the revenue. For years, the government stopped buying advertising in our weeklies and local or regional newspapers. Instead, it was buying advertising from Facebook and Google. **Not only did this do nothing to aid journalism, but public funds were being used to pay these large foreign companies, often American, to promote the news that the federal government wanted to promote.** It is absolutely unbelievable."

APPENDIX B:
Market Concentration in Media Industry
[FIGURES 1-3][32]

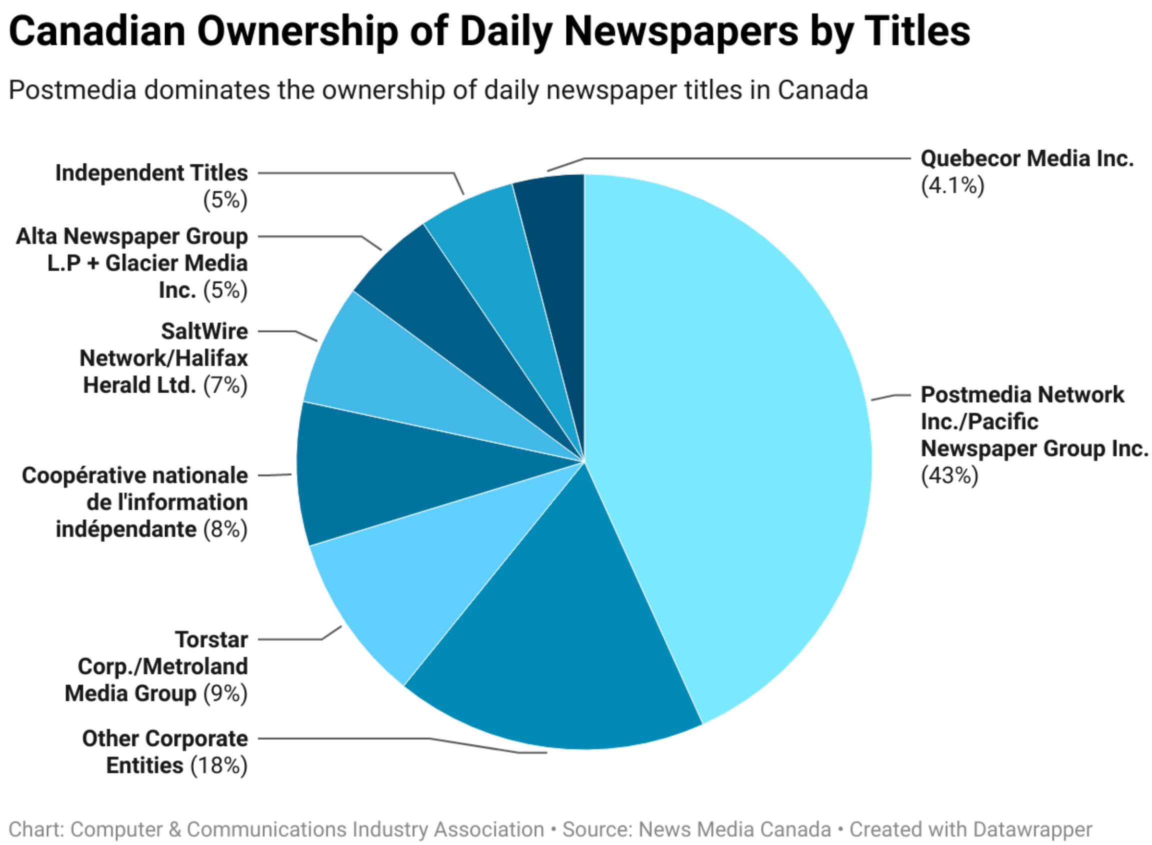

Figure 1

[32] https://nmc-mic.ca/wp-content/uploads/2022/02/SNAPSHOT-2021-REPORT_Total-Industry-FINAL-01.31.2022.pdf; https://crtc.gc.ca/eng/publications/reports/policymonitoring/2021/rad.htm#a4.

Canadian Newspaper Industry Ownership by Total Circulation

Six companies control 79% of the circulation of daily newspapers in Canada.

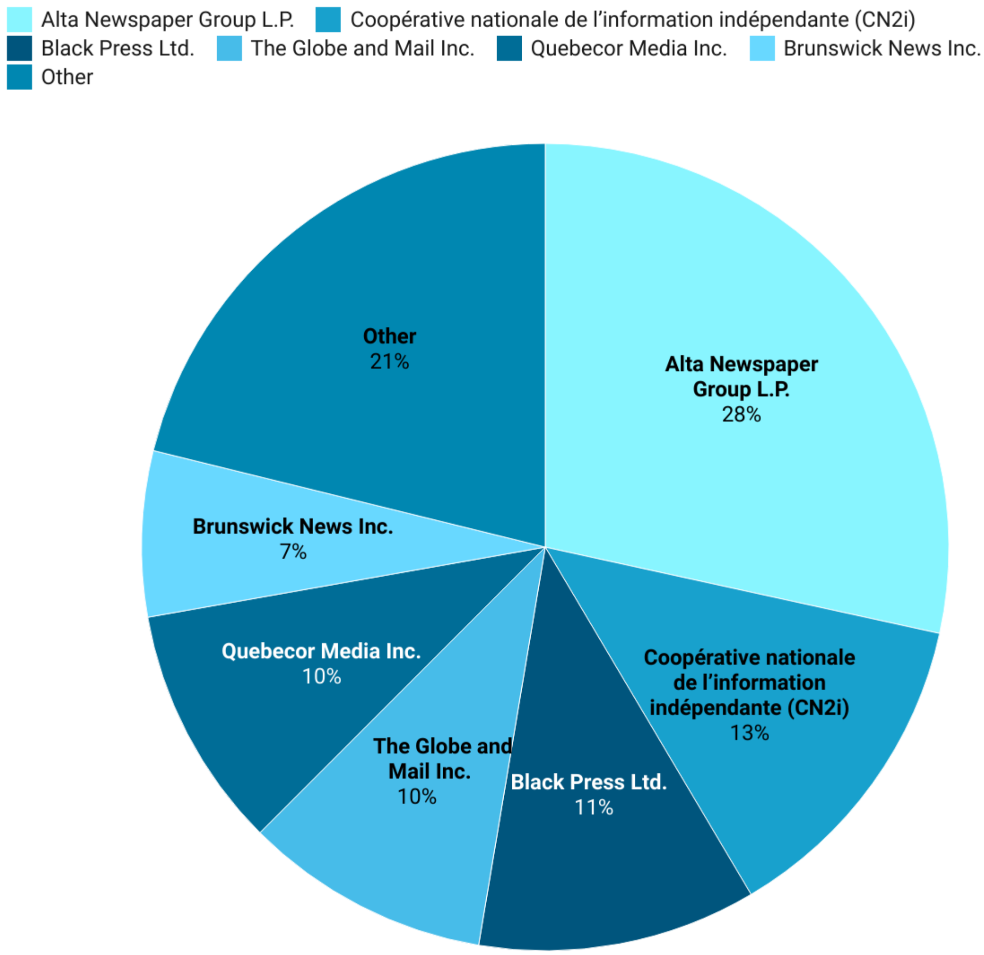

Chart: Computer & Communications Industry Association • Source: News Media Canada • Created with Datawrapper

Figure 2

Share of Total Television Revenues, in Percentages [2019-2020]

Four Companies Dominate Roughly 88% of Television Revenues in Canada.

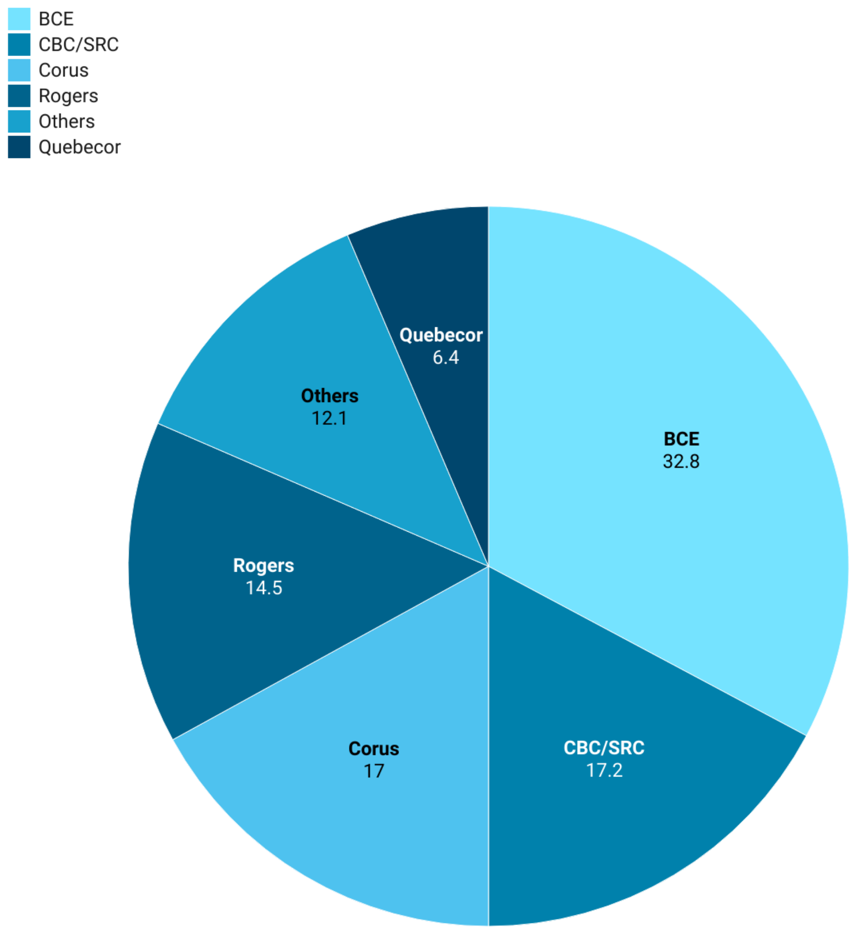

Chart: Computer & Communications Industry Association • Source: Canadian Radio-television and Telecommunications Commission • Created with Datawrapper

Figure 3

APPENDIX C:
Key Trade Rules Implicated by C-18[33]

I. National Treatment: USMCA Articles 14.4 (Investment); and 15.3 (Cross-Border Services).

The rule:

> Article 14.4
>
> 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.
>
> 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
>
> Article 15.3, 15.4
>
> 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… [and] to services and service suppliers of another Party or a non-Party.

As applied to Bill C-18:

Based on these rules, Canada has an obligation to ensure that the treatment it accords U.S. investors and U.S. investments, and cross-border service suppliers, is no less favorable than that extended to comparable investors, investments and service suppliers of Canada. Accordingly, if Canadian social media companies, news aggregators, or search services (*e.g.*, UrbanToronto, Loonie Politics, or Daveberta) are not designated and required to compensate Canadian news businesses the way a U.S. business could be, Canada could be in breach of this obligation.

II. Most-Favored Nation Treatment (MFN): USMCA Articles 14.5 (Investment) and 15.4 (Cross-Border Services).

The rule:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than the treatment it accords, in like circumstances, to

[33] USMCA: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; General Agreement of Trade in Services: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

> investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
> 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 investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

As applied to Bill C-18:

Based on this rule, Canada has an obligation to ensure that the treatment it accords U.S. investors and U.S. investments, and cross-border service suppliers, is no less favorable than that extended to comparable investors, investments, and service suppliers of third-countries. Accordingly, if a social media company like OK.RU, WeChat, or TikTok or a search company like Naver, Baidu, Yandex, or Qwant (all of which do business in Canada) are not designated and required to compensate Canadian news businesses the way a U.S. business could be, Canada could be in breach of this obligation.

III. Performance Requirements: USMCA Article 14.10.

The rule:

> No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:
> (a) to export a given level or percentage of goods or services;
> (b) to achieve a given level or percentage of domestic content;
> (c) to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory[.]

As applied to Bill C-18:

Based on subparagraph (c) of this rule, a U.S. investor or investment cannot be required to buy, use, or accord a preference to a Canadian service. Accordingly, if a U.S. platform is required to carry and/or license Canadian news content pursuant to a governmental measure (*e.g.*, Bill C-18), Canada could be in breach of this obligation.

IV. Non-Discriminatory Treatment of Digital Products: USMCA Article 19.4.

The rule:

> No Party shall accord 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 it accords to other like digital products.

As applied to Bill C-18:

Based on this rule, Canada cannot extend a preference to a Canadian digital product (which clearly covers news in textual, audio, or video form) not also extended to U.S. suppliers. Accordingly, if a U.S. news company cannot qualify for the benefits of Bill C-18 based on failure to employ Canadian journalists or perform editing in Canada, Canada could be in breach of this obligation.