



AUTHORS
ALLIANCE

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January 5, 2022

The Honorable Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559

Re: Publishers' Protection Study, Request for Additional Comments

Dear Register Perlmutter:

Authors Alliance appreciates the opportunity to provide input on the Copyright Office's notice of inquiry ("NOI") on proposed protections for press publishers. Authors Alliance elected not to submit an initial comment, deciding to wait to see how other commenters would respond before determining whether a submission from Authors Alliance would be useful and appropriate. This should not be taken as a lack of interest in or attention to the matters covered in the NOI. This comment responds to both issues raised in the NOI and additional issues raised by commenters.

Authors Alliance is a nonprofit organization based in Berkeley, California. Founded in 2014, Authors Alliance exists to advance the interests of authors who want to serve the public good by sharing their creations broadly. To effectuate our mission, we create educational materials for authors and advocate on their behalf before Congress, the courts, and other government entities.¹

As this comment will explain, Authors Alliance does **not** support the creation of a new ancillary press publishers' right, which would not serve the authors and creators that copyright is designed to protect. Because the development of such a right is contrary to the interests of our author members and many others as a matter of public policy, and because it is inconsistent with both the U.S. Constitution and U.S. international treaty obligations, a new press publishers' right is not a sound proposal.

Sincerely,

Rachel Brooke

Interim Executive Director, Authors Alliance

¹ *About Us*, Authors Alliance, <https://www.authorsalliance.org/about/>.

New Protections for Press Publishers Would Not Serve the Interests of Many Authors

Authors Alliance represents the interests of authors who have as their highest goal seeing their works reach the broadest possible audiences. For our author members, the enhanced availability of copyrighted works that news aggregation facilitates in fact furthers this aim.

News aggregation supports authorship in a number of ways. First, news aggregation helps the authors of journalistic works reach wide audiences. Many such authors, such as those who publish in the publication TechDirt, are strongly motivated by this goal.² Authors are not a monolith: while some authors believe their interests may not be served by news aggregation,³ others recognize that widespread sharing of works of authorship can result in substantial reputational capital and career advancement. Many authors prioritize these benefits over maximizing economic gain from licensing.

Second, news aggregation services can serve as research tools for authors seeking information about topics related to their work. Rather than requiring authors to comb through myriad individual press publications, news aggregators allow authors to find news articles from a variety of different press sources using particular search terms. These services are analogous to the full-text searchable database of books made available to scholars and the public in the Google Books project. As the Second Circuit observed in the *Google Books* case, Google’s search tool “permit[ted] a researcher to identify those books, out of millions, that do, as well as those that do not, use the terms selected by the researcher.”⁴ In the same way, news aggregation allows authors and researchers to search through news articles from a variety of different press publications to identify those using certain phrases or covering certain topics.

Third, authors themselves may aggregate news sources in order to enhance their research capabilities. Depending on the particulars of a new press publishers’ right, websites where users share links to press publications could also be affected. These forums may include individual author websites or other aggregations, limiting an author’s availability to cull information on personal websites or social media.⁵

New Protections for Press Publishers Would Not Serve the Interests of Small Press Publishers

A new press publishers’ right would also not serve the interests of smaller press publishers. Authors Alliance questions the argument that news aggregation has itself damaged the financial

² U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Copia Inst., Initial Comment, COLC-2021-0006-0001 at 2.

³ U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Authors Guild, Initial Comment, COLC-2021-0006-0017 at 2.

⁴ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 209 (2d Cir. 2015).

⁵ Copia Inst., Initial Comment at 2 n. 1.

interests of press publishers and authors who contribute to press publications.⁶ On the contrary, the economic problems faced by the press publishers and journalists are a result of myriad economic changes in the information ecosystem, such as declining revenues from classified ads, “news media consolidation [and] corporate governance models that emphasize quick profits over good journalism[.]”⁷ While the internet may have “disrupted the business model of newspapers,” this pattern “goes back decades,”⁸ long before the rise of news aggregation services.

Indeed, small publishers have argued that a new press publishers’ right would be counter to their economic interests. Authors Alliance cares about this too, as some of our members publish their works in these outlets. In its initial comment, the Copia Institute points out that its economic interests as a small press publisher are in fact served by news aggregation.⁹ Like Authors Alliance’s members, Copia prioritizes seeing its articles reach readers, and its business model depends on news aggregators to meet this goal.¹⁰ While large publishers may be able to reach licensing agreements with news aggregators, publishers with smaller “footprints” will see little licensing revenue.¹¹ Small publishers such as Copia depend on news aggregation platforms to participate fully in the press ecosystem, and obstacles to news aggregation will consequently lead to less readers for the publication’s articles. A new press publishers’ right could therefore serve the interests of larger publishers while harming the interests of smaller publishers, leading to a less diverse and vibrant media ecosystem.

New Protections for Press Publishers Would Interfere With Limitations and Exceptions to Copyright

Granting press publishers a new intellectual property right would also impermissibly interfere with well-established exceptions and limitations to copyright. Authors depend on the limitations and exceptions to copyright to create new works of authorship and participate in scholarly dialogue. For example, authors regularly reuse facts or ideas presented elsewhere in their own works, based on the well-established principle that these are not protected by copyright.¹² Similarly, nonfiction authors regularly rely on fair use to comment on or criticize another’s works in order to contribute to scholarly discourse.

First, extending protection to titles, headlines, short phrases, facts, and ideas would impermissibly expand the scope of copyright. This would interfere with freedom to reuse these elements of protected works because these limitations promote the purpose of copyright law. In

⁶ Authors Guild, Initial Comment at 1-2.

⁷ Copia Inst., Initial Comment at 5.

⁸ U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Pub. Knowledge, Initial Comment, COLC-2021-0006-0029, at 1.

⁹ Copia Inst., Initial Comment at 2.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 4.

¹² *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

the NOI, the Office noted explicitly that “titles and short phrases, including headlines” were not copyrightable.¹³ Headlines effectively serve as “titles or subtitles of a work,”¹⁴ placing them squarely outside of copyright protection under U.S. law. Yet some commenters suggest that the proposed right should cover headlines and short phrases,¹⁵ despite the fact that these types of information are beyond the long-established norms of copyright law. A press publishers right that requires headlines and short ledes to be licensed would effectively expand the scope of copyright protection for press publications, creating exceptions to constitutionally required limitations on copyright’s scope.

A new press publishers’ right could also lead to licensing requirements for other types of uncopyrightable subject matter that “should not be owned,” such as facts and ideas.¹⁶ Because headlines and ledes, in addition to being titles and short phrases, tend to include facts, a new press publishers’ right threatens to extend copyright protection to items that have historically not been protected for reasons of public policy.¹⁷ As the Supreme Court recognized in *Feist Publications v. Rural Telephone Services*, facts are the building blocks of knowledge that all should be free to reuse without asking permission.¹⁸

Second, the proposed right may cover uses that would be protected by copyright’s fair use doctrine, creating an exception to this important doctrine for only certain types of rightsholders. Creating a searchable database of works which merely display titles and snippets of a work is a paradigmatic case of fair use, particularly where those uses are transformative and do not serve as market substitutes for the original.¹⁹ “Snippet view thus adds importantly to the highly transformative purpose of identifying [works] of interest to the searcher.”²⁰

¹³ U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,723 (Oct. 12, 2021).

¹⁴ U.S. Copyright Off., Circular 33: Works Not Protected by Copyright at 2-3, <https://www.copyright.gov/circs/circ33.pdf>.

¹⁵ See, e.g., U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Axel Springer, Initial Comment, COLC-2021-0006-0028, at 16 (proposing that “the use of small parts of a press publication by . . . online service providers, including but not limited to the use of headlines and ledes, should in any case require prior consent (a license) from the press publisher); U.S. Copyright Off., Publishers’ Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Jane Ginsburg, Initial Comment, COLC-2021-0006-0021, at 6 (arguing that “copying only the headline and the lede of each article incorporated by news aggregators” may not be permissible).

¹⁶ Pub. Knowledge, Initial Comment at 4.

¹⁷ *Harper & Row Pubs., Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985) (“[N]o author may copyright facts or ideas The copyright is limited to those aspects of the work—termed “expression”—that display the stamp of the author’s originality”) (citing 17 U.S.C. § 102).

¹⁸ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁹ See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 225 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97-99 (2d Cir. 2014).

²⁰ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015)

The aggregation of headlines and snippets is a fair use for many of the same reasons articulated in *Google Books*. As in that case, this limited information serves a different purpose—previewing and linking to a full news article—than the news article itself, which provides much more information and context than snippets can. As was the case in *Google Books*, the display of snippets that provide only limited information about the news article cannot serve as a substitute for the *entire* article,²¹ contrary to the views of some commenters that such limited information can serve as a substitute for the entire article.²² Moreover, these limited snippets can in fact help the original work gain wider readership.²³ When news aggregators take more than copyright law permits, as in *Associated Press v. Meltwater*, courts can find infringement and enjoin the uses.²⁴ It would impede the progress of knowledge for copyright or any newly created related right to extend exclusive rights beyond copyright’s bounds.

New Protections for Press Publishers Would Violate the Constitution

Article I, section 8, clause 8 of the U.S. Constitution authorizes Congress to grant exclusive rights to authors in their writings for limited times in order to promote the progress of science (by which the founders meant knowledge). That clause is both a grant of rights and a limitation on Congress’ powers. Press publishers who support creating a sui generis exclusive right to control news aggregation are not “authors” under the Constitution; and they want this right without regard to any original expression in article titles or the like.²⁵ Authors Alliance questions not only whether it is a good idea to create such a right (it isn’t), but whether Congress has the power under the Constitution to grant such a right. The Supreme Court repeatedly said in *Feist* that “originality” is constitutionally required to support the grant of exclusive rights.²⁶

It is well-established that copyright has built-in limitations, such as fair use and the fact-idea/expression doctrines, that preserve its consistency with free speech and free expression rights guaranteed by the First Amendment to the U.S. Constitution.²⁷ A press publishers’ right that forbids activities considered to be fair use would also run afoul of the First Amendment protection for works of scholarship, which protects, among other things, an author’s ability to reuse facts and comment on other works of authorship.²⁸ Moreover, the proposed press publishers’ right could run afoul of the First Amendment by depriving both press publications

²¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 222 (2d Cir. 2015).

²² Ginsburg, Initial Comment at 8.

²³ Joan Calzada & Ricard Gil, *What Do News Aggregators Do? Evidence from Google News in Spain and Germany* 4-5 (2018), <http://diposit.ub.edu/dspace/bitstream/2445/150425/1/695577.pdf>.

²⁴ *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 558 (S.D.N.Y. 2013).

²⁵ Axel Springer, Initial Comment at 12 (arguing that “the exclusive right for press publishers should constitute a sui generis right” which does not “require[] a certain level of originality”).

²⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991).

²⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

²⁸ Pub. Knowledge, Initial Comment at 6.

and news aggregator services the editorial discretion to decide how to make content available to readers.²⁹

New Protections for Press Publishers May Violate U.S. Treaty Obligations Under the Berne Convention

Authors Alliance agrees with other opponents of the proposed press publishers' right that granting such a right would violate U.S. obligations under Article 10(1) of the Berne Convention.³⁰ Article 10(1), sometimes referred to as the fair quotation right, requires that all member states of the Berne Union permit authors "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[.]"³¹ A new U.S. press publishers' right requiring news aggregators to pay licensing fees in order to quote short phrases and headlines, as some commenters have argued for,³² would violate this quotation right. The fair quotation right under Article 10(b) is mandatory, meaning that federal legislation that conflicts with this provision is not permitted. Article 10(b) would therefore not permit a press publishers' right which requires mandatory licensing for snippets and headlines. The U.S. is not only bound by its commitment to the Berne Convention, but this provision was incorporated as a mandatory norm into the Trade-Related Intellectual Property Rights treaty, which also binds the U.S. to its norms.

Conclusion

In sum, because a new press publishers' right is neither desirable as a matter of public policy nor consistent with U.S. copyright law and mandatory international treaty obligations, Authors Alliance cautions the Office against the adoption of such a right. A press publishers' right requiring mandatory licensing fees would not serve the interests of the creators whom copyright is designed to protect. Moreover, it would greatly upset the careful balance between the protection of a rightsholder's exclusive rights under copyright and the importance of copyright's limitations and exceptions,³³ which facilitate the progress of knowledge and serve the interest of our author members.

²⁹ Copia Inst., Initial Comment at 3.

³⁰ U.S. Copyright Off., Publishers' Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), Library Copyright All., Initial Comment, COLC-2021-0006-0023, at 7-9.

³¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, Art. 10(1).

³² *Supra* n. 14.

³³ U.S. Copyright Off., Publishers' Protection Study: Notice and Request for Public Comment, 86 Fed. Reg. 56,721 (Oct. 12, 2021), ReCrete, Initial Comment, COLC-2021-0006-0025, at 2.