

Before the  
**U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS**

**Publishers' Protections Study: Notice and Request for Comment**

**Docket No. 2021-5**

**Comments of the Electronic Frontier Foundation**

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The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows. EFF represents tens of thousands of dues-paying members, including consumers, hobbyists, artists, computer programmers, entrepreneurs, students, teachers, and researchers.

In these comments, we respond to the Office's Notice of Inquiry regarding copyright and ancillary rights in news content.

## A. Copyright Is A Poor Fit For the Issue of News Aggregators

### i. News Aggregators' Use of Headlines and Short Snippets Does Not and Likely Cannot Implicate Copyright (Question 2(a))

The typical use of news articles by aggregators involves reproduction of titles and sometimes short snippets of text. Such uses are nearly always a fair use of the original work, or are non-infringing in the first instance. The inapplicability of copyright to these minimal reproductions has a Constitutional basis, and is a fundamental aspect of copyright law. This makes copyright an inappropriate vehicle for monetizing such uses of news articles by aggregators.

As the Copyright Office noted in its Notice of Inquiry, titles and short phrases, including headlines, are not copyrightable according to well-established precedent. Copyright applies only to “original works of authorship,”<sup>1</sup> and headlines are not “original works” as a matter of law, even if they contain creative choices by the author.<sup>2</sup> Headlines, even if they contain some creativity, are so predominantly factual that permitting them to be copyrighted would effectively create a copyright in facts. This is impermissible, because the Copyright Act excludes any “idea” or “concept” from its scope of protection.<sup>3</sup> Nor could Congress amend the Act to make headlines copyrightable, because the Constitution’s

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<sup>1</sup> 17 U.S.C. § 102(a).

<sup>2</sup> *Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 769, 772 (W.D. Pa. 1986) (“even more colorful descriptions, such as advertising slogans, are not accorded copyright protection.”).

<sup>3</sup> 17 U.S.C. § 102(b).

grant of authority to enact copyright law limits copyright to the “writings” of “authors.”<sup>4</sup> The Supreme Court has held that this language makes the “original works of authorship” standard a Constitutional requirement.<sup>5</sup>

Short snippets of text from articles, while not excluded from the scope of copyright in the first instance, are highly likely to be non-infringing fair uses in the context of news aggregation. Under the fair use doctrine’s third statutory factor, the amount and substantiality of the portion of a work that is copied affects whether the use is fair. Any very short excerpt is therefore more likely to be a fair use. The fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” encompasses only market effects that flow from the use of the creative elements of the original work in a manner that substitutes for the original.<sup>6</sup> Even if news aggregators’ reproduction of text snippets from news articles tends to cause would-be readers not to click the link and view the complete article—the existing research is equivocal at best about whether this is so—any substitution of demand is not likely to be caused by any reproduction of the creative elements of the article, but rather because a snippet will likely contain the key *facts* conveyed by the article. Copyright does not apply to facts, and as discussed above, it cannot. Without a harmful effect on the market for or value of the original, creative

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<sup>4</sup> U.S. Const. Art. 1 Sec. 8. Cl. 8.

<sup>5</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

<sup>6</sup> *Google LLC v. Oracle Am., Inc.*, 141 S.Ct. 1183, 1206 (2021) (fourth factor considers only harms that are “cognizable under the Copyright Act”) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994)).

elements of an article, the reproduction of a short, factual snippet of the article by an aggregator is highly likely to be a fair use.

**ii. Declining Revenues of News Media Are Due To The Monopolization of Online Advertising, Not News Aggregation (Question 2(d)-(e))**

The problems facing news media are many, and are not limited to the changes wrought by the internet and the rise of social media. To whatever extent those *are* harming news media, it's not news aggregators that are causing the harm. Aggregation can spread the work of journalists to those who would not have had access to it when it existed only in physical form. And journalists use aggregation services themselves, either to amplify, iterate on, or debunk stories. Investigative journalism especially is an expensive endeavor, and many smaller, independent investigative outlets build upon reporting done by other publications, furthering a story and increasing the amount of investigation and knowledge of a topic. Investigative journalists use news aggregators to find this prior reporting on a topic.

The harms facing news media are not those of aggregators and copyright. A far bigger factor is monopoly control of online advertising. Even though news aggregation services and monopolist advertising networks can be operated by the same companies—as in the case of Facebook and Google—conflating the two ultimately does not serve the best interests of the news media. Expanding copyright, or creating a new right that covers aggregation, won't replace the revenue lost to the structure of the online ad market, in which entities with market power control access to information and bidding rules, and can direct revenues to themselves and favored partners. Even if copyright or a newly created

right allowed news media to recoup some revenue from aggregators (to the detriment of both the news media's reach and its smaller members in particular), nothing prevents the advertising side of these companies from diverting more revenue away from news media. Until there are more alternatives to the current online advertising market, news media will continue to be at the mercy of large companies like Google and Facebook.

For example, starting in 2015, many online media companies started “pivoting to video,” gutting their traditional newsrooms and spending large amounts of money to build video journalism operations from scratch.<sup>7</sup> Part of the impetus for this pivot was metrics that showing that audiences preferred video to text—metrics provided, in large part, by Facebook. In 2014, Facebook claimed that “Facebook has averaged more than 1 billion video views every day.”<sup>8</sup>

Those metrics turned out to be grossly inflated, by as much as 60 to 80 percent.<sup>9</sup> Advertisers like video more than print, since video ads are harder to ignore than ads that can be scrolled past in a text post. Facebook and the like want more video to run ads in because it allows them to make more money. And by claiming that this is what “readers want,” news media could be manipulated into creating more video.<sup>10</sup>

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<sup>7</sup> <https://www.niemanlab.org/2021/09/well-this-puts-a-nail-in-the-news-video-on-facebook-coffin/>

<sup>8</sup> <https://media.fb.com/2015/01/07/what-the-shift-to-video-means-for-creators/>

<sup>9</sup> <https://www.wsj.com/articles/facebook-overestimated-key-video-metric-for-two-years-1474586951>

<sup>10</sup> <https://slate.com/technology/2018/10/facebook-online-video-pivot-metrics-false.html>

Because the preference for video did not, in fact, extend to viewers, the pivot to video was devastating for news media—specially new, independent outlets who had placed a huge bet based on Facebook’s misleading metrics. And none of that harm is related to news aggregation. It’s related to the size and power of Facebook’s advertising division. With Facebook and Google dominating online advertising, publishers had no choice but to believe the metrics those companies were reporting. If there had been alternative ad networks and other effective business models for news media, there would have been more metrics to give the whole story—that Facebook’s numbers only held up if you counted someone as “watching” video if three seconds of the video happened to play.

Therefore, it’s useless at best and actively harmful at worst to place the blame for the news media’s declining revenues on news aggregation services alone.

**B. Additional Protections for Press Publishers Would Likely Benefit Only the Largest Publishers, If Any, And Would Contribute to Further Consolidation of the News Media (Question 4)**

By almost any measure, the news media has experienced a wave of consolidation over the past twenty years.<sup>11</sup> Many of the problems plaguing the news media today, including the loss of local coverage in many parts of the country, are a symptom of this consolidation.<sup>12</sup> A newly created “ancillary right” for news media publishers would not reverse this trend, but rather exacerbate it. The largest publications, holding the most negotiating leverage, will tend to make favorable licensing arrangements with the largest

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<sup>11</sup> <https://www.colorado.edu/today/2021/10/20/media-consolidation-takes-toll-local-news-doesnt-necessarily-bias-coverage>

<sup>12</sup> *Id.*

news aggregators, including agreements to rank major media content higher in search results and curated newsfeeds. And because both major news media publishers and the largest news aggregation services are so often owned by conglomerates, these deals are likely to include advantageous licensing of other kinds of media, personal data about users, and other products and assets that smaller news media publishers cannot offer. The benefits of any mandatory compensation of news publishers by aggregators will therefore flow primarily to the largest news publishers, leading to further consolidation and more failure of local and niche reporting.

In summary, news aggregators are not a significant source of the news media's current financial woes, and neither an extension of copyright to cover the practices of news aggregators, nor the creation of a new "ancillary" right, are likely to be an effective solution.