



**Response to the Notice and Request for Public Comment:
United States Copyright Office’s Publishers’ Protections Study**

86 FR 56721 (Oct. 12, 2021)
Docket No. 2021-5

November 24, 2021

Google appreciates the opportunity to submit comments in connection with the U.S. Copyright Office (the “Office”) Request: Publishers Protection Study: Notice and Request for Public Comment, 86 FR 56721. We share the Office’s interest in supporting a diverse and sustainable news ecosystem. We are therefore pleased to detail how Google supports journalism and to answer the Office’s questions about existing and potential new protections for news content under U.S. copyright law. We believe the current protections are appropriate in light of the predominantly factual subject matter in question and other inherent limits that our copyright system places on exclusive rights in the news of the day, including the idea-expression dichotomy, the merger doctrine, the exclusion of titles and short phrases, the de minimis use doctrine, and fair use.

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INTRODUCTION: HOW GOOGLE SUPPORTS JOURNALISM AND THE NEWS ECOSYSTEM

Since 1998, Google’s mission has been to make the world’s information universally accessible and useful. Connecting users to news that matters to them and supporting journalism are important elements of this mission. A robust news industry informs people in the United States and around the globe about the environmental, social, and political challenges we face. News holds individuals and organizations to account and presents stories that inspire all of us to be better citizens. For nearly two decades, Google has worked collaboratively with partners in the news industry by providing tools, platforms, and resources to develop, distribute, fund, and access news.

Every time someone searches with Google, we provide links to thousands, sometimes millions, of web pages with helpful information. When they are looking for news, those pages could be from a large traditional news publisher or a new digital outlet. In this way, Google Search and Google News drive billions of interactions with publisher content globally for free – helping people all over the world find relevant, authoritative news about issues that matter. Today, Google connects users to publishers’ websites more than 24 billion times per month, providing an opportunity for news publishers to grow their business and relationship with readers. Google is also leading the effort to promote consumer engagement with news by developing tools to build online trust and highlight reputable news sources. For example, we have worked to elevate original reporting in Search and to improve the organization of top stories to help people better orient themselves to a topic and easily explore related ideas.

We also recently announced a number of new features coming to Google Search to help readers find content from local publishers even more easily than before.¹ We're expanding a feature that we initially launched for COVID-19 searches, where readers will soon see a carousel of local news stories when Google finds local news coverage relevant to their query. Over the past few months, we've also improved our systems so that authoritative local news sources appear more often alongside national publications, when relevant, in our general news features such as Top Stories. Finally, we recently launched a new way to help people find local information on the topics they're searching for by surfacing tweets by local, authoritative sources and authors, including tweets from news organizations. These efforts help local publishers by adding another way for their essential reporting to reach the community that needs it most.

In addition, Google offers tools and services to help news publishers generate income from their content. Google's cutting-edge advertising technology is used by news businesses to sell ads on their websites and apps to advertisers. This technology enables publishers to retain the vast majority of the digital advertising revenue generated from the sale of advertising inventory. Today, thousands of news publishers around the world use Google Ad Manager to run digital advertising on their websites and apps. Many news publishers keep more than 95 percent of the digital advertising revenue they generate when they use Ad Manager to show ads on their websites.² Google also works with publishers to make it easier for users to access premium content using their Google accounts. Through Subscribe with Google, we streamlined the process for users who wish to access paid content published on platforms for which the users have not yet subscribed. Today, 144 publishers from around the world have signed up for Subscribe with Google. And since launch, we've driven over 500,000 subscriptions for our partners around the world, 90,000 of which were just in the last six months.

Finally, we have continued to collaborate with the news industry to help tackle new challenges they face in the digital environment. Since 2018, the Google News Initiative has focused on helping advance the practice of quality journalism, strengthening and evolving publisher business models, and cultivating a global news community. To date, the Google News Initiative has supported 7,000+ news partners, trained 450,000 journalists, and provided \$300 million in global funding.³ In addition, in response to financial pressures related to the COVID-19 pandemic, Google launched a global Journalism Emergency Relief Fund to support small and medium-sized news organizations that produce original news for local communities. Through the initiative, Google has provided \$40 million in funding to more than 5,700 newsrooms in 115 countries.⁴

Achieving a healthy, sustainable and diverse news industry isn't something Google or any single entity can or should do alone. This is a shared responsibility across publishers, companies, governments, civil society, and more. Today we remain as committed as we've always been to playing our role in a deep and meaningful way.

THE EFFECTIVENESS OF CURRENT PROTECTIONS FOR PRESS PUBLISHERS

(2) *Third-party uses of news content*

(a) *Under what circumstances does or should aggregation of news content require a license? To what extent does fair use permit news aggregation of press publisher content, or of headlines or short snippets of an article?*

¹ See Danny Sullivan, *New Tools and Features to Support Local News*, THE KEYWORD (Nov. 16, 2021), <https://blog.google/products/news/local-news-update-census-mapper/>.

² See Bonita Stewart, *A Look at How News Publishers Make Money with Ad Manager*, GOOGLE AD MANAGER (Jun 23, 2020), <https://blog.google/products/admanager/news-publishers-make-money-ad-manager/>.

³ See Richard Gingras, *Looking at the Impact of the Google News Initiative*, THE KEYWORD (Nov 16, 2021), <https://blog.google/outreach-initiatives/google-news-initiative/gni-impact-report-2021/>.

⁴ See Ludovic Blecher, *What Emergency Funding Means for Publishers Around the World*, THE KEYWORD (Jul 23, 2020), <https://blog.google/outreach-initiatives/google-news-initiative/journalism-emergency-relief-fund-data/>.

The Office defines news aggregator as “an online service that collects *links to and sometimes snippets of third-party articles* and makes them available to its readers.”⁵ This definition suggests that the focus of this study is the potential creation of a new property right in links to and snippets of predominantly factual news articles. It is important for stakeholders, policymakers, and the public to be clear about the meaning of broad terms like “news content” and “press publisher content” in the context of both this study and broader policy conversations about ancillary rights for press publishers, in order to be precise about the nature and scope of the uses being considered.

There are no circumstances under which a license should be required for use of links and snippets in news aggregation services, because such content is excluded from the scope of copyright under core doctrines of copyright law, including those acknowledged by the Office in this Notice and Request for Public Comment: the fact-expression and idea-expression dichotomies; the titles and short phrases doctrine; and the merger doctrine.⁶ These doctrines are not narrow exceptions to copyright; they are fundamental building blocks of the copyright system, which can promote the progress of learning – as the Constitution requires – only by striking an appropriate balance between incentives for authors and public access to knowledge. Simply put, one doesn’t – and shouldn’t – need permission to reproduce, publicly display, or distribute links to and snippets of news articles because they are not within the scope of any copyright holder’s exclusive rights under copyright law.

Under the Office’s appropriately precise description of existing aggregators and their practices, “news content” does not refer to expressive news material or to significant excerpts of such material. It does not mean, for example, whole or partial newspaper articles, investigative reporting, feature stories, or any other form of protectable, compensable expression that copyright law recognizes as authorship within news publications. Rather, it means only *links and snippets*, including headlines, which fall into categories of subject matter – facts, ideas, titles, and short phrases – that are uniformly recognized as unprotectable in the Copyright Act and the relevant case law.⁷ Links and snippets are unprotectable because they do not exhibit originality sufficient to meet the Constitutional requirement of authorship.⁸ The same logic extends to news headlines. The news articles associated with particular hyperlinked headlines and snippets are copyrightable, but the copyright in those articles does not extend to the limited material that aggregators actually use.⁹ If one extends the notion of aggregator beyond this precise definition to encompass the use of *more than mere links or snippets*, that use is not subject to the exceptions above and can be pursued under existing copyright law.

To the extent that some headlines or longer snippets may contain sufficient original expression to be protected by copyright, their use in search engines and news aggregation services is currently regarded

⁵ Copyright Office, Publishers’ Protections Study: Notice and Request for Public Comment, 86 Fed. Reg. 56721, 56722 (Oct. 12, 2021).

⁶ See *id.* at 56723 (listing the long-established limiting doctrines that preclude copyright protection for links, snippets, and headlines).

⁷ See 17 U.S.C. § 102(b) (“In no case does copyright protection...extend to any idea,...concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (“That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that ‘no author may copyright his ideas or the facts he narrates.’” (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985))); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1520 (1st Cir. 1996) (stating that “copyright protection simply does not extend to ‘words and short phrases, such as names, titles, and slogans’”) (quoting 37 C.F.R. § 202.1(a) (1994)).

⁸ See *Feist*, 499 U.S. at 346 (“Originality is a Constitutional requirement.”)

⁹ See *id.* at 348 (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”).

as a permissible fair use, for which no permission or remuneration is or can be required.¹⁰ An abbreviated four-factor fair use analysis proves this point.¹¹ Any cognizable copyright in such heavily factual, previously published content must be exceedingly thin.¹² The amount of the use is only slightly more than de minimis. And the use does not substitute for the expressive, protected content in linked news articles. Moreover, not only is there substantial public benefit from services that aggregate news content, news aggregators' transformative use of links and snippets drives profitable traffic to publishers' copyrighted articles, increasing rather than diminishing the value of those articles.

(c) To what extent and under what circumstances do aggregators seek licenses for news content?

Google does not seek licenses for “news content” defined as links, headlines, and snippets, because such content is either not copyrightable, or its use in Google’s products is fair use or protected by another limitation or exception,¹³ as discussed in the response above. At the same time, we have always respected a publisher’s choice to opt out of appearing in our services. Every news organization has control over whether and how their snippets and links appear in Google Search and News.¹⁴ Most website operators want to ensure that people, including new readers, can find them in Google search results — but if a news site (or any other site for that matter) does not want to show up or wants to control what is shown on Google, they can choose to do so using the robots.txt exclusion protocol or other forms of standard HTML markup.¹⁵ They can do that whether their site is paywalled or free to view.

When Google does seek licenses from news publishers, it is for compensable uses of expressive, protectable material – for example, the playback of full audio stories to users – or is payment for sweat-of-the-brow effort not protectable by copyright – for example, the work to aggregate and deliver real time sports scores or factual information about every candidate for office in the country.

(d) What is the market impact of current news aggregation practices on press publishers? On the number of readers? On advertising revenue?

The internet has led to an unprecedented boom in the public consumption of news from a much greater variety of sources than ever before. It has also enabled publishers to reach a much larger audience at a much lower cost. The result is that people now have access to more news from more places, and media companies no longer need expensive physical printing presses and distribution networks.

Google helps facilitate access to information and contributes to media plurality by reducing barriers to entry, increasing choice for consumers, contributing to a diverse news landscape, and promoting independent news outlets. Google services contribute significant value to news publishers by connecting users to publishers’ websites more than 24 billion times per month. This traffic drives advertising and subscription revenue to news publishers of all types and sizes. Every time a user clicks a link on an aggregator and arrives on a publisher’s website, that click is an opportunity for the publisher to make

¹⁰ Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (“If the use is otherwise fair, then no permission need be sought or granted.”).

¹¹ See 17 U.S.C. § 107 (setting forth the four fair use factors).

¹² See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (stating that “copyright’s protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function”).

¹³ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that Google’s use of web publishers’ thumbnail images in Google Image Search is highly transformative, provides a significant benefit to the public, and is fair in light of the other fair use factors and the overall purpose of copyright).

¹⁴ See John Mueller, *More Options to Help Websites Preview Their Content on Google Search*, GOOGLE SEARCH CENTRAL (Sept. 24, 2019), <https://developers.google.com/search/blog/2019/09/more-controls-on-search>.

¹⁵ See *id.*

money through advertising, to collect data for later monetization, and to promote their subscription offerings. A study by Deloitte in Europe found that the value of each click was between 4-6 euro cents.¹⁶

The fact that current aggregation practices benefit news publishers is also evident from the fact that news publishers have not used their *existing* ability to disable either snippets or links from being displayed to users. To the contrary, many of them employ search engine optimization experts and social media professionals whose sole job functions are to increase the visibility of the publisher's content on search engines and social media sites.

(f) Do third-party uses of published news content other than news aggregation have a market impact on press publishers? What are those uses and what is the market impact? Do such uses require a license or are they permitted by fair use?

When “news content” is defined to mean links and snippets, as the Office posits, the potential market impact of its secondary use by aggregators and other third parties is not relevant as a matter of copyright law, because the content is not copyright-protected in the first instance. If the snippets in question contain sufficient expressive content to be protected by copyright, then market harm is part of the fair use analysis, and third-party uses that are non-transformative and merely substitutive will likely be held infringing if they are undertaken without a license. In any given case, market impact is a question of fact to be proven in the course of the litigation. Because news articles are typically either created as work for hire or licensed to a publication on an exclusive basis, publishers already have the ability to enforce their copyrights in them against any infringing third-party uses.

(3) Existing non-copyright protections for press publishers

(a) What non-copyright protections against unauthorized news aggregation or other unauthorized third party uses of news content are available under state or federal law in the United States? To what extent are they effective, and how often are they relied upon?

News publishers have no need to rely on whatever state or federal, non-copyright causes of action may exist for “unauthorized” news aggregation, because they can easily and reliably opt out of having their sites crawled and indexed by search engines and news aggregators. By using the robots.txt exclusion protocol, an industry standard that Google and other aggregators have voluntarily implemented since the 1990s, news publishers and other website operators can control whether and how their content is accessed, and by using other standard instructions can prevent indexing and display to users of Google Search and News.¹⁷ We do not override or ignore publisher preferences that are expressed via robots.txt or the robots meta tags. If news publishers don't want their content to appear in Search or News, they can add a single line of code to their webpages to prevent it.¹⁸ Through the operation of these instructions, headlines, links, and snippets that appear in Search and News appear with publishers' consent.¹⁹

THE DESIRABILITY AND SCOPE OF ANY ADDITIONAL PROTECTIONS FOR PRESS PUBLISHERS

¹⁶ Deloitte, *The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers: A Study for France, Germany, Spain and the UK* (Sept. 2019), <https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>.

¹⁷ See Mueller, *supra* note 14 (describing how the robots.txt exclusion protocol and robots meta tags work).

¹⁸ For example, the “noindex” metatag communicates to the Googlebot “Do not show this page, media, or resource in search results.” The “nosnippet” meta tag communicates “Do not show a text snippet or video preview in the search results for this page.” See GOOGLE SEARCH CENTRAL, *Robots Meta Tag, Data-Nosnippet, and X-Robots-Tag Specifications*, https://developers.google.com/search/docs/advanced/robots/robots_meta_tag?hl=en (last updated Nov. 22, 2021).

¹⁹ Cf. *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006) (holding that a web publisher who knew about the robots.txt exclusion protocol and knew how to use it, but made a conscious decision not to, thereby granted a license to Google to crawl his website and include content from it in search results).

The Internet has changed the marketplace for all kinds of creative content, bringing into existence new digital publishers and creators, increasing the diversity of voices in the public sphere, and opening access to information for people. This thriving ecosystem is built upon a foundation of copyright law that balances the need to create meaningful incentives for authors and publishers with the goal of providing wide public access to knowledge and information. The U.S. copyright system recognizes that limitations on exclusive rights, including carve-outs from protectable subject matter and a robust fair use doctrine, are necessary to create space for new expression, follow-on creativity, and cumulative innovation. Every proposed expansion on the incentive side of the copyright balance without a corresponding expansion on the access side threatens to undermine the health of the creative ecosystem that copyright is supposed to foster. The creation of a new form of copyright or paracopyright for news publishers would be just such an unbalanced expansion.

Adopting ancillary copyright for news publishers would lead to unintended consequences for the broader news industry, while limiting access to news online for consumers. It would force news aggregators to pick winners and losers in the news ecosystem, because online news aggregation services, some of which generate no revenue, would inevitably have to make choices about which publishers to negotiate deals with. It is implausible that any business will be able to license every U.S. news publisher. The transaction costs alone would be insurmountable, and the outlets most likely to be passed over would be the small and out-of-the-way local outlets experiencing the most pressure in today's news economy. Conversely, those most likely to benefit would be the largest legacy publishers. As a result, adopting ancillary copyright would seriously risk reducing consumers' ability to discover and access a diversity of views and opinions that are necessary for an informed populace. Consumers would no longer find the news across the web that is most relevant to them, but rather only the news that online services have been able to commercially license.

(1) To what extent do the copyright or other legal rights in news content available to press publishers in other countries differ from the rights they have in the United States?

The United States does not have such legal rights, because they would conflict with “the ultimate goal of copyright,” which is to expand public knowledge and understanding.”²⁰ Congress, and the courts for 300 years before it, recognized that “giving authors absolute control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge.”²¹ The creation of ancillary copyright for news publishers is an illustrative circumstance. Countries that have adopted ancillary copyright have given news publishers absolute control over all copying from their works, for the possible financial benefit of some news publishers but at the expense of the public's knowledge and understanding of history as it unfolds.

Countries that have adopted ancillary copyright for press publishers also often differ from the United States in that their copyright laws do not embrace the right of fair use for innovators acting as transformative secondary users of copyrighted works. In the United States, limits on copyright like fair use ensure that the free market can function and that the statutory monopoly granted to copyright holders does not harm consumers and “stifle the creativity [copyright law] was designed to foster.”²² Fair use allows everyone to discover, access, and share information online. Indeed, it is no accident that the United States is the country that launched some of the world's most innovative Internet companies, including Google.

²⁰ Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015).

²¹ *Id.*

²² See Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1187 (2021) (“Because [copyright's] exclusivity may trigger negative consequences, Congress and the courts have limited the scope of copyright protection to ensure that a copyright holder's monopoly does not harm the public interest.”).

(2) In countries that have granted ancillary rights to press publishers, what effect have those rights had on press publishers' revenue? On authors' revenue? On aggregators' revenues or business practices? On the marketplace?

Ancillary copyright policies have yet to produce any measurable benefits in the jurisdictions where they have been adopted. In Spain, the copyright law change in 2014 led to a sharp drop in both revenue and Internet traffic for publishers; diminished access to news information for consumers; and decreased diversity, choice, and competition among online services. Studies revealed that the consequences of the legislation were harmful to publishers – especially smaller ones, which saw increased difficulties in reaching new users)²³ – and hampered innovation in the online news market: “The negative impact on the online press sector is also very clear, since a very important channel to attract readers disappears, resulting in lower revenues from advertising. In addition, the new fee is also a barrier to the expansion of small publications with little-known brands, and an entry barrier for new competitors, since they will be unable to count on these platforms to increase their readers’ base.”²⁴

In 2013, Germany gave news publishers greater copyright protection, permitting them to charge for the display of snippets. In accordance with the law, and because Google does not pay websites for the links and short extracts that appear in search results, Google removed snippets for those publishers that did not grant us a license to use snippets. Later, publishers that initially declined to license snippets saw their traffic decline and ultimately decided to authorize snippets without additional payments. The German courts affirmed that this non-commercial exchange of value resulted in a “win-win-win” for search engines, users, and publishers alike.

Most recently, when legislators in the European Union introduced a neighboring right for press publishers in Article 15 of the Digital Single Market Copyright Directive, they explicitly specified that the neighboring rights “shall not apply to acts of hyperlinking,” and “shall not apply in respect of the use of individual words or very short extracts of a press publication.”²⁵ EU Member States are still transposing the new Copyright Directive into their national laws, but significant uncertainty remains around what content and publishers are covered or exempted. This uncertainty will likely lead to years of litigation and to risk-mitigating changes to existing services that may make it harder for the public to easily find and access diverse and high-quality news sources.

(3) In countries that have granted ancillary rights to press publishers, are U.S. press publishers entitled to remuneration for use of their news content? Would adoption of ancillary rights in the United States affect the ability of U.S. press publishers to receive remuneration for use of their news content overseas?

²³ Joe Mullin, *New Study Shows Spain's "Google Tax" Has Been a Disaster for Publishers*, ARS TECHNICA (Jul. 30, 2015), <https://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>.

²⁴ Nera Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual: Informe para la Asociación Española de Editoriales de Publicaciones Periódicas* (2015), <https://www.aeepp.com/pdf/InformeNera.pdf> (original in Spanish); see also Mike Masnick, *Study of Spain's 'Google Tax' on News Shows How Much Damage It Has Done*, TECHDIRT (Jul. 29, 2015), <https://www.techdirt.com/articles/20150725/14510131761/study-spain-s-google-tax-news-shows-how-much-damage-it-has-done.shtml>.

²⁵ Directive 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (“EU Copyright Directive”), art. 15, 2019 O.J. (L130), 92, 118.

Article 15 of the EU Copyright Directive applies only to European press publishers and online services that operate within EU Member States.²⁶ It doesn't benefit U.S. press publishers, but it does substantially burden U.S. platforms operating in Europe specifically. With respect to the relationship between ancillary copyright and remuneration, it is important to note that Article 15 of the Copyright Directive did not introduce a "remuneration right" but rather an exclusive right for covered press publishers to authorize or prohibit certain uses of their news articles online – excluding facts, hyperlinks and "individual words and very short extracts."²⁷ Such a right effectively gives news publishers the ability to opt out of having covered content aggregated. It does not guarantee them payment or compel existing aggregators to continue to use their content.

Today, every news organization globally already has control over whether and how their headlines and links appear in Google Search and News.²⁸ Most welcome the fact that people can find them in Google search results – but if a news site (or any other site for that matter) doesn't want to show up or wants to control what is shown on Google, they can choose to do so.²⁹ They can do that whether their site is paywalled or free to view.

Copyright's exclusive rights have always been understood, both in the United States and globally, as rights to exclude uncompensated uses of protected works, not rights to demand and collect payment for compelled uses. Consistent with the principle of freedom of contract, copyright licenses are not compulsory for those who choose not to make compensable uses of covered works. In other words, remuneration for rightsholders does not necessarily follow from the creation or existence of a right to exclude. Payment is conditioned on a willing licensee's use of that rightsholder's covered work.

If the United States were to adopt an ancillary copyright covering news content in the form of links and snippets, such a right would not lead to automatic or guaranteed remuneration for U.S. press publishers. Online services confronted with the change in law could rationally respond by declining to aggregate links and snippets belonging to publishers that demand licensing fees in addition to the existing documented value they have historically received in the form of referral traffic. In such a case, the public would have a harder time finding and accessing a full range of relevant news sources, and news publishers could lose valuable traffic from online services. Further, U.S. law does not apply extraterritorially, so holders of U.S. ancillary rights could not seek either licenses or remuneration for overseas uses.

(4) Should press publishers have rights beyond existing copyright protection under U.S. law? If so:

- a) What should be the nature of any such right—an exclusive copyright right, a right of remuneration, or something else?**
- b) How should "press publishers" be defined?**
- c) What content should be protected? Should it include headlines?**
- d) How long should the protection last?**
- e) What activities or third party uses should the right cover?**
- f) If a right of remuneration were granted, who would determine the amount of remuneration and on what basis? Should authors receive a share of remuneration, and if so, on what basis?**

²⁶ See *id.* at 104 ("The legal protection for press publications provided for by this Directive should benefit publishers that are established in a Member State and have their registered office, central administration or principal place of business within the Union.").

²⁷ See *id.* at 118.

²⁸ See Mueller, *supra* note 14.

²⁹ See *id.*

No. In fact, ancillary news publisher rights or remuneration rights would cause significant damage to the integrity of the copyright system – by undermining bedrock limiting doctrines – and to the Internet ecosystem – by disrupting the public’s settled expectation of free access to basic news facts and news publishers’ settled expectation of free referral traffic from aggregators.

The Supreme Court held in *Feist Publications, Inc. v. Rural Telephone Services Co.* that copyright is not a proper vehicle for protecting “sweat of the brow” investments in the “industrious collection” of facts, including newsworthy facts.³⁰ The exclusion of facts from the scope of copyright protection in news articles dates back to the 1909 Copyright Act and the Court’s decision in *International News Service v. Associated Press*.³¹ The Court explained in that case, and the *Feist* Court reaffirmed, that while news articles as a whole are copyrightable, “[t]he news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”³² The “news element” in newspaper articles belongs where it has always been under U.S. copyright law: in the public domain, free for all to use and share.³³

News aggregators provide a valuable public service by collecting topical, important public domain information, making that information easily discoverable and freely accessible to the public, and funneling interested readers to publishers’ websites to view full-length news articles. The Supreme Court in *Feist* criticized “sweat of the brow” courts for doing exactly what the creation of ancillary copyright would accomplish: “hand[ing] out proprietary interests in facts and declar[ing] that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works.” It is undeniably important to ensure a healthy and robust marketplace for news; however, long-recognized and sound principles of copyright dictate that that goal cannot be accomplished by creating a property interest, however temporary, in newsworthy facts.

(5) Would the approach taken by the European Union in Article 15 of the CDSM, granting “journalistic publications” a two-year exclusive right for certain content, be appropriate or effective in the United States? Why or why not?

No. Ancillary copyright regimes like Article 15 risk reducing both readers’ access to content and traffic to publisher sites and would be a disincentive for new entrants to build services to bring news publisher content to consumers. They also chill freedom of expression on sites where users refer to, comment on, and link to news content. Encroaching on the fundamental copyright principle that some types of unauthorized copying are necessary to support the public interest would have significant negative consequences for the entire ecosystem.

(6) Would an approach similar to Australia’s arbitration requirement work in the United States? Why or why not?

No. The Australian Competition and Consumer Commission (“ACCC”) developed a mandatory code of conduct that would address perceived bargaining power imbalances between digital platforms and news publishers. The Code requires designated digital platforms to negotiate with eligible news businesses, in relation to remuneration for the news content “made available” by the digital platform – a definition that

³⁰ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991) (“The ‘sweat of the brow’ doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement – the compiler’s original contributions – to the facts themselves.”).

³¹ *Int’l News Serv. v. AP*, 248 U.S. 215 (1918).

³² *Id.* at 234.

³³ See *id.* (“It is not to be supposed that the framers of the Constitution...intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.”).

includes just links, with no other content from the publication. While no digital platform has been designated under the Code at this stage, we believe that it should not be replicated.

The ability to link freely is a key feature of the free and open web. Changing that would not only negatively impact the economic model that stems from it, it would force information to be consumed in a particular manner, favoring a narrow range of sources for the diffusion of knowledge, and thereby undermining democratic discourse and media diversity. As many have said, including Vint Cerf and Sir Tim Berners-Lee, regulatory proposals should avoid “breaching a fundamental principle of the web by requiring payment for linking between certain content online.”³⁴ In addition, the primary benefactors of such a code would be a small number of incumbent media providers - stifling further media diversity.

(7) If you believe press publishers should have additional protections, should these or similar protections be provided to other publishers as well? Why or why not? If so, how should that class of publishers be defined and what protections should they receive?

For reasons discussed in other responses to this Notice and Request for Public Comment, we do not believe that any additional protections, within the copyright regime or sui generis, are necessary or appropriate for news publishers or any other category of publishers at this time.

THE INTERACTION BETWEEN ANY NEW PROTECTIONS AND EXISTING RIGHTS, EXCEPTIONS AND LIMITATIONS, AND INTERNATIONAL TREATY OBLIGATIONS

(2) Would granting additional rights to press publishers affect the ability of users, including news aggregators, to rely on exceptions and limitations? If so, how?

Yes, as detailed throughout our answers, ancillary copyright for news publishers would directly conflict with current law on exceptions and limitations, including rules defining the scope of protectable subject-matter.

(3) Would granting additional rights to press publishers affect United States compliance with the Berne Convention or any other international treaty to which it is a party?

Implementing ancillary copyright in the U.S. would not only upend fundamental principles of the Internet and U.S. copyright law, it would violate international norms and law to which the United States is bound. The Berne Convention requires its members to recognize the right of quotation, including the right to quote from news articles.³⁵ The Berne Convention also expressly excludes from its scope “the news of the day” and “miscellaneous facts having the character of mere items of press information.”³⁶ Ancillary copyright for news publishers that would cover “news content” as the Office defines it for purposes of this study directly conflicts with these principles.

³⁴ Tim Berners-Lee, *Submission to the Australian Parliament Senate Standing Committee on Economics* (Jan. 18, 2021), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions; see also Vint Cerf, *Submission to the Australian Parliament Senate Standing Committee on Economics* (Jan. 10, 2021), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions (“Links are the cornerstones of open access to information online; requiring a search engine (or anyone else) to pay for them undermines one of the fundamental principles of the Internet as we know it today.”).

³⁵ See The Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), Sept. 9, 1886 (entered into force in the United States Mar. 1, 1989) (“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.”).

³⁶ Berne Convention, art. 2(8).

OTHER ISSUES

(2) Please provide any statistical or economic reports or studies that demonstrate the effect of aggregation on press publishers or the impact of protections in other countries such as those discussed above on press publishers and on news aggregators.

We suggest the Office consider the following reports:

- Deloitte, *The impact of web traffic on revenues of traditional newspaper publishers - A study for France, Germany, Spain and the UK* (Sept. 2019). Available at: <https://www2.deloitte.com/content/dam/Deloitte/es/Documents/financial-advisory/The-impact-of-web-traffic-on-revenues-of-traditional-newspaper-publishers.pdf>.
- Accenture, *USA News Media Landscape Trends* (June 2021). Available at: https://newsmedia-analysis.com/wp-content/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf.

(3) Please identify any pertinent issues not mentioned above that the Copyright Office should consider in conducting its study.

Given the focus and expertise of the Office and the specificity of the request from Congress, we believe it is important that the study focus only on issues directly related to U.S. copyright law.

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Google appreciates the opportunity to share its perspective and experience, and we look forward to continued engagement with the Office on this topic.